

THE RIGHT OF CHILD VICTIMS OF ARMED CONFLICT TO REINTEGRATION AND RECOVERY

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1 Introduction

Article 39 of the *Convention on the Rights of the Child* (1989) (hereafter the CRC) provides as follows:

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 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.

It certainly needs no elaboration of the statement that article 39, like other provisions of the CRC, is broadly formulated. It is generally accepted that such general exposition not only provides a 'common denominator approach' which allows for more States to ratify the CRC, but also enables an accommodation of ideological divisions amongst States Parties to the CRC. The nature and effect of this article are therefore influenced by various factors, as provisions of the CRC *qua* international instrument are not enforceable *per se*.

This contribution deals with the position of child victims of armed conflict. An explanation is tendered of the circumstances under which children are considered to be the victims of armed conflict. Specific reference is made to the question of whether or not a former child soldier may be viewed as a child victim. In the second place the question is addressed how a monist or dualist approach regarding the incorporation of treaty law into municipal law influences the rights of child victims in terms of article 39. Thirdly, article 39 is discussed against the background of the CRC as an international human rights instrument.

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2 The child as a victim of armed conflict

2.1 *Introduction*

There is no single source for the international law of the child. It is found in specific and general treaties both at universal and regional level, the rules of international humanitarian law, customary international law, and the law and practice of States.¹ This exposition also holds true for the right to the reintegration and recovery of child victims of armed conflict. The focus of this discussion will therefore be on the right to the reintegration and recovery of child victims of armed conflict in terms of article 39 of the CRC, and reference to humanitarian law (and other treaties) will be made only where applicable.

Various factors and situations may influence the exercising of the child victim's right to rehabilitation and recovery. These may include questions like who is a child victim and if former child soldiers may be seen as victims of armed conflict. This aspect will be covered in paragraph 2 by merely referring to the debate.² In paragraph 3 the

¹ Cohn and Goodwin-Gill *Child Soldiers* 55.

² As the focus of this study primarily falls on the right of children to recovery and reintegration in terms of article 39 of the CRC *qua* human rights document, the protection of child civilians in armed conflict in terms of humanitarian law is not addressed. Various provisions in international humanitarian law and human rights law provide for the protection of child victims of armed conflict. The Law of Geneva, the so-called *Geneva Conventions* (hereafter the GC) *qua* body of law relates to the protection of the victims of war. There are four conventions - *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949) (*Geneva Convention I*); *Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea* (1949) (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Prisoners of War* (1949) (*Geneva Convention III*); and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949) (*Geneva Convention IV*). See too *Protocol Additional to the Geneva Convention of August 12, 1949 and Relating to Victims of International Armed Conflicts* June 8, 1977, 1125 U.N.T.S 3 1725 (Protocol.I) and *Protocol Additional to the Geneva Convention of August 12, 1949 and Relating to Victims of Non-International Armed Conflicts* June 8, 1977, 1125 U.N.T.S 609 (Protocol.II). See Cohn and Goodwin-Gill *Child Soldiers* 56; Dinstein "Human Rights in Armed Conflict" 345-368; Sandoz "Implementing International Humanitarian Law" 268; Detrick *Commentary on the UN Convention* 649; Happold 2000 *NILR* 31; Hampson *Legal Protection Afforded to Children* para 2.1.1; Hamilton and El-Haj 1997 *Int'l J Children's Rts* 1; Robinson 2002 *TSAR* 697; Renteln 1999-2000 *Whittier L Rev* 192; Van Bueren *International Law* 329, 340; Van Bueren 1994 *Int'l & Comp LQ* 809 *et seq*; Pictet 1951 *AJIL* 462 *et seq*; Singer 1986 *International Review of the Red Cross* 134. See also Maher 1989 *BC Third World LJ* 312; McCoubrey *International Humanitarian Law* 171 *et seq*; Boothby 2006 *Intervention* 244-259; Cohn 1991 *IJRL* 100-111; Kalshoven 1995 *AJIL* 849-852; McIntyre 2002 *International Humanitarian Law* 15; Pictet *Development and*

relevance of a monist or dualist system for the integration into municipal law of international treaties by individual States will be considered.³ In as much as these issues are largely settled law, only scant attention will be directed at these principles of International Law. Paragraph 4 will be directed at the provisions of article 39. No attention will be paid to the debate concerning the influence of the evolving capacity of the child or his criminal liability.⁴

2.2 The child as a victim of armed conflict

2.2.1 Definitions

Armed conflict

Despite the fact that different international protocols apply to the position of child victims in situations of war between two (or more) countries and armed conflict of a national character, article 39 of the CRC specifically refers to armed conflict. For the sake of convenience, therefore, the term armed conflict will be used in this contribution.

Child

In terms of article 1 of the CRC a child is every human being below the age of 18 years unless majority is attained earlier under the law applicable to the child. This age limit corresponds with the *Geneva Conventions* and the *Additional Protocols to*

³ *Principles 29 et seq; Plattner 1984 International Review of the Red Cross 140 et seq; Cohn and Goodwin-Gill Child Soldiers 55 et seq* for a critical discussion of the APs.

⁴ Reservations by States Parties to a treaty no doubt may also be of particular significance. However, as no States Party has made a reservation to art 39, no reference will be made to this aspect.

⁴ See Van Bueren *International Law* 335 for a discussion of some other fundamental problems raised by child participation in armed conflict. Also see Fox 2005 *Human Rights Review* 30; Kuper *International Law* 74; Breen 2007 *Human Rights Review* 76; Grover 2008 *IJHR* 54; Singh 2007 *African Human Rights Law Journal* 206, 214; Mulira *International Legal Standards* 22 et seq; Abatneh *Disarmament, Demobilization, Rehabilitation and Reintegration* 89.

*the Conventions and also the Optional Protocol on the Involvement of Children in Armed Conflict.*⁵

2.2.2 *Background*

Many children are caught up in armed conflicts in which they are the targets of violence. Some are victims of a general onslaught against civilians while others die as part of a calculated genocide. Some suffer the effects of sexual violence or multiple deprivations which result *inter alia* in the lack of food and educational facilities, and the deprivation of parental care and a family environment, and contribute to the spread of diseases.⁶ It is trite that armed conflict to a lesser or greater extent violates the fundamental rights of children, *inter alia* the right to life, to be with family and community, to the development of the child's personality, to be nurtured and to be protected. Many conflicts last the length of a 'childhood,' resulting in those children experiencing multiple and accumulative assaults. Disrupting the social networks and primary relationships that support children's physical, emotional, moral, cognitive and social development in this way and for such a long duration invariably causes severe physical and psychological trauma to them.⁷

Machel conveys that in the decade before 1996 an estimated two million children had been killed in armed conflict and that three times as many had been seriously

⁵ U.N.GAOR, U.N.Doc.A/RES/54/263(2000)

⁶ See Machel *Impact of Armed Conflict on Children*; Kuper *International Law* 75; McCoubrey *International Humanitarian Law* 171; Cohn and Goodwin-Gill *Child Soldiers* 58; Nylund 1998 *Int'l J Children's Rts* 23; Otunnu *Address at the Conference on Atrocities Prevention and Response*; Commission on Human Rights *Report on the Rights of the Child*. See further Abatneh *Disarmament, Demobilization, Rehabilitation and Reintegration*; Aldrich and Baarda *Rights of Children in Armed Conflict*; Alfredson 2002 *Disarmament Forum* 17-27.

⁷ Machel *Impact of Armed Conflict on Children* para 30. See also Mulira *International Legal Standards* 4; Fonseka 2001 *APJHRL* 70 et seq; Breen 2007 *Human Rights Review* 72; Singer 1986 *International Review of the Red Cross* 152. Plattner 1984 *International Review of the Red Cross* 142 refers to a report of UNESCO which explains that it is not the facts of war itself (bombings, military operations etc) which affect the child emotionally but the repercussions of events on the family and on affective ties, and the separation from his customary framework of life which affect the child.

injured or permanently disabled. Countless others had been forced to witness and even to take part in "horrifying acts of violence".⁸ She concludes that:

These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a place in which children are exploited as soldiers; a space in which children are starved and exposed to brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.⁹

2.2.3 *Who is a child victim? – child soldiers as the victims of armed conflict*

2.2.3.1 Child soldiers as the victims of armed conflict

From the exposition above it is clear that war and armed conflict invariably result in children being the direct and indirect victims of such conflict. However, it is coming to be accepted that former child soldiers may also be considered the victims of armed conflict.¹⁰ This stems from the point of departure of international law, which focuses on those who recruit children rather than on their participation. As an outflow of this approach it is argued that children participating in conflict should not forfeit their special protection under the law so that prosecution should be reserved for those who bear the greatest responsibility for serious violations of humanitarian law.¹¹

⁸ Machel *Impact of Armed Conflict on Children* para 2. See also Van Bueren 1994 *Int'l & Comp LQ* 812 *et seq*; Russell and Gozdziak 2006 *Georgetown Journal of International Affairs* 57.

⁹ Machel *Impact of Armed Conflict on Children* para 3. See also Commission on Human Rights *Report on the Rights of the Child* para 6-12; Maher 1989 *BC Third World LJ* 306.

¹⁰ It is estimated that more than 300,000 children actively participate in conflict in 41 countries around the world. An additional 200,000 are recruited into paramilitary and guerrilla groups and civil militias in 87 countries. The use of child soldiers is more prevalent in Africa where more than 120,000 children are actively engaged in combat. However, children are also involved in the developed world where about 7,000 children under the age of 18 were in the British armed forces in 2001. See Amnesty International [date unknown] web.amnesty.org. See too Grossman 2006-2007 *Georgetown J Int'l L* 323-361. For a discussion of the reintegration and recovery of child soldiers, see para 4.4 *infra*. See also Mulira *International Legal Standards* 8 *et seq*.

¹¹ Musila 2005 *African Human Rights Law Journal* 329, 331; Custer 2005 *Temp Int'l & Comp LJ* 449-476; Breen 2007 *Human Rights Review* 75; Fonseka 2001 *APJHRL* 77; Renteln 1999 *Whittier L Rev* 202; Cohn and Goodwin-Gill *Child Soldiers* 25, 61; Singer 1986 *International Review of the Red Cross* 152.

