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Excluding Children From Refugee Status: Child Soldiers and Article 1F of the Refugee Convention

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EXCLUDING CHILDREN FROM REFUGEE STATUS: CHILD SOLDIERS AND ARTICLE 1F OF THE REFUGEE CONVENTION

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INTRODUCTION

Although the paradigmatic refugee is a male individual who has sought asylum because he has been persecuted by an oppressive government for his political beliefs, the majority of refugees in the world today are women and children fleeing from civil conflicts in which the distinction between oppressor and oppressed is often unclear.¹ At the same time, developed States are increasingly

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1. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEES BY NUMBERS 8 (2000) (stating that as of 1999, the countries of origin for the ten largest groups of refugees in the world were Afghanistan, Iraq, Burundi, Sierra

complaining that the current international legal regime governing the status of refugees places undue burdens upon them.² In these circumstances, there has been a tendency in recent years to subject asylum seekers to closer scrutiny to determine whether, by reason of their previous conduct, they are undeserving of refugee status.³

There is no right to asylum under customary international law.⁴ The granting or withholding of asylum is regulated by a number of multilateral treaties; the most significant being the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").⁵ This Convention provides that Contracting States shall grant refugee status to persons who are outside their country of origin and cannot return due to a well-founded fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion.⁶ Such persons shall not be expelled or returned

Leone, Sudan, Somalia, Bosnia-Herzegovina, Angola, Eritrea, and Croatia, which are all nations that have recently faced internal civil conflicts).

2. *See id.* at 6 (explaining that the majority of persons of concern to the Office of the United Nations High Commissioner for Refugees ("U.N.H.C.R.")—refugees, asylum seekers, returned refugees, and internally displaced persons—are located in developing, not developed States).

3. *See* Dennis McNamara, *Exclusion Clauses: Closer Attention Paid to the Exclusion Clauses*, in *REFUGEE AND ASYLUM LAW: ASSESSING THE SCOPE FOR JUDICIAL PROTECTION* 68 (International Association of Refugee Judges ed., 1997) ("For a number of reasons the international community is taking a longer, harder look at who should be protected and assisted as refugees than at any time in the past. Partly, this no doubt reflects the hardening climate towards refugees generally: there is an increased eagerness to weed out the undeserving."). At the time, Mr. McNamara was Director, Division of International Protection, U.N.H.C.R. *See id.*

4. *See* COLIN HARVEY, *SEEKING ASYLUM IN THE UK: PROBLEMS AND PROSPECTS* 48-49 (2000) (discussing the resistance in the international community to recognize asylum as a legal right).

5. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*] (describing the general duties and obligations of refugees and their host countries and reflecting the scope of the treaty); *see also* Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 (amending the Refugee Convention to include persons becoming refugees after January 1, 1951).

6. *See* Refugee Convention, *supra* note 5, art. 1A(2) (providing that such fears must be based on events occurring before January 1, 1951); *see also* GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 18-20 (2d ed. 1996) (discussing the persons who qualify as refugees under the Refugee Convention and the Protocol Relating to the Status of Refugees).

to the frontiers of territories where their life or freedom is threatened for one of the specified reasons.⁷ However, not all persons who may be subject to persecution can benefit from refugee status.⁸ The Refugee Convention provides that certain classes of persons are ineligible for refugee status, either because they are not in need of international protection or are receiving it elsewhere,⁹ or because they are, by reason of their conduct, undeserving cases.¹⁰

Article 1F of the Refugee Convention deals with persons undeserving of the benefits of refugee status.¹¹ Article 1F provides, *inter alia*, that the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”¹² In recent years there has been an increasing tendency for warring factions to recruit children into their armed forces and groups.¹³ Such

7. See Refugee Convention, *supra* note 5, art. 33(1) (setting forth a prohibition on expulsion).

8. See *id.* art. 33(2) (indicating that refugees posing a threat to the security of their host country may not take advantage of this provision).

9. See *id.* arts. 1C-E (providing examples of persons who are not eligible for refugee status, including individuals who are eligible for the protection of their home states).

10. See *id.* art. 1F (explaining that the Refugee Convention does not apply to persons who are suspected of committing certain crimes, such as crimes against peace).

11. See *id.* art. 1F(c) (providing that a person is not protected by the Refugee Convention if “he has been guilty of acts contrary to the purposes and principles of the United Nations”).

12. Refugee Convention, *supra* note 5, art. 1F(c); see also *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(v), U.N. GAOR, 5th Sess., Supp. No. 20, at 121 (1950) (stating that the High Commissioner shall not offer protection to those who have committed crimes under certain treaties); Convention on the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 1(5), 1001 U.N.T.S. 45, 46 (declaring that the “activities of such subversive elements should be discouraged”).

13. See The Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, art. 1, U.N. Doc. A/44/49 (1989) [hereinafter C.R.C.] (establishing that “[f]or the purposes of the present Convention a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”). Thus,

child soldiers have committed atrocities in a number of recent or current armed conflicts.¹⁴ This article considers the implications of Article 1F with respect to child soldiers who may have committed war crimes or crimes against humanity.¹⁵

I. ARTICLE 1F OF THE REFUGEE CONVENTION

Article 1F is framed in mandatory language: the provisions of the Refugee Convention “shall not apply to any person” falling within its terms.¹⁶ From a literal reading of the provision, it would appear that States have no discretion as to whether or not to grant refugee status to persons suspected of committing war crimes, crimes against peace, or crimes against humanity.¹⁷ Rather, they are prohibited from granting refugee status in such circumstances.¹⁸ This interpretation is confirmed by consideration of the provision’s drafting history.¹⁹ Prior to the scrutiny of the Economic and Social Council and the General Assembly of the United Nations and adoption by a Conference of Plenipotentiaries, the first draft of the Refugee Convention was prepared by an *ad hoc* Committee on Statelessness and Related

based on the Convention’s definition of “child,” there has been an increase in the recruitment of children into the armed forces and groups by warring factions. *See id.* Unless specifically stated, the terms “child” and “children” shall have the same meaning in this article as they do in the Convention.

14. *See* HUMAN RIGHTS WATCH, EASY PREY: CHILD SOLDIERS IN LIBERIA 23, 32 (Human Rights Watch/Africa Human Rights Watch Children’s Rights Project) (1994) (discussing the promotion of child soldiers for decapitating an enemy).

15. Crimes against the peace will not be discussed. For obvious reasons, child soldiers do not hold sufficiently elevated rank to participate in decisions to wage aggressive war.

16. *See* Refugee Convention, *supra* note 5, art. 1F (outlining three reasons to determine to whom the convention does not apply).

17. *See id.* (proving that the Refugee Convention will not apply to individuals about whom states have “serious reasons for considering” them guilty of certain actions).

18. *See id.* (providing that the Refugee Convention shall not apply to anyone who may have committed a war crime, serious non-political crime outside the nation of refuge prior to entry as refugee, and has been guilty of acts that run contrary to the goals of the United Nations).

19. *See* GOODWIN-GILL, *supra* note 6, at 95-97 (explaining that the drafting history of the Refugee Convention demonstrates that the prohibition on accepting criminals was considered from the beginning of the creation of the Convention).

Problems.²⁰ During the initial session of the Committee, the reaction to a United States' proposal that each receiving State retain discretion on whether to exclude war criminals from refugee status resulted in the adoption of a French amendment confirming an obligation to not apply the Convention to war criminals.²¹ The relevant provision (which became Article 1F) subsequently was amended, but not so as in any way to detract from its obligatory quality.²²

It further appears that in applying to "any person", Article 1F does not distinguish between children and adults, so that the obligation to not grant refugee status to persons who may have committed such crimes applies with respect to both adult and child perpetrators.²³ In some quarters this has been seen as unsatisfactory. Child soldiers, even if they have committed atrocities, can be seen as victims rather than violators.²⁴ It has been argued that children should never be subject to exclusion from refugee status on the basis of Article 1F.²⁵ However, although there are many arguments in favor of such a

20. See *id.* at 95 (indicating that the exclusion of war criminals was first considered by the ad hoc committee during January-February 1950).

21. See *id.* at 96 (explaining that the French amendment resulted in revision to the definition of "refugee").

22. See *id.* at 97 (revealing that the subject was referred to a working group, which recommended the current wording of Article 1F(a)).

23. See United Nations High Commissioner for Refugees, *The Exclusion Clauses: Guidelines on their Application*, December 1995, reprinted in, REFUGEE LAW IN CONTEXT: THE EXCLUSION CLAUSE 19, 22 (Peter J. van Krieken, ed., 1999) [hereinafter *Exclusion Clause Guidelines*] (explaining the view of the U.N.H.C.R. regarding the exclusion clauses of various refugee documents); see also United Nations High Commissioner for Refugees on *Child-Soldiers*, reprinted in REFUGEE LAW IN CONTEXT: THE EXCLUSION CLAUSE 43, 44 (Peter J. van Krieken, ed., 1999) [hereinafter *U.N.H.C.R. on Child Soldiers*] (stating that "[t]he exclusion clauses do not distinguish between adults and minors").

24. See *U.N.C.H.R. on Child Soldiers*, *supra* note 23, at 43 (asserting that the "vulnerable status and special needs of children should always be taken into consideration").

25. See Michael Kingsley Niynah, *Exclusions Under Article 1F: Some Reflections on Context, Principles and Practice*, 12 INT'L. J. REFUGEE L. 295, at 308 n.20 (2000) (discussing this argument as it is made in the "Non-Governmental Organizations' Submission to the Standing Committee of the United Nations High Commissioner's Programme," which was presented at the 10th meeting of the Executive Committee of the U.N. High Commissioner for Refugees' Programme).

view, it is contrary to both the wording and the drafting history of Article 1F.²⁶ Given the international law rules on the interpretation of treaties, any such reading of Article 1F would be implausible.²⁷ In practice children have been excluded from refugee status as a result of the application of Article 1F.²⁸

II. CHILD SOLDIERS IN THE WORLD TODAY

The most likely reason why Article 1F does not distinguish between children and adults is that its drafters failed to consider that the article might be applied to children.²⁹ The Refugee Convention was agreed with the Second World War fresh in the drafters' minds.³⁰ The participation of children in armed conflicts was not a problem, or, at least, was not seen as one. The Second World War had been largely fought with mass conscript armies. Only in extremis, such as in Germany in 1945, had any of the major powers conscripted children into their armed forces. Where children had participated in hostilities it was as irregulars—partisans or resisters. Such participation was seen as voluntary and heroic or, at best, as an unfortunate necessity. Certainly, child combatants were not associated with the commission of war crimes. Today, however, the situation is very different. A recent survey estimated that, worldwide, there could be around 300,000 children under eighteen serving

26. See GOODWIN-GILL, *supra* note 6, at 257-56 (stating that neither the 1951 Convention nor the Convention on the Rights of the Child, so far as they address the issue of children as refugees, provide an adequate legal basis).

27. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31-32, 1155 U.N.T.S. 331

28. See Exclusion Clause Guidelines, *supra* note 23, at 22 ("Children under eighteen can and have been excluded in special cases."); see also Sibylle Kaepferer, *Exclusion Clauses in Europe—A Comparative Overview of State Practice in France, Belgium and the United Kingdom*, 12 INT'L J. REFUGEE L. 194, 214 (2000) (providing examples of Belgian and French cases where children under eighteen were excluded).

29. See GOODWIN-GILL, *supra* note 6, at 97 (explaining that the drafters only considered "those with respect to whom there are *serious reasons* for considering that they have committed a crime").

