

Child Soldiers: Recruitment, Use and Punishment

Magne Frostad *

1. Introduction

All are vulnerable to superior force, but children may be singled out as one of the groups which are most vulnerable to such. Children have thus been negatively influenced by armed conflicts since time immemorial, and during 1807-1814 a number of individuals as young as 10 to 12 years old were found among the Danish-Norwegian prisoners of war held by the United Kingdom of Great Britain and Ireland, the children having served on vessels later confiscated by British forces.¹ Stories of intentional cruelty to children probably have a long history as well, making the stories of children tortured at the hands of Syrian authorities sadly familiar.²

Some claim that at any given time at least 300,000 child soldiers participate in hostilities,³ but this number is probably insufficiently substantiated.⁴ However, 20 states would seem to have used children for this purpose during 2010-12,⁵ not counting the many non-state entities beyond state control doing the same. 2011 thus saw 316 instances of child recruitment in Afghanistan,⁶ and 22 incidents of children being used by armed groups in Afghanistan as vehicles for suicide bombs – some of

them not even aware of the fact that they were carrying explosives.⁷ One of these was a boy merely 8 years old.⁸ Also illustrating is the forced recruitment of children by The Lord's Resistance Army in 3 African states from July 2009 to February 2012 in no fewer than 591 cases.⁹

Two reasons are typically given for the enhanced attention child soldiers have been provided with during the last two decades: An increase in the use of such soldiers, where the use is moving away from auxiliary functions to active participation in hostilities, and a change in society's perception of when a person moves from childhood to adulthood.¹⁰

Children are generally understood as people below the age of 18.¹¹ However, different thresholds are found in the law of armed conflict (LOAC) regarding the termination of the special protection offered to children; from 12, via 15 to 18.¹² In general, though, the 1949 Geneva Conventions on the protection of victims of international armed conflicts can be said to apply a threshold of 15,¹³ whereas the 1977 Additional Protocol I to the Geneva Conventions¹⁴ would seem to apply 18 as the general cut-off point with 15 as the relevant

*Dr.iuris. Associate Professor, Faculty of Law, University of Tromsø, Norway. The author would like to thank the participants at the Child Law Conference held in Tromsø in January 2013 for helpful comments.

¹ Carl Roos, *Prisonen: Danske og norske krigsfanger i England 1807-14*, Gyldendal København 1953, p. 213. The special problems faced by these boys became apparent after a while and many of them were then set free, id.

² Ragnhild Sofie Rygg, *Syriske barn tortureres til døde*, obtainable from <http://www.reddbarna.no/nyheter/syriske-barn-tortureres-til-doede>, and Save the Children, *Untold Atrocities: The Story of Syria's Children*, obtainable from <http://www.savethechildren.org.uk/resources/online-library/untold-atrocities-stories-syria-children>. Unless otherwise stated, all urls were last checked on 1 October 2013. For an overview of children's current suffering in armed conflicts, see Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012.

³ EU guidelines on children and armed conflict, 2008, Sec. I.1, obtainable from http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/r10113_en.htm

⁴ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 26

⁵ Child Soldiers International, *Longer than words: An agenda for action to end state use of child soldiers* (London 2012), p. 18, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁶ Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 2.

⁷ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 63. The number is given as 11 in Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 2, whereas 11 children were used in the commission of suicide attacks in Pakistan, id., p. 27.

⁸ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 63.

⁹ Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army, UN Doc. S/2012/365, 25 May 2012, p. 5.

¹⁰ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 28.

¹¹ See Convention on the Rights of the Child, 1577 UNTS 3, Art. 1, first alternative, the African Charter on the Rights and Welfare of the Child, OUA Doc. CAB/LEG/24.9/49 (1990), Art. 2, and the International Labour Organization's Convention No. 182 from 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2133 UNTS 161, Art. 2.

¹² See e.g. the following provisions in 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GCIV), 75 UNTS 287, Articles 14, 24(3), and 51(2). As of 10 March 2013, this agreement has 195 ratifications. See Roberta Arnold, *Children and Armed Conflict*, Max Planck Encyclopedia of Public International Law, obtainable at <http://www.mpepil.com>, para. 4.

¹³ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 28.

¹⁴ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3. As of 10 March 2013, the agreement has 173 ratifications.

threshold for the prohibition of recruitment etc.¹⁵

Numerous international agreements regulate aspects of the issues considered in this note. Chief among them are the 1977 Additional Protocols to the 1949 Geneva Conventions (AP I and AP II),¹⁶ the 1989 Convention on the Rights of the Child (CRC),¹⁷ the 1998 Rome Statute of the International Criminal Court (RSICC),¹⁸ the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,¹⁹ and the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OP).²⁰ Also, the United Nations Security Council (UNSC) has recognized that the widespread impact of armed conflict on children is an important peace and security concern.²¹ The obligations of a state in relation to its use of child soldiers therefore vary according to the treaties the said state has ratified.²²

The aim of this article is to provide an overview of the prohibition on recruitment and use of child soldiers, as well as indicating and assessing clarifications offered by relevant international case law in 2012. The article will therefore first address some preliminary issues such as extraterritoriality, before it considers the illegality of employing children within state or non-state armed forces/groups, their treatment should they fall into the hands of another armed force/group, the prosecution of those who recruit or use child soldiers, and the prosecution of child soldiers for violations of international criminal law during the course of the conflict.

2. Preliminary issues

2.1 Extraterritorial application

A preliminary question here is the extent to which human rights conventions, especially the CRC, are applicable extraterritorially. This issue has generated much

writing in relation to other global and some regional human rights agreements, but has been comparatively less considered in relation to the CRC. The question is then whether a state party is bound by the relevant obligations when it deploys troops abroad, i.e. not on territory to which the said state itself has made the CRC applicable thorough a declaration,²³ e.g. when recruiting local youth as interpreters to its troops or as outer perimeter guards at its foreign bases.

Under CRC Art. 2 parties “shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction...”. The general trend with the extraterritoriality of UN human rights conventions is to make them applicable abroad when a state party holds sufficient control over a person or territory.²⁴ It is only to be expected that the Committee on the Rights of the Child will subscribe to this view.

2.2 Which entity is responsible?

Additionally, one must consider whether another entity than the state actually undertaking the relevant acts or omissions may be held solely responsible for them. It is also here to be expected that the Committee on the Rights of the Child will adopt the approach of the Human Rights Committee. That committee held in its General Comment No. 31 from 2004 that a party’s responsibility remains even where its public servants only constitute a national contingent assigned to an international peace-keeping or peace-enforcement operation.²⁵

Responsibility may even arise for recruitment and use by non-state entities, on the state’s home territory or where it is deemed to hold extraterritorial jurisdiction. This follows from the requirement in CRC Art. 2 to “ensure” the relevant rights – so called positive obligations – and will have to be decided on a case by case basis.

¹⁵ Compare API Art. 77(2) and (5), and consider the heading of that provision. A similar view is held by Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 58-59, although he indicated earlier that 15 might be the threshold under AP I: Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children’s participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 32. The ICRC commentary to AP I would seem to hold 15 as the relevant threshold; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross and Martinus Nijhoff Publishers Geneva 1987, pp. 899-900, paras. 3178-3179.

¹⁶ Additional Protocol II: 1125 UNTS 609. As of 10 March 2013, this agreement has 166 ratifications.

¹⁷ 1577 UNTS 3. As of 10 March 2013, this agreement has 193 ratifications.

¹⁸ 2187 UNTS 90. As of 10 March 2013, this agreement has 121 ratifications.

¹⁹ 2133 UNTS 161. As of 10 March 2013, this agreement has 177 ratifications.

²⁰ 2173 UNTS 222. As of 10 March 2013, this agreement has 150 ratifications.

²¹ See e.g. UNSC Res. 2068 (2012), 19 September 2012, UN Doc. S/RES/2068 (2012), p. 1, preambular para. 2.

²² Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 238.

²³ For a list of such declarations (territorial application), see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en.

²⁴ See e.g. the view of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, Art. 2 in General Comment No. 31 (2004) *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, para. 10. As of 10 March 2013, the ICCPR has 167 ratifications.

²⁵ General Comment No. 31 (2004) *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, para. 10.

2.3 The relationship of international human rights law to the law of armed conflict

The provisions of LOAC naturally apply to armed conflicts, but some of them – like the prohibition on recruiting children into armed forces in API Art. 77(2) – would also seem to apply in peace time.²⁶ As regards the applications of international human rights law to instances of armed conflicts, the short answer is that they will also apply there, to the extent that states have not validly derogated from them or LOAC has modified them through the *lex specialis* principle. The main differences between these disciplines are their age limits on recruitment and use, and their rules regarding the treatment of detained child soldiers.

As regards different age limits, the more restrictive age threshold in the CRC or its OP would not be modified during an armed conflict by LOAC. The very title of the OP – Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts – makes it clear that its rules also apply to armed conflicts.