The tendency to regard child soldiers as victims of war results from practice in particular circumstances where children are forced into armies or armed groups. In essence this tendency stems from the way in which children are recruited and the reality in which they find themselves once so recruited. Life for such children is often harsh. They may suffer from a variety of risks to their physical health as they are frequently tasked to do the most dangerous jobs. Many fight on the front lines¹² or serve as couriers, spies or carriers of (often) heavy loads. In addition to engaging in combat, girls are frequently victims of sexual exploitation through rape, sexual slavery and abuse. Younger children are often malnourished and may suffer from respiratory and skin infections. It is also likely that child soldiers are at higher risks of drug and alcohol abuse, sexually transmitted diseases and pregnancy, and may suffer auditory and visual impairments due to their frequent exposure to landmines.¹³ It goes without saying that the psychological trauma of soldiering is severe, as children in these conditions witness "the worst of humanity on a daily basis".¹⁴

2.2.3.2 Recruitment practices

a. Forced recruitment

Forced recruitment entailing a threat to or the actual violation of the physical integrity of the child or someone close to him or her is practised not only by armed groups but also by some national forces. In some states where conscription is legally regulated, systemic forced recruitment is commonly practised where there are shortages of manpower.¹⁵ Brutal indoctrination is used to turn young children into fierce fighters. A typical recruitment practice amongst certain armed groups would be to take a boy

¹² This is made easier by the use of light-weight weapons. Weapons have become so light that a child of 10 can use, strip and reassemble them. See Grossman 2006-2007 *Georgetown J Int'l L* 327; Sainz-Pardo 2008 *IJHR* 558 *et seq*; Van Bueren *International Law* 334; Mulira *International Legal Standards* 4 *et seq*; Fox 2005 *Human Rights Review* 28; Breen 2007 *Human Rights Review* 73.

¹³ Grossman 2006-2007 *Georgetown J Int'l L* 327-328.

¹⁴ Grossman 2006-2007 *Georgetown J Int'l L* 328. Extremely brutal forms of abuse are reported. See eg Wessells 2004 *Cornell Int'l LJ* 514; Ramos-Horta 1989 *Fam & Concil Cts Rev* 335.

¹⁵ Cohn and Goodwin-Gill *Child Soldiers* 24. See also Brett 1996 *Int'l J Children's Rts* 125; Kargbo 2004 *Cornell Int'l LJ* 486; Mulira *International Legal Standards* 6.

soldier back to his village and force him to kill someone known to him, usually a family member or a close friend. The killing takes place in such a way that the whole community knows that the boy has committed the murder. In this manner the child is effectively barred from returning to the village and per force develops a relationship of dependency upon his captors, eventually coming to identify with their cause.¹⁶

b. Coercive or abusive recruitment

In such recruitment it cannot be proved that there is a direct physical threat or intimidation, but there is nevertheless evidence indicative of involuntary enlistment.¹⁷

c. Children joining armed forces but not being recruited or coerced into joining

Children are often not forced or coerced into participating in conflict but are rather subject to subtly manipulative motivations and pressures. Such may include, *inter alia*:

- the continued presence of highly militarised State forces;
- personal exposure to extremes of physical violence (often producing a desire for revenge);
- social and economic injustice within the community;

¹⁶ Cohn and Goodwin-Gill *Child Soldiers* 27; Van Bueren *International Law* 335; Mulira *International Legal Standards* 18; Renteln 1999-2000 *Whittier L Rev* 202. One may refer in this respect also to the *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (2007) (hereafter the Paris-Principles). Representatives from 58 countries adopted the Paris-Principles in February 2007 with the aim of providing practical actions to implement developing global legal standards. The principles aim to prevent the unlawful recruitment or use of children; to facilitate the release of children associated with armed forces and armed groups and to facilitate the reintegration of children associated with armed forces and armed groups. In particular they are also aimed at putting an end to the impunity of those unlawfully recruiting or using children in armed conflict. These principles therefore call on States to ensure that the perpetrators of violence against children associated with armed forces or groups, including sexual violence against girls, are prosecuted either through national legislation or through the International Criminal Court. See Sainz-Pardo 2008 *IJHR* 558.

¹⁷ Cohn and Goodwin-Gill *Child Soldiers* 28; Fox 2005 *Human Rights Review* 30; Singh 2007 *African Human Rights Law Journal* 212; Sainz-Pardo 2008 *IJHR* 564.

- the lack of a tolerable alternative, normally in the case of internally displaced, homeless, orphaned or fearful children; and
- inadequate education.¹⁸

In the circumstances set out above, children are both the victims of violence and the perpetrators of atrocities. Deciding whether to prosecute or to reintegrate them into society when the conflict has come to an end is consequently a complex issue.

2.2.2.3 The prosecution or reintegration of child soldiers?

a. States' obligations towards child soldiers

In coming to a decision whether to prosecute or re-integrate former child soldiers, the application of international law is of decisive importance.¹⁹ In particular, the prescripts of international humanitarian law and international human rights law as reflected in the CRC need to be considered.²⁰ Article 38 of the CRC is of specific relevance in this respect:

¹⁸ Mulira *International Legal Standards* 4; Cohn and Goodwin-Gill *Child Soldiers* 30-39. At 62 the authors refer to a report which conveys the information that in many developing countries boys of 14 are considered to be adults and therefore would automatically be combatants. The authors point out that from a physical and psychological perspective this is manifestly wrong. However, this is also wrong from the perspective of international humanitarian law, the aim of which is to protect.

¹⁹ The sources of international law are provided in particular in article 38 of the *Statute of the International Court of Justice* (1945). Article 38 provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties;

international custom, as evidence of general practice accepted as law;

the general principles of law recognized by civilized nations;

subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

38(2): The provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

²⁰ Kuper *International Law* 75; Renteln 1999 *Whittier L Rev* 197; Fonseka 2001 *APJHRL* 79; Mulira *International Legal Standards* 8; Van Bueren 1994 *Int'l & Comp LQ* 818. See also Jesseman 2001 *African Human Rights Law Journal* 140. At 149 *et seq* the author deals with the so-called participation rights of children and the influence of the autonomy of the child on his criminal

- (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- (2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.
- (3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.²¹
- (4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care for children who are affected by an armed conflict.²²

Article 38(3) prohibits the recruiting of children under fifteen years of age. As indicated in note 21 *supra*, this prohibition corresponds with AP (II) under the GCs of 1949. As a consequence hereof children below this age may not even volunteer to participate directly in armed conflict. The *Rome Statute for the International Criminal Court* (hereafter the Rome Statute) specifically provides that it is a "war crime" to conscript or enlist children under the age of fifteen years into national armed forces or to use them to participate actively in hostilities. However, recent international treaties raise the age of permitted participation in armed conflict to eighteen years.²³

liability. The focal point of the argument is that not all children are forcibly recruited into armed forces.

²¹ It needs to be noted that this provision is similar to a 77 of AP I and also Part II, article 4 of AP II. These two protocols specifically provide that children who have not attained the age of 15 shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. See discussion in n 3 *supra*. The provisions of a 6(3) of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) (hereafter Optional Protocol) should be read together with a 38(3). A 6(3) provides that States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilised or otherwise released from service. They shall also when necessary accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration. The Protocol entered into force on 12 February 2002. See also Vandewiele "Optional Protocol" 63; Olivier 1999 *SAYIL* 246; Cohn 2004 *Cornell Int'l LJ* 532; Singh 2007 *African Human Rights Law Journal* 216.

²² For a comprehensive discussion of this article, see, *inter alia*, Kuper *International Law* 98 *et seq*; Cohn and Goodwin-Gill *Child Soldiers* 68; Fonseka 2001 *APJHRL* 80. See n 91 below for a discussion of art 6(3) of the AP.

²³ See a 1 of the Optional Protocol, which amends the age of allowed direct participation in armed conflict to 18 years for parties to the Protocol. It stipulates that States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. It would appear therefore that a child under the

States incur specific obligations towards children during armed conflict, irrespective whether such conflict is of internal or international dimension. Children must receive special affirmative protection under humanitarian law²⁴ in addition to the blanket guarantees under Common Article 3 of the GCs, which provides as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- a. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- i. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii. taking of hostages;
- iii. outrages upon personal dignity, in particular humiliating and degrading treatment;

age of 18 years may not compulsorily be drafted into the armed forces of a State Party, yet he or she may still volunteer to do so provided he or she is not participating directly in hostilities. In terms of the Optional Protocol armed groups, as distinct from States' armed forces, must refrain from both using and recruiting children under the age of 18 (art 4). In fact, States Parties are required to take all feasible measures to prevent such recruitment and use and must adopt necessary legal measures to prohibit and criminalise such practices. Children between the ages of 15 and 18 may therefore not join armed groups but may nevertheless voluntarily join the armed forces of States Parties to the Protocol. See the discussion of Mulira *International Legal Standards* 26, 33. Other treaties which aim to raise the age of permitted participation in armed conflict to 18 years include *ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999) and various articles of the *African Charter on the Rights and Welfare of the Child* (1990), which considers a child a person under the age of 18 and calls upon African States to ensure that no child takes part in hostilities and to refrain from recruiting children.

²⁴ Grossman 2006-2007 *Georgetown J Int'l L* 336; Fox 2005 *Human Rights Review* 37; Cohn and Goodwin-Gill *Child Soldiers* 59; Breen 2007 *Human Rights Review* 83.

- iv. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affecting all the judicial guarantees which are recognized as indispensable by civilized peoples.
- b. The obligation to prosecute those who commit crimes under international law

There appears to be a growing international consensus that those responsible for international crimes should be prosecuted and punished. The preamble to the Rome Statute affirms that the most serious crimes of concern to the international community must be punished and that their effective prosecution must be ensured by States taking measures at national level and engaging in international cooperation.²⁵ It would therefore appear that a State that fails to prosecute a child (or, for that matter, an adult) who has violated international criminal law may be acting in violation of its international law obligations. If a child commits certain crimes of concern to the international community a State may consequently be under an obligation to prosecute him under international treaty and customary law, even if these crimes are committed against a State's own nationals.²⁶

However, contrary to the approach set out above, some authors argue that in the event of internal strife the decision to prosecute rests on the domestic criminal law. This line of argument gains some strength from common article 3 of the four GCs of 1949 which, while prohibiting parties to a conflict from harming unarmed civilians in an internal conflict, contains no 'grave breaches' provision that mandates criminal

²⁵ Article 8 of the *Rome Statute of the International Court* (1998) (Rome Statute) reads as follows: The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy as part of a large-scale commission of such crimes. For the purposes of this Statute, 'war crime' means:

(b)(xxvi) Conscribing or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

See also Grossman 2006-2007 *Georgetown J Int'l L* 337; Renteln 1999 *Whittier L Rev* 199; Fox 2005 *Human Rights Review* 30.

²⁶ Sainz-Pardo 2008 *IJHR* 556; Musila 2005 *African Human Rights Law Journal* 323; Grossman 2006-2007 *Georgetown J Int'l L* 336. Grossman refers to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), which explicitly compels States to undertake to prevent and to punish the crime of genocide. In similar fashion the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) obliges States Parties to criminalise torture under their domestic law and to make these offences punishable by appropriate penalties which take their grave nature into account.

punishment. The decision whether to prosecute or not is therefore dependent on municipal law. Article 6(5) of AP II to the GCs relates to the protection of victims of internal conflicts and appears to favour amnesty over prosecution. It provides that after hostilities have ceased the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict.