30. See *id.* at 95 (informing that the drafting of the Refugee Convention started in 1946).

in governmental or insurgent armed forces or groups.³¹ Children were reported as participating in some thirty-six armed conflicts from 1997 to 1998, and children under the age of fifteen participated in twenty-eight armed conflicts.³² Further, children seem to be used increasingly in combatant as well as auxiliary roles.³³

A child's recruitment into an armed group can be both physically and psychologically damaging.³⁴ Child soldiers are frequently put at risk from enemy attack.³⁵ Even if they escape injury, participation in combat subjects children to psychological pressures with which they do not have the maturity to deal.³⁶ Even if they avoid combat, child soldiers may be subjected to other damaging treatment; for example, they may be forced to carry over-heavy loads or be unable to contact their families.³⁷ Consequently, all recruitment of children under fifteen is prohibited by international law.³⁸ Indeed, the prohibition is

31. See RACHEL BRETT & MARGARET MCCALLIN, *CHILDREN: THE INVISIBLE SOLDIERS* 19 (2d ed. 1998) (stating that over 300,000 children are participating in combat but that it is impossible to provide an exact figure).

32. See *id.* at 19-22 (discussing generally the international participation of children in combat).

33. See *id.* at 20 (noting that boy childhood soldiers historically have been used as servants on the battlefield).

34. See Human Rights Watch, *Children's Rights: Stop the Use of Child Soldiers*, 2 [hereinafter *Stop the Use of Child Soldiers*] (arguing for the end of the use of child soldiers for, among other reasons, the devastating physical and psychological toll combat takes on children), at <http://www.hrw.org/campaigns/crp/index.htm> (last visited June 30, 2002).

35. See *id.* (discussing the level of involvement of children in various armed conflicts).

36. See *id.* (indicating the physical and psychological vulnerabilities of children that make them obedient soldiers and swifter casualties).

37. See *id.* (noting the tasks many child soldiers are required to do as the forced isolation from their families).

38. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 39 [hereinafter Protocol I] (directing that parties to the conflict shall take all feasible measures to ensure that children under the age of fifteen do not directly participate in the hostilities and the parties should not recruit them); see also Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(3)(c), 1125 U.N.T.S. 609 [hereinafter Protocol II]; C.R.C., *supra* note 13, art. 38(2)-(3) (prohibiting children under fifteen from participating in hostilities); see also Matthew Happold, *Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities*

viewed sufficiently seriously for its breach to be a war crime—a violation of the laws and customs of war engaging individual criminal responsibility.³⁹

However, many child soldiers do not serve willingly; they have been abducted or forcibly recruited.⁴⁰ The compulsory recruitment of all children (that is, all persons under eighteen years of age) is prohibited under a number of treaties and possibly under customary international law.⁴¹ Further, in many cases child soldiers are the victims of additional human rights violations at the hands of their own comrades.⁴² Child soldiers often are beaten or even killed by their commanders.⁴³ Girl child soldiers are raped and subjected to

47 NETH. INT'L L. R. 27, at 43-48 (2000) (suggesting that there is probably a rule of customary international law prohibiting the recruitment of children under fifteen into States' armed forces and obligating States to make all feasible efforts to prevent such children from taking a direct part in hostilities).

39. See Rome Statute of the International Criminal Court, art. 8(2)(b)(xxvi)-(e)(vii), U.N. Doc. A/CONF.183/9* (1998) [hereinafter Rome Statute] (declaring that conscripting or enlisting children under the age of fifteen into the armed forces or groups or using them to participate actively in hostilities qualifies as a war crime); Statute of the Special Court for Sierra Leone, art. 4(c), U.N. Doc. S/2000/915 (2002) (noting that the Statute of International Criminal Court recognizes that the abduction and forced recruitment of children under the age of fifteen into armed forces or groups for the purpose of using them to actively participate in hostilities constitutes a war crime); see also Letter from Sergey Lavrov, President of the Security Council, to the Secretary General (Dec. 22, 2000) U.N. Doc. S/2000/1234 (2000); Ninth Report of the Secretary General on the United Nations Mission in Sierra Leone, para. 54, U.N. Doc. S/2001/1228 (2001) (implying that the recruitment of children under fifteen into armed forces or groups is a war crime under customary international law).

40. See *Stop the Use of Child Soldiers*, *supra* note 34, at 1-2 (describing how children are forced into fighting).

41. See African Charter on the Rights and Welfare of the Child, art. 22, O.A.U. Doc. CAB/LEG/24.9/49 (1990), available at <http://www1.umn.edu/humanrts/Africa/afchild> (last visited June 23, 2002); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. Convention 182), June 17, 1999, 38 I.L.M. 1207, art. 2-3(a) [hereinafter ILO Child Labour Convention]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, 54th Sess., Supp. No. 49, art.2 (2000) (prohibiting all recruitment of children).

42. See BRETT & MCCALLIN, *supra* note 31, at 88-90 (providing examples of "inhuman and degrading treatment" of child soldiers).

43. See, e.g., Amnesty International, *Sierra Leone: Childhood - A Casualty of Conflict*, 8 (2000) [hereinafter *Amnesty International*] (describing the treatment,

other forms of sexual violence.⁴⁴ Child soldiers are plied with alcohol and drugs, and are coerced or manipulated into committing atrocities.⁴⁵ It is submitted that such treatment can amount to persecution within the meaning of Article 1A(2) of the Refugee Convention, and that children recruited into armed forces or groups can compose a “particular social group” within the scope of the provision.⁴⁶

III. CHILD SOLDIERS AS REFUGEES

The concept of persecution under the Refugee Convention is a flexible one, with no universally accepted definition.⁴⁷ Nevertheless, there appears to be general agreement that violating an individual’s fundamental (or core) human rights amounts to persecution.⁴⁸ As mentioned previously, recruiting children under the age of fifteen is a sufficiently serious breach of international law so as to give rise to individual criminal responsibility.⁴⁹ Further, the forced or compulsory use of all children under the age of eighteen in armed conflict has been categorized as a form of slavery or, at least, a practice similar to slavery.⁵⁰ There is no doubt that the enslavement

especially by their commanders, of child soldiers in Sierra Leone), at <http://web.amnesty.org/802568F7005C4453/0/516C89BFE1E7CA4B8025694500723A8C?Open> (last visited Aug. 13, 2002).

44. See *id.* at 12 (discussing the fact that girl soldiers in Sierra Leone are forced to become wives or concubines of adult male soldiers).

45. See *id.* (describing the means by which children are forced to fight in Sierra Leone).

46. See Refugee Convention, *supra* note 5, art. 1(A)(2) (determining refugee status based on the persecution experienced by that person).

47. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 51 (1992) (“There is no universally accepted definition of ‘persecution’ and various attempts to formulate such a definition have met with little success.”).

48. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 106-107 (1991) (identifying the various individual rights that States have a duty to protect from persecution, including both the freedom from interference and entitlement to resources); see also GOODWIN-GILL, *supra* note 6, at 66-69 (asserting that persecution includes cruel punishment and degrading treatment).

49. See *supra* notes 38-39 and accompanying text (discussing the international prohibition on the recruitment of children under the age of fifteen).

50. See ILO Child Labour Convention, *supra* note 41, art. 3(a). Article 3(a)

of a person is a breach of his fundamental human rights.⁵¹ It is submitted that the forcible or compulsory recruitment of any child under eighteen or the recruitment *per se* of any child under fifteen is a similar violation and, as such, amounts to persecution within the meaning of the Refugee Convention.⁵² Additionally, even if a child soldier does not suffer persecution solely because of the fact of his recruitment, his subsequent treatment may amount to such.⁵³ Physical maltreatment and sexual assault have been frequently recognized as types of persecution, as has (less frequently) interference with a person's private and family life.⁵⁴

However, to qualify for refugee status under the Refugee Convention, it is not enough to show that one has a well-founded fear of persecution.⁵⁵ The persecution feared must be on account of one of the specified grounds (race, religion, nationality, membership

states:

For the purposes of this Convention, the term 'the worst forms of child labour' comprises: (a) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict . . .

Id.

51. See GOODWIN-GILL, *supra* note 6, at 69 (demonstrating that slavery, servitude, and forced or compulsory labour are banned in a number of international instruments and as a matter of customary international law). See generally Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Final Act of the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 8, 999 U.N.T.S. 171 (evidencing international agreements that ban slavery and forced labor).

52. See, e.g., International Covenant on Civil and Political Rights, *supra* note 51, art. 8 (prohibiting forced military service).

53. See *infra* note 54 and accompanying text (explaining various recognised types of persecution in accordance with the Refugee Convention).

54. See HATHAWAY, *supra* note 48, at 112-13 (describing risks of civil and political rights); see also GOODWIN-GILL, *supra* note 6, at 69 (explaining that due to the limitlessness of the possible known measures of persecution, assessments of what qualifies as persecution must be made on a case-by-case basis).

55. See *Refugee Convention*, *supra* note 5 art 1A(2) (requiring through the inclusion of a list of grounds for persecution, an articulation of the specific grounds upon which an individual is basing his or her well-founded fear of persecution).

of a particular social group or political opinion).⁵⁶ It is submitted that children who are liable to be recruited into armed forces or groups have a well-founded fear of persecution because of their membership of a particular social group.⁵⁷ The social group in such cases being children from a particular country or region who, by reason of their age and (in most cases) gender, are potential recruits (generally, although not always, adolescent boys).⁵⁸

What amounts to a "particular social group" for the purposes of the Refugee Convention has been a subject of controversy.⁵⁹ On the one hand, it has been argued that the existence of a particular social group requires a degree of cohesiveness, co-operation, or interdependence between its members.⁶⁰ On the other hand, a requirement of cohesiveness has been denied. Persecution on account of membership of a particular social group means:

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one

56. See *id.* (articulating the specific grounds upon which a potential refugee can claim persecution).

57. See *supra* note 46 and accompanying text (discussing the classification of children recruited into armed forces as a "particular social group" for purposes of the Refugee Convention).

58. See *infra* notes 62-63 and accompanying text (discussing the definition of a particular social group in which child soldiers qualify for protection).

59. See *infra* notes 60-63 and accompanying text (outlining the debate over the definition of "particular social group").

60. See *Sanchez-Trujillo v. Immigration & Naturalization Serv.*, 801 F.2d 1571, 1577 (9th Cir. 1986) (holding that "an all-encompassing grouping as the petitioners identify as a 'class of young, urban, working class males of military age who had maintained political neutrality' simply is not that type of cohesive, homogeneous group to which we believe the term 'particular social group' was intended to apply"); see also *R. v. Secretary of State for the Home Dep't, ex parte Shah*, 1 W.L.R. 74, 93 (Staughton L.J.) (Eng. C.A. 1998) (finding that Shah did not fall under "a particular social group"); see also *Gomez v. Immigration & Naturalization Serv.*, 947 F.2d 660, 664 (2d Cir. 1991) (holding that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership of a particular social group").

that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁶¹

It is this second, expansive definition that has been most widely adopted. Children would seem to fit into it (as they do not into the first).⁶² Although their common characteristic is not immutable, it is not something they can change voluntarily. Only time can transform children into adults. Children recruited into armed forces or groups are persecuted for reasons of their membership of a particular social group (children) because it is their very membership of that group that renders their recruitment persecution.⁶³

Generally, deserters or draft evaders are not seen as eligible for refugee status because the treatment they fear from the authorities on account of their actions is considered punishment for their refusal to obey the law of the land rather than as persecution.⁶⁴ Asylum seekers are required to show that the conscription they sought to avoid was conducted in a discriminatory manner so as to amount to persecution, or that their desertion or evasion was to avoid participating in an illegitimate conflict or (possibly) as the result of a conscientious

61. *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. Lexis 1985).