Although the CRC does not say anything on the treatment of detained child soldiers, Happold points out that it provides some guidance on the detention of children in general.²⁷ An interesting question is thus whether the CRC may influence the legality of detention under LOAC and whether it provides additional procedural rights to the child.²⁸ With some reservations, one might concur with Happold's finding that "there seems no objection to applying the CRC to interpret the provisions in API and APII dealing with children detained or interned for reasons relating to an armed conflict or to regulate issues not covered by international humanitarian law."²⁹

3. The prohibition on recruitment and use of child soldiers, and their treatment should they fall into the hands of another armed force or group

3.1 The prohibition

The prohibition analyzed here establishes

international responsibility for the state party whose personnel have carried out the prohibited recruitment or use. Although AP I also establishes individual criminal responsibility for some of its breaches, the recruitment and use of child soldiers is not one of these.³⁰ The direction international customary law and treaty law have taken on individual criminal responsibility will be addressed in sections 4 and 5, whereas the focus of this section will primarily be on acts generating state responsibility.³¹

The two Additional Protocols from 1977 were the first treaties to regulate the issue of children participating in some way in hostilities. AP I on international armed conflicts provides the following regulation in Art. 77(2):

"The Parties to the conflict 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. In *recruiting* among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give *priority* to those who are oldest."³²

As regards the reference to "all feasible measures", it should probably be interpreted in a similar way to corresponding phrases used elsewhere in that treaty, like in Art. 57(2)(a)(i). The latter provision was extensively discussed during the negotiations of the treaty, and through the reference in the commentaries of the International Committee of the Red Cross (ICRC) to the expression being understood in its dictionary meaning, Happold focuses on whether something is possible or practicable.³³ States must therefore abstain from recruiting persons under 15 into their armed forces, whereas they must take all feasible measures to avoid that such children in other ways directly participate in hostilities.³⁴

A separate issue is here where the difference lies between indirect and direct participation in hostilities. This is also central to Art. 51(3) of that treaty and has been discussed extensively during the last few years, in preparation of and following the ICRC's interpretative

²⁶ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 33.

²⁷ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240.

²⁸ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240. Such a potential right could be found in Art. 37(d).

²⁹ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240.

³⁰ See AP I Art. 85.

³¹ An act may nevertheless establish both individual criminal responsibility and state responsibility. This will often be the case for crimes committed by military personnel of a state.

³² Italics by the author.

³³ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 34.

³⁴ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 35.

guidance thereon.³⁵ This issue will not be explored here, as the focus of a later section will instead be on the related concept of active participation in hostilities.³⁶

Another relevant issue is the reference in Art. 77(2) to the act of recruiting. Some suggest that the term does not include voluntary enlistment,³⁷ but it is submitted that it covers both voluntary enlistments and conscription.³⁸

Moving on to another instrument, it follows from AP II on non-international armed conflicts Art. 4(3)(c) that “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”. This would include taking indirect part in hostilities, and the provision is therefore stricter than AP I Art. 77(2). Happold submits that the difference between these provisions is a result of inadvertence on behalf of the founding fathers,³⁹ and this would seem to be a plausible explanation. Moreover, as AP II Art. 4(3) does not include a reference to “all feasible measures”, it would also here seem to require more than AP I does.⁴⁰

CRC Art. 38 also regulates the exposure of children to armed conflicts and its central paragraphs provide that “States 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” (para. 2), and that “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into

their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest” (para. 3). The article was seen as unsatisfactory by some states and NGOs since it provides little expansion of the protection offered by AP I.⁴¹ In general, the objections are threefold: Firstly, the provision does not differentiate between conscription and enlistment for those between 15 and 18, seemingly subsuming both under recruitment. Secondly, as the provision does not differentiate between international and non-international armed conflicts, the fact that children under 15 were not prohibited from indirect participation in hostilities requires less of the parties than AP II does. Thirdly, any direct participation of children under 15 were not strictly prohibited, as the provision simply obligated states to take all feasible measures to prevent it.⁴² As to the objection of the CRC backtracking from ground won by LOAC, Arnold nevertheless argues that a literal and teleological interpretation of Art. 38(1) suggests that LOAC will nevertheless constitute the *lex specialis* rules during an armed conflict.⁴³

For its sake, OP Art. 1 requires states to take “all feasible measures” to stop children under 18 within their armed forces from participating directly in armed conflict.⁴⁴ Two limitations are thus of relevance: Firstly, that the obligation is merely one of effort and secondly

³⁵ International Committee of the Red Cross, ‘Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law’, (2008) 90 *International Review of the Red Cross* pp. 991-1047, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. See also Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 36.

³⁶ See nevertheless the short consideration of this issue in relation to OP Art. 1 in Section 3.1. Here it will suffice to say that war-sustaining activities like the production of weapons and logistical functions like the provision of food are held by the International Committee of the Red Cross (ICRC) to merely constitute indirect participation. See International Committee of the Red Cross, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, 2009, pp. 50, 52, 54 and 55, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

³⁷ Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International law and comparative law quarterly*, pp. 809-26, p. 814.

³⁸ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 37 and id., n. 39. The ICRC seems to lump enlistment and conscription together, see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross and Martinus Nijhoff Publishers Geneva 1987, pp. 900-901, paras. 3184-5, and J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press Cambridge 2005, pp. 482-485. The latter work has nevertheless come under criticism for its methodological approach, see J. B. Bellinger III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law’, (2007) 89 *International Review of the Red Cross*, pp. 443-471.

³⁹ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 39-41. See also Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International law and comparative law quarterly*, pp. 809-26, p. 815, and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, p. 252.

⁴⁰ Sylvain Vité, Prosecuting children during armed conflict: international humanitarian law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, p. 25.

⁴¹ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 41-43.

⁴² For a largely similar view, see Matthew Happold, The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-244, p. 228.

⁴³ Roberta Arnold, Children and Armed Conflict, *Max Planck Encyclopedia of Public International Law*, obtainable at <http://www.mpepil.com>, para. 12.

⁴⁴ Under Art. 3(5) the raising of the age threshold does not influence the age threshold for application to schools operated by or under the control of the armed forces of the States Parties.

that the obligation only relates to direct participation.⁴⁵ As regards feasible measures, the USA has defined this threshold in its understanding issued upon ratification as “those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations”.⁴⁶ In relation to direct participation, the Committee on the Rights of the Child admittedly holds that the focus should rather be on preventing children from participating in any activity which put them at risk, thereby seemingly interpreting away the term direct. The Committee has thus voiced its concern where states have not prohibited also indirect participation in hostilities.⁴⁷ Beyond their roles as soldiers participating in hostilities, the committee has noted with concern *inter alia* the use by armed forces and groups of children as sex slaves, human shields, spies/informants, cooks, and to carry goods and weapons.⁴⁸ In comparison, the USA stated in the above mentioned understanding that direct participation “does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment”.⁴⁹

OP Art. 2 on the other hand prohibits compulsory recruitment of those under 18, whereas Art. 3 regulates the possibility of voluntary recruitment of children under 18. The latter provision raises the minimum age for

voluntary recruitment to 16.⁵⁰ NGOs typically point out how hard it is for states to establish sufficiently strong control mechanisms in order to stop their under 18s from participating directly in hostilities,⁵¹ thereby arguing against enlistment of 16-17s. It is nevertheless a fact that the OP allows for such enlistment and by doing so it also accepts that a risk for such participation will remain, as the obligation on the state is merely to take “all feasible measures” for its avoidance. There is currently a strong drive for raising this threshold to 18, as seen *inter alia* in resolution 1215 (2000) of the Parliamentary Assembly of the Council of Europe.⁵² The Special Representative of the Secretary-General for Children and Armed Conflict has also argued strongly for the “straight-18 position” in relation to the depositing of binding declarations on the minimum age for voluntary recruitment under the OP.⁵³

Here, OP Art. 4 (1) seemingly prohibits armed groups distinct from the armed forces of the state from recruiting persons under 18 and from using similar persons in hostilities. Due to the use of the term “should” in this provision as opposed to “shall”, it is not clear whether the provision establishes a ban binding directly on such groups, or whether this is merely a non-binding appeal to such groups whereas the obligation to establish the prohibition lies with the state as part of its “feasible measures” obligation under Art. 4(2).⁵⁴ It might seem odd that a human rights instrument like the OP should

⁴⁵ Compare here with the 1990 African Charter and the Rights and the Welfare of the Child which obligates states parties in Art. 22 (2) 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.” NGOs often emphasize stronger limitations on state parties by stating that children should be protected against any kind of involvement in armed conflicts, see e.g. Child Soldiers International, *Lower than words: An agenda for action to end state use of child soldiers* (London 2012), p. 124, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁴⁶ Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11-b&chapter=4&lang=en#EndDec.

⁴⁷ See e.g. Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Nicaragua, UN Doc. CRC/C/OPAC/NIC/CO/1, 21 October 2010, para. 15.⁴⁸

⁴⁸ See *inter alia* Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Nepal, UN Doc. CRC/C/15/Add.261, 21 September 2005, para. 81, Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Uganda, UN Doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, para. 24, Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Israel, UN Doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, para. 24, and Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Colombia, UN Doc. CRC/C/OPAC/COL/CO/1, 21 June 2010, para. 37.

