

Article

Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation

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Abstract

Child soldiers are recruited worldwide to serve in armed forces as porters, guards, and combatants. While in the armed forces, they witness acts of extreme violence; are subject to physical, mental, and sexual abuse; are forced to take drugs or alcohol; and ultimately become perpetrators themselves. If these individuals remain in the armed forces they can become the next generation of militia leaders and those most responsible for international crimes. Eventually, they may be vulnerable to indictment for war crimes, crimes against humanity, and genocide. This article contends that courts should consider mitigation in sentencing for former child soldiers, even for crimes committed as adults. First, psychological studies on childhood trauma demonstrate that the violence that these children witness and are subjected to makes them vulnerable to mental illness, which in turn increases the likelihood

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that they will commit crimes as adults. Growing up surrounded by violence also means that these individuals see violence as the norm and are less able to develop a functioning sense of morality. Second, personal mitigation has been used in cases in the developed world to reduce sentences for individuals who experienced childhood trauma, are abuse victims, or suffer from mental illness. The extreme violence experienced by child soldiers and their inability to develop a functioning sense of morality indicate that personal mitigation is also appropriate in these cases. Finally, this article addresses potential objections to the use of personal mitigation in cases of former child soldiers and provides recommendations to international tribunals.

I. Introduction

When he was sixteen or seventeen years old, a Sierra Leonean boy named Issa Sesay was forcibly recruited into the Revolutionary United Front (“RUF”) rebel group. More than twenty-five years later, Sesay, who had risen to be a senior commander in the RUF, was indicted by the Special Court for Sierra Leone and sentenced to fifty-two years in prison for crimes against humanity and war crimes, including recruiting child soldiers.²

Throughout the world, children are used as guards, porters, and soldiers in violent armed conflicts. An estimated 300,000 child soldiers are currently fighting worldwide, more than fifty percent of them in Africa³ and an estimated sixty percent of non-state armies worldwide use child soldiers.⁴ The recent International Criminal Court (“ICC”) judgment of Thomas Lubanga drew attention to this issue: Lubanga was the first person found guilty by the court and was charged with the war crime of conscripting children under the age of fifteen.⁵ Many conflicts that involve child soldiers, like that in the Democratic Republic of Congo (“DRC”), have continued for decades and currently show no signs of slowing or stopping. This means that the next militia leaders indicted by the ICC may be those who, like Sesay, were abducted as children and forced into the armed forces.

As Lubanga’s case demonstrates, recruiting children is itself a serious international crime, and child soldiers who are removed from armed forces while they are still children are treated, rightfully, as victims. Children are believed to be less culpable than adults and do not have the necessary state of mind to commit many crimes.⁶ Of course, child soldiers who do not have the good fortune to escape their militia and be rehabilitated are subject to the same trauma as

² WAR DON DON (Salone Films 2010).

³ Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167, 171 (2001).

⁴ P.W. SINGER, CHILDREN AT WAR, 95 (2005).

⁵ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

⁶ Matthew Happold, *Child Soldiers: Victims or Perpetrators?* 29 U. LA VERNE L. REV. 56, 72 (2008). Note, however, that many serious international crimes do not have culpability requirements.

those who are rescued and treated as victims. However, as Sesay's case shows, their status as victims ends when they enter adulthood and are unwilling or unable, physically or mentally, to remove themselves from the armed forces. This shift in status occurs despite the fact that exposure to extreme violence at a young age can have profound effects on an individual's adult behavior: exposure to violent crime as a child increases the likelihood of developing Post-Traumatic Stress Disorder ("PTSD"), depression, anxiety, and other mood disorders, which may contribute to future violence.⁷ Exposure to violence may also impair individuals' ideological development and ability to develop a functioning sense of morality.⁸

This paper argues that due to the psychological effects of being a child soldier, status as a former child soldier should be considered a mitigating factor when sentencing individuals for crimes committed as adults. Other jurisdictions have used this type of personal mitigation for individuals with mental disorders or violent childhoods,⁹ so it is well suited to cases of former child soldiers. It would also further the purposes of criminal law by punishing individuals according to their moral blameworthiness. Section II will provide background on child soldiers, the problems they may develop and the effect of these problems on brain development and adult behavior. Section III will present an argument for mitigation in sentencing for former child soldiers. Section IV will conclude and offer recommendations to judges, prosecutors and defense attorneys involved in cases of former child soldiers.

A. *Note on Methodology*

To discuss the psychological implications of being a child soldier, I will use examples of children's experiences in combat in Uganda, Sierra Leone, and Mozambique. I will also look to psychology literature on the effects of violence on children, as well as interviews and studies conducted with rescued child soldiers, to discuss how individuals who remain in the armed forces until adulthood may psychologically develop. However, there are several

⁷ See *infra* Part II.

⁸ *Id.*

⁹ See *infra* Part III.

limiting factors to this body of work. First, most research available about the mental health of child soldiers is conducted with individuals who are rescued or released from armed forces *while they are still children*. Most interviews are done in conjunction with rehabilitation efforts and children are interviewed almost exclusively as victims. It is very difficult, therefore, to determine how prolonged and continued activity in the armed forces from childhood into adulthood affects individuals' development. In short, we only know what happens if we cut short the cycle of violence when the individual is still a child and still legally viewed as someone who cannot be held fully responsible for his or her actions. This article seeks to examine the ramifications of that cycle continuing indefinitely until it produces a fully culpable adult.

Second, the studies that do focus on the effects of violence on children who remain in their violent communities until adulthood tend to be conducted in developed countries, such as the United States or United Kingdom. For example, studies show that many currently incarcerated adults experienced trauma or mental illness as a child.¹⁰ While they provide useful insight into the potential effects of early exposure to violence and mental illness on behavior and development, these studies are difficult to apply to the life of a child soldier. While children everywhere experience hardship and abuse, the violence experienced by child soldiers is often on a completely different scale than that in even the worst parts of the developed world.

Therefore, these two bodies of work provide complementary, but not exhaustive, information. From one we may learn about the effects of extreme violence, but only on children; the other demonstrates how violence can affect adults, but not at the same level of trauma. In this article I will attempt to merge these perspectives to determine, to the extent possible, how an adult is affected by growing up in the extreme violence of a military group.

II. Child Soldiers and the Psychological Effects of Service in Armed Forces¹¹

¹⁰ See *infra* Part II. A.

