
THE EXTRATERRITORIAL OBLIGATION TO PREVENT THE USE OF CHILD SOLDIERS

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INTRODUCTION

Children are recognized as a vulnerable group because, among other attributes, they are young, immature, impressionable, and physically smaller than adults.¹ These traits make children particularly vulnerable to human rights abuses. As conflict ravages large portions of the world, children are severely affected by the fighting. Sadly, children are often forced to fight in these wars for both governmental and non-governmental armed groups. Warring parties often abduct children from their homes or internally displaced persons camps and force them to fight—targeting them precisely because they are impressionable and immature. When children are forced to fight they are deprived of security, education, family, and other needs essential for a stable upbringing. Child soldiers are exposed to extreme violence and live in hostile conditions, which can leave permanent emotional and physical scars.

Regardless of how children end up in armies and rebel groups, whether through forced recruitment or “voluntary” enlistment, the international community recognizes that children should not be fighting wars.² There are a variety of international and national instruments that prohibit warring factions from conscripting children.³ First, this paper discusses the global use of child soldiers,

1. See United Nations Convention on the Rights of the Child, pmbl., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter *Convention on the Rights of the Child*]; Declaration of the Rights of the Child, G.A. Res. 1386, ¶ 3, U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959); Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 13 Int'l J. Child. Rts. 433, 433 (2005) (noting that children are especially susceptible to being targeted based on their gender, religion, or race).

2. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 1, May 25, 2000, 2173 U.N.T.S. 222 [hereinafter *Optional Protocol on Children in Armed Conflict*]; Rome Statute of the International Criminal Court art. 8(2)(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (defining children as persons under the age of eighteen); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 77, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*] (defining children as persons under the age of fifteen).

3. Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2) (2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008); *Optional Protocol on Children in Armed Conflict*, *supra* note 2, art. 1; *Rome Statute*, *supra* note 2, art. 8(2)(b)(xxvi); *Additional Protocol I*, *supra* note 2, art. 77.

the legal framework regarding child soldiers, and state obligations to protect the rights of children. Next, this paper argues that international and national instruments create extraterritorial obligations for states to prevent the use of child soldiers beyond their own borders. Lastly, this paper examines U.S. extraterritorial obligations regarding child soldiers and the country's ability to uphold its obligations.

II. THE USE OF CHILD SOLDIERS

Images of young children draped in bullets and carrying an AK-47 are increasingly common. Government armies and rebel groups throughout the world have conscripted children into their armies, forcing them to fight on the front lines, carry provisions, act as couriers, and serve as sex slaves. The Coalition to Stop Child Soldiers has reported that between 2004 and 2007 government and rebel forces in twenty-one countries were using child soldiers.⁴ In 2010, the U.S. State Department reported that government forces in at least six countries used child soldiers: Chad, Democratic Republic of the Congo, Sudan, Yemen, Burma, and Somalia.⁵

Over the past ten years, Human Rights Watch has released numerous reports documenting the use of child soldiers throughout the world. In 2004, Liberian opposition groups and government forces used approximately 15,000 child soldiers.⁶ Children were

4. COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2008 12, 15 (2008), *available at* <http://www.childsoldiersglobalreport.org/> [hereinafter CHILD SOLDIERS REPORT 2008] (explaining that at least eighty-six countries and territories still employ forms of recruitment of children under eighteen).

5. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 10 (10th ed. 2010) [hereinafter TRAFFICKING IN PERSONS REPORT]; *cf.* Howard LaFranchi, *Obama waives sanctions for four countries that use child soldiers*, CHRISTIAN SCI. MONITOR (Oct. 29, 2010, 7:53 PM), <http://www.csmonitor.com/USA/Foreign-Policy/2010/1029/Obama-waives-sanctions-for-four-countries-that-use-child-soldiers> (discussing President Obama's waiver of sanctions on four of the six recognized governments using child soldiers); Brian Knowlton, *4 Nations With Child Soldiers Keep U.S. Aid*, N.Y. TIMES, Oct. 28, 2010, <http://www.nytimes.com/2010/10/29/world/africa/29soldiers.html> (observing that the only countries that President Obama did not waive sanctions for were Somalia and Myanmar).

6. *See* HUMAN RIGHTS WATCH, HOW TO FIGHT, HOW TO KILL: CHILD SOLDIERS IN LIBERIA 1 (2004) [hereinafter CHILD SOLDIERS IN LIBERIA] (noting

kidnapped, sexually abused, forced to fight, and exposed to the amputation of enemy fighter extremities.⁷ In Nepal, the Maoist rebels used children to carry provisions and ammunition to the frontlines.⁸ The Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka recruited children as young as eleven years old to fight for them.⁹

In Chad, Rwanda, and Uganda, government and paramilitary forces have conscripted children. In Chad, Human Rights Watch reported the use of underage children in various regions of the country, and the U.S. State Department has said the same.¹⁰ One Chadian boy said, "The village is not safe; it is better to go to war."¹¹ As in Liberia, children were forced to fight or were living in such dire conditions that fighting seemed like a better option than staying at home.¹² During the Rwandan genocide, children were forced to kill other children, steal property, and seek out people in hiding.¹³ A reported 5,000 children were abducted by the Lord's Resistance

that some military units consisted primarily of boy and girl soldiers under 18 years old).

7. *Id.* at 2, 22-23.

8. HUMAN RIGHTS WATCH, BETWEEN A ROCK AND A HARD PLACE: CIVILIANS STRUGGLE TO SURVIVE IN NEPAL'S CIVIL WAR 60-61 (2004) [hereinafter NEPAL'S CIVIL WAR] (discussing the Maoist effort to raise a militia of over fifty thousand children to replenish depleted ranks).

9. See HUMAN RIGHTS WATCH, LIVING IN FEAR: CHILD SOLDIERS AND THE TAMIL TIGERS IN SRI LANKA 2 (2004) [hereinafter CHILD SOLDIERS IN SRI LANKA] (explaining that rebels forced parents to contribute at least one child to the movement in order to avoid violent retaliation).

10. See TRAFFICKING IN PERSONS REPORT, *supra* note 5, at 10; HUMAN RIGHTS WATCH, EARLY TO WAR: CHILD SOLDIERS IN THE CHAD CONFLICT 17-19 (2007) [hereinafter CHILD SOLDIERS IN CHAD] (reporting that some child soldiers are used by Sudanese rebel groups that receive support from the Chadian government); see also Knowlton, *supra* note 5 (noting that the government of Chad has recruited refugee children for active armed conflicts against rebel forces).

11. See CHILD SOLDIERS IN CHAD, *supra* note 10, at 22 (telling the story of one twelve-year-old boy who refused to idly "wait in the village to die" and instead joined the combatants to seek revenge for the death of his family).