⁴⁹ Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11-b&chapter=4&lang=en#EndDec. As to the discussion on whether this understanding is in conformity with the OP, see Child Soldiers International, *Lower than words: An agenda for action to end state use of child soldiers* (London 2012), p. 47, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵⁰ Matthew Happold, The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-44, p. 238.

⁵¹ Child Soldiers International, *Lower than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 12 and 48-49, obtainable from http://www.childsoldiers.org/global_report_reader.php?id=562. As regards the reasons for changing the law so that even voluntary enlistment of under 18s is prohibited, see *id.*, p. 52.

⁵² Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 5 (j). See also Child Soldiers International, *Lower than words: An agenda for action to end state use of child soldiers* (London 2012), p. 52, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵³ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 16.

⁵⁴ For the discussion, see Wouter Vandenholde, Stephan Parmentier and Ilse Derluyn, Editorial introduction – International law on children and armed conflict: the interface between various normative frameworks, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 2-13, pp. 5 and 12 with further references, and Sylvain Vité, Prosecuting children during armed conflict: international humanitarian law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, pp. 27-8.

establish obligations for non-state entities, as obligations under international human rights law are generally held by states. To the extent that such an obligation is nevertheless found to bind these groups, this would be due to the provision mixing international human rights law and LOAC, as under the latter obligations may also be held by non-state parties.⁵⁵ Be that as it may, Happold correctly points out that the formulation chosen is wide enough also to cover forces allied with the government,⁵⁶ although the understandings of some of the ratifying states would seem to indicate otherwise.⁵⁷ The obligation on state parties in Art. 4 (2) to “take all feasible measures to prevent such recruitment and use” probably means that the greater the level of state control or influence over the relevant armed group, the more measures would be feasible.⁵⁸ Moreover, the very mentioning of non-state entities in OP Art. 4 strongly suggests that the protocol applies to both international and non-international armed conflicts,⁵⁹ as well as in peace time.

The different treatment of state forces and non-state groups is owing to the latter being unable to become parties to the OP, and since the existence and effectiveness of their safeguards to avoid recruitment cannot therefore be monitored by the Committee on the Rights of the Child.⁶⁰ However, this differential treatment does not motivate non-state entities to abide by the law. Admittedly, to the extent that recruitment or use is done by non-state groups outside of state control, these groups may anyway find domestic law of little normative importance, as they act in defiance of the current government, might plan on toppling it and will anyway be punished – if they are caught and no amnesty is at hand – severely for their rebellion, killing and destruction. That they also risk added punishment due to illegal recruitment or use of children is probably of little importance to

them.

The responsibility for recruitment and use of child soldiers by other entities is also regulated by OP Art. 7 (1), which provides *inter alia* that “States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto... , including through technical cooperation and financial assistance.” Furthering illegal recruitment or use through support of parties in breach of their obligations has unsurprisingly been condemned as a breach of this provision.⁶¹ In this context the non-binding Paris principles provide in Sec 6.24 that relevant entities “should seek to limit the supply of arms and other support to parties unlawfully recruiting or using children in armed conflict. Control of the availability of small arms and light weapons may be especially important in reducing children’s capacity to participate in armed conflict.”⁶² Such limitations would be welcome.

It might here be useful to mention that the ILO’s Worst Forms of Child Labour Convention only prohibits the “forced or compulsory recruitment of children for use in armed conflict”.⁶³ Thus, to the extent that children enlist voluntarily, the situation is not covered by this convention. This is probably also the case where children are not conscripted for use in armed conflicts before they turn 18, as would seemingly be the case if they undergo education and training but are not to be used in combatant roles until they reach the age threshold. That such a separation might be hard to enforce during hostilities, is a different matter.

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms,⁶⁴ commonly referred to as the European Convention on Human Rights (ECHR), does not explicitly regulate the issue of child soldiers. However, Art. 4 (3)(b) establishes military service

⁵⁵ For the similar view, see Matthew Happold, *The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict*, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-44, p. 236. The parties negotiating the OP discussed whether a reference to non-state entities should be made, or whether such a reference would give these groups unwarranted legitimacy, see *id.*, p. 233 with further references.

⁵⁶ Matthew Happold, *The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict*, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-244, p. 239.

⁵⁷ The US thus “understands that the term “armed groups” in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups”; Understanding No. 4 issued upon ratification, obtainable from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11-b&chapter=4&lang=en#EndDec.

⁵⁸ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 86, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵⁹ *United States of America v. Omar Ahmed Khadr*, Defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 18 January 2008, p. 9, para. iii.

⁶⁰ Provided as reason for this rule in *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, pp. 7-8.

⁶¹ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 102, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁶² The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 6.24, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>. This has also been held to be important by the Parliamentary Assembly of the Council of Europe, see Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 3.

⁶³ Art. 3(a).

⁶⁴ ETS No. 005 (with later amendments). As of 10 March 2013, this agreement had 47 ratifications.

as a valid exception to its prohibition of slavery and forced labour, but a literal interpretation of this exception would seem to limit its coverage to only compulsory military service. The issue of voluntary military service was raised in the *W, X, Y and Z v. United Kingdom* case, where the European Commission of Human Rights rejected the application since Art. 4(3)(b) was found also to cover voluntary enlistment, and since voluntary enlistment did not constitute “servitude” under Art. 4(1) as the protection of minors was secured through parental consent to the children’s voluntary enlistment.⁶⁵ Moreover, it would seem farfetched for family members of a conscripted or enlisted child, as well as for the child itself, to claim that their or its right to family life under Art. 8 is being breached as a consequence thereof. As regards the issue of use in hostilities, a question might arise in relation to the state party’s positive obligations under Art. 2, especially as regards its failure to stop non-state groups from recruiting or using children in hostilities.

As to the question of how this issue is regulated by customary international law, the Special Court for Sierra Leone (SCSL)⁶⁶ held in the *Norman* case that “[t]he widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.”⁶⁷ This reasoning has been questioned since widespread ratification and upholding of treaty obligations only show that these states abide by their treaty obligations, not that they have also taken on customary law obligations.⁶⁸ However, the widespread participation in the negotiations of the APs and the CRC, as well as the lack of real objections to their rules on child soldiers, might suffice to establish the relevant state

practice and *opinio juris* for an international customary law rule banning the recruitment of children under 15 into the armed forces of states and obliging these states to use all feasible measures to prevent children under 15 from taking a direct part in hostilities.⁶⁹

3.2 The treatment

There are few rules explicitly regulating the treatment of child soldiers after they have been captured. It would seem as if states and NGOs have preferred to focus on the formal prohibition of child soldiers, as opposed to facing the reality of their actual use.⁷⁰ Illustrating is here AP I Art. 77 which refers to captured children as “exceptional cases”.

In relation to international armed conflicts, child soldiers are not excluded from status as combatants and thus as prisoners of war should they be captured. They will also be entitled to protection against “any form of indecent assault” under Art. 77(1). The same paragraph entitles them additionally to “the care and aid they require, whether because of their age or for any other reason”. This would seem to include items for schooling, and, as appropriate, psychological help.⁷¹ Moreover, not only protection from transgressions on the side of the holding power is included, but also transgressions undertaken by likewise detained children and adults, as well as from anybody else.⁷² This would probably require a separation of adults and children, as well as dividing both groups according to sex.⁷³ The separation of children from adults, save when families are accommodated as family units, follows explicitly from Art. 77(4). Art. 77(3) furthermore establishes that such children will “continue to benefit from the special protection accorded by [Art. 77], whether or not they are prisoners of war.”

AP II has even less to say about the treatment of child soldiers. Art. 4(3) merely states that children are entitled to “the care and aid they require”, which includes *inter alia* education.⁷⁴ This “special protection” is not forfeited by taking direct part in hostilities.⁷⁵

As CRC Art. 37(b) establishes that children shall only

⁶⁵ *W, X, Y and Z v. United Kingdom*, Appl. No. 3435-3438/67, Decision 19 July 1968. See Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International Law and Comparative Law Quarterly*, pp. 809-826, p. 817, and R.C.A. White & C. Ovey, *Jacobs, White & Ovey The European Convention on Human Rights*, 5th ed., Oxford University Press Oxford 2010, pp. 202-204.

⁶⁶ Established by an agreement between Sierra Leone and the UN on 16 January 2002.

⁶⁷ SCSL, *Prosecutor against Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (appeals chamber), 31 May 2004, p. 7396, para. 20.

⁶⁸ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 94-95. The case is also analyzed in *id.*, pp. 128-132.

⁶⁹ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 43-48.

⁷⁰ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 237.

⁷¹ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, p. 104 with further references. Entitlement to teaching may also follow from GC IV Arts. 24 and 50.

⁷² Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 239.

⁷³ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 239.

