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Jason Blevins

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Child Soldiers & Juveniles in Gangs:

Opposite Sides of the Same Coin with Dissimilar Legal Liabilities in
International and American Constitutional Law

Jason Blevins

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ADVISOR: PROFESSOR SARA BLOCK

INTRODUCTION

In 2010, somewhere in Mogadishu, Somalia, “a moody 12 year old” attired in “ripped-up clothes,” and armed with a “fully automatic, fully loaded Kalashnikov assault rifle,” guards a checkpoint in this “shattered city.”¹ The juvenile, Awil, “is working for a military that is substantially armed and financed by the United States” and is “a critical piece of the American counterterrorism strategy in the Horn of Africa” as child soldier in “Somalia’s Transitional Federal Government.”²

Four years later and an ocean away, 14-year-old Jaydon Reid murdered two people during a Georgia drug deal in 2014; he later entered a guilty plea to the double homicide³ and violations of the “Georgia Street Gang Terrorism and Prevention Act.”⁴ At the time of the homicides, the juvenile Reid “had a well-documented history with a Powder Springs gang calling themselves Ham Squad.”⁵ In light of his plea, Reid received “two life sentences, plus 15 years” with parole eligibility in 30 years.⁶

¹ Jeffrey Gettleman, *Children Carry Guns for a U.S. Ally*, N.Y. TIMES, June 13, 2010, <https://www.nytimes.com/2010/06/14/world/africa/14somalia.html>

² *Id.*

³ Dave Huddleston, *Teen to Serve 2 Life Sentences in Double Murder Case*, WSB-TV, Jun. 3, 2016, <https://www.wsbtv.com/news/local/cobb-county/teen-takes-plea-deal-for-2-life-sentences-in-double-murder-case/318945329/> (“a teenager was sentenced to two life sentences for a double murder he committed when he was 14 years old. Jaydon Reid, now 17, took a plea deal and admitted to the crime. . . . Initially Reid was charged with double murder and 21 other charges, including dealing drugs and robbery while associated with a street gang.”) (omission added)

⁴ See also Julie Wolfe, *Judge to Teen Murderer: ‘You Became the Wrong Crowd’*, Alive.com, June 2, 2016, <https://www.11alive.com/article/news/local/judge-to-teen-murderer-you-became-the-wrong-crowd/85-228373706> (“Reid pleaded guilty to two counts of Malice Murder and two counts of Violation of the Georgia Street Gang Terrorism and Prevention Act.”)

⁵ *Id.*

⁶ *Id.*

Two juveniles, separated by continents and years, operated in organized activities. As he (somehow) supported the national security of the United States⁷ by manning a checkpoint in Somalia, presumably in conformity with his superior's orders, twelve-year-old Awil served the then-existing⁸ (and now former)⁹ national government. Conversely, a United States citizen performing organized—albeit illegal—activities received two life sentences *and* separate gang convictions for the actions.¹⁰ But for twists of fate and geography, customary international law may have offered Reid outright immunity or at least immunity from the separate gang charge.

Foundationally, this discussion first defines the phrase “child soldier” by summarizing various international proposals and then details efforts to reduce the involvement of youth in armed conflict after World War II. The discussion then, in the second section, summarizes the myriad of legal authorities in the United States related to the criminalization of youth gang activities. After establishing the foundation, section three addresses the similarities between youth gangs and child soldiers. Section four discusses diminishing international tribunal jurisdiction over juveniles following World War II. Section five discusses the role of juvenile court and how additional gang charges undermine the court's rehabilitative goal.

⁷ See Gettleman *supra* note 1.

⁸ See *United States v Moalin*, 973 F.3d 977, 985 (9th Cir. 2020) (“In 2004, an interim government for Somalia, the Transitional Federal Government (‘TFG’), was established in Kenya. Although the TFG received significant international support, it faced widespread distrust and opposition in Somalia. The TFG installed itself in Somalia with the protection of Ethiopian military forces, which occupied Somalia beginning in 2006.”)

⁹ See U.S. Dept. of State, *U.S. Relations With Somalia*, Mar. 18, 2022, <https://www.state.gov/u-s-relations-with-somalia/> (“a transitional government was established in 2004. In 2012, Somalia completed its political transition through a limited, indirect election of a new federal parliament and president. With the adoption of a provisional constitution, the United States formally recognized the new federal government of Somalia (FGS) on January 17, 2013.”)

¹⁰ See Wolfe *supra* note 4.

While the scope of this discussion does not argue that international law offers blanket immunity to children younger than 15 for any illegal activities, it highlights longitudinal shifts in legal protections for children. Succinctly, charging juveniles younger than 15 with gang-related offenses—as a separate offense in addition to the underlying offense or as a sentence enhancement—is unconstitutional in light of existing customary international law as applied via the Supremacy Clause.¹¹

Section 1: Child Soldiers & Broken Honor

What is a Child Soldier?

When asked to determine whether the controversy before the United States Supreme Court violated the free speech protections of the Constitution's First Amendment, Justice Stewart simply noted in concurrence "I know it when I see it ..."¹² It is axiomatic and tautological to declare that a "child soldier" is simply a child who is also a soldier. Yet, legally, this phrase has no conclusive answer and interpretations vary based on jurisdiction or authority. Additionally, children's youth generally afforded them a protected status throughout the history of warfare.¹³ While true that "[i]nternational humanitarian law has developed very exacting rules for who qualifies as a valid soldier

¹¹ While addressed *infra*, see *United States v. Cardales-Luna*, 632 F.3d 731, 745 (1st Cir. 2011) ("The major sources of international law in the United States pursuant to the Supremacy Clause, U.S. CONST. ART. VI, § 2, are treaties and customary international law (which is somewhat the common law of international law, but is nevertheless part of our municipal law under the Supremacy Clause.)"). See also William Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. IN BRIEF 1, 7-8 (2007) ("we know--because the Supreme Court has told us--that there is a federal common law of international human rights based on customary international law. . . . we also know--though *not* because the Court has told us--that the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause senses.") (Omission added, emphasis in original).

¹² *Jacobellis v. Ohio*, 378 U.S. 184, 197; 84 S. Ct. 1676, 1683; 12 L. Ed. 2d 793, 804 (1964) (Stewart, J., concurring).

¹³ PETER SINGER, CHILDREN AT WAR 15 (2005) ("while there were isolated instances in which children did serve in armies or other groups at war, a general norm held against child soldiers across the last four millennia of warfare.") (*Hereinafter* Child War)

and who is too young to be recruited and to fight,”¹⁴ the reality—discussed *infra*—is that those “too young to be recruited and to fight” nonetheless appear on the world’s battlegrounds with alarming regularity.

In 1997, at a United Nations symposium in Cape Town, South Africa, scholars and diplomats developed the “Cape Town Principles and Best Practices” to address growing mobilizations of child soldiers and “recommend actions to be taken by governments” to “end this violation of children’s rights.”¹⁵ That recommendation broadly defines “child soldier” as:

any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.¹⁶

Five years later, in 2002, the United States ratified the Optional Protocol on the Involvement of Children in Armed Conflict.¹⁷ That multilateral treaty declares, first, that treaty members “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”¹⁸

¹⁴ ROBERT TYNES, TOOLS OF WAR, TOOLS OF STATE: WHEN CHILDREN BECOME SOLDIERS 193 (2018) (alteration added).

¹⁵ UNICEF, Cape Town Principles and Best Practices (Apr. 30, 1997), [https://nepal.ohchr.org/en/resources/Documents/English/children/Cape_Town_Principles\(1\).pdf](https://nepal.ohchr.org/en/resources/Documents/English/children/Cape_Town_Principles(1).pdf).

¹⁶ *Id.* at page 12.

¹⁷ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted Feb. 12, 2002, T.I.A.S. No. 13,094; 2173 U.N.T.S. 222, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children> (hereinafter “Optional Protocol”); see also Joseph Madubuike-Ekwe, *The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts*, 11 ANN. SURV. INT’L & COMP. L. 29, 44 n.107 (2005) (“The United States ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on December 23, 2002.”)

¹⁸ *Id.* at art. 1.

It next states that treaty members “shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”¹⁹ Notably, and perhaps following Justice Stewart’s “I know it when I see it” definition,²⁰ the Optional Protocol fails to specify *what* elements comprise the “child soldier” term of art.

Even examining the main treaty—the Convention on the Rights of the Child—produces no clarity.^{21,22} That instrument simply states that parties “shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”²³ It also directs that parties “shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces” and shall “give priority to those who are oldest” if recruiting juveniles between ages 15 and 18.²⁴

In 2004, the United Nations Security Council adopted a resolution “[n]oting the fact that the conscription or enlistment of children under the age of 15 or using them to participate actively in hostilities in both international and non-international armed conflict is classified as a war crime”²⁵ by various international treaties.²⁶ The Security Council later, in 2005, adopted a separate resolution in which it “[s]trongly condemns the recruitment and use of child soldiers by parties to armed conflict in violation of

¹⁹ *Id.* at art. 2.

²⁰ *Jacobellis*, *supra* note 12.

²¹ Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (*Hereinafter* CRC).

²² Diego Lopez, *The Time is Now to Ratify the Convention on the Rights of the Child*, 52 U.S.F. L. REV. 477, 477-78 (2018) (“Although President Bill Clinton did sign the CRC in 1995, the treaty has yet to go before the Senate for advice and consent, rendering it non-binding” for the United States.)

²³ CRC, *supra* note 21, at art. 38(2).

²⁴ *Id.* at art. 38(3).

²⁵ S.C. Res. 1539, pmbl. (April 22, 2004), <http://unscr.com/en/resolutions/doc/1539> (alteration added)

²⁶ See Rome Statute, *infra* note 60 and CRC, *supra* note 21.

international obligations applicable to them and all other violations and abuses committed against children in situations of armed conflict.”²⁷

Five years after the 2002 Optional Protocol, and ten years after the 1997 Cape Town symposium, the United Nations sponsored a symposium in 2007 to update the Cape Town principles.²⁸ While generally aligned with the Cape Town definition, the 2007 Paris Principles define “a child associated with an armed force or armed group” as:

any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.²⁹

Further refining the 1997 Cape Town Principles and the 2007 Paris Principles, the 2017 Vancouver Principles arose from a third United Nations Conference.³⁰ These revisions, adopted by 105 countries as of November 2021,³¹ reaffirmed core commitments to “the prevention of recruitment and use of child soldiers,” but provided little further advancement.³²

²⁷S.C. Res. 1612, para 1 (Jul. 26, 2005), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf> (alteration added).

²⁸ UNICEF, The Paris Principles: The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, Feb. 2007, https://www.icrc.org/en/doc/assets/files/other/parisprinciples_en%5b1%5d.pdf

²⁹ *Id.* at page 7.

³⁰ See Government of Canada, The Vancouver Principles, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/principles-vancouver-principes.aspx?lang=eng (last updated November 17, 2021).

³¹ *Id.*

³² See *Vancouver Principles: On Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers*, at art 1, Nov. 15, 2017, https://www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/human_rights-droits_homme/principles-vancouver-principes-english.pdf.

With respect to regional treaties, the African Charter on the Rights of the Child, effective in 1999, defined child as “every human being below the age of 18 years,”³³ and directed treaty parties to “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.”³⁴ The successor continental organization, the African Union, incorporated this treaty upon its creation in 2002 and it remains in place to date.³⁵

Federal law in the United States, adopted as part of the Child Soldiers Prevention Act of 2008 to comply with the Optional Protocol’s legal requirements,³⁶ provides four initial definitions for child soldier:

- (i) any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces, police, or other security forces;
- (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces, police, or other security forces;
- (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces, police, or other security forces; or
- (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state;³⁷

³³ Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child, art. 2, July 11, 1990, CAB/LEG/24.9/49 (1990) (Entered into Force Nov. 29, 1999), https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf

³⁴ *Id.* at art. 22(2).

³⁵ See African Union, Treaty Status List, at <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf> (last visited Apr. 22, 2023).

³⁶ Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. This Act, later reauthorized as amended by the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, 132 Stat. 5472, codified a child soldier definition in US federal law. See 22 U.S.C. 2370c(2)(A) (2018) which provides that the statute is “consistent with the provisions of the Optional Protocol to the Convention on the Rights of the Child.”

³⁷ See 22 U.S.C. 2370c(2)(A)(i)-(iv) (2018) (paragraph breaks added for readability).

The statute expands the definition by declaring it also “includes any person” who “serv[es] in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave.”³⁸ This expansion recognizes that children involved in non-combat activities “can equally find their lives in danger by military actions.”³⁹

Ultimately, after three international symposiums producing *recommended* definitions, two child-focused treaties lacking definitions, at least one regional treaty banning recruitment of children under 18, and an on-point federal law in the United States, what is a workable definition of “child soldier”? Succinctly, one commentator accurately summarized the current state of the law as “[a] ‘child soldier’ is generally defined (under both international law and common practice) as any person under eighteen years of age who is engaged in deadly combat or combat support as part of an armed force or group.”⁴⁰ On the other hand, at least one commentator argues that the phrase “child soldier” cannot plausibly exist in a world undertaking concerted efforts to make 18 the minimum age of recruitment; in this view “the terminology [of] child soldiers (and all its avatars) is an oxymoron.”⁴¹ In other words, because practice and custom proscribe those under 18 from becoming part of a conflict, children cannot lawfully become soldiers.

Regretfully, however, the same commentator noted the definition’s necessity “is a horrifying proof of how the nature of the warrior has changed. The presence of children

³⁸ 22 U.S.C. 2370c(2)(B) (2018).

³⁹ KENDRA DUPUY, *WAR AND CHILDREN: A REFERENCE BOOK* 68 (2010) (alteration added).

⁴⁰ Child War, *supra* note 13, at 7 (alteration added).

⁴¹ Mohamed Kamara, *In Search of the Lost Kingdom of Childhood* in *RESEARCH HANDBOOK ON CHILD SOLDIERS* (Mark Drumbl & Jastine Barrett eds.) 35 (2019) (clarification added).

has become a fact of modern combat, violating the once universal rule that they simply have no part in warfare, either as target or participant.”⁴²

Child Soldiers: Moving from Unwritten Custom to Written Proscription

In World War II, “scores of Hitler Jugend were killed in futile skirmishes, all occurring after the war had essentially been decided.”⁴³ While the utilization of German children in a last minute attempt to win the war may have shocked the world and prompted new treaties, “[b]y the turn of the twenty-first century, child soldiers had served in significant numbers on every continent of the globe but Antarctica.”⁴⁴ In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights which stated that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”⁴⁵

The Fourth Geneva Convention,⁴⁶ one of four multilateral treaties adopted or updated in Geneva on August 12, 1949,⁴⁷ required that belligerent nations in a conflict “establish . . . hospital and safety zones and localities so organized as to protect from the

⁴² *Id.*

⁴³ Child War, *supra* note 13, at 15.

⁴⁴ *Id.* at 16 (alteration added).

⁴⁵ Universal Declaration of Human Rights, art. 25(2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english>

⁴⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287, <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-protection-civilian-persons-time-war> (hereinafter GC IV).

⁴⁷ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 31, <https://ihl-databases.icrc.org/assets/treaties/365-GC-I-EN.pdf>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 85, <https://ihl-databases.icrc.org/assets/treaties/370-GC-II-EN.pdf>; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 135, <https://ihl-databases.icrc.org/assets/treaties/375-GC-III-EN.002.pdf>; and GC IV, *supra*.

effects of war, wounded, sick, and aged persons, children under fifteen, expectant mothers, and mothers of children under seven.”⁴⁸ It also required that nations at war “take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources...”⁴⁹

In a subsequent 1977 treaty, an Additional Protocol to the Geneva Conventions addressed *international* conflict and first stated that “children shall be the object of special respect and shall be protected against any form of indecent assault.”⁵⁰ It then directed that conflicting states “shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”⁵¹ Notably, this treaty also stated that if “children who have not attained the age of fifteen years take a direct part in hostilities” and become captured, “they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war.”⁵²

Contemporaneous with Protocol I in 1977, a second Additional Protocol⁵³ addressed the status of children in *non-international* armed conflict. As with Protocol I, Protocol II directed that “children who have not attained the age of fifteen years shall

⁴⁸ GC IV, *supra* note 46, at art. 14 (omission added).

⁴⁹ *Id.* at art. 24 (omission added).

⁵⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77(1), Jun. 8, 1977, 1125 U.N.T.S. 3, <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/v1125.pdf> (*hereinafter* Protocol I).

⁵¹ *Id.* at art. 77(2).

⁵² *Id.* at art. 77(3).

⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609, <https://ihl-databases.icrc.org/assets/treaties/475-AP-II-EN.pdf> (*hereinafter* Protocol II).

neither be recruited in the armed forces or groups nor allowed to take part in hostilities”⁵⁴

It also stated that children under fifteen retain the “special protection provided by this article . . . if they take a direct part in hostilities . . . and are captured.”⁵⁵ In other words, Additional Protocols I & II provided explicit protections for children under 15 in armed conflict regardless of whether it crossed international boundaries.

As an example of non-compliance with both the letter and the spirit of the three treaties, the Islamic Republic of Iran signed the Fourth Geneva Convention in 1949, and ratified it in 1957,⁵⁶ requiring it to protect children under fifteen “from the effects of war.”⁵⁷ In December 1977, the nation signed Additional Protocol I & II but has not ratified either as of 2023.⁵⁸ Nonetheless, despite signaling an intent to align with the values in both of the 1977 Additional Protocols and its obligations under the 1949 treaty:

in 1984, Iranian president Ali-Akbar Rafsanjani declared that ‘all Iranians from twelve to seventy-two should volunteer for the Holy War.’ Thousands of children were pulled from schools, indoctrinated in the glory of martyrdom, and sent to the front lines only lightly armed with one or two grenades or a gun with one magazine of ammunition⁵⁹

⁵⁴ *Id.* at art. 4(3)(c).

⁵⁵ *Id.* at art. 4(3)(d) (omission added).

⁵⁶ See International Committee of the Red Cross, IHL Database, Convention (IV) Relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949, Status Table <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties> (last visited Apr. 22, 2023).

⁵⁷ GC IV, *supra* note 46, at art 14.

⁵⁸ For the status of Protocol I, see International Committee of the Red Cross, IHL Database, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Status Table, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties> (last visited Apr. 22, 2023).

For the status of Protocol II, see International Committee of the Red Cross, IHL Database, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Status Table, <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/state-parties> (last visited Apr. 22, 2023).

⁵⁹ Child War, *supra* note 13, at 22, *quoting* IAN BROWN, KHOMEINI’S FORGOTTEN SONS: THE STORY OF IRAN’S BOY SOLDIERS 2 (1990).

Increasing violations of international norms ultimately led the world community to declare “that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity” and adopt the Rome Statute.⁶⁰ This instrument, a multilateral treaty which created the International Criminal Court, became effective in 2002.⁶¹ It declared the conscription or enlistment of children under 15 in international, or non-international, armed conflict⁶² to fall within the definition of war crimes.⁶³ It also noted that the court lacked jurisdiction “over any person who was under the age of 18 at the time of the alleged commission of a crime.”⁶⁴ Yet, one criticism of the Rome Statute is that “it leaves the issue of the culpability of the children who have committed war crimes unaddressed” because of its focus “on the issue of recruiting and using child soldiers.”⁶⁵

The Cape Town Principles (1997), the Optional Protocol (2002), the Paris Principles (2007), and the Vancouver Principles (2017)—all discussed *supra*—built upon the legal foundations established by the Fourth Geneva Convention (1949) and refined by its subsequent Additional Protocols (1977). The issue, however, is that these authorities received little practical application; child soldiers still appear in battlefields

⁶⁰ Rome Statute of the International Criminal Court, pmbl., Jul. 17, 1998, 2187 U.N.T.S. 90, (entered into force Jul. 1, 2002), <https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf> (*hereinafter* Rome Statute).

⁶¹ *Id.*

⁶² *Id.* at Arts. 8(2)(b) and 8(2)(e)

⁶³ See also U. C. JHA, CHILD SOLDIERS: PRACTICE, LAW, AND REMEDIES 172 (2018) (Under the Rome Statute, “during an armed conflict any recruitment, both involuntary and voluntary, of children under 15 by any armed force or group is prohibited” and criminal offenses by adults under the Rome Statute “are of a continuous nature and end only when the child either leaves the force or group or turns 15.”)

⁶⁴ Rome Statute, *supra* note 60, at Art. 26.

⁶⁵ DAVID ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM 145 (2005)

despite 173 countries⁶⁶ “reaffirming that the rights of children require special protection...”⁶⁷ as of 2023.

27 years after Additional Protocols I & II and two years after the Rome Statute, in 2004, the United Nations Special Court for Sierra Leone noted that “[t]he overwhelming majority of states . . . criminalized” recruitment of children under 15 years old “prior to 1996.”⁶⁸ While commenting that “[t]he rejection of the use of child soldiers by the international community was widespread by 1994,”⁶⁹ it found that “[t]he fact that child recruitment still occurs and is thus illegally practiced does not detract from the validity of the customary norm.”⁷⁰

In 2008, the Special Court for Sierra Leone (SCSL) again “affirm[ed] that the crime of recruitment by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law entailing individual criminal responsibility.”⁷¹ It

⁶⁶ See United Nations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Status Table, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en (Last updated February 12, 2023).

⁶⁷ Optional Protocol, *supra* note 17, at pmb1.

⁶⁸ *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) ¶ 51 (May 31, 2004), [http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72\(E\)-131.pdf](http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf) (Alteration and omission added).

⁶⁹ *Id.* at ¶ 52 (alteration added).

⁷⁰ *Id.* at ¶ 51 (alteration added).