62. *See, e.g., Applicant A. v. Minister for Immigration and Ethnic Affairs*, 142 A.L.R. 331 (1997) (holding that there must be a common unifying element binding individuals with similar characteristics or aspirations together before there is a social group of which they are members); *Canada (Attorney General) v. Ward*, [1993] S.C.R. 689; *In re G.J.*, [1998] I.N.L.R. 387 (N.Z. Refugee Status Authority); *Shah*, 1 W.L.R. 74 (referring to the definition of a "particular social group" throughout these opinions).

63. *See* GOODWIN-GILL, *supra* note 6, at 69 (inferring that the descriptions of various forms of persecution are broad). *But see* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF STATE, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 25 (1998) (arguing that "an aged-based claim grounded solely in the applicant's status as a child or a child from a particular country is unlikely to be sufficiently discrete to establish persecution on account of that status"), available at <http://www.ilw.com/belluscio/childr~1.pdf> (last visited on June 28, 2002).

64. *See* HATHAWAY, *supra* note 48, at 179. Stating that:

persons who claim refugee status on the basis of a refusal to perform military service are neither refugees *per se* nor excluded from protection . . . the crucial question is whether the claimant can show that desertion or evasion is grounded in civil or political status, failing which the claim cannot succeed.

Id.

objection to military service.⁶⁵ It is difficult, however, to see this general rule applying in the case of child draft evaders or deserters. Recruitment of children under fifteen amounts to persecution *per se*,⁶⁶ with regard to children between fifteen and eighteen years old, whilst recruitment does not equal persecution in of itself, the treatment meted out to recruits frequently does.⁶⁷

Finally, it is also the case that a person can be at risk of persecution because of his status as a former child soldier.⁶⁸ Particularly because of their use to commit atrocities, emobilized child soldiers are often objects of hatred and suspicion.⁶⁹ Former child soldiers are a group of persons sharing a common immutable characteristic; in this case, a shared personal experience.⁷⁰ In such circumstances, if reprisals amounting to persecutory acts ensue, they are aimed at former child soldiers because of their membership of a particular social group.

IV. CHILD SOLDIERS AS WAR CRIMINALS

Consequently, it can be seen that recruitment as a child soldier can form the basis of an asylum claim. At the same time, one of the reasons children are recruited may be because they are less socialized, more docile, and more malleable than adults⁷¹ and hence

65. See *id.* at 179-85 (exploring in further depth the requirements for asylum seekers to establish that their attempt to avoid military conscription was legitimate).

66. See *supra* notes 38-39, 54 (noting what qualifies as a violation of international law and what is considered persecution where children are concerned).

67. See *id.* at 179-85 (explaining that the manner in which recruits are treated may amount to persecution).

68. See *infra* notes 69-70 (noting experiences of child soldiers on the African continent).

69. See C.P. DODGE & M. RAUNDALEN, *REACHING CHILDREN IN WAR: SUDAN, UGANDA AND MOZAMBIQUE* (1991) (describing the treatment of former child soldiers in Mozambique).

70. See *supra* note 61 (illustrating the clear parallel that can be drawn with one of the examples given in Acosta, that of the shared past experience of "former military leadership"). See also 19 I. & N. Dec. 211 at 54.

71. See *infra* pp. 113-15 (discussing appropriate treatment of former child soldiers under international law).

are more obedient and more easily coerced into committing atrocities.⁷² For example, in a report on child soldiers in Liberia, Human Rights Watch reported a relief worker as saying, "I think [the warring factions in the Liberian civil war] use kids because the kids don't understand the risks. And children are easier to control and manipulate. If the commanding officer tells a child to do something, he does it."⁷³ A similar view has been taken by Rachael Brett and Margaret McCallin, who summarized the results of their study of child soldiers by stating, "the evidence of this book is that children are recruited predominantly because not enough adult recruits are forthcoming, *or in order to use them as spies or to commit atrocities*."⁷⁴

Child soldiers have committed serious atrocities in a number of recent conflicts, such as those in Mozambique, Liberia, the Democratic Republic of Congo, and Sierra Leone.⁷⁵ In Liberia, for example, child soldiers, some as young as nine years of age, were responsible for killings, maimings, and rapes, both against members of opposing armed groups and the civilian population.⁷⁶

However, most people would agree that children and adults should not be treated identically in respect of exclusion from refugee status. This perception would seem to comport with the developing international law of children's rights.⁷⁷ Article 1 of the Convention on the Rights of the Child provides that: "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."⁷⁸ The Article further states that parties to the

72. See *infra* notes 72-74 (explaining reasons for using children in combat).

73. EASY PREY: CHILD SOLDIERS IN LIBERIA, *supra* note 14, at 23.

74. BRETT & MCCALLIN, *supra* note 31, at 167 (emphasis added) (explaining results of their comprehensive study of child soldiers).

75. See EASY PREY: CHILD SOLDIERS IN LIBERIA, *supra* note 14, at 23 (noting that one of the advantages of using children as fighters is that children are very obedient, don't question their orders, and act out of blind obedience, making it possible for them to commit such atrocities).

76. See *id.* at 32 (noting that children are an integral part of attacks on and occupation of civilian areas).

77. See *infra* notes 78-83 (describing various international legal provisions designed specifically in the interests of children).

78. See C.R.C., *supra* note 13 (documenting the General Assembly's comments and the Convention's preamble).

Convention "undertake to ensure the child such protection and care as is necessary for his or her well-being."⁷⁹ Even before adoption of the Convention on the Rights of the Child, the U.N.H.C.R. Executive Committee, in its Conclusion No. 47 on refugee children, "stressed that all action on behalf of refugee children must be guided by the principle of the best interests of the child."⁸⁰ The U.N.H.C.R. applies the Convention of the Rights of the Child to its own work by using the rights laid down in the Convention as guiding principles.⁸¹ It is submitted that such an approach is the correct one and that the provisions of the Refugee Convention should be interpreted as far as possible in conformity with the principles set down in the Convention on the Rights of the Child.

Children are more vulnerable, more dependent, and have developmental needs which adults do not have. Given this, the rest of this paper will discuss the defences child soldiers might have to efforts to exclude them from refugee status under Article 1F(a).⁸² Two issues, in particular, will be discussed: firstly, the consequences of children's lack of mental and moral development in terms of their criminal responsibility for their actions; secondly, the availability of a defence of duress in respect to child soldiers' responsibility for international crimes, given that their participation in hostilities frequently is coerced.⁸³

79. *Id.* art. 3(2) (describing the responsibilities of States party to the Convention).

80. See *Report of the U.N.H.C.R. Executive Committee on Refugee Children*, U.N.H.C.R. Executive Committee, 38th Sess., Conclusion No. 47, para 205, U.N. Doc. A/AC.96/702 (1987); see also *Report of the U.N.H.C.R. Executive Committee on Refugee Children*, U.N.H.C.R. Executive Committee, 40th Sess., Conclusion No. 59, para 26, U.N. Doc. A/AC.96/737 (1989), reaffirmed by U.N. Doc. EC/SCP/82, reprinted in *Refugee Children: Guidelines on Protection and Care*, U.N.H.C.R., Annex A (2d ed. 1993) [hereinafter *Refugee Children*] (recognizing the efforts made by the Office of High Commissioner to respond to children's needs and noting concern for children's nutritional and educational deficiencies).

81. See *Refugee Children*, supra note 80, at 4 (providing basic necessities such as shelter, food, water, and medicine in emergencies).

82. See *infra* Parts V, VI (discussing infancy and duress as defences for child soldiers to exclusion from refugee status).

83. See United Nations High Commissioner for Refugees, *Application of Article 1(F) to Child-Soldiers*, reprinted in, REFUGEE LAW IN CONTEXT: THE EXCLUSION CLAUSE 43, 44 (Peter J. van Krieken, ed., 1999) (noting that "children

Before concentrating on available defences, however, one possible objection must be addressed. It might be argued that to exclude a person from refugee status under Article 1F all one needs to show is that there are "serious reasons" for thinking that the person has committed atrocious acts.⁸⁴ If this were the case, then whether a person had a defence would be irrelevant. All that would be needed would be to demonstrate that the person had behaved in a manner amounting to the *actus reus* of a war crime, a crime against humanity, or a crime against peace. It is submitted, however, that such an approach would be wrong. A crime consists of three elements: the *actus reus* (the conduct element), the *mens rea* (the mental element), and the absence of any available defence.⁸⁵ Article 1F does not refer to atrocities or persecution; it refers to international crimes.⁸⁶ What distinguished exclusion proceedings from criminal proceedings is simply the standard of proof that is applied (reasonable suspicion rather than beyond reasonable doubt); the burden of proof remains the same and all elements of the crime must be proved.

V. INFANCY AS A DEFENCE TO EXCLUSION

Most systems of criminal law take the view that before a person can be held blameworthy and, therefore, punishable, his behavior must contain an element of fault.⁸⁷ In general, to be guilty of a crime, particularly with regard to serious offences, it is not enough to simply to have done a particular prohibited act; there must be the

participate in hostilities through abductions, threats to their families, and other forms of harsh and extreme pressure").

84. See *supra* note 12 and accompanying text (quoting the language of Article 1F of the Refugee Convention).

85. See generally *Martin v. State*, 17 So. 2d 427 (Alaska Ct. App. 1994) (noting that criminal responsibility does not attach without commission of a voluntary act); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993) (finding that, in addition to a voluntary act, intent to commit the specific crime is required before the accused is liable for the crime).

86. See *supra* note 12 and accompanying text (noting that article 1F of the Refugee Convention only includes broad categories for denying refugee status).

87. See *infra* notes 90-91 (discussing criminal liability); see also *supra* notes 85-86 (explaining essential elements of a crime).

requisite *mens rea* as well as the *actus reus*.⁸⁸ Consequently, it can be possible to escape criminal liability by showing that one was lacking the necessary guilty mind, such as, for example, if the act was committed accidentally rather than intentionally or while in a state of automatism. In respect of one class of persons, however, a lack of *mens rea* is generally presumed.⁸⁹ As Simester and Sullivan state, "[a]lthough it [the defence of infancy] is a defence of status (no-one under 10 years of age [the minimum age of criminal responsibility in England and Wales] can commit a crime), the status is predicated on assumptions concerning such a person's mental development and consequent moral irresponsibility for her actions."⁹⁰

Children are considered *doli incapax*; incapable of evil. By virtue of this presumption, they avoid criminal liability for their acts.⁹¹ Thus, it would appear that there cannot be "serious reasons for considering" that a child has committed an international crime if that child is under the age of criminal responsibility.⁹²

88. See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 87-88 (3d ed. 1999) (stating "[t]he essence of the principle of autonomy is that the incidence and degree of criminal liability should respect the choices made by the individual"). The quote continues:

The principle of *mens rea* expresses this by stating that defendants should only be held criminally liable for events or consequences, which they intended or knowingly risked. Only if they were aware (or, as it is often expressed 'subjectively' aware), of the possible consequences of their conduct should they be liable.

Id.

89. See *infra* note 92 and accompanying text (noting criminal liability of children in the United Kingdom)

90. A. P. SIMESTER & G.R. SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* 541 (2000).

91. See *id.* at 644-45 Explaining:

Certain mental defences may be incompatible with justified blame. Young children afford an obvious example. From an early age, children are capable of aggressive and predatory conduct. Such conduct may need to be restrained but a degree of maturity, a capacity for self-criticism, is required before formal pronouncements of blame and punishment are apt.