⁷⁴ *Litra a.*

⁷⁵ *Litra d.*

be detained as a “measure of last resort and for the shortest appropriate period of time”, Happold holds that this obligates states to make good-faith efforts to conclude agreements for repatriation of such prisoners of war before the cessation of hostilities in accordance with 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War⁷⁶ Art. 109(2).⁷⁷ This presumes on the other hand that the receiving state is not acting in breach of its obligations on the use of children in armed conflicts. If that is so, the detaining state might be in violation of its own obligations if it seeks to return the children home and thereby expose them to the risk of treatment in violation of the relevant instruments.

An interesting issue is raised here by OP Art. 6(3) which states that “States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” Is a state capturing illegally recruited child soldiers then obliged to demobilize or otherwise release them from captivity? If children are entitled to release at an earlier point in time than would otherwise be the case due to OP Art. 6(3),⁷⁸ this would provide for a significant exception to the general regime of detention during armed conflicts. If that is so, Happold correctly states that this would impose considerable positive obligations on the detaining power.⁷⁹

As regards the reference to “social reintegration” in OP Art. 6 (3), it might again be illustrative to refer to No. 2 (A) of the understanding issued by the USA upon ratification: “[T]he term “feasible measures” means those measures that are practical or practically possible, taking

into account all the circumstances ruling at the time, including humanitarian and military considerations”. It has been claimed that the term “appropriate assistance” will include opportunity to pursue an education,⁸⁰ and that the term “necessarily entails criminal justice procedures tailored to the unique needs of children and designed to ensure their rehabilitation and reintegration into society”,⁸¹ should a child be prosecuted. The provision itself is nevertheless so generally phrased that it provides little concrete guidance.⁸²

The provision was raised before the US Military Commission in the *Khadr* case, where the defense sought to have evidence obtained from *Khadr* suppressed since he had been designated as unlawful combatant, and not as a child entitled to special protection under Art. 6 (3).⁸³ The Commission nevertheless found that no such obligation existed under the OP or relevant national law.⁸⁴

Which protection may then be offered to a child soldier by the new third optional protocol to the CRC?⁸⁵ That protocol also covers obligations under the OP (Art. 5(1)(c)), and it provides victims with a right to individual petition (Art. 5), and the Committee with a right to initiate an inquiry in relation to “reliable information indicating grave or systematic violations” (Art. 13) of inter alia the OP. However, the latter procedure may be limited by the opt-out clause in Art. 13(7).

4. Prosecuting those who recruit or use child soldiers

The SCSL was the first non-national tribunal or court to establish recruitment and use of children under 15 as a war crime under international customary law,⁸⁶ although the crime was already mentioned as a “serious violation of laws and customs applicable in international armed conflict/armed conflicts not of an international

⁷⁶ 75 UNTS 135.

⁷⁷ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, p. 103.

⁷⁸ This would seem to be the view of The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 3.11, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

⁷⁹ Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 241.

⁸⁰ *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, p. 6. This is also held by the Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding observations: United States of America, UN Doc. CRC/C/OPAC/USA/CO/1, 25 June 2008, p. 7, para. 30 (h).

⁸¹ *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, p. 4.

⁸² Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 247.

⁸³ Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 244. See *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, pp. 1-8. Information on the US military commissions may be found at <http://www.mc.mil>. In relation to the *Khadr* case, information may also be found at <http://www.defense.gov/news/commissionsKhadr.html>.

⁸⁴ *United States of America v. Omar Ahmed Khadr*, Ruling on defense motion to suppress evidence of statements (violation on child soldier protocol), 15 August 2008, p. 1.

⁸⁵ 2011 Optional protocol to the convention on the rights of the child on a communications procedure, UN Doc. A/RES/66/138. Under Art. 19 the protocol requires 10 ratifications before it enters into force. As of 10 March 2012, 35 states have signed the protocol, but only 3 states (Gabon, Thailand and Germany) have acceded to or ratified it. Information obtained from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

⁸⁶ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

character" in the chapeau of RSICC Art. 8(2)(b) and 8(2)(e).⁸⁷ The International Criminal Court (ICC) has in a number of cases referred to such crimes, for example in relation to the activities of the Lord's Resistance Army,⁸⁸ and its first judgment solely dealt with the war crime of such recruitment and use of children.⁸⁹ Furthermore, Trial Chamber II of the SCSL found Charles Taylor guilty inter alia of the war crime of recruiting and using child soldiers. The acts were admittedly committed by an armed group not under his direct command and control, but he had nevertheless supported the relevant group in numerous ways.⁹⁰ This was the first time a former head of state had been found guilty of such acts.⁹¹

Some find that these indictments and judgments usefully deter recruitment of child soldiers in armed conflict,⁹² and the Special Representative of the Secretary-General for Children and Armed Conflict has stated that parties to conflicts seem to be "cognizant of the [*Lubanga* and *Taylor*] cases and the implication on their own behavior."⁹³ However, others are far more skeptical of the preventive effects of such prosecutions.⁹⁴

The main provisions for the crime of using and recruiting children under 15 as soldiers are RSICC Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii). These provisions were the first to establish such acts as war crimes.⁹⁵ They nevertheless build on the abovementioned provisions of the APs, CRC and OP, and the ICC has held that those provisions recognize that children are particularly vulnerable and that they require privileged treatment as compared to the rest of the civilian population.⁹⁶ The

principal objective of those provisions has allegedly been to protect children under the age of 15 from the risks associated with armed conflicts, hereunder securing their physical and psychological well-being. The latter is said to include not only protection from violence and fatal or non-fatal injuries during fighting, but also any potentially serious trauma that may accompany recruitment.⁹⁷ Interpretation of the short-phrased provisions of the RSICC is left with the ICC, and it will typically rely on the jurisprudence of other international tribunals when establishing what constituted international law when the relevant acts or omissions took place.⁹⁸

These RSICC provisions cover international and non-international armed conflicts respectively⁹⁹ and the prohibitions are formulated largely similar: "Conscripting or enlisting children under the age of fifteen years into the national armed forces/armed forces or groups or using them to participate actively in hostilities." Thus, during an armed conflict any recruitment, both involuntary and voluntary,¹⁰⁰ of children under 15 is prohibited by any armed force or group. It is therefore unnecessary for the purposes of the RSICC to go into the definitions of these different recruitment scenarios.¹⁰¹ It might nevertheless be of interest to note that the SCSL has construed enlistment broadly to "...include any conduct accepting the child as part of the militia",¹⁰² whereas it has also applied a flexible understanding to conscription, which it recognizes as covering "acts of coercion, such as abductions and forced recruitment, by an armed group [or armed force] against children, committed for the purpose of using them to participate

⁸⁷ The crimes themselves are defined in Art. 8(2)(b)(xxvi) and Art. 8(2)(e)(vii) respectively.

⁸⁸ See *Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army*, UN Doc. S/2012/365, 25 May 2012.

⁸⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012.

⁹⁰ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

⁹¹ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

⁹² *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 7.

⁹³ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 3.

⁹⁴ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012 pp. 135 and 162-166.

⁹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, p. 261, para. 569.

⁹⁶ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, pp. 276-277, para. 605.

⁹⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, pp. 276-277, para. 605.

⁹⁸ This indirectly follows from RSICC Art. 20(1)(b). Admittedly, the only reference to jurisprudence relates to the case law of the ICC itself, and it found in the *Lubanga* case that "[a]lthough the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute"; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, para. 603.

⁹⁹ This even includes armed conflicts which are not covered by the APs, as AP II only covers some non-international armed conflicts – see AP II Art. 1(1). See Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 88.

¹⁰⁰ The term "recruitment" is used in the APs, CRC and OP, and is considered to cover both voluntary enlistment and compulsory conscription. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263 and 276-278.

¹⁰¹ As to their understanding by the Special Court for Sierra Leone, see SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, paras. 441-442 with further references. As it is nevertheless more blameworthy to conscript than to enlist, this should be taken into consideration in sentencing the perpetrators, see Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 148.

¹⁰² SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-A, judgment (appeals chamber), 28 May 2008, para. 144.

actively in hostilities.”¹⁰³ It is similarly prohibited to let children actively participate in hostilities. Although the wording of Art. 8(2)(b)(xxvi) might be somewhat ambiguous, the Elements of Crimes (Elements) provide that “[t]he perpetrator conscripted *or* enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.”¹⁰⁴ As a consequence, a child’s consent to enlist is only of interest in relation to sentencing or reparations.¹⁰⁵ Thus, the prohibition in Art. 8 covers three types of offences: Enlistment, conscription and use.¹⁰⁶

As regards conscription and enlistment, both scenarios would seem to require that the child is recruited with the purpose of carrying out functions which constitute active participation in hostilities.¹⁰⁷ Otherwise, the prohibition would also cover activities which are normally carried out by civilian services, but which are now carried out partially by younger persons in uniform due to a breakdown of these civilian services, like garbage handling or assistance work during a natural catastrophe.