12. CHILD SOLDIERS IN LIBERIA, *supra* note 6, at 9 (explaining that some children seek protection for their families by joining the forces that previously abused them).

13. See HUMAN RIGHTS WATCH, LASTING WOUNDS: CONSEQUENCES OF GENOCIDE AND WAR ON RWANDA'S CHILDREN 13 (2003) [hereinafter CONSEQUENCES OF GENOCIDE ON RWANDA'S CHILDREN] (discussing that child soldiers participated in the gamut of genocide by committing murder and rape).

Army in northern Uganda from 2002 to 2003, with the total estimate from 1986 to 2002 reaching about 20,000 children.¹⁴

In the past, the Coalition to Stop the Use of Child Soldiers has criticized the United Kingdom, arguing that it has used child soldiers by recruiting children into its army at the age of sixteen.¹⁵ Although the U.K. signed the Optional Protocol on the involvement of children in armed conflict, at the time of ratification it declared that the government would deploy soldiers under eighteen in situations where there is “genuine military need.”¹⁶ The U.K. has since deployed soldiers under the age of eighteen to combat zones in Iraq.¹⁷

In regions throughout the world, children are forced into conflict. Their minds are impressionable and exposure to extreme violence can permanently harm the children if they are not first killed in the conflict. The use of child soldiers has been condemned through both international treaties and national laws that create obligations for states to prohibit the use of child soldiers.¹⁸

III. LEGAL FRAMEWORK

In response to their widespread use, states have taken action to prevent and punish the use of child soldiers. A variety of international conventions and documents exist to prevent armed

14. See HUMAN RIGHTS WATCH, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA 2* (2003) [hereinafter *STOLEN CHILDREN IN UGANDA*] (noting a dramatic increase in abductions in 2002 compared to 2001, when fewer than 100 children were abducted).

15. Greg Barrow, *UK ‘shamed’ over teenage soldiers*, B.B.C. NEWS, June 12, 2001, <http://news.bbc.co.uk/2/hi/europe/1383998.stm>.

16. See Jo Becker, *Children as Weapons of War*, in HUMAN RIGHTS WATCH, *WORLD REPORT 2004* (2004), available at <http://www/hrw.org/en/news/2004/01/25/children-weapons-war> (singling out the U.K. out as the only European country that continues to send soldiers under the age of eighteen into combat).

17. See *Under-18s Were Deployed to Iraq*, B.B.C. NEWS, Feb. 4, 2007, <http://news.bbc.co.uk/2/hi/6328771.stm> (explaining that fifteen seventeen-year-old soldiers were inadvertently sent to Iraq between June 2003 and July 2005; however, no seventeen-year-olds have been deployed since July 2005).

18. Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2) (2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008); Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 1; Rome Statute, *supra* note 2, art. 8(2)(b)(xxvi); Additional Protocol I, *supra* note 2, art. 77.

groups from using child soldiers. International courts have also issued arrest warrants and prosecuted individuals for the crime of conscripting children.¹⁹ Although there are a number of instruments and judicial opinions concerning child soldiers, the most specific legally-binding instrument regarding the use of child soldiers is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”).²⁰

A. THE CONVENTION ON THE RIGHTS OF THE CHILD

The most significant legally-binding document regarding children’s rights is the Convention on the Rights of the Child (“CRC”)²¹ and its two optional protocols: one on the sale of children, child prostitution, and child pornography,²² and the other on the involvement of children in armed conflict.²³ States negotiated the CRC in November 1989, and less than one year later it entered into force.²⁴ There are currently 193 States Parties to the CRC, making it one of the most signed treaties.²⁵ The CRC defines children as anyone eighteen years old or younger and recognizes the rights of

19. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Prosecution’s Second Amended Indictment, ¶ 22 (Spec. Ct. for Sierra Leone May 29, 2007) (asserting that Taylor’s actions directly promoted the abduction and use of soldiers under the age of fifteen during the Sierra Leone civil war between 1996 and 2002); *Prosecutor v. Sesay*, Case No. SCSL-203-05-I, Indictment, ¶ 46 (Spec. Ct. for Sierra Leone Mar. 7, 2003) (accusing Sesay of being a senior officer who directly approved the use of child soldiers); *Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶ 6 (Spec. Ct. for Sierra Leone Mar. 2, 2009) (prosecuting three individuals for “enlisting or conscripting children under the age 15 or using them to participate actively in hostilities”).

20. Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 1.

21. Convention on the Rights of the Child, *supra* note 1.

22. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263 (Mar. 16, 2001) [hereinafter *Optional Protocol on Sale of Children*].

23. Optional Protocol on Children in Armed Conflict, *supra* note 2.

24. Convention on the Rights of the Child, *supra* note 1.

25. *Status of the Convention on the Rights of the Child*, U.N. TREATY SERVICE (June 26, 2011), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

children by creating legally binding obligations for States Parties.²⁶

The Optional Protocol on the Involvement of Children in Armed Conflict is most pertinent to the issue of child soldiers. There are currently 142 States Parties to the Protocol, including the United States.²⁷ States negotiated the protocol in 2000, and it entered into force in 2002.²⁸ The Protocol creates legally-binding obligations regarding the prohibition of the use of child soldiers, and States Parties are obligated to abide by all the provisions of the Protocol to satisfy international law.²⁹

The Optional Protocol completely prohibits the use of children in conflict, defining a “child” as someone who is under eighteen years old.³⁰ The Protocol specifically provides that neither governmental forces nor non-governmental actors may use child soldiers.³¹ Under international law, because states sign treaties, they are normally the ones that are legally bound by the treaties’ obligations.³² However, since the use of child soldiers has been considered an egregious act, and non-state actors often use children in their armies, this Optional Protocol took the step of specifically including non-state actors.³³ Human Rights Watch has systematically reported the use of child soldiers by non-state actors in countries such as Uganda (by the Lord’s Resistance Army),³⁴ Sri Lanka (by the LTTE),³⁵ and Nepal

26. Convention on the Rights of the Child, *supra* note 1, arts. 1, 2.

27. *Status of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, U.N. TREATY SERVICE (June 26, 2011), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-b.en.pdf>.

28. *Id.*

29. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (setting forth the principal of *pacta sunt servanda* that requires States to uphold their treaty duties in good faith).

30. See Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 1; *cf.* Convention on the Rights of the Child, *supra* note 1, art. 38 (prohibiting the conscription of children under age fifteen).

31. Optional Protocol on Children in Armed Conflict, *supra* note 2, arts. 1, 2, 4.

32. Vienna Convention on the Law of Treaties, *supra* note 29, arts. 6, 26; *cf.*, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010) (holding that corporations cannot be held liable for violations of international law because corporations do not sign treaties).

