

Child soldiers

Dr. Norbert B. Wagner

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1 Introduction

“Child soldiers“ are generally a major concern of the community of states as well as of mankind. In modern armed conflicts – as Wells says – the recruitment and use of child soldiers is often a rule rather than an exception.¹

It would be much easier to deal with the problems from a legal point of view if we all knew what a “child” in international customary law is and if there were binding rules of international customary law for international and non-international armed conflicts existing and applicable, that “children must not be recruited into armed forces or armed groups” and that “children must not be allowed to take part in hostilities,” as it was asserted in the study on customary international humanitarian law recently undertaken by researchers of the ICRC.² The Special Court for Sierra Leone in *Prosecutor v Samuel Hinga Norman* decided that there was in 1996 already customary international penal law existing upon the prohibition on the abduction and forced recruitment of children below 15 years of age in non-international armed conflicts though.³

It is estimated that about 300 000 “child soldiers“ are suffering currently,⁴ used as fighters, spies, porters, servants, and sexual slaves for armed forces and groups,⁵ but reliable data is not available. As Happold explains, “... *the number of child soldiers cannot be accurately estimated, there are undoubtedly tens, if not hundreds of thousands worldwide.*”⁶

McKnight reports that children had been recruited in more than 85 countries and had fought in approximately 36 conflicts across the globe,⁷ especially in Africa and Asia.

¹ Wells “Crimes against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law” 12 *Tul. J. Int'l & Comp. L.* (2004) 287. See for details on “recruitment”: UN-Document “Promotion and Protection of the rights of Children, Impact of armed conflict on children” (“Machel study”), A/51/306, 26.08.1996, para. 36-43, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012).

² Rules 136, 137 of the “List of Customary Rules of International Humanitarian Law” (Henckaerts “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” *International Review of the Red Cross* [87] 2005 175 210).

³ SCSL (Appeals Chamber), *Prosecutor v Samuel Hinga Norman*, 31.05.2004, SCSL-2004-14-AR729E, Decision on Preliminary Motion Based on Lack of Jurisdiction, para. 53 (available: <http://www.unhcr.org/refworld/publisher,SCSL,,49abc0a22,0.html> [last visited: 16.04.2012]).

⁴ McKnight “Child Soldiers in Africa. A Global approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration” 18 *Afr. J. Int'l & Comp. L.* (2010) 113 113.

⁵ Wells 12 *Tul. J. Int'l & Comp. L.* (2004) 287 288; Singh “When a child is not a child: The scourge of child soldiering in Africa” *African Human Rights Journal* 2007 206 207. See for the use of “child soldiers” also: UN-Document A/51/306, 26.08.1996, para. 44-48, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012).

⁶ Happold “Protecting Children in Armed Conflict: Harnessing the Security Council’s ‘Soft Power’” 43 *ISRAEL LAW REVIEW* (2010) 360 360.

⁷ McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 113. It is not in general correct to say, as McKnight does, they served “as combatants, mine testers, messengers and cooks” as the term “combatants” is only applicable to members of armed forces of states (Art. 43 [2] Protocol Additional of the 1977 to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [cited: Protocol Additional I], printed in: Haupt, Haßenpflug, Spieker & Wagner [Editorial team] *Documents on International Humanitarian Law* A Joint Publication of the

We will see that the continents with the strongest legal rules have the biggest problems, so that it might be reconsidered if the problem is properly tackled by further work on age limits. According to official information given by the United Nations in 2010 “child soldiers“ were utilized in Afghanistan, D.R. Congo, Iraq, Yemen, Columbia, Myanmar, Nepal, Philippines, Somalia, Sri Lanka, Sudan/South-Sudan, Chad, Uganda and Central African Republic.⁸ It is not really comfortable to accept, that

“This growing use of child soldiers flies in the face of the claim that international norms and laws are exerting an increasing influence on the behaviour of state and non-state actors. Indeed, a plethora of global protocols, agreements, and declarations attempting to protect children from both forced and voluntary recruitment have been flagrantly ignored since the end of the Cold War.”⁹

Civil wars and other non-international armed conflicts as well as internal disturbances and tensions formed in the period since the second World War the overwhelming majority of conflicts. Conflicts of a non-international nature lie within the primary responsibility of states.¹⁰ The existence of “child soldiers“ is in some cases an almost inevitable consequence of the very nature of the actual conflict, if conflicts are no longer classical “wars“ or other international armed conflicts but “internal“ conflicts within the territory of a certain state between state and non-state actors or between non-state-actors, when small weapons are easily available¹¹ and human beings using them are seen as needed cheap human material in warfare, even against sophisticated high-tech-weaponry of the adversary. In these conflicts rather easily available small arms tend to be used instead of expensive technology, which make the process of killing less expensive and more widely achievable, so that even children can handle many of the modern light weapons of war.¹² From recruiters perspective children are “more obedient, do not question orders and are easier to manipulate than adult soldiers”.¹³ Another “advantage“ of the abuse of children as “child soldiers“ may be seen in a savings of costs because of less needs from food to

Federal Foreign Office, the German Red Cross, and the Federal Ministry of Defense [2006], available: <https://www.auswaertiges-amt.de/cae/servlet/contentblob/365946/publicationFile/3671/DokumenteHumanitaeresVoelkerrecht.pdf> (last visited: 16.04.2012), 495) and children are nowadays primarily used by non-State actors.

⁸ See: UN-Document A/65/820–S/2011/250, 23.04.2011. See also: Answers of the German Federal Government to Parliament (BT-Drs. 17/8408, 1 1, 2; available: <http://dipbt.bundestag.de/dip21/btd/17/084/1708408.pdf> [last visited: 15.04.2012]).

