

Protection of Child Soldiers under International Law & The Application of Refugee Status Criteria Based on the 1951 Refugee Convention

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Introduction

Children today remain the principal victims of war. During the 20th century, they have figured prominently among the victims of systematic acts of violence.² The United Nations estimates in 2017 that more than 10,000 children were killed or maimed as a direct result of armed conflict taking place in 14 countries, including Syria, Yemen, Iraq,³ Sudan, and Afghanistan.⁴

In Syria, since the war broke out in March 2011, an estimated 19,800 children were killed⁵ and about three millions children are displaced within Syria. In addition, half of the three million refugees in neighbouring countries are children.⁶

Every day in all conflict situations, thousands of children are being recruited, killed, maimed, abducted, subjected to trafficking, sexual violence, indoctrinated and forced to commit atrocities, denied humanitarian access, and deprived of health care.⁷

Despite some progress made in the course of last year towards the protection of children in armed conflict, the illegal recruitment and use of children in armed conflict remain a great challenge and sad reality. Indeed, armed conflict still plagues children's lives,

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² An estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict. See: http://oecdobserver.org/news/archivestory.php/aid/701/Children_are_war_s_greatest_victims.html

³ UNHCR's Position on Returns to Iraq reported that "children are being recruited and used in support and combat functions by ISIS as well as by anti-ISIS armed groups, including the Popular Mobilization Units. According to this report "Iraq is considered one of the most dangerous places in the world for children, with killing and maiming being the most reported forms of violence against children. ISIS is reportedly responsible for widespread abuses against children, including abduction, physical abuse, sexual violence, recruitment, corporal punishment, and execution. Children are also wounded or killed as a result of military operations, and are reported to be disproportionately affected by the deteriorating humanitarian conditions. According to the UN Children's Fund (UNICEF), at least 3.6 million children in Iraq, or one in five, are at serious risk of death, injury, sexual violence, abduction and recruitment by armed groups." *UNHCR's Position on Returns to Iraq*, 14 November 2016, Para. 9-15, available at: <https://www.refworld.org/docid/58299e694.html> [accessed 5 March 2019]

⁴ Satoshi Sugiyama, 'U.N. Reports Sharp Increase in Children Killed or Maimed in Conflicts', *The New York Times*, June 27, 2018, available at: <https://www.nytimes.com/2018/06/27/world/un-children-armed-conflict.html>; Annual Report of the Secretary-General on children and armed conflict, A/72/865-S/2018/465, Para. 6-7, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/2018/465&Lang=E&Area=UNDOC

⁵ Associated Press, 'After 7 years of war, here are the shocking statistics on Syria's children', *Al-Arabiya*, 13 March 2018, available at: <http://english.alarabiya.net/en/features/2018/03/13/After-7-years-of-war-here-are-the-shocking-statistics-on-Syria-s-children-.html>

⁶ Lisa Schlein, 'UNICEF Says Children Main Victims of War', September 23, 2014, available at: <https://www.voanews.com/a/unicef-says-children-main-victims-of-war/2459908.html>; Martin Chulov, '2017 was the deadliest year of Syrian war for children, says Unicef' *The Guardian*, 12 March 2018, available at: <https://www.theguardian.com/world/2018/mar/12/2017-deadliest-year-of-syrian-war-for-children-says-unicef-psychological-ruin>

⁷ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui (A/HRC/25/46), Para. 12; Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/HRC/37/47, Para.10.



depriving them of their right to life and physical integrity, but also of their basic social, economic and cultural rights. Thus, children, and especially child soldiers, continue to be in need of protection. In these circumstances, children, who are forcibly conscripted into national armies or rebel forces, fled their country of origin seeking safety in the host country. Often they apply for refugee status to obtain international protection based on the 1951 Refugee Convention.⁸

Child Soldiers as Victims

The recruitment of children for participation in an armed conflict is one of the most frequent and egregious violations targeting children. In the last 13 years, the use of child soldiers has spread to almost every region of the world and every armed conflict. Though an exact number is impossible to define, thousands of child soldiers are illegally serving in armed conflict around the world.⁹

Because of a children's unique vulnerability and immaturity, they are particularly susceptible to recruitment by manipulation or force. They might enter armed conflicts either involuntarily, through the threat or use of violence against them or their loved ones, or "voluntarily," due to dire poverty, feelings of helplessness and vulnerability, peer pressure, or the desire for revenge.¹⁰

In the majority of conflicts, the primary method of child recruitment is abduction. According to a U.N. report, young soldiers may be abducted or recruited from the conflict

⁸ Article 1A (2) of the 1951 Convention refers to the core of the refugee definition, which covers any person who "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." However, the definition makes no specific reference to or provision for children, although it is clear that the convention applies to all individuals regardless of age. It has been suggested that the absence of any child-specific provision has allowed the convention to be interpreted through an "adult -focused lens" resulting in the development of an age -insensitive jurisprudence where "the adult asylum seeker is the norm".

UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, Para. 34, 213. available at: <https://www.refworld.org/docid/5cb474b27.html> [accessed 27 April 2019]

⁹ It is estimated that some 300,000 child soldiers are actively being used in direct conflict in more than thirty countries around the world. While they are most frequently used by rebel groups, a number of government armies have been reported to use them as well. In addition to active combatants, the United Nations estimates that more than fifty states have recruited another 500,000 children into their military and paramilitary forces, in violation of international law and, often times, the country's own domestic law.

Erinda Duraj, 'Protecting Children Rights under International Criminal Justice', *Academic Journal of Business, Administration, Law and Social Sciences*, IIPCCL Publishing, Tirana-Albania, March 2015, Page. 92, available at: <https://doaj.org/article/567f8bf17b0c4d22aa1c2023acea85c8>

UNHCR's letter to legal counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 2.

'4 out of 10 child soldiers are girls', Office of the Secretary General's Envoy on Youth, 12 February 2015, available at: <https://www.un.org/youthenvoy/2015/02/4-10-child-soldiers-girls/>

¹⁰ Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations', *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page. 2, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes



areas, second countries, refugee communities, or by trafficking across borders.¹¹ Many child soldiers are taken while at school, at home, on the streets or in the markets.¹² Children are considered particularly desirable recruits because they are more easily intimidated and physically vulnerable than adult soldiers.¹³

Once they become soldiers, children may suffer from a variety of physical health risks, as they are frequently given the most dangerous jobs. Many fight on the front lines, facilitated by increasingly lightweight weapons that they can carry, facing the conventional dangers of injury and death during armed conflict. Other children are used as spies, messengers, porters, servants, or to lay or clear landmines. In addition to engaging in combat and other tasks the boys participate in, girls are also frequently victims of sexual exploitation through rape, sexual slavery, and abuse.¹⁴

The psychological trauma of soldiering is undoubtedly severe. Children who serve as soldiers are rarely given choices. In fact, for most of them, their only choice is to kill or be killed. They are immature, physically vulnerable, easily intimidated, and typically make very obedient soldiers and they committed atrocities during an armed conflict,¹⁵ resulting in severe psychological harm,¹⁶ and a violation of their rights. Child perpetrators are thus victims of criminal policies for which adults are primarily responsible.¹⁷

On the other hand, while child soldiers are primarily victims of violence, one of the most disturbing aspects of their participation in armed conflict is that, recruited and used in violation of international law, often drugged and coerced, they are also perpetrators of atrocities. They commit genocide, war crimes and crimes against humanity. As a result, they

¹¹ See Press Release, Human Rights Watch, *Child Soldiers: Global Survey Shows New Trends*, 11 June 2001, available at: <https://www.hrw.org/news/2001/06/11/child-soldiers-global-survey-shows-new-trends>

¹² UNICEF, "Guide to the Optional Protocol on the Involvement of Children in Armed Conflict," 3 December 2003, available at: https://www.unicef.org/publications/files/option_protocol_conflict.pdf

¹³ Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations', *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page. 2, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes

¹⁴ *Ibid.*, page. 3

¹⁵ Just as children are often recruited through manipulation or force, they are frequently coerced into staying in the group and obeying orders. It is common for children to be drugged in order to overcome their fear or reluctance to fight. Additionally, they may be threatened with death, torture, or the death of their loved ones in order to ensure they comply with the demands of their superiors. It is not uncommon for one child soldier to be forced to witness the execution of another dissenting child soldier. Some are forced to commit horrific atrocities, such as killing their neighbors or members of their family, with the idea that such acts will break their spirits, turn them into ruthless soldiers, ostracize them from their community, and prevent them from ever returning home.

UNHCR's Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, page 3. available at: <https://www.refworld.org/docid/440eda694.html>

¹⁶ For children, being compelled to fight in active combat as well as witness and participate in crimes themselves can be psychologically devastating. Even after the conflict is over, former child soldiers may be left so physically disabled and mentally traumatized that they are unable to successfully re-join civilian society. Most have never received any formal schooling or vocational training, and few have access to such programs following the conflict. Additionally, other post conflict programs offering family reunification, food and shelter, are often not available to them.

Ibid., page 3.

¹⁷ Erinda Duraj, 'Protecting Children Rights under International Criminal Justice', *Academic Journal of Business, Administration, Law and Social Sciences*, IIPCCL Publishing, Tirana-Albania, March 2015, Page. 95, available at: <https://doaj.org/article/567f8bf17b0c4d22aa1c2023acea85c8>



can be perceived as ‘criminals’ and they may face exclusion from refugee status pursuant to Article 1(F) (a) of the Refugee Convention if they are used as child soldiers and commit international crimes.

In this sense, the paper presents a short overview on the current legal framework of the protection of children during armed conflicts under International Humanitarian Law, Human Rights Law, and International Criminal Law, considering both a state's duty to prohibit child recruitment and its affirmative obligations to rehabilitate and reintegrate former child soldiers into society.

The paper will briefly explore the required criteria to meet refugee status and we will then pay particular attention to the exclusion clause under Art 1 (F) of the 1951 Refugee Convention, addressing briefly the main contours of the criminal responsibility of child soldiers for their participation in international crimes, and suggesting that children under age eighteen should not be prosecuted for international crimes, and instead, should be treated primarily as victims of armed conflict.

The Definition of Child and Child Soldier

A “child” as defined in Article 1 of the Convention on the Rights of the Child (CRC), means “every human being below the age of 18 years unless, under the law applicable to the child, the majority is attained earlier”.¹⁸ Accordingly, “a child associated with an armed force or armed group” refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity.¹⁹ The generic language was meant not to limit the category of child fighters to children who participate in combat or who carry weapons but also refers to porters, sex slaves, and anyone accompanying such groups. Thus, child soldiers are any children under the age of 18 who are recruited by a state or non-state armed group and used as fighters, cooks, suicide bombers, human shields, messengers, spies, or for sexual purposes.²⁰ The definition includes also girls recruited for sexual purposes and forced marriage,²¹ and therefore, the definition is intentionally broad so as to extend protection

¹⁸ In terms of actions by UNHCR, the word “child” refers to all children falling under the competence of the Office, including asylum-seeking children, refugee children, internally displaced children and returnee children assisted and protected by UNHCR and stateless children.

¹⁹ The Paris Principles, Principles And Guidelines On Children, Associated With Armed Forces Or Armed Groups, February 2007, Page 7

²⁰ UNHCR's Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 12 November 2014, HCR/GIP/13/10/Corr. 1, Para. 40.

²¹ Guide to the optional protocol on the involvement of children in armed conflicts, Coalition To Stop The Use Of Child Soldiers, UNICEF, December 2003, Page 14. See also: <https://www.child-soldiers.org/FAQs/what-is-a-child-soldier>
Roman Graf, ‘The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment’, *Journal of International Criminal Justice*, Volume 10, Issue 4, September 2012, Page 965. Available at: <https://doi.org/10.1093/jicj/mqs044>



to as many children as possible.²² As mentioned earlier, while child soldiers are often used to commit atrocities and, as a result, can be perceived as ‘criminals’, they are firstly, and above all, victims. As such, they must be protected.