There is consequently a measure of uncertainty with respect to a State's obligation to prosecute a child for serious crimes under international law. It appears on the one hand that at least in the case of internal conflicts amnesty is encouraged, but on the other hand a State's failure to prosecute a child who has committed serious violations of international law may itself be in breach of international law.²⁷

c. The minimum age of criminal liability for child soldiers

The age of the child soldier may be of particular importance to establish whether a child should be prosecuted or be treated as a victim. Also in this respect it appears that there is uncertainty in international law as, *inter alia*, the Rome Statute and statutes of recent human rights tribunals do not provide clear direction in this respect – the emphasis seems to fall on those responsible for the infringements of international humanitarian law.²⁸ The prosecution of children under these instruments is therefore not necessarily precluded. On the other hand the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone

²⁷ Sainz-Pardo 2008 *IJHR* 564; Grossman 2006-2007 *Georgetown J Int'l L* 338.

²⁸ **Rome Statute (n 27).** Renteln 1999 *Whittier L Rev* 196. Grossman 2006-2007 *Georgetown J Int'l L* 338 illustrates the point by referring to the International Criminal Tribunal for the Former Yugoslavia and for Rwanda where the minimum age for criminal responsibility was not addressed but instead the importance of prosecuting those responsible for serious violations of international humanitarian law. It should be noted, though, that the Rome Statute does not provide for persons under the age of 18 at the time of the commission of a crime to fall within its jurisdiction. See also Grover 2008 *IJHR* 58; Singh 2007 *African Human Rights Law Journal* 218; Williams 2007 *Legal Studies* 261-287; Musila 2005 *African Human Rights Law Journal* 326.

specifically allows for individuals over the age of fifteen to be prosecuted, as they may be considered "most responsible" for crimes against humanity and war crimes.²⁹

Within the meaning attributed to it in the present Statute, the term 'most responsible' would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position ... the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.³⁰

The provision of the Rome Statute which provides that a Court shall not have any jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime is, however, indicative of a move not to hold persons under the age of eighteen criminally accountable for their war crimes and infringements of humanitarian law.

As far as treaty law on the treatment of juveniles in the process of ordinary domestic criminal prosecution is concerned, Grossman states that there is also a lack of consensus on the minimum age for criminal responsibility, which indicates an absence of both customary and treaty norms.³¹ In article 1 the CRC considers a child as being every human being below the age of eighteen years, unless majority is attained earlier. under the law applicable to the child. In article 40 the divergence of views of when a child may be prosecuted is accommodated by requiring in sub-article (3)(a) that States Parties shall promote the establishment of laws, procedures, authorities and institutions specifically applicable to children who have infringed the penal law. In particular States Parties are required to set a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. To some extent the *United Nations Standard Minimum Rules for the Administration*

²⁹ UN Secretary-General *Report on the Establishment of a Special Court*. See also Van Bueren *International Law* 333; Fox 2005 *Human Rights Review* 34; Breen 2007 *Human Rights Review* 76 *et seq.*

³⁰ UN Secretary-General *Report on the Establishment of a Special Court* para 31.

³¹ Grossman 2006-2007 *Georgetown J Int'l L* 339. See also Van Bueren *International Law* 338; Fox 2005 *Human Rights Review* 35.

of Juvenile Justice (hereafter the Beijing Rules) also acknowledge the different views by stipulating that:

It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety coming under the definition of 'juvenile', ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems ...³²

Particularly illuminating is a further statement in the Beijing Rules that the minimum age of criminal responsibility differs widely due to history and culture. The modern approach would be to consider whether or not a child can live up to the moral and psychological components of criminal responsibility; that is, if a child, by virtue of his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.³³

Grossman convincingly argues that despite the lack of 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 against the background of the *Vienna Convention on the Law of Treaties* may point to a legal obligation to at least refrain from prosecuting children under fifteen years of age for serious crimes arising from armed conflict. This conclusion is arrived at by referring to the preamble to the CRC, which requires of States Parties to provide special protection for children; by recalling the *Universal Declaration of Human Rights* in which the United Nations proclaim that childhood is entitled to special care and assistance; and also by considering the *Declaration of the Rights of the Child*, which provides that a child, by reason of physical and mental immaturity, needs special safeguards and care. By stipulating fifteen years as the minimum age for recruitment and use, it is clear that the drafters of the CRC were emphasising the need to protect children from the

³² *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985).

³³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (commentary to Rule 4). See also *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990), which define a juvenile as a child under the age of eighteen years.

dangers of war in accord with international humanitarian law. She proceeds to argue that in addition to the psychological and physical dangers of war, the prohibition on both forced recruitment and the use of children under the age of fifteen years in direct hostilities seems to suggest that the States Parties to the respective treaties believed that children under the age of fifteen do not possess the mental maturity to express valid consent to join an armed group. If children under the age of fifteen are therefore not sufficiently mature to consent to engage directly in armed conflict they must be protected from the dangers of war under the provisions of the CRC and are arguably more likely to be considered the victims of armed conflict than the perpetrators.³⁴

With regard to children between fifteen and eighteen years of age also, there appears to be an emerging consensus that they should be exempted from criminal liability. This stems from the provisions of the Rome Statute³⁵ and the Optional Protocol.³⁶ The Rome Statute makes it clear that it is a war crime to enlist or conscript children under the age of fifteen, but the fact that the International Criminal Court's jurisdiction is limited to persons who were eighteen years and older at the time of the commission of a crime serves as a clear indication on the part of the international community of the desire not to prosecute children between fifteen and eighteen years of age. Further evidence of this preference is to be found in article 41 of the CRC, which provides that measures "most conducive to the realisation of the rights of the child" are to be preferred when the CRC and domestic law or domestic treaty obligations differ.³⁷

Once it has been decided to prosecute a former child soldier the CRC, the Rome Statute and the Beijing Rules contain specific prescriptions providing for special protection of such a child. Besides the prescript in article 3 of the CRC that the

³⁴ Grossman 2006-2007 *Georgetown J Int'l L* 341 et seq; Renteln 1999 *Whittier L Rev* 203; Breen 2007 *Human Rights Review* 81; Musila 2005 *African Human Rights Law Journal* 327.

³⁵ See n 23 *supra*.

³⁶ Optional Protocol (n 23) *supra*. Article 1 provides that States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. The protocol entered into force on 12 February 2002. See also discussion by Renteln 1999 *Whittier L Rev* 196; Olivier 1999 *SAYIL* 247.

³⁷ Grossman 2006-2007 *Georgetown J Int'l L* 342.

child's best interest shall be a primary consideration where action against him is taken *inter alia* by courts of law and administrative authorities, article 40 sets out a variety of safeguards for such children. These include the presumption of innocence, knowledge of the charges against him or her, and the rights of privacy and appeal.³⁸ In similar fashion Rule 5 of the Beijing Rules requires that the aims of juvenile justice should include an emphasis on the well-being of the juvenile and a consideration of the individual circumstances of the offence and the offender. In this respect an evaluation of the individual's social status, his or her family situation and the gravity of the crime must be conducted when considering an appropriate response. In terms of article 54 of the Rome Statute the prosecutor of the International Criminal Court is charged to consider incriminating as well as exonerating circumstances (which might include the age of the offender) in coming to a decision whether to investigate and prosecute crimes or not. Both the CRC and the Beijing Rules prohibit the imposition of capital punishment for persons under the age of eighteen, and both provide that the deprivation of the liberty of a child may be used only as a measure of last resort, and then also only for the shortest period of time.³⁹

It goes without saying, of course, that as far as substantive law is concerned it is the obligation of the State to prove the necessary *mens rea*. In situations where severely abused children were forced to commit crimes under duress or the influence of desensitizing drugs, the requisite *mens rea* may be absent. Although an order of a supervisor does not ordinarily shield an actor from liability in the commission of crime, it may be accepted that since a child under fifteen presumably does not possess the mental maturity to volunteer to participate directly in armed conflict, such a child will probably be insufficiently mentally developed to resist an order from a supervisor.⁴⁰

³⁸ The article provides that such a child should be treated in a manner consistent with the promotion of the child's sense of dignity and worth so that it will reinforce the child's respect for human rights and the fundamental freedoms of others. It also stipulates that the treatment of the child must take into account the age of the child and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

³⁹ See a 37(b) of the CRC and rule 17(b)-(c) of the Beijing Rules. See also discussion of the articles by Grossman 2006-2007 *Georgetown J Int'l L* 343-344.

⁴⁰ Mulira *International Legal Standards* 47. See also Grossman 2006-2007 *Georgetown J Int'l L* 345. In the event of genocide, Grossman explains, the requirement of *mens rea* is more complex and may be even more difficult to prove. In terms of a 2 of the *Convention on the Prevention and*

d. Conclusion

There is a measure of uncertainty regarding the question of whether to treat child soldiers as victims who have a right to recovery and reintegration or as perpetrators of crimes against humanity who should be prosecuted. However, from the above discussion it appears that it is generally accepted that children under fifteen should not be prosecuted. On the other hand, as far as children between the ages of fifteen and eighteen are concerned there seems to be an ever growing consensus that such children should also be reintegrated into society rather than being prosecuted. The reason for this line of argument is fairly simple – children should primarily be viewed as victims because of their emotional, mental and intellectual immaturity.⁴¹ Grossman argues strongly that such children should occupy a role in the peacemaking process that recognises their vulnerabilities with a view to their rehabilitation.⁴²

It is suggested that the provisions of the CRC, the Beijing Rules and the Machel Report, all of which call for the establishment of a minimum age of criminal responsibility, should now be heeded.⁴³ The setting of a minimum age of criminal responsibility should maximise opportunities for the rehabilitation of former child

Punishment of the Crime of Genocide (1948) a child must possess the 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group'. A child soldier under the age of fifteen or even eighteen may not satisfy the requirement, as such a child may not be able to understand the meaning of the crime itself.

⁴¹ Machel *Impact of Armed Conflict on Children* para 251.

⁴² Grossman 2006-2007 *Georgetown J Int'l L* 347. See also Sainz-Pardo 2008 *IJHR* 556; Breen 2007 *Human Rights Review* 72.