⁹ Achvarina/Reich “No Place to Hide: Refugees, Displaced Persons, and the Recruitment of Child Soldiers” 31 *International Security* (2006) 127 128.

¹⁰ Art. 2 Nr. 7 Charter of the United Nations, 26 June 1945 (cited: UN-Charter), printed in: Haupt, Haßerpflug, Spieker & Wagner *Documents* 295.

¹¹ See in this context: McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 132; Achvarina/Reich *International Security* 2006 (31) 127 135-137; Wells 12 *Tul. J. Int'l & Comp. L.* (2004) 287 290, 291.

¹² De Berry “Child Soldiers and the Convention on the Rights of the Child” *The Annals of the American Academy of Political and Social Science* 2001 92 93.

¹³ UN-Document A/51/306, 26.08.1996, para. 34, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012).

money and easier possibilities to influence or manipulate, lead and train children as fighters and the view of children as being more expendable than adult soldiers.¹⁴

Before the first international treaty about the problem of child soldiers was concluded in 1977 the use of children as combatants in international armed conflicts¹⁵ or fighters in other conflicts was primarily seen as belonging to the internal affairs of a state. Nowadays there are lots of legal attainments achieved but there is a huge problem of enforcement existing¹⁶ - starting with liable birth registrations – and a lot is still to be done regarding disarmament, demobilization, rehabilitation and reintegration of “child soldiers”,¹⁷ and sometimes not only punishment of the leading personnel of armed groups¹⁸ but also of “child soldiers”, especially those who committed heinous war crimes. *“It has often been said that what is needed is not more humanitarian law, but better methods of enforcing this law.”*¹⁹

2 The Term “Child Soldier” and its Definition

The term “child soldier” mixes two incompatible elements, childhood and military. “Childhood” as a synonym of innocence, vulnerability and dependency of parents doesn’t fit into a context of duty, mission, collateral damage, casualties, bloodshed and braveness if necessary. On an informal level a definition of “child soldiers” was presented by the “Cape Town Principles” of the Working Group on the Convention on the Rights of the Child and UNICEF of 1997, in which the term “child soldier” means

*“any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.”*²⁰

¹⁴ See: Singh, “When a child is not a child: The scourge of child soldiering in Africa” *African Human Rights Journal* (2007) 206 211.

¹⁵ “Without a party to a conflict which is a subject of international law no combatant status can exist at all” (Ipsen in Bothe (ed) “National Implementation of International Humanitarian Law, Proceedings of an International colloquium at Bad Homburg, June 17-19, 1988” 1990 115.

¹⁶ See for details: McKnight 18 *Afr. J. Int’l & Comp. L.* (2010) 113 126-128.

¹⁷ See for the needs of demobilization and re-integration: UN-Document A/51/306, 26.08.1996, para. 49-57, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012).

¹⁸ Persons like Thomas Lubanga Dyilo, who on 14.03.2012 was found guilty by the ICC of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. See: <http://www.icc-cpi.int/NR/exeres/A70A5D27-18B4-4294-816F-BE68155242E0.htm> (last visited: 15.04.2012).

¹⁹ Byron “A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies” 47 *Va. J. Int’l L.* (2006-2007) 839 841.

²⁰ Cape Town Principles on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, organised by UNICEF in

This broadened approach is helpful to understand which persons are involved in the relevant political and social problem, but is not capable to be used in a legal context. As a legal technical term “child soldier“ has not been defined yet. Official documents of the international level refer to “children in armed conflicts”,²¹ “children” under a certain age or just “children”, they do not refer to “child soldiers.“ This is not surprising, because international treaties on armed conflicts mostly refer to “members of armed forces”²² and know the term “soldier” only in the context of members of national armies,²³ so that an understanding of “child soldiers” as children in the status of members of national armies would limit the meaning of the term “child soldiers” too much.

It might be stressed already at the beginning, that a breach of international law by a state recruiting an under aged person for military purposes, especially for direct participation in hostilities, does not give an excuse for a “child soldier” from being punishable because of atrocious war crimes. Although the State and its officials might take responsibility for their failure to protect children adequately from such an involvement that does not mean that a “child soldier“ as a member of state’s armed forces could not personally be held responsible for the commitment of war crimes.

3 *The Framework for Legal Protection of “Child Soldiers“*

The increasing number of clauses for the protection of “child soldiers” demonstrates the progressive will of the international community of states to keep children apart from hostilities and other manifestations of armed conflicts. The current legal framework of the protection of “child soldiers“ consists of four different legal branches, the Law of Armed Conflicts, the Human Rights Law, International Labor Law and International Criminal Law.

cooperation with the NGO Sub-Group of the NGO Working Group on the Convention of the Rights of the Child, Cape Town, 30 April 1997, UN-Dok E/CN.4/1998/NGO/2, 10. Dezember 1997, available: http://www.unicef.org/emerg/files/Cape_Town_Principles%281%29.pdf#page=8 (last visited: 15.04.2012).

²¹ See: Preamble of the Optional Protocol to the 1989 Convention on the Rights of the Child (cited: CRC-OP), 2173 UNTS 222.

²² See Art. 3 (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (cited: GC I), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 111; Art. 3 (I), 38 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (cited: GC II), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 191; Art. 3 (I) Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (cited: GC III), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 215; Art. 3 (I) Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (cited: GC IV), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 215. The Rome Statute of the International Criminal Court, 17 July 1998 (cited: Rome statute), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 913, knows “members of armed forces” also in Art. 8 (2) (c).