⁷¹ *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 139 (May 28, 2008), <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>; See also *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Trial Judgment, ¶ 187 (Mar. 2, 2009), <https://www.scsldocs.org/documents/view/5892-17026> (“The chamber takes this opportunity to repeat, however, that ‘the distinction between voluntary enlistment and conscription is somewhat contrived. Attributing voluntary enlistment in the armed forces or groups to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife is, in the Chamber’s view, of questionable merit.’”) quoting *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Trial Judgment, ¶ 192 (Aug. 2, 2007).

also noted that “where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defense” to the violation of customary international law.⁷² In 2012, the SCSL trial court “held that merely sending trained soldiers to a fighting area sufficiently places the children at risk and amounted to participating actively in hostilities.”⁷³

The wartime protection of children shifted from unwritten custom to affirmative legal proscription following “a massive breakdown in . . . the ‘Warrior’s Honor.’ The participants in battle are often no longer honored warriors guided by an ethical code;” instead they are “new predators, who target the weakest of society.”⁷⁴ Arising from “this breakdown has been a disturbing change in the morbidity of contemporary conflicts.”⁷⁵ In other words, despite the War to End All Wars (and its sequel),⁷⁶ regardless of the “form it takes, and whatever technology it employs, sooner or later war will break through the rules. It will remain what it has always been, namely a horrible, messy affair in which some people are killed and others mutilated.”⁷⁷ Nonetheless, while the phrase “child soldier” may conjure images of youth guarding checkpoints far removed from the Chicago or Detroit suburbs, must the phrase inherently exclude children in America?

⁷² *Fofana*, *supra* note 71, at ¶ 140.

⁷³ Jha, *supra* note 63, at 169, *citing Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), ¶ 1476 (May 18, 2012), *available at* <https://www.scsldocs.org/documents/view/6662-19559> (Part 14).

⁷⁴ Child War, *supra* note 13, at 4, *quoting* MICHAEL IGNATIEFF, *THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* (1998) (omission added).

⁷⁵ *Id.*

⁷⁶ See M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 *DENV. J. INT’L L. & POL’Y* 244, 290 (2002) (“World War I, commonly referred to as the ‘Great War’ and ‘the war to end all wars,’ took place between 1914 and 1918 and was the first general war, involving all the Great Powers of the day, to be fought out in the modern, industrialized world.) (Internal quotations and citations omitted).

⁷⁷ MARTIN VAN CREVELD, *TECHNOLOGY AND WAR* 310 (1991)

***Distilling Decades of History & Esoteric Doctrines into the Elevator Pitch:
Defining Child Soldier Recruitment Laws in Under 60 Seconds***

Coalescing the various treaties, principles, legal interpretations by courts, and scholarly commentary on the status of the law, what emerges?

First, nations and non-state actors both utilize children in operations to such an extent that the problem remains unaddressed after years of negotiations and treaty deliberations. While this reality may be dwindling in parts of the world, children remain on the battlefield nonetheless.

Second, those older than 18 are not protected by the various *supra* treaties relating to children in armed conflict and are potentially subject to the International Criminal Court's jurisdiction. While juveniles between 15 and 18 years old *should not* be recruited for combat operations by nations or other armed groups, children younger than 15 *shall not* be recruited for combat operations.

Third, a juvenile, sent into combat after receiving training, constitutes a child soldier. Notably, the minimum quantity or quality of "training" necessary to qualify a child as a child soldier is ill-defined at best.

These principles illustrate that children not only receive broad protections in international law, both by custom and by treaty, but also that nations have affirmative obligations to protect younger children.

Section 2: Youth Gangs

Definitions, Methodology, & Statistics

In contrast to the *supra* discussion and attempt to define "child soldier" as a legal term of art, laws in the United State offer numerous definitions for the word "gang." The National Gang Center at the Department of Justice concedes "there is no widely or

universally accepted definition of a ‘gang’ among law enforcement agencies”⁷⁸ at the state or national level. Immigrations and Customs Enforcement, for example, will affix a gang notation to someone “if he meets at least two criteria from a long list that includes ‘having gang tattoos,’ ‘frequenting an area notorious for gangs,’ and wearing gang apparel.”⁷⁹ Nonetheless, it is relevant what similarities appear between the codified authorities.

A review of each state’s laws, in addition to the District of Columbia and federal law, generated the dataset attached as Appendix C. Appendix C also incorporates state and national population estimates, as of July 2022, utilizing data supplied by the United States Census Bureau.⁸⁰

Because the Federal Bureau of Investigation does not include a specific “gang” offense category in its crime trend reporting tool, instead appearing to classify the offense by violence or property categories, crime statistics were not considered as part of the analysis.⁸¹ For this analysis, the most recent statistical trend data from the National Youth Gang Survey Analysis, last compiled in 2012, was disregarded as outdated.⁸²

Of the 52 jurisdictions surveyed, data supports the conclusion that most jurisdictions require few individuals to constitute a “gang” for statutory purposes.

⁷⁸ Office of Juvenile Justice & Delinquency Prevention, Nat’l Gang Center, *National Youth Gang Survey Analysis*, <https://nationalgangcenter.ojp.gov/survey-analysis> (last visited Apr. 22, 2023) (hereinafter “Gang Survey Analysis”)

⁷⁹ Jonathan Blitzer, *How Gang Victims Are Labeled As Gang Suspects*, THE NEW YORKER, Jan. 23, 2018, <https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects>

⁸⁰ U.S. GOV’T CENSUS BUREAU, STATE POPULATION TOTALS AND COMPONENTS OF CHANGE: 2020-2022, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html> (last updated Jan. 4, 2023), (Table: “Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia and Puerto Rico: April 1, 2020 to July 1, 2022 (NST-EST2022-POP)”)

⁸¹ Fed. Bureau of Investigation, Crime Data Explorer (last updated Oct. 5, 2022), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>

⁸² See Gang Survey Analysis, *supra* note 78 (“The National Gang Center (NGC) conducted an annual survey of law enforcement agencies between 1996–2012...”)

- 47 general jurisdictions (including DC and the federal government) had specific gang statutes.
 - Four jurisdictions (Vermont, Maine, West Virginia, and Hawaii) had no specific “gang” conduct statute.
 - It is possible that these jurisdictions have not codified a proscription or they rely upon general racketeering or organized crime criminal proscriptions.
 - Two jurisdictions (Arizona and Colorado) had two relevant gang statutes in different parts of their statutes. For analysis purposes, only one statute per state was counted.
 - Two jurisdictions (Nebraska and North Carolina) placed the gang section specifically in the juvenile code.
 - One jurisdiction (New Mexico) lacked a statewide gang statute.
 - However, the Albuquerque city code contains an anti-gang statute. This was included in the analysis for completeness rather than excluding the state.
- Of the 48 jurisdictions with obtainable data (47 states/federal government/DC + New Mexico), the statutes of five states (Connecticut, Nevada, Oregon, Maryland, and Arizona) did not list a minimum number of participants to constitute a “gang.”
 - For these jurisdictions “2” was utilized.

Based on the minimum numbers of each jurisdiction reflected in the charts included as Appendix B, the aggregate average number of people required to form a gang in the United States is 3.17. When organized by population, states with an estimated population of fewer than 1 million residents required—on average—four people to form a gang while those states with over 10 million estimated residents required 3.36 people.

From a practical standpoint, adding a separate gang charge or using gang activity as a sentence enhancement requires few individuals acting in concert.⁸³ This minimal hurdle for increased liability could result in longer or more severe sanctions up front and potentially more difficulty setting aside the adjudication or conviction later in life.

Age of Entry/Sociological Group Classification

While some debate amongst the authorities exists, the consensus is that juveniles commonly join gangs between 12 and 15.⁸⁴ While addressed *infra*, it is unlikely that a child in this range spontaneously declares their candidacy for gang membership. Instead, joining the gang may be the result of long-term external influences.

One sociologist classified gangs, without regard to age of its members, in three forms, “scavenger, territorial, and corporate.”⁸⁵ Utilizing this model, scavenger gangs “often have no common bond beyond their impulsive behavior” with “no particular goals, no purpose, [and] no substantial comradeships”⁸⁶ binding the organizational structure.

⁸³ Of the 48 jurisdictions with ascertainable “gang” statutes, a slim majority 25 refer to the group as a “criminal street gang.” (MA, WY, AK, ND, RI, MO, NH, NE, IA, UT, OK, LA, CO, MI, WA, VA, NJ, GA, TX, CA, AZ, KS, the federal government, DC, & NM). CO’s Comprehensive Health Education Act also references “gang.” One state (DE) refers to the group as a “criminal youth gang.” Eleven states define the group as a “criminal gang” (MN, ID, NV, KY, SC, WI, TN, NC, OH, PA, & FL). Two states (IN & MD) call it a “criminal organization.” Three states—excluding CO’s health code—simply call the group a “gang.” (CT, MI, & OR). One state (NY) criminalizes “gang assault.” Four states reference “streetgang” [sic] or “street gang.” (AL, SD, MS, & IL). One state (AR) codified the group as a “criminal gang, organization, or enterprise” but—in a different section—references “gang.” See Appendix C.

⁸⁴ Compare Office of Juvenile Justice & Delinquency Prevention, Nat’l Gang Center, *Parents’ Guide to Gangs*, July 2015, at 2 available at <https://www.nationalgangcenter.gov/Content/Documents/Parents-Guide-to-gangs.pdf> (“the most common age that youth join a gang is around 15, but the early adolescent years (12-14 years of age) are a crucial time when youth are exposed to gangs and may consider joining a gang.”); Rebecca Rader Brown, *The Gang’s All Here: Evaluating the Need for a National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 294 (2009) (“Adolescents between the ages of 12 and 15 are most likely to join a gang due to a combination of familial, social and environmental risk factors.”); Kristin Babik, *Youth & Delinquency: An Anthropological View of Street Gangs, Early Intervention & Policy Implications*, 29 U. FLA. J.L. & PUB. POL’Y 237, 249 (2019)

⁸⁵ CARL S. TAYLOR, *Gang Imperialism*, in GANGS IN AMERICA 105 (C. Ronald Huff ed., 1990).

⁸⁶ *Id.* (alteration added).

Transition to the next phase occurs “[w]hen scavenger gangs become serious about organizing for a specific purpose;” in this event, the gangs “enter the territorial stage.”⁸⁷ At this point, the organization “designates something, someplace, or someone belonging exclusively to the gang.”⁸⁸ Thereafter, the territorial gang must “defend that territory from outsiders. In the process of defining and defending territory, gangs become ‘rulers.’ They act as controllers” in order to “protect their particular business.”⁸⁹ Unsurprisingly, “[t]he concept of territory is not new for youth gangs; neither is violence.”⁹⁰

The final phase of this model, a corporate gang, sees a shift in primary focus away from territory control; the group’s “main focus . . . is participation in illegal money-making ventures.”⁹¹ In this structure, “[m]embership is based on the worth of the individual to the organization. Promoting inside the infrastructure is based on merit, not personality. Discipline is comparable to that of the military, and goals resemble those of Fortune 500 corporations.”⁹² Similar to territory gangs, “[b]oth scavengers and corporates accept violence as part of doing business” whether in the “Capone era” or “Detroit in the 1980s.”⁹³

Another researcher argues that while “gangs in the 1950s revealed three basic types of youth gangs in the United States,” defined as “the social gang,” “the delinquent gang,” or the “violent gang,” those distinctions no longer exist.⁹⁴ Instead, the core

⁸⁷ *Id.* at 107 (alteration added).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (alteration added).

⁹¹ *Id.* at 108 (omission added).

⁹² *Id.* (alteration added).

⁹³ *Id.* at 112 (alteration added).

⁹⁴ LEWIS YABLONSKY, GANGSTERS 15 (1997)

functions of those groups eventually funneled into an aggregate “multipurpose gang.”⁹⁵

Under this model, it “tends to encompass all violent gang activities, including gangbanging over territory, some social activities, and delinquent behavior, especially drug dealing.”⁹⁶

Seemingly fitting into the territorial model noted *supra*, the multipurpose gang type:

has a distinctive name and a territorial neighborhood base; its participants are involved at different times in various delinquent and criminal acts, including burglary, theft, and violence; the commerce of drugs and their use are a significant part of the gang configuration; and the multipurpose gang also provides a form of social life and camaraderie that includes senseless gangbanging, gambling, drinking, hanging out, and partying.⁹⁷

In other words, whether using the Taylor model to classify gangs by organization or the Yablonsky multipurpose model to classify gangs by social purpose, both groups present more than a transient affiliation under a temporary banner. Instead, either classification method illustrates territory protection by a discrete group, for unlawful purposes, to the detriment of unaffiliated or excluded individuals.

If It Looks Like A Duck And Quacks Like A Duck...

Critically, a mere convenience store trip by four juvenile friends—without more—is insufficient for the group to constitute a “gang” or violate the applicable gang statute in their jurisdiction. While true that gang statutes provide a startlingly low threshold for formation, four pre-teens playing Euchre likely do not create a regional scavenger, territorial, or corporate gang of illicit card sharks.

⁹⁵ *Id.*

⁹⁶ *Id.* at 16.

⁹⁷ *Id.*

Common between the statutes is the requirement that the individuals have a shared unlawful purpose or intent to act unlawfully in furtherance of the group.⁹⁸ As such, a casual observer⁹⁹ should avoid the preemptive classification of several youths standing together as a nefarious gang absent additional evidence. Indeed, in this case and without additional illicit activities from the group, “if it looks like a duck, walks like a duck, and quacks like a duck,”¹⁰⁰ it may instead be a Ferrari.

The practical reality, however, is that additional criminal liability may inhibit the rehabilitative focus of juvenile court by simply finding more reasons to charge children with additional crimes.

Section 3: Similarities Between Child Soldiers & Juvenile Gangs

Having established *what* constitutes a child soldier and *how* states determine whether a group constitutes a gang, the next logical step is answering *why* (and in what ways) the seemingly disparate groups overlap.

Recruiting

Following her appointment by the United Nations Secretary General to investigate the effects of armed conflict on children, Graça Machel submitted a report to the General Assembly in 1996.¹⁰¹ She determined that “[o]ne of the most basic reasons that children join armed groups is economic. . . . Children themselves may volunteer if they believe

⁹⁸ See Appendix C.

⁹⁹ The superior observational skills of Justice Stewart notwithstanding. See *Jacobellis*, *supra* note 12.

¹⁰⁰ Nathan Kellum, *If it Looks Like A Duck . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 *Hastings Const. L.Q.* 1, 1n2 (2005) (“This is a quote attributed to Walter Reuther, a labor leader in the 1930s, on how to spot a communist.”).

¹⁰¹ Graça Machel (appointed expert of the Secretary-General), *Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/219/55/pdf/N9621955.pdf> (*Hereinafter* Machel).

that this is the only way to guarantee regular meals, clothing, or medical attention.”¹⁰² Later commentators noted that “lack of the rule of law, extreme poverty, social injustice, and a lack of education and job opportunities that increase the risk of boys and girls facing abuse as child soldiers. Children are primarily recruited from refugee camps, orphanages, or the poorest families.”¹⁰³

Machel also argued that “[s]ome children feel obliged to become soldiers for their own protection. Faced with violence and chaos all around, they decide they are safer with guns in their hands. Often such children join armed opposition groups after experiencing harassment from government forces.”¹⁰⁴ Indeed, for “some societies, military life may be the most attractive option. Young people often take up arms to gain power and power can act as a very strong motivator in situations where people feel powerless and are unable to acquire basic resources.”¹⁰⁵

In viewing recruitment of child soldiers from the lens of the recruiter, one scholar argued that “[c]onflict group leaders now see the recruitment and use of children as a low-cost and efficient way for their organizations to mobilize and generate force.”¹⁰⁶ Those children involuntarily recruited by force “are usually from special risk groups: street children, the rural poor, refugees, and others displaced” while allegedly voluntary recruits “are often from the very same groups, driven to do so by poverty, propaganda, and

¹⁰² *Id.* at para. 39 (alteration and omission added).

¹⁰³ Steffen Krüger & Diana Hund, *Child Abuse in Conflict: Child Soldiers in Congolese Society*, 30 *KAS International Reports: Army And Society* 21, 25 (2014), available at <https://www.jstor.org/stable/resrep10100.5> (on file with author).

¹⁰⁴ Machel, *supra* note 101, at para 41 (alteration added).

¹⁰⁵ *Id.* at para 42.

¹⁰⁶ *Child War*, *supra* note 13, at 38.

alienation.”¹⁰⁷ For example, “[i]n Sudan . . . the government set up camps for street children, and then rounded up children to fill them in a purported attempt to ‘clean up’ Khartoum. These camps, however, served as reservoirs for army conscription.”¹⁰⁸

In part due to their age, children “are easy targets susceptible to manipulation and threats. Telling children that their family will be murdered if they do not join, or actually murdering a child’s family, leaves them with few choices and serves to persuade them to join militias relatively easily.”¹⁰⁹ While at least two rulings rejected the defense that children become soldiers voluntarily,¹¹⁰ social science research concedes that “voluntary enrollment . . . is a blind spot in the issue of child soldiers, which is rarely addressed by the humanity sciences.”¹¹¹ Of the available literature, which investigated the role familial abuse may play in compelling a child to join, two researchers argued that “[b]y altering self-image, abuse constitutes an opportunity to leave the family group and join the armed group, in search for a new family.”¹¹²

Alternatively, “some groups may take deliberate advantage of the fact that adolescents are at a stage in life where they are still defining their identity” by provide “glamorous or honorable roles (soldier, hero, leader, protector) in addition to “membership

¹⁰⁷ *Id.* at 45.

¹⁰⁸ *Id.* at 59, citing Human Rights Watch, *Children in Sudan: Slaves, Street Children, and Child Soldiers*, Sept. 1995, available at <https://www.hrw.org/reports/sudan1995.pdf> (alteration and omission added).

¹⁰⁹ Megan Nobert, *Children at War: The Criminal Responsibility of Child Soldiers*, 3 PACE INT’L L. REV. ONLINE COMPANION 1, 3 (2011).

¹¹⁰ See *Prosecutor v. Fofana* and *Prosecutor v. Sesay*, *supra* note 71.

¹¹¹ Theodore Onguene Ndongo & Daniel Derivois, *Understanding Voluntary Enrollment of Child Soldiers: A Key to Reintegration*, 180 ANNALES MÉDICO-PSYCHOLOGIQUES 145, 146 (2022) (omission added) (on file with author).

¹¹² *Id.* at 147 (alteration added).

and acceptance in a group.”¹¹³ Nonetheless, it remains true that rationale for children becoming soldiers is idiosyncratic; “[n]o single common social denominator or personal motive links all the children who were in combat.”¹¹⁴ In the Democratic Republic of the Congo, “Thomas Lubanga’s liberation force is said to have recruited so many children that it is known as the Army of Children”¹¹⁵ while, “in the Sudan, hundreds of children were recruited by the Sudan People’s Liberation Army, most around the age of eight.”¹¹⁶

Unfortunately, “poorer children are typically more vulnerable to being pulled into conflict and are overrepresented in child soldier groups.”¹¹⁷ This is, at least in part, because “[s]chool fees and expenses for school materials, even at primary level, are more than many families can afford, causing children to be pulled out of school before completion so that they can work to support their family.”¹¹⁸

By recruiting child soldiers, “groups that would have been easily defeated in the past now can emerge as very real contenders. Organizations that would be little more than gangs become viable military threats.”¹¹⁹ Regrettably, “after the recruitment and indoctrination have occurred . . . it is almost inevitable that the armed group becomes the child’s new community.”¹²⁰

¹¹³ Child War, *supra* note 13, at 65-66.

¹¹⁴ Rosen, *supra* note 65, at 61 (alteration added).

¹¹⁵ *Nobert*, *supra* note 109, at 14.

¹¹⁶ *Id.* at 15.

¹¹⁷ Child War, *supra* note 13, at 63 *citing* ED CAIRNS, CHILDREN AND POLITICAL VIOLENCE 114-15 (1996).

¹¹⁸ Human Rights Watch, *Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma*, October 2007, at 34, <https://www.hrw.org/sites/default/files/reports/burma1007webwcover.pdf> (hereinafter HRW).

¹¹⁹ Child War, *supra* note 13, at 95.

¹²⁰ Francesca Capone, *Children, Not Soldiers: Preventing the Recruitment and Use of Children in Armed Forces and Groups* in HANDBOOK OF POLITICAL VIOLENCE AND CHILDREN: PSYCHOSOCIAL EFFECTS, INTERVENTION, AND PREVENTION POLICY (Charles Greenbaum et. al, eds,) 443, 446 (2021) (omission added).

Regarding gang recruitment, those groups “prey upon impoverished communities with underfunded school systems and unstable family structures.”¹²¹ With respect to providing familial stability, “because gangs already have a quasi-family relationship and hierarchical structure in place, it is easy for them to dupe victims into believing that they can become beloved members of this large and powerful family.”¹²² However, perhaps more pragmatically, “children are easier to control because many will grow to respect and adapt to gang culture due to the benefits it provides them – such as money and a ‘life’s purpose.’”¹²³

In addition to gang membership “fill[ing] an emotional void by promising a collective sense of belonging, familial-like support, and power that many teens crave,” gang affiliation can be “necessary to survive in high-crime neighborhoods because teens may be physically assaulted or killed without gang protection.”¹²⁴ Established “[g]angs sometimes exercise substantial influence over certain neighborhoods, and potential victims quickly discern that gang members enjoy power and esteem that the victims usually lack.”¹²⁵

In other words, and notwithstanding that some children are “simply abducted and forced into armed service,”¹²⁶ both groups share similar high-level recruitment traits:

¹²¹ Cecelia Harper, *How Do I Divorce My Gang?: Modifying the Defense of Withdrawal for a Gang-Related Conspiracy*, 50 VAL. U.L. REV. 765, 770 (2016).

¹²² Michael Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342, 371 (2015).

¹²³ Ashley Scoville, *Escaping Danger: How Central American Children Can Win Asylum in America*, 51 SUFFOLK U.L. REV. 641, 656 (2018).

¹²⁴ Harper, *supra* note 121, at 770-71 (Alteration added).

¹²⁵ Frank, *supra* note 122, at 369 (Alteration added).

¹²⁶ Rosen, *supra* note 65, at 61. See also Child War, *supra* note 13, at 58 (“Case studies indicate that in the majority of conflicts, a primary method of recruitment of children is through some form of abduction.”)

- Child soldier and gang recruitment efforts each target juveniles in lower socioeconomic situations.¹²⁷
- Child soldier and gang recruitments appeal to those seeking to balance a power or familial imbalance.¹²⁸
- Child soldier and gang recruitments occur in areas lacking strong core community services.¹²⁹
- Child soldier and gang recruitments may be the only viable path for a child's personal safety.¹³⁰

Activities

Once in the organization, as a soldier or gang member, juveniles undertake similar activities. For example, child soldiers may serve as messengers or lookouts,¹³¹ expendable frontline troops,¹³² or “infantry shock troops.”¹³³ Additionally, because “[a]dults do not usually view children, especially the very young as a threat,”¹³⁴ “children

¹²⁷ See Machel, *supra* note 101; Child War, *supra* note 13, at 94; HRW, *supra* note 118; Harper, *supra* note 121.