¹¹ There is, of course, controversy as to what age legally constitutes childhood. The Rome Statute of the ICC makes it a crime to recruit anyone under the age of

Child soldiers are often forcibly abducted from their homes, schools, and villages to serve. For example, in Mozambique, sixty-four percent of children in one study had joined armed forces through abduction.¹² In many cases, the ease of their recruitment is what appeals to leaders of armed forces. Recruiting children eliminates the need for armed forces to convince people to join their armies or campaign about their causes. It is inexpensive and easy to abduct an army of children, allowing “groups that would have been easily defeated in the past [to] now emerge as very real contenders.”¹³ Thus, the use of child soldiers can actually increase the frequency of armed conflicts. These armies can also easily recruit new groups of children if their numbers are reduced, thus prolonging conflicts by sustaining groups that would otherwise have been

fifteen, and the Convention on the Rights of the Child (“CRC”) says that states should take all possible measures to avoid using individuals under fifteen in the armed forces. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 339, 346 (2007); Rome Statute of the International Criminal Court, art. 8(b)(xxvi), *entered into force* July 1, 2002, 2187 U.N.T.S. 90; Convention on the Rights of the Child, art. 38, *entered into force* Sept. 2, 1990, 1577 U.N.T.S. 3. However, the CRC classifies a child as under eighteen. Convention on the Rights of the Child, art. 1. The Special Court for Sierra Leone allowed individuals over fifteen to stand trial, taking their young age into account. Michael Custer, *Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States’ Judicial System*, 19 TEMP. INT’L & COMP. L.J. 449, 454 (2005). While it is beyond the scope of this paper to discuss the benefits of different age classifications, it is important to note that many of the situations described in this paper involved children who fit well within any classification of a child. For example, the mean age of children abducted in Uganda was 12.9 years old, and the mean length of service was two years. Ilse Derluyn et al., *Post Traumatic Stress in Former Ugandan Child Soldiers*, 363 THE LANCET 861, 861 (2004) (in this study, the authors interviewed 301 former child soldiers who had served with the LRA to collect demographic information and then randomly selected seventy-five individuals to fill out the Impact of Event Scale – Revised (IES-R) survey, which allowed them to self-report their symptoms after traumatic events. This data was collected from the seventy-one individuals who agreed to participate).

¹² Neil Boothby, *What Happens When Child Soldiers Grow Up? The Mozambique Case Study*, 4 INTERVENTION 244, 248 (2006). This study collected data from thirty-nine male former child soldiers between 1988 and 2004. The individuals were selected from detention centers in southern Mozambique.

¹³ Singer, *supra* note 4.

destroyed by loss of fighters.¹⁴ Additionally, children are easier to control than adults and are less likely to understand the risks of armed conflict.¹⁵

While the development of lightweight arms means that children can more easily play an active role in conflict situations, children serve a variety of roles in armies.¹⁶ For example, in Sierra Leone, children served as “front line combatants, commanders of other child soldiers, spies, porters, cooks, domestic servants, and care-takers of younger children.”¹⁷ Whether children are likely to see combat depends on the individual conflict, but regardless of their role, they are constantly subjected to violence as a form of control. Violence can include beatings, sexual assault, threats, and forced intake of drugs or alcohol; “an aura of menace and violence, whether verbal, physical, psychological, and/or sexual, [becomes] an integral feature of daily interaction.”¹⁸ For example, in Mozambique, fifty-one percent of children interviewed in one study were subjected to physical violence or torture.¹⁹

Child soldiers also witness violence toward others, which can cause further trauma. Abducted children are usually taken “under circumstances of extreme coercion, violence, and fear,” and see their families or community members killed.²⁰ A study in Uganda showed that while serving in the Lord’s Resistance Army (“LRA”), a group notorious for using child soldiers, children were exposed to six different traumatic events on average. Seventy-seven percent saw a person killed and six percent saw a member of their immediate

¹⁴ *Id.* at 98.

¹⁵ Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT’L L. REV. 1131, 1144 (2002).

¹⁶ Grossman, *supra* note 11, at 327, noting that “[o]f the 140 Liberation Tigers Tamil Eelaam (LTTE) soldiers killed during a battle at Ampakamam, Sri Lanka in October 1999, 49 were children; 32 of those children were girls between the ages of eleven and fifteen.”

¹⁷ Myriam Denov, *Coping with the Trauma of War: Former Child Soldiers in Post-Conflict Sierra Leone*, 53 INT’L SOC. WORK 791, 794 (2010). In this study forty boys and forty girls who had formerly served with the RUF while under eighteen were interviewed.

¹⁸ *Id.*

¹⁹ Boothby, *supra* note 12.

²⁰ Denov, *supra* note 17.

family killed.²¹ The statistics are similar in Mozambique, where an estimated seventy-seven percent of children witnessed murder, “often in large numbers.” Sixty-three percent witnessed sexual abuse or rape.²²

However, child soldiers are also perpetrators of some of the most violent crimes in these conflicts. In Uganda, an estimated thirty-nine percent of those interviewed had killed another person, while sixty-four percent were involved in combat. Two percent were forced to kill a close relative.²³ Similarly, children in Mozambique were trained to act without question and with no emotion, and even after they were rehabilitated, many continued to identify primarily as members of the Mozambican National Resistance (“RENAMO”) rebel group rather than victims of a conflict.²⁴

While children are initially forced to commit these crimes, often with the aid of drugs or alcohol, some report that later they began to enjoy killing.²⁵ Rehabilitated children often report that they still feel responsible for what they have done, despite the fact that rescuers assure them that they are innocent victims. “In instances where the former child soldiers had decided to commit horrendous acts themselves, it was clear to them and to others, what they had done. They would then discuss among themselves ‘the feeling of acting independently.’”²⁶ The progression from innocent victim to perpetrator is therefore not always linear. Children are instructed to commit crimes constantly, and it is easy for them to get caught up in the message and instruction of their armed forces and willingly, even eagerly, commit crimes. This does not necessarily mean, however, that they are completely converted. Many later regret their acts and can then repeat this cycle. “[C]hildren continually [drift] between committing acts of violence, and simultaneously being victims of violence by others.”²⁷ A statement by a child in Sierra Leone

²¹ Derluyn, et al. *supra* note 11.

²² Boothby, *supra* note 12.

²³ Derluyn et al., *supra* note 11.

²⁴ Boothby, *supra* note 12, at 248–49.

²⁵ Denov, *supra* note 17, at 795.

²⁶ Grace Akello et al., *Reintegration of Former Child Soldiers in Northern Uganda: Coming to Terms with Children's Agency and Accountability*, 4 INTERVENTION 229, 238 (2006).

²⁷ Denov, *supra* note 17, at 795.

exemplifies the movement from victim to perpetrator: “I was in an ambush and bullets were flying back and forth, people were shooting. I didn't want to pull the trigger at all but when you watch kids . . . being shot and killed and . . . dying and crying and their blood was spilling all over your face you just moved beyond, something just pushed you and you start pulling the trigger.”²⁸

Thus self-preservation can be mingled with an actual thirst for killing, and children's emotions can shift rapidly and repeatedly between shame about their actions to enjoyment of violence.²⁹ Children are constantly influenced by their surroundings.³⁰ Therefore, it may be that an act can seem heroic when the child commits it, later become abhorrent, and still later be re-glorified if it is praised or retold. Because these shifts occur when children are still developing a sense of morality and ideology, children are not only impaired from acting “morally” but also from developing a sense of what they believe is and is not “moral”.³¹

A. *Exposure to Violence and Mental Disorders*

Prolonged childhood trauma can alter immune, neuroendocrine, and central nervous system functions and can lead to physical and mental health problems in adulthood.³² The effects of

²⁸ Grossman, *supra* note 11, at 328.

