

# An Analysis of the Exclusion of Child Soldiers Seeking Asylum under the 1951 Refugee Convention from the Principle of the Best Interests of the Child Perspective

Yvonne Muthembwa\*

## Abstract

*Article 1F (a) of the Convention Relating to the Status of the Refugees has been applied by courts of law to exclude child soldiers seeking asylum from refugee status where it is established that there are serious reasons to consider that they committed the prohibited crimes. Its current application has fallen short of the best interests principle of the Convention on the Rights of the Child. The author posits that the lack of a universally accepted minimum age of criminal responsibility has contributed to the problem. Furthermore, she contends that the legal threshold set out in Article 1F (a) has presented a challenge in applying the exclusion clause because of diverse interpretations.*

## I. Introduction

Article 1F (a) of the Convention Relating to the Status of the Refugees<sup>1</sup> (hereinafter the Refugee Convention) excludes people who have committed crimes against peace, war crimes and crimes against humanity from gaining refugee status.<sup>2</sup> It does not distinguish between adults and children.<sup>3</sup> Therefore, children who are alleged to have committed the prohibited crimes can be excluded from refugee status. The Refugee Convention was made with World War

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\* The author is an LL.B graduate from the Strathmore University Law School in Nairobi, Kenya.

<sup>1</sup> *Convention Relating to the Status of the Refugees*, 14 December 1950, 189 UNTS 150 and the *Protocol to the 1951 Convention Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267.

<sup>2</sup> Article 1F (a), *Convention Relating to the Status of the Refugees* and *Protocol to the 1951 Convention Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267.

<sup>3</sup> Brett R and Mccallin M, *Children: The invisible soldiers*, Rädda Barnen, Save the Children Sweden, Vajxo, 1998, 95.

II (hereafter WWII) fresh in the drafters' minds and the participation of children in armed conflicts was not a problem, or, at least, was not seen as one.<sup>4</sup>

This paper seeks to respond to the problem of whether the current application of Article 1F (a) is against the best interests principle (hereinafter BIP) in Article 3(1) of the Convention on the Rights of the Child (hereinafter CRC).<sup>5</sup> The study is justified on the basis that although there exists a wealth of literature on refugee status determination, the treatment of child soldiers under Article 1F (a) has not been assessed in light of the best interests of a child under the CRC. The general objective of the study is to analyse Article 1F (a) of the Refugee Convention in light of the BIP in Article 3 (1) of the CRC. The specific objectives are to: examine the application of Article 1F (a) of the Refugee Convention from State practice, assess what the BIP entails and establish if a conflict exists between the application of Article 1F (a) by states and the BIP.

The questions guiding the study are: What are the implications of Article 1F (a) for child soldiers seeking asylum? What does the standard of proof 'serious reasons to consider' under Article 1F (a) entail? What is the liability of children who commit crimes under ICL? What is the BIP? The study is anchored on; the interest theory which explains children's rights, the criminal justice theory which justifies the exclusion clause and the common good theory which justifies the actions of a state with respect to granting refugee status.

The paper is structured as follows: the first section analyses Article 1F (a) of the 1951 Refugee Convention. The second section examines the legal framework surrounding child soldiers, the factors considered in granting refugee status to child soldiers and the interpretation and application of Article 1F (a) by courts of law from select jurisdictions. The third section analyses the BIP in Article 3 (1) of the CRC and its application by courts of law in select jurisdictions. The fourth section identifies the issues arising from the analysis in the preceding sections. The fifth section includes recommendations and a conclusion is reached based on the analysis.

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<sup>4</sup> Happold M, 'Excluding children from refugee status: Child soldiers and Article 1F of the Refugee Convention' 17 *American University International Law Review* 6 (2002), 1131-1173.