33. See Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 4.

34. *STOLEN CHILDREN IN UGANDA*, *supra* note 14, at 2.

(by the Maoists).³⁶ These are but three examples amongst many more, and the international community has recognized the fact that states are not the only actors using child soldiers.

In recognition of this fact and the severity of the crime of using child soldiers, states created the Optional Protocol to specifically include an article referring to non-state actors. Article 4 provides that “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”³⁷ Recognizing that States, as treaty signatories, are those responsible for treaty implementation, the second part of Article 4 provides that States Parties must take measures to prevent the recruitment and use of child soldiers.³⁸

The Protocol spells out the steps that states must take within their jurisdiction and sets forth the obligation of states to provide assistance outside their jurisdiction. States must strive to ensure that any children in combat are demobilized and reintegrated into society.³⁹ Article 7 provides that all States Parties to the protocol must cooperate to ensure the complete implementation of the protocol.⁴⁰ State obligations include providing financial and technical assistance to other States Parties and taking measures to prevent any action that might be contrary to the Protocol.⁴¹ The idea of “international cooperation” that is outlined in Article 7 is essential to international law because it ensures that all States Parties help each other uphold their obligations.

B. ADDITIONAL INSTRUMENTS CONDEMNING THE USE OF CHILD SOLDIERS

Although the Optional Protocol to the Convention on the Rights of the Child specifically addresses the use of child soldiers, a number of other instruments incorporate articles relating to child soldiers.

35. CHILD SOLDIERS IN SRI LANKA, *supra* note 9, at 2.

36. NEPAL'S CIVIL WAR, *supra* note 8, at 60.

37. Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 4.

38. *Id.* (“States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices”).

39. *Id.* art. 6.

40. *Id.* art. 7.

41. *Id.* arts. 6, 7.

Additional Protocol I to the 1949 Geneva Conventions, relating to international armed conflict, prohibits states from recruiting children under the age of fifteen and requires that states take measures to ensure that children under the age of fifteen do not take part in hostilities.⁴² Additional Protocol II to the 1949 Geneva Conventions, relating to non-international armed conflict, imposes the same requirements as the first protocol: states shall not recruit children under fifteen to the armed forces and children under age fifteen may not take up arms.⁴³ The prohibition of the use of child soldiers in these Additional Protocols is essential because the Geneva Conventions and their Additional Protocols have risen to the level of customary international law, meaning that all states are obligated to abide by them regardless of whether they have signed the treaties.⁴⁴

Additionally, the International Labor Organization Convention Number 182 (“ILO Convention 182”) prohibits the conscription of children into the armed forces.⁴⁵ States negotiated the ILO Convention 182 on the Elimination of the Worst Forms of Child Labor in 1999, and the Convention came into force in 2000.⁴⁶ Article 3 includes the forced recruitment of children into the armed forces as one of the worst forms of child labor, and expressly prohibits it.⁴⁷

Furthermore, other instruments have been created regarding the use of child soldiers. The UN Security Council has passed numerous

42. Additional Protocol I, *supra* note 2, at 77.

43. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (reiterating that even if children are deployed, they are still entitled to special protections).

44. See Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT’L CRIM. JUST. 683, 685 (2009) (asserting that the Geneva Conventions are understood to be customary international law largely because of universal ratification, and stating that it has “long been recognized that treaty law can provide the blueprint for future behaviour and lay the foundation of the development of customary rules.”).

45. International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 1-3, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter Convention on Worst Forms of Child Labour] (defining children as those under eighteen).

46. *Id.* art. 10; see *Ratifications of Convention No. C182*, ILO (June 26, 2011), <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> (noting 174 states have ratified the convention).

47. See Convention on Worst Forms of Child Labour, *supra* note 45, art. 3.

resolutions calling on states to prohibit the use of children in armed conflict.⁴⁸ Additionally, in 2007, UNICEF and the French Foreign Ministry held a meeting in Paris called “Free Children From War,” where fifty-nine UN states participated and endorsed two outcome documents that create political commitments for states to uphold.⁴⁹ One of the documents is a series of commitments based on current legal obligations regarding child soldiers, and the other is a detailed set of principles relating to the protection of children from participation in armed conflict and to the reintegration of child soldiers into society after they have stopped fighting.⁵⁰ The creation of these documents and resolutions demonstrate both the UN’s and states’ commitment to prevent the use of child soldiers and to assist children who are forced to fight.

C. JUDICIAL PRECEDENT

The Rome Statute of the International Criminal Court contains provisions relating to criminal accountability for recruiting and using child soldiers in both international and non-international armed conflict.⁵¹ The Rome Statute establishes a permanent court to try individuals charged with war crimes, crimes against humanity,

48. See S.C. Res. 1612, ¶ 1, U.N. Doc. S/RES/1612 (July 26, 2005); S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004 (noting a lack of progress towards the eradication of child soldiers); S.C. Res. 1460, ¶ 3, U.N. Doc. S/RES/1460 (Jan. 30, 2003); S.C. Res. 1379, ¶ 8, U.N. Doc. S/RES/1379 (Nov. 20, 2001); S.C. Res. 1314, ¶ 4, 11, U.N. Doc. S/RES/1414 (Aug. 11, 2000); S.C. Res. 1261, ¶ 2, 13, U.N. Doc. S/RES/1261 (Aug. 25, 1999) (urging states to intensify their efforts to end the use of children in armed conflict).

49. The Paris Commitments, Feb. 5-6, 2007, *The Paris Commitments to Protect Children From Unlawful Recruitment or Use by Armed Forces or Armed Groups*, ¶¶ 3, 4, available at http://www.un.org/children/conflict/_documents/pariscommitments/ParisCommitments_EN.pdf [hereinafter *The Paris Commitments*]; The Paris Principles, Feb. 5-6, 2007, *The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, ¶¶ 3.11-3.13, available at http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf [hereinafter *The Paris Principles*]; see generally Paris Conference, Feb. 5-6, 2007, *Free Children from War*, available at <http://www.unicef.org/protection/files/Attendees.pdf> (listing the 59 participating countries).

50. See *The Paris Commitments*, *supra* note 49, ¶¶ 5-20; *The Paris Principles*, *supra* note 49, ¶¶ 3.11, 3.12.

51. Rome Statute, *supra* note 2, art. 8(2)(b)(xxvi), 8(2)(e)(vii) (establishing the recruitment of children under fifteen as a war crime).

aggression, and genocide.⁵² Within these definitions, the Rome Statute considers the recruitment of children under age fifteen to be a war crime.⁵³

The International Criminal Court (ICC) has tried individuals for the crime of recruiting and using children under age fifteen. In *Prosecutor v. Lubanga*, the first case before the ICC, the court heard the case of Thomas Lubanga Dyilo, who commanded rebel forces in the Democratic Republic of Congo.⁵⁴ The prosecutor accused him of the war crimes of conscripting, enlisting, and using children under age fifteen in non-international armed conflict.⁵⁵ The fact that the Rome Statute includes the use of child soldiers as a war crime and the fact that the ICC tried someone accused of this crime in its first trial shows that the international community considers the use of child soldiers to be an egregious crime and that it is willing to punish those who commit this crime.