Another issue is what constitutes “national armed forces” under the provision dealing with international armed conflicts. Although “national” is not necessarily synonymous with “governmental” under a literal interpretation, it would nevertheless seem as if the term was chosen to exclude responsibility for e.g. children participating in the intifada.¹⁰⁸ Also, the use of terms as armed forces and armed groups would seem to establish a distinction between them.¹⁰⁹ However, the ICC interpreted in the *Lubanga* case the term “national” wide enough to also cover non-governmental armed forces.¹¹⁰

Although conscription etc. of child soldiers is illegal in any armed conflict under customary international law, and a restrictive interpretation would in effect shield perpetrators from prosecution by the ICC due merely to the RSICC suffering from insufficient draftsmanship, it is submitted that this is nevertheless probably a too flexible interpretation of the very wording used by the RSICC itself.¹¹¹ The problem does not arise in relation to non-international armed conflicts as the terms used there (“armed forces or groups”) are wide enough to cover most armed entities.

Here, a single case of recruitment will actually suffice,¹¹² although such a perpetrator who has not additionally committed any of the other crimes found in the RSICC would hardly be important enough for prosecution before the ICC.¹¹³ The offences are furthermore of a continuous nature and only end when either the child leaves the force or group, or turns 15.¹¹⁴

The Elements shall under Art. 9 “assist the Court in the interpretation and application” of the RSICC, and beyond the part addressed above, they provide the following guidance in relation to Art. 8(2)(b)(xxvi):

2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual

¹⁰³ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 227, para. 734.

¹⁰⁴ The Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. Italics by author. The Elements of Crimes for Art. 8(2)(e)(vii) are largely identical.

¹⁰⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, pp. 281-282, para. 617.

¹⁰⁶ See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, pp. 276-277, para. 609.

¹⁰⁷ For a similar view, see SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, para. 441, and p. 502, para. 1378.

¹⁰⁸ Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 90.

¹⁰⁹ Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 91.

¹¹⁰ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, decision on the confirmation of charges (pre-trial chamber I), 29 January 2007, pp. 94-8, paras. 268-285. The trial chamber avoids addressing the issue, see e.g. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, p. 261, para. 568. The issue was explicitly referred to in the Separate and dissenting opinion of judge Odio Benito in that case, pp. 4-5, paras. 9-14, attached to *ibid*. She stated in para. 13: “As I previously stated, the recruitment of children under the age of 15 is prohibited under international customary law, regardless of whether this was committed in the context of an international or non-international armed conflict and regardless of the nature of the armed group or force that recruited the child. It would be contrary to the “object and purpose” of the Rome Statute and contrary to internationally recognised human rights (and thus contrary to Article 21(3) of the Rome Statute) to exclude from the prohibition of child recruitment, and armed group, solely for the nature of its organization (State or non-state armed group).”

¹¹¹ For a seemingly similar view, see Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 90-93 and 100.

¹¹² A similar prohibition in the statutes of the SCSL has been understood in the same way; SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 164, para. 439 with further references.

¹¹³ RSICC Art. 17(1)(d).

¹¹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, p. 282, para. 618, and SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, para. 443.

circumstances that established the existence of an armed conflict.

The information provided by the Elements for Art. 8(2)(c)(vii) is largely identical, merely referring to armed conflict not of an international character instead of international armed conflict, and armed groups instead of national armed forces.¹¹⁵

Does the relevant recruitment or use require an intentional mind set, or will gross or other negligence suffice? The Elements indicate that “should have known” will suffice as *mens rea*, whereas the perpetrator must also have been aware of the factual circumstances which established an armed conflict. RSICC Art. 30 (1) nevertheless requires “knowledge and intent”, although the ICC seems to focus primarily on the negligence standard.¹¹⁶ Here, the SCSL has found it sufficient with a mere reference to the actual age of the relevant child at the time of recruitment, and the use of this general formulation: “Given the prevalence of children under the age of 15 in the RUF [Revolutionary United Front], the Trial Chamber is satisfied that the members of the RUF knew or should have known that [the child] was under the age of 15 years.”¹¹⁷

As regards No. 4 of the Elements, the conduct must have taken place “in the context of and was associated with an international armed conflict.” This requires a nexus between the act and the armed conflict at hand, and this will be the case where “the perpetrator acted in furtherance of or under the guise of the armed

conflict”.¹¹⁸ In the *Lubanga* case, the ICC held that “[g]iven the plain and ordinary meaning of this provision, it is unnecessary to discuss its [the issue of context] interpretation in detail: it is sufficient to show that there was a connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character.”¹¹⁹

The central terms of the prohibition, highlighted in No. 1 of the Elements, are referred to in the *travaux préparatoires* in the following manner: “The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.”¹²⁰ Be that as it may, this does not mean that both direct and indirect participation are covered,¹²¹ as the phrases compared in the quote above are rather direct participation and active participation. Although there have been efforts to hold these terms to be identical,¹²² the above quote seems to find active participation in hostilities to be broader than mere direct participation in hostilities, where the latter phrase

¹¹⁵ Similar understandings were made by the SCSL in inter alia SCSL, *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, judgment (trial chamber II), 20 June 2007, pp. 225-226, para. 729.

¹¹⁶ Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 96-98 with further references to case law. See also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, pp. 252 and 255. An example from the ICC is ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, decision on the confirmation of charges (pre-trial chamber I), 30 September 2008, p. 77, paras. 251-252.

¹¹⁷ An example is SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 512, para. 1410.

¹¹⁸ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 206, para. 566 with further references, especially to case law from the International Tribunal for the former Yugoslavia (ICTY). This would typically be the case where the recruitment or use of children “can be said to have served the ultimate goal of a military campaign”, see SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 206, para. 567.

¹¹⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, para. 571. Note that the relevant armed conflict of that case was non-international.

¹²⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the preparatory committee on the establishment of an international criminal court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 21, n. 12. See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, p. 253 for reference to the three different formulations being considered during the negotiations of the RSICC.

¹²¹ As claimed by Child Soldiers International, *Lower than words: An agenda for action to end state use of child soldiers* (London 2012), p. 45, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562. The NGO refers in id., n. 4 to the ICRC’s customary international humanitarian law study Rule 137, as found in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, reprinted with corrections, Cambridge University Press Cambridge 2009, pp. 485-488. Rule 137 states rather categorically that “[c]hildren must not be allowed to take part in hostilities”. No differentiation is here made between direct and indirect participation in hostilities. This view is supported by Sylvain Vité, *Prosecuting children during armed conflict: international humanitarian law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, pp. 28-29, but it is submitted by the present author that the ICRC study on this issue would have benefitted from additional analysis.

¹²² For information on this, see Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 97-8, and Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 94-95. See also the International Committee of the Red Cross, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, (2008) 90 *International Review of the Red Cross*, pp. 991-1047, pp. 1013-4, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. This is allegedly also the view of the defense in the *Lubanga* case, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, 18 February 2013, p. 89, para. 198.

regulates whether civilians supporting the war effort lose their legal protection from direct targeting by the enemy. In the *Lubanga* case, the ICC found that a different formulation from the APs “was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities.”¹²³ It would thus seem as if individuals are held criminally responsible for acts which would not establish ordinary state responsibility – AP I, CRC and OP using direct participation in hostilities as the relevant threshold.¹²⁴

The active participation formula has also been analyzed by the SCSL which found that, generally, “[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”¹²⁵ In a more illustrative manner, the SCSL has held that “[u]sing’ children to participate actively in the hostilities encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such [as] carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields. Whether a child is actively participating in hostilities in such situations will be assessed on a case-by-case basis.”¹²⁶ Likewise, providing guard duty to military objectives suffices.¹²⁷ Moreover, in the context of Sierra Leone, the SCSL found diamond mines to be crucial to the war effort of all the relevant armed groups, thereby generating a high risk of enemy attacks on these objects. Since children providing guard duties here were in direct danger of being caught in hostilities, they were found to

have participated actively in hostilities.¹²⁸ Similarly, safeguarding the physical safety of a military commander, particularly when used as bodyguards, will suffice.¹²⁹ Also, current case law holds the threshold to have been reached where children carry arms and commit crimes against civilians in the context of food-finding missions.¹³⁰ Additionally, using a child to amputate limbs¹³¹ or flog civilians¹³² would constitute active participation, as would their capture of girls for sexual purposes,¹³³ their looting,¹³⁴ and their burnings.¹³⁵ The very carrying of arms and ammunition would seem to suffice as well.¹³⁶ The SCSL has even found that the mere sending of trained child soldiers to a fighting area sufficiently places the children at risk for them to participate actively in hostilities.¹³⁷

As regards criminal responsibility, one of the central questions is now where to draw the line between non-active and active participation, i.e. what does active mean, or negatively phrased: Which activity is not covered by this prohibition and can thus take place without generating individual criminal responsibility under this prohibition?

In relation to food-finding, the SCSL has held that “not every instance in which a child participated in a food-finding mission constitutes active participation in hostilities”.¹³⁸ Whether the relevant threshold is reached will depend upon whether there is a “clear link” between the mission and the hostilities.¹³⁹ As regards domestic chores, the SCSL has found that this did not constitute active participation in hostilities, since such activities were not sufficiently related to hostilities and did not directly support the military operations of the relevant armed

¹²³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 285, para. 627.