¹²⁸ See Machel, *supra* note 101 at para 42; Child War, *supra* note 13, at 65-66; Ndongu, *supra* note 111.

¹²⁹ See Child War, *supra* note 13, at 45. See also Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 1041 (2018) (“community programs have proven more effective than gang policing at reducing gang crime. This is because these programs are specifically tailored to address the needs that drive people to join gangs and commit crime. They provide job training and affordable housing and create strong communities rooted in non-criminal activity.”)

¹³⁰ Compare Child War, *supra* note 13, at 61 (“Once caught, children have no choice; usually they must comply with their captors or die”) and 64 (“Surrounded by violence and chaos, children may decide they are safer in a conflict group, with guns in their own hands, than going about by themselves unarmed”) with Rebecca Marston, *Guild By Alt-Association: A Review of Enhanced Punishment for Suspected Gang Members*, 52 U. MICH. J.L. REFORM 923, 925 (2019) (“If you're a young black man living in a poor neighborhood on the South Side of Chicago, a lot of violence is inescapable. One of the best ways to stay safe is by joining a gang. So your neighborhood becomes moderately safe, but now the neighborhoods surrounding yours are not safe at all.”).

¹³¹ Machel, *supra* note 101, at para. 44

¹³² *Id.* at para. 115 (“child soldiers are particularly vulnerable as they are often the personnel used to explore known minefields. In Cambodia, a survey of mine victims in military hospitals found that 43 per cent had been recruited as soldiers between the ages of 10 and 16.”) See also DAVID ROSEN, CHILD SOLDIERS IN THE WESTERN IMAGINATION: FROM PATRIOTS TO VICTIMS 135 (2015) (“During the Iran-Iraq War, Iran recruited some ninety-five thousand children above age twelve, and some as young as nine, to be used as human waves to clear areas of land mines.”)

¹³³ Child War, *supra* note 13, at 16.

¹³⁴ ROMÉO DALLAIRE & JESSICA DEE HUMPHREYS, THEY FIGHT LIKE SOLDIERS THEY DIE LIKE CHILDREN: THE GLOBAL QUEST TO ERADICATE THE USE OF CHILD SOLDIERS 119 (2010) (alteration added).

can move about more freely than adults and are not instantly suspected of spying or supplying.”¹³⁵

Similarly, “[j]uveniles are also recruited to criminal street gangs because of their unsuspecting nature” because, in effect, “children are less likely to draw the attention of law enforcement as compared to traditional gang members.”¹³⁶ Because of this inherent stealth, “youth gang members are often used to perform criminal acts such as drug dealing, grand theft auto, burglary, assault, robbery, and murder.”¹³⁷

Unfortunately, with older gang members increasingly incarcerated for their actions “recruitment of juveniles has seen an uptick as well, not only because of their susceptibility and vulnerability to recruitment tactics, but also for their ability to avoid criminal sentencing and enthusiasm to participate in violence.”¹³⁸ Outside of the United States in particular, some juvenile gang members “participate in many of the same dangerous jobs as adult members, including blackmailing citizens and government officials; murdering uncooperative citizens or rival gang members; and serving as lookouts”¹³⁹ to further the gang’s goals.

It is accurate that the activities of child soldiers and juvenile gangs lack an airtight overlap. For example, one former child soldier in the Peruvian Shining Path guerrilla group wrote that his compatriots “in small groups, went out to obtain food in the nearby

¹³⁵ Child War, *supra* note 13, at 75.

¹³⁶ Giuseppe Finelli, *Slash, Shoot, Kill: Gang Recruitment of Children and the Penalties Gangs Face*, 57 FAM. CT. REV. 243, 246 (2019)

¹³⁷ *Id.*

¹³⁸ *Id.* at 247, *see also* Scoville, *supra* note 123, at 656 (“Moreover, children legally cannot be charged with felonies in Honduras, Guatemala, and El Salvador, limiting the jail time they can serve.”)

¹³⁹ Scoville, *supra* note 123, at 655-56 (omission and alteration added).

communities. That was the guerrilla’s routine: read, sing, have discussions, find food, and be ready for combat.”¹⁴⁰ Given the lack of guerrilla warfare in the United States, for example, it is unlikely that juveniles in gangs must travel to adjacent cities to obtain food.

However, both groups—assuming the gang has advanced to the territorial phase noted *supra*¹⁴¹--have a vested interest in controlling and retaining their territory. At one trial, a gang expert testified “that youths growing up in gang neighborhoods know where and when they should stay within their own gang areas for safety.”¹⁴² At different trial, “[t]he prosecution's gang expert explained that gangs use violence to protect their territory, earn respect from rival gangs, prevent the rivals from claiming the territory as their own, and create fear within the entire community.”¹⁴³ Additionally, in describing a truce between two street gangs—Down Insane Miditos and the Playboy Gangster Crips—at trial, “the expert explained that the two gangs worked together to expand their influence, with the goal of expanding their territory beyond the La Cienega Heights area.”¹⁴⁴

Similarly, while perhaps obvious, child soldiers protect their group’s territory by guarding borders, sensitive areas, or otherwise participating in combat.¹⁴⁵

¹⁴⁰ LURGIO SANCHEZ, WHEN RAINS BECAME FLOODS: A CHILD SOLDIER’S STORY 11 (2015).

¹⁴¹ See *Taylor*, *supra* note 85, at 107.

¹⁴² *Fuller v. Warden, High Desert State Prison*, No. CV 10-5515-DSF, 2012 U.S. Dist. LEXIS 47937, at *14 (C.D. Cal., Feb. 14, 2012)

¹⁴³ *JG v. Superior Court of Solano Co*, No. A154682, 2018 Cal. App. Unpub. LEXIS 7572, at *14-15 (Cal. Ct. App., Nov. 7, 2018) (alteration added).

¹⁴⁴ *In re SQ*, 2009 Cal. App. Unpub. LEXIS 4875, at *3-4 (Cal. Ct. App. June 18, 2009).

¹⁴⁵ See *Everett*, *infra*, note 146; Gettleman, *supra* note 1; and Lucia Seyfarth, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 14 CHI-KENT J. INT’L & COMP. L. 117, 119 (2013) (“Throughout the world, children are used as guards, porters, and soldiers in violent armed conflicts.”)

Hierarchy

In light of the militarization inherent in the phrase “child soldier,” the existence of an organizational hierarchy is unsurprising. Children in armed conflict “may start working as servants, and then take on additional responsibility such as guard duty, patrolling, or carrying heavy loads. Many serve as spies, lay down landmines, or are thrown to the front lines of battle.”¹⁴⁶ Additionally, opportunities for promotion exist for child soldiers based on brutality as “some child soldiers attain positions in armed groups and become leaders by actively participating in the hostilities and committing the worst atrocities (e.g. committing murders, punishing and executing fellow armed soldiers)[.]”¹⁴⁷

With respect to gangs, succinctly, “[g]angs function in an organized capacity; this makes it extremely easy to shadow, and in a way, parallel the typical American business It is a system that operates from the top down” with those “disposable to the gang” at the bottom,” mid-level “managers,” and leadership.¹⁴⁸ In one trial, four members of the “R.T.B.” gang testified “that a member may rise in status and respect in the gang by ‘putting in work’” ranging from “selling drugs, robbing people in the neighborhood” or other activities supporting the gang’s goal of retaining “their territory to have an exclusive market for drug sales.”¹⁴⁹

¹⁴⁶ Jennifer Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT’L L. 285, 292 (2009). See also A.B. Zack-Williams, *Child Soldiers in the Civil War in Sierra Leone*, 28 REV. AFR. POL. ECON. 73, 80 (2001) (On file with author) (“Recruits generally have started out in support rather than combat activities, such as guard duties, patrolling and manning checkpoints, working as porters carrying arms and ammunition as well as loot.”)

¹⁴⁷ Noëlle Quéniwet, *The Liberal Discourse and the “New Wars” of/on Children*, 38 BROOKLYN J. INT’L L. 1053, 1105 (2013) (alteration added).

¹⁴⁸ Danielle Ciniello, *Don’t Hate the Player, Hate the Game: Gangs and their Operation as a Criminal Enterprise in an Alternate Illegal Economic Market*, 15 RUTGERS BUS. L. REV. 210, 225 (2020) (omission and alteration added). For a more succinct determination, see also *People v. Harris*, 2018 Cal. App. Unpub. LEXIS 2832, at *11 (Cal. Ct. App., Apr. 26, 2018) (“There is a hierarchy of gang members.”)

¹⁴⁹ *United States v. Edwards*, No. 07-297(3), 2008 U.S. Dist. LEXIS 67789, at *7-8 (D. Minn., Sep. 5, 2008).

One R.T.B. member testified that the gang “has a loose structure, at the top of which are O.B.s or O.G.s” and alleged that the original organization “had a more hierarchical structure like that of the Chicago gangs, the Vice Lords and the Gangster Disciples” but later “adopted a structure more like that of the Los Angeles gangs, which was more free form and . . . had fewer people to whom they had to answer.”¹⁵⁰ One member noted that “the gang recruits young males, called ‘shorties’ to carry and sell drugs because, as juveniles, if they are caught they will ‘get a slap on the wrist.’ Shorties are at the bottom of the gang structure and sometimes serve as look-outs while other members are selling drugs.”¹⁵¹ In another trial, relating to the “21st Street” gang, one member testified—in exchange for immunity¹⁵²--that the gang “is organized into a three-tiered hierarchy comprised of ‘soldiers,’ ‘squad leader[s],’ and the ‘channel.’ A soldier receives orders” from leaders, who in turn receive orders from the channel.¹⁵³

Yet, while the *supra* examples reflect a top-down hierarchy likely attributed to gangs evolving into a corporate model,¹⁵⁴ this level of organization is unlikely achieved by pre-teens lacking independent transportation. For juvenile gangs comprised largely (if not entirely) of children lacking legal transportation options exceeding two wheels, the reality may fall closer to the scavenger/territorial line¹⁵⁵ of organization. As members age or merge into an established gang, anarchic youthful tendencies may fall away to group coalescence around some general order.

¹⁵⁰ *Id.* at 6-7.

¹⁵¹ *Id.* at 7.

¹⁵² *People v Velez*, 85 Cal App 5th 957, 961 n.5 (2022)

¹⁵³ *Id.* at 961-62 (alteration in original).

¹⁵⁴ See Taylor, *supra* note 85.

¹⁵⁵ *Id.*

For example, in a Michigan gang prosecution of the Baker Street Goons (BSG), one member argued that the appellate court should vacate his conviction “because there was no established leadership or command structure” for the organization.¹⁵⁶ Yet, *inter alia*, the Michigan Court of Appeals noted trial testimony illustrated that BSG had “an established command structure because all of the members made decisions regarding BSG's activities, in a fashion analogous to stockholders.”¹⁵⁷ Notably, while this representation suggests BSG contained a complicated group dynamic with many members, “BSG had eight confirmed members and consisted of young adults who grew up in the neighborhood surrounding Baker Street.”¹⁵⁸

In other words, even if a gang of relatively few members coalesces around a democratic process or horizontal organization rather than a vertical hierarchy, the mere existence of *an* operational structure may prove sufficient for criminal liability purposes.

Not All Groups Are Teams

As noted *supra*, while gangs with juvenile members can commit reprehensible acts, those acts likely pale in comparison to the scope of atrocities committed by armed belligerents. For example, providing “cocaine or heroin mixed with gunpowder to make it stronger”¹⁵⁹ to amplify childhood fearlessness¹⁶⁰ before sending the children “to attack ‘soft’ targets such as villages or weakly defended military or police posts,”¹⁶¹ is a tactic likely unavailable to gangs in the United States. Similarly, because research does not

¹⁵⁶ *People v. Merriweather*, No. 331666, 2017 Mich. App. LEXIS 1060 at 4 (Mich. Ct. App. Jun. 27, 2017).

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *Id.* at *5.

¹⁵⁹ *Child War*, *supra* note 13, at 81.

¹⁶⁰ *Id.* at 82.

¹⁶¹ *Id.* at 84.

support street gangs throughout the United States commonly employing land mines in their operations, leaders of rival gangs are unlikely to use their juvenile personnel as makeshift land mine detectors.¹⁶²

Notwithstanding outright kidnapping, recruitment of children into either organization relies upon enticing those in a weaker position to join a stronger group. The post-recruitment duties, objectives, and operational structure of juveniles in gangs and child soldiers share striking similarities. New recruits in both entities perform basic tasks while learning the organizational culture.¹⁶³ Regardless of whether the juvenile is a child soldier—utilized by a national government or a rebel group—or a gang member in Los Angeles, California or Muskegon, Michigan, their activities at any level support the overall mission: survival of the group through stability and territory control.

In classifying “child combatants” as a weapon system, one commentator bluntly noted that “[i]n case readers in stable democracies think this weapon system is only deployed in countries with serious social unrest, they should remember the growing number of children used in many of the same ways by street gangs in the drug trade.”¹⁶⁴

¹⁶² See *id.* at 106-07 (“when children are present in an organization, they are most often the personnel used to explore suspected minefields, usually through simple trial and error. In fact, this was the original motivation behind the use of children in the Iran-Iraq war, to clear paths for follow-on assault forces. In Guatemala, underage soldiers were even termed ‘mine detectors.’”)

¹⁶³ See STEPHEN P. ROBBINS & MARY COULTER, *MANAGEMENT* 88 (14th Ed. 2018) (“Organizational culture has been described as the shared values, principles, traditions, and ways of doing things that influence the way organizational members act and that distinguish the organization from other organizations.”)

¹⁶⁴ Dallaire, *supra* note 134, at 104.

Section 4: Relevant International Law

In June 1963, following the conclusion of the Cuban Missile Crisis the prior November,¹⁶⁵ President Kennedy declared “let us also direct attention to our common interests. . . . in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children’s future. And we are all mortal.”¹⁶⁶ President Kennedy’s sentiments 1) reinforced the reality that only artificial borders separate humanity, 2) functioned as a subtle reminder to new college graduates of the world’s interconnectivity, and 3) implicitly warned against isolationism in an increasingly interconnected world.

Laws rarely exist in a vacuum; the effects of international treaties and customs manifest in small cities throughout the world. It is accurate that 1) no worldwide legislature exists to impose laws on nations and 2) international treaties serve as contracts between nations. Additionally, from a practical perspective, the amount of bilateral and multilateral treaties required for regulation of every international activity is likely impossible to calculate. Instead, out of generations of international practice and increasing adherence to standards of conduct, nations assign customary international law the same weight as ratified treaties. As noted *infra*, the United States expressly incorporated customary international law into the national fabric forming the country’s legal foundation.¹⁶⁷

¹⁶⁵ Nicholas Allard, *Sweet Are the Uses of Adversity*, 52 U. Tol. L. Rev. 200, 202n4 (2021) (“the so-called Cuban Missile Crisis was a frightening episode lasting one month and four days, from October 16 to November 20, 1962”).

¹⁶⁶ John F. Kennedy, President, United States of America, Commencement Address at American University (June 10, 1963) (omission added), <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/american-university-19630610>

¹⁶⁷ See *Am. Legion v. Am. Humanist Ass’n*, ___ U.S. ___; 139 S. Ct. 2067, 2094; 204 L. Ed. 2d 452, 481 (2019) (Kavanaugh, J, concurring) (“the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor.”)

For the domestic practitioner, the concept of international *practice* having the same force as a codified law runs afoul of a variety of legal principles, omits at least one branch of government, and seemingly infringes on the dual sovereignty concurrently exercised by the federal government and each state.¹⁶⁸

Defining Customary International Law

In deciding cases, the International Court of Justice—itsself formed with authority provided by a multilateral treaty—applies “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states,” “**international custom**, as evidence of a general practice accepted as law,” “**the general principles of law recognized by civilized nations**,” and “judicial decisions” of nations in certain circumstances.¹⁶⁹

One scholar noted that “[c]ustomary international law – general practice accepted as law – is one of the three sources of international law in addition to international agreements and general principles of law;” it is “obligatory on all states.”¹⁷⁰ Unfortunately, the concept “increasingly overlaps (and potentially conflicts) with U.S. statutes.”¹⁷¹ It is regrettable, for the purposes of this discussion, that scholarly “focus has been on how to

¹⁶⁸ See *Gamble v. United States*, ___ U.S. __; 139 S. Ct. 1960, 1964; 204 L. Ed. 2d 322, 326 (2019) (“We have long held that a crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign. Under this ‘dual-sovereignty’ doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.”)

¹⁶⁹ Statute of the International Court of Justice (“ICJ Statute”), June 26, 1945, art. 38(1)(a)-(d), 59 Stat. 1055, 1060, 832 U.S.T.S. 993, available at <https://www.icj-cij.org/en/statute> (emphasis added).

¹⁷⁰ Bart Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1120 (2014) (alteration added).

¹⁷¹ *Id.*

recognize a customary international rule when you see it, rather than on the steps preceding or leading up to the formation of the customary rule.”¹⁷²

At its core, customary international law “is the creation of state practice and *opinio juris*, that is, the state practice must have been motivated by a belief that such conduct was legally obligatory.”¹⁷³ Further complicating the discussion is the application of international custom—between nations—to non-state actors. As noted *supra*, the Geneva Conventions’ Additional Protocol I¹⁷⁴ applies to international conflict for nations which have ratified it while Additional Protocol II¹⁷⁵ applies to armed groups inside a ratifying country who are engaged in non-international conflict.¹⁷⁶

Restated, for the purposes of this discussion, four groups emerge: #1) nations which have ratified a treaty, #2) armed groups inside those ratifying nations, #3) nations which have not ratified a treaty, and #4) armed groups inside those non-ratifying nations. If a nation agrees (via a treaty) to a code of conduct for its combat against another nation (#1), and agrees (via a treaty) to curtail certain actions by those within its borders (#2), those agreements are binding on the ratifying nation and its population.

However, what authority constrains the actions of nations which have not ratified the treaty (#3) and compels that nation to thwart the actions of those within its border (#4)? The remaining issue, of course, is the reality that “on the whole, rebel and terrorist

¹⁷² Hjalte Osborn Frandsen, *Customary International Law as a Vessel for Global Accord: The Case of Customary Rules of the Road for Governing the Orbital Highways of Earth*, 87 J. AIR L. & COM. 705, 748 (2022).

¹⁷³ MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 89 (2005) (emphasis in original).

¹⁷⁴ Protocol I, *supra* note 50.

¹⁷⁵ Protocol II, *supra* note 53.

¹⁷⁶ See also Happold, *supra* note 173, at 95.

groups themselves have little reason to follow international laws created by the very states they are generally fighting against.”¹⁷⁷

With respect to international humanitarian law, “it is particularly important to avoid cases in which a person could be left without protection or assistance.”¹⁷⁸ Notably, the four individual Geneva Conventions¹⁷⁹ and Additional Protocol I¹⁸⁰ contain language requiring parties “to fulfil by virtue of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”¹⁸¹

This language, arising from the 1899 Hague Convention¹⁸² reflects the reality that contracting nations long ago determined that the public conscience and custom should offer broad protection in warfare when the plain text of existing treaties would otherwise offer little protection. Friedrich Martens, the Russian delegate to the 1899 Hague Peace

¹⁷⁷ JOHN WALL, CHILDREN’S RIGHTS: TODAY’S GLOBAL CHALLENGE 112-13 (2017).

¹⁷⁸ FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 92 (Camille Michel, ed., Laura Brav, trans., 3rd ed. 2013)

¹⁷⁹ *Supra* at notes 46 & 47.

¹⁸⁰ *Supra* note 50.

¹⁸¹ Fourth Geneva Convention, *supra* note 46, at art. 158. For similar, if not identical, language see *also, supra* note 47, the First Geneva Convention at art. 63; the Second Geneva Convention at art. 62; the Third Geneva Convention at art. 142. In particular, see Protocol I, *supra* note 50, at art. 1.2 (“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.”)

¹⁸² See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1176 n40 (U.S. Mil. Comm. Rev. 2011), *citing* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INTERNATIONAL REVIEW OF THE RED CROSS 125 (1997) (on file with author) (“The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land: ‘Until a more complete code of the laws of war is issued, **the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.**’”) (Emphasis added)

Conference, proposed¹⁸³ this expansion of legal protections during warfare; it stands as a regrettable historical irony given the ongoing conflict in Ukraine today.

Simply restated, the international community agreed over 100 years ago to consider extrinsic evidence¹⁸⁴ of custom and practice in addition to the plain text of treaties. Today, many years and wars later, the subsequent international communities performed in conformity with both sources of law—written and custom—in detrimental reliance on that 1899 agreement. For example, the preamble to the 1969 Vienna Convention on the Law of Treaties—a treaty establishing mechanisms for interpreting other treaties—“Affirm[s] that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.”¹⁸⁵

Identifying Customary International Law

In the view of one scholar, customary international law contains three prerequisite components: “wide acceptance or consensus among nation-states,” adherence to “this rule of law as a matter of perceived obligation,” and “substantial history of state practice” reflected by a “history of compliance with the rule of law.”¹⁸⁶ In his view,

¹⁸³ See Ticehurst, *supra* at note 182.

¹⁸⁴ Extrinsic evidence is “evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement.” *Extrinsic Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁸⁵ Vienna Convention on the Law of Treaties pmbl., May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980), https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

¹⁸⁶ DAVID ROSEN, CHILD SOLDIERS: A REFERENCE HANDBOOK 13 (2012).

It is now a nearly universal principle of international treaty law to ban the recruitment of children below age 15 by armed forces and groups. But one court, the Special Court for Sierra Leone, has *also* ruled that the recruitment of children under the age of 15 is already absolutely banned as a matter of customary international law.¹⁸⁷

Another scholar argued that rather than having three components, “customary international law exists whenever two key requirements are met: (1) a general practice among states regarding a particular matter and (2) a belief among states that such practice is legally compelled.”¹⁸⁸

While recruiting children under 15 for combat is proscribed by treaty and custom, the reality is that it still occurs. Does international law, customary or otherwise, provide immunity to these unlawful combatants for their acts? Indeed, “the question remains of what is to be done with child soldiers who themselves have committed war crimes. International law provides no explicit guidelines for whether, or at what age, child soldiers should be prosecuted for war crimes.”¹⁸⁹ Because law often builds upon what occurred in the past, it is necessary first review the foundations supporting today’s legal practices. For example, what legal foundation formed the basis for the 1994 *Prosecutor v. Norman* case, noted *supra*, in which the Appellate Chamber of the Special Court for Sierra Leone found that child soldier recruitment violated established customary international law?¹⁹⁰

Through a multilateral treaty in 1945, the Allied powers established an International Military Tribunal (IMT) in Nuremburg “for the Prosecution and Punishment of the Major

¹⁸⁷ *Id.* at 14.