Id.

92. See generally C.R.C., *supra* note 13, pmbl. (stating that "the child, by reason of physical and mental immaturity, needs special safeguards and care" within the international legal system).

This view has been supported by the U.N.H.C.R.⁹³ However, a problem immediately arises: what is the minimum age of criminal responsibility in respect of war crimes and crimes against humanity? Is there, indeed, a minimum age of criminal responsibility in international law? Here the Convention on the Rights of the Child is of little help; no minimum age of criminal responsibility is stipulated. The only provision dealing with the matter is Article 40, on treatment in penal affairs,⁹⁴ the relevant provisions of which declare that State parties to the Convention shall seek to establish a minimum age below which children shall be presumed to not have the capacity to infringe the criminal law.⁹⁵ Consequently, all that the Convention provides is that States should establish a minimum age of criminal responsibility, but that it is a matter for each State as to what that age should be.⁹⁶

93. See *Application of Article 1F to Child Soldiers*, *supra* note 83, at 44 (stating “[e]xclusion decisions rest on evidence of individual liability for excludable crimes”). The quote continues with :

In order for individual liability to be established, the elements for *mens rea* must be present. This means that the excludable acts must have been committed voluntarily, with some understanding or foresight as to the moral consequences of those acts, and by a person to whom a moral choice was available. These elements of a ‘guilty mind’ are, however, those in respect of which minors are presumed not to have the requisite mental or emotional capacity.

Id.

94. See C.R.C., *supra* note 13, art. 40 (noting that children should be treated in a manner that takes into account age and potential for reintegration into society); see also Amnesty International On line, *Child Soldiers Treaty Should be Backed by Defence Bans* (Sep. 16, 2000) (stating that the Optional protocol to the Convention on the Rights of the Child seeks to ban recruiting soldiers who are under the age of eighteen), at <http://web.amnesty.org/ai.nsf/print/IOR510052000?opendocument>.

95. C.R.C., *supra* note 13, art. 40(3)(a).

96. See *id.* (declaring that “[s]tate parties shall promote the establishment of laws” that address the minimum age of culpability without proving specific direction as to the precise laws to be made or the ages to which the laws should apply). But see Optional Protocol to the Convention of the Rights of the Child G.A. Res. 54/263 Annex I, U.N. GAOR, 54th Sess., No. 49, art. 3, U.N. Doc A/54/49 (2000) (entering into force Feb. 12, 2002) (stating that parties to the Protocol “shall” raise the age for compulsory military recruitment to eighteen years).

The issue had previously arisen during the negotiations of Additional Protocol I to the Geneva Conventions (Protocol I).⁹⁷ There, the representative of Brazil proposed that what is now Article 77(5) of the Protocol⁹⁸ be amended to add the sentence “[p]enal proceedings shall not be taken against, and sentence not pronounced on, persons who were under sixteen years of age at the time the offence was committed.”⁹⁹ The proposed amendment was not accepted. However, the Italian representative without objecting to the article as it was adopted, stated that he would have wished that it included an additional paragraph prohibiting any criminal prosecution and conviction of children who, at the time of the commission of the offence, were too young to understand the consequences of their actions.¹⁰⁰ Committee III, to whom the draft article had been assigned, agreed that there was a general principle that a person cannot be convicted of an offence if, at the time he committed it, he was unable to understand the consequences of his act. The committee decided, however, to leave the question to national legislation. It is submitted that such a rule is indeed a general principle of law, and as such, a rule of international law.¹⁰¹

Such a conclusion is partially supported by the relevant provisions of the United Nations Standard Minimum Rules of the Administration of Juvenile Justice (“The Beijing Rules”) and their commentary.¹⁰² Of course, the Rules are not *per se* binding, but they

97. See Protocol I, *supra* note 38 (defining armed combatants and calling upon international standards to prevent children who have not attained the age of fifteen from being recruited or detained as combatants).

98. See *id.* (stating “[t]he death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed”).

99. O.R. III, p. 307, CDDH/III/325.

100. See O.R. XV, p. 219, CDDH/II/SR.59.

101. See GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 173 (1995) (stating, “[a]nother basic principle enshrined in international law is that the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions”).

102. See *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, G.A. Res. 40/33, 40 U.N. G.A.O.R. Supp. No. 53 at 207, U.N. Doc. A/40/53 (1985) [hereinafter *The Beijing Rules*] (providing guidance to States

provide an indication of the shared thinking of States on the issue. Rule 4, on the age of criminal responsibility, is not particularly supportive¹⁰³ merely stating that: "[i]n those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."¹⁰⁴ This seems to require even less than the (subsequent) Convention on the Rights of the Child. However, the commentary to the rule is more interesting. It sees disparities in national minimum ages of criminal responsibility as the product of historical and cultural differences.¹⁰⁵ The comment goes on to say that:

The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for antisocial behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.¹⁰⁶

In other words, criminal responsibility should only be imposed when there is some element of fault, that is, sufficient mental and moral awareness on the part of the individual committing the prohibited act of the consequences or potential consequences of his actions.¹⁰⁷ The commentary also links the imposition of criminal responsibility to granting civil rights, such as the right to marry and the right to vote.¹⁰⁸ Such rights, of course, are frequently only granted from age

for the protection of children's rights and respect for their needs in the development of separate and specialized systems of juvenile justice).

103. See *Beijing Rules*, *supra* note 106, pt. 1 sec. 4.1 (noting that, similar to the C.R.C. preamble, determination of a child's criminal responsibility should take into account a child's physical and emotional immaturity).

104. *Id.* pt. 1 sec. 4.1.

105. See *infra* notes 111-16 (discussing important factors in creating an internationally acceptable age for criminal responsibility).

106. *Id.*

107. See ASHWORTH, *supra* note 90 (concluding that knowledge of the consequences of one's actions is required to hold a person accountable for a crime).

108. See *Beijing Rules*, *supra* note 106, pt. 1 sec. 4.1 ("In general, there is a

sixteen, seventeen, or eighteen. The commentary ends by stating that efforts should be made to agree on an international standard minimum age of criminal responsibility.¹⁰⁹

This, of course, has not yet happened. However, an interesting discussion on the subject took place in the European Court of Human Rights' recent judgment in the cases of *T v. United Kingdom* and *V v. United Kingdom*.¹¹⁰ Both T and V were ten years old when they abducted and killed a two-year-old boy.¹¹¹ At age eleven, they were tried in public in an adult court before a judge and jury (although some allowances were made for their age), convicted of murder and abduction, and sentenced to an indefinite period of detention.¹¹² They applied to the European Court of Human Rights on the ground, *inter alia*, that their treatment violated Article 3 (the prohibition of torture and other inhuman or degrading treatment or punishment) of the European Convention on Human Rights.¹¹³

The Court considered whether the attribution to the applicants of criminal responsibility in respect their acts gave rise to a breach of Article 3, and found that it did not.¹¹⁴ It found Article 5 of the Beijing Rules and Article 40(3)(a) of the Convention on the Rights of the Child of little help.¹¹⁵ Nor did it consider that there was any common

close relationship between the notion of responsibility for . . . criminal behavior and other social rights and responsibilities . . .").

109. See *Beijing Rules*, *supra* note 106, pt. 1 sec. 4.1 ("Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.")

110. 30 EUR. H.R. REP. 121 (2000) (noting that both *T v. United Kingdom* and *V v. United Kingdom* were published under one opinion because they were decided on the same day and are "virtually identical").

111. See *id.* at 130 (explaining that T and V were truant from school when they took a two-year old child from a shopping area).

112. See *id.* at 131-34 (detailing the trial and sentencing process, which was conducted "with the formality of an adult trial").

113. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, 213 U.N.T.S. 222, E.T.S. No. 5 [hereinafter European Convention on Human Rights] (stating that no one shall be subjected to torture or to inhumane or degrading treatment or punishment).

114. See *V. v. United Kingdom*, 30 EUR. H.R. REP. at 121 (noting that the vote was ten to seven).

115. See *id.* at 145-46 (noting that the Court did not rely on these conventions). The Court, however, did recommend consideration to raising the minimum age of

standard as to the minimum age of criminal responsibility among the member States of the Council of Europe.¹¹⁶ Consequently, the Court held that:

Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of 10 cannot be said to be so young as to differ disproportionately from the age limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.¹¹⁷

With respect to the Court, however, the fact that a practice is not unusual is not itself enough to legitimize it. Quite a number of common practices breach the human rights of those subjected to them. The Court's decision on this point seems distinctly under-reasoned.¹¹⁸ However, in a joint, partly dissenting opinion, Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens, and Butkevych disagreed with the majority on the point.¹¹⁹ The dissenters stated that standards could be ascertained from the relevant international instruments and the practice of the member States of the Council of Europe.

Only four Contracting States out of 41 are prepared to find criminal responsibility at an age as low as, or lower than, that applicable in England and Wales. We have no doubt that there is a general standard amongst the Member States of the Council of Europe under which there is

criminal responsibility. *See id*; *see also Committee on the Rights of the Child, Comments on United Kingdom of Great Britain and Northern Ireland*, 8th Sess., U.N. Doc. CRC/C/15/Add.34 (1995) (recommending that the United Kingdom give serious consideration to raising the minimum age of criminal responsibility).

116. *See T. v United Kingdom*, 30 EUR. H.R. REP. at 146 (noting that the "age of criminal responsibility is seven in Cyprus, Ireland, Switzerland and Liechtenstein; eight in Scotland; 13 in France; 14 in Germany, Austria, Italy and many Eastern European countries; 15 in the Scandinavian States; 16 in Portugal, Poland and Andorra; and 18 in Spain, Belgium and Luxembourg").

117. *Id.* at 176.

118. It is also objectionable because, basing its conclusions on the lack of consensus amongst the contracting States, the Court grants States a wide margin of appreciation in respect of an issue within the scope of Article 3, which is an absolute, non-derogable right.

119. *See T. v United Kingdom*, 30 EUR. H.R. REP. At 202 (finding that the trial and sentence contradicted Article 3 of the Convention) (Ridruejo, J., et al., dissenting in part).

a system of relative criminal responsibility beginning at the age of 13 or 14 – with special court procedures for juveniles – and providing for full criminal responsibility at the age of 18 or above. . . . Even if Rule 4 of the Beijing Rules does not specify a minimum age of criminal responsibility, the very warning that the age should not be fixed too low indicates that criminal responsibility and maturity are related concepts. It is clearly the view of the vast majority of Contracting States that this kind of maturity is not present in children below the age of 13 or 14.¹²⁰

Accordingly, taking the age of criminal responsibility together with the trial procedure and sentencing, there had been a breach of Article 3.¹²¹ It is submitted, at least with regard to whether there are any emerging standards as to the minimum age of criminal responsibility, that the reasoning of the minority of the Court is to be preferred.

Consideration of the issue has also recently taken place in the context of the drafting of the Statute of the Special Court for Sierra Leone. The statutes of the International Criminal Tribunals for Former Yugoslavia and Rwanda do not include any provisions governing the age of criminal responsibility¹²² and neither tribunal has indicted any person below the age of eighteen.¹²³ The issue,

120. *Id.* at 203 (Ridruejo, J., et al., dissenting in part).

121. *See id.* at 202. Noting that:

Bringing the whole of weight of the adult criminal processes to bear on children as young as 11 is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all.

Id.

122. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 6 para. 58, U.N. Doc. S/Res/827 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia and stating that individual tribunals will need to establish a minimum age or mental incapacity at which criminal responsibility will attach); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994) (establishing an International Criminal Tribunal for Rwanda).