The Special Court of Sierra Leone, a hybrid court established to try individuals accused of war crimes during Sierra Leone's civil war, has also tried individuals for the use of child soldiers.⁵⁶ The Statute of the Special Court of Sierra Leone criminalized the use of

52. Rome Statute, *supra* note 2, arts. 1, 5.

53. *Id.* art. 8(2)(b)(xxvi). The Rome Statute uses the age of under fifteen because it relies on the Geneva Conventions. *Id.* art. (8)(2)(a).

54. *See* *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 9 (Int'l Crim. Ct. Jan. 29, 2007) (charging Lubanga with "the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group . . . and using them to participate in hostilities"); *see also* *Lubanga Case*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited July 14, 2011); *DRC: ICC's First Trial Focuses on Child Soldiers*, HUMAN RIGHTS WATCH (Jan. 23, 2009), <http://www.hrw.org/en/news/2009/01/22/drc-icc-s-first-trial-focuses-child-soldiers>.

55. *Dyilo*, Case No. ICC-01/04-01/06 at ¶ 9 (alleging that Lubanga started recruiting children in September 2002).

56. *See* Statute of the Special Court for Sierra Leone arts. 1, 4, Jan. 16, 2002, 2187 U.N.T.S. 145 [hereinafter SCSL Statute]; *see, e.g.*, *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment, ¶ 22 (Spec. Ct. for Sierra Leone May 29, 2007); *Prosecutor v. Sesay*, Case No. SCSL-203-05-I, Indictment, ¶ 46 (Spec. Ct. for Sierra Leone Mar. 7, 2003); *Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶ 6 (Spec. Ct. for Sierra Leone Mar. 2, 2009); *Prosecutor v. Kondewa*, Case No. SCSL-03-12-I, Indictment, ¶ 24 (Spec. Ct. for Sierra Leone June 24, 2003).

children under age fifteen in armed conflict;⁵⁷ the statute, however, does not define the use of child soldiers as a war crime, but rather as a “serious violation of international humanitarian law.”⁵⁸ In 2007, the Court convicted three individuals, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, of committing war crimes during the Sierra Leonean conflict, and of committing “other serious violations of international law, including the use of child soldiers.”⁵⁹ Charles Taylor, Issan Sesay, and Allieu Kondewa also stood trial for the use of child soldiers.⁶⁰ The provision on the prohibition of child soldiers has been used against individuals who participated in the Sierra Leonean conflict, showing a strong aversion to the crime and the severe repercussions for its violations.

There are a vast number of widely accepted international instruments, from treaties to resolutions, prohibiting the recruitment and use of child soldiers. Furthermore, international courts have upheld the existence of the international crime of using child soldiers and have tried people specifically for this crime. The widespread acceptance of an international norm prohibiting the use of child soldiers shows the customary nature of the prohibition and the universal need to uphold the obligation to prevent the use of child soldiers.

IV. STATE OBLIGATIONS UNDER INTERNATIONAL LAW

Under international law, states have legally-binding obligations

57. SCSL Statute, *supra* note 56, art. 4.

58. *Id.*

59. See Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Trial Judgment, ¶¶ 2113, 2117, 2121 (Spec. Ct. for Sierra Leone July 20, 2007) (ruling that each of the three men were guilty of conscripting or using soldiers under the age of 15 to participate in active warfare); Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-2004-16-A, Appeals Judgment (Spec. Ct. for Sierra Leone Feb. 22, 2008) (dismissing all grounds for defendants’ appeals, thereby upholding the trial court’s determination of guilt); *Child Soldiers—Developments*, COALITION TO STOP THE USE OF CHILD SOLDIERS, <http://www.child-soldiers.org/childsoldiers/legal-framework> (last visited July 14, 2011) (reporting that all three defendants were sentenced to over 45 years of imprisonment).

60. Taylor, Case No. SCSL-03-01-PT, ¶ 22; Sesay, Case No. SCSL-203-05-I, ¶ 46; Sesay, Kallon, & Gbao, Case No. SCSL-04-15-T, ¶ 6; Kondewa, Case No. SCSL-03-12-I, ¶ 24.

that they must uphold. Traditionally, states are only responsible for obligations in the conventions that they have signed. Therefore states can voluntarily take on obligations and can only be held to the obligations they have signed on to. Most treaties obligate states to take action in support of, or refrain from taking action against, people within their territory or jurisdiction.⁶¹ This is based on the traditional notion of state sovereignty, whereby states are only responsible for people within their jurisdiction.⁶² As this section details, there are obligations that states must fulfill even though the obligations fall outside the jurisdiction or territory of the state. These obligations are called “extraterritorial obligations.”

The existence of extraterritorial obligations is not globally accepted, and scholars note that these obligations are emerging as the world becomes more globalized.⁶³ The political and economic nature of the globalizing world forces states to constantly interact with other states. People continuously travel and migrate throughout the world, seeking jobs, safety, and freedom. This globalization further leads to the argument that states should be responsible for how their actions affect people outside of their borders. This section outlines where

61. For example, Article 2 of the International Covenant on Civil and Political Rights states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” (emphasis added); disarmament treaties such as the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and their Destruction specifically obligate states to destroy weapons within their jurisdiction and territory. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention on Cluster Munitions art. 3, May. 30, 2008, CCM/77 (entered into force Aug. 1, 2010), available at http://www.clustermunitionsdublin.ie/pdf/ENGLISH_finaltext.pdf; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction arts. 4, 5, Sep. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Convention on Anti-Personnel Mines].

62. See Sigrun Skogly & Mark Gibney, *Introduction*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 1 (Mark Gibney & Sigrun Skogly eds., 2010) (chronicling a shift from the traditional view of state sovereignty to a modern view that recognizes the fluidity of state sovereignty due to globalization).

63. See *id.* (explaining that, in the past, international human rights law has focused on what domestic governments are doing in terms of human rights; however, in an interdependent, globalized world it is equally important to assess the effect of other actors such as: intergovernmental organizations, international private entities, and foreign states).

extraterritorial obligations can be found and why there is an extraterritorial obligation regarding the use of child soldiers.

A. GENERAL STATE OBLIGATIONS

Under international law there are three main actions that states must undertake to uphold the rights of people in their jurisdiction: the obligation to respect, to protect, and to fulfill each right.⁶⁴ The language creating each obligation is normally codified in a treaty.