⁴³ Article 40(3)(a) of the CRC provides that States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law. In particular provision must be made for the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. When appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings must also be promoted, providing, of course, that human rights and legal safeguards are fully respected. In para 251 of her report Machel (*Machel Impact of Armed Conflict on Children*) argues that the severity of the crime involved does not provide justification for suspending or abridging the fundamental rights and legal safeguards accorded to children under the CRC. States Parties should establish a minimum age below which children are presumed nor to have the capacity to infringe penal law. While the CRC does not mention a specific age, the Beijing Rules stress that such an age should not be fixed at too low a level, bearing in mind the child's emotional, mental and intellectual maturity. An assessment of a child's criminal responsibility should not be based on subjective or imprecise criteria such as the attainment of puberty, the age of discernment or the child's personality.

soldiers. In this regard it is suggested that the Grossman's sympathetic conclusion is correct:

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.⁴⁴

It is suggested that it is not in the best interests of former child soldiers that they should stand trial for war crimes, as such trials are unlikely to promote their well-being and social reintegration. The submission is put forward that rehabilitative measures in terms of article 39 are better suited to conform to the goals set by the CRC. Rather than prosecuting children below the age of eighteen, alternative methods should be investigated to address the needs of the victims of child soldiers and their communities while the child soldiers are being rehabilitated. It must be emphasised again that even children who volunteer to join armed groups often do so for reasons of hunger, poverty, fear, the desire for protection, and so forth. After being deliberately exposed to severe human rights violations like rape, murder and maiming or being forced to commit such crimes themselves, many become

⁴⁴ Maher 1989 *BC Third World LJ* 309; Grossman 2006-2007 *Georgetown J Int'l L* 347. The author advances a number of reasons in coming to this conclusion. See also Godfrey 2005 *African Human Rights Law Journal* 321-334.

Psychological studies show that a child's understanding of the world is fundamentally altered during adolescence, a finding which suggests that the child does not possess the same abilities as an adult to act independently or appreciate the rights of others.

Younger children find it difficult to understand the concept of individual and minority rights juxtaposed with state power. If children therefore do not know how to question state authority or if they do not know how to understand the concept of rights, they should not be held criminally responsible for following orders.

Significant changes in moral development may occur during adolescence. This may support the idea that holding children responsible for violations of the laws of war may be inappropriate when they are too young to hold independent moral views.

If a child does not understand that he or she may choose to disobey an order to protect community welfare or to avoid self-condemnation, it may be inappropriate to hold him or her accountable for crimes when ordered by a superior or in the context of collective armed action.

Prosecuting children under the age of eighteen is inconsistent with the underlying goal of the CRC, which in essence is to promote the best interests and well-being of the child. In article 3 the CRC specifically states that the best interests of the child shall be a paramount consideration in all actions concerning the child, and in article 38 it is stipulated that States Parties should undertake all feasible measures to care for and protect children in armed conflict. As will be discussed in chapter 3 infra, States parties also undertake in terms of article 39 to seek to promote the physical and psychological recovery of child victims of armed conflict.

desensitised to violence. As Grossman puts it: "These children have been more wounded by the world than *vice versa*".⁴⁵

2.2.3 *Monist or dualistic system of implementation*

In as far as the contents of this paragraph are settled law, the distinction between a monist and a dualistic approach to the incorporation of treaties into municipal law will be only cursorily discussed.⁴⁶ As the CRC *qua* international treaty is an agreement among the signatory States Parties to the treaty, it is trite that its provisions do not vest individual children with rights enforceable against particular States Parties.⁴⁷ However, general public international law requires States to ensure that their legislative and executive Acts conform to their international treaty law duties (*in casu* the provisions of the CRC) and does not permit such States to rely on national law to justify non-compliance with their international obligations.⁴⁸ The issue that bears an

⁴⁵ Grossman 2006-2007 *Georgetown J Int'l L* 351.

⁴⁶ See *S v Harksen, Harksen v President of the Republic of South Africa, Harksen v Wagner* 2000 1 SA 1185 (CPD) para 47 *et seq* for a comprehensive exposition of the nature of treaties.

⁴⁷ See, *inter alia*, Fortin *Children's Rights and the Developing Law* 43 *et seq*. The CRC is an enormously influential instrument and may well be regarded as the cornerstone of children's rights throughout the world. See eg Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141. It constitutes the most comprehensive list of human rights for children *qua* a group. It is also seen as an instrument by means of which the active and responsible participation of children within family and society can be achieved. The CRC provides a framework for the implementation of the rights of children through government policies and programmes. There are two main concerns with the provisions of the CRC, though. The first is that many of the rights included in the CRC are moral claims rather than 'juridical' rights, since they are too vague to be translated into domestic law. There are consequently authors who argue that there is a danger that a 'proliferation of the language of rights' devalues its appeal. Listing 40 substantive rights, as does the CRC, contributes to the process of rights devaluation. As Fortin points out, many of the rights included among the 40 provided for in the CRC are in reality no more than aspirations regarding what should happen if governments were to take children's rights seriously. The second concern relates to the fundamental weakness of the CRC, which is that it has no direct method of formal enforcement available to children who are the rights-holders. No court can assess a claim that its terms have been infringed, since governments are merely directed to undertake all appropriate legislative, administrative and other measures to implement the rights contained in the CRC. The Committee on the Rights of the Child is established in a 43 to evaluate the progress governments have made in achieving the realisation of the obligations contained in the CRC.

⁴⁸ Roodt 1987-88 *SAYIL* 72; Rosa "Interpretative Use of the Convention". Rosa specifically addresses the question of how the CRC can be strengthened to provide greater assistance to the interpretive power of South African courts in bringing about the realisation of the socio-economic right of children. As a point of reference she states that several human rights treaties have been adopted under the auspices of the United Nations since it was founded in 1945. However, a concern about the lack of effective implementation of such envisaged human rights frameworks has dampened the excitement concerning the prospects of such frameworks.

influence on the child victim of armed conflict's right to recovery and reintegration pertains to the question of how the provisions of the CRC will come to operate in the national area of jurisdiction, as States are obliged to comply with their CRC-treaty duties and must take steps to harmonise their national law with the provisions of the CRC.⁴⁹ In this respect the position of individual States differ with reference to the question of whether the so-called monist or dualist approach to express the theoretical relation between municipal and international law is followed.⁵⁰ It also has to be borne in mind that even though the terms monist and dualist are used to explain different types of domestic legal systems, the actual systems of many States do not fit neatly into either of these categories.⁵¹

⁴⁹ Roodt 1987-88 *SAYIL* 74.

⁵⁰ Dugard *International Law* 47; Roodt 1987-88 *SAYIL* 75. Roodt explains that one can actually distinguish between subdivisions of the monist and dualist approaches. Such may include a traditional monist approach (which accord primacy to public international law) and moderate monism. As for dualism the distinction lies between moderate dualism and the harmonisation approach. See also Sloss *Role of Domestic Courts*, who uses the term 'hybrid monist state,' as it is doubtful that any states have actually adopted a pure monist system.

⁵¹ Sloss *Role of Domestic Courts* 5-6. The author explains that one would expect domestic courts to play a more active role in (hybrid) monist States than they would in traditional dualist States, but that an empirical survey has shown that this is not the case. He states that in the five traditional dualist States that have been examined, (Australia, Canada, India, Israel and the United Kingdom) domestic courts play a fairly active role in treaty enforcement, but that they apply treaties indirectly and not directly. There are many variations on the theme of indirect application, but the most common approach would be for legislatures to enact legislation to incorporate a treaty into domestic law and for courts to apply a presumption that statutory and/or constitutional provisions should be interpreted to conform to international obligations codified in unincorporated treaties. In Australia, Canada, India and the United Kingdom the judicial presumption of conformity, combined with the legislative practice of enacting statutes to implement treaties that require domestic implementation, means that private parties who are harmed by a violation of their rights flowing from a treaty can normally avail themselves of domestic legal remedies even though the courts do not apply treaties directly.

China, Germany, the Netherlands, Poland, Russia, the United States of America and South Africa serve as examples of hybrid monist States. At least some treaties in these States have the force of law within the domestic legal system. Courts sometimes apply treaties directly as law since some treaties have the status of law within their municipal legal systems. Especially in South Africa, Germany, Poland and the Netherlands there is evidence that courts play a fairly active role in the enforcement of treaties. In general, private parties whose treaty-based rights have been violated can obtain domestic legal remedies in these jurisdictions.

A further distinction that applies in this respect is that between treaties and customary international law. In this respect the *South African Constitution* determines in s 231(4) that any international agreement becomes law in the Republic when it is enacted into law by the national legislator. A self-executing provision of an agreement that has been approved by Parliament is law unless it is inconsistent with the *Constitution* or an Act of Parliament. Customary international law, on the other hand, is in terms of s 232 law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.

In essence the monist theory maintains that all municipal systems, together with the international legal system, constitute a single legal structure/ universal legal order. In terms of this line of reasoning international and municipal law are essentially similar and must be regarded as manifestations of a single concept of law.⁵² In terms of this approach no contextual or formal change is required when international law is applied on a national level. It is also clear that the point of departure of the monist approach concedes a more fundamental competence to public international law – if capacities are derived from the idea of law and the law grants jurisdiction to exercise such capacities, the law to which jurisdictional reference should be made determines its limits. The monist approach therefore deduces from the unity of all law the inherent jurisdictional superiority of international law in municipal courts.⁵³ Due to the incorporation of international law into municipal law, no act of adoption or incorporation is needed. The monist approach is consequently often described as supporting a doctrine of incorporation.⁵⁴

As against monism, the dualist approach is grounded in the *a priori* assumption that there is a dichotomy of international and municipal law. International and municipal law govern a dualism of sources, contents and relationships respectively and are autonomous, co-ordinate independent legal orders which represent two totally different legal spheres.⁵⁵ Should the provisions of a treaty be applied in a jurisdiction following a rigid dualist approach, the court will be constrained to apply municipal law and will be allowed to follow international law only when expressly authorised to do so by its constitution. In the absence of such express constitutional authorisation, a national court simply lacks the capacity to declare municipal law invalid with reference to international law. The rule that States must ensure that their legislative,

⁵² Dugard *International Law* 47; Sloss *Role of Domestic Courts* 5 et seq. Roodt 1987-88 SAYIL 76 explains that, depending on the will of the State, international law is viewed as an incorporated part of municipal law. She continues that the so-called adoption doctrine is closely associated with the monist theory and refers to Kelsen, one of the leading exponents of the monist school. According to his hierarchical doctrine, legal rules are conditioned by other rules or principles from which they derive validity and binding force – the latter rule depending on the former, thereby constituting a 'bond of dependence' which in turn constitutes the principle of unity in the legal order.

⁵³ Roodt 1987-88 SAYIL 76.

⁵⁴ Dugard *International Law* 47.