²³ Art. 6 (3), 19 Annex (Regulations Concerning the Laws and Customs of War on Land) to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 583.

3 1 Law of Armed Conflict

Although several provisions of the classical Law of Armed Conflict (nowadays often called “Humanitarian International Law”) dealt with the situation of children within a belligerent environment or times of military occupation they didn’t provide specific provisions for “child soldiers”.²⁴ Since the two 1977 Protocols Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Armed Conflicts things have developed and emerged.

Although the civilian population as such, as well as individual civilians, shall not be the object of attack,²⁵ the 1977 Protocol Additional I applicable in international armed conflicts²⁶ (and only few “internationalized” non-international armed conflicts²⁷ primarily of the past) provides that children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict have to provide them with the care and aid they require.²⁸

But it is a general misunderstanding of *Detrick* to believe, children were “protected” even in the case of their participation in hostilities,²⁹ if we have an identical understanding of what “protection” in Humanitarian International Law means. By international law no civilian regardless of age, gender or another criterion is “protected” as the term is meant in Article 51 (3) of Protocol Additional I as long as he takes a direct part in hostilities. To the contrary, everybody who takes a direct part in hostilities is a legal military objective according to Article 48 of Protocol Additional I as long as he does so.³⁰ If children take an active or direct part in hostilities they lose their general protection as civilians under the Law of Armed Conflict.³¹

According to Article 77 (2) of Protocol Additional I 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 shall endeavor to give priority to those who are oldest. But this provision does not exclude voluntary service of children under the age of 15 years completely:

“Although the obligation to refrain from recruiting children under fifteen

²⁴ Art. 14, 17, 23, 24, 38, 50, 82, 89, 94, 132 GC IV.

²⁵ Art. 51 (2) Protocol Additional I.

²⁶ Art. 1 (3) Protocol Additional I.

²⁷ Art. 1 (4), 96 (3) Protocol Additional I.

²⁸ Art. 77 (1) Protocol Additional I.

²⁹ Detrick “Article 38: Children in Armed Conflicts” in *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 645 649.

³⁰ See: McKnight 18 *Afr. J. Int’l & Comp. L.* (2010) 113 117.

³¹ Wells 12 *Tul. J. Int’l & Comp. L.* (2004) 287 295.

remains, the one of refusing their voluntary enrolment is no longer explicitly mentioned. In fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen. ... However, if despite this, such "under fifteens" are intent on participating in hostilities -- a case covered by paragraph 3 -- the authorities employing or commanding them should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with persons who are not yet sufficiently mature, or even have the necessary discernment of discrimination. Thus they should give them the appropriate instruction on handling weapons, the conduct of combatants and respect for the laws and customs of war.³²

Members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatants, and have because of that the "right" to participate directly in hostilities.³³ As members of the armed forces they are to be treated as prisoners of war by a detaining power.³⁴ A combatant who falls into the power of an adverse Party while failing to meet specific requirements of combatants (e.g. carrying of arms openly during each military engagement) forfeits his right to be a prisoner of war³⁵ and may be treated as an ordinary criminal.

A specific privilege for "child soldiers" occurs in so far in Article 77 (3) of the 1977 Protocol Additional I. If in exceptional cases children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by Article 77 of the 1977 Protocol Additional I,³⁶ whether or not they are prisoners of war. Insofar McKnight is most cases correct by saying a child needed to be a combatant to maintain its protected status,³⁷ but not under all circumstances, since Article 77 Protocol Additional I is also applicable to "child soldiers" as members of a "levée en masse" in the sense of Article 4 (A) (6) GA III³⁸ or as irregulars.

It proves false to assume, like Grover does, Article 77(3) Protocol Additional I effectively erased for children under the age of 15 the conventional distinction between combatant and civilian in international armed conflict,³⁹ since combatants enjoy the privilege under international customary law that only war crimes (but not

³² Pilloud/De Preux in ICRC, *Commentary Art. 77* para. 3184, 3185.

³³ Art. 43 (2) Protocol Additional I.

³⁴ Art. 4 (A) (1) GC III; Art. 44 (1) Protocol Additional I.

³⁵ Art. 43 (3) of the 1977 Protocol Additional I.

³⁶ These special protections relate only to holding in quarters separate from the quarters of adults and the exclusion of the execution of the death penalty on persons who had not attained the age of eighteen years at the time the offence was committed.

³⁷ McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 117.

³⁸ "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

³⁹ Grover "Trial of the Child Soldier: Protecting the Rights of the Accused" *ZaöRV* 2005 217 223.

their lawful participation in hostilities⁴⁰) can be punished on the basis of national or international penal law, whereas even juvenile non-combatants can be punished for their direct participation in hostilities as well as for the possession of fire-arms. “*Civilians who take part in hostilities in an armed conflict do not thereby become combatants.*”⁴¹

The term “combatant” describes in Article 43 (2) Protocol Additional I a legal status,⁴² not an activity. In so far it is possible to say that soldiers under the age of 15 years might be “combatants”, who are “lawfully” at the theatre of war,⁴³ although they are unlawful members of armed forces.