The duty to respect provides that a state must refrain from violating the rights codified in a treaty. Article 2 of the CRC begins by stating that “States Parties shall respect and ensure the rights set forth in the present Convention to each child. . . .”⁶⁵ The International Covenant on Civil and Political Rights similarly provides that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant”⁶⁶ The use of this language obligates states to not violate the rights provided in those conventions. This means that if a state signs the Convention on the Rights of the Child it cannot then prohibit children from attending schools or accessing medical care, which are protected rights within the Convention.⁶⁷

The duty to protect provides that a state must try to avoid violations of the rights set forth in a treaty by other individuals or entities. The CRC addresses protection in Article 19 by stating:

States Parties shall take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁶⁸

This language requires that a State Party take responsibility for other actors—namely the parents or guardians of a child—to ensure children’s safety. The state, therefore, is responsible for making sure

64. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 52 (2d ed. 1996).

65. See Convention on the Rights of the Child, *supra* note 1, art. 2.

66. See ICCPR, *supra* note 61, art. 2.

67. See Convention on the Rights of the Child, *supra* note 1, arts. 24, 28.

68. See *id.* art. 19.

that children's rights are not violated by third parties.

The duty to fulfill provides that a state must make remedies available for violations of rights provided for in a treaty. The International Covenant on Civil and Political Rights, for example, provides that "[e]ach State Party to the present Covenant undertakes . . . to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy"⁶⁹ A remedy would normally include access to a judicial system so that someone who has had her rights violated can file a lawsuit and seek a remedy, either pecuniary or non-pecuniary. To have a remedy available, a state must have a functioning judicial system and national laws that allow an individual to file suit regarding the violation of her rights codified in the applicable convention.

B. EXTRATERRITORIAL OBLIGATIONS

While states have national duties to protect, fulfill, and respect, they also have extraterritorial obligations. Extraterritorial obligations are those obligations that a state owes to persons outside of its territory or jurisdiction. One of the UN Special Rapporteurs noted that, especially given our globalizing world, one country's action often impacts another country.⁷⁰ Therefore, states should ensure that their policies and actions will not result in human rights violations in another country.⁷¹ An extraterritorial obligation, for example, would include refraining from dumping waste in a river that ends in another country whose residents would be harmed by the waste.

In her article on state responsibility, Monica Hakimi notes that there are three approaches to determine if a state has an extraterritorial obligation.⁷² The decisive factors for determining

69. See ICCPR, *supra* note 61, art. 2 (requiring a remedy even for violations caused by officials).

70. See Special Rapporteur on the Right to Food, *The Right to Food*, ¶ 28, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/44 (Mar. 16, 2006) (by Jean Ziegler) [hereinafter *Right to Food*] (discussing the impact of national agricultural policies on the right to food of individuals in other nations).

71. *Id.*

72. See Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 376-77 (2010) (recognizing extraterritoriality as one of the most contentious issues in human rights law).

extraterritorial obligations include the state's: "(1) control over the rights holder; (2) control over the territory in which the abuse occurs; or (3) influence over the abuser."⁷³ Although the second approach is widely accepted by human rights experts, Hakimi rejects the first two approaches for too narrowly construing the theory of extraterritorial obligations, and opines that the third approach proves the most useful.⁷⁴

The "influence over abuser" approach gives guidance in how to determine a state's responsibility to uphold its obligations. "Influence" refers to a state's ability to affect the actions of non-state actors or another state, primarily through incentives or threats. If a state has influence over another state or actor who may violate human rights, the influential state has an obligation to prevent that state or actor from taking illegal actions.

C. FINDING EXTRATERRITORIAL OBLIGATIONS IN INTERNATIONAL INSTRUMENTS

Generally, the creation of an extraterritorial obligation can be distilled from the language of certain treaties. The UN Charter outlines the function of the UN and of all UN member states in relation to UN goals and objectives.⁷⁵ Most countries are UN members, and every state party to the CRC is a UN member.⁷⁶ In terms of extraterritorial obligations created by the UN Charter, one such obligation can be read into the language in Articles 55 and 56, which must be read together.⁷⁷

Article 55 and 56 of the UN Charter are contained in Chapter IX regarding "International Economic and Social Co-operation." Article 55 addresses the goals of the UN in regards to a variety of economic

73. *Id.*

74. *See id.* at 377-78 (noting that the third approach cures some of the deficiencies in the other two approaches because it focuses on the state's relationship with the abuser and does not rely on the notion of control).

75. U.N. Charter art. 55.

76. *Compare Status of the Convention on the Rights of the Child, supra note 25* (reporting 140 signatories to the Convention), *with Member States of the United Nations*, U.N., <http://www.un.org/en/members/> (last visited July 15, 2011) (reflecting the membership of 192 states in the United Nations).

77. U.N. Charter arts. 55, 56 (instructing member states, in article 56, to take action to achieve the purposes of article 55).

and social issues. It provides that the “. . . United Nations shall promote: . . . *universal* respect for, and observance of, human rights and fundamental freedoms for all”⁷⁸ Bruno Simma’s commentary on Article 55 notes that the article contains a “universality” aspect, which ensures that all states respect human rights and that all “individuals should benefit equally from the protection of human rights.”⁷⁹ Article 56 provides that “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”⁸⁰ Since Article 56 obligates all UN member states to uphold, through whatever means possible, the provisions of Article 55 including the universal respect for human rights, it can be argued that this creates an extraterritorial obligation for states to support human rights in other countries. This would then create an extraterritorial obligation through which states must promote human rights outside of their own countries.

Language regarding “international cooperation and assistance” contained in treaties also creates extraterritorial obligations. Most treaties contain this type of language to different degrees. The International Covenant on Economic, Social and Cultural Rights provides that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”⁸¹ In a recent article, Arne Vandenberg noted that scholars read this language to include extraterritorial obligations “to respect, to protect and to fulfill ESC [economic, social and cultural] rights in other countries”⁸² Since the

78. *Id.* art. 55 (emphasis added).

79. Bruno Simma, *International Economic and Social Co-operation*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 923, 924 (Bruno Simma ed., 2d ed. 2002).

80. U.N. Charter art. 56.

81. International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

82. Arne Vandenberg & Wouter Vandenhoe, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of Its Effectiveness in Light of the Drafting Process*, 10 Hum. Rts. L. Rev. 207, 227 (2010) (documenting the highly politicized discussion around the legal obligation to provide international assistance and cooperation).

language provides for the progressive realization of rights through all appropriate means, this includes taking measures to uphold rights—and to refrain from violating rights—of people living outside a state's borders.