²⁹ Denov, *supra* note 17, at 795–96.

³⁰ See generally Cathy Spatz Widom, *Does Violence Begat Violence? A Critical Examination of the Literature*, 106 PSYCHOL. BULL. 3 (1989) (discussing the role that an upbringing in a violent environment may play in children's future tendencies towards violence.)

³¹ See *infra* Part II. 1.

³² Christine Heim & Charles B. Nemeroff, *The Role of Childhood Trauma in the Neurobiology of Mood and Anxiety Disorders: Preclinical and Clinical Studies*, 49 SOC'Y BIOLOGICAL PSYCHOL. 1023, 1023–24 (2001). See also, e.g., Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: the Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245 (1998); P.E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD. ABUSE NEGLECT. 7 (1996); B.E. Saunders et al., *Child Sexual Assault as a Risk Factor for Mental Disorders Among Women: A Community Survey*, 7 J. INTERPERSONAL VIOLENCE 189 (1992); M.B. Stein et al.,

trauma can be manifested as depression, anxiety, PTSD, Attention Deficit Hyperactivity Disorder (“ADHD”), and behavioral disorders, as well as other problems such as schizophrenia and substance abuse.³³

PTSD is an anxiety disorder caused by experiencing or witnessing a traumatic event.³⁴ Symptoms of PTSD include re-living the event or events, avoiding triggers reminding one of the event, or hyper-arousal.³⁵ These symptoms may manifest themselves in emotional unavailability, forgetting the event, trouble sleeping, or violent outbursts.³⁶ As discussed above, many child soldiers demonstrate these symptoms or behavior. A study of former child soldiers in Uganda found that ninety-seven percent showed PTSD symptoms.³⁷

It is difficult to know exactly which events are PTSD precursors or worsen it. Generally, there is a correlation between seeing more highly “toxic” violent events—for example, seeing a family member killed or becoming disabled—and experiencing higher levels of PTSD.³⁸ In Sierra Leone and Uganda, it was found that exposure to more violent events was an indicator of the PTSD severity.³⁹ PTSD has also been associated with violent tendencies later in life.⁴⁰

Childhood Physical and Sexual Abuse in Patients with Anxiety Disorders in a Community Sample, 153 AM. J. PSYCHIATRY 275 (1996).

³³ Heim & Nemeroff, *supra* note 32, at 1023–24.

³⁴ NATIONAL INSTITUTE OF MENTAL HEALTH, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE OF HEALTH, NIH PUBLICATION NO. 08 6388, POST-TRAUMATIC STRESS DISORDER I.

³⁵ *Id.* at 1–2.

³⁶ *Id.*

³⁷ Derluyn et al., *supra* note 11, at 862.

³⁸ Theresa S. Betancourt et al., *Research Review: Psychosocial Adjustment and Mental Health in Former Child Soldiers – A Systematic Review of the Literature and Recommendations for Future Research*, 54 J. CHILD. PHYSIOLOGY & PSYCHOL., 17, 28, 30 (2013). Note that the author feels that more work need be done in this area.

³⁹ *Id.* at 27.

⁴⁰ Marie E. Reuve & Randon S. Welton, *Violence and Mental Illness*, 5 PSYCHOL. 34, 39 (2008).

In a Ugandan study, eighty percent of child soldiers exposed to trauma showed signs of depression.⁴¹ Other problems identified were “abnormal grief reactions, academic impairment, fear and dependent behaviour, physical symptoms e.g. loss of appetite and multiple physical complaints, suicidal ideation and moral development/loss of childhood.”⁴² Even four years after being in conflict, many child soldiers still experienced “nightmares, flashbacks, hyperarousal, depression, and anxiety.”⁴³ In Sierra Leone, many former child soldiers experienced nightmares and the feeling that they were being haunted.⁴⁴ Instances of depression were also often accompanied by anxiety.⁴⁵ In Mozambique, some rescued children experienced “impaired social functioning” and were unable to stop their violent behavior, reintegrate into their communities, or cope with day-to-day life.⁴⁶ The children who exhibited the most severe problems were those who led other children while in the armed forces and those who were abducted at an especially young age. In one case, a child who displayed particularly significant difficulty functioning socially was abducted when he was only six years old.⁴⁷

There is a strong connection between these disorders and propensity toward crime later in life. A study from a U.S. juvenile

⁴¹ John D. McMullen et al., *Screening for Traumatic Exposure and Psychological Distress among War-Affected Adolescents in Post-Conflict Northern Uganda*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1489, 1491 (2012). The authors conducted a study of 205 adolescents aged 12–19 from a school in Gulu in Northern Uganda. *See generally* NATIONAL INSTITUTE OF MENTAL HEALTH, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE OF HEALTH, NIH PUBLICATION NO. 11-3561, DEPRESSION 5 (describing symptoms of depression and its association with trauma).

⁴² *Id.*, at 1490.

⁴³ *Id.*, at 1495.

⁴⁴ *See generally* Denov, *supra* note 17 (discussing the effects of armed conflict on children in Sierra Leone, and how they coped with the psychological problems caused by serving in armed forces); NATIONAL INSTITUTE OF MENTAL HEALTH, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE OF HEALTH, NIH PUBLICATION NO. 09-3879, ANXIETY DISORDERS (describing general symptoms and types of anxiety, including those associated with trauma).

⁴⁵ Akello et al., *supra* note 26, at 237.

⁴⁶ Boothby, *supra* note 12, at 252.

⁴⁷ *Id.*

justice system in Illinois showed that sixty percent of males and more than sixty-six percent of females in the system experience a psychiatric disorder, including depression, psychotic disorders, anxiety, ADHD, and disruptive behavioral disorders.⁴⁸ These statistics may be underestimations; they do not include individuals who committed crimes and were released, or were sent straight to mental health facilities.⁴⁹ However, they do illustrate the strong correlation between these disorders and propensity to commit crime.