International Legal Framework

Children during and subsequent to war are protected by several instruments of international human rights law. The key international legal instrument for the protection of children is the Convention on the Rights of the Child (CRC), which is the most widely ratified human rights treaty in history, explicitly outlines international obligations for the protection of children.²³

At the same time, international refugee law has also recognized that a refugee child is entitled to special care and protection. In this regard, the international community has adopted the 1951 Refugee Convention, which has been ratified by 145 states²⁴ and described as the first truly international agreement covering the most fundamental aspects of a refugee’s life. It is further considered as the first international source for regulation of the rights of refugees, and therefore constitutes the cornerstone of the international refugee protection regime.²⁵ Furthermore, international humanitarian law sets basic rules to protect children as they are the main victims of armed conflicts, not only as civilians but also as soldiers. Therefore, states have committed themselves to protect children as part of their general undertakings to protect

²² The ‘child soldier’ means any person under 18 who is - or was - part, regularly or occasionally, of any kind of regular or irregular armed force or armed group in any capacity and regardless of whether he/she is carrying - or has carried - arms and whether there is an armed conflict or not. M. Maystre, *Les enfants soldats en droit international: Problématiques contemporaines au regard du droit international humanitaire et du droit international pénal* (Pedone, 2010), at pages 34 -35.

²³ The CRC convention was adopted by UN General Assembly Resolution 44/25 of 20 November 1989 and entered into force by 2 September 1992. Currently, 196 countries are party to the convention.

²⁴ The 1951 Refugee Convention was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entered into force on 22 April 1954, in accordance with article 43. Currently, 145 states have ratified the convention. However, Syria, Lebanon, Iraq, among other states, did not sign the 1951 Refugee Convention and its Protocol.

The Syrian Government has not ratified any international or regional conventions relating to refugee issues for the following reasons: 1) political concerns related to the date of this Convention and the circumstances of its formulation. 2) Concerns arising from that the 1951 Convention would impose new obligations on the Syrian government in dealing with refugee issues. 3) Expectations that this agreement will limit the state's authority to grant asylum status or not. 4) Concerns arising from the situation of Palestinian refugees under the 1951 Convention. 5) Concerns that the provisions of this agreement would be inconsistent with the Syrian laws. However, this situation does not mean that the refugees have no rights in Syria or the Syrian government has no legal obligations towards them because their rights derived basically from the Human Rights instruments, which has been ratified by the Syrian government, including: the Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on Economic, Social and Cultural Rights (CESCR) 1966, Convention on the Elimination of All Forms of Racial Discrimination against Women (CEDAW) 1979, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) 1984, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990, Convention on the Rights of the Child 1989 (CRC).

See also: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN;
And: <https://www.unhcr.org/en-au/3b73b0d63.pdf>

²⁵ UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection provide guidance on interpreting and applying the 1951 Convention refugee definition, reflecting State practice and issued in accordance with UNHCR’s supervisory responsibility Conclusion on the Provision on International Protection Including through Complementary Forms of Protection. No. 103 (LVI) – 2005. Persons in need of international protection, page 2, available at: <https://www.refworld.org/pdfid/596787734.pdf>



human rights and humanitarian principles laid down in various other international instruments.²⁶

Child Recruitment

Although there is a growing consensus towards a prohibition on any form of military recruitment or use in hostilities of persons under the age of 18 years old,²⁷ children continue to be recruited by government forces or armed rebel groups around the world. The use of child soldiers has been condemned by the international community as the illegal and immoral persecution of children. As a result, there are a number of widely adopted international human rights instruments that explicitly prohibit the use of children in direct combat and/or criminalize the forcible recruitment of child soldiers. These include the 1977 Additional Protocols of the Geneva Conventions,²⁸ the 1989 Convention on the Rights of the Child,²⁹ the Rome Statute of the International Criminal Court,³⁰ the Statute of the Special Court for Sierra Leone,³¹ the ILO Worst Forms of Child Labor Convention,³² and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.³³

States' Obligations toward Child Soldiers

Prohibition of Child Recruitment

International Humanitarian Law (IHL):

International humanitarian law provides broad protection for children. In the event of armed conflict, either international or non-international, children benefit from the general protection

²⁶ There should be greater interaction between international refugee law and international law on the rights of the child by no means novel. The UNHCR EXCOM has underlined the relationship between the refugee convention and the CRC in its formal conclusions. In most recent conclusion on refugee children, the committee stressed the need for 'A rights-based approach, which recognizes children as active subjects of rights, and according to which all interventions are consistent with States' obligations under relevant international law, including, as applicable, international refugee law, international human rights law and international humanitarian law, and acknowledgement that the CRC provides an important legal and normative framework for the protection of children. UNHCR's Conclusion on Children at Risk No. 107 (LVIII), 5 October 2007.

²⁷ UNICEF, The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, Feb. 2007 (hereafter "The Paris Principles"). While not binding, they reflect a strong trend for a complete ban on under-age recruitment. See also UN Security Council resolution 1612 (2005) (on children in armed conflict), 26 July 2005, S/RES/1612, <http://www.unhcr.org/refworld/docid/43f308d6c.html>, para. 1; 1539 on the protection of children affected by armed conflict, S/RES/1539, 22 Apr. 2004, <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>
See: Geneva Call, Armed non-State actors speak about child protection in armed conflict, Meeting report 22 – 24 November 2016, Page 6, available at https://genevacall.org/wp-content/uploads/dlm_uploads/2017/09/CansaReport_web.pdf

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 39, entered into force Dec. 7, 1978. Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(3) (c), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

²⁹ Convention on the Rights of the Child, art. 38, (1) U.N. Doc. 1/44/49 (1989), entered into force Sept. 20, 1990.

³⁰ Rome Statute of the International Criminal Court, art. 8(2) (b) (xxvi), U.N. Doc. A/CONF.183/9 (1998)

³¹ Statute of the Special Court for Sierra Leone, art. 7, U.N. Doc. S/2000/915 (2002).

³² ILO Worst Forms of Child Labor Convention No. 182, June 17, 1999, art. 3(a), entered into force Nov. 19, 2000,

³³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 2, U.N. Doc. No. A/RES/54/263 (2001), entered into force Feb. 12, 2002.



provided for civilians not taking part in the hostilities. Non-combatant civilians are guaranteed humane treatment and covered by the legal provisions on the conduct of hostilities. Given the particular vulnerability of children, the Geneva Conventions of 1949 and their Additional Protocols of 1977 lay down a series of rules according them special protection. Children who take direct part in hostilities do not lose that special protection. The Additional Protocols, the 1989 Convention on the Rights of the Child and its recent Optional Protocol, in particular, also set limits on children's participation in hostilities.³⁴

First attempts to prohibit the recruitment and use of child soldiers under international humanitarian law were undertaken with the adoption of the 1977 Protocols Additional to the 1949 Geneva Conventions. Article 77(2) of Additional Protocol I requires the parties to an international armed conflict to '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.' Moreover, Article 4(3)(c) of Additional Protocol II, applicable in armed conflicts not of an international character, provides 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' in non-international armed conflicts.³⁵

Similarly, Article 38(2) and (3) of the Convention on the Rights of the Child requires state parties to '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' and to 'refrain from recruiting any person who has not attained the age of fifteen years into their armed forces', and when recruiting children aged fifteen to eighteen, to prefer the oldest children. Article 38 of the CRC reiterates state parties' obligations under international humanitarian law.³⁶

In light of the above, states' obligations to children during armed conflict extend beyond merely refraining from recruiting them into their armed forces, according to both global and regional legal instruments. During both international and internal armed conflict children receive special affirmative protection under humanitarian law, in addition to blanket guarantees under Common Article 3 of the Geneva Conventions, prohibiting all states and other parties to the conflict, including dissident groups, from harming all persons taking no

³⁴ ICRC, Advisory Service on International Humanitarian Law, *Legal Protection of Children in Armed Conflict*, 28 Feb 2003, available at: <https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet>

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>, Art. 77(2). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), <http://www.unhcr.org/refworld/docid/3ae6b37f40.html>, Art. 4(3).

Children are also entitled to special respect and protection under rules of the customary international law. (135, 136, 137). See: International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules, available at: <https://www.refworld.org/docid/5305e3de4.html> [accessed 10 March 2019], pages 479 - 488

³⁶ CRC, art 38 (1).



active part in the hostilities. Under the Optional Protocol to the CRC, states are required to demobilize, release, and aid child soldiers in physical and psychological recovery and social reintegration.³⁷ Article 39 of the CRC similarly states:

‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child’.³⁸

International Criminal Law (ICL):

The Rome Statute of the International Criminal Court (ICC) was the first international treaty to criminalize the recruitment of child soldiers as a war crime.³⁹ The Rome Statute (and Optional Protocol to the CRC) has classified as war crimes the conscription or enlistment under the age of 15 years into armed forces or groups using them to participate actively in hostilities.⁴⁰

Article 8 (2) (b) (xxvi) of the ICC Statute proscribes ‘conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities’ in the context of an international armed conflict. In the context of a non-international armed conflict, Article 8(2) (e) (vii) prohibits ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.’⁴¹

³⁷ Optional Protocol to the CRC, art. 6.

³⁸ CRC, art. 39.

³⁹ Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, Para. 569. Available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1379838>

At the time of the drafting of the Rome Statute, it was neither clear whether a norm of customary international law prohibiting the recruitment and use in hostilities of children under 15 had emerged nor the extent of such a norm. The Appeals Chambers of the Special Court for Sierra Leone (‘SCSL’) had considered the recruitment of children a crime under customary law since November 1996. Judge Geoffrey Robertson, however, in his dissenting opinion held that ‘the crime of non-forcible child enlistment did not enter international criminal law until the Rome Treaty in July 1998. However, this conflict of opinion does not undermine the fact that recruiting and using children in hostilities has been a crime since at least 1 July 2002, the date the ICC Statute entered into force, in those states the ICC has jurisdiction. Roman Graf, *The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment*, *Journal of International Criminal Justice*, Volume 10, Issue 4, September 2012, Page 953-954. Available at: <https://doi.org/10.1093/jicj/mqs044>

⁴⁰ ICC Statute, Art. 8 (2) (b) [xxvi] and (e) [vii]. UN General Assembly, Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July 1998 (hereafter “ICC Statute”), <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>

The Special Court for Sierra Leone has concluded that the recruitment of children under the age of 15 years into the armed forces constitutes a crime under general international law. See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72 (E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 52–53; UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, <http://www.unhcr.org/refworld/docid/3ae6afb4.html>, para. 17, which recognized the customary character of the prohibition of child recruitment.

⁴¹ The two types of conduct - conscription and enlistment - may be subsumed under the heading ‘recruitment’. This is the term employed by the Additional Protocols to the 1949 Geneva Conventions, and the Convention on the Rights of the Child. Interestingly, an earlier draft of the Rome Statute proposed by the Preparatory Committee contained the term ‘recruiting children’, instead of ‘conscripting or enlisting children’. The Trial Chamber in *Lubanga* concurred with Pre-Trial Chamber I that the distinguishing element, is one of compulsion. While enlisting refers to the voluntary incorporation of a child under the age of 15 years into an armed force or group, a child is conscripted if he or she is coercively forced to join the armed force or group.