UN reports have also referenced extraterritorial obligations of states. Although these reports are not legally binding, they are highly influential and should be respected and upheld by states. In 2006, the UN Commission on Human Rights released a report on “the right to food” with a section relating specifically to extraterritorial obligations regarding food access.⁸³ The report discusses the issue of international agricultural trade affecting some countries detrimentally and advocates that states have extraterritorial obligations to respect, protect, and fulfill the right to food.⁸⁴ These obligations require states to ensure that their policies do not lead to human rights violations elsewhere, that actors within the state's jurisdiction do not take actions that will violate rights in another country, and that states are supporting other countries' ability to fulfill their right to food.⁸⁵ These carefully outlined obligations demonstrate the UN's commitment to and support of the idea of extraterritorial obligations to ensure that one state's actions do not lead to the violation of rights in another state.

Under customary international law, extraterritorial obligations are not firmly established, but they are emerging.⁸⁶ References to obligations outside of a States Parties territory exist in international conventions, and non-binding UN commentaries specifically discuss extraterritorial obligations. This shows a rising acceptance of extraterritorial obligations.

D. DOES THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT CREATE AN EXTRATERRITORIAL OBLIGATION?

The Optional Protocol regarding child soldiers *does* create an

83. See *Right to Food*, *supra* note 70, ¶¶ 28-38.

84. *Id.* ¶¶ 35-37.

85. *Id.*

86. Hakimi, *supra* note 72, at 377-78 (recognizing that the approach to extraterritoriality has often been based on confused reasoning and inconsistent application).

extraterritorial obligation for states. Primarily, states have an obligation to uphold the right of all children to not be conscripted. This obligation provides that states should take no actions that would lead to another state's or non-state actor's use or recruitment of child soldiers.

Examining the language of the Optional Protocol is essential to determining the existence of an extraterritorial obligation to prevent the use of child soldiers. Article 7 addresses the area of international cooperation and assistance and states that all "States Parties shall cooperate . . . in the prevention of any activity contrary to the Protocol . . ."⁸⁷ The main provisions in the Protocol require a prohibition on the conscription of soldiers under eighteen years old by both states⁸⁸ and non-state actors.⁸⁹ It also requires States Parties to create "legal, administrative and other measures" to implement the Protocol within their jurisdictions.⁹⁰ These provisions require states to prevent the use of child soldiers within their jurisdiction. Furthermore, reading Article 7 with the overall provisions of the Protocol shows that States Parties commit to trying to prevent the use of child soldiers in any country (" . . . cooperate . . . in the prevention of any activity contrary to the Protocol . . .").

Using Hakimi's "influence over the abuser" approach to extraterritorial obligations proves useful in this situation.⁹¹ From this perspective, a state that has influence over another state—by affecting the other state's actions—hereby has a responsibility to promote the abidance of the treaty. In relation to the use of child soldiers, if state A can influence the policy and activities of state B, and both are States Parties to the Optional Protocol, then state A has a responsibility to influence the activities of state B to ensure that state B is not violating the Protocol. For example, if state A provides military or technical assistance to state B, state A should not provide this type of assistance if it knows that state B uses child soldiers. Otherwise state A's international assistance would actually promote

87. See Optional Protocol on Children in Armed Conflict, *supra* note 2, art. 7.

88. *Id.* art. 2.

89. *Id.* art. 4.

90. *Id.* art. 6.

91. See Hakimi, *supra* note 72, at 377-79 (discussing the application of the influence-based approach to scenarios where the other two approaches proved to be too narrow in scope).

the use of child soldiers rather than prevent it and would thus violate the Optional Protocol.

The theory of extraterritorial obligations comes up frequently in regard to arms transfers. In 2006, the UN General Assembly passed a resolution calling for an arms trade treaty to ensure that states exporting arms were not exporting to parties outside of their territorial jurisdiction that would use the weapons to commit human rights abuses.⁹² The resolution acknowledged that arms control is essential for maintaining international peace and security, and recognized the detrimental impact that unrestricted weapons sales can have on human rights.⁹³

In a recent essay, Barbara Frey, the former UN Special Rapporteur for Small Arms and Human Rights, argues that an extraterritorial obligation exists regarding the transfer of small arms and light weapons.⁹⁴ Part of Frey's argument hinges on the right to life being a peremptory international norm which, therefore, must be upheld by all states.⁹⁵ *Barcelona Traction*, an International Court of Justice case, famously declared that the right to life is *erga omnes*, meaning that it is an obligation owed to the international community as a whole and that the international community as a whole has a legal interest in upholding it.⁹⁶ Therefore, according to Frey, the irresponsible transfer of small arms and light weapons can lead to the violation of a peremptory norm, which is impermissible under international law.

Expanding Frey's argument that the nature of the right to life as an international peremptory norm creates an extraterritorial obligation

92. See G.A. Res. 61/89, ¶¶ 1, 2, U.N. Doc. A/RES/61/89 (Dec. 18, 2006) (establishing a group of experts to study the issue and draft the parameters of the treaty).

93. *Id.* (considering the international legal structures protecting human rights while proposing further restrictions on the international sale of conventional arms).

94. Barbara Frey, *Obligations to Protect the Right to Life: Constructing a Rule of Transfer Regarding Small Arms and Light Weapons*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 35 (Mark Gibney & Sigrun Skogly eds., 2010) [hereinafter *Obligations to Protect*] (looking to both the ICCPR as well as arms embargoes).

95. See *id.* (recognizing that the right has been generated by both customary international law and treaties).

96. See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 50, ¶ 33 (Feb. 5, 1970).

regarding arms transfers, the obligation to uphold the right to life extends to preventing the use of child soldiers. In other words, a state taking actions that would support the use of child soldiers in another country should be seen as violating the peremptory norm of the right to life. Due to the heightened probability of death for a conscripted child, conscripting a child puts the right to life in more jeopardy than conscripting an adult. Therefore, based similar to Frey's argument regarding the affect of weapons transfers on the right to life, there is an extraterritorial obligation to prevent the use of child soldiers because conscription of children jeopardizes the right to life.

There is widespread international condemnation of the use of child soldiers. There are currently 142 States Parties to the Optional Protocol on the Involvement of Children in Armed Conflict, and the U.S. government reported this year that it knows of only six government forces that are using child soldiers.⁹⁷ Since such a large number of countries prohibit the use of child soldiers within their own borders and recognize the horrifically damaging effects of fighting as a child, it is illogical for these countries to not try, within their means and without abrogating state sovereignty, to prevent the use of child soldiers in other countries. This tends to show that the norm of prohibiting the use of child soldiers, coupled with the extensive treaty law preventing their use, creates an extraterritorial obligation to prevent the use of child soldiers and protect children from conscription.