The Protocol Additional II to the Geneva Conventions is applicable only in such non-international armed conflicts which take place in the territory of a State party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.⁴⁴ Protocol Additional II does not apply to situations of internal disturbances and tensions, as not being armed conflicts.⁴⁵ That is the reason why is

⁴⁰ In Germany the privilege of combatants of international customary law is applicable in national law via Art. 25 of the Constitution. According to Art. 25 (“*The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.*” [available in English: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0133, last visited: 15.04.2012]) customary international law ranks below the Constitution and **above** parliamentary Acts. The “general rules of international law” in the sense of Art. 25 of the German Constitution are the rules of universal customary international law and the from national legislations passed on general principles, as the Constitutional Court often expressed. Art. 25 is not applicable on treaty law. See e.g.: Germ. FCC, 2 BvM 9/03 (06.12.2006), Para. 26, available: http://www.bverfg.de/entscheidungen/ms20061206_2bvm000903.html (last visited: 16.04.2012). The customary international law is in South Africa law in the Republic, but only unless it is inconsistent with the Constitution or an Act of Parliament (Section 232 of the Constitution), so that it is questionable how it could be guaranteed that adversary combatants couldn't get punished as it is required by international law.

⁴¹ Rona “Legal Issues in the ‘War on Terrorism’ – Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger” 9 *German Law Journal* (2008) 711 723.

⁴² Rona 9 *German Law Journal* (2008) 711 722 uses the phrase “license-to-kill” to describe the “combatant’s privilege”.

⁴³ “Thus, the distinction ... between lawful and unlawful combatants ... does not contribute to the clarification, because a combatant is a legal term by itself. One does not try, for instance, to qualify an expropriation based on legal rules as lawful robbery, or vice versa.” (Ipsen in Bothe (ed) “National Implementation of International Humanitarian Law, Proceedings of an International colloquium at Bad Homburg, June 17-19, 1988” 1990 113). The “combatants’ privilege ... provides immunity from the application of municipal law against homicides, wounding and maiming, or capturing persons and destruction of property, as long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict.” (Solf in Bothe/Partsch/Solf (ed) “New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols additional to the Geneva conventions of 1949” 1982 243).

⁴⁴ Art. 1 (1) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (cited: Protocol Additional II), printed in: Haupt, Haßenpflug, Spieker & Wagner *Documents* 583.

⁴⁵ Art. 1 (1) Protocol Additional II.

often not applicable, because most current conflicts do not reach the level of internal armed conflicts required by Protocol Additional II.⁴⁶

Protocol Additional II states in Article 4 that children shall be provided with the care and aid they require, and in particular 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.⁴⁷ In contrary to Protocol I this clause prohibits the participation of under-aged child soldiers in hostilities, whether direct or indirect, in non-international armed conflicts,⁴⁸ and further:

“The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be “allowed to take part in hostilities”, i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.”⁴⁹

The special protection provided by Article 4 to children who have not attained the age of fifteen years remains applicable to them under all circumstances.⁵⁰ This provision implies that not only States but also armed rebel groups are responsible for the non-recruitment of children. But obviously the binding of non-state-actors to international law has proven difficult yet and introduces the importance of deterring individual criminal responsibility.⁵¹

3 2 Human Rights Law

The protection of “child soldiers” is also a topic on the agenda of the universal and regional framework of Human Rights Law.

3 2 1 Convention on the Rights of the Child

The Convention on the Rights of the Child establishes minimum standards for children’s rights in a huge variety of fields and is applicable in peace times as well as in times of international armed conflict. Article 38 (3) Convention on the Rights of the Child contains only one provision to reduce the risk of children to become actively involved in belligerency:

“States Parties shall refrain from recruiting any person who has not attained

⁴⁶ Mezmur “Children at Both of the Gun: Child Soldiers in Africa” in *Children’s Rights in Africa* 201.

⁴⁷ Art. 4 (3) (c) Protocol Additional II.

⁴⁸ Wells 12 *Tul. J. Int’l & Comp. L.* (2004) 287 295.

⁴⁹ Junod in ICRC, Commentary Art. 4 para. 4557.

⁵⁰ Art. 4 (3) (d) Protocol Additional II.

⁵¹ McKnight 18 *Afr. J. Int’l & Comp. L.* (2010) 113 117.

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.”

But children may be allowed to join armed forces voluntarily before the age of 18 years according to that provision.

3 2 2 *Optional Protocol to the Convention on the Rights of the Child*

The last success was the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. The Optional Protocol of 25 May 2000 defines its personal scope by referencing the members of armed forces compulsorily or voluntary recruited. As a general requirement States parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.⁵² Some states believe that the latter clause only means “immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy” and not “indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment”.⁵³

Article 3 (2) of the Optional Protocol is **not** inconsistent with Article 1 of the same treaty, because it depends on the quality of a war or conflict and the human and other resources of a State to examine and decide what feasible is or isn't,⁵⁴ although it might be – as it is seen by McKnight – the most effective measure for preventing children from taking direct part in armed conflict to require the minimum age of 18 years for voluntary military service.⁵⁵

States parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.⁵⁶ State parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38 (3) of the Convention on the Rights of the Child, and shall deposit a binding declaration that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the

⁵² Art. 1 OP-CRC.

⁵³ American Declaration upon ratification (available: http://www.bayefsky.com/html/usa_t2_crc_opt1.php [last visited: 15.04.2012]).

⁵⁴ It is on the international arena not an unusual usual way if there can't a consensus be reached to weaken formulations with a “feasible” in a way to the discretion of states. Different opinion: McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 118.

⁵⁵ McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 118, 130.