⁵⁵ Roodt 1987-88 SAYIL 77.

executive and judicial acts conform with international treaty law is interpreted to mean that public international law is supreme in the international sphere only and not that it governs national law. National law therefore determines if and when international law will have an overriding effect.⁵⁶

To be applicable in municipal law, international rules and norms must be transformed into national law.⁵⁷ Such a process is required both to avoid the potential for conflict situations and to turn international rules into binding municipal rules. It is the rules and norms of municipal law that create specific rights and obligations for subjects of a State adopting the dualist approach to international law.⁵⁸ Acts of a State therefore retain their validity if contrary to international law, even though States are obliged to ensure that their own acts are in conformation with the prescripts of the international order. The transgression of international law consequently has ramifications in the international sphere only.

The position of a State following either a monist or dualist approach influences the status of an individual *vis-à-vis* the State in terms of a treaty. It has been stated earlier that the provisions of the CRC do not endow children with legally enforceable

⁵⁶ Roodt 1987-88 *SAYIL* 77-78. In this respect reference may also be made to the contribution of Malan 2008 *De Jure 81 et seq.* The author argues that multilateral human rights conventions (such as the CRC) are in the nature of *stipulationes alteri* so that the rights negotiated for the particular individuals (children) accrue at the same time as the conventions enter into force between the State Parties to the treaties. He proceeds that such treaties are self-executing in nature and consequently do not need to be incorporated into the domestic law of the relevant State Parties before individuals in such States acquire rights under such conventions. In fact, individuals acquire such rights at the very moment a State Party incurs duties under international law pursuant to such treaties. This line of argument leads the author to conclude that individual beneficiaries to such treaties are fully-fledged parties to such human rights conventions and within the context of such treaties subjects of public international law. Indeed they are not parties to the conclusion of such treaties but they are subjects of international law in consequence thereof. A further conclusion to be drawn from this exposition is that the rights under these conventions cannot be diminished by a consecutive treaty among the States who originally entered into the convention; neither may they be diminished by legislation passed by the legislature of any of the contracting parties.

⁵⁷ Transformation is a formal process of the specific introduction of international law on the national level. There are two methods to transform treaties; by way of a statute of parliament or through an authorisation of the executive in a pre-existing parliamentary act to grant applicability to the terms of an agreement. See Rosa "Interpretative Use of the Convention" para 2; Sloss *Role of Domestic Courts* 5 and 555-612.

⁵⁸ Roodt 1987-88 *SAYIL* 78.

rights. This is trite.⁵⁹ However, the effect of the ratification of a treaty by a State following a monist approach may entail that a particular individual is endowed with the rights provided for in the treaty, which may be enforceable on the domestic level against the particular State. On the other hand it would appear that before taking action against the State in the municipal sphere, an individual in a State following a dualist approach will be able to rely on the treaty only once the particular State has transformed it into domestic law.⁶⁰ This exposition bears relevance to the right of the child victims of armed conflict to recovery and reintegration, as the availability of any action for them will to a substantial extent depend on the question of whether the State within which they find themselves follows a dualist or a monist approach.⁶¹

Admittedly the exposition set out in the previous paragraph may contain a modicum of generalisation, since it has become imperative to nuance the concepts of monism and dualism. However, for the sake of convenience it is accepted as a point of departure that in a dualist system it is the enacting legislation that forms the basis of the child's right (and not the CRC itself) while in a monist system the CRC may simultaneously function as law in both the international and the domestic spheres.⁶²

⁵⁹ It may be of relevance to note that international treaties may indeed create rights and obligations for private individuals so that they may be the third-party beneficiaries of a treaty that has come into existence between two states. See Van Alstine "Role of Domestic Courts" 2.

⁶⁰ Against this background the view of Malan 2008 *De Jure* 82 is doubtful: that rights negotiated for individuals in human rights treaties accrue at the same moment as the conventions enter into force between the States Parties to these treaties.

⁶¹ Even though it may be of relevance, no attention will be paid to the notion of self-executing treaties and reservations to treaties. A self-executing treaty may broadly be described as one forming part of the law of the land without any enabling action by the legislature whereas in a 2 of the *Vienna Convention on the Law of Treaties* (1969) a reservation is defined as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". See in this respect, *inter alia*, Levi *Contemporary International Law* 24 and 206-208; Brownlie *Principles of Public International Law* 612-615; Aust *Modern Treaty Law* 183-197, 125-161; Alston and Crawford *Future of UN Human Rights* 318-322, 235-237; Cassese *International Law* 226-227, 173-175; Shearer Starke's *International Law* 421-424, 74-77. Van Alstine "Role of Domestic Courts" 43 explains with reference to Netherlands law that the treaty must be 'clear enough to serve as objective law'. To establish whether this standard has been met courts and scholars have identified two factors to assess the direct effect of treaty provisions: the intent of the parties to the treaty; and whether or not the treaty provision at issue is sufficiently clear in its content to serve as objective law without formal legislative implementation.

⁶² In its reporting guidelines on general measures of implementation, the Committee starts by inviting the States Party to indicate whether it considers it necessary to maintain the reservations it has made, if any, or has the intention of withdrawing them. States Parties to the CRC are entitled to make reservations at the time of their ratification of or accession to it (a 51 CRC). The

It needs to be emphasised that irrespective of which system a State follows, the provisions of article 18 of the Vienna Convention on the Law of Treaties must be borne in mind. This article provides that even though a State is not bound by a treaty that it has signed but not ratified, it is still obliged to refrain from acts which might defeat the object and purpose of the treaty until it has made its intention clear not to be bound by the particular treaty.⁶³

3 The provisions of the CRC

3.1 *Historical background to article 39*

I

nternational human rights law developed in importance after World War II. However, the League of Nations adopted the Declaration of the Rights of the Child as early as in 1924.⁶⁴ This Declaration stipulates that "[m]ankind owes the child the best it has to give". Furthermore it is provided that "[b]eyond and above all considerations of race, nationality or creed" the following provisions, which are referred to as the rights of the child, must be accorded to the child:

1. The child must be given the means requisite for its normal development, both materially and spiritually.

Committee's aim of ensuring full and unqualified respect for the human rights of children can be achieved only if States withdraw their reservations. It consistently recommends during its examination of reports that reservations be reviewed and withdrawn.

Article 2 of the *Vienna Convention* defines 'reservation' as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. The *Vienna Convention* notes that States are entitled, at the time of ratification or accession to a treaty, to make a reservation unless it is 'incompatible with the object and purpose of the treaty' (see a 19). However, a 51(2) of the CRC reflects that a reservation incompatible with the object and purpose of the present Convention shall not be permitted. The Committee therefore expresses concern about the reservations of some States which are incompatible with a 51 (2) by suggesting, for example that respect for the Convention is limited by the State's existing Constitution or legislation, including in some cases religious law. In this respect the Committee refers to a 27 of the *Vienna Convention on the Law of Treaties*, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

⁶³ See also Dugard *International Law* 408; Rosa "Interpretative Use of the Convention" 6; Liebenberg and Pillay *Socio-Economic Rights* 82.

⁶⁴ *Declaration on the Rights of the Child* (1924) adopted by the Assembly of the League of Nations. See also Maslen 1996 *Transnat'l L & Contemp Probs* 358; Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 139; Renteln 1999 *Whittier L Rev* 195.

2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood and must be protected against any form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

There is little doubt that even though the Declaration refers to the rights of the child, the provisions set out above merely provide for children as persons in need of specific care and treatment. And even though the use of the imperative word 'must' is used, it cannot be argued that the Declaration was ever intended to be an instrument which places binding obligations upon States. In fact, it is the "[m]en and women of all nations" who are placed under a burden to live up to these provisions.⁶⁵

Despite the provisions of the Declaration not having the force of enforceable law, the Declaration is of significance for a number of reasons. Firstly, it was an international document that established the concept of rights for children internationally. As such it was one of the first examples of international human rights law. Secondly, it enshrined economic and social rights for children, a fact which can be considered evidence that the development of international human rights law did not focus exclusively on civil and political rights. Thirdly, using the terminology of the 'rights of the child' indicates a link between child welfare and the rights of the child.⁶⁶

In 1959 the United Nations General Assembly adopted a new Declaration of the Rights of the Child.⁶⁷ The accompanying resolution urged national governments to recognise the rights set forth in the Declaration and to strive for their observance. In this respect the 1959 Declaration clearly went further than its 1924 predecessor,

⁶⁵ See Liefaard *Deprivation of Liberty of Children* 22; Van Bueren *International Law* 7.

⁶⁶ Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141; Liefaard *Deprivation of Liberty of Children* 22 *et seq*; Van Bueren *International Law* 8.

⁶⁷ *Declaration on the Rights of the Child* (1959).

which did not contain any explicit reference to the obligations of States. In its preamble the 1959 Declaration reiterates the obligation of mankind to give the child the best it has to give. It also affirms that a child has special needs, such as special safeguards and care and appropriate legal protection due to the child's physical and mental immaturity. The Declaration furthermore comprises of ten principles which include, *inter alia*, a child's entitlement to a name and nationality; to growth and development in health; to adequate nutrition, housing, recreation and medical services, and to education. It furthermore embodies provisions regarding special care and protection for children and their mothers; regarding special treatment, education and care for a physically, mentally or socially handicapped child; regarding support of the child without a family, and regarding the protection of every child against all forms of neglect, cruelty and exploitation.⁶⁸

Principle 2 contains the provision that the best interests of the child shall be the paramount consideration in the enactment of laws for the child's realisation of the enjoyment of special protection and opportunities and facilities by law and by other means, to enable him or her to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. This 'best-interests' principle is the predecessor of article 3 of the CRC.

It appears that the 1959 Declaration addressed the position of children more elaborately than its 1924 predecessor. Although the Declaration was a resolution that was not legally binding as such, it had a significant moral value and stimulated thinking about children's rights.⁶⁹ Most importantly, though, while the child was considered as an object of international law in the 1924 Declaration, the 1959 Declaration acknowledged the child as a subject of international law by providing for entitlements, although these were regrettably limited to economic and social matters. It did not address the civil and political rights of children.⁷⁰

⁶⁸ See also Liefraad *Deprivation of Liberty of Children* 24.

⁶⁹ Liefraad *Deprivation of Liberty of Children* 25; Van Bueren *International Law* 12.

⁷⁰ Van Bueren *International Law* 12; Liefraad *Deprivation of Liberty of Children* 24 *et seq.* It must be noted that the *International Covenant on Civil and Political Rights* (1966) also contains provisions relating to the position of children. For the purposes hereof, however, no further attention will be paid to this instrument.