¹²⁴ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 134-135.

¹²⁵ SCSL, *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, judgment (trial chamber II), 20 June 2007, p. 359, para. 1266.

¹²⁶ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 166, para. 444 with further references.

Footnotes in the original text have been omitted. It has been reported that Syrian armed forces have used children as human shields, see *Children and armed conflict, Report of the Secretary-General*, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 23.

¹²⁷ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 528, para. 1459 with further references.

¹²⁸ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, pp. 528-529, para. 1459, and p. 541, para. 1495.

¹²⁹ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 532, para. 1468.

¹³⁰ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479, p. 546, para. 1509, and p. 550, para. 1519.

¹³¹ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 539, para. 1490, and p. 543, para. 1502.

¹³² SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 569, para. 1581.

¹³³ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 543, para. 1502.

¹³⁴ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 553, para. 1526.

¹³⁵ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 553, para. 1528.

¹³⁶ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 537, para. 1486, and p. 551, para. 1524.

¹³⁷ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 535, para. 1476.

¹³⁸ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479. See also *id.*, para. 1478.

¹³⁹ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479. See also SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, judgment (trial chamber I), pp. 517-518, para. 1743.

groups.¹⁴⁰

Moreover, in the *Lubanga* case, the ICC avoided to decide whether sexual violence may constitute “use”. The Special Representative of the Secretary-General for Children and Armed Conflict had nevertheless argued for considering sexual exploitation of boys and girls by armed forces or groups as an “essential support function”.¹⁴¹

From the above it would seem as if all acts constituting “direct” participation in hostilities would qualify as “active” participation. However, this criminal law prohibition does not redefine the threshold for losing legal protection as civilian in LOAC, and it is important that no influence is let to flow in that direction.¹⁴² Nevertheless, the SCLS seemingly equate “actively participating in hostilities” with the situation when a person turns a “legitimate military target”.¹⁴³ This is a dangerous mixing of two conceptually different concepts.

Furthermore, a somewhat problematic finding was made by the SCLS in 2007 in the *Brima, Kamara and Kanu* case, where the court held that “regardless of the specific duties of the children at the [Armed Forces Revolutionary Council Secretariat in Kenema], the presence of children in locations where crimes were widely committed was illegal.”¹⁴⁴ Although the quote requires that crimes are “widely” committed, it is surprising that more than mere presence is not required before the children are found to participate actively in hostilities.

One may also ask whether merely putting children at risk of injury or suffering is sufficient to constitute their active participation in hostilities. It is submitted that this

is probably a too flexible reading of the provision, but both the SCSL and the ICC seem comfortable in doing exactly that. Thus, the SCSL found in the *Brima, Kamara and Kanu* case that “[u]sing’ children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat”,¹⁴⁵ whereas the ICC held in the *Lubanga* case that “[t]he decisive factor in deciding whether an indirect role [i.e. supporting the combatant] is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.”¹⁴⁶ There are admittedly other parts of the *Lubanga* judgment which seem to indicate that the risk potential is not in itself enough,¹⁴⁷ and it’s only to hope that this issue is addressed in a convincing manner during the appeal round.¹⁴⁸

For the purpose of comparison, state parties to the ECHR are bound to have sufficiently accessible and clear descriptions of prohibited acts.¹⁴⁹ On the other hand, ECHR Art. 7 explicitly recognizes international law as a valid source for such prohibitions, thereby arguably opening up to some degree for more vaguely circumscribed crimes than this court would have let pass had the crimes been founded in national law. Some domestic legal systems nevertheless require the prohibited acts to follow from domestic law and do not accept mere references to international law, even where the international crime itself might be well-delimited.¹⁵⁰

As regards international criminal law, the nullum crimen principle seems admittedly to have been applied in a flexible manner by the International Tribunal for the former Yugoslavia (ICTY).¹⁵¹ Be that as it may, RSICC Art. 22 (2) provides that “the definition of a crime shall

¹⁴⁰ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, judgment (trial chamber I), p. 516, para. 1739 and SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 512, para. 1411, p. 535, para. 1477, p. 551, para. 1522. The ICC does not seem to explicitly say this, but it nevertheless only seems to consider domestic work as active participation when undertaken together more military-oriented activities like acting as bodyguards, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 385, para. 882.

¹⁴¹ As referred to in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 288, para. 630 and id., n. 1811.

¹⁴² For a similar view, see Sylvain Vité, *Prosecuting children during armed conflict: international humanitarian law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, p. 25.

¹⁴³ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 581, para. 1604, and id., n 3688.

¹⁴⁴ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 359, para. 1268.

¹⁴⁵ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 228, para. 736. The putting-lives-directly-at-risk formula is also mentioned in SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 166, para. 444.

¹⁴⁶ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 363, para. 820.

¹⁴⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 285-286, para. 628.

¹⁴⁸ The issue is referred to in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, *Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74*, 18 February 2013, p. 91, para. 201.

¹⁴⁹ See e.g. Robin C.A. White and Clare Ovey, *Jacobs, White and Ovey’s The European Convention on Human Rights*, 5th ed., Oxford University Press Oxford 2010, pp. 301-303 and 312-315.

¹⁵⁰ An example is Norway, where Art. 96 of the Constitution is held to require the prohibition being found in acts of the Norwegian parliament. See e.g. Eivind Smith, *Konstitusjonelt demokrati*, Fagbokforlaget, Bergen 2009, pp. 436-439.

¹⁵¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An introduction to international criminal law and procedure*, Cambridge University Press Cambridge 2010, p. 19. The ICTY was established by UNSC Res. 827 (1993).

be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” A strict construction is therefore to be expected from the ICC. However, as Art. 22(2) may not constitute a statement of customary law, the SCSL is not bound by the rule behind that provision. Nevertheless, it will arguably be in the SCSL’s best interest to abide by a strict construction of this principle as this will lessen its exposure to criticism smearing its aftermath.

Admittedly, in relation to many of the above findings the SCSL has held that they constitute active participation in hostilities “in the context of the conflict in Sierra Leone”.¹⁵² This may limit the transferal value of these findings to other conflicts, but it is submitted that the phrase is used to address the nexus issue more than limiting the possibility of using SCSL findings as authoritative, if strictly non-binding, by other tribunals and courts. Nevertheless, one exception to this is probably whether violent acts by children against civilians constitute active participation in hostilities. Here, the SCSL went to some length to provide arguments for this conclusion in para. 1604 of the *Taylor* judgment. The court built its conclusion, which was provided by the abovementioned context-phrase, on the following aspects: The violent acts were directly linked to hostilities; the children were armed and accompanied by adult fighters and commanders; the violence typically took place in the context of guerrilla warfare; and the purpose of the crime was to damage or harm the adversary. It is uncertain whether all of these issues would have to be present before the ordering etc. of such violent acts would constitute a relevant “use” of a child outside the context of the conflict in Sierra Leone.

It should also be highlighted that in addition to the requirements considered above, the SCSL demands the following before it may establish guilt in relation to Art. 4 on other serious violations of international humanitarian law, hereunder *litra c* (child soldiers): “(ii) that the victim was not directly taking part in the hostilities at the time of the alleged violation and (iii) that the perpetrator knew or had reason to know that the victim was not taking a direct part in the hostilities at the time of the alleged act or omission”.¹⁵³ The court addresses this *inter alia* in para. 1606 of the *Taylor* judgment. However, this begs the question as to why such issues should at all

be relevant in relation to the recruitment or use of child soldiers. An armed group would presumably be no more allowed to recruit or use captured child soldiers, than it would children it has recruited or used itself who had previously not taken any direct part in hostilities. Moreover, the very use of the phrase “directly taking part in hostilities” regulates as mentioned the extent to which a civilian loses his legal protection against attacks, something which calls for a more narrowly cast net than that which generates individual criminal responsibility for a person who recruits or uses child soldiers. It is not obvious why the court would need to address this issue in relation to recruitment and use of child soldiers.

As regards criminal responsibility, a central question is how close the relationship between the state/group and the relevant child must be before it is proper to speak of the child as being used by that party. The focus is here on situations where the child has not been recruited and responsibility would probably not arise where a child during an attack on his village takes a weapon from a dead soldier and shoots some children who have bullied him. Even if these bullies were in the process of defending the village, and the child’s attack thus supports the attacking force, this would seem insufficient to constitute proper use by the relevant force/group. Amongst other reasons, the potential “perpetrators” of child soldiering would probably not even know of this individual fighter. But what if the child afterwards follow the armed group at some distance, visits places the group has just left and then plunders or kills if opportunities arise, and the leader of the armed group is aware of this and finds it useful that the child strikes additional terror in the previous victims of the armed group? Is it too much to place the threshold for constituting use as high as “overall control” or even “effective control”?¹⁵⁴

In relation to penal procedures against those who recruit or use child soldiers, the non-binding Paris principles provide that “[a]ll feasible measures should be taken to protect the rights of child witnesses and victims who may be called upon to provide evidence of any sort against or on behalf of alleged perpetrators of crimes against them or others. In no circumstances should the provision of services or support be dependent on a child’s full participation in justice mechanisms.”¹⁵⁵ For its purposes, the ICC had to be innovative in upholding the best interests of the child in the Lubanga case. It thus

¹⁵² See e.g. SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 552, para. 1526.