<sup>5</sup> Article 1F (a), *Convention Relating to the Status of the Refugees*; Article 3 (1), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

## II. Article 1F (a) of the Refugee Convention

Article 1F (a) of the 1951 Refugee Convention provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.<sup>6</sup> Article I (5) (a) of the 1969 the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>7</sup> has a similar provision that obliges States to deny the benefits of refugee status to persons who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.<sup>8</sup>

### i. *The purpose of Article 1F (a)*

The purpose of Article 1F was recognized by the *travaux préparatoires* as being two fold. Firstly, to deny the benefits of refugee status to persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are ‘serious reasons for considering’ that they committed heinous acts.<sup>9</sup> Secondly, to ensure that such persons do not misuse the institution of asylum to avoid being held legally accountable for their acts.<sup>10</sup>

### ii. *The standard of proof of Article 1F (a) and its application*

The standard of proof set in Article 1F (a) is ‘serious reasons to consider’. This standard of proof requires clear and credible evidence.<sup>11</sup> It is unnecessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met.<sup>12</sup> In the United Kingdom Supreme Court (hereafter UKSC) decision of *Al-Sirri v Secretary of State for the*

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<sup>6</sup> Article 1F (a), *Convention Relating to the Status of the Refugees*.

<sup>7</sup> 10 September 1969, 1001 UNTS 45.

<sup>8</sup> Article 1 (5) (a), *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

<sup>9</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, Statements of Herment (Belgium) and Hoare (UK).

<sup>10</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting.

<sup>11</sup> UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, 35.

<sup>12</sup> UNHCR, *Guidelines on International Protection*, 35.

*Home Department*,<sup>13</sup> it was held that ‘serious reasons’ is stronger than ‘reasonable grounds’ and the evidence from which those reasons were derived has to be clear and credible. ‘Considering’ is stronger than suspecting/believing but the decision-maker need not be satisfied beyond reasonable doubt.<sup>14</sup> In exclusion procedures, the burden of proof is on the state/United Nations High Commissioner on Refugees (UNHCR) to justify the exclusion.<sup>15</sup>

### iii. *The legal framework for the crimes prohibited*

The international instruments which offer guidance on the international crimes prohibited under Article 1F (a) are: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>16</sup> the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols (API and APII),<sup>17</sup> the Statutes of the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY Statute), the Statute of the International Criminal Tribunal for Rwanda (hereinafter the ICTR Statute),<sup>18</sup> the Statute of the Special Court for Sierra Leone (SCSL),<sup>19</sup> the Charter of the International Military Tribunal,<sup>20</sup> (hereinafter the London Charter), the 1996 Draft Code of Crimes against the Peace and Security of Mankind<sup>21</sup> and the

<sup>13</sup> [2012] UKSC 54.

<sup>14</sup> [2012] UKSC 54 at 75.

<sup>15</sup> UNHCR ‘Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees’ 107. file:///C:/Users/sauberberg/Desktop/UNHCR%20Background%20Note%20on%20Exclusion.pdf on 28 November 2015.

<sup>16</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 278 UNTS 1021.

<sup>17</sup> ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609; ICRC, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005.

<sup>18</sup> UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993; UNSC, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.

<sup>19</sup> UNSC, *Statute of the Special Court for Sierra Leone*, 16 January 2002.

<sup>20</sup> 82 UNTS 279.

<sup>21</sup> ILC, *Draft Code of Crimes against the Peace and Security of Mankind* Yearbook of the International Law Commission, (1996), vol. II.

Rome Statute of the International Criminal Court (ICC)<sup>22</sup> (hereinafter the Rome Statute).

The international crimes prohibited under Article 1F (a) are: crimes against peace, war crimes and crimes against humanity.<sup>23</sup> They are discussed below.

a. A crime against peace

A crime against peace is defined in the London Charter as the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.<sup>24</sup> The crime can only be committed by those in a high position of authority representing a state or a state-like entity.<sup>25</sup> One may infer that the crime of aggression in the Rome Statute substituted the crimes against peace that is defined by State Parties as being committed when a leader of a state causes that state to illegally use force against another state, provided that the use of force constitutes by its character, gravity and scale a manifest violation of the Charter of the United Nations<sup>26</sup> (hereinafter the UN Charter).

In the case of crimes against peace/ crime of aggression there are six elements. To begin with, the perpetrator planned, prepared, initiated or executed an act of aggression.<sup>27</sup> Secondly, the perpetrator must have been in a position to effectively exercise control over or to direct the political or military action of the state.<sup>28</sup> Thirdly, the *actus reus* required is the use of armed force by a state against the sovereignty of another state, or in any other manner inconsistent with the UN Charter.<sup>29</sup> Additionally, the perpetrator needs to have been aware that established that the use of armed force was inconsistent with the UN Charter.<sup>30</sup>

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<sup>22</sup> UNGA, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

<sup>23</sup> Article 1F (a), *Convention Relating to the Status of the Refugees*.