3.2 General measures regarding the implementation of the provisions of the CRC

The Committee on the Rights of the Child, which was established in terms of article 43 of the CRC, has drafted a general comment to outline States Parties' obligations to develop what it has termed 'general measures of implementation'. In the comment the Committee refers to the general principles on which the CRC is premised⁷¹ and it is at pains to point out that it is fundamental to ensure that all domestic legislation is fully compatible with the CRC and that the CRC's principles and provisions can be directly applied and appropriately enforced.⁷² Against this background it refers to article 4 of the CRC, which provides as follows:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.⁷³

It is clear that article 4 serves as a general measure of implementation.⁷⁴ However, while reflecting States Parties' overall implementation obligation, it may also be indicative of a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. The Committee, correctly so, it is submitted, indicates that there is no simple or authoritative division of human rights in general, or of CRC rights into the two categories. It explains that the Committee's reporting guidelines group some articles under the heading 'civil rights and freedoms', but indicate by the context that these are not the only civil and political

⁷¹ Committee on the Rights of the Child *General Comment 5* para 12.

⁷² Committee on the Rights of the Child *General Comment 5* para 1.

⁷³ In international human rights law there are articles similar to article 4 of the Convention setting out overall implementation obligations, such as article 2 of the *International Covenant on Civil and Political Rights* (1966) and article 2 of the *International Covenant on Economic, Social and Cultural Rights* (1966). The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have issued general comments in relation to these provisions which should be seen as complementary to the present general comment and which are referred to below. See Committee on the Rights of the Child *General Comment 5* para 5. In terms of article 42 States Parties undertake to make the contents of the CRC widely known to children and adults and in terms of article 44(6) States Parties 'shall' make their reports to the Committee on the Rights of the Child widely available to the public in their own countries.

⁷⁴ Committee on the Rights of the Child *General Comment 5* para 2.

rights in the CRC. Indeed, it is clear that many other articles, including articles 2, 3, 6 and 12 of the CRC, contain elements which constitute civil/political rights, thus reflecting the interdependence and indivisibility of all human rights. The enjoyment of economic, social and cultural rights is inextricably intertwined with the enjoyment of civil and political rights. The Committee believes that economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable. The Committee therefore emphasises that economic, social and cultural rights as well as civil and political rights must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.⁷⁵

It furthermore needs to be borne in mind that the second sentence of article 4 reflects a realistic acceptance that a lack of resources, financial and other, can hamper the full implementation of economic, social and cultural rights in some States. This introduces the concept of the 'progressive realisation' of such rights. States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation.⁷⁶

The general measures of implementation identified by the Committee and described in the present general comment are intended to promote:

⁷⁵ Committee on the Rights of the Child *General Comment 5* para 25.

⁷⁶ The wording of the sentence is similar to the wording used in the *International Covenant on Economic, Social and Cultural Rights* (1966) and the Committee entirely concurs with the Committee on Economic, Social and Cultural Rights in asserting that "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ..." Whatever their economic circumstances, States are required to undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups. Mulira *International Legal Standards* 18 explains that even though it may be expected that the fulfilment of the formal requirements may be complicated by a lack of resources and political will, certain obligations like physical integrity, humane treatment and freedom from torture are not dependent on the availability of resources and must be fulfilled by States. See Doek 2003 *U Fla JL & Pub Pol'y* 125. Doek explains that six-hundred million children have to live – that is to be housed, clothed, fed and educated – with less than one U.S. dollar a day. The implementation of the CRC is directly affected by the prevalence of poor socio-economic conditions.

- full enjoyment of all of the rights in the Convention by all children, through legislation,
- the establishment of coordinating and monitoring bodies - governmental and independent - comprehensive data collection, awareness-raising and training; and
- the development and implementation of appropriate policies, services and programmes.

The Committee explains that a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. The review needs to consider the CRC not only article by article, but also holistically, recognising the interdependence and indivisibility of human rights. States parties need to ensure with all appropriate means that the provisions of the Convention are given legal effect within their domestic legal systems. The Committee indeed welcomes the incorporation of the provisions of the CRC into domestic law. Incorporation should mean that the provisions of the CRC can be directly invoked before the courts and applied by national authorities and that the CRC will prevail where there is a conflict with domestic legislation or common practice.⁷⁷ Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the CRC. In the case of any conflict in legislation, predominance should always be given to the CRC in the light of article 27 of the Vienna Convention on the Law of Treaties.

The Committee points out that if Governments are to promote and respect the rights of the child, they need to apply a unifying, comprehensive and rights-based national strategy rooted in the CRC. It commends the development of a comprehensive national strategy or national plan of action for children, built on the framework of the CRC. The Committee expects States Parties to take account of the

⁷⁷ Despite this explanation of the Committee, one must still bear in mind the distinction between monist and dualist legal systems. See n 53 for a discussion of the position in South Africa.

recommendations in its concluding observations on their periodic reports when developing and/or reviewing their national strategies. If such a strategy is to be effective, it needs to relate to the situation of all children and to all of the rights in the CRC.⁷⁸ Particular attention will need to be given to identifying and giving priority to marginalised and disadvantaged groups of children. The strategy must not be simply a list of good intentions; it must include a description of a sustainable process for realising the rights of children throughout the State; it must go beyond statements of policy and principle to set real and achievable targets in relation to the full range of economic, social and cultural, and civil and political rights for all children.

In examining States Parties' reports the Committee has almost invariably found it necessary to encourage further coordination of government to ensure effective implementation: coordination among central government departments, among different provinces and regions, among central and other levels of government, and between Government and civil society. The purpose of coordination is to ensure respect for all of the CRC's principles and standards for all children within the State Party's jurisdiction; to ensure that the obligations inherent in the ratification of or the accession to the Convention are recognised not only by those large departments which have a substantial impact on children - education, health or welfare and justice - but right across government, including for example departments concerned with finance, planning, employment and defence, and at all levels. The Committee also emphasises that decentralisation of power through devolution and the delegation of government does not in any way reduce the direct responsibility of the State Party's Government to fulfil its obligations to all children within its jurisdiction, regardless of the State's structure.⁷⁹ Furthermore, States Parties to the CRC have a legal obligation to respect and ensure the rights of children as stipulated in the CRC, which includes the obligation to ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations on such actors.⁸⁰

⁷⁸ Committee on the Rights of the Child *General Comment 5* para 29-32.

⁷⁹ Committee on the Rights of the Child *General Comment 5* para 40.

⁸⁰ Committee on the Rights of the Child *General Comment 5* para 43.

Ensuring that the best interests of the child are a primary consideration in all actions concerning children as set out in article 3(1) of the CRC and that all of the provisions of the CRC are respected in legislation and policy development and delivery at all levels of government demands a continuous process of impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.⁸¹

As far as data collection is concerned, the Committee notes that the collection of sufficient and reliable data on children, disaggregated to enable the identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementation. The Committee reminds States Parties that data collection needs to extend over the whole period of childhood up to the age of 18 years.⁸² It also stresses the need for the identification and analysis of resources for children in national and other budgets.⁸³ No State can tell whether or not it is fulfilling children's economic, social and cultural rights "to the maximum extent of ... available resources", as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. States Parties' obligation to develop training and capacity-building for all those involved in the implementation process - government officials, parliamentarians and members of the judiciary - and for all those working with and for children is also emphasised. These include, for example, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and armed forces, including peacekeeping forces, those working in the media and many others. Training needs to be systematic and ongoing. The purpose of training is to emphasise the status of the child as a bearer of human rights, to increase knowledge and understanding of the CRC, and to encourage active respect for all of its provisions.

⁸¹ Committee on the Rights of the Child *General Comment 5* para 45.

⁸² Committee on the Rights of the Child *General Comment 5* para 48.

⁸³ Committee on the Rights of the Child *General Comment 5* para 51.

With regard to the required cooperation between States and civil society the Committee expresses the need for States Parties to engage all sectors of society, including children themselves. It concurs, for example, with paragraph 42 of General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the Right to the Highest Attainable Standard of Health, which declares that while only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society, individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business sector, have responsibilities regarding the realisation of the right to health. It is therefore the responsibility of States Parties to provide an environment which facilitates the discharge of these responsibilities.

Article 4 emphasises that the implementation of the CRC is a cooperative exercise for the States of the world. This article and others of the Convention highlight the need for international cooperation. Articles 55 and 56 of the Charter of the United Nations identifies the overall purposes of international economic and social cooperation, and members pledge themselves under the Charter "to take joint and separate action in cooperation with the Organization" to achieve various purposes, *inter alia* the alleviation of poverty. The Committee advises States Parties that the CRC should form the framework for international development assistance related directly or indirectly to children and that the programmes of donor States should be rights-based.⁸⁴ The Committee specifically refers to article 42 of the CRC. It provides that States Parties undertake to make the principles and provisions of the CRC widely known to adults and children alike by appropriate and active means. In view of the fact that traditionally in most if not all societies children have not been regarded as rights bearers, article 42 assumes particular importance. If the adults in the lives of children, for instance their parents and other family members, teachers and carers do not understand the implications of the CRC, and above all its

⁸⁴ Committee on the Rights of the Child *General Comment 5* para 60-64.

confirmation of the equal status of children as subjects of rights, it is most unlikely that the rights set out in the Convention will be realised for many children.⁸⁵

3.3 ***The provisions of article 39***⁸⁶

Article 39 of the CRC provides that States Parties must ('shall') take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment and also of armed conflict. It specifically provides that such recovery and reintegration must ('shall') take place in an environment which fosters the health, self-respect and dignity of the child.⁸⁷

⁸⁵ See Committee on the Rights of the Child *General Comment 5* para 65-73. See also De Berry 2001 *Ann Am Acad Polit Soc Sci* 92 *et seq.*

⁸⁶ The duty of the State to reintegrate and recover child victims may generally be seen as the obligation to provide for the survival of the child through the provision of medical and food assistance, for the security of the child and for a psychologically sound environment within which a routine (for example, education) can be maintained. More particularly, as far as former child-soldiers are concerned, it may include the process of facilitating their transition to civilian life. It may include social reintegration, which would typically include the provision of food and medical assistance and psychological reintegration leading to recovery from the experience and learning to live with it.

⁸⁷ It is of some significance to refer to a 6(3) of the Optional Protocol (n 22 *supra*) in this respect. This article concerns the demobilisation and recovery of child soldiers and to some extent serves to illustrate the provisions of a 39. In terms of this article States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilised or otherwise released from service. When necessary such States Parties shall accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

To implement this provision the reporting guidelines to the Committee reads as follows:
"When relevant, please indicate the all measures adopted with regard to disarmament, demobilisation (or release from service) and the provision of appropriate assistance for the physical; and psychological recovery and social reintegration of children, taking due account of girls, including information on –

Disaggregated data on children involved in that proceeding, on their participation in such programmes, and on their status with regard to the armed forces and armed groups (eg when do they stop to be members of the armed forces or groups?);

The budget allocated to these programmes, the personnel involved and their training, the organization concerned, cooperation among them, and participation of civil society, local communities, families, etc.;

The various measures adopted to ensure the social reintegration of children, eg interim care, access to education and vocational training, reintegration in the family and community, relevant judicial measures, while taking into account the specific needs of children concerned depending notably on their age and sex;

The measures adopted to ensure confidentiality and protection of children involved in such programmes from media exposure and exploitation;

It is clear that article 39 comprises of two parts; the first relates to recovery and reintegration and the second to the type of environment in which activities to achieve that aim should take place.⁸⁸ As such, the second part provides a framework for the level of quality of action to be taken.⁸⁹ Physical and psychological recovery cover a

The legal provisions adopted criminalizing the recruitment of children and the inclusion of that crime in the competence of any specific justice seeking mechanisms established in the context of conflict (eg war crimes tribunal, truth and reconciliation bodies). The safeguards adopted to ensure that the rights of the child as a victim and as a witness are respected in these mechanisms in light of the *Convention on the Rights of the Child*;

The criminal liability of children for crimes they have committed during their stay with armed forces or groups and the judicial procedure applicable, as well as safeguards to ensure that the rights of the child are respected;

When relevant, the provisions of peace agreements dealing with disarmament, demobilization and/or physical and psychological recovery and social reintegration of child combatants."