¹⁵³ SCSL, *Prosecutor v. Charles Gbankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 209, para. 579.

¹⁵⁴ Thresholds used to ascribe responsibility for acts or omissions of others to the relevant “perpetrator” in relation to individual criminal responsibility or state responsibility, respectively.

¹⁵⁵ The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.4, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

used screens between the witnesses and the accused, and counseling.¹⁵⁶ In this case it also contributed to the development and definition of the right to reparations.¹⁵⁷

Lastly, mention must be made of the obligation to criminalize relevant recruitment and use under OP Art. 6(1).¹⁵⁸ As the OP established limitations upon states which go beyond the APs and ICC, its special limitations are nevertheless not yet representative of international customary law.

5. Prosecuting child soldiers

Although the opposite is often stated,¹⁵⁹ some children have indeed been prosecuted under national law for their actions in armed conflicts, and some prosecutions have also been undertaken in relation to breaches of international criminal law.¹⁶⁰ Arnold nevertheless correctly points out that children may escape domestic prosecution in states where war crimes are reserved for military courts and where these may have limited their jurisdiction to persons who were at least 18 at the time of the relevant act or omission.¹⁶¹

Although the Committee on the Rights of the Child holds that “[t]he conduct of criminal proceedings against children within the military justice system should be avoided”,¹⁶² it would not seem as if there is any prohibition as such on the prosecution of juveniles for war crimes.¹⁶³ Actually, both AP I Art. 77 and AP II Art.

6 indirectly admit of the possibility to prosecute perpetrators who were under 18 at the time of the relevant act or omission, as these provisions merely prohibit the execution and pronouncement respectively of a death sentence in such situations.¹⁶⁴ Moreover, an absolute “immunity” for child perpetrators of international crimes might have the perverse effect of organizers giving tasks in violation of international criminal law to 15 to 17s, whereas soldiers aged 18 or above are set to undertake ordinary military operations.¹⁶⁵ On a similar note, the UNSC simply “[s]tress[es] the need for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity”.¹⁶⁶ It is not explicitly stated that the perpetrator himself must have been older than 18.

The issue was addressed by a military commission in the Khadr case, where the judge held that “[h]aving considered the motion, response, and reply, and the amicus briefs, the commission finds that neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age.”¹⁶⁷

Although one may be skeptical towards international

¹⁵⁶ For a short breakdown of the relevant innovations, see *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, paras. 12-3.

¹⁵⁷ For a short breakdown of ICC’s contribution on this topic, see *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict*, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, paras. 28-33.

¹⁵⁸ See Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 64-66, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

¹⁵⁹ See e.g. *United States of America v. Omar Ahmed Khadr*, Defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 18 January 2008, p. 2, para. 4, and p. 5, para. 5, and *United States of America v. Omar Ahmed Khadr*, Amicus curias brief filed by McKenzie Livingston, Esq. on behalf of sen. Robert Badinter, et al., 18 January 2008, p. 11, para 15.

¹⁶⁰ See *United States of America v. Omar Ahmed Khadr*, D22 Government response to the defence’s motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008, p. 17, *United States of America v. Omar Ahmed Khadr*, D-022 Defence reply to government response to motion [...] for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 31 January 2008, pp. 8-9, Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 241 with further references, and Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 17-8.

¹⁶¹ Roberta Arnold, *Children and Armed Conflict*, *Max Planck Encyclopedia of Public International Law*, obtainable at <http://www.mpepil.com>, para. 36.

¹⁶² Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding observations: United States of America, UN Doc. CRC/C/OPAC/USA/CO/1, 25 June 2008, p. 7, para. 30 (g). See also the Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child*, Congo, para. 75 i.f., U.N. Doc. CRC/C/15/Add.153 (2001). The Paris Principles even hold that “[c]hildren should not be prosecuted by an international court or tribunal”; The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.6 i.f., obtainable from <http://www.unhcr.org/refworld/docid/46519842.html>.

¹⁶³ *United States of America v. Omar Ahmed Khadr*, D-022 Defence reply to government response to motion [...] for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 31 January 2008, p. 1.

¹⁶⁴ As also pointed out by the US in its second report under the Optional Protocol submitted 22 January 2010, UN Doc. CRC/C/OPAC/USA/2, p. 48, para. 220. The same rule also applies for “protected persons” under 1949 Geneva Convention IV Art. 68.

¹⁶⁵ The organizers themselves would nevertheless risk prosecution for command responsibility. A somewhat similar example is given by Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 150.

¹⁶⁶ UNSC Res. 2068 (2012), 19 September 2012, UN Doc. S/RES/2068 (2012), p. 2, preambular para. 10.

¹⁶⁷ *United States of America v. Omar Ahmed Khadr*, D-022 Ruling on defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 30 April 2008, p. 6, para. 18. Italics in original have not been reproduced. The commission found that arguments regarding the rehabilitation and reintegration of children “should be addressed to a forum other than a military commission”, id., p. 7, para. 22. Omar

and national criminal law prosecutions of child soldiers since the primary penological goals of such prosecutions are seldom rehabilitation and reintegration, such prosecutions are thus nevertheless to a large degree legal under current international law.¹⁶⁸

As regards prosecution before an international tribunal, RSICC Art. 26 provides that “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.” It is obviously irrelevant that the defendant is no longer a child by the time the case is brought to the courts, since “[a] person cannot be held fully responsible for a crime if he or she was not fully responsible at the time he or she committed it.”¹⁶⁹ Although both the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)¹⁷⁰ lack formulations explicitly prohibiting the prosecution of children,¹⁷¹ there nevertheless seems to be a rule under development which prohibits children from being prosecuted before international courts or tribunals.¹⁷² At the SCSL, 15 admittedly constitutes the age threshold for criminal responsibility, but under Art. 7(1) people between 15 and 18 are to be “treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.” The prosecutor at the SCSL has also stated that his office will not indict a person for crimes committed when he was a child.¹⁷³ Thus, the increasing

focus on rehabilitating child soldiers and their reintegration into society seem to distract from the prosecution of young offenders.¹⁷⁴ SCSL Art. 19(1) further supports this trend by prohibiting imprisonment for juvenile offenders. Art. 7 (2) on the other hand shows the wide selection of tools on offer to the SCSL should it sentence child soldiers. It would therefore seem as if the prosecution of those under 18 at the time of the relevant act or omission is largely left with the states themselves.

Should such prosecutions be undertaken before national courts, it is vital to note CRC Art. 40 (3)(a) which requires a state party to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. Although the CRC does not establish an exact minimum age for criminal responsibility, the Committee on the Rights of the Child has stated “that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.”¹⁷⁵ Also, the relevant criminal procedure will need to take into account the special judicial guarantees bestowed on children. These follow from CRC Art. 40 and the 1966 International Covenant on Civil and Political Rights (ICCPR) Art. 14 (4). Some would even hold that “[a]bsent specific provision in the statute of a [national] law of war tribunal permitting the rehabilitative exercise of criminal jurisdiction international law precludes prosecution.”¹⁷⁶ Moreover, if the court system is not likely to handle the amount of cases generated by an armed conflict in a

Ahmed Khadr was in 2010 the sole remaining person at the detention facility at Guantanamo Bay captured when he was younger than 18, and he was also the only person prosecuted before a military commission for crimes he committed before he turned 18. See here the second US report under the Optional Protocol submitted 22 January 2010, UN Doc. CRC/C/OPAC/USA/2, p. 45, para. 212, and p. 47, para. 219. Khadr was sentenced in 2010 to 8 years of incarceration following a plea agreement and was repatriated to Canada on 29 September 2012, see http://en.wikipedia.org/wiki/Omar_Khadr.

¹⁶⁸ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 21 and 178-180.

¹⁶⁹ *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, p. 21.

¹⁷⁰ Established by UNSC Res. 955 (1994).

¹⁷¹ As regards most of the hybrid tribunals, see *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, pp. 12-16. The following is provided in the *travaux préparatoires* for the ICTY: “The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.” The quote is found in Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704, p. 15, para. 58.

¹⁷² Reflected also in the Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.6, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁷³ Public Affairs Office, Special Court Prosecutor Says He Will Not Prosecute Children, press release, 2 November 2002, obtainable at <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCue%2baVhw%3d&tabid=196>.

¹⁷⁴ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 242.

¹⁷⁵ Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 32. For the view that prosecutions are allowed, see also Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012 p. 106.

¹⁷⁶ *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, p. 16.

sufficiently speedy way, priority should among others be given to child perpetrators.¹⁷⁷ As regards LOAC, little reference is made to the prosecution and punishment of child offenders in AP I and AP II,¹⁷⁸ and their most central provisions are the abovementioned ones on death penalty.