<sup>24</sup> Article 6 (a), UN, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*.

<sup>25</sup> UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* at 11.

<sup>26</sup> 24 October 1945, 1 UNTS XVI; The Global Campaign for Ratification and Implementation of the Kampala Amendments on the crime of Aggression, 'The Crime of Aggression-a Brief History' <http://crimeofaggression.info/history/> on 25 May 2015.

<sup>27</sup> Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2.

<sup>28</sup> Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court*.

<sup>29</sup> Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court*.

<sup>30</sup> Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court*.

Moreover, the act of aggression, by its character, gravity and scale, must have constituted a manifest violation of the UN Charter.

b. War crimes

A war crime covers, for example, wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.<sup>31</sup> The ICC and other tribunals have identified general elements that have to be proven against a perpetrator.<sup>32</sup> In *Prosecutor v Brdjanin*,<sup>33</sup> the International Criminal Tribunal for the former Yugoslavia identified four preconditions for war crimes: existence of an armed conflict, the establishment of a nexus between the alleged crimes and the armed conflict, the armed conflict must be international in nature; and the victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions.<sup>34</sup>

c. Crimes against humanity

Crimes against humanity include acts such as murder, extermination, enslavement and deportation carried out as part of a widespread or systematic attack directed against the civilian population.<sup>35</sup> The International Criminal Tribunal for the former Yugoslavia identified five elements that have to be satisfied for a perpetrator to be held liable for crimes against humanity. In *Prosecutor v Limaj, Bala and Musliu*,<sup>36</sup> the Tribunal enumerated the five elements for crimes against humanity as: the occurrence of an attack, the acts of the perpetrator must be part of the attack, the attack must be directed against any civilian population, the attack must be widespread or systematic and the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern.<sup>37</sup>

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<sup>31</sup> Article 8, *Rome Statute of the International Criminal Court (last amended 2010)*.

<sup>32</sup> Article 8, ICC, *Report of the Preparatory Commission for the International Criminal Court*.

<sup>33</sup> Case No. IT-99-36-T (Trial Chamber), September 1, 2004.

<sup>34</sup> Case No. IT-99-36-T (Trial Chamber) at 121.

<sup>35</sup> Article 7, *Rome Statute of the International Criminal Court (last amended 2010)*.

<sup>36</sup> Case No. IT-03-66-T (Trial Chamber), November 30, 2005.

<sup>37</sup> Case No. IT-03-66-T (Trial Chamber) at 18.

iii. *Decisions by national courts in applying Article 1F (a)*

In *Ramirez v Canada (Minister of Employment and Immigration)*,<sup>38</sup> (hereinafter the *Ramirez Case*), the claimant enlisted in the army voluntarily and witnessed the torture and killing of many prisoners. Due to the circumstances of the claimant's participation in the military, the Canadian Court of Appeal found that he shared the military's purpose in committing these acts and was an accomplice in committing international crimes.<sup>39</sup> Therefore, for Canadian courts, the mere membership of an asylum seeker in an organisation associated with violence is deemed to be a person excludable under Article 1F (a).

Also, in a decision by the United Kingdom Immigration and Asylum Tribunal (UKIAT) of *Gurung*,<sup>40</sup> the Tribunal in applying Article 1F (a) excluded the applicant from refugee status by virtue of his voluntary membership of an organisation whose aims, methods and activities were deemed to be predominantly terrorist in character.<sup>41</sup>

Additionally, in the infamous case of the Afghan military intelligence service; *Khadamat-e Aetla'at-e Dawlati* (KHAD/WAD), the Dutch government assumed responsibility of the prohibited crimes in Article 1F for all officers of that organization.<sup>42</sup> Its conclusions were based on a policy brief from the Department of Foreign Affairs, which stated that "all NCOs and officers were personally involved in the arrest, interrogation, torture and even execution of suspects".<sup>43</sup>

Nonetheless, other courts and commentators have criticized the above decisions. In the case of *R (Sri Lanka) v Secretary of State for the Home Department*,<sup>44</sup> the Court of Appeal emphasized the need to consider a wide range of determining factors such as a person's contribution to the commission of an international crime other than mere association/affiliation with an organization.<sup>45</sup> Furthermore, the Canadian courts have held that there is need to determine the existence of a shared common purpose and that liability should be determined subjective-

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<sup>38</sup> (1992)2 FC 306 (CA).