¹⁸⁸ SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 102 (3rd ed.) (2018).

¹⁸⁹ Alice Debarre, *Rehabilitation & Reintegration of Juvenile War Criminals: A De Facto Ban on their Criminal Prosecution?*, 44 DENV. J. INT’L POL’Y 1, 2 (2015)

¹⁹⁰ See *supra* notes 68 & 69.

War Criminals of the European Axis.”¹⁹¹ As noted *infra* in Appendix A, the Charter appended to the agreement¹⁹² granted the tribunal jurisdiction to try cases for “crimes against peace,” “war crimes,” and “crimes against humanity.”¹⁹³ Notably, the Charter permitted the tribunal to declare certain groups as a “criminal organization” which then granted governments “the right to bring individuals to trial for membership therein before national, military, or occupation courts.”¹⁹⁴ Any sentence imposed by the subsequent trials was “independent of and additional to the punishment imposed by the Tribunal.”¹⁹⁵

In other words, following World War II, the IMT in Europe had subject matter jurisdiction certain crimes but could procedurally declare that a person’s membership in a group violated criminal law. Thereafter, the relevant state, military, or occupying authorities could conduct subsequent legal proceedings and impose additional punishment for membership in the group. Notably, this tribunal and its attached charter contained no minimum age for culpability.

General Douglas MacArthur, utilizing authority conferred onto him,¹⁹⁶ created a similar tribunal in Japan (known as the International Military Tribunal for the Far East or

¹⁹¹ Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, <https://treaties.un.org/doc/Publication/UNTS/Volume%2082/v82.pdf> (PDF page 301) (Hereinafter London Agreement)

¹⁹² *Id.* at 82 U.N.T.S. 285 (PDF page 307) (Hereinafter London Agreement Annex).

¹⁹³ *Id.* at 288, art. 6(a)-(c).

¹⁹⁴ *Id.* at 290, arts. 9-10.

¹⁹⁵ *Id.* at art. 11.

¹⁹⁶ See U.S. Dept. of State, Office of the Historian, *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, <https://history.state.gov/milestones/1945-1952/nuremberg> (last visited Apr. 22, 2023) (In 1945, the Allied nations granted Gen. MacArthur authority to issue orders related to post-war Japan. “In January 1946, acting pursuant to this authority, General MacArthur issued a special proclamation that established the [International Military Tribunal for the Far East]. The Charter for the [IMTFE] was annexed to the proclamation.”) (Alteration added).

IMTFE) to impose “stern justice to war criminals”¹⁹⁷ involved in the Pacific theatre of World War II. As reflected *infra*, this tribunal had a similar jurisdictional scope to the European tribunal but the IMTFE’s charter did not permit it to declare groups as “criminal organizations” for later prosecutions.

In May 1993, the Secretary-General of the United Nations issued a report to the Security Council advocating for the creation of an international tribunal to address human rights violations in the former Yugoslavia.¹⁹⁸ As part of that report, and forming the legal basis for what law the tribunal would apply, the Secretary General argued “[w]hile there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.”¹⁹⁹

Specifically, the Secretary General argued that the Geneva Conventions, *inter alia*, had “beyond doubt become part of international customary law.”²⁰⁰ Subsequently, the United Nations Security Council adopted the report and created an international tribunal later known as the International Criminal Tribunal for the Former Yugoslavia.²⁰¹ This

¹⁹⁷ *Charter for the International Military Tribunal for the Far East* (Amended Apr. 26, 1946), T.I.A.S. 1589, at _____ pmb1, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (*Hereinafter* IMTFE Charter).

¹⁹⁸ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 22, U.N. Doc. S/25704, <https://digitallibrary.un.org/record/166504> (*hereinafter* ICTY Resolution)

¹⁹⁹ *Id.* at ¶ 33.

²⁰⁰ *Id.* at ¶ 35.

²⁰¹ S.C. Res. 827 (May 25, 1993), <https://digitallibrary.un.org/record/166567>.

tribunal's jurisdiction expressly rejected group affiliation as a basis for criminal liability²⁰² and asserted jurisdiction "over natural persons" without regard to minimum age.²⁰³

In 2000, the United Nations created a court under the United Nations Transitional Administration in East Timor (UNTAET)²⁰⁴ with exclusive jurisdiction to consider a narrow scope of crimes, listed *infra*. Later, the United Nations established specialized panels within the court to hear "serious criminal offenses."²⁰⁵ However, in this tribunal, prosecutors did once charge a 14-year-old with crimes against humanity.

In 2002, the UNTAET prosecutor initiated proceedings against the juvenile defendant—referred to as "X" with all information otherwise redacted because of youthfulness—for committing crimes against humanity.²⁰⁶ Thereafter, the prosecutor reduced the charge to murder, the juvenile entered a guilty plea, and the court imposed a one-year jail sentence—with credit for the 11 months and 21 days served in pretrial confinement—suspended the balance, and issued a one-year probationary term.²⁰⁷

²⁰² See ICTY Resolution, *supra* note 198, at para. 51 ("The question arises, however, whether a juridical person, such as an association or organization may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the international tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the international tribunal irrespective of membership in groups.")

²⁰³ *Id.* at art. 6.

²⁰⁴ U.N. Transitional Admin. In East Timor, Reg. No. 2000/11: On the Organization of Courts in East Timor, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), <https://mj.gov.tl/jornal/lawsTL/UNTAET-Law/Regulations%20English/Reg2000-11.pdf> (Regulation 10.1) (*hereinafter* East Timor Regulation)

²⁰⁵ U.N. Transitional Admin. in East Timor, Reg. No. 2000/15: On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), <https://mj.gov.tl/jornal/lawsTL/UNTAET-Law/Regulations%20English/Reg2000-15.pdf> (Regulation 1.3) (*hereinafter* East Timor Panel).

²⁰⁶ *Prosecutor v. X*, No. 04/2002, Amended Indictment [UNTAET] (Oct. 23, 2002), <https://exhibits.stanford.edu/virtual-tribunals/catalog/wj029br4865>

²⁰⁷ *Prosecutor v. X*, No. 04/2002, Judgment [UNTAET] (Dec. 2, 2002), <https://exhibits.stanford.edu/virtual-tribunals/catalog/qv099wy6410>

Notwithstanding that a 14-year-old was charged with crimes against humanity in the first place, the *Prosecutor v. X* case is particularly striking because of what did not occur.

Art. 22.2 of the UNTAET authorizing treaty states that a three-judge panel is typical but, “in cases of special importance or gravity, a panel of five judges composed of three international and two East Timorese judges may be established.”²⁰⁸ In other words, a 14-year-old charged with committing crimes against humanity related to “extermination and attempted extermination”²⁰⁹ was not of sufficient importance to empanel five judges.

Additionally, unlike the Sierra Leone sentencing regulations precluding juvenile incarceration (addressed immediately *infra*), the East Timor sentencing regulations do not exclude juveniles from imprisonment.²¹⁰ Succinctly, “the one instance where a minor was indicted for crimes against humanity resolved itself through a guilty plea that placed the minor outside the formal framework of international criminal law. No trial, sentence, or confession to an extraordinary international crime took place.”²¹¹

In 2002, via a multilateral treaty, the United Nations and Sierra Leone agreed to create the Special Court for Sierra Leone.²¹² As reflected *infra*, the statute²¹³ adopted by this treaty granted the court jurisdiction over four categories of acts:²¹⁴ “crimes against

²⁰⁸ East Timor Regulation, *supra* note 204, at art. 22.2

²⁰⁹ MARK DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 125 (2012).

²¹⁰ East Timor Regulation, *supra* note 204, at art. 10(1).

²¹¹ Drumb, *supra* note 209, at 125.

²¹² See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 U.N.T.S. 137 (entered into force 12 April 2002), <https://treaties.un.org/doc/Publication/UNTS/Volume%202178/v2178.pdf> (hereinafter SCSL Treaty)

²¹³ Appended to this treaty was the *Statute for the Special Court for Sierra Leone* establishing the court’s jurisdiction. See *id.* at 145 (PDF page 165) or <http://www.rscsl.org/Documents/scsl-statute.pdf> (hereinafter SCSL statute).

²¹⁴ *Id.* at arts. 2-6.

humanity,” “Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II,” “Other Serious Violations of International Humanitarian Law,” and “Crimes Under Sierra Leonean Law.” The court’s statute declared that it “shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.”²¹⁵

In his testimony to a Canadian parliamentary committee in 2008, a former chief prosecutor at the Special Court for Sierra Leone succinctly stated, “when I was the chief prosecutor at the International War Crimes Tribunal in Sierra Leone, I chose not to prosecute child soldiers, as it is my opinion that no child under the age of 15 can commit a war crime.”²¹⁶ As noted *supra*, however, the court lacked jurisdiction over those under 15 years old and expressly could not incarcerate juveniles.²¹⁷ Admittedly, it is unknown whether a probationary sentence for a 14-year-old convicted of genocide and other war crimes would balance rehabilitation interests and the needs of justice.

With the luxury of history, and several decades of international tribunals developing the boundaries of international law, what applicable principles emerge?

²¹⁵ See SCSL Statute, *supra* note 213 at art 7.

²¹⁶ *Subcommittee on International Human Rights of the Standing Committee of Foreign Affairs and International Development*, (Can.) 39th Parliament, 2nd Session (May 13, 2008) (testimony of Professor David Crane, former chief prosecutor for the at the Special Court for Sierra Leone from 2002-05), <https://www.ourcommons.ca/Content/Committee/392/SDIR/Evidence/EV3494571/SDIREV14-E.PDF>

²¹⁷ See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, art. 19(1), 2178 U.N.T.S. 137 (entered into force 12 April 2002), <https://treaties.un.org/doc/Publication/UNTS/Volume%202178/v2178.pdf> (pdf page 171) (“The Trial Chamber shall impose upon a convicted person, **other than a juvenile offender**, imprisonment for a specified number of years.”) (Emphasis added).

At least dating back to the tribunals after World War II, international tribunals have not attempted to criminalize children's membership in a group.²¹⁸ In other words, while some international²¹⁹ tribunals possessed the express authority to try children for particularly heinous acts and others simply contained no age minimum, the tribunals' work focused nearly exclusively on individual adults. Instead, the subsequent body of law developed the liability of the children's adult commanders. Notwithstanding the aberration of the *Prosecutor v. X* case in East Timor which resolved in a homicide conviction rather than crimes against humanity, subsequent international tribunal prosecutions focused on those *using* the child soldiers and not the child soldiers' individual actions.

As reflected *infra*, international tribunals operated under narrow subject matter jurisdiction rather than broad grants of authority. The jurisdictional takeaway from decades of international tribunals is that international custom established courts to administer justice in the most serious of cases. Where jurisdiction over juveniles younger than 15 existed, such as East Timor, the subject matter jurisdiction of those courts did not cover the "crime" of being a child soldier. In other words, international courts could punish the *acts* of a child soldier unless proscribed by the relevant statute. International courts could not, however, also punish the juvenile for having the *status* of "child soldier."

²¹⁸ As noted *supra*, while Arts. 9-10 of the London Agreement Annex permitted the tribunal to declare groups to be "criminal organizations," the subsequent trial of individuals for their membership in the criminal groups was to then occur "before national, military, or occupation courts." See London Agreement Annex, *supra* note 192.

²¹⁹ However, while the author does acknowledge the case of Omar Khadr, his incarceration and trial for violations of U.S. federal law occurred not via an international tribunal, but rather via a United States military tribunal at Guantanamo Bay authorized by federal law.

Because of the domestic nature of the prosecution, and the solely domestic legal procedures utilized, the trial of this juvenile combatant is not germane to the discussion of international tribunals. See *Khadr v. Obama*, 724 F. Supp. 2d 61, 62 (D.D.C. 2010) ("Omar Khadr has been incarcerated since 2002 at the United States Naval Base in Guantanamo Bay, Cuba, after his capture as a juvenile during a firefight in Afghanistan in which several members of the U.S.-led coalition were killed or injured")

The *infra* charts illustrate that the focus of the international community since 1945 is on significant acts violating wartime honor amongst combatants or inappropriately harming non-combatants to the conflict. For the purposes of the instant discussion, however, it is notable that no international tribunal after the 1945 IMT permitted prosecution of individuals solely for their membership in a particular group. In other words, being a child and serving in the armed forces of a government or rebel group did not itself confer liability on the child soldier under international law. It was, in theory, the child soldier's acts on the battlefield which individually created that legal peril.

While the 1945 IMT could find a group to be a "criminal organization," the tribunal lacked subject matter jurisdiction to also sanction an individual for membership in that group. It deferred prosecution of the membership crime to domestic courts. Following the 1945 IMT, the international community seemingly rejected group membership as a separate ground for criminal liability. Notably, while the 1946 IMTFE tribunal in Japan retained significant portions of its European counterpart, it could not declare groups as "criminal organizations" or defer prosecution of group members to other courts.

If applying the Murphy, two prong, analysis for the existence of customary international law,²²⁰ it is clear that (in 2023) the world community legally rejects the use of children under 15 as lawful combatants in armed conflict. This rejection is seen both in treaties and domestic law and thus satisfies the objective, "general practice," component of customary international law.²²¹

²²⁰ See Murphy, *supra* note 188.

²²¹ *Id.* at 102.

With respect to the subjective *opinio juris*²²² component noted *supra*, one scholar noted that “[v]arious forms of evidence might demonstrate *opinio juris*, including public statements by governments or pleadings that they file in national or international courts.”²²³ In light of the international symposia and recommendations noted *supra*, it is likely that these statements reflect a near universal belief that children younger than 15 require special protections from armed conflict.

Addressing the historical compliance test, from Rosen’s three-prong analysis,²²⁴ one authority argues that “[s]ummary statistics confirm that for all armed conflicts from 1987 to 2007, child soldier use is highly prevalent.”²²⁵ Prior to a multitude of statistical analyses controlling for a variety of variables,²²⁶ Tynes contends that “we see that 226 out of 258 dyads (87.6%) had at least one side using child soldiers.”²²⁷ If accurate, this analysis may suggest that children are not necessarily protected by customary international law.

Yet, the UCDP/PRIO Armed Conflict dataset²²⁸ applied in the argument by Tynes appears to have multiple entries per conflict²²⁹ and also does not account for increased

²²² The phrase *opinio juris* is shortening of the phrase “*opinio juris sive necessitates*” (*id.* at 104) and is translated to mean “an opinion of law or necessity.” See Roozbeh Baker, *Customary International Law: A Reconceptualization*, 41 BROOKLYN J. INT’L L. 439, 443 (2016).

²²³ Murphy, *supra* note 188, at 105 (alteration added, emphasis in original).

²²⁴ See Rosen, *supra* note 186.

²²⁵ Tynes, *supra* note 14, at 108 (alteration added).

²²⁶ *Id.* at 108-30.

²²⁷ *Id.* at 108

²²⁸ See Upsala University--Department of Peace & Conflict Research, Uppsala Conflict Data Program, UCDP Dataset Download Center, <https://ucdp.uu.se/downloads/> (last visited Apr. 22, 2023).

²²⁹ For example, rows 2450-2467 in the dataset reflect the conflict between the United States and Al-Qaeda which began on September 11, 2001. These rows contain reports between 2001-2017 and 2019 stating the nations involved in the conflict.

international attention on the issue of reducing child soldiers since 1996²³⁰ as discussed *supra* and after the analysis ends in 2007. In other words, while Tynes accurately states that juveniles participated in a significant number of conflicts during the 1987-2007 period, 1) the legal reality now (in 2023) diminishes the impact of an analysis concluding in 2007 and 2) it is difficult to prove a negative. For example, some states—such as the Holy See—are unlikely to have recruited or utilized child soldiers; as such, the international community's efforts providing enhanced legal protection for children in war zones would have no impact on these nations.

It is fair to observe that a nation adhering to a course of conduct under a treaty is not, by definition, observing a custom; it is following a legal requirement. Yet, it is also accurate that the *multiple* treaties, laws, court rulings, and scholarly recommendations noted *supra* came into existence across decades. While treaties may plainly reflect legal obligations rather than custom, treaty drafters, scholars, and jurists inevitably incorporated existing customs into their respective works. More simply stated, legal scholarship seldom arises from ethereal whole cloth but rather draws upon existing norms and standards. Instead, repeatedly incorporating existing protections for juveniles into persuasive or binding authorities represents the international community's ongoing acknowledgement that certain categories of juveniles warrant additional legal protection.

Ultimately, 1) treaties establishing international tribunals required an increasingly higher minimum age for culpability or the tribunals declined to charge the youngest offenders and 2) tribunals focused not on organizational liability and but instead on the offender's culpability. In other words, current customary international law rests on the

²³⁰ See Machel, *supra* note 101.

liability of individual combatants and focuses on those utilizing children as tactical devices rather than the acts caused by the juveniles.

Intertwining Customary International Law & Constitutional Law

The United States Constitution declares that itself, “and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”²³¹ In 1796, the United States Supreme Court declared that the “Constitution establishes the power of a treaty over the Constitution and laws of the States” and held that the treaty in question was “sufficient to nullify the law of Virginia.”²³²

In addressing the status of treaties, the Court looked to “the law of nations” and held that it “may be considered of three kinds, to wit, general, conventional, or customary.”²³³ In historical context, the Court’s decision in *Ware* is unsurprising. The year prior, in 1795, the Attorney General of the United States issued an advisory opinion—citing the law of nations—for the extraterritorial prosecution of United States citizens who commit “acts of hostility” or “crimes” on the high seas while beyond the territorial jurisdiction of federal courts.²³⁴ In again affirming the applicability of the law of nations to the United States in 1815, the Supreme Court later noted “the Court is bound by the law of nations which is a part of the law of the land.”²³⁵

²³¹ U.S. CONST. art. VI, cl. 2.

²³² *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244-45; 1 L. Ed. 568, 588 (1796).

²³³ *Id.* at 227.

²³⁴ See *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 58-59 (1795).

²³⁵ *The Nereide*, 13 U.S. (9 Cranch.) 388, 423; 3 L. Ed. 2d 769, 780 (1815).

Thereafter, in 1900, the United States Supreme Court again affirmed the applicability of international law to the country's jurisprudence. The Court held that "[i]nternational law is part of our law and must be ascertained and administered by the courts of justice . . . where there is no treaty, and no controlling executive or legislative act or juricial decision, resort must be had to the customs and usages of civilized nations."²³⁶ The Court noted that reference "to the works of jurists and commentators" following "years of labor, research, and experience" are "resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."²³⁷ Additionally, in 1992, the Court noted that while the government's brief in a case acknowledged the United States had not ratified the United Nations Convention on the Law of the Sea, the government conceded the treaty's "baseline provisions reflect customary international law."²³⁸

This century, with its obligation "to say what the law is,"²³⁹ the Court has recognized customary international law's application several times. For example, in 2018, the Court noted that because "certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of

²³⁶ *The Paquete Habana*, 175 U.S. 677, 700; 20 S. Ct. 290; 44 L. Ed. 320, 328-29 (1900) (omission added).

²³⁷ *Id.*

²³⁸ *United States v. Alaska*, 503 U.S. 569, 588 n.10; 112 S. Ct. 1606; 118 L. Ed. 2d 222, 40 (1992) ("Under international law, artificial alterations to the coastline will extend a country's boundaries for purposes of determining the territorial sea and exclusive economic zone. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U. S. T. 1607, T. I. A. S. No. 5639, art. 8; **Brief for United States** 25, n. 6 (stating that 'the United States has not ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law')." (Clarification in original).

²³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177; 2 L. Ed. 60, 72 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

international human rights protections that are clear and unambiguous.”²⁴⁰ Separately, the Court noted that the “killing of an American abroad” is punishable in the United States via federal law and that “customary international law allows this exercise of jurisdiction.”²⁴¹ Additionally, and rather explicitly, the Supreme Court noted “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”²⁴² It appears settled that, as noted by one district court, “the eighteenth century phrase ‘law of nations’ means customary international law.”²⁴³

More pointedly, because of powers vested in the Legislative Branch from the Constitution, the Supreme Court simply declared that “the States can no longer prevent or remedy departures from customary international law because the Constitution deprives them of the independent power to lay imposts or duties on imports and exports, to enter into treaties or compacts, and to wage war.”²⁴⁴ In other words, states lack the legal capacity to address legal issues—such as customary international law—within the purview of the federal government.

Applying Customary International Law to Main Street USA

Despite the broad application of customary international law noted *supra*, its application to criminal jurisprudence seemingly remains unpopular and inconsistent.

In 1958, the Court considered whether the Eighth Amendment’s proscription of cruel and unusual punishment permitted stripping a “native-born American” of his

²⁴⁰ *Jesner v. Arab Bank, PLC*, ___ U.S. ___; 138 S. Ct. 1386, 1397; 200 L. Ed. 2d 612, 625 (2018).

²⁴¹ *U.S. v. Gamble*, 139 S. Ct. at 167, *supra* note 168.

²⁴² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729; 124 S. Ct. 2739, 2764; 159 L. Ed. 2d 718, 752 (2004).

²⁴³ *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1233 (D. Fl. 2012).

²⁴⁴ *Franchise Tax Bd. v. Hyatt*, ___ U.S. ___; 139 S. Ct. 1485, 1497; 203 L. Ed. 2d 768, 780 (2019).

citizenship following a single day's desertion from a military post and subsequent dishonorable discharge.²⁴⁵ In restoring the defendant's citizenship, the plurality noted

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . . The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.²⁴⁶

However, because *Trop* is a 5-4 plurality opinion with Justice Brennan's concurrence built on a legal framework unrelated to international law, *Trop's* precedential and persuasive authority is diminished.