One way of controlling child soldiers is to force them to take drugs and alcohol in order to reduce fear and impulse control. Many rescued children return from armed forces with addictions. As one child in Sierra Leone put it, “[w]hen I go to battle fields, I smoke enough. That’s why I become unafraid of everything . . . When you refuse to take drugs, it’s called technical sabotage and you are killed.”⁵⁰ Use of drugs and alcohol can lead to substance abuse, which is also correlated with violent crime.⁵¹

The relationship between depression, behavioral disorders, anxiety, ADHD, PTSD, addiction, and violent behavior can be self-fulfilling. Individuals who see extreme violence are at an increased risk of developing disorders and having a disorder increases the risk of developing violent behavior. While some children who enter the armed forces may be predisposed to these problems, the life of a child soldier is so violent and the recruitments so random that it is unlikely that the relationship between psychological disorders, violence, and a history in the armed forces is coincidental.⁵² Many of these disorders also impair an individual’s ability to think

⁴⁸ Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1136–37 (2002). Note that the juvenile justice system deals with individuals under the age of eighteen. The authors conducted a study of 1,829 youth between the ages of ten and eighteen, 1,172 male and 657 females, detained in Cook County, IL.

⁴⁹ *Id.*

⁵⁰ Ismene Zarfis, *Sierra Leone’s Search for Justice and Accountability for Child Soldiers*, 9 HUM. RTS. BRIEF 18, 19 (2002).

⁵¹ Reuve & Welton, *supra* note 40.

⁵² While some children may volunteer for the army, many are abducted from schools or villages on raids where the armies have no prior connection to the children and do not select them based on their suitability for armed forces. Therefore, for the purposes this discussion regarding mental health, children are recruited randomly. *See, e.g.*, Boothby, *supra* note 12.

rationally, which may prevent the individual from understanding the ramifications of his or her actions. Studies are also split on how factors such as age, gender, or time spent in armed forces affect psychological problems.⁵³

B. *Aggression and Ideological Development*

Another trend to consider is the correlation between trauma, childhood aggression and adult crimes. It is clear that childhood aggression can be an indicator of a criminal future. For example, conflicts between parents or a home life characterized by violence, aggression or neglect can influence a child's tendency toward aggression and committing crimes as an adult.⁵⁴ One U.S. study showed that almost fifty percent of former abused or neglected children had committed a non-traffic offense in the past six years.⁵⁵ A study in London also showed a correlation between childhood aggression, as reported by a child's teacher and peers, and criminal activity as an adult.⁵⁶

Furthermore, the level of violence a child experiences as a victim or observer can influence his or her aggression. It is likely that this tendency toward violence is due in large part to the models that

⁵³ For example, some studies show that children who are recruited at a younger age or spend more time in the armed forces are more disposed to mental problems later. Female child soldiers often report higher levels of trauma than male child soldiers. However, being subjected to sexual violence is also an indication of higher trauma, and it is likely that victims of sexual violence are usually girls. *See, e.g.,* Denov, *supra* note 17, at 795. Girls are also often subjected to increased stigma when they return from the armed forces because they are seen as sexually impure. Betancourt, *supra* note 38, at 27–28.

⁵⁴ David P. Farrington, *Childhood Aggression and Adult Violence: Early Precursors and Later-Life Outcomes*, in *DEV. & TREATMENT CHILDHOOD AGGRESSION* 5, 6 (Debra J. Pepler & Kenneth H. Rubin eds., 1991).

⁵⁵ Michael G. Maxfield & Cathy Spatz Widom, *The Cycle of Violence: Revisited 6 Years Later*, 150 *ARCHIVES PEDIATRIC & ADOLESCENT MED.* 390, 393 (1996).

⁵⁶ Farrington, *supra* note 54, at 5. Note, however, that this connection is by no means definite, and it cannot be said that children who are exposed to violence will invariably be criminals. "Being abused as a child may increase one's risk for becoming an abusive parent, a delinquent, or an adult violent criminal. However, on the basis of the findings from the existing literature, it cannot be said that the pathway is straight or certain." Widom, *supra* note 30, at 24.

children receive from the adults in their lives: “[c]hildren learn behavior, at least in part, by imitating someone else’s behavior. Thus, children learn to be aggressive by observing aggression.”⁵⁷ Aggressive children may then become desensitized to violence, reinforcing the pattern.⁵⁸ As one child in Sierra Leone said, “I didn’t have the mind to kill someone initially . . . but later on I enjoyed the wicked acts.”⁵⁹ Children become accustomed to life in the armed forces and the extreme levels of violence become normalized.⁶⁰ In 2006, one survey reported that seventy percent of inmates in the Gulu District juvenile prison were former child soldiers.⁶¹ In Mozambique, many rescued soldiers continued to “use aggression as a principal means of exerting control and social influence.”⁶²

Growing up in an environment as violent as the one that many child soldiers experience also affects their ability to reason and develop a sense of morality. Young children generally are not fully able to create an ideology that they can stand by. This capability changes in adolescence.⁶³ “A child’s grasp of the political world changes dramatically between ages twelve or thirteen and fifteen or sixteen; a child’s cognitive mode changes, his or her authoritarian views of the political system sharply decline, and he or she achieves a capacity for ideology.”⁶⁴ Joseph Adelson describes the development of the political ideology of adolescents as a new capacity for “moral and conceptual relativism.”⁶⁵ Children abducted at a young age will likely not have developed this “capacity for ideology” at the time of the abduction and will reach the age when this sense of ideology would normally develop while still active in the armed forces. Thus their sense of ideology is likely to be based

⁵⁷ Widom, *supra* note 30, at 4.

⁵⁸ Patricia J. Falk, *Novel Theories of Criminal Defense Based on the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 769–770, 783 (1996).

⁵⁹ Denov, *supra* note 17, at 795.

⁶⁰ Widom, *supra* note 30, at 4.

⁶¹ Akello et al., *supra* note 26, at 229.

⁶² Boothby, *supra* note 12, at 249.

⁶³ Grossman, *supra* note 11, at 347, 48.

⁶⁴ *Id.* at 347.

⁶⁵ Joseph Adelson, *The Political Imagination of the Young Adolescent*, 100 TWELVE TO SIXTEEN: EARLY ADOLESCENCE 1013, 1021 (1971).

on an environment characterized by extreme violence and physical and mental manipulation.

Furthermore, children at this age often take cues about right and wrong and their “moral intensity” from their parents;⁶⁶ in the absence of parents, these cues may come from commanders or other soldiers who not only expose children to massive acts of violence but teach them that the children should commit these acts too.⁶⁷ Child soldiers may be taught that they are freedom fighters, killing those who are destroying their country or creating a threat, and thus any means they use are justified. For example, one twelve-year-old child in Sierra Leone reported, “I didn’t know what I was fighting for. The rebels just told us that we were fighting for the people. I don’t know what the war was all about because at the time, I was not really old enough to understand these things.”⁶⁸ Another child mentioned being taught to hate and differentiate themselves from those they fought: “[w]e were told that if we touched these people they can’t feel pain. They were different than us.”⁶⁹ Therefore, children who grow up in this environment are highly unlikely to be able to develop a functional moral compass and determine whether their actions, as children or in the future, are right or wrong.