123. *See Secretary-General's Report on Aspects of Establishing An International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1170, para. 58 (1993) ("The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon the general principles of law recognized by all nations").

however, was addressed directly in the Rome Statute of the International Criminal Court.¹²⁴ Article 26 of the Statute provides that, "[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offence."¹²⁵ However, it is clear both from the language of the article and its drafting history that the provision is procedural rather than substantive in nature. It is simply the jurisdiction of the International Criminal Court that is excluded, leaving the treatment of child war criminals to national courts.¹²⁶ Indeed, it appears that one of the reasons for this exclusion of jurisdiction was to avoid arguments as to what the minimum age of responsibility of international crimes should be.¹²⁷

However, with regard to the Statute of the Special Court for Sierra Leone the issue did have to be grappled with.¹²⁸ The civil war in Sierra Leone had seen extensive use of child soldiers, many of whom committed serious atrocities, including killings, rapes, and mutilations.¹²⁹ In his report on the establishment of a Special Court, the U.N. Secretary-General acknowledged the difficulty in prosecuting child soldiers for war crimes and crimes against

124. See *Rome Statute*, *supra* note 39, art. 26 (determining the Court's jurisdiction over minors).

125. *Id.*

126. See ROGER S. CLARK & OTTO TRIFFTERER, *Article 26: Exclusion of Jurisdiction Over Persons Under Eighteen*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 499 (Otto Triffterer ed., 1999). Noting:

Only the jurisdiction of the ICC is excluded. . . . Therefore, it cannot be assumed that persons under eighteen are not responsible for crimes under international law *in general*. Quite the opposite. They are responsible for crimes for which the ICC has jurisdiction according to article 5 before *national* courts under the principle of universality and insofar as national law provides for such a jurisdiction over minors.

Id.

127. See *id.* at 497 (stating "[t]he reasons for this exclusion [of the I.C.C.'s jurisdiction] were to avoid a conflict with regulations in different *national* jurisdictions about the age when criminal responsibility should start and how the period of growing maturity should be dealt with").

128. See *infra* note 135 and accompanying text (noting that children below the age of fifteen were combatants in the Sierra Leone conflict).

129. See *Amnesty International*, *supra* note 43, at 1 (estimating that over 5,000 child combatants have fought in the Sierra Leone conflict).

humanity, given their dual status as both victims and perpetrators.¹³⁰ There was considerable dispute between the people of Sierra Leone and international non-governmental organizations as to how juvenile offenders should be dealt with.¹³¹ Consequently, whilst Article 7 of the draft Statute provided that the Special Court should have jurisdiction over persons who were fifteen years of age at the time of the alleged commission of the crime, it also included special procedures for the prosecution, trial, and punishment of the under-eighteens.¹³²

To sum up, it appears that although international law dictates that States establish a minimum age of criminal responsibility, it does not purport to tell them what the age should be. It does, however, offer a number of guidelines.¹³³ First, the age should not be so low as to result in the punishment of children who, at the time of the offence, were too young to understand the consequences of their actions.¹³⁴ Second, there may be the beginning of a trend (to put it at its highest) to standardize the minimum age of criminal responsibility somewhere in the mid-teens (e.g. thirteen, fourteen, fifteen).¹³⁵ This seems to be the approach taken by the minority in the *T* and *V* cases and by the U.N. Secretary-General when drafting the Special Court's Statute.¹³⁶ Third, even children above the age of criminal

130. See U.N. SCOR, paras. 15(c), 17-18, U.N. Doc. S/2000/915 (2000) (concluding that international humanitarian law is violated when children under fifteen years old are abducted and forced to participate in hostilities).

131. See *id.* para. 35 (discussing that there was unanimous consent to find judicial accountability of children under eighteen years old).

132. See *id.* at Enclosure art. 7(2)-(3) (treating a person under 18 years of age with "dignity and a sense of worth" and prioritizing releasing the juvenile offender).

133. See C.R.C. *supra* note 13, pmb. (stating general purposes and guidelines of the Convention); *Beijing Rules*, *supra* note 106, pt 1 art. 5.1 (noting that the one of the international juvenile justice should consider both the gravity of the offense and the personal circumstances of the young offender).

134. See *supra* notes 90, 112 (discussing the fact that without mental capacity there cannot be criminal culpability).

135. See *supra* Parts IV, V (explaining legal approaches to considering a child a criminal and noting that age should be a defence to such a charge).

136. See *United Kingdom*, 30 Eur. H.R. Rep. at 170 (stating that it is contrary to common sense to attribute criminal responsibility to an eleven year old child) (Conforti, J. & Bekes, J., dissenting in part).

responsibility should be treated differently from adults.¹³⁷ Taking all of this into account, however, States are still left with a considerable amount of discretion.¹³⁸ Thus, there is no fixed minimum age of responsibility for international crimes.

Obviously, this presents somewhat of a problem for the national decision-maker when deciding whether or not to exclude a child soldier from the benefits of refugee status under Article 1F(a). It may be, however, that the solution is a simple one. It is now fairly generally admitted that perpetrators of war crimes and crimes against humanity are subject to universal jurisdiction.¹³⁹ Any State into whose hands they come may prosecute them.¹⁴⁰ In such cases, States would apply their own domestic law regarding the minimum age of criminal responsibility and it appears that, within the broad limits set out above, this would be perfectly proper under international law. Given this, it would seem equally proper for States to apply their own domestic law as to the minimum age of criminal responsibility when determining whether there are "serious reasons" for believing an asylum seeker has committed crimes within the scope of Article 1F(a). If a former child soldier seeking asylum was below the national minimum age at the time he was alleged to have committed the impugned acts, then his behavior cannot give rise to "serious reasons" for thinking that he has committed an international crime because he cannot be considered criminally liable for his actions.

But what about the situation where the minimum age of criminal responsibility in the State from which the child soldier is fleeing is lower than that of the State from which he seeks asylum? In such a case, it might be that the asylum seeker would be potentially criminally liable for his acts in the State of refuge, but not in the

137. See generally C.R.C., *supra* note 13, pmbl. (declaring that due to a child's inherent immaturity, he should be afforded special safeguards and legal protections).

138. See *id.* art. 40 (failing to indicate a precise minimum age of responsibility and leaving such a determination to individual States' and their laws).

139. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (5th ed., Clarendon Press 1998) (revealing that breaches of international laws of war may be prosecuted by any state that obtains custody of the violator).

140. See *id.* at 308 (indicating that international law gives all states the liberty to prosecute and punish war crimes and crimes against humanity).

State of flight.¹⁴¹ As a consequence, he might be deported to face a prosecution to which he could not be subjected.¹⁴² There are two ways of looking at such a situation. On the one hand, it might be argued that each State is entitled to determine its own minimum age of criminal responsibility, and hence, is entitled to enforce that standard on persons within its jurisdiction.¹⁴³ The State of refuge, in other words, is entitled as a matter of public policy to refuse to grant refugee status to persons that it considers might be war criminals.¹⁴⁴ On the other hand, the provisions of Article 1F might be seen not as conferring a right upon States, but an obligation.¹⁴⁵ Indeed, it seems clear that this is what the provision was intended to do.¹⁴⁶ To put it another way, the State of refuge, in applying Article 1F, is acting as an agent of all the State parties to the Refugee Convention.¹⁴⁷ It is enforcing a general policy that undeserving persons should not receive international protection.¹⁴⁸ But is a child who would not be considered criminally responsible for his actions in the place that he committed them an undeserving person? It might be thought not. If so, then Article 1F should not be applied. In such circumstances,

141. See GOODWIN-GILL, *supra* note 6, at 257-62 (noting that due to absence of consistent national and international laws and jurisdiction, refugee children may or may not fall within an umbrella of protection).

142. See Marie Staunton, *Children of Genocide*, THE TIMES, Aug. 12, 1997

143. See *id.* at 251 (noting that a State's right to detain a non-national pending its own determination of entry or removal is beyond question).

144. See *id.* at 100 (discussing that fact that the Geneva Convention allows a State the individual responsibility to seek out and to prosecute war criminals and, as a war criminal, the accused person may be undeserving of refugee status).

145. See James C. Hathaway & Collin J. Harvey, *Framing Refugee Protection In The New World Disorder*, 34 CORNELL INT'L L.J. 247 (2001) (discussing generally the provisions of Article 1F and their implications for asylum seekers).

146. See discussion *infra* pp. 105-08 (noting the fact that Article 1F does not apply to children combatants). But see James C. Hathaway & Collin J. Harvey, *Framing Refugee Protection In The New World Disorder*, 34 CORNELL INT'L L.J. 247 (2001) (discussing generally the provisions of Article 1 F and their implications for asylum seekers).

147. See *supra* Part I and notes 149-52 (discussing application of the Refugee Convention).

148. See *id.* (stating that, in general, those who commit war crimes are not deserving of refugee status).

decision-makers should apply the domestic law of the State of flight.¹⁴⁹

VI. DURESS AS A DEFENCE TO EXCLUSION

But what if the child soldier is above the minimum age of criminal responsibility of both the State of refuge and the State of flight? In such a case, it would seem that Article 1F is generally applicable.¹⁵⁰ There is, however, one reason in particular why the child might be excluded from the ambit of the provision. Child soldiers' participation in war crimes and other atrocities is often coerced.¹⁵¹ In such circumstances, if faced with prosecution for their actions, they might be able to avail themselves of the defence of duress by threats.¹⁵² If successfully asserted, such a defence acts as an excuse, avoiding criminal liability. In exclusion proceedings, there would not be "serious reasons" for considering that the child had committed a war crime or a crime against humanity.

However, it has been argued that, although a defence to criminal prosecution, duress cannot be pleaded in the context of exclusion proceedings. Certainly, this has been the view of the U.S. courts.¹⁵³ Such a view derives from the U.S. Supreme Court's judgment in *Fedorenko v. United States*.¹⁵⁴ In that case, the U.S. government successfully brought denaturalization proceedings against Fedorenko on the basis that, as a concentration camp guard during World War

149. See *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel*, 51st Sess., Agenda Item 108, para. 22, U.N. Doc. A/51/306 (1996) (evaluating the impact of armed conflict on children). The fact that child soldiers are often as much victims as perpetrators of human rights violations adds force to this argument. *Id.*

150. See *supra* Parts IV and V (discussing application of article 1F exclusion clause for war criminals and age as a defence to exclusion).

151. See *supra* Part II (noting that most child soldiers do not fight willingly).

152. See *infra* notes 153-200 (discussing examples of how child soldiers can assert the duress defence).

153. See *Fedorenko v. United States*, 449 U.S. 490 (1981) (noting that it was not congressional intent to allow a concentration camp guard, whether service as such was voluntary or involuntary, to remain in the United States).

154. 449 U.S. 490 (1981) (holding that the Displaced Persons Act of 1948 ("D.P.A.") does not apply to those who helped enemy forces).

II, he had participated in the persecution of camp inmates.¹⁵⁵ Fedorenko argued that he did so under duress, but the Supreme Court ruled that duress was not an available defence.¹⁵⁶ *Fedorenko* was applied to asylum claims by the Board of Immigration Appeals in *Rodriguez-Majano*.¹⁵⁷ There, it was argued that the applicant was ineligible for asylum on the ground that he had engaged in the persecution of others.¹⁵⁸ The applicant admitted that he had been a member of the guerrillas in El Salvador, but argued that he had been forced to join them and had deserted after two months.¹⁵⁹ The Board, however, held that, "[t]he participation or assistance of an alien in persecution need not be of his volition to bar him from relief [from deportation]",¹⁶⁰ although on the facts of the applicant's case, the court found that the guerrillas had not engaged in persecution.¹⁶¹

However, the Supreme Court reached its decision in *Fedorenko* solely on its reading of relevant domestic legislation.¹⁶² The Court saw the issue as one of statutory construction and did not purport to lay down any general rules as to the status of the defence of duress as a matter of international law.¹⁶³ Delivering the opinion of the Court,

155. *See id.* at 493 (stating that by not disclosing his role in World War II, Defendant procured his visa by making a willful misrepresentation).