<sup>39</sup> (1992)2 FC 306 (CA) at 317.

<sup>40</sup> *Gurung v Secretary of State for the Home Department* [2002] UKIAT 4870 at 29.

<sup>41</sup> *Gurung v Secretary of State for the Home Department* [2002] at 3 and 118.

<sup>42</sup> Report to Parliament (Tweede Kamer) 2008, *Schriftelijke overleg brief en notitie inzake de toepassing v an artikel 1F Vluchtelingenverdrag*, Ministry of Justice, 8 September 2008.

<sup>43</sup> *Veiligheidsdiensten in Communistisch Afghanistan (1978-1992)*: AGSA, KAM, KhAD en WAD, Ministry of Foreign Affairs (2000), 24-25 <http://www.comite1fbeleid.nl/files/2000-02-29-aab-veiligheidsdiensten-afghanistan.pdf> on 27 May 2015.

<sup>44</sup> (2010) UKSC 15.

<sup>45</sup> *R (Sri Lanka) v Secretary of State for the Home Department* (2010) UKSC 15 at 29.

ly.<sup>46</sup> Thus, one needs to establish *mens rea*, of the individual implicated.<sup>47</sup> This is in keeping with UNHCR's note on the exclusion clause, which recommends that liability be determined by reference to the 'knowledge, intention and moral choice on the part of the individual concerned'.<sup>48</sup>

### III. Child Soldiers in Relation to Article 1F (a) of the 1951 Refugee Convention

The use of children in military operations is not a new phenomenon. Throughout history, children have been involved in military operations.<sup>49</sup> For instance, in WWI, in Great Britain 250,000 boys below 19 years joined the army.<sup>50</sup> Additionally, in WWII, child soldiers fought in the Warsaw Uprising,<sup>51</sup> and the Jewish resistance.<sup>52</sup> The use of child soldiers is now global in scale.<sup>53</sup>

#### *i. The legal and regulatory framework of child soldiers*

Since the 1970s, a number of international conventions have been made to limit the participation of children in armed conflicts. There has also been the creation of NGOs to prevent the recruitment and exploitation of children in warfare and ensure their reintegration into larger society by means of research, advocacy and capacity building.<sup>54</sup> The following highlights the international laws that seek to prevent the recruitment of children in armed conflict.

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<sup>46</sup> *Ramirez v. Canada* at 16-19.

<sup>47</sup> *Moreno v Canada* (Minister of Employment and Immigration) (1993) 107 DLR (4th) 424.

<sup>48</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"), (Geneva, January 1992) H CR/IP/4/Eng/REV.2 at 152.

<sup>49</sup> Wessels M., 'Child Soldiers' 53 (6) *Bulletin of the Atomic Scientists*, (1997) 32-39.

<sup>50</sup> "How Did Britain Let 250,000 Underage Soldiers Fight In WW1?" BBC News <http://www.bbc.co.uk/guides/zcvdhyc> on 30 November 2015.

<sup>51</sup> Norman D, *Rising '44: The battle for Warsaw*, Pan Books, London, 2004, 603.

<sup>52</sup> Rosen D, *Armies of the young: Child soldiers in war and terrorism*, Rutgers University Press, Brunswick, 2005, 54-55.

<sup>53</sup> Eben Kaplan, 'Child soldiers around the world' Council Foreign Relations. <http://www.cfr.org/human-rights/child-soldiers-around-world/p9331#p2> on 26 May 2016.

<sup>54</sup> Child Soldiers International, 'Our Vision'. [Http://Www.Child-Soldiers.Org/About\\_Us.Php](Http://Www.Child-Soldiers.Org/About_Us.Php) on 26 November 2015.

a. Additional *Protocol I* and Additional Protocol II to the *Geneva Conventions*

Additional Protocol I provides that the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest.<sup>55</sup> This provision was most likely influenced by the extensive recruitment of children during WWII.<sup>56</sup> Article 4 (3) (c) of APII, provides that children who have not attained the age of fifteen years shall neither be recruited in the armed forces nor allowed to take part in hostilities.<sup>57</sup>

b. The Convention on the Rights of the Child

Article 38 (2) and (3) provides that states parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Moreover, states parties are required to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states parties are to endeavour to give priority to the oldest.<sup>58</sup>

c. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The enactment of the Protocol was prompted by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for peace, security and development.<sup>59</sup> Articles 1 and 2 provide 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.<sup>60</sup>

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<sup>55</sup> Article 77 (2), *Protocol I of the four Geneva Conventions of 12 August 1949*.