⁵⁶ Art. 2 OP-CRC

safeguards it has adopted to ensure that such recruitment is not forced or coerced.⁵⁷ Several states like France, Germany, Israel, Italy, the United States (minimum 17 years), Egypt and the United Kingdom (minimum 16 years) permit voluntary recruitment into their national armed forces under the age of 18 years. South Africa has already achieved a minimum age of 18 years in its legislation.⁵⁸

States without a “straight-18-approach” shall maintain safeguards to ensure, as a minimum, that: Such recruitment is genuinely voluntary; such recruitment is carried out with the informed consent of the person's parents or legal guardians; such persons are fully informed of the duties involved in such military service; such persons provide reliable proof of age prior to acceptance into national military service,⁵⁹ although this requirement is especially in Africa of a major concern regarding the fact, that in sub-Saharan Africa a majority of children under the age of 5 (!) years are said to be not registered.⁶⁰

Although it is still under dispute, whether non-State actors can be bound by international human rights law,⁶¹ the Optional Protocol stipulates that armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.⁶²

States parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such

⁵⁷ Art. 3 (2) OP-CRC. Germany ratified with the declaration: “Declaration: The Federal Republic of Germany declares that it considers a minimum age of 17 years to be binding for the voluntary recruitment of soldiers into its armed forces under the terms of Art. 3 paragraph 2 of the Optional Protocol. Persons under the age of 18 years shall be recruited into the armed forces solely for the purpose of commencing military training. The protection of voluntary recruits under the age of 18 years in connection with their decision to join the armed forces is ensured by the need to obtain the consent of their legal guardian and the indispensable requirement that they present an identification card or passport as a reliable proof of their age.” (available: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en# EndDec).

The reason why states like Germany do not accept a “straight-18 approach” might be simple: The majority of young people who leave secondary schools and could be interested in a career in the national armies are 16 or 17 years old and would probably decide themselves for different employers (e.g. police) if they had to wait too long.

The United Kingdom declared e.g. upon ratification: “The minimum age at which individuals may join the UK Armed Forces is 16 years. This minimum broadly reflects the minimum statutory school leaving age in the United Kingdom, that is the age at which young persons may first be permitted to cease full-time education and enter the full-time employment market. Parental consent is required in all cases of recruitment under the age of 18 years.” (available: http://www.bayefsky.com/html/uk_t2_crc_opt1.php [last visited: 15.04.2012]).

⁵⁸ Section 52 (1) Defence Act, 2002 (available: <http://www.dod.mil.za/documents/acts/New%20Defence%20Act%2042%20of%202002.pdf> [last visited: 16.04.2012]).

⁵⁹ Art. 3 (3) OP-CRC.

⁶⁰ Mezmur “Children at Both of the Gun: Child Soldiers in Africa” in *Children's Rights in Africa* 206.

⁶¹ Happold *ISRAEL LAW REVIEW* 2010 (43) 360 374.

⁶² Art. 4 paragraph 1 OP-CRC.

practices,⁶³ although it is obvious that in situations of non-international armed conflicts their real possibilities to influence the recruitment policy of the adversary are limited and the deterring effect of a law might be little with regard to a group trying to overthrow the law-making system.⁶⁴ Insofar the population plays an important role too: “NGOs, religious groups and civil society in general have important roles in establishing ethical frameworks that characterize children’s participation in armed conflicts as unacceptable.”⁶⁵ Even if Non-state actors don’t respect the law, they can’t ignore their social environment, if they want to be supported by the population. Recently states committed themselves again to

*“take all feasible measures, including legal and administrative measures, to prevent armed groups within the jurisdiction of our State that are distinct from our armed forces from recruiting or using children under 18 years of age in hostilities.”*⁶⁶

The Optional Protocol acknowledges the need for measures to ensure that “child soldiers” are demobilized or otherwise released from service, appropriate assisted for their physical and psychological recovery and their social reintegration.⁶⁷

Regarding the implementation of the Optional Protocol it might be interesting how Germany deals with its responsibilities. 1 305 persons under the age of 18 years were recruited voluntarily to start a career in the armed forces in the years between 2009 and 2011,⁶⁸ but soldiers under the age of 18 years do not take part in the international missions of the German army (“Bundeswehr”) under mandate of the Security Council of the United Nations in Afghanistan, Kosovo, Bosnia-Herzegovina, on the High Seas or wherever.⁶⁹ With the ratification of the Optional Protocol ministerial orders were given, that soldiers under the age of 18 years are not allowed to fulfill any tasks outside of training self-reliantly when the use of weapons might become necessary (e.g. guard duties) and use of weapons is only allowed for purposes of training under painstaking supervision.⁷⁰ The Federal Government does

⁶³ Art. 4 (2) OP-CRC.

⁶⁴ See : UN-Document A/51/306, 26.08.1996, para. 61, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012): “Armed opposition groups are less amenable to external or formal pressure than government-sponsored armies.”

⁶⁵ UN-Document A/51/306, 26.08.1996, para. 59, available: <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm> (last visited: 16.04.2012).

⁶⁶ Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups, Feb. 2007, para. 4 (available: <http://reliefweb.int/node/227449> [last visited: 15.04.2012]).

⁶⁷ Art. 6 (3) OP-CRC.

⁶⁸ Answers of the German Federal Government to Parliament (BT-Drs. 17/6311 3; available: <http://dipbt.bundestag.de/dip21/btd/17/063/1706311.pdf> [last visited: 16.04.2012]).

⁶⁹ Answers of the German Federal Government to Parliament (BT-Drs. 17/6311 5, 8; available: <http://dipbt.bundestag.de/dip21/btd/17/063/1706311.pdf> [last visited: 16.04.2012]).