Despite the Rome Statute's continuing emphasis on age fifteen, an international consensus appears to be emerging around raising the age of allowable direct participation in hostilities to eighteen years of age.⁴²

The first case adjudicated by the ICC was 'Thomas Lubanga Dyilo' (*Lubanga case*). Lubanga, a former rebel leader active in the Ituri Province of the Democratic Republic of Congo (DRC), was found guilty on 14 March 2012 of the war crime of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003 within the meaning of Articles 8 (2) (e) (vii) and 25 (3) (a) of the Rome Statute. On 10 July 2012, he was sentenced to a total of 14 years' imprisonment.⁴³ In this context, Lubanga's conviction is one of the ICC's first contributions to the broader struggle to end this inhumane practice. Further prosecutions of persons who conscript, enlist or use child soldiers must follow.⁴⁴

Finally, while child soldiers are increasingly the victims of atrocities, they can also commit war crimes, crimes against humanity, or any criminal acts that fall within the jurisdiction of the ICC. However, the Rome Statute eschews jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime.⁴⁵ Children can participate in the ICC only as victims or witnesses.⁴⁶ This idea emphasizes that children are essentially victims and, therefore, should be treated as such by the international criminal justice system.⁴⁷

Roman Graf, 'The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment', *Journal of International Criminal Justice*, Volume 10, Issue 4, September 2012, Page 955. Available at: <https://doi.org/10.1093/jicj/mqs044> Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, Para. 608. Available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1379838>

⁴² Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations', *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page. 5, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes

⁴³ The *Lubanga* case is of great interest for scholars, human rights practitioners and for victims of international crimes. It sets important precedents regarding the war crime of conscripting and enlisting or using children to participate actively in hostilities, victims' participatory rights and reparations. The Rome Statute is the first treaty to embody the recruitment and use of children in hostilities as a war crime. It is remarkable that 'only' 10 years after the entry into force of the Rome Statute such a war crime was punished, leading to the conviction of Lubanga. This reflects a global consensus against the use of children in armed conflict.

Pietro Sullo, '*Lubanga Case*', Max Planck Foundation for International Peace and the Rule of Law, April 2014, Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2119>

⁴⁴ Roman Graf, 'The International Criminal Court and Child Soldiers: An Appraisal of the *Lubanga* Judgment', *Journal of International Criminal Justice*, Volume 10, Issue 4, September 2012, Page 969. Available at: <https://doi.org/10.1093/jicj/mqs044>

⁴⁵ ICC Statute, Art. 26.

⁴⁶ ICC Statute, Art. 68. Erinda Duraj, 'Protecting Children Rights under International Criminal Justice', *Academic Journal of Business, Administration, Law and Social Sciences*, IIPCC Publishing, Tirana-Albania, March 2015, Page 95, available at: <https://doaj.org/article/567f8bf17b0c4d22aa1c2023acea85c8>

⁴⁷ Max du Plessis, "Children under International Criminal Law," *African Security Review*, Vol. 13, No. 2, 2004, available at: <https://www.tandfonline.com/doi/pdf/10.1080/10246029.2004.9627290?needAccess=true>, Page 110



Legal analysis of relevant articles under CRC & OPAC

A) The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC)

The OPAC provides that states parties shall take all feasible measures to ensure that members of their armed forces under the age of 18 years do not take part in hostilities, and ensure that persons under the age of 18 years are not compulsorily recruited into their armed forces.⁴⁸

The Optional Protocol contains an absolute prohibition against the recruitment or use, under any circumstances, of children who are less than 18 years old by armed groups that are distinct from the armed forces of a State.⁴⁹ The Protocol therefore reflects an emerging international consensus that 18 years should be the minimum age for recruitment into armed forces and groups and for participation in hostilities. It also amends Article 38 of the CRC by raising the minimum age of voluntary recruitment.⁵⁰ States also commit to use all feasible measures to prohibit and criminalize under-age recruitment and use of child soldiers by non-State armed groups.⁵¹ The Committee on the Rights of the Child emphasizes that:

"Under-age recruitment and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on "reasons of race, religion, nationality, membership of a particular social group or political opinion."⁵²

B) The Convention on the Rights of the Child (CRC)

Article 38 of the CRC places a duty on states to take measures to ensure that children under the age of 15 do not take a direct part in armed conflict, and prohibits the recruitment of children under 15 years of age.⁵³ Critically, Article 38 deals with voluntary recruitment only, under no circumstances may a child be forcibly conscripted into armed forces, whatever his age.⁵⁴

⁴⁸ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <http://www.unhcr.org/refworld/docid/47dfb180.html>, Arts. 1–2. There are currently 127 States Parties to the Optional Protocol. See also the African Charter, which establishes 18 years as the minimum age for all compulsory recruitment, Arts. 2 and 22.2, and the ILO Convention on the Worst Forms of Child Labour, which includes the forced recruitment of children under the age of 18, Arts. 2 and 3(a) in its definition of worst forms of child labor.

⁴⁹ The Optional Protocol is stricter with respect to armed groups distinct from a state's armed forces since these must refrain from both using and recruiting children under eighteen, suggesting children aged fifteen to eighteen may not join armed opposition groups although they may join the state's armed forces voluntarily. See OPAC, art 4.

⁵⁰ OPAC, art 3.

⁵¹ OPAC, art 4.

⁵² UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin, CRC/GC/2005/6, Sep. 2005 (hereafter "CRC, General Comment No. 6"), <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para. 58-59.

⁵³ CRC, art 38 (3)

⁵⁴ This is confirmed by OPAC, art 2



One disadvantage of the CRC is that the Convention did not provide absolute prohibition on children taking a direct part in armed conflict and therefore it must now be read in conjunction with the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), which provides that states 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. The OPAC raises the minimum age of recruitment for non-government military groups to 18 years⁵⁵ and provides that states must raise the minimum age for recruitment to government controlled armed forces, though it does not specify an age.⁵⁶ Therefore, the OPAC reflects an emerging international consensus that 18 years should be the minimum age for recruitment into armed forces and groups and for participation in hostilities.

The other relevant instruments contain diverse provisions creating different levels of protection for children. However, not all children are protected in the same manner, given that: (i) most of these instruments limit their protection to children under the age of 15, thus leaving children between the ages of 15 and 18 unprotected;⁵⁷ and (ii) none of these instruments is universally ratified and, therefore, the protection offered to children depends on the status of state ratification.⁵⁸

Customary international law partly remedies this situation by establishing a minimum level of protection through a norm prohibiting the recruitment of children under the age of 15 into armed forces or groups or their use to participate actively in hostilities.⁵⁹ Moreover, individual criminal responsibility is envisaged for the persons breaching this rule. Consequently, the conscription or enlistment of children under the age of 15 into armed forces or groups or their use to participate actively in hostilities is a violation of a fundamental human right laid down in international customary and treaty law, amounting to persecution within the meaning of Article 1 (A) (2) of the Refugee Convention.⁶⁰

⁵⁵ OPAC, art 4.

⁵⁶ OPAC, art 3 (1).

⁵⁷ International Committee of the Red Cross (ICRC), 'Practice Relating to Rule 136. Recruitment of Child Soldiers', available at: https://ihl.databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule136 See Art. 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (hereafter 'Additional Protocol I'); Art. 4(3) (c) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 1977; Art. 38 (3) Convention on the Rights of the Child 1989, Art. 3 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 2000; Art. 3 (a) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999 (hereafter 'ILO Convention 182'). Art. 8(2)(b)(xxvi) and (e)(vii) ICCSt. Art. 4(c) SCSLSt. Regional treaties also contain provisions on this issue. Art. 22 African Charter on the Rights and Welfare of the Child of 1990 (hereafter 'ACRWC'); Art.12 (3) Ibero-American Convention on Rights of Youth of 2005.

⁵⁸ Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers', *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Page 980.

⁵⁹ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules, available at: <https://www.refworld.org/docid/5305e3de4.html> [accessed 10 March 2019], Page 488

⁶⁰ *Ibid.*, Page 981.



The Competence of UNHCR⁶¹

Refugee Status Determination Procedures and Relevant Principles

Refugee status determination (RSD) pursuant to UNHCR's mandate is a core UNHCR protection function.⁶² The purpose of mandate RSD is to permit UNHCR to determine whether asylum seekers fall within the criteria for international refugee protection. The determination of refugee status has potentially profound implications for the life and security of the individuals concerned. It also defines the obligations of UNHCR towards the individuals, and may also determine the obligations and responsibilities of governments and other actors with whom UNHCR cooperates to protect refugees. The effectiveness of mandate RSD as a protection function depends upon the fairness and integrity of UNHCR RSD procedures and the quality of UNHCR RSD decisions. UNHCR determines eligibility for mandate refugee status on an individual basis through the examination of individual claims.⁶³

The Legal basis for the Refugee Status Determination

The 1951 Refugee Convention does not contain provisions on the procedures for determining refugee status. However, it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the Convention.⁶⁴ The necessity for States to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and to enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the 1951 Refugee Convention as well as international and

⁶¹ The United Nations (UN) High Commissioner's Office for Refugees was established by the United Nations General Assembly through resolution 319 A (IV) of 3 December 1949 and came into effect 1 January 1951.5 The Statute of the Office of the High Commissioner for Refugees (1950 Statute) was passed by the United Nations General Assembly as an Annex to resolution 428 (V), December 14th, 1950. UNHCR, The UN Refugee Agency, "History of UNHCR, A Global Humanitarian Organization of Humble Origins." See also: <http://www.unhcr.org/pages/49c3646cbc.html> [Accessed March 7, 2019] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html> [accessed 5 March 2019]

⁶² The term Refugee Status Determination, or RSD, is the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law. RSD is often a vital process in helping refugees realize their rights under international law. States have the primary responsibility to conduct RSD, however, UNHCR may conduct RSD under its mandate when a state is not a party to the 1951 Refugee Convention and/or does not have a fair and efficient national asylum procedure in place. A person does not become a refugee by virtue of a recognition decision by the host country or UNHCR, but is recognized because he or she is a refugee. In other words, the recognition decision is declaratory: it acknowledges and formally confirms that the individual concerned is a refugee. UNHCR, Refugee Status Determination, 31 May 2016, EC/67/SC/CRP.12, Page, 1, available at: <https://www.refworld.org/docid/57c83a724.html> [accessed 5 March 2019]. See also: <https://www.unhcr.org/refugee-status-determination.html>

UNHCR, Self-Study Module 2: Refugee Status Determination. Identifying who is a refugee, 1 September 2005, Page. 4. available at: <https://www.refworld.org/docid/43141f5d4.html> [accessed 5 March 2019]

⁶³ UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 20 November 2003, Unit, 1. Page 1-1. available at: <https://www.refworld.org/docid/42d66dd84.html> [accessed 5 March 2019]

⁶⁴ UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, paras. 4–5, available at: <https://www.refworld.org/docid/3b36f2fca.html>



regional human rights instruments law, and is acknowledged in relevant conclusions of UNHCR's Executive Committee.⁶⁵

Inclusion and Exclusion Criteria

The focus of this contribution concerns Articles 1(A) (2) and 1(F) (a) of the Refugee Convention, also referred to as the 'inclusion clause' and 'exclusion clause', respectively. The inclusion clause outlines the criteria that an individual must meet to be recognized as a refugee. The exclusion clause enumerates the circumstances in which an individual is excluded from the application of the Refugee Convention, even though that person has met the criteria of the inclusion clause.⁶⁶

In respect of situations of armed conflict, the method of assessing the claim to refugee status requires also inclusive criteria for the purpose of refugee status determination regardless of categories of armed conflict (international and non-international) within the meaning of international humanitarian law.⁶⁷ The following sections briefly consider inclusion and exclusion criteria one by one. Further details can be found in the Handbook on Procedures and Criteria for Determining Refugee Status (RSD Handbook) issued in February 2019.⁶⁸

Credibility Assessment⁶⁹

⁶⁵ UNHCR, *Summary of Deliberations on Credibility Assessment in Asylum Procedures*, Expert Roundtable, 14-15 January 2015, Budapest, Hungary, 5 May 2015, Para. 2. available at: <https://www.refworld.org/docid/554c9aba4.html>

⁶⁶ As a preliminary remark, it is important to note that the Refugee Convention is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. Given that the Refugee Convention considers that, in order 'to assure refugees the widest possible exercise of fundamental rights and freedoms, it is necessary 'to extend the scope of and protection accorded by [previous international agreements relating to the status of refugee]', the inclusion clause must be interpreted broadly. Meanwhile, the exclusion clause must be interpreted restrictively in order to ensure that it does not undermine the object and purpose of the Refugee Convention by denying fundamental protections.