<sup>56</sup> Norman, *Rising '44*, 603.

<sup>57</sup> Articles 4(3) (C), *Protocol II to the Geneva Conventions of 12 August 1949*.

<sup>58</sup> Article 38 (2) and (3), *CRC*.

<sup>59</sup> Paragraph 3 of the Preamble, *Optional protocol to the CRC on the involvement of children in armed conflict* (adopted and opened for Signature, Ratification And Accession On 25 May 2000) General Assembly Resolution A/RES/54/263.

<sup>60</sup> Articles 1 and 2, *Optional protocol to the CRC on the involvement of children in armed conflict*.

d. The Rome Statute

Article 8 (2) (b) (xxvi) categorizes the conscription of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a war crime.<sup>61</sup>

e. The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups

The Principles are read together with the *Paris commitments to protect children from unlawful recruitment or use by armed forces or groups*. These two documents consolidate global humanitarian knowledge and experience in working to prevent recruitment, protect children, support their release from armed forces and reintegrate them into civilian life.<sup>62</sup>

The above laws suggest that in all matters concerning child soldiers, they should be treated like victims and not perpetrators. Nonetheless, the lack of a common minimum age of criminal responsibility (hereinafter MACR) remains an issue. For instance, although the Optional Protocol to CRC on the involvement of children in armed conflict defines a child as anyone under the age of 18, it allows for the recruitment of 16 and 17 year olds by national armed forces, not non-state actors, but prohibits them from taking part in active combat.<sup>63</sup> Furthermore, countries like the Netherlands still recruit persons under the age of 18 into their armed forces.<sup>64</sup>

ii. *The grant of refugee status to child soldiers*

a. Child soldiers as refugees

A child soldier is any person under 18 years who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members.<sup>65</sup> The definition includes girls recruited for sexual

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<sup>61</sup> Article 8 (2) (b) (xxvi) UNGA, *Rome Statute of the ICC (last amended 2010)*.

<sup>62</sup> UNICEF, 'Child protection from violence, exploitation and abuse; Paris Principles and Commitments' on 6 December 2013. [http://www.unicef.org/protection/57929\\_58012.html](http://www.unicef.org/protection/57929_58012.html) on 26 November 2015.

<sup>63</sup> Felton J, *Child soldiers; are more aggressive efforts needed to protect children?* CQ Researcher (2008).

<sup>64</sup> 'Child Soldiers Global Report 2008' Coalition to Stop the Use of Child Soldiers, 29, [www.child-soldiersglobalreport.org/files/country\\_pdfs/FINAL\\_2008\\_Global\\_Report.pdf](http://www.child-soldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf) on 30 November 2015.

<sup>65</sup> Principle 2.1, *The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*,

purposes and forced marriage.<sup>66</sup> After the end of hostilities, child soldiers may seek asylum to escape persecution in their country.

Child soldiers have to prove that they are refugees according to Article 1A (2) of the Refugee Convention. To qualify as a refugee, one has to prove that:

- 1) They have a well-founded fear of being persecuted;
- 2) They are persecuted by reasons of race, religion, nationality, membership of a particular social group or political opinion
- 3) They are outside the country of their nationality and they are unable or, owing to such fear, unwilling to avail themselves of the protection of that country
- 4) They do not have a nationality and being outside the country of their former habitual residence as a result of such events, unable or, owing to such fear, are unwilling to return.<sup>67</sup>

1) *Well-founded fear of persecution*

The concept of persecution under the Refugee Convention has no universally accepted definition.<sup>68</sup> Scholars opine that violating an individual's fundamental human rights amounts to persecution.<sup>69</sup> Going by that definition, the recruitment of children is a serious breach of international law that violates their fundamental human rights.<sup>70</sup> Furthermore, the compulsory use of children under the age of eighteen in armed conflict has been categorized as a form of slavery.<sup>71</sup>

Additionally, the subsequent treatment of child soldiers after recruitment amounts to persecution. This is because child soldiers face physical maltreatment and sexual assault while in active combat.<sup>72</sup>

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<sup>66</sup> Definitions, *Cape Town Principles and Best Practices*, (adopted at the Symposium' on the prevention of recruitment of children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa 27-30 April 1997) Cape Town, South Africa.