156. *See id.* at 512 (noting that Congress did not limit visa exclusion to those who "voluntarily assisted enemy forces," thus, "all those who assisted in the persecution of civilians [are] ineligible . . .").

157. *See Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (B.I.A. 1988).

158. *See id.* (noting that the persecution does not need to be of the person's own actions); *see also* 8 U.S.C.A. § 1101(a)(42)(B)(1982) (stating that "the term 'refugee' does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, nationality, religion, membership in a particular social group, or political opinion").

159. *See id.* (indicating that the defendant stated that he was taken from his home and forced to participate in burning cars and spreading propaganda).

160. *Id.* para. (2).

161. *See id.* (holding that the evidence suggests that the respondent engaged only in actions that were the natural consequence of civilian strife and that such harm does not amount to persecution).

162. *See Fedorenko*, 449 U.S. at 490 (relying on the Displaced Persons Act of 1948); *see also* Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (1948) (noting that the 1948 Displaced Persons Act excluded people eligible for immigration that had helped enemy forces in persecuting civilians).

163. *See generally* Abbe L. Dienstag, *Fedorenko v United States: War Crimes*,

Judge Marshall stated that:

[W]e conclude that the District Court's construction of the Act was incorrect. The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard – whether voluntary or involuntary – made him ineligible for a visa. That Congress was perfectly capable of adopting a 'voluntariness' limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b), which excludes only those individuals who 'voluntarily assisted the enemy forces . . . in their operations' Under traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.¹⁶⁴

In fact, the wording of § 2(a) and (b) of the 1948 Displaced Persons Act was taken verbatim from the 1946 Constitution of the International Refugee Organisation ("I.R.O."), the predecessor to the U.N.H.C.R.¹⁶⁵ Persons not of concern to the I.R.O. included, "other persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations."¹⁶⁶

The definitions in the Displaced Persons Act were adopted in conformity with the I.R.O. Constitution.¹⁶⁷ Given this, arguments from presumed congressional intent do not appear particularly compelling. Indeed, there is evidence to show that the Supreme Court's interpretation does not conform to that of the drafters of the

the Defense of Duress, and American Nationality Law 82 COLUM. L. REV. 120 (1982) (discussing extensively the case and its implications).

164. *Fedorenko*, 449 U.S. at 512.

165. Constitution of the International Refugee Organization and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persons, Dec. 15, 1946, 18 U.N.T.S. 283 [hereinafter International Refugee Organization] (defining refugee status and the role of signatory states concerning refugees in the aftermath of World War II).

166. *Id.* at 20.

167. See Displaced Persons Act of 1948, Pub. L. No. 775, § 2(b), 62 Stat. 1009 (1948) (defining the term "displaced person" based on the definition of this term in Annex I of the Constitution of the International Refugee Organization).

I.R.O. Constitution.¹⁶⁸ A footnote to Article 2(b) indicates that the word “voluntarily” was used to exclude from the scope of the provision officials who continued to carry out their normal duties under enemy occupation or persons who cared for sick and wounded enemies.¹⁶⁹ The term was not intended to distinguish between actions performed freely or whilst under duress.¹⁷⁰

The Office of the U.N.H.C.R. succeeded the I.R.O. as the principal United Nations agency concerned with refugees, whilst who is a refugee is now defined by the Refugee Convention.¹⁷¹ As previously discussed, the Refugee Convention’s definition of those persons excluded from refugee status by virtue of their previous conduct is somewhat different from that of the I.R.O.¹⁷² Article 1F speaks specifically of “crimes,” rather than of persecution, which would seem to be a clear implication that general part of criminal law should apply and that, accordingly, duress should be an available defence to attempts to exclude from refugee status.¹⁷³ It is submitted

168. See *Fedorenko*, 449 U.S. at 512 (revealing that Congress intended to exclude all persons who served in a concentration camp or persecuted civilians, whether their service was voluntary or involuntary).

169. See International Refugee Organization, *supra* note 165, at 20 n.1. Stating:

Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute ‘voluntary assistance.’ Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.

Id.

170. See *id.* at 20 (allowing non-combatants to continue with their regular existence).

171. See Refugee Convention *supra* note 5, at 152 (explaining that, for the purposes of this Convention, the term “refugee” shall apply to any person who fits the criteria set out in subsections A (1) and A (2) of Article 1).

172. See *supra* Introduction and Part I (explaining that categories of persons and prior actions that are excluded from refugee status).

173. See *id.* at 156 (inferring that by including non-political crimes as a disqualification to refugee status and thus, should make duress a defence to those non-political crimes for the purpose of gaining refugee status).

that not only are the U.S. decisions wrong in principle, but they are in no way relevant to the interpretation of Article 1F.¹⁷⁴

Duress differs as a defence from infancy. Although formally a status defence, infancy derives its rationale from a belief that children lack the necessary mental and moral development to fully comprehend the consequences of their actions.¹⁷⁵ Accordingly, a lack of *mens rea* is presumed.¹⁷⁶ A defendant claiming duress, on the other hand, is not saying that he did not intend to do what he did,¹⁷⁷ but rather that, faced with an imminent and unavoidable threat aimed at persuading him to commit an offence, he had no viable alternative but to do as he was told.¹⁷⁸ The rationale for the duress defence was well put by Judge Murnaghan, sitting in the Irish Court of Criminal Appeal. Duress is a defence because "threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal."¹⁷⁹

174. See *Fedorenko*, 449 U.S. at 530 (describing how the majority incorrectly interpreted the Displaced Persons Act and the International Refugee Organization) (Stephens, J., dissenting).

175. See SMITH AND HOGAN, CRIMINAL LAW 237 (8th ed. 1996) (breaking children into categories based upon their age, the youngest being children under seven-years-old who are exempt from criminal responsibility under common law).

176. See *id.* at 238 (demonstrating that as a child grows older, it is easier for the prosecutor to prove a child has the *mens rea* for criminal responsibility).

177. See *id.* at 238. Stating:

[W]hen [the] D[efendant] pleads duress (or necessity) he admits that he was able to control his actions and chose to do the act with which he is charged, but denies responsibility for doing so. He may say, 'I had no choice' but that is not strictly true. The alternative to committing the crime may have been so exceedingly unattractive that no reasonable person would have chosen it; but there was a choice.

Id.

178. See *Regina. v. Graham*, 1 W.L.R. 294 (Eng. C.A. 1982) (explaining that in English law, the threats must have been such that "a sober person of reasonable firmness" would not have resisted them).

179. *Attorney-General v. Whelan*, 1934 I.R. 518, 526 (Ir. C.C.A.) (holding that duress is a defence to receiving stolen goods under threat of immediate death); see also Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982) (discussing the distinction between justification and excuse). Strictly speaking, in most circumstances duress provides and excuse for, rather than a justification of, the defendant's conduct.

In such circumstances, we cannot seriously expect individuals to refuse to comply with the demands made upon them, and given this, they should not be held criminally responsible for their actions.¹⁸⁰ Morally, such a refusal might be laudable, but it is so because it goes beyond what might reasonably be expected of a person. And, in such circumstances, the criminal law will not demand that we all be heroes.¹⁸¹ Although the law does not approve of the conduct of the person acting under duress, it is not considered blameworthy; and, hence, punishable.¹⁸² It is difficult to see why this rationale should not apply in exclusion proceedings. Article 1F is concerned with persons “undeserving” of the benefits of refugee status.¹⁸³ Persons who have committed crimes under duress are more unfortunate than undeserving.¹⁸⁴

In fact, duress has been successfully pleaded in opposition to efforts to exclude a person from refugee status.¹⁸⁵ However, an issue

180. See ASHWORTH, *supra* note 88 at 231. Stating:

[D]uress operates as an excuse, recognizing the dire circumstances which [the] D[efendant] was faced and conceding a complete defence where D[efendant] responded in a way that did not fall below the standard to be expected of the reasonable citizen. On this rationale the person of reasonable firmness assumes a central role, not so much in announcing a standard that should be followed, or reducing the risk of false defences, but rather in recognizing that D[efendant] was not lacking in responsibility for what was done. [The] D[efendant] is excused for giving way to the threat or danger when resistance could not reasonably be expected in the circumstances – which means that self-sacrifice is required in certain (lesser) situations.

Id.

181. See J.C. SMITH, *JUSTIFICATION AND EXCUSE IN CRIMINAL LAW* 94 (1989) (stating with regard to the unavailability of duress as a defence to murder, “[h]eroism is a splendid thing but it is usually considered to be conduct going beyond the call of duty, which is why the hero is awarded a medal. A person should not be liable to life imprisonment for failing to be a hero.”).

182. See *id.* at 79 (arguing that many acts performed under duress might be technically illegal, but no one considers that one should condemn themselves in order to save another).

183. See *supra* Part I (explaining that where there are serious concerns over a person’s prior conduct, he may not be deserving of refugee status).

184. See *id.* at 96 (noting that a responsible person can behave in a morally acceptable way and still run afoul of the law when acting under duress).

185. See HATHAWAY, *supra* note 48, at 218 (citing *Felix Salatiel Nuñez Veloso*, Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.5, August 24, 1979, regarding the Canadian Immigration Appeals Board decision where under

still arises in relation to the ambit of the defence.¹⁸⁶ The defence of duress is not the same in all legal systems. Whereas, in general, duress may constitute a complete defence to all criminal charges in civil law systems,¹⁸⁷ in almost all common law systems it is not a defence to charges of murder.¹⁸⁸ This might be thought to be unsatisfactory.¹⁸⁹ Take one hypothetical example. Two child soldiers face prosecution in a State with a common law legal system that does not permit duress as a defence to murder. Both are over the minimum age of criminal responsibility and are each required by their commanders, under threat of immediate execution, to cut off a person's hands. In each case, the intention was not to kill the person, but merely to inflict grievous bodily harm so that they would serve as living examples of the armed group's ruthlessness towards its opponents. The person mutilated by Child A, however, dies of his wounds, whilst the person mutilated by Child B does not. In that case, Child A could be prosecuted for murder (as an intention to inflict grievous bodily harm is sufficient to provide the *mens rea* for the crime of murder)—and could not rely on the defence of duress,

pain of execution, Nuñez participated in crimes against humanity (torture); but, because his actions had been committed under duress, he was not excluded from refugee status under Article 1F).

186. See *id.* at 218 (commenting that a consideration of whether human suffering induced by a person claiming duress should outweigh the perpetrators own well-being).

187. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22-T, 1997 WL 33341547, para. 59 (U.N. I.C.T. App. Ct. 1997) (detailing duress as a defence in the penal codes of France, Belgium, the Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, and Yugoslavia).

188. See *Abbott v. The Queen*, 1 A.C. 755 (P.C. 1977) (appeal taken from Trinidad and Tobago) (holding of the Privy Council that under English law, duress is not a defence to murder); see also *R. v. Howe*, 1 A.C. 417 (H.L.(E) 1987) (procuring murder as opposed to actually committing it does not mean that the prohibition on duress as a defence to murder does not apply, duress is not available as a defence for principals in the first or second degree); see also *Reg. v. Gots*, 1 A.C. 412 (H.L.(E) 1992) (stating that the value of human life is so sacred that duress is not available as a defence to murder under common law).