Many crimes require a certain state of culpability, *mens rea*, for the individual to be declared guilty. Most people agree that children do not have the necessary mental capacity for *mens rea*.⁷⁰ In *Roper v. Simmons*, the U.S. Supreme Court held that it was unconstitutional to impose the death sentence for crimes committed when the perpetrator was less than eighteen years old, stating that juveniles were less culpable than adults.⁷¹ The Court said the same when it concluded that life without parole was unconstitutional for juvenile offenders.⁷² The same principle applies for crimes committed by child soldiers: “[t]here would seem to be no disagreement that almost all of these child soldiers are a great deal

⁶⁶ *Id.* at 1031.

⁶⁷ See *infra* notes 29–30 and accompanying text.

⁶⁸ SINGER, *supra* note 4, at 99.

⁶⁹ *Id.* at 103.

⁷⁰ Happold, *supra* note 6. Note, however, that many serious international crimes do not require a specific state of mind. *Id.*

⁷¹ *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

⁷² See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

less than fully culpable for the actions they might be charged with, and . . . are more appropriately viewed as victims than as perpetrators.”⁷³

However, this issue becomes more complicated when the individuals in question are adults who were abducted as children but remain in the armed forces into adulthood. Though they may suffer from various mental disorders and have impaired ideological development, these problems do not necessarily impact their culpability as adults. The next section suggests the alternative solution of mitigating sentences, rather than reducing culpability, for former child soldiers.

III. The Case for Mitigation

While there is little data that discusses the psychological implications of growing up in the armed forces through adulthood, it is clear that the exposure to violence can have profound effects on an individual’s mental development, understanding of ideology, ability to make decisions, and mental health. Therefore, I argue that an individual’s status as a former child soldier should be considered a mitigating factor when determining punishment, even for crimes committed as adults. The upbringing of child soldiers can render them fundamentally unable to make moral decisions regarding their behavior, and they often suffer from mental disorders that impair their ability to think rationally, increasing their risk of violent behavior.

This is not to say that a child soldier’s culpability should be lessened. Even if their decision-making and morality are compromised, many former child soldiers committing crimes certainly do so knowingly or purposefully. I do not, therefore, believe that former child soldiers should be charged with lesser crimes, or they should be considered to have acted at a lower culpability level. However, personal background and mental illness has been, and should be considered in mitigating the *sentence* of child soldiers.

⁷³ Custer, *supra* note 11, at 471.

Childhood trauma as a mitigating factor in sentencing is not new. Personal mitigation is sentencing mitigation based on a particular characteristic of the accused. In a study of the United Kingdom's Crown Court, Jessica Jacobson and Mike Hough of the Institute for Criminal Policy Research found that there may be a case for personal mitigation if the individual demonstrates remorse, has a responsibility to take care of a family, is particularly young, or lacks a criminal background.⁷⁴ Mitigation can also be based on whether the individual has had a "difficult or deprived background" or a history of substance abuse, especially if the individual is willing to seek treatment.⁷⁵ A childhood in foster care or with abusive parents has also been used as a significant mitigating factor, as have illiteracy and severe depression.⁷⁶ Personal mitigation is also used in U.S. cases, most notably in capital cases where individuals with mental health difficulties, for example, may be granted life in prison rather than given the death penalty.⁷⁷ Serious crimes like murder can also be mitigated slightly; for example, an individual may be given life in prison with the option of parole at the earliest opportunity,⁷⁸ or a reduction of a charge, such as from murder to reckless homicide.⁷⁹

However, personal mitigation is not without controversy. Jacobson and Hough also recognize that mental health and a difficult

⁷⁴ JESSICA JACOBSON & MIKE HOUGH, PRISON TRUST REFORM, MITIGATION: THE ROLE OF PERSONAL FACTORS IN SENTENCING ix, 9, 13 (2007).

⁷⁵ *Id.*

⁷⁶ *Id.* at 15–16.

⁷⁷ See generally Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143 (1999) (describing the case for mitigation in death penalty cases based on childhood abuse and mental illness and how it has been used in the United States).

⁷⁸ For example, in the unpublished case of Felicia Morgan, a teenager who killed another teenager when attempting to take her coat, the judge granted her the option of parole after thirteen years and four months rather than the maximum sixty years based on her history of child abuse and growing up in a violent environment. Falk, *supra* note 58, at 738–39. While it is important to note that in this case the crime was committed while Morgan was still a minor, it still provides an illustration of how mitigation factors may impact sentencing in serious crimes. *Id.*

⁷⁹ In another unpublished case, Turhan Taylor killed a sexual partner while experiencing a PTSD flashback to his prior sexual abuse, and the prosecutor reduced his charge after hearing evidence of his mental state. Falk, *supra* note 58, at 739–40. Note that Taylor was an adult when this crime was committed, and much of his abuse occurred while he was a child. *Id.*

background, while significant when they are considered, are used infrequently to mitigate sentences.⁸⁰ Judges give several reasons for this, including lack of sympathy for those who are unable to overcome a poor background and the lack of available care for mental illness, leaving the prison system as the only option.⁸¹ This is also a response in U.S. courts. In one study, two-thirds of jurors on capital cases said they did not take into consideration a background of child abuse when sentencing, though this number was slightly lower if the defendant had been unable to receive help with mental problems.⁸²

Similarly, there has been academic resistance in the United States to what some describe as the “rotten social background” defense. Professor Paul H. Robinson argues that this defense should not substantially affect judge’s views, because “crime-control doctrines of general deterrence and incapacitation would not support an excuse in such cases.”⁸³ Robinson cites the major purposes of criminal law as just punishment, rehabilitation, incapacitation and deterrence,⁸⁴ and believes that allowing evidence of the defendant’s background as an excuse will undermine these goals.⁸⁵ Mitigated sentencing based on an individual’s background will weaken criminal law’s credibility and ability to deliver what is perceived as a just punishment by going against society’s intuitions of justice; it will undermine deterrence because future criminals may believe that they will be relieved of the consequences of their crime; and it will potentially defeat the purpose of incapacitating dangerous individuals.⁸⁶

⁸⁰ JACOBSON & HOUGH, *supra* note 74, at 23, 32.

⁸¹ *Id.*

⁸² Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1565–66 (1998). This paper analyzes data collected by the Capital Jury Project in South Carolina, which questioned selected random sample of jurors from forty-one capital cases in 1993. *Id.*

⁸³ Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background”*, 2 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 53, 54 (2011).

⁸⁴ See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 19 (1987).

⁸⁵ Robinson, *supra* note 83, at 61–62.