Nearly fifty years later, in considering the constitutionality of the death penalty on individuals who commit their capital crimes while juveniles, the majority in *Roper* noted that *Trop* permitted the Court to examine "the evolving standards of decency that mark the progress of a maturing society" in its application of the Eighth Amendment.²⁴⁷ After finding the imposition of capital punishment for those younger than 18 at the time of the offense to be unconstitutional, the majority noted that the ruling "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."²⁴⁸

Yet, in the next sentence, the majority declares that "[t]his reality does not become controlling, for the task of interpreting the Eighth Amendment remains our

²⁴⁵ *Trop v. Dulles*, 356 U.S. 86, 87-88; 78 S. Ct. 590, 591; 2 L. Ed. 2d 630, 635 (1958) (plurality opinion).

²⁴⁶ *Id.* at 102-03 (omission added).

²⁴⁷ *Roper v. Simmons*, 543 U.S. 551, 561; 125 S. Ct. 1183, 1190; 161 L. Ed. 2d 1, 16 (2005), *quoting Trop, supra*, 356 U.S. at 100-01.

²⁴⁸ *Id.* at 575.

responsibility”²⁴⁹ before listing a multitude of other cases in which the Court considered international practices.²⁵⁰ The majority grimly concluded that “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty” and noted “it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty...”²⁵¹

In dissent, Justice O’Connor noted that “the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergency of an otherwise global consensus does not alter that basic fact.”²⁵² In his dissent, Justice Scalia lamented that “the views of our citizens are essentially irrelevant to the Court’s decision today” because “the views of other countries and the so-called international community take center stage.”²⁵³

Perhaps not adequately advised of longstanding Supreme Court precedent on customary international law developed at least two hundred years before his confirmation to the Court, Justice Scalia then argues “[m]ore fundamentally, however, the basic premise of the Court’s argument--that American law should conform to the laws of the rest of the world--ought to be rejected out of hand.”²⁵⁴ After listing a variety of cases in which the Court purportedly failed to consider international legal developments, Justice Scalia declared that the Supreme Court:

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 575-76.

²⁵¹ *Id.* at 577 and 578, respectively (omission added).

²⁵² *Id.* at 605 (O’Connor, J, dissenting).

²⁵³ *Id.* at 622 (Scalia, J., dissenting).

²⁵⁴ *Id.* at 624 (Scalia, J., dissenting) (alteration added).

should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.²⁵⁵

In later proscribing life imprisonment without parole for juveniles committing non-homicide offenses, the Court in *Graham* noted “[t]here is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”²⁵⁶ The majority again, however, swiftly noted that the world’s rejection of the sentence “does not control our decision” because “judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment.”²⁵⁷

Similarly, the majority later noted “The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual.”²⁵⁸ In concluding its consideration of international law, and perhaps contradicting pre-*Trop* precedent, the majority noted:

²⁵⁵ *Id.* at 627 (emphasis in original).

²⁵⁶ *Graham v. Florida*, 560 U.S. 48, 80; 130 S. Ct. 2011, 2033; 176 L. Ed. 2d 825, 849 (2010) (alteration added).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 81.

The debate between petitioner's and respondent's amici over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.²⁵⁹

In other words, in *Graham*, the Court boldly declared—at least for the purposes of the Eighth Amendment—that *it* and not the law of nations would “say what the law is.”²⁶⁰ However, in so doing, the Court myopically ignored its own precedent of determining that international custom was inherent in the Supremacy Clause.²⁶¹ The problem with *Graham* (2010) sharing the same universe as *Ware* (1796), and both existing as binding precedential authority,²⁶² is that each case’s rationale causes friction in the other case.

Two Sword Lengths Apart

“The United Kingdom’s House of Commons may be physically designed to prevent violence between members, as the Government and Opposition benches are said to be two sword lengths apart so that duels will be fought with words rather than swords.”²⁶³

In the United States, over two hundred years of Constitutional jurisprudence exist which purport to interpret, reinterpret, and expand our understanding of a document

²⁵⁹ *Id.* at 82 (internal references omitted, emphasis in original).

²⁶⁰ *Marbury, supra*, 5 U.S. (1 Cranch) at 77.

²⁶¹ *See Ware, supra*, 3 U.S. (3 Dall.) at 244-45 and *The Paquete Habana, supra*, 175 U.S. at 700.

²⁶² Last cited in a majority opinion on February 1, 2022, *Ware* remains controlling. *See Ballinger v. City of Oakland*, 24 F.4th 1287, 1296 (9th Cir. 2022).

²⁶³ Christopher Gandrud, *Two Sword Lengths Apart: Credible Commitment Problems and Physical Violence in Democratic National Legislatures*, 53 J. PEACE RESEARCH 130 (2016).

amended only 27 times since it became effective in the late 1780s.²⁶⁴ The issue, however, is that despite the world becoming *more* interconnected since the Supreme Court considered the Law of Nations and customary international law in its 1796 ruling,²⁶⁵ the Supreme Court appears *less* likely to consider international developments now.

In other words, the Constitution's plain text renders it, federal law, and treaties co-equal sources of law. Based on explicit Supreme Court precedent, customary international law is contained within the scope of the Constitution. Yet, without overruling these past precedents, today's judiciary appears increasingly willing to ignore customary international law despite *stare decisis* unless it aligns with the court's majority.

In this regard, in the space of two proverbial sword lengths, agitation builds in the gulf. On one side is prior reliance on the law of nations. On the other side rests the desire to exert future national sovereignty.

Section 5: Charting the Path Forward

Current State of Juvenile Justice

In a footnote, a clearly exasperated federal district judge once declared “[w]hen presented with binding Fourth Circuit precedent, district courts, like obedient children, should be seen and not heard.”²⁶⁶ While perhaps conveying an anachronistic viewpoint about children's behavior, the comment appropriately illustrates the unstable role that children—as a class—occupy in the legal system. “The evolution of the United States

²⁶⁴ See Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 32 (2001) (“The Constitution became law over a period of time beginning on June 21, 1788. That conclusion may be inconvenient in some respects (not the least of which is the awkwardness of encyclopedia entries on the effective date of the Constitution), but it is right.”)

²⁶⁵ See *Ware, supra*, 3 U.S. (3 Dall.) at 244-45.

²⁶⁶ *Sadighi v. Dghighfekr*, 36 F. Supp. 2d 279, 288 n9 (D. S.C. 1999).

juvenile justice system is marked by several distinct eras—the Progressive Era, the Due Process Era, the Get Tough, and the more recent Kids Are Different Era.”²⁶⁷

The first juvenile court in the United States gaveled into session in Chicago, Illinois in 1899.²⁶⁸ During “the early twentieth century, psychological thought had begun to question the prevailing perception of children merely as ‘miniature adults’ who were entitled to be heard only through their parents.”²⁶⁹ In 1925, a majority of states maintained juvenile courts “which sought to rehabilitate most offenders outside the adult model” of retribution.²⁷⁰ The system’s goal “sought to protect maltreated and dependent children, and to extricate delinquent children from the adult criminal justice system and harsh adult punishment.”²⁷¹ With this mindset, the juvenile courts operated with some informality until the United States Supreme Court noted in 1967 that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”²⁷²

Thereafter, in the late 20th Century, after “grow[ing] impatient with largely inaccurate perceptions of rising juvenile crime rates[. State] legislatures responded with a more punitive juvenile court model that resembles the adult criminal process in significant respects.”²⁷³ Political statements such as “‘adult crime, adult time’ or ‘old enough to do the crime, old enough to do the time’”²⁷⁴ reflect the change in then-existing

²⁶⁷ BARRY C. FELD & PERRY L. MORIEARTY, JUVENILE JUSTICE ADMINISTRATION 1 (4th ed. 2018) (hereinafter JJA).

²⁶⁸ DOULAS ABRAMS ET. AL, CHILDREN AND THE LAW 458 (6th Ed. 2018) (hereinafter Child Law)

²⁶⁹ *Id.* at 16

²⁷⁰ *Id.* at 458-59.

²⁷¹ *Id.* at 466.

²⁷² *In re Gault*, 387 U.S. 1, 13; 87 S. Ct. 1428, 1436; 18 L. Ed. 2d 527, 538 (1967).

²⁷³ Child Law, *supra* note 268, at 472 (alterations added).

²⁷⁴ JJA, *supra* note 267, at 17.

social policy. Indeed, some young professionals today were children, infants, or not yet born when Republican Senator Bob Dole proclaimed in 1996 that “[u]nless something is done soon, some of today’s newborns will become tomorrow’s super-predators—merciless criminals capable of committing the most vicious acts for the most trivial of reasons.”²⁷⁵ Yet, despite the ease of Senator Dole’s assertion during “Get Tough” era of juvenile justice,²⁷⁶ the pendulum quickly reversed the narrative.

As noted *supra*, a mere nine years after Senator Dole’s remarks, the Supreme Court proscribed capital punishment in 2005 for those who commit capital offenses before age 18; in so doing, the Court noted “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult[.]”²⁷⁷ In *Roper*, the majority expansively discussed “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”²⁷⁸

In 2010, the Supreme Court similarly noted “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”²⁷⁹ as its rationale for precluding life without parole sentences for juvenile non-homicide offenders. The Supreme Court shortly thereafter, in 2012, reiterated its holdings in *Roper*

²⁷⁵ *Dole Seeks to Get Tough on Young Criminals*, L.A. TIMES, July 7, 1996, at A16, available at <https://www.latimes.com/archives/la-xpm-1996-07-07-mn-22017-story.html> (alteration added).

²⁷⁶ JJA, *supra* note 267, at 16-17 (Suggesting that the “Get Tough” era policies were “culminating in the late 1980s and early 1990s”).

²⁷⁷ *Roper*, *supra*, 543 U.S. at 570 (alteration added).

²⁷⁸ *Id.* at 569 (alteration added).

²⁷⁹ *Graham*, *supra*, 560 U.S. at 68.

and *Graham* and noted that they “show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders.”²⁸⁰

In 2023, juvenile justice still falls into the “Kids Are Different Era”²⁸¹ mentality in light of the *Roper/Miller/Graham* line of cases noting the physical and psychological distinctions between children and adults. Yet, as discussed *supra*, the focus of juvenile justice jurisprudence rapidly altered in less than a decade. How and when that change next occurs depends on the views of policymakers funding juvenile court programming.

Future Rehabilitation or Future Retribution of Juvenile Gang Members?

If one adopts, in whole or in part, a more retributive view of juvenile justice, the analysis begins and ends with charges. In this view, succinctly, the more charges brought, the more likelihood of the juvenile court acquiring jurisdiction and crafting an appropriately harsh sentence. Under this theory, juvenile gang members should be punished for both their bad criminal acts *and* their bad acts as a part of the group. In the views of one commentator, “a substantial gulf remains between the ‘law on the books’ and the ‘law in action’ given that “[s]tates continue to manipulate the fluid concepts of children and adults or treatment and punishment to maximize the social control of young people.”²⁸²

If one adopts the contrary view of juvenile justice, rehabilitation, then fewer charges likely reflect a better outcome for the juvenile. Arguably, under this view, one probationary sentence for larceny would balance the needs of juvenile rehabilitation, juvenile punishment, and restorative justice more efficiently than two probationary sentences for larceny *and* gang activities.

²⁸⁰ *Miller v. Alabama*, 567 U.S. 4601, 476; 132 S. Ct. 2455, 2468; 183 L. Ed. 2d 407, 422 (2012).

²⁸¹ JJA, *supra* note 267, at 1.

²⁸² *Id.* at 24 (alteration added).

Further complicating this issue is the uncertainty surrounding international law's place within the local court system.²⁸³ Discussed *supra*, the international legal community views a child to be anyone under 18 years old. Demonstrated *supra*, there is also an unwillingness to try child soldiers for their crimes against humanity in international tribunals. Because customary international law, in addition to treaty, criminalizes recruitment of child soldiers below the age of 15, special attention should be given to charges levied against those under 15.

For example, if a 14-year-old child soldier in Somalia—tasked with securing territory, recruiting, and inflicting violence—is effectively immune from prosecution for engaging in heinous acts, why should a 14-year-old in Chicago receive additional charges and possibly a longer sentence for protecting gang territory or committing violence as part of the gang?

If, 1) under the *Roper/Graham/Miller* jurisprudence in the 21st Century, juveniles are different than adults, 2) the jurisprudence of the 18th Century wove customary international law into our national fabric via the Constitution, and 3) the international community overwhelmingly declines to prosecute child soldiers for their acts, then how can juvenile gang charges for those also under 15 withstand constitutional scrutiny?

As discussed *supra*, child soldiers and juvenile gang members perform identical tasks—organizational survival, recruitment, and unlawful acts—as part of a structured, if not hierarchical, system. If members of the child soldier group survive and escape, the international community utilizes rehabilitation while extending mental health services as

²⁸³ Because most (if not all) states permit juvenile waiver into adult court, this analysis applies for all juveniles charged with a gang offense or subject to a gang-related sentencing enhancement.

part of reintegration services.²⁸⁴ If members of the latter group survive and face charges, the outcome rests with the prosecutor and the judge; the ultimate disposition may provide far less rehabilitation and more retribution from state to state, county to county, or courtroom to courtroom.

Even graduating beyond the basic level of similarities, the reality is that the international community views children in war zones (however they join the belligerent group) as victims. Conversely, the criminalization of youth gang activities reflects a societal belief that juvenile gang involvement in the United States is a choice. While this may be accurate to a certain extent because a child likely makes an affirmative *decision* to join a gang, whether that decision always qualifies as a *choice* is debatable.

In *Roper*, the Supreme Court noted that “that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”²⁸⁵ The mere membership of a juvenile in a gang or enlistment as a soldier does not provide the process with an indicia of reliability; the child’s decision may not be fully informed or may be the product of coercion, manipulation, lack of safety, lack of structure, or any of the other *supra* reasons. While it is accurate that “classical criminal law attributed crime to free-willed actors who chose to offend,”²⁸⁶ current juvenile justice theories reflected in the *Roper/Graham/Miller* logic exist in a far different space (the colloquial “Kids Are Different Era”)²⁸⁷ in this century.

²⁸⁴ For example, Save the Children is a Connecticut-based charity focused on international children’s aid projects including child soldier rehabilitation. See <https://www.savethechildren.org/us/charity-stories/child-soldiers> (last visited Apr. 22, 2023).

²⁸⁵ *Roper*, *supra*, 543 U.S. at 569.

²⁸⁶ JJA, *supra* note 267 at 6.

²⁸⁷ *Id.* at 1.

Indeed, if “the purposes of juvenile courts remain more rehabilitative and interventionist than those of the criminal justice system;”²⁸⁸ the aim should be *fewer* children with narrowly tailored charges in the juvenile justice system. Ultimately, similarly situated children performing generally similar acts receive different treatment based on their geographic location in the globe. In practice, this results with those committing the worst offenses receiving near-zero liability while those engaged in criminal acts of far smaller scope receiving additional liability and longer sentences.

Following World War II, except for the 1945 IMT noted *supra*, no international tribunal possessed jurisdiction to criminalize group membership as a standalone charge. Near universally, prosecutors have not brought charges against juveniles for their acts as child soldiers. The reality is that while juvenile justice in the United States may resemble a pendulum, the international agreements developed in the past 80 years reflect one way road moving away from placing juveniles, particularly those younger than 15, in legal jeopardy for criminal acts.

From a practical perspective, as noted *supra*, this argument does not advocate or propose that juveniles in gangs should receive total immunity for their actions. Under Michigan’s current laws, an *Order of Adjudication* for a juvenile convicted of a felony and the additional, separate, gang felony would appear as follows:

THE COURT FINDS:						
4. The following material allegations of the petition are sustained or dismissed:						
Count	ADJUDICATED BY			DISMISSED By*	ALLEGATIONS	CHARGE CODE(S) MCL Citation/PACC Code
	Plea*	Court	Jury			
1		G			Mayhem	MCL 750.397
2		G			Gang Related Felony	MCL 750.411u

²⁸⁸ *Id.* at 64.

Assuming, *arguendo*, that policymakers adopt the full scope of arguments advanced herein—immunization of juveniles under 15 years old from separate gang charges or sentence enhancements from gang activity—what remains? In other words, removing the gang felony as a separate offense would change the same adjudication to:

THE COURT FINDS:						
4. The following material allegations of the petition are sustained or dismissed:						
Count	ADJUDICATED BY			DISMISSED By*	ALLEGATIONS	CHARGE CODE(S) MCL Citation/PACC Code
	Plea*	Court	Jury			
1		G			Mayhem	MCL 750.397

Yet, this mere change in the number of charges would not otherwise alter the reality that gang activity contributed to the underlying offense in whole or in part. Regardless of whether the court finds the youth responsible for one or two felony-level offenses, the justice system must nonetheless process the juvenile. The question of “what next?” is relevant given that the juvenile will likely return to the same community where the gang activity originated.

The National Gang Center operated through the federal Office of Juvenile Justice and Delinquency Prevention, noted *supra*, created a Comprehensive Gang Model (CGM) containing “a set of five interrelated core strategies that offer a comprehensive, collaborative approach designed to prevent and reduce gang violence.”²⁸⁹ The interdisciplinary strategies CGM relies upon are: “Community Mobilization,” “Opportunities Provision,” “Social Intervention,” “Suppression,” and “Organizational Change and Development.”²⁹⁰ After studying CGM at five project sites nearly

²⁸⁹ Office of Juvenile Justice & Delinquency Prevention, Nat’l Gang Center, *Comprehensive Gang Model: Core Strategies*, <https://nationalgangcenter.ojp.gov/sites/g/files/xyckuh331/files/media/document/CoreStrategies.pdf> (last visited Apr. 22, 2023).

²⁹⁰ *Id.*

simultaneously throughout the United States for multiple years in the late 1990s, it is accurate that 1) the individual reports produced some useful recommendations for future systemic anti-gang efforts and 2) obviously questionable methodology at each study's outset created longitudinal problems undercutting the reliability of the final data.²⁹¹

In a report addressing a five-year application of CGM to the Mesa, Arizona Gang Intervention Program from 1998 to 2002, researchers noted:

Gang programs in earlier decades emphasized single-strategy approaches to gang prevention, social intervention, crisis intervention, community organization, street work, interagency coordination, and community organization. Evaluations of these programs suggest negative, indeterminate, or in a very few cases limited positive results.

Community-based gang programs have failed for a range of reasons: poor conceptualization, vague or conflicting objectives, weak implementation, organizational-goal displacement (particularly by police and youth agencies), interagency conflict, politicization, lack of sustained effort, insufficient resources, etc. . . . This may be due in large measure to the complexity of community-based gang programs, and to the difficulties of designing and implementing complex evaluations of such programs in the community.²⁹²

While correct that the five-year study in Mesa produced an overall 11.9% decrease in youth offenses in the target area which received CGM services, the three nearby comparison areas selected as control groups without services also decreased their overall youth offenses by 5.6%, 8%, and 9.1%.²⁹³ The study noted that the survey's results "indicate that the program probably had a positive effect in containing the gang

²⁹¹ While addressed more in depth *infra*, see in particular Mesa Report, *infra* note 292, at 2.21 (PDF page 79) ("Each local site evaluator had his or her own research interest, which sometimes could become complementary to the evaluation mission of the National Evaluator, sometimes not. At four of the five sites, the local evaluator had no research experience with gang youth.")

²⁹² Irvin Spergel, Kwai Ming Wa, & Rolando Sosa, *Evaluation of the Mesa Gang Intervention Program (MGIP)*, 2.1-2.2, May 2005, <https://www.ojp.gov/pdffiles1/ojdp/grants/209187.pdf> (internal citations omitted and omission added) at PDF pages 59-60 (*Hereinafter* "Mesa Report")

²⁹³ *Id.* at table 14.3 (PDF page 461).

problem, particularly in reducing violent crime, and, to some extent, other types of crime” and that it facilitated a “greater reduction in crime by program youth individually, and by youth generally in the program area, than would have occurred otherwise.”²⁹⁴

However, a relatively small sample size of 258 CGM program youth against 96 comparison youth in the control group,²⁹⁵ significant misalignment of institutional goals in the early phases of the program,²⁹⁶ and over-reliance on youth self-reporting or youth interviews as primary data sources²⁹⁷ call into question the study’s reliability.

The Mesa study concluded by 1) calling for “a better assessment system . . . for identifying highly at-risk and gang-involved delinquent youth in comprehensive, community-wide gang programs,” 2) the development of a “fully-effective approach utilizing social intervention and controls by local grassroots organizations in combination with established youth-serving and criminal-justice agencies,” and 3) calling for a “special emphasis” on “social-intervention services for “gang youth with special needs related to school and job success and social development.”²⁹⁸

²⁹⁴ *Id.* at 14.10 (PDF page 457).

²⁹⁵ *Id.* at ii-iii (PDF pages 5-6).

²⁹⁶ *See id.* at 6.11 (PDF page 134) “the community-mobilization strategy . . . did not adequately facilitate the collaboration of grassroots groups and organizations with criminal-justice and social agencies to address the social-development and control problems of gang-involved youth. The Youth gang problem was not viewed or addressed in its full continuum of formal and informal, established-agency and grassroots-organization connections.”) *See also id.* at 6.42 (PDF page 165) “The Project Director and Case Management Coordinator frequently expressed concern that patrol officers and the Project detectives often harassed gang youth or associates by taking away their driver’s licenses for minor infractions . . . it was extremely difficult to recover licenses unless a \$500 fine was paid.” (Omission added)

²⁹⁷ *Id.* at 8.2 (PDF page 187) “Our main individual-level data-collection instruments were the individual gang member survey, the worker tracking form for program youth, and official police arrest histories for both program youth (interviewed and not interviewed) and comparison youth (all of whom we interviewed)”

²⁹⁸ *Id.* at 16.26 (PDF page 498).

The Tucson study, overseen by local agency “Our Town,”²⁹⁹ particularly lacks credibility given that “Our Town did not develop an adequately-functioning Steering Committee to guide the Project in its development and activities during its four-year period of operations.”³⁰⁰ The Tucson study also suffered from a smaller sample size (227)³⁰¹ than the Mesa study, found “no statistically significant differences in change patterns for total arrests . . . between program and comparison youth” during the study,³⁰² and declared that “Our Town did not develop a comprehensive approach to the gang problem Our Town appeared to be interested only in sustaining and/or funding an expansion of its own established services.”³⁰³

Of the 180 total juveniles (101 studied and 79 in the control group)³⁰⁴ in the Bloomington-Normal study, researchers “belatedly . . . discovered that the sample of gang youth from the comparison area did not adequately represent its gang population.”³⁰⁵ In other words, “the value of the comparison sample was diminished” by poor initial research controls.³⁰⁶ This study ultimately concluded that “[t]he program and comparison youth samples that were analyzed were neither comparable in terms of prior arrest records, nor representative of the gang populations in either community.”³⁰⁷ Further exacerbating the

²⁹⁹ See Irvin Spergel, Kwai Ming Wa, & Rolando Sosa, *Evaluation of the Tucson Comprehensive Community-Wide Approach to Gang Prevention, Intervention, and Suppression Program*, 3.4 May 2005, <https://www.ojp.gov/pdffiles1/ojjdp/grants/209190.pdf> (PDF page 76) (*hereinafter* Tucson Report)

³⁰⁰ *Id.* at 4.8-4.9 (PDF pages 93-94).