189. See generally Alan Reed, *Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence* 6 J. TRANSNAT'L L. & POL'Y 51 (1996) (comparing the duress defence in England and the United States while noting the inconsistencies and anomalies present in the applicable case law).

but Child B, charged with inflicting grievous bodily harm, could.¹⁹⁰ Indeed, the present situation in English law has been subject to extensive and cogent academic criticism.¹⁹¹ However, the policy reasons given by the House of Lords for maintaining the distinction between murder and attempted murder would seem to apply with equal force to murder-type crimes, such as war crimes and crimes against humanity involving killing.¹⁹² In these situations, given the sanctity afforded to human life, it may be that the law does require that we all be heroes and refuse to save our own lives at the expense of others'.¹⁹³

Certainly this was the view taken by the majority of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Erdemovic* case.¹⁹⁴ Erdemovic had been charged with a crime against humanity and a war crime in respect of his participation in a Bosnian Serb firing squad following the fall of Srebrenica in 1995.¹⁹⁵ Before a Trial Chamber of the Tribunal, he pleaded guilty to the charge of a crime against humanity, but added that he would have been killed had he refused to join the firing squad.¹⁹⁶ Erdemovic told the court:

190. See SMITH & HOGAN, *supra* note 175, at 94 (giving a similar example).

191. See *e.g.*, *id.* at 73-98 (discussing necessity and duress as a defence).

192. See Peter Alldridge, *Duress, Murder and the House of Lords*, 52 J. CRIM. L. 186 (1988) (analyzing recent decisions by the House of Lords that duress is not a defence to murder).

193. See *Reg. v. Howe*, 1 A.C. at 438 (noting the analyses of Lord Griffiths and Lord Mackay of Clashfern in that duress is not, and has never been, a defence to murder under common law).

194. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22-T, 1997 WL 33341547 (U.N. I.C.T. App. Ct. (Yug.) 1997) (stating that in light of international case law, humanitarian law, and the policies of civilized nations, duress is not a complete defence to crimes against humanity) (Cassese P. and Stephen J., dissenting).

195. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22-T, 1997 WL 33341545, para. 12 (U.N. I.C.T. App. Ct. 1997) (participating with other members of his unit, Mr. Erdemovic shot and killed hundreds of Muslim male civilians at the Pilica collective farm in Srebrenica on or about July 16, 1995).

196. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia in the Appeals Chamber, Case No. IT-96-22-T, 1997 WL 2014005, para. 14 (U.N. I.C.T. Sentencing Ct. 1997) (pleading guilty to the crimes

Your Honour. I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family my wife and son who then had nine months, and I could not refuse because then they would have killed me.¹⁹⁷

The Trial Chamber accepted Erdemovic's guilty plea and sentenced him to ten years' imprisonment.¹⁹⁸ Erdemovic appealed against his sentence.¹⁹⁹ In determining his appeal, the Appeals Chamber examined whether a plea of duress, rather than serving as a mitigating factor, could serve as a defence to war crimes and crimes against humanity.²⁰⁰

The majority of the Appeals Chamber (Judges McDonald, Vohrah and Li) considered that it could not.²⁰¹ Judges McDonald and Vohrah did so largely on the grounds put forward by the British House of Lords.²⁰² Judge Li accepted the submissions of the prosecutor that

against humanity, Mr. Erdemovic maintained that he had no choice but to kill civilians or die alongside them).

197. *Id.*

198. *See id.* para. 6 (sentencing Erdemovic to ten years of imprisonment after he pleaded guilty to one count of crimes against humanity).

199. *See Erdemovic*, 1997 WL 33341545, para. 11 (explaining that the Defendant was appealing his sentence on the grounds of duress, which he claimed should excuse him of serving prison time, or mitigating circumstances, which should reduce the amount of time to be served).

200. *See Erdemovic*, 1997 WL 33341547, para. 32 (beginning the study between the availability of duress as a defence to murder, war, crimes, and crimes against humanity).

201. *See id.* para. 88 (concluding that accepting duress as a complete defence to crimes against humanity would undermine the very foundation of international law).

202. *See id.* para. 75. Stating that:

Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war, to punish perpetrators of crimes against humanity and war crimes, and to deter the commission of such crimes in the future? If national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than

post-World War II tribunals had laid down a rule of customary international law that duress could only be pleaded in mitigation.²⁰³ In a separate and dissenting opinion, however, President Cassese gave a lengthy and convincing rebuttal of this argument.²⁰⁴ Like Judges McDonald and Vohrah, President Cassese was unable to discover any international rules determining whether duress was a valid defence for international crimes involving killing.²⁰⁵ Unlike them, however, he held that it was a general principle of law that duress did amount to a defence to criminal behavior, and if no exception to the rule could be found, then it should apply.²⁰⁶ Judge Stephen also dissented, but on narrower grounds. He found that the reasons given by national courts for not permitting duress as a defence to charges of murder did not refer to situations where an individual, acting under duress, killed persons who would have been killed regardless of that individual's participation in their deaths.²⁰⁷

What is even less clear, however, is whether the rule laid down by the majority of the Appeals Chamber in *Erdemovic* as to the unavailability of a defence of duress to international crimes

match that policy since it deals with murders often of far greater magnitude.

Id.

203. See *id.* para. 5 (noting that although duress has been used as a mitigating factor, the authority is sparse and often not international in character, but rather a reflection of an individual state's law).

204. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22-T, 1997 WL 33341544, paras. 20-29 (U.N. I.C.T. App. Ct. 1997) (stating the majority misinterpreted the case law and furthermore, the tribunals cited were not of international character) (Cassese, J., dissenting).

205. See *id.* para. 47 (differing from the majority opinion by stating that the law of duress is more realistic and flexible, a rule based on what society can reasonably expect from its members) (Cassese, J., dissenting).

206. See *Erdemovic*, 1997 WL 33341547, para. 66 (finding that it was a general principle of law that an accused person is less blameworthy and less deserving of full punishment when he performs a prohibited act under duress) (MacDonald, J. & Vohrah, J.).

207. See *Erdemovic*, 1997 WL 33341549, para. 64 (discussing the dissenting opinion of Judge Stephen in that accepting duress as a defence in international law would not harm the fundamental concepts of the common law, such as in *Erdemovic's* case, where he was one member of an execution squad) (Stephen, J., dissenting).

involving killing is meant to be binding on national courts.²⁰⁸ It is suggested that it is not.²⁰⁹ In the Appeals Chamber, only Judge Li considered that international law governed the issue,²¹⁰ and his reasons for so concluding were comprehensively exploded by President Cassese.²¹¹ Judges McDonald, Vohrah, Cassese, and Stephen were all agreed that there were no rules of international law regarding the availability of duress as a defence to the killing of innocent persons.²¹² However, as judges in a court of criminal appeal, it was not open to them to declare a *non liquet*.²¹³ All four judges agreed that they had to make a decision and determine Erdemovic's appeal.²¹⁴ It was in respect of the process by which they were entitled to come to a decision that they disagreed.²¹⁵

208. See *Erdemovic*, 1997 WL 33341547, para. 75 ("Whilst reserving our comments on the appropriate rule for domestic national contexts, we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes.") (McDonald, J. & Vohrah, J., dissenting).

209. See *id.* (noting that the scope of the crimes addressed by the International Tribunal, war crimes and crimes against humanity, are of a different scale than domestic crimes and as such, the laws are meant to protect the weak and vulnerable, thus serving a different purpose than domestic law).

210. See *Prosecutor v. Erdemovic*, 1997 International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22-T, 1997 WL 33341546, para. 4 (U.N. I.C.T. App. Ct. 1997) (commenting that the governing authority should be the decisions of military tribunals, both national and international, applying international law) (Li, J., dissenting). This seems to be a reference to Article 38(1)(d) of the Statute of the International Court of Justice, which lists "judicial decisions . . . as subsidiary means for the determination of rules of [international] law." *Id.*

211. See *Erdemovic*, 1997 WL 33341544, paras. 20-29 (continuing analysis of post World War II military tribunals) (Cassese, J., dissenting).

212. See *Erdemovic*, 1997 WL 33341547, para. 55 (stating "it is our considered view that no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings") (McDonald, J. & Vohrah, J.).

213. See *id.* para. 57 (finding that when international tribunals are faced with an absence of applicable law, it is their duty to determine the general legal principle based upon the laws of civilized nations).

214. See *id.* (determining that despite an absence of clear authority, the Tribunal would rule on duress as a defence to murder and crimes against humanity).

215. See *id.* (demonstrating that the interpretation of many legal systems inevitably leads to differences of opinion).

Since *Erdemovic*, however, the issue has been addressed in the Rome Statute of the International Criminal Court. Article 31 of the Statute provides, *inter alia*, that:

In addition to other grounds for excluding criminal responsibility provided in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct . . . the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.²¹⁶

The Rome Statute is, of course, only binding on State parties to the treaty.²¹⁷ Although it might be argued that Article 31(1)(d) reflects a rule of customary international law, if so, at least according to the majority of the Yugoslavia Tribunal Appeals Chamber in *Erdemovic*, it is a rule that has crystallized remarkably quickly.²¹⁸ What is of particular interest, however, is that the rule, as enunciated in the Rome Statute, applies in relation to all crimes within the jurisdiction of the International Criminal Court.²¹⁹ That is, it applies in relation to war crimes and crimes against humanity involving killing.²²⁰ To this extent, *Erdemovic* has been overruled. Consequently, it is difficult to argue that international law prohibits a defence of duress to charges of war crimes and crimes against humanity involving killing.²²¹

216. Rome Statute, *supra* note 39, art. 31.

217. *See id.* art. 126 (inferring that the Rome Statute came into force on 1 July 2002).

218. *See* Albin Eser, *Article 31: Grounds for Excluding Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 499 (Otto Triffterer ed., 1999) (emphasizing that the provision cannot easily be seen as marking the crystallization of a rule of customary international law).

219. *See* Rome Statute, *supra* note 39, art. 31 (noting that there is no war crimes exception to grounds for excluding criminal responsibility).

220. *See* Rome Statute, *supra* note 39, art. 23 (stating that "a person convicted by the Court may be punished only in accordance with this statute").

221. *See id.* art. 31 (showing that the Rome Statute clearly allows duress as a defence).

Attempts have been made to apply international standards in cases where persons seeking to avoid exclusion from refugee status have pleaded that they acted under duress. In *Ramirez v Minister of Employment and Immigration*,²²² the Canadian Federal Court of Appeal applied Article 9 of the Draft Code of Offences Against the Peace and Security of Mankind provisionally adopted by the International Law Commission in 1987,²²³ which imported a requirement of proportionality between the harm inflicted and the harm sought to be avoided.²²⁴ The Court concluded that Ramirez could not rely on the defence of duress as, by his own admission, the harm he inflicted was in excess of that which would otherwise have been directed at him.²²⁵ The Draft Code, however, predates the Yugoslav tribunal's decision in *Erdemovic* and has been superseded by the Rome Statute.²²⁶ It is accordingly difficult to say that it reflects customary international law.²²⁷

If no rule of international law governs the issue, States have freedom of action; they can apply their own rules regarding the scope of the defence.²²⁸ A national decision-maker, when determining

222. 89 D.L.R. 173 (1992) (finding that a former member of the Salvadoran army who observed the killing and torture of prisoners and non-combatants could be denied refugee status based on the belief that he had committed war crimes or crimes against humanity).