<sup>67</sup> Article 1A (2), *Convention Relating to the Status of the Refugees*.

<sup>68</sup> UNHCR, Handbook on procedure and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 51 (1992).

<sup>69</sup> Hathaway J, *The law of refugee status*, Butterworths, Toronto, 1991, 106-107.

<sup>70</sup> Article 77 (2), *Protocol I of the Geneva Conventions of 12 August 1949*; Article 4(3) (c), *Protocol II of the Geneva Conventions of 12 August 1949*.

<sup>71</sup> Art. 3(a), ILO, *Worst Forms of Child Labour Convention, C182*, 17 June 1999, C182.

<sup>72</sup> Hathaway, *The law of refugee status*, 112-113.

- 2) *Persecution due to race, religion, nationality, membership of a particular social group or political opinion*

Children who are likely recruits of armed groups have a well-founded fear of persecution because of their membership to a particular social group.<sup>73</sup> The social group could be children from a particular country or region who by reason of their age and gender are potential recruits.<sup>74</sup> Courts have required that for the ground of persecution based on membership to a social group, the applicants have to show that they have a common characteristic that cannot be changed voluntarily.<sup>75</sup> For children, their common characteristic is being minors which cannot change voluntarily.

- 3) *He is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*

A child soldier would be unable or unwilling to avail themselves to the protection of their country due to the atrocities they committed which make them objects of hatred and suspicion.<sup>76</sup>

If all the above arguments were to fail, child soldiers are first and foremost children, and as such require special attention. This special attention arises from their vulnerability, their dependency on adults and the fact that they are developing.<sup>77</sup>

### *iii. Exclusion of child soldiers under Article 1F (a)*

Article 1F (a) provides that the Convention shall not apply to *any person* with respect to whom there are serious reasons for considering that: he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.<sup>78</sup>

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<sup>73</sup> Happold M, 'Excluding children from refugee status', 1141.

<sup>74</sup> Happold M, 'Excluding children from refugee status', 1140.

<sup>75</sup> *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985.

<sup>76</sup> Dodge CP and Raundalen M, *Reaching children in war: Sudan, Uganda and Mozambique*, Sigma Forlag, Bergen, 1991.

<sup>77</sup> UNICEF, 'Refugee children: Guidelines on protection and care'. <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=guidelines+of++granting+refugee+status+to+children> on 26 November 2015.

<sup>78</sup> Article 1F (a), UNGA *Convention Relating to the Status of Refugees*.

The use of the word ‘any person’ is indiscriminate and includes children. Therefore, children whom a state has serious reasons to consider have committed the crimes prohibited may be denied refugee status. Child soldiers have committed serious atrocities in conflicts, in the DRC, Liberia and Sierra Leone.<sup>79</sup> In Liberia, child soldiers as young as nine years were responsible for killings, maiming, and rape, against members of opposing armed groups and the civilian population.<sup>80</sup> They are used to commit such atrocities because they do not understand the risks and are easier to control.<sup>81</sup> Even those who appear to commit these crimes voluntarily do so due to social, economic and political pressures that arise from armed conflict.<sup>82</sup>

Therefore, it begs the question; is the *mens rea* of a child considered to discharge the standard of proof of ‘serious reasons to consider’? The next part shows how this standard of proof has been applied by courts.

#### *iv. Case law of child soldiers seeking refugee status*

There is jurisprudence from courts in Canada, Netherlands and the UK where the exclusion of child soldiers seeking asylum status under Article 1F (a) has been considered.

##### *a. Canada*

In the *Ramirez Case*, the applicant was a member of the Salvadoran army who enlisted voluntarily for a period of two years at the age of fifteen to revenge the atrocities committed against members of his family by insurgents.<sup>83</sup> After the first term, he re-enlisted for a further term and finally deserted the army after 33 months of service during which time he had been promoted to sergeant. As a member of the army, he participated in over 100 engagements and was present during tortures and killings of many prisoners.<sup>84</sup> The Canadian Court of Appeal stated that Ramirez was on all occasions a participating and knowing member of a military force whose common objective was to torture prisoners to extract information, and was therefore responsible for the crimes committed.<sup>85</sup>

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<sup>79</sup> Human Rights Watch, ‘Easy Prey: Child Soldiers in Liberia’, Human Rights Watch/Africa Human Rights Watch Children’s Rights Project, (1994), 23.