⁷⁰ Answers of the German Federal Government to Parliament (BT-Drs. 17/6311 2, 5, 8; available: <http://dipbt.bundestag.de/dip21/btd/17/063/1706311.pdf> [last visited: 16.04.2012]).

not support any states regarding training or equipment of their armed forces who do not abide by the Convention on the Rights or its respective Optional Protocol.⁷¹

3 2 3 *Regional Instruments*

For purposes of regional protection of children's rights there are also instruments in place, for example the African Charter on the Rights and Welfare of the Child,⁷² still the only regional treaty in the world focused on the human rights of children.⁷³ It defines in its Article 2 by a "straight-18-approach" a child as every human being below the age of 18 years. States Parties shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.⁷⁴ States parties shall protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall – which is also something special – also apply to children in situations of internal armed conflicts, tension and strife.⁷⁵ Although the "straight-18-standard" is quite high, there is no mention in the treaty about the responsibility of non-State armed groups.⁷⁶

3 3 *International Labor Law*

3 3 1 *Minimum Age Convention*

International Labor Law deals also with the protection of "child soldiers" although the "Minimum Age Convention"⁷⁷ with its "straight-18 approach" is not applicable on

⁷¹ Answers of the German Federal Government to Parliament (BT-Drs. 17/2998 5; available: <http://dip21.bundestag.de/dip21/btd/17/029/1702998.pdf> [last visited: 16.04.2012]).

⁷² African Charter on the Rights and Welfare of the Child (cited: ACRWC), 11.07.1990, available: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (last visited: 16.04.2012).

⁷³ McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 119.

⁷⁴ Art. 22 (2) ACRWC

⁷⁵ Art. 22 (3) ACRWC.

⁷⁶ McKnight 18 *Afr. J. Int'l & Comp. L.* (2010) 113 119.

⁷⁷ See: Article 3 (1) ILO Convention No. 138 on the minimum age for admission to employment and work, 26.06.1973 (available: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> [last visited: 15.04.2012]): "The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years."

service in armed forces,⁷⁸ as the existence of Article 3 (a) of the “Worst Forms of Child Labor Convention”⁷⁹ demonstrates.

It might be seen as an over-subtle argument, but it has always been the common understanding of countries that the “Minimum Age Convention” did not affect matters of the Law of Armed Conflict,⁸⁰ because it is not the very nature of the service in armed forces in peacetime or time of conflict which is likely to jeopardize the health (and life) of children, but the existence of armed conflicts with the possible impact of the adversary.

State parties like South Africa and Germany have specified a minimum age of 15 years in the sense of Article 2 (1) of the “Minimum Age Convention”,⁸¹ which would not go together with their declarations regarding the Optional Protocol to the Convention on the Rights of the Child, if the “Minimum Age Convention” was applicable to service in armed forces.

3 3 2 Worst Forms of Child Labor Convention

The “Worst Forms of Child Labor Convention”, which has been ratified by 174 State parties yet, as a contrast deals with the abolishment and prevention of worst forms of child labor. According to Article 3 (a) of that Convention, the term “worst forms of child labor” comprises all forms of slavery or practices similar to slavery, such as forced or compulsory recruitment of children for use in armed conflict. The term “child” in the context of that Convention applies to all persons under the age of 18.⁸² This “straight-18 approach” does not prohibit voluntary military service of children under the age of 18 years. The General Conference of the International Labor Organization recommended in 1999, the member States should provide that forced or compulsory recruitment of children for use in armed conflict are criminal offences,⁸³ a recommendation with special regard to non-Parties to the Rome Statute.

⁷⁸ The different insinuation of Olivier “Protocoll on Children in Armed Conflict: An International Law analysis” in C.J. Davel (ed) *Introduction to Child Law in South Africa* (2000) 257 260 is misleading insofar.

⁷⁹ ILO Convention No. 182 concerning the Prohibition and immediate Action for the Elimination ofv the Worst Forms of Child Labour, 17.06.1999, available: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last visited: 15.04.2012).

⁸⁰ For similar reasons Art. 32 (1) CRC (“States Parties recognize the right of the child to be protected ... from performing any work that is likely to be hazardous or ... to be harmful to the child's health or physical, mental, spiritual, moral or social development.”) does not relate to “child soldiers” under the age of 18 years.

⁸¹ See: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C138&Lang=EN> (last visited: 15.04.2012).

⁸² Art. 2 ILO 182.

⁸³ R190, Worst Forms of Child Labour Recommendation, 17.06.1999, para. 12 (a), available: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R190> (last visited: 16.04.2012).

3 4 Criminal Law

3 4 1 International Criminal Law

An important development was brought by the adoption of the Rome Statute of the International Criminal Court in 1998 with its inclusion of both forms of recruitment,⁸⁴ namely the enlisting (enrolling on the list of a military body⁸⁵ or non-compulsory recruitment⁸⁶) or the conscripting (compulsorily enlisting⁸⁷ or recruitment⁸⁸), of children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts as a war crime,⁸⁹ although there was, has been and will be a never ending discussion, when there is a non-international armed conflict⁹⁰ and what participating actively in hostilities really means,⁹¹ although it is clear that it is directed against exposure to particular “armed conflict risks”.⁹² As Ambos reports,

“(t)he plausible interpretations of the ‘active participation’ requirement range from a very restrictive reading limiting the participation to exclusively combat-related activities to a broader reading, including any supporting activity or role. This position is also shared by the (ICC). What is clear from this and indeed quite uncontroversial is that, on the one hand, activities clearly unrelated to the hostilities, for example delivering food or working as domestic staff, are excluded and, on the other hand, a ‘direct’ participation ‘in

⁸⁴ As Ambos “The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues” 12 *International Criminal Law Review* 2012 (No. 2) 1 21 Fn. 126, available: <http://ssrn.com/abstract=2030751> [last visited: 15.04.2012]) points out, “‘Recruitment’ is the primary, superior term encompassing both ‘conscripting’ and ‘enlistment’.”