223. See *Draft Code of Offences Against the Peace and Security of Mankind*, 39th Sess., 2 Y.B. Int'l Comm'n 11, UN Doc. A/CN.4/SER.A/1987/Add.1 (part 2) (1987) [hereinafter *Draft Code*] (highlighting that the Draft Code sought to provide exceptions to criminal responsibility such as incapacity and self defence).

224. See HATHAWAY, *supra* note 48, at 218 (criticizing the decision in *Nuñez* for failing to require such a condition).

225. See *Ramirez*, 89 D.L.R. at 188 (quoting from the Draft Code in that coercion can be used as a defence when an individual is motivated to perpetrate an act in order to avoid grave and imminent danger).

226. See *Draft Code*, *supra* note 223 (highlighting that the only provision relating to defences in the Draft Code as adopted was Draft Article 14, which provided that "[t]he competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of character of each crime").

227. See *id.* (inferring in the commentary to the draft article that a watering-down of the original provision was a result of disagreements over the scope of the defence of duress).

228. See *id.* para. 40 (noting that the competent court decides if international law applies, but that the court can resort to analogous national law).

whether there are serious reasons for thinking that a particular child soldier committed an international crime, should apply his own domestic law regarding the existence and ambit of the defence of duress.²²⁹ Again, this cannot be seen as satisfactory. As with the defence of infancy, if the scope of the defence of duress varies in the State of refuge and the State of flight, the question arises as to which law should be applied.²³⁰

With regard to the the particular situation of child soldiers, however, three points deserve emphasis. First, the fact that a child soldier was recruited by coercive means is insufficient to found duress.²³¹ It must be shown that there was a direct threat aimed at inducing the child soldier to commit the particular crime with regard to which his exclusion from refugee status is sought and that led him to commit that crime.²³² Second, it is probably the case that voluntary membership of an organization notorious for committing atrocities prevents use of the defence of duress in cases when a member of such a group is threatened to induce him to commit such crimes (the doctrine of prior fault).²³³ Such a rule has been applied in domestic proceedings regarding the membership of violent criminal gangs and paramilitary organizations.²³⁴ While the rationale for the rule would seem to apply with equal, if not greater force, with regard to war crimes and crimes against humanity, whether it should apply in

229. *See id.*

230. *See* Peter Rowe, *Duress as a Defense to War Crimes After Erdemovic: A Laboratory for a Permanent Court?* 1 Y.B. INT'L HUMANITARIAN L. 210, 213 (1998) (commenting on the uncertainty of any defences being accepted by the International Criminal Tribunal).

231. *See supra* Part VI (defining when duress may be used as a defence).

232. *See generally* Rome Statute, *supra* note 39, art. 31(d) (noting that a person may be excluded from criminal responsibility under the theory of duress if the crime was committed as a result of "a threat of imminent death or of continuing or imminent serious bodily harm . . . and the person acts necessarily and reasonably . . .").

233. *See* Reg. v. Fitzpatrick, (1977) (N.I. C.C.A.) (stating that a person who voluntarily joins an illegal organization, submitting himself to illegal compulsion, cannot rely on the duress as an excuse).

234. *See* R v. Sharp, 1987 Q.B. 853 (Eng. C.A.) (holding that the defence of duress was unavailable to a person who voluntarily joined a criminal organization or gang).

relation to child soldiers is more doubtful.²³⁵ The recruitment of all children under fifteen years old is unlawful.²³⁶ This can be seen as indicating that children under fifteen-years-old are not viewed as having the maturity to make a real choice whether or not to join an armed group.²³⁷ If so, it would seem unfair to penalize them for joining a criminal one. Application of the rule to children of fifteen years or over remains, however, an open question, as only the conscription of such children is prohibited.²³⁸

Finally, the obverse of the third point is that a child soldier should not be penalized simply because he was a member of an armed group whose members committed atrocities.²³⁹ He must have, in some way, whether as principal or accessory, participated in such offences.²⁴⁰ Article 1F(a) is clear: there must be serious reasons for considering that the person committed an international crime.²⁴¹ Membership of an organization is not a sufficient reason for excluding a person from refugee status.²⁴² In such circumstances, the issue should not arise and, accordingly, there should be no need to raise any defence of duress (or, indeed, infancy).

235. See *State v. Bradbury*, 1967 S.A. 387 (A) (relying on moral blameworthiness more than the actual deed, the court found duress a mitigating factor to a gang member sentenced to death; on appeal the sentence was reduced to life imprisonment).

236. See C.R.C., *supra* note 13, art. 38 (noting that the recruitment of children under fifteen years of age violates the Convention).

237. See *id.* arts. 34, 38 (requiring nations to prevent children from taking part in armed conflicts).

238. See *id.* art. 38(3) (asking states to give priority to soldiers who are at least eighteen years of age).

239. See *Ramirez*, 89 D.L.R. at 180 (stating “[m]ere membership of an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status”).

240. See *id.* (showing that although the judgement is worded generally, it is clear that only persons criminally liable, including principal actors and accomplices, can be excluded from refugee status).

241. See *supra* Part I (discussing section 1F requirements in detail).

242. See *id.* (finding that mere presence at the scene is also not enough to exclude a person from refugee status).

VII. CONCLUSION

Finally, it is important to remember that even if a child soldier is excluded from refugee status under Article 1F(a), it by no means follows that he can necessarily be deported.²⁴³ Article 1F permits the exclusion from refugee status of those in respect of whom, although they have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, there are serious reasons for considering have committed crimes against peace, war crimes or crimes against humanity.²⁴⁴ Such persons may, however, be protected against *refoulement* for other reasons.²⁴⁵

In particular, the European Convention on Human Rights²⁴⁶ and the Convention Against Torture²⁴⁷ prohibit the deportation of any person when there are substantial grounds for believing that the individual will be subjected to torture or to inhuman or degrading treatment or punishment in the receiving State.²⁴⁸ This obligation is absolute.²⁴⁹ It is not affected by the individual's conduct.²⁵⁰ This was

243. See Refugee Convention, *supra* note 5, at 156 (noting that disqualification as a refugee does not mean that other factors, such as being subjected to torture or other degrading treatment, will preclude a person from expulsion).

244. See *id.* (understanding that the text does not show any exceptions for those suspected of crimes against humanity to gain refugee status).

245. See *infra* note 247 and accompanying text (explaining what some of those other reasons might include).

246. European Convention on Human Rights, *supra* note 113, art. 3 (attempting to ensure that no one is subjected to torture).

247. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 46, U.N. GOAR, 39th Sess., Supp. No. 51, art. 8, U.N. Doc. A/39/51 (1985) (noting that a state may deny extradition if the Convention is not following in the requesting state).

248. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (series A) paras. 84-91 (1989) (finding that States contracting to the Convention on Human Rights must consider what consequences, such as torture, a deportee will face even if the deportee is a fugitive from justice attempting to abuse the purpose of protections afforded to refugees).

249. See *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A), para. 70 (1991) (holding that it is the responsibility of an extraditing state to take the responsibility that a requesting state will not subject a person to torture or to inhumane treatment).

250. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 EUR. H.R. REP.

made clear in relation to Article 3 of the European Convention by the European Court of Human Rights in *Chahal v United Kingdom*.²⁵¹ The U.K. Government had sought to deport Chahal, a Sikh militant, to India on the ground that his presence in the U.K. was contrary to the public good for reasons of national security and the international fight against terrorism.²⁵² Chahal claimed that if he were to be deported to India, he would be at serious risk of torture by the Indian security forces. Before the Court, the U.K. Government argued that the guarantee in Article 3 against deportation was not absolute in cases where an individual posed a threat to the national security of the deporting State.²⁵³ The Court rejected this argument and reaffirmed the blanket nature of Article 3, stating that, "the activities of the individual in question, however, undesirable or dangerous, cannot be a material consideration."²⁵⁴ The rule would appear to apply as much to suspected war criminals as to suspected terrorists.²⁵⁵

Given the approach of the minority of the Strasbourg Court in *T. and V.*, it may be that the manner in which a child soldier is prosecuted for war crimes or crimes against humanity in the

413, 414 (1996) (stating unequivocally that protection against deportation to a state where a person may be subjected to torture is absolute).

251. *See id.* (finding in Article 3 the responsibility of the expelling state to ensure that the deportee will not be subjected to torture or other inhumane treatment).

252. *See id.* (providing that Mr. Chahal was a Sikh separatist leader who had been refused asylum and in the opinion of the Home Secretary, a threat to national security).

253. *See id.* (noting that Mr. Chahal complained that his deportation to India would expose him to risks of torture).

254. *See id.* para. 2(b). Stating:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question however undesirable or dangerous, cannot be a material consideration.

Id.

255. *See Chahal*, 23 Eur. H.R. Rep. at 414 (noting that it is more important to know where a deportee is being sent than why that person was expelled).

receiving State might of itself amount to inhuman and degrading treatment.²⁵⁶ Further, if the result of such a trial might be the execution of the child soldier, it seems likely that this too would be contrary to Article 3.²⁵⁷ The execution of persons for crimes committed whilst under the age of eighteen is fairly generally agreed to be contrary to international law.²⁵⁸

In such circumstances, an exercise of executive discretion granting the child soldier permission to stay in the State of refuge would seem appropriate. Such a resolution need not, however, mean that an individual also gains a grant of immunity.²⁵⁹ War crimes and crimes against humanity are crimes of universal jurisdiction.²⁶⁰ If the alleged

256. See *V. v. United Kingdom*, 30 EUR. H.R. REP. at 121 (recalling that it was not considered degrading treatment to convict a ten-year-old of murder in an adult court).

257. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 114 Europ. T.S. 32 (inferring that although the Convention abolishes the death penalty, the European Court of Human Rights has not yet ruled on whether extradition or deportation from a State party to a State retaining the death penalty can violate Article 1 of Protocol 6); see also *Fidan* (1987) II Recueil Dalloz-Sirey 305 (Conseil d'Etat) (refusing to extradite M. Fidan to a country still using the death penalty); *Gacem* (1988) I Semaine Juridique IV-86 (Conseil d'Etat) (refusing to extradite M. Gacem to a country using the death penalty); *Short v. Netherlands* (1990) 76 Rechtspraak van der Week 358, translation in 29 I.L.M. 221 (1991) (Supreme Court of the Netherlands) (refusing to extradite Mr. Short, an American serviceman who murdered his wife while in Holland until the United States agreed to not charge him with a crime that carried the death penalty).

258. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 304-05 (2d ed. 1997). Stating

State practice, with a few lingering exceptions, is consistent with such a banThe Human Rights Committee has stated that the prohibition of execution of children constitutes a customary norm, although it has not precisely specified the age cut-off. In declaring that the United States' reservation to article 6, section 5 of the [International] Covenant [on Civil and Political Rights] was incompatible with the object and purpose of the instrument, it may have implicitly recognized that execution for crimes committed under the age of eighteen was contrary to a customary norm.

Id.

259. See BROWNLIE, *supra* note 139, at 308 (commenting that war crimes are often considered a breach of international law rather than a violation of the national law where the crime took place).

260. See *id.* (noting that a breach of international law, which allows all states to prosecute, does not necessarily mean that the act is criminal).

crimes were particularly heinous, there is, of course, no barrier preventing the State of refuge from prosecuting the child soldier itself.²⁶¹

261. *See id.* (finding that breaches of the laws of war may be punished by any state that obtains custody of the offender); *see also infra* note 139 and accompanying text.