⁸⁶ *Id.*

In order for mitigation to truly align with society's intuitions of justice, Robinson argues, the individual's upbringing must be so far removed from the public's experiences that it is not just worse than what most people experience, but it is worse in a different and objectively more extreme way: "qualitatively worse."⁸⁷ Robinson cites one case in which a teenager abducted and sexually abused other children because he himself was subject to constant sexual abuse as a child and educated, by his abuser, to believe that this behavior was normal.⁸⁸ The extreme trauma this child endured should not be considered to be a mitigating factor because, Robinson argues, even an upbringing like this one "is only quantitatively different from the struggles, disappointments, temptations, deprivations, and outrages that most people experience in their daily lives. It is worse, but it is not qualitatively worse."⁸⁹ In other words, plenty of people are subjected to abusive and irrational caregivers, and not all become criminals; this story is merely a particularly bad example. In contrast, where a prisoner of war was systematically brainwashed in a North Korean prison camp experienced something "qualitatively worse" than the average human being.⁹⁰ As Robinson puts it, the individual's circumstances were "so unusual and so apart from the nature of people's daily lives that they could easily shift the blame for the offense to the effects of having been 'brainwashed.'"⁹¹ Therefore, Robinson argues, there is a case for mitigation in the latter case, but not the former.

However, there are several reasons why these arguments are inapplicable to the case for sentence mitigation of former child soldiers. First, Robinson primarily discusses the fact that one's background should not be an *excuse*. I do not argue that the background of a child soldier should be a defense, but that it should be a consideration in sentencing. It does not affect the guilt or innocence of the party, but only their punishment.

Second, as Robinson points out, a "qualitatively different" background is distinguished from one that is "quantitatively

⁸⁷ *Id.* at 76.

⁸⁸ *Id.* at 69–73 (discussing the case of Alex Cabarga).

⁸⁹ *Id.* at 76.

⁹⁰ *Id.* at 65–68, 76 (discussing the case of Richard Tenneson).

⁹¹ *Id.* at 76.

worse.”⁹² While individuals in developed nations surely do experience violence at home and in poor communities, it is drastically different from that experienced by children fighting in the armed forces, often against their families and neighbors. Simply put, child soldiers live in a constant state of war. In addition to being victims of torture, sexual violence, and regular beatings, they regularly witness murder, rape, forced amputations, and other forms of torture.⁹³ If any situation is “qualitatively worse,” it is that of a child soldier. The Sierra Leonean child’s description of finding oneself surrounded by flying bullets, other dying children, and blood is particularly demonstrative of the extreme nature of this violence.⁹⁴

Furthermore, as literature suggests,⁹⁵ the more extreme violence to which children are exposed, the more extreme the effects on their mental capacity and development. It is likely that many child soldiers experience much more extreme psychological problems than those individuals exposed to more common forms of abuse and neglect. Therefore, the case for personal mitigation on grounds of mental illness is also much stronger in former child soldiers than in civilians.

Third, mitigation in these sentences is also logical when we consider the purposes of criminal law. The mitigation I suggest—one of a lower sentence—will not substantially affect rehabilitation, incapacitation, or deterrence. First, more severe or longer sentences are not likely to affect whether individuals are deterred from crime. Instead, several studies have shown that deterrence is more closely linked to the certainty of the punishment.⁹⁶ Individuals are much

⁹² Of course, there are plenty of arguments that a sufficiently “quantitatively” worse background should also be cause for mitigation, and that child soldiers reach that level of trauma. This, though, this is a subjective assessment, and because it is clear that child soldiers experience an upbringing that is also “qualitatively” worse, it is not necessary to determine how much worse is enough for mitigation in the case of quantitative differences.

⁹³ See *supra* Part II.

⁹⁴ See *supra* text accompanying note 28.

⁹⁵ See *supra* note 38 and accompanying text.

⁹⁶ VALARIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATION CERTAINTY VS. SEVERITY OF PUNISHMENT, 6 (2010); see also generally ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (1999) (finding that increased severity of sentences does not increase deterrence); Daniel Nagin & Greg

more likely to be deterred if they are more likely to get caught, while changing the length or severity of a sentence does not seem to substantially affect deterrence.⁹⁷ Therefore, mitigation is unlikely to make a major impact on the deterrent effect of these sentences.

Second, a slight decrease in a sentence, for example, from Sesay's sentence of fifty-two years to forty, will not defeat the purpose of incapacitation of dangerous individuals. First, the age of the individuals tried and the lengths of their sentences mean that they are often in their seventies and eighties when released, ages when individuals are much less likely to commit crimes.⁹⁸ This is likely more true of former child soldiers, who when incarcerated will be removed from the armed conflict and the environment that encourages their actions and fuels their violent tendencies. Due to the fact that their sentences are likely to be forty or fifty years, many armed conflicts may in fact be resolved when these individuals are released. Furthermore, if it is judged that the individual is too dangerous to be released earlier, the judge or jury still has this discretion, and mitigation can take the form of an option for earlier parole rather than a guaranteed shorter sentence. Finally, rehabilitation can still be a part of sentencing, even if the sentence itself is shorter.

However, mitigation can have a positive effect on whether the punishment is just for the individual under the concept of desert or moral blameworthiness. Robinson defines a just punishment as "the punishment of an offender in relation to the degree of his moral blameworthiness for the conduct or omission constituting the offense."⁹⁹ While a background as a child soldier may not affect the

Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 *CRIMINOLOGY* 865 (2001) (finding that certainty of punishment was a much more "robust deterrent" than severity); David Farrington et al, *Changes in Crime and Punishment in America, England and Sweden between the 1980s and the 1990s*, 3 *STUDY ON CRIME PREVENTION* 104 (1994) (finding a correlation between probability of conviction and decreasing crime rates, but not crime rates and severity of punishment).

⁹⁷ See WRIGHT, *supra* note 97.

⁹⁸ See, e.g., Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 *AM. J. SOC.* 552, 554–56 (1983).

⁹⁹ Robinson, *Hybrid Principles for the Disruption of Criminal Sanctions*, *supra* note 83, at 19 n.1.

culpability of an individual, it may have profound effects on the individual's moral blameworthiness, given his or her disrupted development and lack of choice in childhood.¹⁰⁰ An individual who grows up in a context of war, initially forced to commit crimes, and who does not have the mental capacity to fully develop an independent ideology is unlikely to morally deserve the same punishment as one who lacks these negative influences. Robinson further points out that generally intuitions of justice tend to favor lenience in cases of "coercive indoctrination," or brainwashing an individual to believe a certain ideology.¹⁰¹ The systematic indoctrination of violence and drug addiction that child soldiers receive certainly demonstrates that they fall into this category.

C. *Potential Objections to Mitigation*

There are several objections that may be presented regarding the proposal to mitigate sentences of former child soldiers charged with crimes. The first is the fact that former child soldiers are most likely to be accused of what are, by definition, the most extreme crimes: crimes against humanity, war crimes, or genocide.¹⁰² The level of violence perpetrated by child soldiers is much higher than the crimes in the U.K. study, or even of many capital cases. Former child soldiers may also be unwilling to express regret or apologize, or may resist rehabilitation, which also weakens their case. However, the seriousness of their background can explain some of these responses. Even as adults, child soldiers have experienced very little outside of working in a violent militia, and are unlikely to be mentally capable of instant remorse or even an understanding of their crimes when they are first removed from the armed forces.