UNHCR's RSD Handbook, Para.149. *UNHCR's Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html> [accessed 12 March 2019], Para.2

UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, available at: <https://www.refworld.org/docid/3f5857d24.html> Para.3-4

⁶⁷ The UNHCR's Guidelines indicates that "Any particular classification of an armed group, for example as criminal or political, is not necessary or determinative for the purpose of refugee status determination". *UNHCR's Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, Para. 5, available at: <https://www.refworld.org/docid/583595ff4.html>

⁶⁸ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/IP/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html> [accessed 27 April 2019]

⁶⁹ The term 'credibility assessment' is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status. Decision-maker must rely on all sources to available information, including COI, to assess whether Applicant's statements are accurate and to evaluate the objective basis for the fear of harm. UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, Page 27, available at: <https://www.refworld.org/docid/519b1fb54.html> [accessed 5 March 2019]



Asylum decision-makers know that the applicant's credibility is often decisive, and that is why it is critical to conduct credibility assessment properly. Yet the 1951 Refugee Convention says nothing about credibility, and credibility does not form part of the refugee definition.⁷⁰

The credibility assessment involves a determination of whether and which of the applicants' statements and other evidence can be accepted, and therefore may be taken into account in the analysis of well-founded fear of persecution and the real risk of serious harm.⁷¹ The credibility assessment should focus on those facts asserted by the applicant that are identified as material or relevant for qualification for international protection,⁷² and that are most significant in the determination of the claim.⁷³ Accordingly, credibility assessment is considered as a core element of the adjudication of asylum applications and it often leads to the determination of the material facts considered for the determination of an application, and is as such the first step in the decision-making process.⁷⁴ UNHCR's Note on Burden and Standard of Proof in Refugee Claims states as follows:

"In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a

⁷⁰ Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, 2013, Volume 1, Page, 21. Available at: <https://www.refworld.org/docid/5253bd9a4.html> [accessed 7 March 2019]

⁷¹ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, Page, 13, available at: <https://www.refworld.org/docid/519b1fb54.html> [accessed 5 March 2019]

⁷² Protection is defined as all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, namely human rights law, international humanitarian law and refugee law. Protection can be seen as: an objective; a legal responsibility; and an activity. In practice, the need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other risks may stem from: famine linked to situations of armed conflict; natural or man-made disasters; as well as being stateless. Frequently, these elements are interlinked and are manifested in forced displacement Persons in need of international protection, page 1, available at: <https://www.refworld.org/pdfid/596787734.pdf>

Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons*, June 2010, Page, 7 available at: <https://www.refworld.org/docid/4790cbc02.html> [accessed 6 March 2019]

⁷³ The purpose of credibility assessment in asylum procedures is to determine whether an applicant's statements can be accepted and relied upon in establishing the material facts of the claim. It was noted that establishing the material facts generally includes four steps: Step 1: Identify Key Material Elements of the Applicant's claim. Step 2: Gather all information relevant to the material elements that can reasonably be obtained. Step 3: Conduct Credibility Assessment of Applicant's statements in relation to each material element and in light of all available evidence. Step 4: Establish/Determine Material Facts of Applicant's case – i.e. factual circumstances relevant to his/her eligibility for refugee status.

UNHCR, *Summary of Deliberations on Credibility Assessment in Asylum Procedures*, Expert Roundtable, 14-15 January 2015, Budapest, Hungary, 5 May 2015, Para. 6. Available at: <https://www.refworld.org/docid/554c9aba4.html> [accessed 5 March 2019]

UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, Page 42, available at: <https://www.refworld.org/docid/519b1fb54.html> [accessed 5 March 2019]

⁷⁴ Credibility represents a very complex and challenging area of refugee law and status determination. Research and practice have showed that it is a core element of the adjudication of asylum applications. The assessment of credibility plays a central role in the determination of an applicant's needs for international protection.

UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, Page, 28, available at: <https://www.refworld.org/docid/519b1fb54.html> [accessed 5 March 2019]



claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.”⁷⁵

The Burden of Proof

According to the general legal principles of the law of evidence, it is a fundamental principle that in claims for refugee protection ‘the duty to ascertain and evaluate all the relevant facts is shared between the Applicant and the decision-maker.’⁷⁶ Thus, while the burden of proof in principle rests on the applicant, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.⁷⁷ This flexibility accounts for the vulnerability of the individual in this context⁷⁸ and the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.⁷⁹ In the case of children these difficulties will often be amplified. In recognition of this, UNHCR’s guidelines on Child Asylum Claims provides that:

‘Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children’s claims, especially if the child concerned is unaccompanied. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.’⁸⁰

This approach has been confirmed recently by UNHCR in its report about Credibility Assessment in Asylum Procedures, published in Jan 2015, as follows:

‘Unaccompanied or separated children of a younger age,⁸¹ victims of torture, sexual or gender-based violence or other treatment resulting in trauma, as well as persons with physical or mental health problems will require a highly specific approach in credibility assessment.’⁸²

⁷⁵ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, Para. 11, available at: <https://www.refworld.org/docid/3ae6b3338.html> [accessed 7 March 2019]

⁷⁶ UNHCR’s *RSD Handbook*, Para. 196-203-204. The shared responsibility is particularly important when the country of origin is experiencing a situation of armed conflict and violence, since this makes obtaining information and documentation – in general, as well as in relation to the individual – more difficult. 159 People fleeing such situations are likely to encounter significant problems in giving a detailed account of events demonstrating a need for international protection, and/or in obtaining evidence to substantiate the claim. In these circumstances, it is therefore frequently necessary to give applicants the benefit of the doubt”. *UNHCR’s Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 93.

⁷⁷ In view of the particularities of a refugee’s situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated. UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, Para. 6. Available at: <https://www.refworld.org/docid/3ae6b3338.html> [accessed 5 March 2019]

UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, Para. 105, available at: <https://www.refworld.org/docid/3f5857d24.html> [accessed 5 March 2019]

⁷⁹ UNHCR’s *RSD Handbook*, Para. 197.

⁸⁰ UNHCR’s *Guidelines on Child Asylum Claims*. Para. 73.

⁸¹ “Unaccompanied children” are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. “Separated children” are those separated from both parents, or



Right to Seek Asylum

Article 22 of the CRC remains the only provision in any international human rights treaty that deals expressly with the situation of refugee children and children seeking refugee status. The provision of this article imposes a positive obligation on states to take appropriate measures to ensure that those children receive the appropriate level of protection and humanitarian assistance, regardless of being unaccompanied or accompanied by their parents. In this context, the Art 22 (2) assured that, where a refugee child has no family members, the child shall be accorded the same protection as any other child permanently or temporarily deprived of their environment.

Family Unity Principle

UNHCR's internal procedural standards for refugee status determination suggest that children who are determined to fall within the criteria for refugee status in their own right should be granted refugee status rather than derivative refugee status and that persons who may have grounds to make an independent refugee claim should not be discouraged from doing so solely because they may be eligible for derivative status under the right to family unity.⁸³ In practice, while children generally receive refugee status according to the principle of family unity if the head of the family meets the criteria of the definition, unaccompanied child soldiers must satisfy the same strict legal criteria as adults in order to benefit from the full spectrum of protections established under the Refugee Convention.⁸⁴

from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. UNHCR's *Guidelines on Determining the Best Interests of the Child*, May 2008, Page, 8, available at: <https://www.refworld.org/docid/48480c342.html> [accessed 8 March 2019]

⁸² UNHCR, *Summary of Deliberations on Credibility Assessment in Asylum Procedures*, Expert Roundtable, 14-15 January 2015, Budapest, Hungary, 5 May 2015, Para. 10. available at: <https://www.refworld.org/docid/554c9aba4.html>

⁸³ UNHCR considered in its guidelines on the Child Asylum Claims that 'In situations where both the parents and the child have their own claims to refugee status, it is preferable that each claim be assessed separately'.

UNHCR's *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08. Para. 9. UNHCR, *RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016, Para. 5.2.1. UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, Para.5.1.1

⁸⁴ UNHCR's *RSD Handbook*, Para. 181-188.



Child-Sensitive Approach

UNHCR's Guidelines on Child Asylum Claims provides 'substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner' and emphasis that the substantive and procedural aspects of a child's application of refugee status should be consistent and informed with the 1989 Convention on the Rights of the Child. UNCRC (United Nations Committee on the rights of Child) has also acknowledge the relevance of the CRC in the refugee status determination process.⁸⁵ However, adopting a child-sensitive interpretation of the 1951 Refugee Convention does not mean, of course, that child asylum-seekers are automatically entitled to refugee status. The child applicant must establish that s/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition.⁸⁶

Participation of Children in Decisions throughout the Asylum Process & Respect for the views of the child (Article 12)

The CRC recognises the capacities and competencies of children to have the opportunity to influence and participate in decisions that will affect their lives. Article 12 requires the child's participation in recognition of children as individual subjects of rights. Indeed, such is the importance and centrality of Article 12 that the UN Committee on the Rights of the Child stated:

"The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child has identified Article 12 as one of the four general principles of the Convention."⁸⁷

The Committee addresses what is meant by the substantive right of the child to be heard in General Comment No. 12. They elaborate that the right "assures to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. In particular, the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her."⁸⁸

⁸⁵ UNHCR's *Guidelines on Child Asylum Claims*. Para. 1 -5. UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, Page, 21

⁸⁶ UNHCR's *Guidelines on Child Asylum Claims*. Para. 4. UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin, CRC/GC/2005/6, Sep. 2005, <http://www.unhcr.org/refworld/docid/42dd174b4.html> , para. 74.

⁸⁷ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 2.

⁸⁸ *Ibid.*, para. 2.



Art 12 (1) of the CRC imposes a positive obligation on states not simply to listen to the views of a child but also to take those views seriously.⁸⁹ In this context, both UNHCR and the UNCRC have called attention to the significance of this article in determining the status of a refugee child.⁹⁰ In this regard, UNHCR considered as follows:

“The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures. A child’s own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process.”⁹¹

Interviewing Child Applicants

RSD interviews with children should be carried out by eligibility officers who have special training and knowledge regarding the physiological, emotional and physical development and behavior of children. UNHCR offices make every effort to develop this staffing capacity.⁹²

In practice, child soldiers might suffer from severe trauma and be intimidated by authority figures before applying for asylum, which would affect their ability to present a clearly understandable account of their experiences while conducting RSD interview. Thus, appropriate interviewing techniques are essential during the refugee status determination procedure, as well as the creation of a non-threatening interview environment.⁹³ Special emphasis should be also placed on putting the child at ease and developing a relationship of trust. The environment and tone of the interview should be as clear and informal as possible.⁹⁴

The Eligibility officers should use simple and age-appropriate language to advise the child about the purpose of the RSD interview and how it will proceed. The importance of being truthful, and providing as much information as possible, should be explained in a way

⁸⁹ *Ibid.*, Para. 28

⁹⁰ UNHCR considered that ‘even at a young age, child may still be considered the principle asylum applicant, and the right of children to express their views in all matters affecting them including to be heard in all judicial and administrative procedures needs to be taken into account’. Similarly, UNCRC emphasis in its General comments (GC 12), that ‘it is urgent to fully to fully implement children right to express their views on all aspects of the immigration and asylum proceeding and that the child must have the opportunity to present his/her reasons leading to the asylum claim’. UNHCR’s *Guidelines on Child Asylum Claims*. Para. 8 -70. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, Para. 123.

⁹¹ UNHCR’s *Guidelines on Child Asylum Claims*. Para. 70

⁹² UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate*, 20 November 2003, Para. 4.3.7. In general, information collection is clearly important to inform all on-going assessments of a child’s best interests for actions and decisions that affect them as they move through the asylum procedure. It is also vital for a full and proper determination of those interests when identifying a longer-term outcome for the child. UNHCR, *Considering the Best Interests of a Child within a Family Seeking Asylum*, December 2013, Page. 29. Available at: <https://www.refworld.org/docid/52c284654.html> [accessed 8 March 2019]

⁹³ UNHCR’s *Guidelines Military Service* Para. 70. UNHCR’s *Guidelines on Child Asylum Claims*. Para. 71. UNHCR’s *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, Para. 5.12

⁹⁴ UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate*, 20 November 2003, Para. 4.3.7



the child can understand. In addition, the child should be assured that if s/he does not understand the question or doesn't know the answer, s/he should say so.⁹⁵ In this respect, UNHCR stated in its guidelines on Child Asylum Claims as follows:

“It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them. This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.”⁹⁶

Child Soldiers as Refugees & Inclusion criteria

While child soldiers are often used to commit atrocities and, as a result, can be perceived as ‘criminals’, they are firstly, and above all, victims. As such, they must be protected. The following sections briefly consider inclusion and exclusion criteria one by one. Further details can be found in the Handbook on Procedures and Criteria for Determining Refugee Status and in relevant guidelines.