³⁰¹ *Id.* at 6.18 (PDF page 138).

³⁰² *Id.* at 11.9 (PDF page 253) (omission added).

³⁰³ *Id.* at 11.6 (PDF page 250) (omission added).

³⁰⁴ Irvin Spergel, Kwai Ming Wa, & Rolando Sosa, *Evaluation of the Bloomington-Normal Comprehensive Gang Program*, 11.3, May 2005, <https://www.ojp.gov/pdffiles1/ojjdp/grants/209186.pdf>

³⁰⁵ *Id.* at 7.14 (PDF page 147).

³⁰⁶ *Id.* at 7.15 (PDF page 148).

³⁰⁷ *Id.* at 15.19 (PDF page 369) (alteration added).

study's problems is that researchers "learned belatedly that the arrest patterns of police in the Bloomington-Normal program and comparison areas were sharply different."³⁰⁸

Foundationally, the San Antonio report concedes that "[t]he lack of clarity and focus about the scope and nature of the gang problem may well have handicapped the development of the [local program] and affected the overall project results achieved."³⁰⁹ After studying the 230 juveniles (104 in the program and 120 in the control group)³¹⁰ between 1995 and 1999,³¹¹ the report noted that the local police department "did not appear to invest a great deal of staff resources in the development of the" local program.³¹² Instead, the local program expended its funds generally "on the development of a service program staffed mainly by outreach youth workers, case managers, and by local social-service agencies."³¹³ The study noted that the local organization "did not become operational until almost two years after the [local police agency] received [federal] funding."³¹⁴ This analysis concluded:

In sum, program youth did better in reducing their level of arrests for different types of crime (except for drug crime) than did comparison youth, but none of the differences were statistically different as main effects. We have no evidence to indicate that the project was substantially effective in reducing arrests for youth, other than what would have occurred without the program.³¹⁵

³⁰⁸ *Id.* at 8.4 (PDF page 152).

³⁰⁹ Irvin Spergel, Kwai Ming Wa, & Rolando Sosa, *Evaluation of the San Antonio Comprehensive Community-Wide Approach to Gang Prevention, Intervention, and Suppression Program*, 3.7, May 2005, <https://www.ojp.gov/pdffiles1/ojjdp/grants/209189.pdf> (PDF page 80).

³¹⁰ *Id.* at 6.18 (PDF page 129).

³¹¹ *Id.* at 1.2 (PDF page 12).

³¹² *Id.* at 11.3-11.4 (PDF pages 216-17).

³¹³ *Id.*

³¹⁴ *Id.* at 11.4 (PDF pages 217) (alterations added).

³¹⁵ *Id.* at 11.9 (PDF page 222).

Additionally, the report noted that “[i]t is likely that the absence of a significant [local] Project effect was due to the fact that the [law enforcement agency], local agencies and grassroots groups did not adequately support the OJJDP Comprehensive, Community-Wide Gang Program Model.”³¹⁶

The final project site, a study from 1995-1999 in Riverside California,³¹⁷ seemingly suffered from a systemic methodology failure for the first four years:

There was general evidence that most of the gang violence, drug operations, and other gang problems took place at night and to a considerable extent on the streets of Riverside. This view of the police and the National Evaluation staff was not accepted by the Project Director and the director of the agency that supplied youth workers. During the first four years of its existence, the Project addressed the gang problem mainly on a 9-to-5 basis during weekdays.

The report later notes that this city “did not begin to substantially meet the requirements of the Comprehensive Gang Program . . . until the latter phase of the project, when a new project director was appointed.”³¹⁸ Ultimately, the total sample size consisted of 182 juveniles in the program group and 135 juveniles in the control/comparison group.³¹⁹ Researchers noted that while “[t]he most reliable data available on general crime offenses were individual offense statistics reported by the Riverside Police Department Juvenile and adult gang and non-gang offense data were not differentiated.”³²⁰ The report further disregards its own information by noting “because of possible poor gang-offense

³¹⁶ *Id.* at 11.10 (PDF page 223) (alterations added).

³¹⁷ Irvin Spergel, Kwai Ming Wa, & Rolando Sosa, *Evaluation of the Riverside Comprehensive Community-Wide Approach to Gang Prevention, Intervention and Suppression*, 3.1, May 2005, <https://www.ojp.gov/pdffiles1/ojjdp/grants/209188.pdf> (PDF page 74).

³¹⁸ *Id.* at 6.1 (PDF page 116).

³¹⁹ *Id.* at 8.19 (PDF page 185).

³²⁰ *Id.* at 13.6 (PDF page 324).

data-system development, we have questions about the reliability of offense patterning prior to 1998.”³²¹

Ultimately, aside from perhaps requiring better methodological controls on federal research funds, what do the five studies demonstrate? First, a one-size-fits-all approach to juvenile gang issues is inappropriate given the non-identical nature of cultures and communities comprising the five cities studied. In other words, what may work to address the influence of the Latin Kings in Chicago³²² may not work on the Hammerskin Nation in Las Vegas.³²³

Second, notwithstanding serious flaws in the data collection methodology of the five studies—and accepting, *arguendo*, that the collected data comported with each city’s protocols—the inescapable reality is that the data produced a skewed result because of non-compliance with the CGM model. Restated, the statistical analysis produced an accurate result using the data examined; however, because the local programs collecting the data did not fully adopt the CGM model prior to (or during) the experiment, the data analyzed did not present an accurate representation of the program’s effectiveness on reducing juvenile gang involvement.

³²¹ *Id.* at 13.8 (PDF page 326).

³²² See *United States v. Farmer*, 38 F.4th 591, 597 (7th Cir. 2022) (“The Latin Kings are a violent street gang headquartered in Chicago, Illinois and operating out of local chapters known as ‘hoods.’”).

³²³ See *United States v. Hack*, No. CR 08-00344 DDP; 2009 U.S. Dist. LEXIS 20801, at *8 (C.D. Cal. Mar. 4, 2009) (“he learned that the violence of the Hammerskin Nation, a neo-Nazi skinhead gang, had been on the rise in Las Vegas throughout 2007.”)

Third, the justice system should integrate the experience of anti-gang organizations³²⁴ already existing in the community with the ideals of juvenile justice rehabilitation. Nearly two decades after the five attempts to utilize the federal CGM model, researchers again noted that “it is imperative to develop effective, evidence-based programs to prevent gang membership and to reduce the impact of gangs on the adolescents who do join them. In this area where effective programs are strongly needed, however, they are least available.”³²⁵ The researchers argued that while “evidence-based programs for a variety of other problem behaviors do exist, currently no known gang programs meet the rigorous standards of demonstrated effectiveness” needed to address the issue.³²⁶

In applying a modified version of Functional Family Therapy (FFT)³²⁷ to research gang influence (“FFT-G”)³²⁸ the study found that FFT-G “had strong deterrent effects for high-gang-risk youth but not for low-gang-risk youth.”³²⁹ Specifically, the study divided its sample size of 129 participants into a group receiving FFT-G treatment (n=66) and a

³²⁴ See e.g. the Gang Rescue and Support Project (GRASP) in Denver, <https://graspyouth.org/>, (“GRASP (Gang Rescue and Support Project) is a peer-run, intervention program that works with youth who are at-risk of gang involvement or are presently active in gangs, helps families of gang victims, and serves as a youth advocate. GRASP works so well because it is primarily run by ex-gang members who broke free of the gang life-style and turned their lives around”) or Homeboy Industries, in Los Angeles, <https://homeboyindustries.org/> (“Homeboy Industries is the largest gang rehabilitation and re-entry program in the world. For over 30 years, we have stood as a beacon of hope in Los Angeles to provide training and support to formerly gang-involved and previously incarcerated people, allowing them to redirect their lives and become contributing members of our community.”)

³²⁵ Terence Thornberry et al, *Reducing Crime Among Youth At Risk for Gang Involvement*, 17 CRIM. & PUB. POL’Y 953, 954 (2018) (on file with author).

³²⁶ *Id.*

³²⁷ *Id.* at 960 (“FFT is a brief and widely disseminated evidence-based treatment for youth presenting with problem behaviors including delinquency and substance abuse”)

³²⁸ *Id.* (“Given the general severity of risk factors in a gang population, FFT-G was designed to involve more direct treatment to address ongoing pressure from neighborhood gang members as well as greater preparation prior to treatment”)

³²⁹ *Id.* at 982.

control group (n=63).³³⁰ The results ultimately reflected that “FFT-G demonstrated a clear deterrent effect on criminal offending for the high-gang-risk youth. Eighteen months after the program began, and 12 months after treatment ended, the FFT-G group had significantly lower recidivism rates as compared with those of the control group.”³³¹

Fourth, while a multidisciplinary approach is likely appropriate, the views of the key stakeholder groups must align from the outset. As noted *supra*, if communities do not uniformly apply the CGM framework with appropriate tweaks as needed, the program’s applicability is questionable at best.

The ultimate point is that the juvenile justice system has a unique opportunity to inhibit future gang related activity regardless of how (or on what grounds) a juvenile younger than 15 years old enters the system. Wasting the chance by trying one theory at a time, such as only zero tolerance or only job placement services, squanders the opening for change; all participants in the system must work together to promote the juvenile justice system’s goal of rehabilitation.

Once More Unto The Breach³³²

The participants at any stage of the juvenile justice process could fairly view the system as a battle; victims battle for justice, juvenile offenders battle for fairness, professionals operating the system battle to balance equities, and policymakers controlling the system’s funding battle to maintain a consistent long term narrative. Yet, as each day begins anew, the system’s participants perpetually charge into the courtroom

³³⁰ *Id.* at 966.

³³¹ *Id.* at 983.

³³² WILLIAM SHAKESPEARE, HENRY V act 3, sc. 1, l. 1-3 (“Once more unto the breach, dear friends, once more, or close up the wall with our English dead!”), <https://www.folger.edu/explore/shakespeares-works/henry-v/read/> (last visited Apr. 22, 2023).

battlefield to make their voices known. The problem, however, is that while the *raison d'etre* is known for many courts,³³³ it is unknown for juvenile court. Is it one of retribution or is it one of rehabilitation? Until the resolution of that question, juveniles may receive inconsistent treatment based on the views of the professionals assigned to their case.

Compounding the conflict is the uncertain level of adherence local courts must provide to customary international law. It is true, of course, that binding authority of appellate courts and unambiguous statutes provide little discretion to the courts actually resolving the community's injustices.³³⁴ On the other hand, customary international law is incorporated into the law of the land via the federal Constitution.³³⁵ Because it is, and the federal Constitution provides the minimum legal standards states must observe,³³⁶ then courts at all levels have an ongoing obligation to consider whether state statutes and precedent meet that minimum in light of established custom and international practice. While it is a fair argument to note, in 2023, that this position seemingly surrenders aspects of sovereignty afforded to states, the more appropriate argument is that states may have developed binding precedent in contravention of Constitutional minimums.

³³³ For example, a divorce court's purpose is the dissolution of the marital estate and division of assets, a criminal court's purpose is to punish for violations of criminal law, and a probate court's purpose is ensuring an orderly distribution of the deceased's estate.

³³⁴ See *Ins. Group Comm. V. Denver*, 329 U.S. 607, 612; 67 S. Ct. 583, 585; 91 L. Ed. 547, 550 (1947) ("When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.") See also *Robinson v. Shell Oil*, 519 U.S. 337, 340; 117 S. Ct. 843, 846; 136 L. Ed. 2d 808, 813 (1997), quoting *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240; 103 L. Ed. 2d 290; 109 S. Ct. 1026 (1989) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'")

³³⁵ See *supra* notes 11, 231-33.

³³⁶ See *Mills v. Rogers*, 457 U.S. 291, 300; 102 S. Ct. 2242, 2449; 73 L. Ed. 16, 23 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.")

The practical challenge for applying the customary international law discussed herein is that 1) seldom will juvenile courts have reason to consider it in light of longstanding precedent imposed by appellate courts and 2) the legal argument rests on application and extension by analogy.

No international law, customary or otherwise, specifically precludes the prosecution of juveniles younger than 15 for gang-related offenses; the applicable authorities and customary international law discussed *supra* only proscribe imposing liability on child soldiers. Yet, given the substantial overlap between child soldiers and juveniles in gangs, a good faith argument exists³³⁷ that juveniles under 15 in gangs automatically fall under the legal liability protections afforded to child soldiers. Alternatively, if the trier of fact finds that the protection does not *automatically* extend to juvenile gang members under 15 years old, international custom as incorporated by the federal Constitution and the similarities between the two groups jointly provide persuasive authority to bolster the argument.

Conclusion

Dependent upon the views of those wielding the policymaking gavel at a given moment, the purpose of the juvenile justice system in the United States vacillates between retribution and rehabilitation. The core premise of the system, now and at the inception of the first juvenile court, is that rehabilitation should form the overarching policy

³³⁷ See Mich. Ct. R. 1.109(E)(5)(b) (“The signer of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, **the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law**[.]”) (alteration and emphasis added).

goal for transgressions committed by juveniles. By compiling charges for juveniles, even if in good faith, does the system truly meet its rehabilitative goals?

Similarly, if juveniles in gangs are subsumed into the overarching class of child soldiers, and customary international law limits the liability of those soldiers under 15, what legal basis exists to prosecute the separate gang offense for juvenile gang members under 15? As noted *supra*, this discussion does not propose that juveniles in the United States should receive total immunity for their actions in contravention of criminal law. Such an argument would effectively reinstate the common law doctrine of infancy.³³⁸ Rather, the argument is that if juvenile justice is focused on rehabilitation, and if juveniles in gangs fall within the larger category of child soldiers, then the juvenile justice system should immunize juveniles under 15 from additional liability to promote rehabilitation.

This approach, rather than piling charges onto a juvenile's record, permits realignment of domestic law with international obligations required by the Constitution. It also reinforces the differentiation between a rehabilitative juvenile court and a retributive adult court. In current practice, whether a juvenile is a gang member or a child soldier is based on the child's location in the world; this distinction is arbitrary and runs afoul of the rehabilitation scope originally intended for juvenile court. Undoubtedly, if the "moody 12 year old" stationed at a military checkpoint in Somalia—observed "shak[ing] his gun menacingly" at an approaching car³³⁹--were in Detroit, he would not be the subject of a New York Times article about his plight or positive comment about his fighting skills.

³³⁸ See Child Law, *supra* note 268, at 480. (Otherwise colloquially known as the "rule of sevens," this doctrine at "common law presumed that children under seven were without criminal capacity (and thus could not be convicted of a crime), created a rebuttable presumption of criminal incapacity for children between seven and fourteen, and held children over fourteen to adult capacity.")

³³⁹ See Gettleman, *supra* note 1 (alteration added).

Instead, he would likely face at least charges (first) for the felony of felonious assault³⁴⁰ because of the involvement of the gun and (second) for the gang felony.³⁴¹ Notably, at least in Michigan, the statute permits consecutive sentencing for the gang felony.³⁴²

The differences between the legal liability of child soldiers under 15 and juvenile gang members under 15 are striking. Yet, the distinctions addressed *supra* become reliant upon political or geographic boundaries. A realignment of domestic law should occur so that juveniles in gangs within the United States receive similar legal treatment to similarly aged child soldiers in gangs abroad. This realignment still balances the needs of the community with the rehabilitation intended for juveniles.

³⁴⁰ See *People v. Jones*, 443 Mich. 88, 100 (1993) (“Felonious assault is defined as a simple assault aggravated by the use of a weapon.”).

³⁴¹ See MCL 750.411u(1) (“If a person who is an associate or a member of a gang commits a felony or attempts to commit a felony and the person's association or membership in the gang provides the motive, means, or opportunity to commit the felony, the person is guilty of a felony punishable by imprisonment for not more than 20 years.”)

³⁴² MCL 750.411u(2) (“A sentence imposed under this section is in addition to the sentence imposed for the conviction of the underlying felony or the attempt to commit the underlying felony and may be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.”)

Appendix A—International Tribunal Jurisdiction Charts

(1945) International Military Tribunal (IMT)³⁴³		
Art. 6(a)—“Crimes Against Peace”	Art. 6(b)—War Crimes	Art. 6(c)—“Crimes Against Humanity”
“Planning, preparation, initiation, or waging a war of aggression or a war in violation of international treaties, agreements or assurances”	“Murder”	“Murder”
“Participation in a common plan or conspiracy for the accomplishment of any of the foregoing”	“Ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory”	“Extermination”
	“murder or ill-treatment of prisoners of war or persons on the seas”	“Enslavement”
	“killing of hostages”	“Other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal.”
	“Plunder of public or private property”	
	“wanton destruction of cities, towns, or villages, or devastation not justified by military necessity”	

(1946) International Military Tribunal for the Far East (IMTFE)³⁴⁴		
Art 5(a)—“Crimes Against Peace”	Art 5(b)—“Conventional War Crimes”	Art 5(c)—“Crimes Against Humanity”
“Planning, preparation, initiation or waging a declared or undeclared war of aggression or war in violation of international law, treaties, agreements or assurances”	“Violations of the Laws or Customs of War”	“Murder”
“Participation in a common plan or conspiracy for the accomplishment of any of the foregoing”		“Extermination”
		“Enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecution on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the tribunal”

³⁴³ See London Agreement Annex, *supra* note 192, at arts. 6(a)-(c).

³⁴⁴ See IMTFE Charter, *supra* note 197, at arts 5(a)-(c).

Appendix A—International Tribunal Jurisdiction Charts

(1994) International Criminal Tribunal for Rwanda (ICTR)³⁴⁵		
Art. 2—Genocide	Art 3—“Crimes against humanity”	Art 4—Violations of Common Article 3 of the Geneva Conventions and Additional Protocol II
“Genocide”	“Murder”	“Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”
“Conspiracy to Commit Genocide”	“Extermination”	“Collective punishments”
“Direct and public incitement to commit genocide”	“Enslavement”	“Taking of hostages”
“Attempt to commit genocide”	“Deportation”	“Acts of terrorism”
“Complicity in genocide”	“Imprisonment”	“Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”
	“Torture”	“Pillage”
	“Rape”	“The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”
	“Persecutions on political, racial, and religious grounds”	“Threats to commit any of the foregoing acts.”
	“Other inhumane acts”	

³⁴⁵ S.C. Res. 955 (Nov. 8, 1994), https://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf

Appendix A—International Tribunal Jurisdiction Charts

(1998) International Criminal Tribunal for the Former Yugoslavia (ICTY)³⁴⁶			
Art. 2—“Acts against persons or property covered under the provisions of the relevant Geneva Convention”	Art 3—Violations of “the laws or customs of war. Such violations shall include, but not be limited to”	Art 4- Genocide	Art 5—“Crimes when committed in armed conflict”
“Wilful [sic] killing”	“Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering”	“Genocide”	“Murder”
“Torture or inhuman treatment, including biological experiments”	“Wanton destruction of cities, towns or villages, or devastation not justified by military necessity”	“Conspiracy to commit genocide”	“Extermination”
“Wilfully [sic] causing great suffering or serious injury to body or health”	“attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings”	“Direct and public incitement to commit genocide”	“Enslavement”
“Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”	“Seizure of, destruction or wilful [sic] damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”	“Attempt to commit genocide”	“Deportation”
“Compelling a prisoner of war or a civilian to serve in the forces of a hostile power”	“Plunder of public or private property”	“Complicity in genocide”	“Imprisonment”
“Wilfully [sic] depriving a prisoner of war or a civilian of the rights of fair and regular trial.”			“Torture”
“Unlawful deportation or transfer or unlawful confinement of a civilian”			“Rape”
“Taking Civilians as Hostages”			“Persecutions on political, racial, and religious grounds”
			“Other inhumane acts”

³⁴⁶ *Supra* notes 198, 201, and 202.