⁸⁵ ICC (ICC-01/04-01/06), Judgment of 14.03.2012 (para. 608), available: <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (last visited: 15.04.2012). The “poor referencing standard of the Chamber” receives profound review by: Ambos 12 *International Criminal Law Review* 2012 (No. 2) 1 45.

⁸⁶ Ambos 12 *International Criminal Law Review* 2012 (No. 2) 1 23.

⁸⁷ ICC (ICC-01/04-01/06), Judgment of 14.03.2012 (para. 608), available: <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (last visited: 15.04.2012).

⁸⁸ Ambos 12 *International Criminal Law Review* 2012 (No. 2) 1 23.

⁸⁹ Ambos 12 *International Criminal Law Review* 2012 (No. 2) 1 25, 26 gives an interesting perspective regarding the relevance of child’s consent as a valid defence to enlistment.

⁹⁰ Protocol Additional II shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts (Art. 1 paragraph 2).

⁹¹ “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” (Art. 51 [3] Protocol Additional I).

⁹² Ambos 12 *International Criminal Law Review* 2012 (No. 2) 1 27.

hostilities', as required by Article 77 (2) AP I, is not necessary."⁹³

According to Article 8 (2) (b) (xxvi) Rome Statute "war crimes" means serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. According to Article 8 (2) (e) (vii) Rome Statute "war crimes" are also serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups (Article 8 (2) (f) Rome Statute). The offence continues to be committed as long as the child remains in its status in that respective organization or is under the age of fifteen.⁹⁴

Important is that the Court has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.⁹⁵ The Rome Statute offers a generous treatment of victims, who are allowed to play an active role in the proceedings (Article 68 (3) Rome Statute). The fact, that child soldiers might have committed war crimes does not disqualify them from the status of a victim.⁹⁶ In *Prosecutor v Lubanga*⁹⁷ the Court does not only recognize the child soldiers but also their parents or relatives as victims of the alleged crimes.

3 4 2 National Criminal Law

The recruitment or usage of child soldiers has increasingly been criminalized in States' national laws, especially to mention the legislation of the United States, not only by State parties to the Rome Statute.⁹⁸ To provide for the ability to prosecute in the sense of Article 17 (1) Rome Statute (complementarity principle) states have to ensure sufficient national legislation.

⁹³ Ambos 12 International Criminal Law Review 2012 (No. 2) 1 26.

⁹⁴ Ambos 12 International Criminal Law Review 2012 (No. 2) 1 22.

⁹⁵ Art. 26 Rome Statute. The Statute of the Special Court for Sierra Leone allows prosecuting "child soldiers" between the ages of fifteen and eighteen"; see: Wells 12 *Tul. J. Int'l & Comp. L.* (2004) 287 289.

⁹⁶ Ambos 12 International Criminal Law Review 2012 (No. 2) 1 3 Fn. 7.

⁹⁷ *Prosecutor v Lubanga* (ICC-01/04-01/06), 14.03.2012 (Para. 17), available: <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (last visited: 15.04.2012).

⁹⁸ Happold "Protecting Children in Armed Conflict: Harnessing the Security Council's 'Soft Power'" *ISRAEL LAW REVIEW* 2010 (43) 360 378.

South Africa and Germany for example have the necessary legislation already adopted in so far, South Africa in partial fulfillment of its additional obligations stemming from the Constitution, which provides that every person under the age of 18 years has the right not to be used directly in armed conflict, and to be protected in times of armed conflict (Section 28 [1] [i] and [3]).⁹⁹ With regard to children of 15 years and younger the right not to be used directly in armed conflict is non-derogable, even after declaration of the state of emergency (Section 37 of the Constitution).

In South Africa conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities in international armed conflicts is under the International Criminal Court Act, 2002 (Schedule 1) a war crime (Part 3 (b) (xxvi)).¹⁰⁰ Conscripting or enlisting children under the age of 15 years in in armed conflicts not of an international character into armed forces or groups or using them to participate actively in hostilities is under that Act a war crime too (Part 3 (e) (vii)). Any person who commits such a crime, is guilty of an offence and can be convicted (Section 4).

In Germany it is under the “Code of Crimes against international Law” according to its Section 8 (1) (5) a “war crime against persons”, if someone in connection with an international or with an armed conflict not of an international character conscripts children under the age of fifteen years into their armed forces, and enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities.¹⁰¹

4 Enforcement of the Protection of “Child Soldiers”

Standard-setting is one thing, but ensuring compliance with the already-existing children’s’ rights law is another. In recent years the focus has been shifting from the first to the latter.¹⁰² On behalf of the implementation of the several different international instruments of the protection of “child soldiers” there are besides “Non-Governmental Organizations” several actors on the international arena to be recognized.

In 1996 the first independent expert appointed by the Secretary-General of the United Nations submitted a report to the General Assembly on the impact of armed conflict on children, which led to the establishment of the Special Representative of the Secretary-General for Children and Armed Conflict. The Special Representative

⁹⁹ Constitution of the Republic of South Africa Act, No. 108 of 1996. According to Section 52 (1) Defence Act of 2002 the minimum age of enlistment is eighteen years.

¹⁰⁰ Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Government Gazette Vol. 445, 18.07.2002, No. 23642).

¹⁰¹ Code of Crimes against international Law (Völkerstrafgesetzbuch), 26.06.2002 (BGBl. I 2254), available in English: <http://www.mpicc.de/shared/data/pdf/vstgbengl.pdf> (last visited: 15.04.2012).