Well-Founded Fear:

In order to be recognized as refugees, child soldiers must demonstrate that they have a ‘well-founded fear of persecution’ based on one of five grounds mentioned in the 1951 Refugee Convention. Since ‘fear’ is a state of mind, UNHCR has argued that the definition includes a subjective element, which must be supported by an objective situation (country of origin reports), and in determining whether well-founded fear exists, both elements must be taken into consideration.⁹⁷

Country of origin information (COI):

In the assessment of claims for refugee status, country of origin information (COI) must be relevant to the particular circumstances of the applicant. Obtaining updated, reliable and accurate COI that is specific to the situation of particular groups of applicants, including children, frequently poses significant challenges.⁹⁸ In this context, the assessment of COI will often be particularly important in cases involving children, as the child may have limited knowledge of conditions in the country of origin or may be unable to explain the reasons for

⁹⁵ *Ibid.*, Para. 4.3.7

⁹⁶ UNHCR's *Guidelines on Child Asylum Claims*, Para. 70

⁹⁷ UNHCR's *RSD Handbook*, Paras. 37-38. The UNHCR's EG on Child Asylum Claim indicates that ‘An accurate assessment requires both an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services. However, children in some cases, might be unable to express their subjective fear and they might not be able to address the risk they might face upon return to their countries. In such circumstances, decision makers must make an objective assessment of the risk that the child would face, regardless of that child's fear. This would require consideration of evidence from a wide array of sources, including child-specific country of origin information. When the parent or caregiver of a child has a well-founded fear of persecution for their child, it may be assumed that the child has such a fear, even if s/he does not express or feel that fear’. UNHCR's *Guidelines on Child Asylum Claims*, Para. 11.

⁹⁸ UNHCR's *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Paras. 90-92. UNHCR's *Guidelines on Child Asylum Claims*, Para. 74.



their persecution. In these circumstances, and in recognition of the shared responsibility of fact-finding, it has been suggested that decision-makers make special efforts to obtain up-to-date country of origin information relevant to the child's claim. In this regard, states and refugee agencies, including UNHCR, have developed a number of tools to assist decision-makers in the fact-finding process, including the preparation and dissemination of country reports on human rights practices and the establishment of country guidance services.⁹⁹

The Degree of Risk:

The applicant's fear can be considered well-founded if there is a reasonable possibility that s/he would face some form of harm or predicament upon return to the country of origin or habitual residence. In general, eligibility for refugee protection under the 1951 Refugee Convention requires a current or future fear of persecution.¹⁰⁰ The applicant must not necessarily have suffered persecution in the past, but if it is established that this has happened, it may normally be assumed that there continues to be a risk of persecution in the future.¹⁰¹

The decision makers should take into consideration that the children may not be able to express their subjective fear for different reasons, like trauma, lack of education and due to their age and lack of maturity.¹⁰² This, however, would not impact upon their need for protection provided that the objective element of fear is present.¹⁰³

Child soldiers may be suffering from severe trauma and be intimidated by authoritative figures. This may affect their capacity to give a clear and understandable account of their experiences.¹⁰⁴ An age-sensitive approach in relation to substantive and procedural aspects of refugee law is required in order to avoid 'failing to recognize child-specific forms of persecution or underestimating the particular fears of children.'¹⁰⁵ Thus, in assessing whether a child has a 'well-founded fear' of persecution, the principle of the best

⁹⁹ Jason M. Pobjoy, *The child in international refugee law*, 2017, Cambridge University Press, Pages 91-92

¹⁰⁰ In this regard, it is important to bear in mind that children who have been released from the armed forces or group and return to their countries and communities of origin may be in danger of harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution. UNHCR's *Guidelines on Child Asylum Claims*, Para. 23.

¹⁰¹ Chapter Three, 'Refugee Status And Resettlement', Page. 83. Available at: <https://www.unhcr.org/3d464c954.pdf>

¹⁰² 'Children may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. .. It is, therefore, essential that examiners have the necessary training and skills to be able to evaluate accurately the reliability and significance of the child's account. This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe'. UNHCR's *Guidelines on Child Asylum Claims*. Para. 70.

¹⁰³ Chapter Three, 'Refugee Status And Resettlement', Page. 88. Available at: <https://www.unhcr.org/3d464c954.pdf>

¹⁰⁴ *Guidelines Military Service*, Para. 70. *Guidelines on Child Asylum Claims*, Paras. 2 -72

¹⁰⁵ General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005 Para. 20 – 59 – 66. *Guidelines on Child Asylum Claims*, Paras. 11, 72, 74.



interests of the child embodied in Article 3(1) of the CRC should be a primary consideration and guide all actions undertaken.¹⁰⁶

The Agent of persecution:

Persecution may emanate from state or non-state actors.¹⁰⁷ Refugee status can be warranted in the case of persons at risk of harm from both actors.¹⁰⁸ Where children might have experienced personal harmful treatment by the national authorities, the source of persecution here is “the state agent”. On the other hand, child might be recruited and abused by militiamen, “non-state agent”. In such cases, the fear of persecution will be well-founded and bring the applicant within the refugee definition of the 1951 Refugee Convention if the authorities are unwilling or unable to provide effective protection.¹⁰⁹

Availability of State Protection:

The availability of state protection in the applicant’s country of origin has long been accepted as a central component of the 1951 Refugee Convention definition¹¹⁰ and where the child recruitment committed by non-state actors, it is really important to consider that the enactment of legislation prohibiting the illegal recruitment of children is, in itself, not sufficient to reject a child soldier’s claim to having a well-founded fear of being persecuted; whether the state ensures that the illegal recruitment of child soldiers is effectively

¹⁰⁶ *Guidelines Unaccompanied Children Seeking Asylum*, Para. 1.5

¹⁰⁷ UNHCR’s *RSD Handbook*, Para. 65. “Agents of persecution may include the state’s armed forces, its law enforcement agents or security forces or other state organs or groups, and individuals for whom the state is responsible or whose conduct can be attributed to the state. The state may empower, direct, control, support or tolerate the activities of so-called non-state actors, such that their actions can in some instances be attributable to the state. Agents of persecution also include non-state actors such as paramilitary groups, militias, insurgents, bandits, pirates, criminal gangs or organizations, terrorist organizations, private military or security companies, or other groups or individuals engaging in situations of armed conflict and violence. An analysis of these actors should take into account that their character may shift from one of these categories to another or defy categorization altogether”.

UNHCR’s *Guidelines on Claims for refugee status related to situations of armed conflict and violence*. Para. 28. UNHCR, Self-Study Module 2: Refugee Status Determination. Identifying who is a Refugee, 1 September 2005, Para. 38 -39, available at: <https://www.refworld.org/docid/43141f5d4.html> [accessed 7 March 2019]

¹⁰⁸ UNHCR’s *Guidelines on Claims for refugee status related to situations of armed conflict and violence*. Para. 28.

¹⁰⁹ UNHCR’s *RSD Handbook*. Para. 65. The decision-maker must review applicable laws, policies and practices to assess whether the State would actually intervene to protect the particular individual concerned. Even if there is legislation prohibiting the persecutory conduct, it is possible that in practice no action is taken to implement it, either because there is no commitment to enforcement, or because of insufficient resources. In some cases the State may not have the power to address the situation, for example where the agents of persecution exercise territorial control in the relevant part of the country. Note that it is not necessary for the applicant to show that she or he actively sought protection from the government, particularly if under the circumstances it would have been unreasonable or impossible to do so. UNHCR, Self-Study Module 2: Refugee Status Determination. Identifying who is a Refugee, 1 September 2005, Paras. 38-39, available at: <https://www.refworld.org/docid/43141f5d4.html> [accessed 7 March 2019].

¹¹⁰ This is premised on the idea that international refugee law was formulated to serve as a back –up to the protection one expects from the state and to enable the applicant who no longer has the benefit of national protection against persecution for a convention reason in his country of origin to turn for protection to the international community. On the other hand, the concept of protection represents a fundamental aspect of the human rights framework for understanding ‘well-founded fear of persecution’. In international human rights law a violation of human right can by definition only occur where a state has failed in its duty to protect an individual. A consideration of the availability of state protection is thus an integral indeed, essential – element in the assessment of whether there has been a violation of human right.

Jason M. Pobjoy, *The child in international refugee law*, 2017, Cambridge University Press, Page 109-112
UNHCR’s *RSD Handbook*, Para. 100.



investigated and those responsible identified and prosecuted is also necessary.¹¹¹ Accordingly, the extent of the ability and/or willingness of the state to provide protection to children being recruited by armed groups and to prevent future violations needs to be assessed before rejecting such a claim. This point has been highlighted in relevant guidelines issued by UNHCR.¹¹²

The Harm should constitute persecution:

The concept of “persecution” is not defined in the 1951 Refugee Convention or in any other international instrument. However, from Article 33 (1) of the 1951 Refugee Convention, it can be inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of human rights.¹¹³ Likewise, conduct amounting to serious violations of IHL can constitute persecution.¹¹⁴ What amounts to persecution will also depend on the circumstances of the individual, including the age, gender, opinions, health, feelings and psychological make-up of the applicant.¹¹⁵

The 1948 Universal Declaration of Human Rights (UDHR)¹¹⁶ sets out a list of fundamental rights which should be universally respected, and the 1966 International Covenants on Civil and Political Rights (ICCPR),¹¹⁷ and on Economic, Social and Cultural Rights (ICESCR)¹¹⁸ codified these in legally binding form. A series of other human rights instruments have built on and developed these standards to address specific categories of rights. In respect of the child, Article 37 of the CRC sets out a list of fundamental rights, including the right to be protected from punishment, torture, or other cruel, inhuman or degrading treatment.¹¹⁹

Situations of armed conflict and violence frequently involve exposure to serious human rights violations or other serious harm amounting to persecution. Such persecution could include, but is not limited to, situations of genocide and ethnic cleansing; torture and other forms of inhuman or degrading treatment; rape and other forms of sexual violence;

¹¹¹ International human rights law recognizes that states are under a duty to protect individuals from infringements of their human rights by non-state actors. This obligation derives from the obligation on states not simply to respect human rights but also to take positive steps to ensure, guarantee and secure them. ICCPR, art 2 (1). CRC, art 2 (1). ICESCR, art 2 (2). CRC, art 19-20. Human Rights Committee, HRC, General Comments GC 31, Para.8

¹¹² UNHCR's *Guidelines on Child Asylum Claims*. Paras. 37-38. *Guidelines Military Service* Paras. 36, 42, 44. UNHCR's *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 30

¹¹³ UNHCR's *RSD Handbook*, Para. 51

¹¹⁴ UNHCR's *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 11.

¹¹⁵ UNHCR's *RSD Handbook*, Paras. 52 and 55

¹¹⁶ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 6 March 2019]

¹¹⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>

¹¹⁸ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 6 March 2019]

¹¹⁹ CRC, art 37 (i - ii).



forced recruitment, including of children; arbitrary arrest and detention; hostage taking and enforced or arbitrary disappearances; and a wide range of other forms of serious harm resulting from circumstances mentioned.¹²⁰

When it comes to child soldiers, persecution may also arise from the nature of the treatment child soldiers would be subject to and/or conduct they would be required to engage in while in the armed forces or groups.¹²¹ However, it is also important to bear in mind that the mere conscription or enlistment of children into armed forces or groups or their use to participate actively in hostilities constitute serious violations of their human rights under the international human rights standards, and is therefore considered to undoubtedly amount to persecution.¹²²

UNHCR lists the recruitment of children for regular or irregular armies among certain policies and practices constituting gross violations of specific rights of the child that may lead to situations that fall within the scope of the Refugee Convention.¹²³ UNHCR's Guidelines considered as follows:

“Forced recruitment and recruitment for direct participation in hostilities of a child below the age of 18 years into the armed forces of the State would amount to persecution. The same would apply in situations where a child is at risk of forced re-recruitment or would be punished for having evaded forced recruitment or deserted the State's armed forces. Similarly, the recruitment by a non-State armed group of any child below the age of 18 years would be considered persecution.”¹²⁴

Furthermore, the conscription or enlistment of children into armed forces or groups constitutes, not only a violation of their human rights but also a violation of international humanitarian law (IHL) as well as a war crime and crime against humanity.¹²⁵ UNHCR considered that:

¹²⁰ UNHCR's *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 13.