Although alternatives to incarceration should be sought for child offenders,¹⁷⁹ such alternatives may not sufficiently address the gravity of the international crimes for which child soldiers might have to answer. The authorities will naturally have to consider the best interests of the child and its reintegration, but it would seem improper to revoke the possibility of incarceration for the more serious violations of international law.¹⁸⁰ If for nothing else, the respect which victims of international crimes are entitled to will occasionally require judicial proceedings with imprisonment as the likely punishment upon a finding of guilt.¹⁸¹ One should on the other hand avoid prosecuting children solely for their membership of armed forces or armed groups.¹⁸²

During incarceration, CRC Art. 37(c) requires child offenders to be separated from adult offenders “unless it is considered in the child’s best interest not to do so”. This limitation should be interpreted narrowly.¹⁸³ The authorities must also keep in mind their obligation under CRC Art. 40 (1) to reintegrate the child into society.¹⁸⁴ Partially for that reason the death penalty is prohibited for offenses committed before the child turned 18,¹⁸⁵ whereas life imprisonment is only allowed if periodic

review is undertaken.¹⁸⁶ As regards the latter, the Committee on the Rights of the Child actually “strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.”¹⁸⁷

6. Conclusions

It is not necessarily so that we need new law.¹⁸⁸ Rather, we need some clarification of existing law, especially as regards active participation, but more importantly we need to have the law as it stands implemented.

As regards the abovementioned clarifications, the *Taylor* and *Lubanga* cases provided us *inter alia* with additional clarification as to what constitutes relevant uses of child soldiers. However, it is reasonable to ask whether these courts went in these and earlier cases a couple of steps too far as regards what may constitute such use. It is to be hoped that the appeals round of the Lubanga case will provide the required clarifications.¹⁸⁹

Generally, it would seem as if there are three ways to prevent the recruitment of child soldiers: Effective legal prevention mechanisms at the national level, strengthening community protection mechanisms at the local level and providing children with alternatives to mobilization.¹⁹⁰ As to the current developments, the Special Representative finds that “considerable progress has been made...in eliciting commitments from armed forces and groups to end the recruitment and use of children.”¹⁹¹ However, she also points out that “[a]

¹⁷⁷ The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.10, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁷⁸ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, p. 237-250, p. 239-240.

¹⁷⁹ CRC Art. 37(b).

¹⁸⁰ The Committee on the Rights of the Child would seem to hold a slightly different view, see Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 71 in fine.

¹⁸¹ For a seemingly different view, see The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.9, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>. Any participation of children in truth-seeking and reconciliation mechanisms must under these principles be voluntary, id., Sec. 8.16.

¹⁸² The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.7, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁸³ Committee on the rights of the child, General Comment No. 10 (2007): *Children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, para. 85.

¹⁸⁴ See also Committee on the rights of the child, General Comment No. 10 (2007): *Children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, para. 29.

¹⁸⁵ CRC Art. 37(a).

¹⁸⁶ CRC Art. 37(a) and Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 77.

¹⁸⁷ Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 77.

¹⁸⁸ Potential changes could be to let the prohibition in international armed conflicts also cover the space between indirect and active participation for under 15s in state armed groups/forces. Active participation could also be incorporated in the provisions dealing with state responsibility. Furthermore, the age threshold could be raised to 20 or 21.

¹⁸⁹ As the mail appeal document of the defense is only available in French (ICC Doc. ICC-01/04-01/06-2942 of 26 November 2012), the current author has had to construct their arguments based on the prosecution’s comments on those arguments, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, 18 February 2013, paras. 197-213. It does not seem as if this issue has been raised in relation the appeal round in the Charles Taylor case, see SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, Prosecution’s Notice of Appeal, 19 July 2012, and SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

¹⁹⁰ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 39.

¹⁹¹ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 14.

growing concern is the number of persistent perpetrators of grave violations against children. Currently, 32 parties to conflict have been listed by the Secretary-General for at least five years and are therefore considered persistent perpetrators.”¹⁹²

One of the relevant measures is therefore the enactment of domestic legislation which penalizes *inter alia* the recruitment of child soldiers.¹⁹³ This must nevertheless be done in a way which does not breach international human rights law, especially as regards how clearly the prohibition is phrased. This issue was raised by the defense in the *Lubanga* case,¹⁹⁴ but the ICC found that the formulation of the prohibition was sufficiently clear, especially when taking into consideration the Elements.¹⁹⁵

As an illustration: In Norway, the CRC and the OP constitute parts of domestic law and will generally outrank other parliamentary acts due to the 1999 Human Rights Act Sec. 3. However, this in itself would not suffice for establishing recruitment or use of child soldiers as a crime, as this would require a specific criminal provision in or delegated from a parliamentary act. The necessary provisions for our purposes are found in the 1902 Criminal Act Sec. 104a and the 2005 Criminal Act Sec. 103 (f). The latter considers it a war crime if in connection with an armed conflict someone recruits children under 18 to armed forces or uses them to participate actively in hostilities. The Norwegian legislation is therefore stricter

than *inter alia* the RSICC, but the jurisdictional principle of universality only covers those parts of Sec. 103 (f) which do not go beyond international customary law.¹⁹⁶

Obviously, such legislation must also be enforced, and to a large extent this is regrettably not the case.¹⁹⁷ Furthermore, although it is not in line with the majority view, international law does not prohibit the prosecution of child soldiers before national courts and international tribunals, to the extent that the statutes of the latter do not explicitly limit their competence in that respect. It is the view of this author that such prosecution may occasionally be necessary. For the majority of young perpetrators, however, non-judicial truth and reconciliation mechanisms may be preferable for holding them responsible.¹⁹⁸ Such a mechanism may also help the reintegration of child perpetrators in their respective environments.¹⁹⁹

Additionally, the need for addressing socio-economic reasons behind child recruitment includes education,²⁰⁰ vocational and skills training. These tools require economic support from the world community,²⁰¹ as well as recognition of the fact that “insecurity and displacement propel children, especially those who have become separated from their families, to voluntarily join an armed group for protection and survival.”²⁰² Likewise will the establishment of administrative reparation programs to address the needs of children affected by conflict require funding. Both for national and

¹⁹² Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 17.

¹⁹³ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, para 83, and Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 65.

¹⁹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 266-7, paras. 581-582.

¹⁹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 279, para. 609.

¹⁹⁶ Sec. 5(4).

¹⁹⁷ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 67-68, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

¹⁹⁸ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 168-208.

¹⁹⁹ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 196 and 200. See also Wouter Vandenhoele, Stephan Parmentier and Ilse Derluyn, Editorial introduction – International law on children and armed conflict: the interface between various normative frameworks, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 2-13, p. 11 with further references.

²⁰⁰ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 12.

²⁰¹ Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 46. To the extent that the problem is one of motivation rather than ability, the suggestion of the Parliamentary Assembly of the Council of Europe of requiring abolition of child soldiers before a reduction of a state's foreign debt is agreed to may be an avenue to pursue; Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 12.

²⁰² Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 10. See also Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International law and comparative law quarterly*, pp. 809-826, p. 816, Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 51, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 49, and The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 6.0, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

international/ hybrid tribunals, such funds may be absent.²⁰³ Here, it is of importance that some degree of international support is actually mandated by OP Art. 7.²⁰⁴

In addition to these fundamental activities, the international community should apply sanctions against entities breaching the rules on the use of children in armed conflicts. One way of doing this is through the sanctions regimes established by the UNSC under its UN Charter chapter VII powers.²⁰⁵ An example is here the sanctions established against Somali “...political or military leaders recruiting or using children in armed

conflicts in Somalia in violation of applicable international law” in UNSC Res. 2002 (2011).²⁰⁶ To the extent that no armed force is authorized, sanction regimes may also be established by regional organizations,²⁰⁷ and this road should be taken alongside the UN path. Also, further prosecutions before relevant international tribunals and courts may have to be considered, e.g. with the UNSC referring situations to the ICC.²⁰⁸ A well-considered multi-dimensional set of severe consequences is probably the only way to motivate the 32 persistent perpetrators to change their ways.

²⁰³ As requested by *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy*, UN Doc. A/HRC/21/38, 28 June 2012, paras. 80-82.

²⁰⁴ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 107, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

²⁰⁵ This route of action is explicitly mentioned in inter alia UNSC Res 2068 (2012), p. 2, para. 3 (b). In UNSC Res. 1612 (2005) p. 2, paras. 2-3, and p. 3, para. 8 the UNSC gave its consent to establish a monitoring and reporting mechanism on children and armed conflict, and established itself a working group of the Security Council to review the reports of the said monitoring and reporting mechanism, respectively. For the suggestion of establishing a designation criteria on grave violations against children for all sanctions regimes, see Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 42.

²⁰⁶ UNSC Res. 2002 (2011), p. 3, para. 1 (d) and its predecessor UNSC Res. 1844 (2008).

²⁰⁷ Nigel White and Ademola Abass, Countermeasures and sanctions, in Malcolm D. Evans (ed.), *International Law*, 3rd ed., Oxford University Press Oxford 2010 531-558, p. 551.

²⁰⁸ Indirectly referred to in Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 46.