It is also noteworthy that the Optional Protocol, contrary to the provisions of article 39 of the CRC, explicitly imposes the obligation to demobilise, rehabilitate and reintegrate children who have been recruited or used in armed conflict. See Vandewiele "Optional Protocol" 50; Van Bueren *International Law* 348; Maslen 1996 *Transnat'l L & Contemp Probs* 350.

⁸⁸ Mulira *International Legal Standards* 18 et seq; Nylund 1998 *Int'l J Children's Rts* 28. See also Shepler 2005 *Journal of Human Rights* 198; Robinson 1997 *Global Legal Studies* 258.

⁸⁹ Nylund 1998 *Int'l J Children's Rts* 30. Article 6(3) of the Optional Protocol provides a framework for the interpretation of article 39. As noted *supra*, article 6(3) specifically pertains to the position of child soldiers as victims of war. The first obligation in terms of this article is that of States to take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilised or otherwise released from service. Demobilisation in this context may be seen as the process of converting a soldier to a civilian. As such it is a process by which armed forces (government and/or opposition or factional forces) either downsize or completely disband as part of a broader transformation from war to peace. It seems to require a formal procedure, yet there are also other ways to release children from service, the aim being that children concerned are liberated from their military obligations regardless of the way in which this goal is achieved. Demobilised children should be dispersed or transferred as expeditiously as possible to interim care sites or centres under civilian control where child protection agencies and other international institutions need to be involved in providing them with health care, counseling and psycho-social support. It must be noted that article 6(3) does not limit the obligation of States to their own citizens. In fact, they are also responsible for children who have been recruited on the territory of another State but who are within their jurisdiction now, as there are refugee and migrant children who have been involved in hostile activities in their home countries. The requirement that 'all feasible measures' be taken reflects an obligation of means (Vandewiele "Optional Protocol" 51).

The second part of article 6(3) reads that States Parties shall when necessary accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration. This part has been held to emphasise the need to assess and respond to the needs of child victims, to provide for psychological assistance, and to ensure their family and social reintegration. If necessary, international cooperation should be sought.

The Optional Protocol does not specify what is to be understood by recovery and reintegration. Generally reintegration may be seen as the process of facilitating the ex-soldiers' transition to civilian life. Reintegration programmes are therefore assistance measures provided to former combatants that would increase the potential for their and their families' economic and social reintegration into civil society. Cash assistance or compensation in kind, as well as vocational training and income-generating activities, may be included in such programmes. Since most child soldiers are physically and psychologically marked, their recovery should be promoted through the establishment of recovery programmes. Vandewiele "Optional Protocol" 54 also argues that psycho-social support should not be reduced to individual psychological assistance but should

number of situations, but neither the Committee on the Rights of the Child nor the *travaux préparatoires* to the CRC give a clear guideline as to the type of special protection that would be necessary to fulfil the legal obligation towards child victims of armed conflict. However, Nylund indicates that social reintegration may include food and medical assistance, which are usually referred to as social rights. Psychological recovery may include recovery from the experience of armed conflict and learning to live with it. In fact, Nylund points out that the need for after-care and the rehabilitation of children traumatised by war was recognised as an urgent matter by the World Conference on Human Rights in 1993.⁹⁰

form part of social reintegration. Other social reintegration measures may include interim care, access to education and vocational training, reintegration in the family and community, and relevant judicial measures. A first priority, however, should be family tracing, reunification and reconciliation. Child soldiers can be accepted back into their families and communities through traditional forgiveness rituals and ceremonies. Vandewiele "Optional Protocol" 56 urges that the measures taken need to be effective. They should preferably be situated within a framework of long-term and comprehensive programmes for assistance, rehabilitation and reintegration for all children affected by armed conflict. National institutions dealing with the recovery and reintegration of children should be allocated sufficient human and financial resources to effectively demobilise and reintegrate children in society and to provide for the necessary follow-up.

Justice is also a means of recovery. Legal provisions should be adopted to criminalise the recruitment of children. In this fashion the rights of the child as a victim and witness will be respected. In this respect the right of the child to be heard (a 12 of the CRC) springs to mind. See also Mulira *International Legal Standards* 43; Grover 2008 *IJHR* 57.

⁹⁰ Nylund 1998 *Int'l J Children's Rts* 29. Nylund explains that the general obligation under a 39 includes providing the necessary medical care for children who have been wounded in or as a result of armed conflict (including from landmines that remain after the conflict is over) and who are the victims of sexual violence. Hodgkin and Newell "Rehabilitation of Child Victims" 581 refers to the guidelines which are set for periodic reports by the Committee on the Rights of the Child, which read as follows: "Please provide information on all measures taken pursuant to article 39 ... to promote the physical and psychological recovery and social reintegration of the child involved with the system of the administration of justice, and to ensure that such recovery and reintegration take place in an environment which fosters the health, self-respect and dignity of the child. Reports should also identify, *inter alia*, the mechanisms established and the programmes and activities developed for that purpose, as well as the education and vocational training provided, and indicate relevant disaggregated data on the children concerned, including by age, gender, region, rural/urban area, and social and ethnic origin. They should further indicate the progress achieved in the implementation of article 39, difficulties encountered and targets set for the future." See also Zack-Williams 2006 *Social Work Education* 124. Maslen 1997 *Reintegration of War-affected Youth* 1-55 describes the training and employment needs in Mozambique *qua* war-affected country. See also Russell and Gozdzik 2006 *Georgetown Journal of International Affairs* 60; Marques "Rehabilitation and reintegration" 1-40.

In terms of a 4 of the CRC States Parties shall undertake all appropriate legislative, administrative and other measures to implement the rights recognised in the CRC. In respect of socio-economic rights they must undertake such measures to the maximum extent of their available resources and where needed, within the framework of international cooperation. In the South African context, the provisions of the CRC and the *Constitution* have played a significant part in legislative reform since its ratification in 1995, and various statutes refer explicitly to the CRC. Reference may in this respect be made to the *Children's Act* 38 of 2005, which provides in

The aim of social reintegration will be achieved only if actions for recovery are taken simultaneously with those associated with the social reintegration. Social reintegration may include actions against poverty and action on behalf of the family and the community. They may include provision for education, family reunification or adoption for those children who cannot be reunited. This part of the article is obviously aimed at making provision for a safe environment within which the transition from a conflict situation to one of peace may take place.

The second part of article 39 providing for an environment which fosters the health, self-respect and dignity of the child must be read together with article 3 of the CRC, which provides for the best interests of the child to be a paramount consideration in all actions undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. This part of the article covers some of the basics in terms of providing for a safe environment in turning from conflict to peace. Nylund consequently argues that it should put an obligation on the State and the international community to strive towards establishing a sound environment to deal appropriately with those who have participated in the armed conflict. Such an environment may be provided for through demobilisation that takes into consideration the interests of the child.⁹¹

its heading that the purpose of the Act is to give effect to certain rights of children as contained in the *Constitution*. In the preamble it is stipulated that there is a need to extend particular care to the child, as has been stated in the CRC, *inter alia*. It is therefore clear that the principles and norms in both the CRC and the *Constitution* serve to guide the legislator in the enactment of legislation.

⁹¹ Mulira *International Legal Standards* 18. See also Awodola 2009 *Peace & Conflict Review* 1-10; Gislesen *Childhood Lost?*; Nylund 1998 *Int'l J Children's Rts* 30. Hodgkin and Newell "Rehabilitation of Child Victims" 586 refer to the following dicta in various reports of the Committee on the Rights of the Child: "The Committee ... urges the State Party to take all necessary measures in cooperation with national and international NGOs ... to address the physical needs of children victims of armed conflict, in particular child amputees, and the psychological needs of all children affected directly or indirectly by the traumatic experiences of the war. In this regards, the Committee recommends that the State Party develop as quickly as possible a long-term and comprehensive programme of assistance, rehabilitation and reintegration. ... [t]he Committee expresses its concern at the lack of rehabilitation services for the children affected by the armed conflict. The Committee urges the State Party to take every feasible measure, including through international mediation, to have all child abductees and combatants released and demobilized and to rehabilitate and reintegrate them into society. ..."

At 587 general measures for the implementation of article 39 are reflected: "Have appropriate general measures of implementation been taken in relation to article 39, including: identification and coordination of the responsible departments and agencies at all levels of government (article 39 is relevant to departments of social welfare, health, employment, justice, defence, foreign

It is clear that the principle underlying the article is the provision of a physically safe environment for child victims of armed conflict.⁹² It also addresses the situation of displaced children. Such children are particularly vulnerable since they are not only displaced, but they also need special protection and provision for a safe environment for recovery in exile if the conflict in their place of origin is still ongoing. In a similar vein one may ask if an extended stay in refugee camps is compatible with the prescripts of article 39. In essence the question is whether or not the environment provided for refugee children meets the standards of article 39, if one considers the effects of holding refugees in confined areas for extended periods of time. Does this environment foster the health, self-respect and dignity of children so that they may recover from the effects of war? The suggestion is put forward in this respect that life

affairs)?; identification of relevant non-governmental organizations/civil society partners?; a comprehensive review to ensure that all legislation, policy and practice is compatible with the article, for all children in all parts of the jurisdiction?; adoption of a strategy to secure full implementation; which includes where necessary the identification of goals and indicators of progress?; which does not affect any provisions which are more conducive to the rights of the child?; which recognizes other relevant international standards?; which involves, where necessary, international cooperation?; budgetary analysis and allocation of necessary resources?; development of mechanisms for monitoring and evaluation?; making the implications of article 39 widely known to adults and children?; development of appropriate training and awareness-raising (including the training of all those responsible for child protection, teachers, social workers and health workers)?." It certainly needs no elaboration that these measures are an embodiment of the provisions of article 4 of the CRC, which require of States Parties to undertake all appropriate legislative, administrative and other measures to the maximum extent of their available resources and within a framework of international cooperation, to implement article 39. See also Malan 2000 *African Security Review*. Arguing as he does that the indoctrination of militaristic and often revolutionary ideology and values must be reversed, he suggests that demobilisation needs to be comprehensive enough to uproot both the instruments and organisation, as the ideology of violence. He identifies the following examples of material, physical, judicial and psychological needs for demobilised child soldiers: nutrition; medical treatment (including for sexually transmitted diseases and substance abuse); respect and self-esteem; human dignity and confidentiality; consultation and participation in determining their fates; reintegration packages and benefits; community sensitisation in advance of family reintegration; amnesty from prosecution and/or protection from retribution for acts committed during hostilities; protection from repeat recruitment; mental 'disarmament'; education, peace education and vocational training; and employment creation. He also recommends the following practical, albeit ambitious, measures for the demobilisation of former child soldiers: preparations for child demobilisation in ongoing conflict by dispersing children or transferring them from zones which are under the control of their former commanders to avoid repeat recruitment or reprisals; special programming for former child soldiers who are demobilised as adults; protection of children from further abuse during the time of demobilisation by separating them immediately from adult soldiers; early removal of children from the formal assembly site to a site where interim care can be provided; systematically assessing the presence and special needs of girl soldiers in a way that reflects their military roles (fighters, cooks, messengers, spies, labourers, 'wives' or sexual slaves; and plans for tracking, documenting and supporting the high percentage who routinely do not enter the formal disarmament, demobilisation and reintegration process.