¹²¹ UNHCR's *Guidelines on Child Asylum Claims*, Para. 23

¹²² UN Sub-Commission on the Promotion and Protection of Human Rights, attached to the Economic and Social Council has considered the above mentioned rights as non-derogable: “These non-derogable rights include: the right to life (art. 6); the right to humane treatment (art. 7); the freedom from slavery (art. 8); the right not to be imprisoned for failure to fulfil a contractual obligation (art. 11); the freedom from ex post facto laws (art. 15); the right to recognition before the law (art. 16); and the freedom of thought, conscience, and religion (art. 18).”

UN Sub-Commission on the Promotion and Protection of Human Rights, *The rights of non-citizens: Progress report of the Special Rapporteur*, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decisions 2000/103 and 2001/108, as well as Commission decision 2002/107, 5 June 2002, E/CN.4/Sub.2/2002/25, Page. 6. available at: <https://www.refworld.org/docid/3d5a2cdd7.html> [accessed 6 March 2019]

¹²³ *Guidelines Unaccompanied Children*, 8.7; *Guidelines Military Service*, 38, 39

¹²⁴ *Guidelines Child Asylum Claims*, 21

¹²⁵ UNHCR's *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 14



“Where the Applicant would be subject to conditions of service that constitute serious violations of international humanitarian or criminal law, serious human rights violations or other serious harm, persecution would arise.”¹²⁶

UNHCR indicates that applicants, including children, cannot be expected to establish that there has been the commission of either an IHL violation or an international crime in order for a decision-maker to reach a finding that a particular kind of harm constitutes persecution, considering that relying on IHL or international criminal law to determine refugee status could undermine the international protection objectives of the 1951 Refugee Convention, and leave outside its protection persons who face serious threats to their life or freedom.¹²⁷

Grounds for Persecution:

The well-founded fear of persecution must be established on one or more of the five listed grounds mentioned in the 1951 Refugee Convention, namely for reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹²⁸ UNHCR’s Guidelines indicate that children’s claims to refugee status most often have been analysed in the context of the Convention ground of “membership of a particular social group”,¹²⁹ although any of the Convention grounds may be applicable.¹³⁰ In this context, it can be argued that child soldiers may have a well-founded fear of persecution based on their membership of a particular social group and political opinion as well. UNHCR noted as follows:

“Where children are singled out as a target group for recruitment or use by an armed force or group, they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live. As with adults, a child who evades the draft, deserts or otherwise refuses to become associated with an armed force may be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established.”¹³¹

¹²⁶ *Guidelines Military Service*, 36. UNHCR’s Executive Committee has also recognized that child-specific forms of persecution includes, but are not limited to, under-age recruitment, child trafficking, forced labour, forced prostitution and child pornography. UNHCR’s *Guidelines on Child Asylum Claims*. Para. 18

¹²⁷ UNHCR’s *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 15.

¹²⁸ UNHCR, *Self-Study Module 2: Refugee Status Determination. Identifying who is a Refugee*, 1 September 2005, Para. 36-37, available at: <https://www.refworld.org/docid/43141f5d4.html> [accessed 7 March 2019]

¹²⁹ “A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”.

UNHCR’s *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, Para 11. Available at: <https://www.refworld.org/docid/3d36f23f4.html> [accessed 7 March 2019]

¹³⁰ UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 48.

¹³¹ UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 52 (3).



Internal Flight or Relocation Alternative (IFA):

The concept of an “internal flight alternative” or “internal relocation alternative” is not explicitly mentioned in the 1951 Refugee Convention. It refers to the possibility for an applicant who has established a well-founded fear of persecution in one part of his or her country to return to another area within the same country. UNHCR’s Guidelines on the Internal Flight or Relocation Alternative, issued on 23 July 2003, provides a detailed analysis of the conditions which must be satisfied. The assessment of a potential internal flight alternative requires that a specific area be identified where there is no serious risk of persecution and where the applicant could reasonably be expected to establish him or herself and lead a normal life. This requires an assessment over time, taking into account the original reasons for flight and a consideration of whether the proposed area provides a meaningful alternative in the future.¹³² For those cases where it is relevant, the possibility of internal relocation is an element in evaluating the well-foundedness of the applicant’s fear. Where an IFA is available, she or he would not be considered eligible for international protection as a refugee.

UNHCR’s guidelines on international protection “IFA” within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees state that for an IFA to be considered available, the proposed areas for relocation must meet both the “relevance”¹³³ and “reasonableness”¹³⁴ tests. For an IFA to be relevant, it must be accessible to the Applicant (Paras. 10-12). The decision-maker must also consider whether the applicant be exposed to a risk of being persecuted or other serious harm upon relocation (Paras. 18-21).

The relevance of an internal flight or relocation alternative in situations of armed conflict and violence needs to be carefully assessed. UNHCR’s considered in its Guidelines that in many situations of armed conflict and violence, it may neither be relevant nor

¹³² UNHCR, Self-Study Module 2: Refugee Status Determination. Identifying who is a Refugee, 1 September 2005, Para. 39-40, available at: <https://www.refworld.org/docid/43141f5d4.html> [accessed 7 March 2019]

¹³³ The Relevance Analysis involves an examination of the following questions: **a)** Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant. **b)** Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available. **c)** Is the agent of persecution a non-State agent? Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there. **d)** Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.

UNHCR’s *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, Para. 7, available at: <https://www.refworld.org/docid/3f2791a44.html> [accessed 7 March 2019]

¹³⁴ The Relevance Analysis involves an examination of the following question: Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there. In answering this question, it is necessary to assess the applicant’s personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival.

UNHCR’s *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative”*. Para. 7.



reasonable to apply an internal flight or relocation alternative.¹³⁵ When it comes to the child, the best interests inform both the relevance and reasonableness assessments.¹³⁶

In the light of above and where child soldiers are being persecuted by the national authorities (state agent), the relevance test is not met as the child would be recruited in any part of his country and therefore, the IFA option is not available. But when the recruitment of children is perpetrated by armed groups (non-state actors), it is important to assess the availability and effectiveness of state protection.

Regarding the assessment of the “reasonableness test”, it is important to consider that age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation¹³⁷ and therefore the protection risks in the place of relocation would also need to be examined carefully, taking into account the age and coping capacity of the child.¹³⁸

Exclusion from Refugee Status¹³⁹

Article 1F of the 1951 Refugee Convention contains those exclusion clauses that address cases where the individual has committed acts so grave as to render him or her undeserving of international protection as a refugee. Thus, the primary purpose of Article 1F is to deprive the perpetrators of heinous acts and serious crimes of international refugee protection, and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.¹⁴⁰ Since Article 1F is intended to protect the integrity of asylum, it needs to be applied “scrupulously”. As with any exception to human rights guarantees, a restrictive interpretation of the exclusion clauses is required in

¹³⁵ “Situations of armed conflict and violence are often characterized by widespread fighting, are frequently fluid, with changing frontlines and/or escalations in violence, and often involve a variety of state and non-state actors, who may not be easily identifiable, operating in diverse geographical areas. Further, such situations often seriously affect state and societal structures and support systems creating hardships for the civilian population. The humanitarian situation of civilian populations living in areas affected by situations of armed conflict and violence is often dire, including as a result of blocking supply routes and restrictions on humanitarian aid and freedom of movement. Considering these factors, in many situations of armed conflict and violence, it may neither be relevant nor reasonable to apply an internal flight or relocation alternative.”

UNHCR’s *Guidelines on Claims for refugee status related to situations of armed conflict and violence*, Para. 40.

¹³⁶ UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 53

¹³⁷ UNHCR’s *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative”*. Para. 25. UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 55

¹³⁸ UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 54

See also, UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin, CRC/GC/2005/6, Sep. 2005, <http://www.unhcr.org/refworld/docid/42dd174b4.html>. Para. 84.

¹³⁹ Article 1F provides that the Convention “shall not apply to any person with respect to whom there are serious reasons for considering” that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes or principles of the United Nations.

¹⁴⁰ UNHCR’s Letter to Legal Counsel regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 5.



view of the serious possible consequences of exclusion for the individual.¹⁴¹ The exclusion clauses are exhaustively enumerated in Article 1F, and no reservations are permitted.¹⁴²

Application of the exclusion clauses under the 1951 Refugee Convention is essentially a three-step process which follows a determination that the person meets the refugee definition (i.e., has a well-founded fear of persecution on account of one of five grounds), if there are indications that he or she may have been involved in conduct which gives rise to exclusion. Under an exclusion analysis, it must first be determined whether the conduct at issue constitutes an excludable act. If this is the case, the person's individual responsibility for the act must be ascertained. Finally, if individual responsibility is found to exist, it must be determined whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed. In the context of child soldiers, the particular circumstances and vulnerabilities of children must be taken into consideration at all stages of the analysis.¹⁴³

Application of Article 1 (F) to Child Soldiers

The 1951 Refugee Convention's exclusion clauses do not distinguish between adults and minors. However, when the application of an exclusion clause for acts committed when the person concerned was under 18 years of age is at issue, regard must be had not only to general exclusion principles but also to the rules and principles pertaining to the special status of children under international and national law.¹⁴⁴

Any exclusion analysis regarding the acts of child soldiers must be undertaken with great care. The use of child soldiers in armed conflict is a practice of increasing international concern and has been condemned by the international community on legal, moral and ethical grounds. Children are often targeted for recruitment due to their young age and vulnerability. Many are forced to commit crimes, as well as witness the crimes of others, and as a result, are left psychologically and emotionally scarred for years.¹⁴⁵

Determining whether child soldiers are victims or 'criminals' is nonetheless necessary because the Refugee Convention 'shall not apply to any person with respect to whom there are serious reasons for considering that:¹⁴⁶ he has committed a crime against

¹⁴¹ UNHCR, *Guidelines on Exclusion*, para. 2; UNHCR *Background Note on Exclusion*, para. 4. UNHCR, *RSD Handbook* para. 149.

¹⁴² UNHCR, *Guidelines on Exclusion*, para. 3; UNHCR, *Background Note on Exclusion*, para. 7.

¹⁴³ UNHCR's Letter to Legal Counsel regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 6.

¹⁴⁴ *Ibid.*, page 10.

¹⁴⁵ *Ibid.*, page 1.

¹⁴⁶ As noted, the standard of proof required under Article 1F of the 1951 Convention for relevant findings of fact is that of "serious reasons for considering." In UNHCR's view, this is less than the standard required in criminal proceedings ("beyond



peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.’¹⁴⁷

As noted earlier, the application of the exclusion clauses to children always needs to be exercised with great caution. Where children are alleged to have committed crimes while their own rights were being violated, it is important to bear in mind that they may be victims of offences against international law and not just perpetrators.¹⁴⁸ Thus, the goal should not be to punish but to promote and facilitate the reintegration of children into society. It is with these principles in mind that the exclusion clause should be assessed with respect to child soldiers.