More importantly, the sentences for crimes committed by child soldiers are in no way comparable to those for shoplifting,

¹⁰⁰ See Jacobson & Hough, *supra* note 74, at 39.

¹⁰¹ Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"*, *supra* note 83, at 68–69, 72–74.

¹⁰² The Rome Statute defines the crimes under its jurisdiction—crimes against humanity, war crimes, genocide, and the crime of aggression—as the "most serious crimes of concern to the international community". Rome Statute *supra* note 11, preamble, Article 5.

burglary, and other lesser offenses, and mitigation should be adjusted accordingly. For example, in the U.K. study, mitigation for minor crimes often took the form of a demand for an apology, a deferred sentence conditioned on finding work, or a fine, instead of incarceration.¹⁰³ I do not suggest that these sentences should be considered for individuals guilty of war crimes, but instead, judges and lawyers should consider slight reductions in time, for example, forty instead of fifty years, depending on an individual's background.¹⁰⁴ Mitigation of serious crimes should simply be judged on a different scale than minor crimes. This also counters the concern that there are no options for care outside of the criminal justice system for individuals with mental illness. I do not recommend substituting psychological care for incarceration, unless the case is particularly extreme, but instead mitigation with a shorter sentence, making the absence of other forms of care irrelevant.

The second objection is that most jurisdictions do not stipulate that mitigation should be provided for disorders like PTSD, mental problems, or a difficult upbringing; as the study in the United Kingdom shows, judges may choose to reduce sentences, but often do not.¹⁰⁵ I agree that it would be problematic for there to be an automatic and prescribed mitigation of sentence for former child soldiers; each case is different, and while a history of severe trauma and mental problems are likely present in most former child soldiers, the extent of their problems must be individually assessed before it can be determined what mitigation is appropriate. Instead, I suggest that the psychological effects of being a former child soldier merely be considered when a sentence is being fashioned.

¹⁰³ JACOBSON & HOUGH, *supra* note 74, at 26.

¹⁰⁴ Issa Sesay received several jail terms that could be served concurrently. The longest was fifty-two years in prison, so I have used his sentence as an example. WAR DON DON *supra* note 2. Note that most international courts do not prescribe the death penalty and, as evidenced by Sesay's sentence, often prescribe lower sentences than U.S. courts, which do allow the death penalty. Therefore, mitigation in international courts is difficult to compare to U.S. courts, because the scales of punishment are usually different. If a court were to consider a life imprisonment term, then mitigation could be adjusted accordingly (for example, a possibility of early release). *Id.*

¹⁰⁵ JACOBSON & HOUGH, *supra* note 74, at 23, 32.

As discussed in the previous section, mitigation is not a novel approach. While there has been pushback to the idea that one's background can offer mitigation, it has been a possibility in both the United Kingdom and the United States.¹⁰⁶ Information about background and mental state are also commonly introduced during trials for other reasons: they have been used as a mental incapacity defense, or even defense that the accused does not have the necessary criminal culpability. Lawyers have also introduced this evidence simply so the jury may hear the information, and potentially decide to be lenient with sentencing, without specifically making this request.¹⁰⁷

Specifically, defense lawyers have used the "urban psychosis" defense, which states that upbringing in a violent urban environment should mitigate a crime, because exposure to violence can diminish an individual's capacity for the necessary mental state by "[causing] psychological dysfunction short of full-blown mental illness or legal insanity, yet still [having] a significant effect on the individual's behavior."¹⁰⁸ Lawyers have also argued that "urban survival syndrome," where individuals grow up in violent areas and develop an extreme defensive attitude and sense of despair, can be a mitigating factor. For example, one defendant who gave this defense was granted the minimum available sentence.¹⁰⁹ Evidence of physical, mental, and emotional abuse have also been introduced as mitigating factors in death penalty cases.¹¹⁰

Children, of course, are more vulnerable to the effects of trauma than adults, and trauma may result in more lasting effects for children.¹¹¹ Children who serve as soldiers are also exposed to, subjected to, and participate in some of the most extreme and

¹⁰⁶ See *supra* notes 71–75 and accompanying text.

¹⁰⁷ See Falk, *supra* note 58, at 783.

¹⁰⁸ *Id.* at 790; see also *supra* note 77.

¹⁰⁹ *Id.* at 741; see also *supra* note 77.

¹¹⁰ Crocker, *supra* note 77, at 1166–69; see also, e.g., Harris v. Vasquez, 949 F.2d 1497, 1505 (1990) (introducing evidence of the defendant's "horrendous" childhood and history of abuse); May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990) (per curiam) (detailing the defendant's childhood abuse and alcoholism); Middleton v. Dugger, 849 F.2d 491, 495 (introducing evidence of childhood neglect, sexual assault, and drug use).

¹¹¹ Falk, *supra* note 58, at 762–63.

sustained violence on a massive scale. Therefore, this mitigation plea is well suited to them, and if mitigation can be used in cases of urban survival syndrome or urban psychosis, it is not a significant departure to suggest that it be used for former child soldiers.

The third objection is that allowing mitigation for these crimes could be a “slippery slope,” encouraging lawyers to argue for mitigation based on any mental condition or history at all, no matter how ridiculous. Obviously the experiences of child soldiers are much more extreme than most cases and therefore much less prone to outrageous claims in the first place.¹¹² However, to avoid the slippery slope issue, judges may set some limiting factors in arguments for mitigation. For example, a judge may reject evidence if the case is particularly unconvincing, if the individual joined the armed forces at a later age, if the individual joined voluntarily, or if there are other indications that the individual’s experience as a child soldier did not significantly impact his or her decision-making. Therefore, arguments may be considered on a case-by-case basis. Further, if judges are able to exercise discretion as to what evidence is admitted in the first place, there is no reason that allowing mitigation arguments for former child soldiers will open the door to additional defense arguments any more than allowing the use of an insanity defense.

Finally, some may object that being abducted into the armed forces and forced to commit crimes is the same as following orders to commit a crime, which in most jurisdictions is not accepted as an excuse.¹¹³ First, I do not suggest considering a child soldier’s

¹¹² For example, U.S. defense attorneys have argued insanity based on defendants’ watching violent television or pornography, or even listening to rock music. *Id.* at 742–48.