V. U.S. OBLIGATIONS

The United States is a State Party to the Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict, which creates legally-binding obligations for the United States to uphold its obligations, and the United States has passed national legislation regarding the use of child soldiers.⁹⁸ This section, premised on the argument that there is an extraterritorial obligation to prevent the use of child soldiers, seeks to determine whether the

97. *Status of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, *supra* note 27; TRAFFICKING IN PERSONS REPORT, *supra* note 5, at 10.

98. Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2)(2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008).

U.S. recognizes this obligation, and how it upholds the obligation if recognized.

VI. DOES THE U.S. RECOGNIZE THIS EXTRATERRITORIAL OBLIGATION?

After signing the Optional Protocol, the U.S. Congress passed two pieces of national legislation regarding child soldiers—the Child Soldiers Prevention Act and the Child Soldiers Accountability Act.⁹⁹ In order to uphold its obligations under the Optional Protocol, the United States had to draft this national legislation. The language of the two acts and the obligations created indicate that Congress recognizes an extraterritorial obligation to prevent the use of child soldiers. The acts sought to uphold this obligation in two ways: (1) by restricting military assistance to governments using child soldiers,¹⁰⁰ and (2) by providing jurisdiction to U.S. federal courts to prosecute people thought to have recruited or used child soldiers, regardless of where these actions took place.¹⁰¹

A. LEGISLATIVE ACTION

The U.S. Congress passed the Child Soldiers Prevention Act and the Child Soldiers Accountability Act in 2008.¹⁰² They are progressive laws that prohibit unlawful conscription of children in the U.S. and seek to prevent the use of child soldiers overseas. In addition, these Acts promote the disarmament and reintegration of children who are currently fighting.

The Child Soldiers Prevention Act prohibits the forcible recruitment of anyone under the age of eighteen and the voluntary recruitment of anyone under age fifteen.¹⁰³ The Act permits the U.S. government to provide assistance to child soldiers overseas in their rehabilitation and reintegration into society.¹⁰⁴ Most significantly, the

99. Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2)(2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008).

100. *See* Child Soldiers Prevention Act § 2370c-1(a) (prohibiting direct licenses of military equipment as well).

101. *See* Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442(c).

102. Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2)(2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (2008).

103. Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442(c) (2008).

104. *See id.* § 2370c-1.

Child Soldiers Prevention Act provides for “Prohibition”, meaning that the U.S. government is prohibited from selling arms (guns, tanks, bullets, etc.) to any government that the United States knows to be using or recruiting child soldiers.¹⁰⁵ The inclusion of this provision shows that Congress was concerned with the ability of the U.S. government to influence other states and intended for the United States to curb the use of child soldiers by preventing military aid. Unfortunately, the Child Soldiers Prevention Act also includes a Presidential waiver that provides that the U.S. President may waive the prohibition of sales of weapons to a foreign government using child soldiers if it “is in the national interest of the United States.”¹⁰⁶ This weak provision, amongst an otherwise strong bill, gives the President discretion on whether to uphold the United States’ obligation to prevent the use of child soldiers in foreign countries.

The Child Soldiers Accountability Act provides extraterritorial jurisdiction for the crimes of recruiting and using child soldiers.¹⁰⁷ The Act criminalizes the recruitment and use of child soldiers and provides U.S. federal courts with jurisdiction to try anyone thought to have used or recruited child soldiers anywhere in the world.¹⁰⁸ Concerned with state sovereignty and reciprocal behavior, the U.S. government rarely recognizes extraterritorial obligations. Other exceptions include the War Crimes Act¹⁰⁹ and the Alien Tort Claims Act.¹¹⁰ These statutes provide jurisdiction for crimes committed outside the U.S., but they do so only for the most egregious international crimes, such as genocide, war crimes, crimes against humanity, and other breaches of the Geneva Conventions.¹¹¹ The use and recruitment of child soldiers has risen to the level of such an egregious international crime and the United States has opened its courts to try perpetrators.¹¹² This is an important step in both

105. *Id.*

106. *Id.*

107. Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442(c) (2008).

108. *See id.* § 2442(a).

109. *See* 18 U.S.C. § 2441 (2006) (criminalizing war crimes committed by or against a member of the U.S. armed forces or a U.S. national).

110. *See* 28 U.S.C. § 1350 (1948) (creating jurisdiction to hear claims of violations of the law of nations or of U.S. treaties).

111. *See id.*; *see also* 18 U.S.C. § 2441(c)-(d) (2006).

112. *But see* U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD AND RESPONSE

stemming the use of child soldiers worldwide and showing States Parties that the United States will hold violators accountable.

U.S. laws provide both for the prohibition of military assistance to governments using child soldiers, and grants extraterritorial jurisdiction for U.S. federal courts to try perpetrators. These two essential steps demonstrate the U.S. commitment to curbing the use of child soldiers *outside* U.S. territorial jurisdiction.

B. CONGRESSIONAL HEARING

To determine the intent of U.S. statutes, lawyers frequently look to hearings and commentary made by members of Congress regarding the provisions of a law. The Congressional hearings regarding the Child Soldiers Accountability Act and Prevention Act was held in 2008. During the hearings, members of Congress listened to presentations by three people—a former girl child soldier, the Washington Advocacy Director of Human Rights Watch, and the former Chief Prosecutor for the Special Court of Sierra Leone—and discussed their own thoughts on the bills.¹¹³ The Representatives' comments reflect the notion that the U.S. Congress understood there to be an extraterritorial obligation regarding the prevention of the use of child soldiers.¹¹⁴

Representative Robert Scott, the chairman of the subcommittee, began with a discussion on the use of child soldiers worldwide—in countries other than the United States—and why that is unacceptable.¹¹⁵ He said that “this hearing will probe ways in which

TO COMMITTEE RECOMMENDATIONS 19 (Jan. 22, 2010), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.OPAC.USA.2.pdf> [hereinafter *U.S. Report to U.N. Committee on the Rights of the Child*] (recognizing that no court has yet exercised this jurisdiction).

113. See *Child Soldiers Accountability Act of 2007: Hearing on S. 2135 Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Hearings on Child Soldiers Accountability Act*].

114. *Id.* at 8, 10 (statements of Rep. Robert C. Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec., and Rep. John Conyers, Jr., Chairman, Comm. on the Judiciary) (recognizing the extraterritorial jurisdiction to prosecute and prevent crimes of genocide as creating the same jurisdiction to take action against the use of child soldiers).