Determination of Individual Responsibility

If it is determined that the conduct at issue falls under one of the exclusion clauses, then personal responsibility must be determined. An individual cannot be excluded from refugee status absent an assignment of individual responsibility. Three issues must be addressed: (1) the involvement of the applicant in the excludable act; (2) whether the applicant had the required mental state (*mens rea*); and, (3) possible grounds for rejecting individual responsibility.¹⁴⁹ In respect of the child, Article 1F can be applied only if they have reached the age of criminal responsibility and possess the mental capacity to be held responsible for the crime in question.¹⁵⁰

Required Mental State (*Mens Rea*):

In international criminal law, as in most national legal systems, it is not enough to have committed a particular prohibited act to incur individual criminal responsibility. The perpetrator must have the requisite *mens rea*, i.e. intent and knowledge.¹⁵¹

The *mens rea* is indirectly and partly linked to the age of a person. Indeed, in order to intend to commit a crime, an individual must have a certain autonomy, which is more or less

reasonable doubt”) but more than mere suspicion. For the “serious reasons for considering” threshold to be met, clear and credible evidence is required. See UNHCR, *Background Note on Exclusion*. Paras. 107–111.

¹⁴⁷ Art. 1 (F) (a) Refugee Convention.

¹⁴⁸ The Paris Principles state: “Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles,” available at: <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> Para. 3.6. It should also be noted that the prosecutor for the SCSL chose not to prosecute children between the ages of 15 and 18 years given that they themselves were victims of international crimes.

¹⁴⁹ UNHCR’s Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 8.

¹⁵⁰ UNHCR, *Guidelines on Exclusion*, para. 26.

¹⁵¹ UNHCR’s *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html> [accessed 12 March 2019], Para. 21.



dependent on his/her age and his/her physical and psychological development.¹⁵² Where the *mens rea* of a crime is not satisfied, individual criminal responsibility is not established. In respect of children, they may not have the mental capacity to be held responsible for a crime because of immaturity¹⁵³ and the younger a child is, the greater the presumption that the requisite mental capacity was absent at the time of the commission of the prohibited act.¹⁵⁴ In this regard, UNHCR's guidelines considered as follows:

“When determining individual responsibility for excludable acts, the issue of whether or not a child has the necessary mental state (or *mens rea*), that is, whether or not the child acted with the requisite intent and knowledge to be held individually responsible for an excludable act, is a central factor in the exclusion analysis. This assessment needs to consider elements such as the child's emotional, mental and intellectual development. It is important to determine whether the child was sufficiently mature to understand the nature and consequences of his/her conduct and, thus, to commit, or participate in, the commission of the crime. Grounds for the absence of the *mens rea* include, for example, severe mental disabilities, involuntary intoxication, or immaturity.”¹⁵⁵

The Minimum Age of Criminal Responsibility for Child Soldiers:

Article 1F can be applied to a child only if s/he has reached the age of criminal responsibility as established by international and/or national law at the time of the commission of the excludable act.¹⁵⁶ Thus, a child below such minimum age cannot be considered responsible for an excludable act.¹⁵⁷

The problem is that the minimum age of individual criminal responsibility (MACR) for international crimes is not settled in international criminal law. Moreover, this minimum age varies between seven and 18 years among the various national legal systems.¹⁵⁸

International criminal law does not exclude children being held individually criminally responsible for war crimes and crimes against humanity. However, below a certain age, most national legal systems consider a child to be '*doli incapax*', i.e. incapable of committing a crime and, therefore, exempt from individual criminal responsibility because of a lack of full individual autonomy.¹⁵⁹ Accordingly, below a minimum age, there cannot be

¹⁵² Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers', *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Page 989.

¹⁵³ UNHCR's *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html> [accessed 12 March 2019] Para. 21

¹⁵⁴ UNHCR's *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 61.

¹⁵⁵ UNHCR's *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 64. (i)

¹⁵⁶ UNHCR, *Guidelines on Exclusion*. Para. 28.

¹⁵⁷ UNHCR, *Background Note on Exclusion*. Para. 91.

¹⁵⁸ Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers', *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Page 989.

¹⁵⁹ Children under fifteen do not have the mental capacity to understand the nature and consequences of their actions and therefore do not possess the requisite *mens rea* to be held criminally responsible in a judicial system. In these types of situations, it is not in the interests of justice to hold the child criminally accountable.



‘serious reasons for considering’ that child soldiers have committed a crime against humanity or a war crime if these children are under the age of criminal responsibility.¹⁶⁰ Consequently, they should not be held individually criminally responsible and they cannot be excluded from the protection afforded to those enjoying refugee status.¹⁶¹

Article 40 of the CRC requires states to establish a minimum age for criminal responsibility,¹⁶² but as mentioned earlier, there is no internationally accepted minimum age of criminal responsibility. In different jurisdictions, the minimum age ranges from seven years to higher ages, such as sixteen or eighteen years, while the statutes of the Special Court for Sierra Leone¹⁶³ and the International Criminal Court¹⁶⁴ set the cut-off age at fifteen years and eighteen years respectively.

The distinction made between adults and children under international law has been articulated by international criminal courts. Article 7 of the Statute of the Special Court for Sierra Leone provides that the Court does not exercise jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime and states that the Court shall treat any person between fifteen and eighteen years of age who comes before it “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.”¹⁶⁵ Thus, the statute of the court explicitly allows for all persons aged fifteen and above to fall under the jurisdiction of the Court.¹⁶⁶

The ICC also does not have jurisdiction over persons under the age of eighteen, although it is a war crime to conscript or enlist children under age fifteen into armed forces,¹⁶⁷

Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, *St. John's Law Review*, Volume 89, Summer/Fall 2015, Numbers 2 & 3. Pages 1034-1044, available at: <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6731&context=lawreview>

¹⁶⁰ Magali Maystre, ‘The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers’, *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014. Page 989.

¹⁶¹ Erika Feller, Volker Türk and Frances Nicholson. (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, Page.473

¹⁶² See CRC, art. 40.3(a).

¹⁶³ UN Security Council, Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 7. Available at: <http://www.rscsl.org/Documents/scsl-statute.pdf> See also: Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, *St. John's Law Review*, Volume 89, Summer/Fall 2015, Numbers 2 & 3 Pages 1030-1031. Available at: <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6731&context=lawreview>.

¹⁶⁴ See ICC Statute, Art. 26.

¹⁶⁵ Statute of the Special Court for Sierra Leone, art. 7.

¹⁶⁶ Despite having the legal authority to prosecute children between the ages of 15 and 18, the Prosecutor for the Special Court chose not to exercise even this limited authority given that many of the child soldiers were themselves victims of international crimes. See: Press Release, Public Affairs Office, The Special Court for Sierra Leone, “Special Court Prosecutor Says He Will Not Prosecute Children,” November 2, 2002, available at <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf>

¹⁶⁷ Although the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not address the minimum age of criminal responsibility, both stress the importance of prosecuting and punishing those responsible; their silence does not necessarily preclude prosecution of children under these mechanisms.

Nienie Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page 6. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes



which leads to the previous idea indicating that children are essentially victims and, therefore, should be treated as such by the international criminal justice system.¹⁶⁸

One of the interesting relevant researches indicates that children under fifteen do not have the sufficient mental capacity to be criminally culpable but a child between the ages of fifteen and eighteen may be capable of making the decision to commit a war crime and therefore must be held accountable. Therefore, it was suggested to establish an international criminal tribunal for juveniles between the ages of fifteen and eighteen to make the proper balance between accountability and rehabilitation.¹⁶⁹

Despite the lack of an explicit consensus in the statutes of international criminal tribunals and the absence of a customary norm regarding the exact minimum age of criminal responsibility for international humanitarian crimes, interpretation of the CRC in light of the Vienna Convention on the Law of Treaties may point to a legal obligation to refrain from prosecuting at least children under fifteen for serious crimes arising from armed conflict.¹⁷⁰ Article 31 of the Vienna Convention states as a “General Rule of Interpretation” that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁷¹

The Rome Statute and the Optional Protocol to the CRC arguably demonstrate an emerging consensus that children aged fifteen to eighteen should also be shielded from criminal liability. Although it is a war crime to conscript or enlist children aged under fifteen according to the Rome Statute, the international community expressed a preference for not prosecuting persons aged fifteen through seventeen by limiting the ICC's jurisdiction to

¹⁶⁸ Max du Plessis, “Children under International Criminal Law,” *African Security Review*, Vol. 13, No. 2, 2004, <https://www.tandfonline.com/doi/pdf/10.1080/10246029.2004.9627290?needAccess=true> Page 110.

¹⁶⁹ The tribunal would provide an element of justice and a sense of closure for the victims while simultaneously promoting a child’s rehabilitation and reintegration into society. Such a tribunal would show the international community that unacceptable voluntary behaviour will not be tolerated, but more importantly, it will provide protection for children and serve as a significant step in deterring the use of child soldiers in armed conflicts around the world.

Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, *St. John’s Law Review*, Volume 89, Summer/Fall 2015, Numbers 2 & 3, Page 1048

¹⁷⁰ The preamble to the CRC repeatedly addresses the need and commitment of the Parties to provide special protections for children; it recalls the Universal Declaration of Human Rights, in which the UN proclaimed that childhood is entitled to special care and assistance, and the Declaration of the Rights of the Child, stating, “the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection”. By setting the minimum age for recruitment and use at fifteen, the drafters of the CRC pointed to the need to protect children from the dangers of war, in accord with international humanitarian law. In addition to the psychological and physical dangers of war, the prohibition on both forced recruitment and use of children under age fifteen in direct hostilities suggests that the States Party to these treaties believed children under fifteen do not possess the mental maturity to express valid consent to join an armed group. If children under fifteen are not sufficiently mature to consent to engage directly in armed conflict and must be protected from the dangers of war under the CRC, they arguably are more like victims of armed conflict than its perpetrators. In agreement with this interpretation of the CRC, the Sierra Leone Report allows for the prosecution of only children aged fifteen and over while recognizing the victimhood of all child soldiers. Similarly, the Rome Statute makes it a war crime to conscript or enlist children under age fifteen in armed conflict.

Nienke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, pages 7-8. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes

¹⁷¹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 1, 1980).



persons aged eighteen and over at the time of commission of a crime.¹⁷² Furthermore, since the Optional Protocol precludes States Parties from allowing children under eighteen to participate in direct hostilities, they should be protected from criminal liability if they are used in armed conflict. Finally, the CRC itself prefers the measures most “conducive to the realization of the rights of the child” when the CRC and domestic law or domestic treaty obligations differ, suggesting that the higher the age of allowable recruitment and criminal responsibility, the better.¹⁷³ In respect of exclusion analysis, UNHCR considered that:

“The exclusion clauses can apply to minors only if they have reached the age of criminal responsibility at the time of the commission of the excludable act. Under Article 40 of the 1989 CRC, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State,¹⁷⁴ a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to be held responsible for the crime in question.”¹⁷⁵

One of the important safeguards applicable to child soldiers facing the exclusion clause is that, even in the case where the individual criminal responsibility of a child soldier is established, it must be determined whether the consequences of his/her exclusion from refugee status are proportional to the seriousness of the crimes committed.¹⁷⁶ With respect to child soldiers, possible mitigating factors might include circumstances of service in the armed forces or groups, treatment of the child by military personnel and age.¹⁷⁷ Crimes against humanity have often been recognized as sufficiently serious to outweigh the degree of persecution feared upon return, but with certain ‘less serious’ war crimes, such as individual incidents of pillaging, the exclusion may be considered disproportionate to the underlying crime.¹⁷⁸ However, the fact that child soldiers under fifteen are themselves victims of a war crime – namely ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’ – and that most child soldiers under eighteen are often victims of various crimes against humanity should militate against finding exclusion proportionate to the acts they have committed.¹⁷⁹

¹⁷² Rome Statute, art. 26

¹⁷³ CRC, art. 41

¹⁷⁴ If the age of criminal responsibility is higher in the country of origin, this should also be taken into account (in the child’s favor).

¹⁷⁵ UNHCR, *Background Note on Exclusion*, para. 91. UNHCR’s Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 11.

¹⁷⁶ *Guidelines Child Asylum Claims*, Para 64 (iii)

¹⁷⁷ *Background Note Exclusion*, Para. 92; *Guidelines Child Asylum Claims*, Para. 64(iii).

¹⁷⁸ UNHCR’s Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 10. *Background Note Exclusion*, 78; *Guidelines Exclusion*, Para. 24

¹⁷⁹ Magali Maystre, ‘The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers’, *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Pages 994-995.