<sup>80</sup> Human Rights Watch, ‘Easy Prey’, 32.

<sup>81</sup> Human Rights Watch, ‘Easy Prey’, 23.

<sup>82</sup> Child Soldiers International, ‘FAQs’ <http://www.child-soldiers.org/faq.php> on 26 November 2015.

<sup>83</sup> *Ramirez v Minister of Employment and Immigration*.

<sup>84</sup> *Ramirez v Minister of Employment and Immigration*, at 182-187.

<sup>85</sup> *Ramirez v Minister of Employment and Immigration*, at 182-187.

In *Saridag v Canada (Minister of Employment and Immigration)*<sup>86</sup> (hereinafter the *Saridag Case*), the Court decided in the context of complicity for crimes against humanity, that a person, who was a member of a terrorist organization in Turkey while aged between 11 and 13 years old, could be denied asylum as long as it could be established that they had knowledge of some of the acts of violence.<sup>87</sup>

Moreover, in *Poshteb v Canada (Minister of Citizenship and Immigration)*<sup>88</sup> (hereinafter the *Poshteb Case*), the mere membership of the applicant between the ages of 16 to 18 in a terrorist organisation that engaged in violent activities was held to be sufficient ground for their exclusion from refugee status.<sup>89</sup>

The decision in the *Poshteb Case* came three years after Canada had ratified the Optional Protocol to the CRC, a treaty that requires signatories to give special consideration to captured enemy fighters under the age of 18.<sup>90</sup> In fact, Canada was the first to ratify the Protocol.<sup>91</sup>

## b. The Netherlands

Before 2004, the Dutch government excluded many child soldiers from refugee status based on Article 1F (a).<sup>92</sup> The government then changed its policy of excluding former child soldiers under Article 1F if they were below 15 years at the time of the alleged commission of the crime.<sup>93</sup>

In 2004, the District Court of Arnhem decided in favour of a former child soldier of National Union for the Total Independence of Angola (UNITA) (AWB 03/26654).<sup>94</sup> The Court judged that the decision of the asylum authorities had not sufficiently taken into consideration the young age of recruitment: 11 years, and the impossibility for him to escape or withdraw from personal participation. According to the Court, it was generally known that UNITA punishes persons who are disloyal without mercy.<sup>95</sup> For these reasons, the asylum authori-

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<sup>86</sup> [1994] FCJ No. 1516.

<sup>87</sup> *Saridag v Canada* (Minister of Employment and Immigration), [1994] FCJ No. 1516.

<sup>88</sup> [2005] 3 FCR 487.

<sup>89</sup> *Poshteb v Canada* (Minister of Citizenship and Immigration) [2005] 3 FCR 487.

<sup>90</sup> Thomas Walkom, 'Canada and child soldiers' Star News, (28 May, 2002) [http://www.thestar.com/opinion/editorialopinion/2008/05/28/canada\\_and\\_child\\_soldiers.html](http://www.thestar.com/opinion/editorialopinion/2008/05/28/canada_and_child_soldiers.html) on 29 November 2015.

<sup>91</sup> Thomas Walkom, 'Canada and child soldiers'.

<sup>92</sup> United States Committee on Refugees and Immigrants, 'US Committee for Refugees, World Refugee Survey 2004-Netherlands', 25 May 2004. <http://www.refworld.org/docid/40b459428.html> on 30 November 2015.

<sup>93</sup> United States Committee on Refugees and Immigrants, 'US Committee for Refugees, World Refugee Survey 2004-Netherlands.'