¹¹³ See, e.g., BRIAN OREND, *THE MORALITY OF WAR* 201 (2013) (“ordinary soldiers . . . remain duty bound not to follow [an immoral order]. If they do follow it, they should be charged with war crimes”); Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generation*, 6 HUMAN RIGHTS BRIEF 1, 5 (1998) (“[i]f Nuremberg stood for anything, it was that “I was only following orders” is not an excuse for war crimes. The statutes for the Yugoslav and Rwanda Tribunals likewise specified that superior orders could not relieve an individual of criminal responsibility.”) The Rome Statute only allows following orders to be an excuse if the individual was under a legal obligation to obey the order, the individual was unaware that the order called for an illegal act, and the act was not plainly illegal. *Id.*

background as an excuse, but merely a mitigating factor. It is also important to consider that children tend to follow orders much more blindly than adults do and do not necessarily have a sense that what they are doing is wrong.¹¹⁴ Young children do not fully understand the “concept of individual and minority rights juxtaposed with state power,” and they truly have no concept of their ability to resist an order based on their sense of morality.¹¹⁵ Beyond the fact that children’s brains are not fully developed to understand the idea of morality, children are taught to blindly follow adults’ instructions from birth. As seen in the Mozambique cases, child soldiers are further taught to be devoid of emotion and follow all orders without question.¹¹⁶ This upbringing may also interfere with the development of independent thought.

Ultimately, while I do not argue that there should be an exception to the bar on the excuse of following orders for former child soldiers, I believe it should be considered when sentencing. Growing up in the armed forces may inalterably change an individual’s capacity to resist orders, and child soldiers should therefore be afforded leniency in their ability to develop a sense between right and wrong.

IV. Conclusion and Recommendations

Issa Sesay is not an innocent man. It is not difficult to understand why he deserves his prison sentence, which will keep him incarcerated into his eighties. The RUF was responsible for some of the most atrocious crimes in recent memory, and Sesay was a senior commander of a group of people responsible for killing, terrorizing, maiming, raping and enslaving the citizens of Sierra Leone. It is not easy to find sympathy for an individual like Sesay, despite his difficult background. To consider a mitigating factor in a case like Sesay’s, we must believe on some level that the fact that he committed these crimes is understandable. This is not an easy thing for a judge or jury to do, at least in part because it is not easy for a judge or jury to understand what it means to be a child soldier. The

¹¹⁴ See *supra* Part II. 1.

¹¹⁵ Grossman, *supra* note 11, at 348–49.

¹¹⁶ Boothby, *supra* note 12, at 248–49. .

lives of child soldiers go far beyond any difficult childhood mitigation argument that is made in a domestic court in a developed country. Child soldiers are repeatedly and systematically beaten, starved, drugged, and raped. They watch as their peers and families are killed and tortured. Child soldiers cannot escape because they have no authority figure to support rather than exploit them. Child soldiers effectively spend their formative years being brainwashed in an environment where violence is logical and natural, power is the only currency, and they wield a machine gun.

Adults who commit crimes as adults should not be stripped of culpability because they were once child soldiers; they are still adults and should be tried as such. However, the psychological effects of being a child soldier are profound and may affect an individual's ability to determine right and wrong or control his or her actions. First, trauma as a child increases the likelihood of mental illness as an adult, and mental illness may increase the likelihood of criminal behavior later in life. Second, exposure to violent crime may cause a child to be more violent in the future. Finally, life as a child soldier may impair individuals' moral development due to their exposure to violence at a crucial point in their neurological development. All these factors indicate that the mental health of former child recruits like Sesay may be so affected by their time as child soldiers that they deserve some mitigation in sentencing.

With this in mind, I have several recommendations for judges, prosecutors, and defense lawyers to consider when dealing with crimes committed by former child soldiers. These guidelines are particularly important for international tribunals such as the ICC, which, as demonstrated in the Lubanga judgment,¹¹⁷ will likely have to deal with issues of children being recruited into the armed forces in many future cases. Furthermore, the ICC's statute grants it jurisdiction only over crimes against humanity, war crimes, genocide, and crimes of aggression, so it is by definition dealing with individuals who have been exposed to the most extreme forms of violence.¹¹⁸

¹¹⁷ Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute ¶ 1358 (Mar. 14, 2012).

¹¹⁸ Rome Statute of the International Criminal Court, art. 5, *entered into force* July 1, 2002, 2187 U.N.T.S. 90.

First, in cases where individuals who were in the armed forces at or below the age of eighteen, and particularly if they were in the forces below the age of fifteen, judges should admit evidence about the child's past as a recruit.¹¹⁹ This is especially important for those who were abducted or recruited under traumatic circumstances, exposed to extreme violence, or joined the army at an especially young age, as they may be more adversely affected than others. Second, judges should allow scientific evidence or expert testimony on the psychological effects of these childhood experiences, and particularly their effect on a future propensity for violence or ideological development. When sentencing, judges should consider mitigating the sentences for those who were raised in this culture of extreme violence at a young age, particularly if the individual exhibits signs of mental disorders or disrupted moral development. This mitigation could take the form of, for example, a shorter sentence; an earlier eligibility for parole; or a shorter sentence with the condition that the individual receive psychiatric treatment, dependent on the treatment's results.

In addition, prosecutors should be familiar with the effects extreme violence has on children and take into consideration how it may affect their adult behavior and propensity for violence. Again, this is particularly important for prosecutors who work in international tribunals, as they will often be presented not only with defendants who are exposed to violence, but also with witnesses and civilians. If a child's history suggests that he or she has been exposed to violence extreme enough to disrupt ideological development or cause mental disorders, prosecutors should consider recommending shorter sentences. To this end, international tribunals such as the ICC should consider training lawyers and judges on the effects of child trauma, particularly if cases before the court involve former child soldiers or conflicts where children are widely used.

Additionally, defense lawyers must make it a priority to learn about a client's background and history in the armed forces to determine if a history as a child soldier could affect the client's

¹¹⁹ See *supra* text accompanying note 11 (discussing the different standards of the age of a child in international law). While some documents, such as the Convention on the Rights of the Child, recognize a child as anyone under eighteen, it is fairly universal that anyone under the age of fifteen qualifies as a child. *Id.*

current behavior. Psychological assessments should be used to determine if clients suffer from a mental disorder or other effects of trauma, such as PTSD or depression. Defense lawyers should also familiarize themselves with mitigation arguments such as those cited by Jacobson and Hough and be prepared to use them in court. They should also seek to admit evidence of psychological trauma, history of the client, and the effect of violence on adult behavior.

Finally, I believe that there is much more work that needs to be done in this area. While many studies have been done on the mental difficulties of child soldiers who were rescued while still classified as children, there is very little information to indicate how continued presence in an armed group from childhood onward might affect behavior and mental health in adults. As armed conflicts in places like the DRC continue or associated groups like the LRA remain active there are likely to be many more individuals coming before international tribunals who were abducted as children and grew up in the armed forces. More information is needed on the development and mental state of these individuals to better determine how their moral development and mental health are affected. With more insight into the connection between the unique trauma experienced by child soldiers and their later criminal behavior, we can better determine how to treat these unique victim-perpetrator hybrids at sentencing.