115. *Id.* at 8 (highlighting the mass abductions of children in Uganda and Burma for use as soldiers).

we may, as a country, contribute to prevention and punishment of recruiting and using child soldiers.”¹¹⁶ Because the United States halted its practice of deploying soldiers under eighteen to combat zones in 2007,¹¹⁷ this comment refers specifically to the United States’ ability to prevent the use of child soldiers in other countries. Representative John Conyers later said, “This bill brings the power of the Justice Department to bear, in recognition that this is an offense against international law that every country has a responsibility to prosecute”¹¹⁸ Conyer’s statements that the crime of using child soldiers requires universal jurisdiction furthers the idea that the United States recognizes an extraterritorial obligation.¹¹⁹

C. UPHOLDING ITS OBLIGATIONS

The United States knows which governments around the world are using child soldiers. In an October 2010 State Department report, the United States noted that six governments are currently using child soldiers: Chad, Democratic Republic of the Congo, Sudan, Yemen, Burma, and Somalia.¹²⁰ The United States provides military assistance to four of these six countries.¹²¹ President Obama specifically provided the waiver to provide military assistance to these four countries. The United States does not provide any form of military aid to Burma or Somalia.¹²² The U.S. government notes that, because the Child Soldiers Prevention Act contains a waiver on the prohibition of military assistance, its provision of assistance is legal because the prohibition has been waived. The assistance, however, goes against the general obligations of international cooperation, created in the Optional Protocol, to prevent violations of the Protocol. By providing military assistance to countries that the United States knows are using child soldiers, the United States is

116. *Id.*

117. See Jeff Schogol, *Marines under 18 no longer will deploy to combat zones*, STARS & STRIPES, Apr. 26, 2007, <http://www.stripes.com/news/marines-under-18-no-longer-will-deploy-to-combat-zones-1.63191>.

118. See *Hearings on Child Soldiers Accountability Act*, *supra* note 102, at 10.

119. *Id.*

120. TRAFFICKING IN PERSONS REPORT, *supra* note 5, at 10.

121. Knowlton, *supra* note 5.

122. *Id.*

promoting violations of the Optional Protocol.

In January 2010, the U.S. government submitted its Periodic Report to the U.N. Committee on the Rights of the Child relating to the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict.¹²³ The report discusses U.S. implementation of the Optional Protocol in regards to military recruiting and education, judicial actions, and international assistance.¹²⁴ The report notes that the U.S. War Crimes Statute¹²⁵ does not explicitly refer to the crime of using and recruiting child soldiers but that “depending upon the circumstances, the manner in which children are recruited, used, or treated in hostilities could constitute prohibited conduct under the statute.”¹²⁶ The report does not at this point reference the Child Soldiers Prevention Act, which does criminalize the use of child soldiers.¹²⁷

The report also includes a section on the provision of aid in regards to U.S. obligations to fulfill its Article 7 international cooperation and assistance obligations.¹²⁸ Interestingly, this aspect of the report focuses primarily on aid provided by USAID to foreign programs that promote the rehabilitation and reintegration of child soldiers.¹²⁹ There is no mention of the prohibition of military assistance to countries using child soldiers. Furthermore, the report notes that there have been no prosecutions despite existing laws that provide jurisdiction for such crimes.¹³⁰

Additionally, the report includes answers to recommendations

123. See *U.S. Report to U.N. Committee on the Rights of the Child*, *supra* note 112.

124. *Id.* at 2-27.

125. The U.S. War Crimes Act criminalizes a “grave breach of the Geneva Conventions.” See War Crimes Act, 18 U.S.C. § 2441 (2008).

126. *U.S. Report to U.N. Committee on the Rights of the Child*, *supra* note 112, at 24.

127. See Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442(a) (2008).

128. *U.S. Report to U.N. Committee on the Rights of the Child*, *supra* note 112, at 27-36 (outlining efforts in Colombia, the Democratic Republic of the Congo, Sri Lanka, Uganda, Sierra Leone, Chad, and Burundi).

129. See *id.* at 28 (discussing programs primarily focused on reuniting children with their families).

130. *Id.* at 19 (noting the short period of time between enactment of the laws and the report).

made by the Committee on the Rights of the Child.¹³¹ One recommendation was to create an extraterritorial obligation within national law to try individuals using or recruiting children.¹³² The United States responded by explaining how the Child Soldiers Accountability Act provides jurisdiction over persons who are U.S. citizens or residents, stateless persons habituating in the United States, persons who are present in the United States, and over any crimes that happened partially or fully in the United States.¹³³ This response acknowledges the United States' ability to hold non-U.S. residents ("persons present in the U.S.") accountable for crimes that happened outside of its jurisdiction, showing the United States' intention to prevent further use of child soldiers overseas and to deter any violators from seeking refuge, or even visiting, the United States.¹³⁴ The Committee further recommended that the United States become a State Party to the Convention on the Rights of the Child and the Rome Statute and that the Senate ratify various treaties on international humanitarian law that it has not yet accepted.¹³⁵ To each of these recommendations, the U.S. noted either that it was reviewing the treaty or that it had no intention of joining the convention.¹³⁶

The United States has signed and ratified the Optional Protocol relating to the use of child soldiers and has created national legislation to uphold its obligations outlined in the Protocol. These actions, coupled with commentary from Congressional hearings, show the United States' understanding that it has an extraterritorial obligation to prevent the use of child soldiers and that it intends to uphold this obligation. However, the presidential waiver included in the Child Soldiers Prevention Act of 2008 deeply undermines its ability to uphold this obligation; the United States can provide military assistance to governments it specifically knows use child soldiers. Although the United States understands and apparently

131. *Id.* at 38-52.

132. *Id.* at 44.

133. *Id.*

134. *Id.*

135. *Id.* at 44-45 (calling for ratification of the Additional Protocols to the Geneva Conventions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction).

136. *Id.*

intends to uphold its extraterritorial obligations, it has failed to do so by continuing to provide money, weapons, and training to foreign militaries using child soldiers.

VII. CONCLUSION

The international community—states, NGOs, and international institutions—have rejected the use of child soldiers. Most states are party to one of many treaties (such as the Geneva Conventions, Optional Protocol to the Convention on the Rights of the Child, ILO Convention 182, and others) that prohibit the use and recruitment of children into armed forces. Furthermore, international legal scholars have acknowledged that extraterritorial obligations can be read into some human rights treaties. Therefore, given the egregious nature of the use of child soldiers and the widespread prohibition and prosecution for their use, states have an extraterritorial obligation to prevent the use of child soldiers. This means that states must not only prevent the use of child soldiers within their own territories, but they must also look beyond their territories to ensure that their actions do not permit or promote the use of child soldiers in other territories.

The United States, as a State Party to the Optional Protocol prohibiting the use of child soldiers, created national legislation that, if implemented properly, would uphold its extraterritorial obligation. The legislation gives jurisdiction to U.S. courts to try individuals suspected of using or recruiting child soldiers and prohibits the U.S. government from providing military assistance to foreign governments that the United States knows is using child soldiers. In practice, however, the United States is not fully upholding its obligations. This year, President Obama waived the prohibition of military aid to four countries the United States knows to be using child soldiers. This action violates the United States' obligations under international law to prevent the use of child soldiers outside of its territory.