UNHCR has argued that the denial of refugee protection to an individual should be based on an individualized examination of whether the person concerned incurred individual responsibility for acts which may give rise to exclusion. In making this assessment, the individual's personal circumstances need to be taken into account. In the case of child soldiers, issues such as age, mental and emotional maturity, voluntariness of service, and treatment by other military personnel, all factor heavily in determining whether exclusion from refugee protection is appropriate. Given the possible consequences of exclusion, i.e., return to persecution, a holistic examination of all relevant facts is critical.¹⁸⁰

Finally, UNHCR has considered that, even if one applies Article 1F to a child, s/he should still be protected from *refoulement* partly because the fact that the child has been a combatant may enhance the likelihood and aggravate the degree of persecution s/he may face harm upon return.¹⁸¹

Possible Defences and Mitigating Circumstances in International Criminal Law as well as Other Safeguards Applicable to Child Soldiers

If mental capacity is established, other grounds for rejecting individual responsibility need to be examined, notably whether the child acted under duress, coercion, or in defence of self or others. Such factors are of particular relevance when assessing claims made by former child soldiers. Additional factors to consider may include: the age at which the child became involved in the armed forces or group; the reasons for which s/he joined and left the armed forces or group; the length of time s/he was a member; the consequences of refusal to join the group; any forced use of drugs, alcohol or medication; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered.¹⁸²

Duress as Possible Defences and Mitigating Circumstances

Child soldiers who are illegally recruited by armed forces or groups are often coerced into committing international crimes. In customary international law, duress may be used as a

¹⁸⁰ UNHCR's Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html> [accessed 15 March 2019], page 1.

¹⁸¹ Erika Feller, Volker Türk and Frances Nicholson. (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, Page.473.

¹⁸² As noted above, even if the circumstances do not give rise to a defence, the vulnerability of the child, especially those subjected to ill-treatment, should be taken into account when considering the proportionality of exclusion. UNHCR's *Guidelines on Child Asylum Claims*. Para. 64 (ii). UNHCR *Guidelines on Exclusion*, paras. 21-24. UNHCR, *Background Note on Exclusion*, paras. 91-93. UNHCR's Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html>. Pages 10-12.



defence when a person who has committed an international crime acted under a threat of severe and irreparable harm to his/her life or limb, or to the life and limb of another person.¹⁸³

The Rome Statute of the ICC provides the most common defences available in international tribunals, including intoxication and duress, which are most applicable to child soldiers.¹⁸⁴ Article 31(1) (d) of the International Criminal Court (ICC) Statute recognizes duress as a defence, also for crimes involving killing. Duress negates the *mens rea* of the person acting under coercion, which is, in a way, replaced with the criminal intent of the person causing duress.¹⁸⁵ UNHCR has considered that given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should, in particular, be examined carefully.¹⁸⁶ Therefore, duress is recognized as possible defences by the UNHCR with respect to child soldiers. Thus, if the child soldier acted under duress and/or non-negligent or involuntary intoxication, s/he should not be considered undeserving of refugee status, even if s/he has committed an international crime.

Finally, the fact that a child soldier has ‘only’ been recruited by coercive means is not sufficient to plead duress as a defence. It must, therefore, be proven that the child soldier was under a threat aimed at inducing –and that actually led– him/her to commit the particular crime against humanity or war crime with respect to which his/her exclusion from the refugee status is sought. However, the continuing coercive and threatening environment in which some child soldiers are kept could be characterized as ‘a threat of continuing or imminent serious bodily harm against that person’ pursuant to Article 31(1) (d) of the ICC Statute.¹⁸⁷

Reintegration & Best Interests

The trauma child soldiers suffer and their psychological development at the time of their crimes mandates that we treat them as victims, not perpetrators of armed conflict and that we seek to rehabilitate them. Although international law arguably requires the prosecution of severe violations of human rights, it also establishes that the best interests of children are paramount and reflect an emerging trend towards forbidding the use of children

¹⁸³ Under customary international law, there are four strict conditions for duress to be admitted as a defence: The act charged is done under an immediate threat of severe and irreparable harm to life or limb; (2) there is no adequate means of averting such evil; (3) the crime committed is not disproportionate to the evil threatened. In other words, to be proportionate, the crime committed under duress: must, on balance, be the lesser of two evils or an evil as serious as the one to be averted; (4) the situation leading to duress: must not have been voluntarily brought about by the person coerced.

Prosecutor v. Drazen Erdemovic (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia (ICTY), 7 October 1997, available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=48aad5c42>

¹⁸⁴ Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, *St. John’s Law Review*, Volume 89, Summer/Fall 2015, Numbers 2 & 3, Page 1047.

¹⁸⁵ UNHCR’s Letter to Legal Counsel regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005, available at: <https://www.refworld.org/docid/440eda694.html>. Pages. 8-9
UNHCR’s *Guidelines on International Protection No. 8: Child Asylum Claims*. Para. 64.

¹⁸⁶ UNHCR *Guidelines on Exclusion*, para. 28.

¹⁸⁷ Magali Maystre, ‘The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers’, *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Page 992.



under eighteen in direct hostilities. In this context, post-conflict governments should focus on rehabilitation, rather than prosecution and punishment of former children under age eighteen. When the time for peace-making arrives, these governments should seek alternative methods of addressing the needs of victims of child soldiers and their communities while rehabilitating the child soldiers themselves.

Considering the purpose of the CRC is to protect children, the Convention provides a critical safeguard for children seeking international protection. The CRC specifically states that the best interests of the child “shall be a primary consideration” in all actions concerning the child.¹⁸⁸ It further specifies that states parties should undertake all feasible measures to care for and protect children in armed conflict,¹⁸⁹ and that states must seek to promote physical and psychological recovery and social reintegration of child victims of armed conflict.¹⁹⁰

Under Article 39 of the Convention, states have affirmative obligations to seek to rehabilitate and reintegrate child victims, including former child soldiers, into society.¹⁹¹ Recovery and re-integration are meant to take place “in an environment which fosters the health, self-respect and dignity of the child.”¹⁹² The CRC itself states that state parties should promote the establishment of measures for children accused of violating penal law “without resorting to judicial proceedings.”¹⁹³ It proposes a variety of dispositions including counselling, vocational training, and other alternatives to institutional care to ensure that “children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”¹⁹⁴ The CRC discourages the use of deprivation of liberty as an adequate disposition, stating that it “shall only be used as a measure of last resort and for the shortest appropriate period of time.”¹⁹⁵

UNHCR has also recognized that other safeguards apply to child soldiers facing exclusion, with respect to all actions concerning refugee children, the ‘best interests’ of the child must be a primary consideration pursuant to Article 3(1) of the CRC. This, *inter alia*,

¹⁸⁸ CRC. Art. 3.

¹⁸⁹ CRC. Art. 38.

¹⁹⁰ CRC. Art. 39.

¹⁹¹ See CRC, art. 39. See also CRC .art. 3 (iii) and art. 40. Nienke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page. 9, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328982&download=yes

¹⁹² CRC. Art. 39.

¹⁹³ CRC. Art. 40. Prosecuting children under age eighteen is inconsistent with the underlying goals of the CRC: to promote the best interests and well-being of the child. The CRC itself states that states parties should promote the establishment of measures for children accused of violating penal law “without resorting to judicial proceedings. As discussed above, states are prohibited from recruiting or using children under age fifteen in their armed forces partly because they lack physical and mental maturity, they should not be held legally accountable for serious violations of international humanitarian law. If a state chooses to prosecute a child aged fifteen through seventeen, it must maintain procedural safeguards to protect the child’s rights and consider his or her best interests and well-being throughout the judicial process. In determining what disposition to impose upon the child, states may not utilize capital punishment for children under age eighteen and should consider the child’s age and circumstances as mitigating factors. Nienke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, *Georgetown Journal of International Law*, Vol. 38, 2007, 17 Jan 2009, page 9.

¹⁹⁴ CRC. Art. 40.

¹⁹⁵ CRC. Art. 37.



means that necessary support services to enable their reintegration and rehabilitation shall be offered and that states shall refrain from returning child soldiers in any manner whatsoever to the borders of a state where there is a real risk of re-recruitment or use by any party to an armed conflict.¹⁹⁶ UNHCR has considered as follows:

“Specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant. The “best interests” principle should also underlie any post-exclusion action. Articles 39 and 40 of the Convention on the Rights of the Child are also relevant as they deal with the duty of States to assist in the rehabilitation of victims (which would include child soldiers) and establish standards for the treatment of children thought to have infringed criminal law.”¹⁹⁷

Conclusion & Recommendations

International law provides no explicit guidelines for whether or at what age child soldiers should be prosecuted for grave violations of international humanitarian and human rights law such as genocide, war crimes, and crimes against humanity. As a principle, and according to international standards, children should not be held individually criminally responsible if they are under the age of criminal responsibility. However, the minimum age is not settled yet in international criminal law. The absence of a minimum age of individual criminal responsibility in international criminal law may exclude child soldiers from refugee status, and hinders the protection afforded to child soldiers, and the protection regime created by international refugee law and the humanitarian nature of the Refugee Convention. Accordingly, there are good reasons for the international community to adopt the minimum age of responsibility at eighteen years old for serious crimes arising from armed conflict. Choosing the age of eighteen as the lower limit for criminal accountability recognizes the state of adolescents' psychological and moral development, and refraining from prosecuting persons below this age promotes the underlying rehabilitative goals of the CRC.¹⁹⁸

Until a minimum age of individual criminal responsibility is adopted in international criminal law, and is ultimately incorporated into international refugee law, child soldiers should not be excluded from the protection of the Refugee Convention for the two following reasons. First, child soldiers who have been coerced and/or drugged to commit international

¹⁹⁶ Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/ 2005/6, 1 September 2005, Paras. 55, 56, 58.

¹⁹⁷ UNHCR's Letter to Legal Counsel regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, 12 September 2005, page 11-12.

¹⁹⁸ Brittany Ursini suggested in his article about 'Prosecuting Child Soldiers' that 'to craft a solution to the problems posed by the lack of an international MACR, the international community must find a way to strike a balance between the demands for accountability and the call for rehabilitation. A system must be established that recognizes criminal responsibility as well as the desire to protect children from a legal process that they may be too young to fully understand. This Note proposes an international MACR of fifteen and calls for the establishment of a special international criminal tribunal for children between the ages of fifteen and eighteen that provides special safeguards and promotes rehabilitation and reintegration of those children into society'. Brittany Ursini, 'Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility', *St. John's Law Review*, Volume 89, Summer/Fall 2015, Numbers 2 & 3, Page 1041.



crimes should not be excluded of refugee status, given the availability of the defences of duress and involuntary intoxication in international criminal law. Second, with respect to child soldiers who have not been coerced or drugged, the fact that international criminal law recognizes age as a mitigating circumstance and favours rehabilitation over retribution with respect to young offenders militates. In the context of a humanitarian regime dedicated to providing protection, this approach would help ensure that the actual circumstances surrounding the child soldier's contribution to the international crime are taken into account in exclusion decisions. These considerations, coupled with the fact that the humanitarian object and purpose of the Refugee Convention should be upheld at all times, call for the protection and reintegration of child soldiers and, therefore, for their non-exclusion from the Refugee Convention.¹⁹⁹

With the current widespread use of child soldiers, the international community is faced with the difficult problem of protecting those children, who should be treated primarily as victims, not perpetrators, of human rights violations. The governments involved must fulfil international humanitarian, human rights, and criminal law commitments to the former child soldiers. This should be done in accord with the general purposes of the CRC protection and promotion of children's rights and consider into account the emotional, mental and intellectual maturity. The governments should promote the well-being and best interest of children. They should choose rehabilitation and reintegration over criminal prosecution. In this respect, the governments should work to reintegrate the child soldiers into their communities, continue their educations, and help them overcome the psychological and physical injuries of war.

¹⁹⁹ Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers', *Journal of International Criminal Justice*, Volume 12, Issue 5, 1 December 2014, Pages 995 – 996.