¹⁰² Happold *ISRAEL LAW REVIEW* 2010 (43) 360 361, 362. See also the (non-legally binding) Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups, Feb. 2007 (available: <http://reliefweb.int/node/227449> [last visited: 15.04.2012]).

can only serve as a voice for the protection and well-being of children in armed conflict and has no official authorities.¹⁰³

The Committee on the Rights of the Child is a body that monitors both, the implementation of the Convention on the Rights of the Child and the implementation of optional protocols to the Convention by its State parties.¹⁰⁴ The Committee is unable to consider individual complaints and can only give recommendations without immediate influence on decisions, since the Committee cannot overrule national decisions.

The African Charter on the Rights and Welfare of the Child provides in Articles 32 an “African Committee of Experts on the Rights and Welfare of the Child”. It receives and considers State Party Reports in the first place, undertakes investigative or fact-finding missions, interprets the provisions of the Charter, but it is also allowed to receive “communication” from any person.¹⁰⁵

The Security Council of the United Nations has no specific treaty competence on children’s rights, but has the “primary responsibility for the maintenance of international peace and security.”¹⁰⁶ In several resolutions the Security Council addressed the problem of “child soldiers”.¹⁰⁷ In his Resolution 1314 (2000) the Council alluded to his potential from Chapter VII of the Charter of the United Nations and pointed out:

“Notes that the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps”¹⁰⁸

Such appropriate steps could be referring of cases to the Prosecutor of the ICC acting under Chapter VII of the Charter of the United Nations.¹⁰⁹ Since Security Council resolution 1612 (2005),¹¹⁰ complemented by resolution 1882 (2009),¹¹¹ there

¹⁰³ See: <http://www.un.org/children/conflict/english/theoffice.html> (last visited: 15.04.2012).

¹⁰⁴ Art. 43 (1) CRC, Art. 8 CRC-OP.

¹⁰⁵ Art. 42-45 ACRWC.

¹⁰⁶ Art. 24 (1) UN-Charter.

¹⁰⁷ E.g.: Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1612 (2005), 1882 (2009) and most recently 1998 (2011).

¹⁰⁸ Available: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/604/03/PDF/N0060403.pdf?OpenElement> (last visited: 15.04.2012).

¹⁰⁹ Art. 13 (b) Rome Statute.

¹¹⁰ Available: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf?OpenElement> (last visited: 15.04.2012). See to the working group also: Happold *ISRAEL LAW REVIEW* 2010 (43) 360 367-371.

is also a monitoring and reporting mechanism in place to monitor the several grave abuses of children and a newly established Security Council Working Group on Children and Armed Conflict. The efforts of the Security Council seem to create impact, because Happold is in a position to report, that this engagement has led a number of non-State actors to cease or reduce their recruitment and use of child soldiers.¹¹²

5 Prosecution of “Child Soldiers”

Generally speaking, “child soldiers are victims more than they are perpetrators.”¹¹³ Nevertheless, the necessity of criminal proceedings against “child soldiers” can’t be denied in general,¹¹⁴ especially excluding proceedings against those who committed serious war crimes like rape, sexual slavery, enforced prostitution, or forced pregnancy would be premature.

As already expressed, international law does not prohibit holding children criminally responsible for criminal offences, especially for war crimes during international or non-international armed conflicts. The legal emphasis on holding recruiters responsible, does not entail a prohibition on the prosecution of child soldiers under the age of 18 years.¹¹⁵ In general, international law leaves it to the discretion of states to establish a minimum age at which children will be held legally responsible for offences.

The ICC has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime, whereas the statute of the Special Court for Sierra Leone allows prosecuting of “child soldiers” between the ages of fifteen and eighteen¹¹⁶ and entails special provisions for their protection.¹¹⁷ The statutes of the

¹¹¹ Available: <http://www.auswaertiges-amt.de/cae/servlet/contentblob/358158/publicationFile/3607/Resolution1882.pdf> (last visited: 15.04.2012).

¹¹² Happold *ISRAEL LAW REVIEW* 2010 (43) 360 375.

¹¹³ Grover *ZaöRV* 2005 217 238.

¹¹⁴ See for aspects of the necessity: Mezmur “Children at Both of the Gun: Child Soldiers in Africa” in Sloth-Nielsen (ed.) *Children’s Rights in Africa, A legal perspective* (2008) 199 211-213.

¹¹⁵ Grover *ZaöRV* 2005 217 218.

¹¹⁶ See: Wells 12 *Tul. J. Int’l & Comp. L.* (2004) 287 289.

¹¹⁷ Art. 7 (Jurisdiction over persons of 15 years of age) of the Statute for the Special Court for Sierra Leone (available: <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJEW%3D&> [last visited: 16.04.2012]) reads: “1. *The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall 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.* 2. *In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service*

ICTY and the ICTR remain silent on whether children can be prosecuted in so far.¹¹⁸ Although it might be unlikely that the Special Court for Sierra Leone will prosecute any children, the statute sets up an icon for the legitimacy of prosecuting children under International Criminal Law.¹¹⁹ In such a case the child would enjoy all rights under international humanitarian law and applicable human rights law in this context.¹²⁰

6 Conclusion

The international community is on a good way, regarding the legal environment, although it's still no offence under International Criminal Law to recruit children under the age of 18 years compulsory or let them take a direct part in hostilities, even if their respective state accepted such a restriction under human rights law, which is understandable, but nevertheless weakening such obligations. In contrast to the legal instruments the reality on the battlefields especially the reality of civil wars remains atrocious. It seems to be time to start the implementation seriously.

orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.”

¹¹⁸ Grover *ZaöRV* 2005 217 220.

¹¹⁹ Grover *ZaöRV* 2005 217 218.

¹²⁰ See: Grover *ZaöRV* 2005 217 221-238.

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