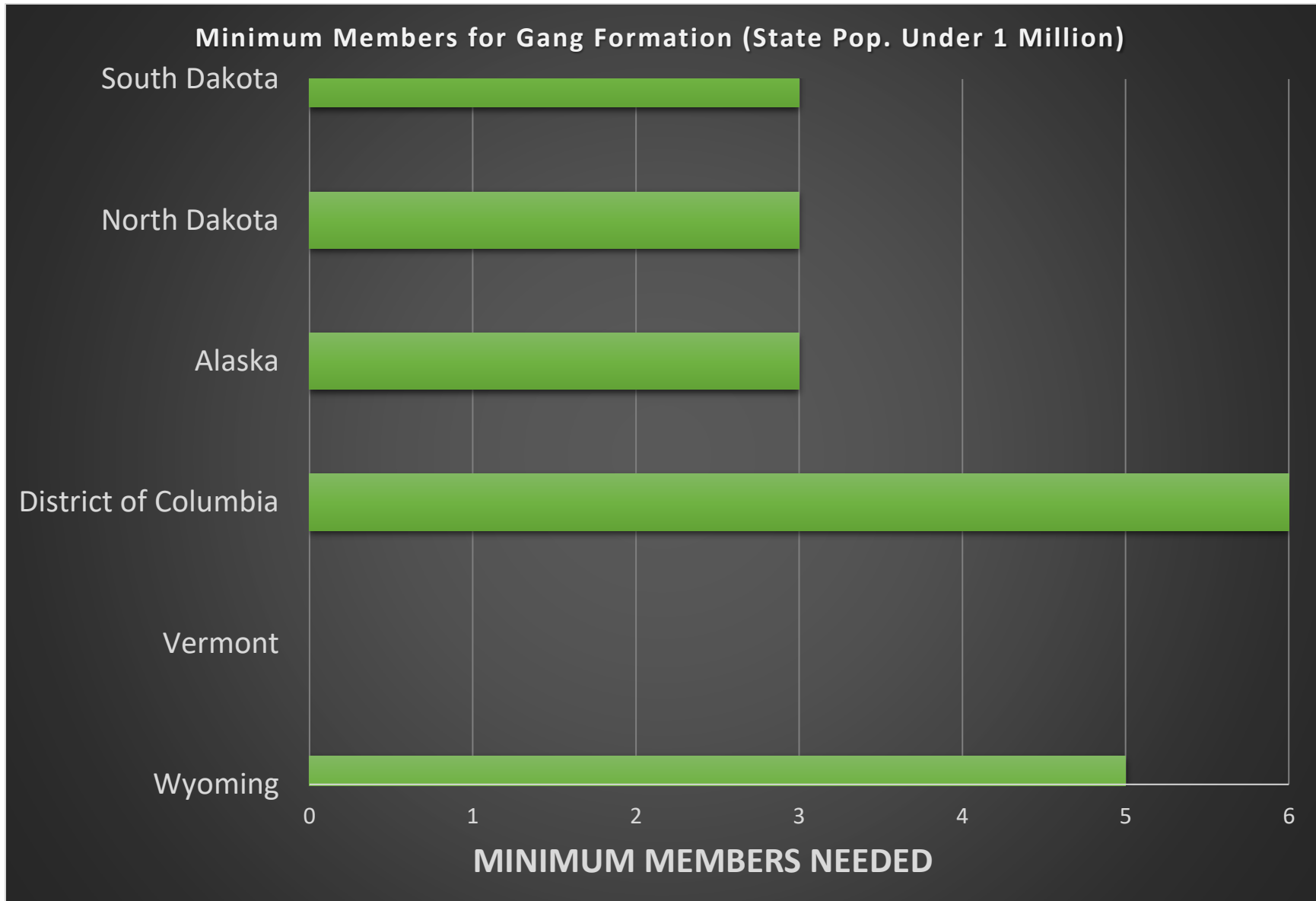
Appendix A—International Tribunal Jurisdiction Charts

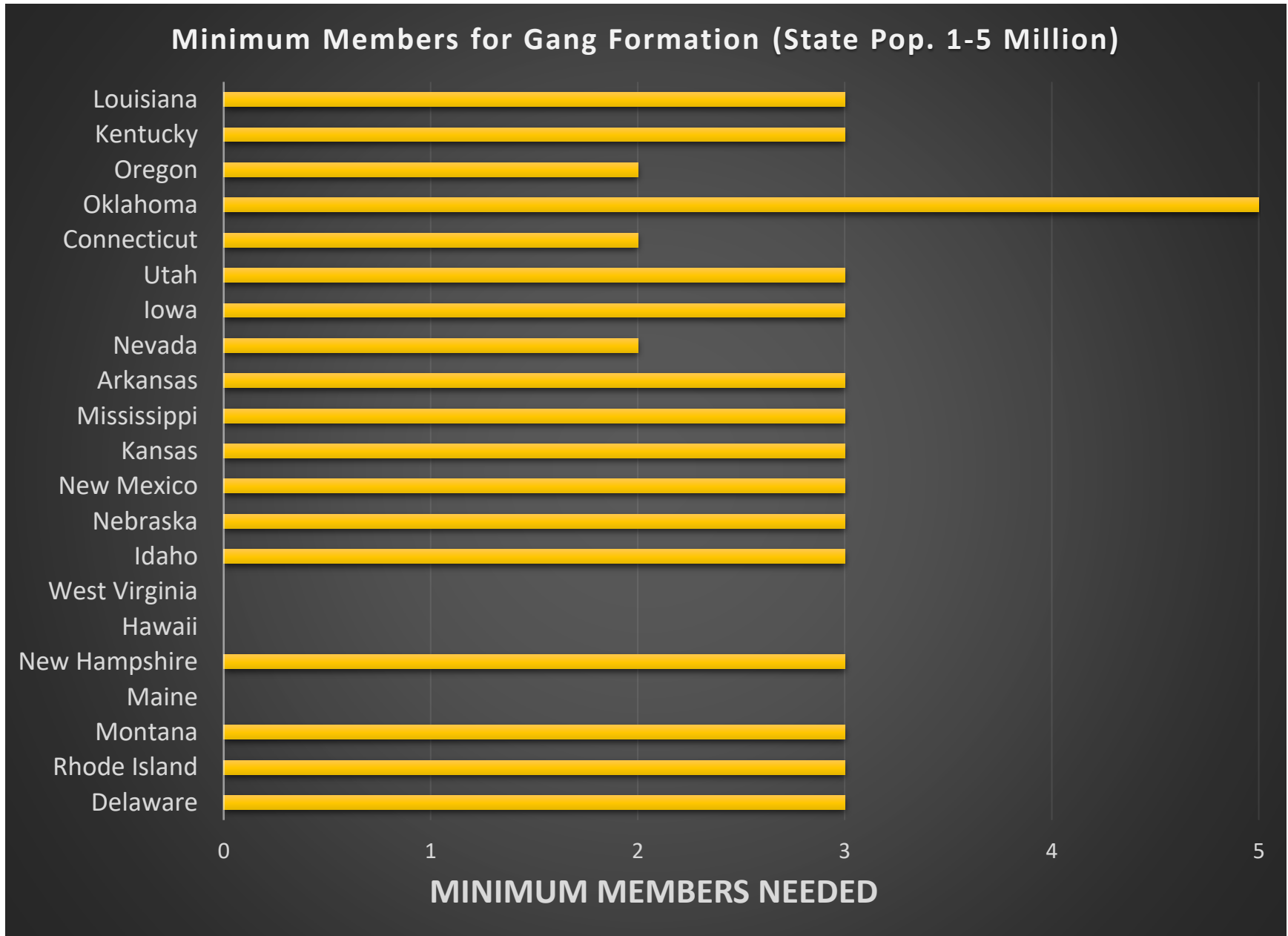
(2002) Special Court for Sierra Leone (SCSL)³⁴⁷			
Art 2—“Crimes Against Humanity”	Art. 3-- Violations of Common Article 3 of the Geneva Conventions and Additional Protocol II	Art. 4—“Other serious violations of international humanitarian law”	Art. 5—“Crimes Under Sierra Leonean Law”
“Murder”	“Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”	“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”	“Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act” (i) “Abusing a girl under 13 under of age” (ii) “Abusing a girl between 13 and 14 years of age” (iii) “Abduction of a girl for immoral purposes”
“Extermination”	“Collective punishments”	“Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objections under the international law of armed conflict”	“Offences relating to the wanton destruction of property under the Malicious Damage Act” (i) “Setting fire to dwelling-houses, any person being therein” (ii) “Setting fire to public buildings” (iii) “Setting fire to other buildings”
“Enslavement”	“Taking of hostages”	“Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”	
“Deportation”	“Acts of terrorism”		
“Imprisonment”	“Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”		
“Torture”	“Pillage”		
“Rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence”	“The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”		
“Persecution on political, racial, ethnic, or religious grounds”	“Threats to commit any of the foregoing acts.”		
“Other inhumane acts”			

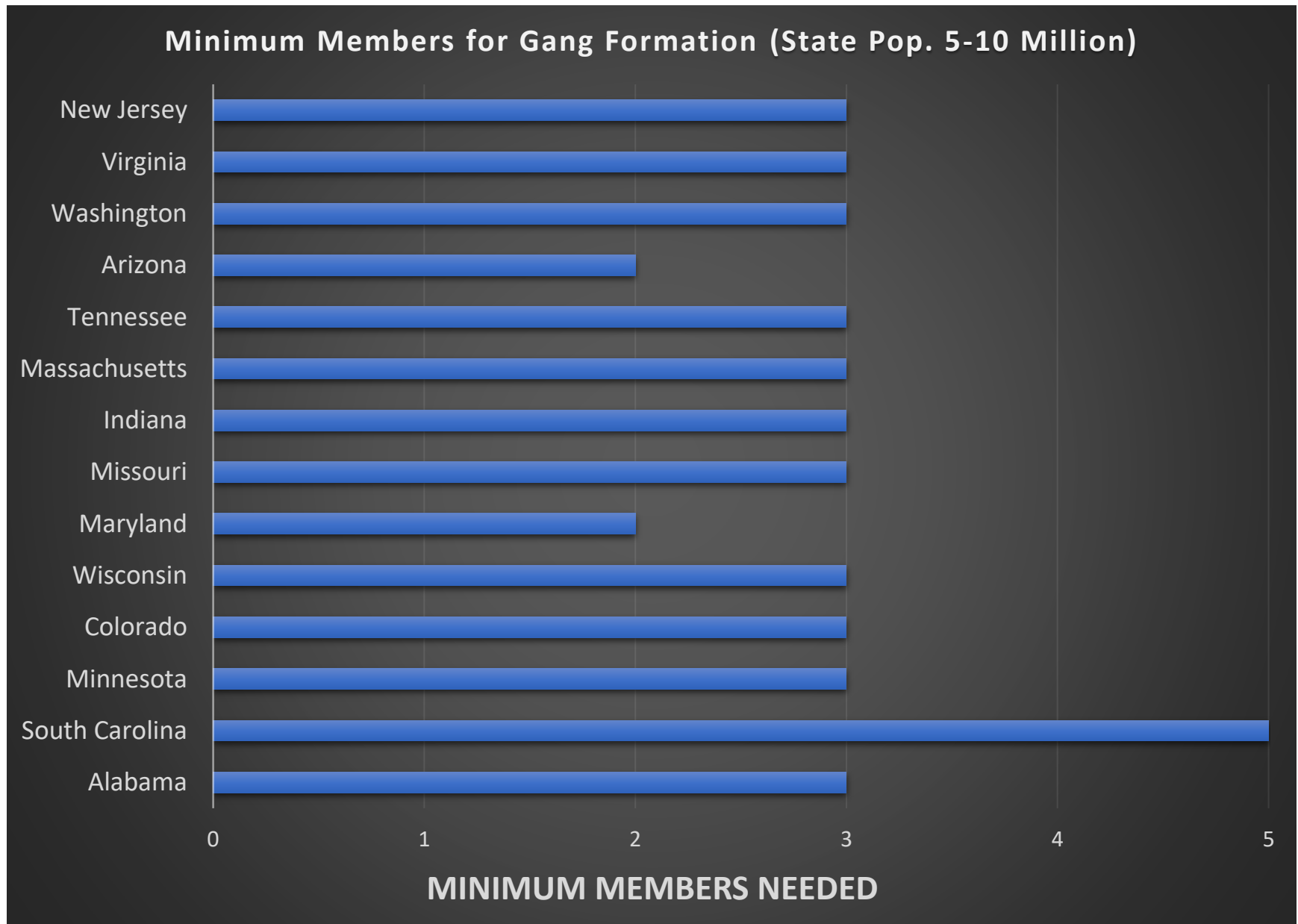
(2000) United Nations Transitional Administration in East Timor³⁴⁸
Section 10—Exclusive Jurisdiction
“Genocide”
“War Crimes”
“Crimes against humanity”
“Murder”
“Sexual Offenses”
“Torture”

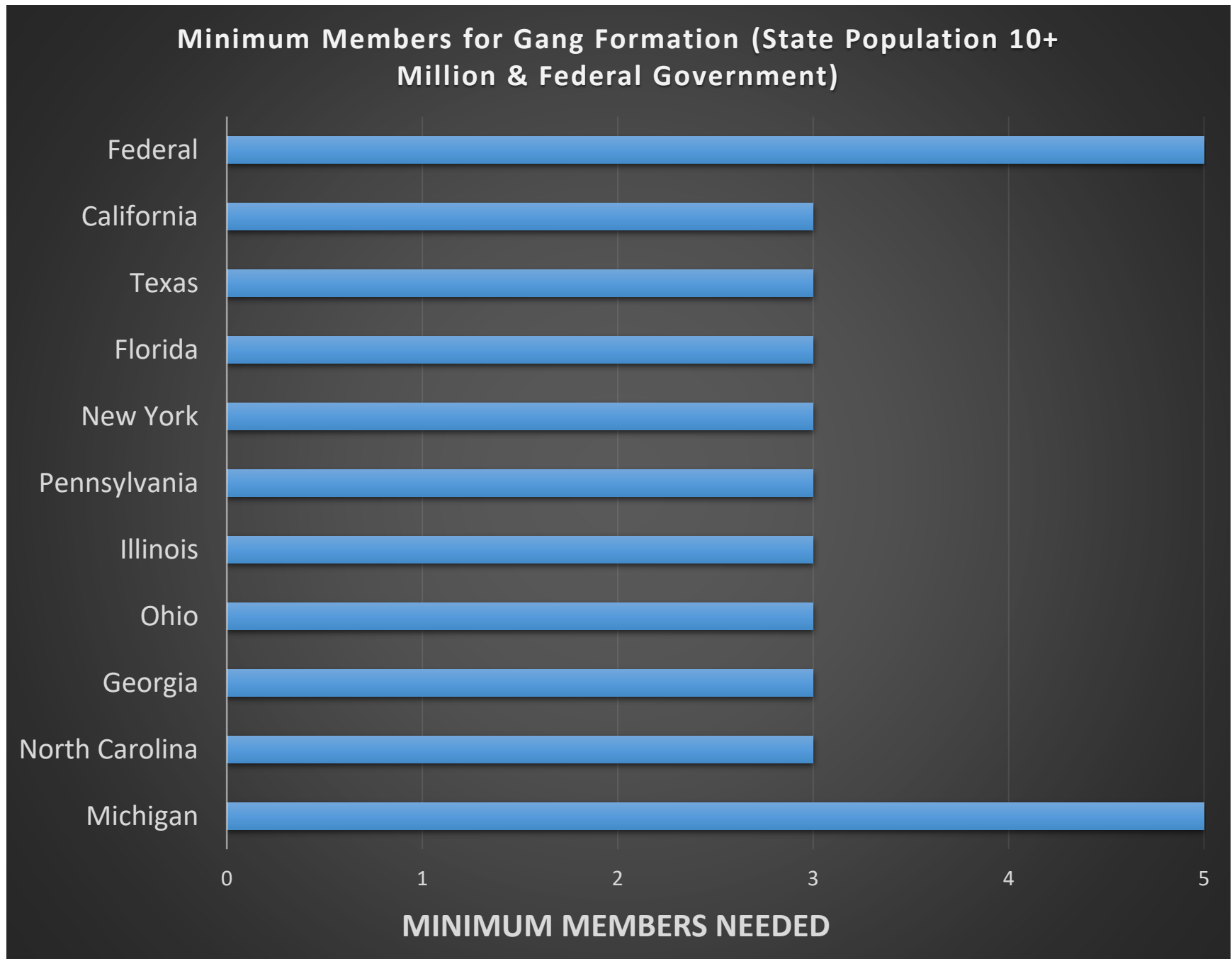
³⁴⁷ See SCSL Statute, *supra* note 213 at arts 2-5.

³⁴⁸ East Timor Regulation, *supra* note 204, at art. 10.1









Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Federal	333,287,557	18 U.S.C. § 521(a)	Criminal Street Gang	<p>“Criminal Street Gang” means an ongoing group, club, organization, or association of 5 or more persons—</p> <p>(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);</p> <p>(B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce. “State” means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.</p>	5
Alabama	5,074,296	Ala. Code § 13A-6-26	Streetgang	<p>(a) For purposes of this section, the term "streetgang" means any combination, confederation, alliance, network, conspiracy, understanding, or other similar arrangement in law or in fact, of three or more persons that, through its membership or through the agency of any member, engages in a course or pattern of criminal activity. (b) A person who expressly or by implication threatens to do bodily harm or does bodily harm to a person, a family member or a friend of the person, or any other person, or uses any other unlawful criminal means to solicit or cause any person to join or remain in a streetgang is guilty of the crime of compelling streetgang membership. (c) The crime of compelling streetgang membership is a Class C felony. (d) Notwithstanding subsection (c), the crime of compelling streetgang membership is a Class A felony if the defendant is over the age of 18 years and the other person is under the age of 18 years. (e) This section shall not be construed to repeal other criminal laws. Whenever conduct proscribed by this section is also proscribed by any other provision of law, the provision which carries the more serious penalty shall apply.</p>	3
Alaska	733,583	Alaska Stat. § 11.81.900	Criminal Street Gang	<p>(13) “criminal street gang” means a group of three or more persons (A) who have in common a name or identifying sign, symbol, tattoo or other physical marking, style of dress, or use of hand signs; and (B) who, individually, jointly, or in combination, have committed or attempted to commit, within the preceding three years, for the benefit of, at the direction of, or in association with the group, two or more offenses under any of, or any combination of, the following: (i) AS 11.41 [murder in the first degree]; (ii) AS 11.46 [offenses against property]; or (iii) a felony offense;</p>	3
Arizona	7,359,197	AZ Code 13-105(8),(9)	Criminal Street Gang	<p>8. "Criminal street gang" means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.9. "Criminal street gang member" means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply: (a) Self-proclamation. (b) Witness testimony or official statement. (c) Written or electronic correspondence. (d) Paraphernalia or photographs. (e) Tattoos. (f) Clothing or colors. (g) Any other indicia of street gang membership.</p>	2
Arkansas	3,045,637	Ark. Code. 5-74-103	"Criminal Gang, Organization, or Enterprise"	<p>(3) “Criminal gang, organization, or enterprise” means any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other</p>	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Arkansas		Ark. Code 5-74-203	Soliciting /Recruiting Minor into Gang	"(a) Any person who by intimidation or duress causes, aids, abets, encourages, solicits, or recruits a minor to become or to remain a member of any group that the person knows to be a criminal gang, organization, or enterprise that falls into the definition and intent of this subchapter is guilty of a Class C felony"	
California	39,029,342	Cal. Pen. Code § 186.34	Criminal Street Gang	(f) As used in this chapter, "criminal street gang" means an ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.	3
Colorado	5,839,926	Colo. Rev. Stat. § 18-23-101	Criminal Street Gang	(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal: (a) Which has as one of its primary objectives or activities the commission of one or more predicate criminal acts; and (b) Whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.	3
Colorado		Colo. Rev. Stat. § 22-25-103(3.5)	Gang	(3.5) "Gang" means a group of three or more individuals with a common interest, bond, or activity characterized by criminal or delinquent conduct, engaged in either collectively or individually.	
Connecticut	3,626,205	Conn. Gen. Stat. § 29-7n(a)	Gang	(a) For the purposes of sections 7-294f and 7-294x, subsection (a) of section 10-16b, subsection (b) of this section and sections 3 and 8 of public act 93-416*, "gang" means a group of juveniles or youths who, acting in concert with each other, or with adults, engage in illegal activities.	2
Delaware	1,018,396	Del. Code tit. 11, § 617	Criminal youth gangs	§ 617. Criminal youth gangs. (a) Definitions. — The following words, terms and phrases, when used in this chapter, shall have their meaning ascribed to them except where the context clearly indicates a different meaning. (1) "Criminal youth gang" shall mean a group of 3 or more persons with a gang name or other identifier which either promotes, sponsors, assists in, participates in or requires as a condition of membership submission to group initiation that results in any felony or any class A misdemeanor set forth in this title or Title 16. (2) "Identifier" shall mean common identifying signs, symbols, tattoos, markings, graffiti, or attire or other distinguishing characteristics or indicia of gang membership. (3) "Student" shall mean any person enrolled in a school grades preschool through 12.	3
District of Columbia	671,803	D.C. Code § 22-951	Criminal Street Gang	(e) For the purposes of this section, the term: (1) "Criminal street gang" means an association or group of 6 or more persons that: (A) Has as a condition of membership or continued membership, the committing of or actively participating in committing a crime of violence, as defined by § 23-1331(4)); or (B) Has as one of its purposes or frequent activities, the violation of the criminal laws of the District, or the United States, except for acts of civil disobedience.	6

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Florida	22,244,823	Fla. Stat. § 874.03	Criminal Gang	<p>(1) “Criminal gang” means a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols, including, but not limited to, terrorist organizations and hate groups.(a) As used in this subsection, “ongoing” means that the organization was in existence during the time period charged in a petition, information, indictment, or action for civil injunctive relief. (b) As used in this subsection, “primary activities” means that a criminal gang spends a substantial amount of time engaged in such activity, although such activity need not be the only, or even the most important, activity in which the criminal gang engages. (2) “Criminal gang associate” means a person who:(a) Admits to criminal gang association; or (b) Meets any single defining criterion for criminal gang membership described in subsection (3). (3) “Criminal gang member” is a person who meets two or more of the following criteria:(a) Admits to criminal gang membership. (b) Is identified as a criminal gang member by a parent or guardian. (c) Is identified as a criminal gang member by a documented reliable informant. (d) Adopts the style of dress of a criminal gang. (e) Adopts the use of a hand sign identified as used by a criminal gang. (f) Has a tattoo identified as used by a criminal gang. (g) Associates with one or more known criminal gang members. (h) Is identified as a criminal gang member by an informant of previously untested reliability and such identification is corroborated by independent information. (i) Is identified as a criminal gang member by physical evidence. (j) Has been observed in the company of one or more known criminal gang members four or more times. Observation in a custodial setting requires a willful association. It is the intent of the Legislature to allow this criterion to be used to identify gang members who recruit and organize in jails, prisons, and other detention settings. (k) Has authored any communication indicating responsibility for the commission of any crime by the criminal gang.</p>	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Georgia	10,912,876	Ga. Code Ann. § 16-15-3	Criminal Street Gang	<p>(1) "Criminal gang activity" means the commission, attempted commission, conspiracy to commit, or the solicitation, coercion, or intimidation of another person to commit any of the following offenses on or after July 1, 2006: (A) Any offense defined as racketeering activity by Code Section 16-14-3; (B) Any offense defined in Article 7 of Chapter 5 of this title, relating to stalking; (C) Any offense defined in Code Section 16-6-1 as rape, 16-6-2 as aggravated sodomy, 16-6-3 as statutory rape, or 16-6-22.2 as aggravated sexual battery; (D) Any offense defined in Article 3 of Chapter 10 of this title, relating to escape and other offenses related to confinement; (E) Any offense defined in Article 4 of Chapter 11 of this title, relating to dangerous instrumentalities and practices; (F) Any offense defined in Code Section 42-5-15, 42-5-16, 42-5-17, 42-5-18, or 42-5-19, relating to the security of state or county correctional facilities; (G) Any offense defined in Code Section 49-4A-11, relating to aiding or encouraging a child to escape from custody; (H) Any offense of criminal trespass or criminal damage to property resulting from any act of gang related painting on, tagging, marking on, writing on, or creating any form of graffiti on the property of another; (I) Any criminal offense committed in violation of the laws of the United States or its territories, dominions, or possessions, any of the several states, or any foreign nation which, if committed in this state, would be considered criminal gang activity under this Code section; and (J) Any criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon, or use of a weapon, whether designated as a felony or not, and regardless of the maximum sentence that could be imposed or actually was imposed. (2) "Criminal gang activity" on and after April 18, 2019, shall also mean the commission, attempted commission, conspiracy to commit, or the solicitation, coercion, or intimidation of another person to commit on and after April 18, 2019, any offense defined in Code Section 16-5-46 as trafficking persons for labor servitude or sexual servitude, 16-6-10 as keeping a place of prostitution, 16-6-11 as pimping, or 16-6-12 as pandering. (3) "Criminal street gang" means any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section. The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics, including, but not limited to, common activities, customs, or behaviors. Such term shall not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity.</p>	3
Hawaii	1,440,196				