⁹² This would include de-mining of areas where children would otherwise not be able to live safely.

in a refugee camp must be 'as normal as possible' and include activities for children that promote their social reintegration.⁹³

3.3.1 *The psychological recovery and social reintegration of the child*

It has been pointed out that the primary aim of article 39 is to provide special protection and care through psychological recovery and social reintegration for child victims of armed conflict. To achieve this goal the actual experiences of the child must be established. It is self-evident that the child needs a safe environment within which he or she will be able to recover psychologically. Such an environment may be provided by enabling the child to be reunited with his or her family or through an alternative environment within which he or she can feel safe. Post-conflict reconstruction which generally also safeguards social reintegration is an expensive exercise. Machel⁹⁴ emphasises in this respect that the most effective and sustainable approach would be to mobilise existing social care systems. An important factor that would contribute to psychological recovery, for the purposes of both policy and credibility, is the sustainability of whatever measures are taken. Providing for the survival of the child would also have to include taking action against poverty. Article 6(2) of the CRC serves as the basis for such a provision. It provides that States Parties shall to the maximum extent possible ensure the survival and development of the child.

Education is a means of both psychological recovery and social reintegration. Various covenants contain provisions in this respect, and article 28 of the CRC specifically provides for the right to education of every child. States are to make primary education compulsory and freely available to all, to progressively achieve this right. In view of the fact that the provisions of the CRC apply equally to all children within the jurisdiction of a State Party, the State is to provide to refugee children education similar to that accorded to its nationals.⁹⁵ Education is also of

⁹³ Nylund 1998 *Int'l J Children's Rts* 31.

⁹⁴ Machel *Impact of Armed Conflict on Children* para 177; Malan 2000 *African Security Review*.

⁹⁵ Mulira *International Legal Standards* 20; Nylund 1998 *Int'l J Children's Rts* 33; Malan 1996 *Transnat'l L & Contemp Probs* 351.

particular importance in providing durable solutions for displaced children , as they invariably are more vulnerable than children who have a family.

Voluntary repatriation to facilitate the recovery of children must be considered against the consideration of whether or not such a return will ensure continued care and the well-being of the child. Appropriate questions in this respect may include whether the return will be in the best interests of the child or whether other solutions may be more appropriate.⁹⁶ It may, for instance, appear that the return of a child may lead to family reunification, but that the community within which the reunification is to take place is unsettled.

3.3.2 Tracing a child's family and the reunification of the child with his or her family

In terms of article 22(2) of the CRC, the governments of States Parties have a positive obligation to protect and assist child refugees and to trace the parents or other family members of any refugee child in order to secure the information necessary for the child's reunification with his or her family.⁹⁷ The Committee has consequently on numerous occasions recommended that States Parties take all necessary measures to ensure that applications for asylum made for the purpose of family reunification be dealt with in a humane, positive and expeditious manner.⁹⁸ Articles 9 and 10 of the CRC must be read in conjunction with the provisions of article 22. Article 9 requires of States Parties to ensure that a child shall not be separated from his or her parents⁹⁹ and article 10 provides for the positive obligation for States Parties to deal in a positive, humane and expeditious manner with an

⁹⁶ Nylund 1998 *Int'l J Children's Rts* 34; Mulira *International Legal Standards* 20. See also McCoubrey and White *International Law and Armed Conflict* 173.

⁹⁷ It is noteworthy that the wording of the article does not extend the protection to internally displaced children.

⁹⁸ Committee on the Rights of the Child *Concluding Observations on Spain* para 287.

⁹⁹ There are, however, limitations provided for by this article. A 9(1) provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will unless it is established by process of law that such a separation is necessary for the promotion of the best interests of the child.

application filed by a child or his or her parents to enter or leave a State Party for the purposes of family reunification.¹⁰⁰

It may safely be concluded from the discussion above that the positive obligation to ensure family reunification is firmly established in international law. This obligation on the State also includes internally displaced children. There is, however, no obligation on States to trace the family of a child.¹⁰¹

3.3.3 Demining

The effects of landmines continue long after a war is over. These weapons have indiscriminate effects and tend to victimise the poorest sectors of society – people who cultivate their fields, look for firewood, or herd their animals. Children who survive a landmine explosion suffer severe medical problems. Machel¹⁰² therefore

¹⁰⁰ Nylund 1998 *Int'l J Children's Rts* 36. In the drafting process it was suggested that a 22 should include an obligation to investigate whether the child has a family or other close relations. Probably as a result of practical considerations the suggestion has been watered down and a 22(2) now reads that '[S]tates Parties shall provide, as they consider appropriate, co-operation' in any efforts by the United Nations and other competent inter-governmental organisations or non-governmental organisations co-operating with the United Nations, to protect and assist such a child to trace the parents or other members of the family. As for humanitarian law provisions in this respect, suffice it to refer to - Article 74 of GC I, which provides that States must facilitate in every possible way the reunification of families separated as a result of armed conflict and also that they must provide support for humanitarian organisations engaged in this task; and Article 26 of GC IV, which reads that each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war with the object of renewing contact with one another and of meeting, if possible. In particular, States must encourage the work of organisations engaged in this task provided, however, that such organisations are acceptable to it and conform to its security regulations. International refugee law adds little to the provisions of the CRC. It makes no reference to the word 'child,' neither does it contain elaborate references to a right to family life. A 12(2) of the *Convention Relating to the Status of Refugees* (1950) is the only provision relating to the family of a refugee and provides that rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State. Nylund 1998 *Int'l J Children's Rts* 37 also refers to the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons that adopted the text of the Convention, but recommended in ch 4 Part B that governments take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the refugee's family is maintained, particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country. Special protection must also be afforded to refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption. Various other human rights instruments contain provisions relating to the right to family life.

¹⁰¹ Nylund 1998 *Int'l J Children's Rts* 40.

¹⁰² Machel *Impact of Armed Conflict on Children* para 116.

urges change and progress in four major areas: a ban on landmines, mine clearance, mine awareness, and rehabilitation programmes to help children recover.

4 Conclusion

The discussion in this contribution involves the provisions of article 39 of the CRC *qua* human rights law. As a point of departure it is accepted that armed conflict infringes upon various fundamental rights of children. It is clear that they are indeed among the victims of such conflict. However, it has been argued that child soldiers may also be regarded as victims. Even though there is a measure of uncertainty, it appears that the position is settled that child soldiers under 15 years should not be prosecuted. There also appears to be growing consensus that child soldiers between 15 and 18 years of age should be recovered and reintegrated into society rather than prosecuted.

The status of a child victim of armed conflict *vis-à-vis* the State is influenced by the State's following either a monist or a dualist approach to the incorporation of treaties, *in casu* the CRC, into their domestic law. Certain possibilities can be discerned in this respect:

- States that have not ratified the CRC. Such States do not incur obligations in terms of the CRC towards child victims.
- States Parties following a monist system. Ratification of the CRC creates rights against the State for child victims, which rights are legally enforceable.
- States Parties following a dualist system. In this instance two possibilities present themselves -
 - States Parties have ratified the CRC, but have not incorporated it into their domestic law. Such States have obligations towards other contracting States Parties in terms of the CRC and also in terms of article 18 of the Vienna Convention. However, child victims in the jurisdiction of such States are not endowed with legally enforceable rights.

- States Parties have ratified the CRC and incorporated it into their domestic law. In this instance the rights of child victims flow from domestic law in the same fashion as with States following a monist system.

There is no authoritative division of fundamental rights between civil and political rights on the one hand and socio-economic rights on the other. As a consequence, all rights in the CRC should be regarded as justiciable. However, a lack of resources may hamper the full implementation of socio-economic rights.¹⁰³

Article 39 requires of States Parties to recover and reintegrate child victims and to provide an environment in which activities to achieve this goal can take place. States Parties are required to provide both a physically safe environment for child victims and for their psychological recovery. In addition, the social reintegration of such children must be accomplished. States Parties can meet these demands by providing (at least) primary education and reuniting the child with his or her family. States Parties should also demine areas to protect children (and adults) from their devastating effect.

¹⁰³ See Mulira *International Legal Standards* 18.

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List of abbreviations

AJIL	American Journal of International Law
Ann Am Acad Polit Soc Sci	ANNALS of the American Academy of Political and Social Science
APJHRL	Asia-Pacific Journal on Human Rights and the Law
BC Third World LJ	Boston College Third World Law Journal
CESCR	Committee on Economic, Social and Cultural Rights
Cornell Int'l LJ	Cornell International Law Journal
CRC	Convention on the Rights of the Child
Fam & Concil Cts Rev	Family and Conciliation Courts Review
GC	Geneva Conventions
Georgetown J Int'l L	Georgetown Journal of International Law
Hum Rts Q	Human Rights Quarterly
IJHR	International Journal of Human Rights
IJRL	International Journal of Refugee Law
Int'l & Comp LQ	International and Comparative Law Quarterly
Int'l J Children's Rts	International Journal of Children's Rights
NILR	Netherlands International Law Review
SAYIL	South African Yearbook of International Law
Temp Int'l & Comp LJ	Temple International and Comparative Law Journal
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

U Fla JL & Pub Pol'y
Whittier L Rev

University of Florida Journal of Law & Public Policy
Whittier Law Review