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Idaho	1,939,033	Idaho Code Ann. § 18-8502	Criminal gang	(1) "Criminal gang" means an ongoing organization, association, or group of three (3) or more persons, whether formal or informal, that has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity, having as one (1) of its primary activities the commission of one (1) or more of the criminal acts enumerated in subsection (3) of this section.(2) "Criminal gang member" means any person who engages in a pattern of criminal gang activity and who meets two (2) or more of the following criteria: (a) Admits to gang membership; (b) Is identified as a gang member; (c) Resides in or frequents a particular gang's area and adopts its style of dress, its use of hand signs, or its tattoos, and associates with known gang members; (d) Has been arrested more than once in the company of identified gang members for offenses that are consistent with usual gang activity; (e) Is identified as a gang member by physical evidence such as photographs or other documentation; or (f) Has been stopped in the company of known gang members four (4) or more times.	3
Illinois	12,582,032	740 ILCS 147/10	Streetgang	"Streetgang" or "gang" or "organized gang" or "criminal street gang" means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity. For purposes of this Act, it shall not be necessary to show that a particular conspiracy, combination, or conjoining of persons possesses, acknowledges, or is known by any common name, insignia, flag, means of recognition, secret signal or code, creed, belief, structure, leadership or command structure, method of operation or criminal enterprise, concentration or specialty, membership, age, or other qualifications, initiation rites, geographical or territorial situs or boundary or location, or other unifying mark, manner, protocol or method of expressing or indicating membership when the conspiracy's existence, in law or in fact, can be demonstrated by a preponderance of other competent evidence. However, any evidence reasonably tending to show or demonstrate, in law or in fact, the existence of or membership in any conspiracy, confederation, or other association described herein, or probative of the existence of or membership in any such association, shall be admissible in any action or proceeding brought under this Act. "Streetgang member" or "gang member" means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity.	3
Indiana	6,833,037	Ind. Code 35-45-9-1	Criminal Organization	Sec. 1. As used in this chapter, "criminal organization" means a formal or informal group with at least three (3) members that specifically: (1) either: (A) promotes, sponsors, or assists in; (B) participates in; or (C) has as one (1) of its goals; or (2) requires as a condition of membership or continued membership; the commission of a felony, an act that would be a felony if committed by an adult, or a battery offense included in IC 35-42-2.	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Iowa	3,200,517	Iowa Code § 723A.1(2)	Criminal Street Gang	"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.	3
Kansas	2,937,150	Kan. Stat. Ann. § 21-6313	Criminal Street Gang	(a) "Criminal street gang" means any organization, association or group, whether formal or informal: (1) Consisting of three or more persons; (2) having as one of its primary activities the commission of one or more person felonies, person misdemeanors, felony violations of K.S.A. 2022 Supp. 21-5701 through 21-5717, and amendments thereto, any felony violation of any provision of the uniform controlled substances act prior to July 1, 2009, or the comparable juvenile offenses, which if committed by an adult would constitute the commission of such felonies or misdemeanors; (3) which has a common name or common identifying sign or symbol; and (4) whose members, individually or collectively, engage in or have engaged in the commission, attempted commission, conspiracy to commit or solicitation of two or more person felonies, person misdemeanors, felony violations of K.S.A. 2022 Supp. 21-5701 through 21-5717, and amendments thereto, any felony violation of any provision of the uniform controlled substances act prior to July 1, 2009, or the comparable juvenile offenses, which if committed by an adult would constitute the commission of such felonies or misdemeanors or any substantially similar offense from another jurisdiction; (b) "criminal street gang member" is a person who: (1) Admits to criminal street gang membership; or (2) meets three or more of the following criteria: (A) Is identified as a criminal street gang member by a parent or guardian; (B) is identified as a criminal street gang member by a state, county or city law enforcement officer or correctional officer or documented reliable informant; (C) is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information; (D) frequents a particular criminal street gang's area; (E) adopts such gang's style of dress, color, use of hand signs or tattoos; (F) associates with known criminal street gang members; (G) has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity; (H) is identified as a criminal street gang member by physical evidence including, but not limited to, photographs or other documentation; (I) has been stopped in the company of known criminal street gang members two or more times; or (J) has participated in or undergone activities self-identified or identified by a reliable informant as a criminal street gang initiation ritual;	3
Kentucky	4,512,310	Ky. Rev. Stat. Ann. § 506.135	Criminal Gang	(1) "Criminal gang" means any alliance, network, conspiracy, or group that: (a) Consists of three (3) or more persons who have any of the following in common: 1. Name; 2. Identifying hand signal or sign; 3. Colors; 4. Symbols; 5. Geographical location; or 6. Leader; (b) Has been identified or prosecuted as a gang by the Commonwealth, or another state or any federal law enforcement agency; and (c) Has two (2) or more members who, individually or collectively, through its members or actions of its members engage in or have engaged in a pattern of criminal activity. "Criminal gang" does not include fraternal organizations, unions, corporations, associations, or similar entities, unless organized for the primary purpose of engaging in criminal activity; and	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Louisiana	4,590,241	La. Stat. Ann. § 15:1404	Criminal Street Gang	A. As used in this Chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, which has as one of its primary activities the commission of one or more of the criminal acts enumerated in Paragraphs (1) through (13) of Subsection B of this Section or which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.	3
Maine	1,385,340				
Maryland	6,164,660	Md. Code, Crim. Law § 9-801	Criminal Organization	(c) "Criminal organization" means an enterprise whose members: (1) individually or collectively engage in a pattern of organized crime activity (2) have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and (3) have in common an overt or covert organizational or command structure. (d) "Enterprise" includes: (1) a sole proprietorship, partnership, corporation, business trust, or other legal entity; or (2) any group of individuals associated in fact although not a legal entity. (e) "Pattern of organized crime activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of two or more underlying crimes or acts by a juvenile that would be an underlying crime if committed by an adult, provided the crimes or acts were not part of the same incident.	2
Massachusetts	6,981,974	Mass Code Ch. 265 Sec.44	Criminal Street Gang	Whoever commits an assault and battery on a child under the age of eighteen for the purpose of causing or coercing such child to join or participate in a criminal conspiracy in violation of section seven of chapter two hundred and seventy-four, including but not limited to a criminal street gang or other organization of three or more persons which has a common name, identifying sign or symbol and whose members individually or collectively engage in criminal activity, shall, for the first offense, be punished by imprisonment in the state prison for not less than three nor more than five years or by imprisonment in the house of correction for not more than two and one-half years; and for a second or subsequent offense by imprisonment in the state prison for not less than five nor more than ten years.	3
Michigan	10,034,113	MCL 750.411u	Gang	(1) If a person who is an associate or a member of a gang commits a felony or attempts to commit a felony and the person's association or membership in the gang provides the motive, means, or opportunity to commit the felony, the person is guilty of a felony punishable by imprisonment for not more than 20 years. As used in this section: (a) "Gang" means an ongoing organization, association, or group of 5 or more people, other than a nonprofit organization, that identifies itself by all of the following: (i) A unifying mark, manner, protocol, or method of expressing membership, including a common name, sign or symbol, means of recognition, geographical or territorial sites, or boundary or location. (ii) An established leadership or command structure. (iii) Defined membership criteria. (b) "Gang member" or "member of a gang" means a person who belongs to a gang. (2) A sentence imposed under this section is in addition to the sentence imposed for the conviction of the underlying felony or the attempt to commit the underlying felony and may be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.	5

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Minnesota	5,717,184	MN Statutes 609.229(1)	Criminal Gang	<p>Subdivision 1. Definition. As used in this section, "criminal gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, that: (1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9; (2) has a common name or common identifying sign or symbol; and (3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity. Subd. 2. Crimes. A person who commits a crime for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members is guilty of a crime and may be sentenced as provided in subdivision 3. Subd. 3. Penalty. (a) If the crime committed in violation of subdivision 2 is a felony, the statutory maximum for the crime is five years longer than the statutory maximum for the underlying crime. If the crime committed in violation of subdivision 2 is a felony, and the victim of the crime is a child under the age of 18 years, the statutory maximum for the crime is ten years longer than the statutory maximum for the underlying crime. (b) If the crime committed in violation of subdivision 2 is a misdemeanor, the person is guilty of a gross misdemeanor. (c) If the crime committed in violation of subdivision 2 is a gross misdemeanor, the person is guilty of a felony and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$15,000, or both.</p>	3
Mississippi	2,940,057	Miss. Code Ann. § 97-44-3	Streetgang	<p>(a) "Streetgang" or "gang" or "organized gang" or "criminal streetgang" means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of three (3) or more persons with an established hierarchy that, through its membership or through the agency of any member, engages in felonious criminal activity. For purposes of this chapter, it shall not be necessary to show that a particular conspiracy, combination or conjoining of persons possesses, acknowledges or is known by any common name, insignia, flag, means of recognition, secret signal or code, creed, belief, structure, leadership or command structure, method of operation or criminal enterprise, concentration or specialty, membership, age or other qualifications, initiation rites, geographical or territorial situs or boundary or location, or other unifying mark, manner, protocol or method of expressing or indicating membership when the conspiracy's existence, in law or in fact, can be demonstrated by a preponderance of the competent evidence. However, any evidence reasonably tending to show or demonstrate, in law or in fact, the existence of or membership in any conspiracy, confederation or other association described herein, or probative of the existence of or membership in any such association, shall be admissible in any action or proceeding brought under this chapter. (c) "Streetgang member" or "gang member" means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a gang-related criminal activity, whether in a preparatory, executory or cover-up phase of any activity, or who knowingly performs, aids or abets any such activity.</p>	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Missouri	6,177,957	Mo. Rev. Stat. § 578.421	Criminal Street Gang	(1) "Criminal street gang", any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its motivating activities the commission of one or more of the criminal acts enumerated in subdivision (2) of this subsection, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;	3
Montana	1,122,867	Mont. Code Ann. § 45-8-402(1)	Criminal Street Gang	(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in 45-8-405, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal street gang activity.	3
Nebraska	1,967,923	Neb. Rev. Stat. § 43-245(7),(8)	Criminal Street Gang	(7) Criminal street gang means a group of three or more people with a common identifying name, sign, or symbol whose group identity or purposes include engaging in illegal activities; (8) Criminal street gang member means a person who willingly or voluntarily becomes and remains a member of a criminal street gang;	3
Nevada	3,177,772	NRS 193.168(8)	Criminal Gang	8. As used in this section, "criminal gang" means any combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if individual members enter or leave the organization, which: (a) Has a common name or identifying symbol; (b) Has particular conduct, status and customs indicative of it; and (c) Has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.	2
New Hampshire	1,395,231	N.H. Rev. Stat. Ann. § 651:6(l-a)(b),©	Criminal Street Gang	(b) " Criminal street gang member " means an individual to whom 2 or more of the following apply: (1) Admits to criminal street gang membership; (2) Is identified as a criminal street gang member by a law enforcement officer, parent, guardian, or documented reliable informant; (3) Resides in or frequents a particular criminal street gang's area and adopts its style of dress, its use of hand or other signs, tattoos, or other physical markings, and associates with known criminal street gang members; or (4) Has been arrested more than once in the company of individuals who are identified as criminal street gang members by law enforcement, for offenses that are consistent with usual criminal street gang activity. (c) " Criminal street gang " means a formal or informal ongoing organization, association, or group of 3 or more persons, which has as one of its primary objectives or activities the commission of criminal activity, whose members share a common name, identifying sign, symbol, physical marking, style of dress, or use of hand sign, and whose members individually or collectively have engaged in the commission, attempted commission, solicitation to commit, or conspiracy to commit 2 or more the following offenses, or a reasonably equivalent offense in another jurisdiction, on separate occasions within the preceding 3 years: (1) Violent crimes, as defined in RSA 651:5, XIII; (2) Distribution, sale, or manufacture of a controlled drug in violation of RSA 318-B:2; (3) Class A felony theft; (4) Unlawful sale of a pistol or revolver; or (5) Witness tampering.	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
New Jersey	9,261,699	N.J. Rev. Stat. § 2C:33-29(1)	Criminal Street Gang	<p>1. a. A person is guilty of the crime of gang criminality if, while knowingly involved in criminal street gang activity, he commits, attempts to commit, or conspires to commit, whether as a principal or an accomplice, any crime specified in chapters 11 through 18, 20, 33, 35 or 37 of Title 2C of the New Jersey Statutes; N.J.S.2C:34-1; N.J.S.2C:39-3; N.J.S.2C:39-4; section 1 of P.L.1998, c.26 (C.2C:39-4.1); N.J.S.2C:39-5; or N.J.S.2C:39-9. A crime is committed while involved in a criminal street gang related activity if the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. "Criminal street gang" means three or more persons associated in fact. Individuals are associated in fact if: (1) two of the following seven criteria that indicate criminal street gang membership apply: (a) self-proclamation; (b) witness testimony or official statement; (c) written or electronic correspondence; (d) paraphernalia or photographs; (e) tattoos; (f) clothing or colors; (g) any other indicia of street gang activity; and (2) individually or in combination with other members of a criminal street gang, while engaging in gang related activity, have committed or conspired or attempted to commit, within the preceding five years from the date of the present offense, excluding any period of imprisonment, one or more offenses on separate occasions of robbery, carjacking, aggravated assault, assault, aggravated sexual assault, sexual assault, arson, burglary, kidnapping, extortion, tampering with witnesses and informants or a violation of chapter 11, section 3, 4, 5, 6, or 7 of chapter 35 or chapter 39 of Title 2C of the New Jersey Statutes.</p>	3
New Mexico	2,113,344	Albuquerque City Code 11-9-1-4	Criminal Street Gang	<p>CRIMINAL STREET GANG. Any ongoing organization, association in fact, or group of three or more persons, whether formally or informally organized, or any sub-group or affiliated group thereof, having as one of its primary activities the commission of one or more criminal acts or illegal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity for a one-year period.</p>	3
New York	19,677,151	New York Penal Code 120.07	Gang Assault	<p>A person is guilty of gang assault in the first degree when, with intent to cause serious physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person.</p>	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
North Carolina	10,698,973	N.C. Gen. Stat. § 7B-2508.1.	Criminal Gang	<p>(1) Criminal gang. – Any ongoing organization, association, or group of three or more persons, whether formal or informal, that (i) has as one of its primary activities the commission of criminal or delinquent acts and (ii) shares a common name, identification, signs, symbols, tattoos, graffiti, attire, or other distinguishing characteristics, including common activities, customs, or behaviors. The term shall not include three or more persons associated in fact, whether formal or informal, who are not engaged in criminal gang activity. (3) Criminal gang member. – Any person who meets three or more of the following criteria:</p> <p>a. The person admits to being a member of a criminal gang. b. The person is identified as a criminal gang member by a reliable source, including a parent or a guardian. c. The person has been previously involved in criminal gang activity. d. The person has adopted symbols, hand signs, or graffiti associated with a criminal gang. e. The person has adopted the display of colors or the style of dress associated with a criminal gang. f. The person is in possession of or linked to a criminal gang by physical evidence, including photographs, ledgers, rosters, written or electronic communications, or membership documents. g. The person has tattoos or markings associated with a criminal gang. h. The person has adopted language or terminology associated with a criminal gang. i. The person appears in any form of social media to promote a criminal gang.</p>	3
North Dakota	779,261	N.D. Cent. Code § 12.1-06.2-01	Criminal Street Gang	<p>Criminal street gang" means any ongoing organization or group of three or more persons, whether formal or informal, that acts in concert or agrees to act in concert with a purpose that any of those persons alone or in any combination commit or will commit two or more predicate gang crimes one of which occurs after August 1, 1995, and the last of which occurred within five years after the commission of a prior predicate gang crime.</p>	3
Ohio	11,756,058	Ohio Rev. Code § 2923.41	Criminal Gang	<p>(A) "Criminal gang" means an ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply:</p> <p>(1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section. (2) It has a common name or one or more common, identifying signs, symbols, or colors. (3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.</p>	3

Appendix C—State Laws

State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Oklahoma	4,019,800	Okla. Stat. tit. 21, § 856(F)	Criminal Street Gang	F. "Criminal street gang" means any ongoing organization, association, or group of five or more persons that specifically either promotes, sponsors, or assists in, or participates in, and requires as a condition of membership or continued membership, the commission of one or more of the following criminal acts: 1. Assault, battery, or assault and battery with a deadly weapon, as defined in Section 645 of this title; 2. Aggravated assault and battery as defined by Section 646 of this title; 3. Robbery by force or fear, as defined in Sections 791 through 797 of this title; 4. Robbery or attempted robbery with a dangerous weapon or imitation firearm, as defined by Section 801 of this title; 5. Unlawful homicide or manslaughter, as defined in Sections 691 through 722 of this title; 6. The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled dangerous substances, as defined in Section 2-101 et seq. of Title 63 of the Oklahoma Statutes; 7. Trafficking in illegal drugs, as provided for in the Trafficking in Illegal Drugs Act, Section 2-414 of Title 63 of the Oklahoma Statutes; 8. Arson, as defined in Sections 1401 through 1403 of this title; 9. The influence or intimidation of witnesses and jurors, as defined in Sections 388, 455 and 545 of this title; 10. Theft of any vehicle, as described in Section 1720 of this title; 11. Rape, as defined in Section 1111 of this title; 12. Extortion, as defined in Section 1481 of this title; 13. Transporting a loaded firearm in a motor vehicle, in violation of Section 1289.13 of this title; 14. Possession of a concealed weapon, as defined by Section 1289.8 of this title; 15. Shooting or discharging a firearm, as defined by Section 652 of this title; 16. Soliciting, inducing or enticing another to commit an act of prostitution, as defined by Section 1030 of this title; 17. Human trafficking, as defined by Section 748 of this title; or 18. Possession of a firearm after former conviction of a felony, as defined by Section 1283 of this title.	5
Oregon	4,240,137	ORS 336.109(2)	Gang	(2) As used in this section, "gang" means a group that identifies itself through the use of a name, unique appearance or language, including hand signs, the claiming of geographical territory or the espousing of a distinctive belief system that frequently results in criminal activity. [1993 c.421 §1]	2
Pennsylvania	12,972,008	18 Pa. Cons. Stat. § 5131	Criminal Gang	(e) Definition.--As used in this section, the term "criminal gang" means a formal or informal ongoing organization, association or group, with or without an established hierarchy, that has as one of its primary activities the commission of criminal or delinquent acts and that consists of three or more persons.	3
Rhode Island	1,093,734	R.I. Gen. Laws § 12-19-39(a),€	Criminal Street Gang	(a) "Criminal street gang" means an ongoing organization, association, or group of three (3) or more persons, whether formal or informal, having as one of its primary activities the commission of criminal or delinquent acts; having an identifiable name or common identifiable signs, colors, or symbols; and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity. (e) This section does not create a separate offense but provides an additional enhanced sentence for the underlying offense.	3

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State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
South Carolina	5,282,634	S.C. Code Ann. § 16-8-230	Criminal Gang	(2) "Criminal gang" means a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity. (3) "Criminal gang member" means an individual who is an active member of a criminal gang.	5
South Dakota	909,824	S.D. Codified Laws § 22-10A-1	Street Gang	"Street gang," any formal or informal ongoing organization, association, or group of three or more persons who have a common name or common identifying signs, colors, or symbols and have members or associates who, individually or collectively, engage in or have engaged in a pattern of street gang activity;	3
Tennessee	7,051,339	Tenn. Code Ann. § 40-35-121	Criminal Gang	(1) "Criminal gang" means a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has: (A) As one (1) of its primary activities, the commission of criminal gang offenses; (B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity;	3
Texas	30,029,572	Tex. Pen. Code § 71.01(d)	Criminal Street Gang	"Criminal street gang" means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.	3
Utah	3,380,800	Utah Code § 76-9-802	Criminal Street Gang	(1) "Criminal street gang" means an organization, association in fact, or group of three or more persons, whether operated formally or informally: (a) that is currently in operation; (b) that has as one of its substantial activities the commission of one or more predicate gang crimes; (c) that has, as a group, an identifying name or an identifying sign or symbol, or both; and (d) whose members, acting individually or in concert with other members, engage in or have engaged in a pattern of criminal gang activity.	3
Vermont	647,064				
Virginia	8,683,619	Va. Code Ann. § 18.2-46.1	Criminal Street Gang	"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.	3
Washington	7,785,786	Wash. Rev. Code § 9.94A.030	Criminal Street Gang	(12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.	3
West Virginia	1,775,156				

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State	Census Estimate as of 7/1/22	Code Citation	Term	Definition	# of People
Wisconsin	5,892,539	Wis. Stat. § 939.22(9)	Criminal Gang	(9) "Criminal gang" means an ongoing organization, association or group of 3 or more persons, whether formal or informal, that has as one of its primary activities the commission of one or more of the criminal acts, or acts that would be criminal if the actor were an adult, specified in sub. (21) (a) to (s); that has a common name or a common identifying sign or symbol; and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.	3
Wyoming	581,381	Wyo. Stat. § 6-1-104(a)(xiv)	Criminal Street Gang	(xiv) "Criminal street gang" means an ongoing formal or informal organization, association or group of five (5) or more persons having as one (1) of its primary activities the commission of one (1) or more of the criminal acts enumerated in paragraph (xv) of this subsection, having a common name or identifying sign or symbol and whose members or associates individually or collectively engage in or have been engaged in a pattern of criminal street gang activity;	5