<sup>94</sup> European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

<sup>95</sup> European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

ties had, according to the Court, failed to examine the personal responsibility of the applicant in a careful way.<sup>96</sup>

### c. The United Kingdom

In the seminal case of *R (on the application of JS (Sri Lanka) v Secretary of State for the Home Department*,<sup>97</sup> the Supreme Court considered the case of a claimant recruited to the Liberation Tigers of Tamil Eelam (LTTE) at the age of ten, who had continued in combat and intelligence roles until he was 24. The Court held that a person would be disqualified under Article 1F (a) if there were serious reasons for considering that he voluntarily contributed to the organisation's ability to pursue its purpose of committing war crimes and was aware that his assistance would in fact further that purpose.<sup>98</sup> As to *mens rea*, if a person was aware that in the ordinary course of events, a particular consequence would follow from his actions, he would be taken to have acted with both knowledge and intent.<sup>99</sup>

From the above case law, it can be seen that national courts have taken different stands in applying the exclusion clause to child soldiers. This is the case, even though Canada, the UK and Netherlands are amongst 100 member states that have endorsed the Paris commitments,<sup>100</sup> which require children accused of crimes against international law after being unlawfully recruited by armed forces or groups to be considered primarily as victims of violations against international law and not only as alleged perpetrators.<sup>101</sup> Therefore, it is clear that in practice, States face difficulty in dealing with child soldiers who are alleged to have committed international crimes.

## IV. The Best Interests Principle of the Child

CRC provides that in all actions concerning children the best interests of the child shall be a primary consideration.<sup>102</sup> The principle of the best interests

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<sup>96</sup> European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

<sup>97</sup> [2010] UKSC 15.

<sup>98</sup> [2010] UKSC 15 at 123.

<sup>99</sup> [2010] UKSC 15 at 38.

<sup>100</sup> International Committee of the Red Cross, '100 Member states have endorsed the Paris Commitments' <https://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf> on 22 March 2016.

<sup>101</sup> Commitment 11, *The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups*.

<sup>102</sup> Article 3 (1), CRC.

of the child is one of the guiding principles of CRC.<sup>103</sup> The BIP is also included in the European Convention on the Exercise of Children's Rights in the preamble and a consideration that judicial authorities have to take into account in making a decision affecting children.<sup>104</sup>

BIP is also included in the African Charter on the Rights and Welfare of the Child (hereinafter ACRWC) in which it is *the* primary consideration setting a higher standard than CRC.<sup>105</sup> The American Convention on Human Rights (ACHR) stipulates that provision must be made for the protection of children 'solely on the basis of their own best interests' when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of wedlock.<sup>106</sup>

The drafters of CRC chose to use the word *a* primary consideration rather than *the* primary consideration because they recognised that there are situations in which the competing interests *inter alia* of justice and of society at large should be at least of equal, if not of greater importance than the interests of the child.<sup>107</sup> On the other hand, the intentions of ACRWC drafters in using *the* primary consideration instead of *a* primary consideration is not known as repeated efforts to establish the existence of a *travaux préparatoires* for the Charter have been unsuccessful.<sup>108</sup> This may lead to the conclusion, until proven otherwise, that there is no such document on the ACRWC.<sup>109</sup>

### *i. The origin of the BIP*

The BIP was not in itself novel when CRC was being drafted. It was included in a number of other international human rights instruments; the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of all of forms of Discrimination Against Women (CEDAW).<sup>110</sup> Nonethe-

<sup>103</sup> Langlaude S, *The Right of the Child to Religious Freedom in International Law*, Martinus Nijhoff Publishers, Leiden, 2007.

<sup>104</sup> Article 6, *European Convention on the Exercise of Children's Rights* 25 January 1996, ETS 160.

<sup>105</sup> Article 4 (1), OAU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

<sup>106</sup> Article 17 (4) and (5), Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

<sup>107</sup> Freeman M, *Article 3: The best interests of the child*, Martinus Nijhoff Publishers, Leiden, 2007, 45.

<sup>108</sup> Save The Children, Sweden, 'Corporal Punishment and the African Children's Charter' March 2012, 14.

<sup>109</sup> Save The Children, Sweden, 'Corporal Punishment and the African Children's Charter', at 14.

<sup>110</sup> Principle 2, UNGA *Declaration of the Rights of the Child* 20 November 1959, A/RES/1386(XIV); Article 5 (b), UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18

less, the BIP was expanded in scope, extending an obligation on states to ensure that children's interests are placed at the heart of all decision-making impacting on children.<sup>111</sup>

ii. *The meaning of the BIP*

According to the traditional meaning, decision makers were obligated to consider the welfare of children when making decisions about their care and placement.<sup>112</sup> This was mostly applied in child custody cases.<sup>113</sup> The traditional approach only focused on the welfare of the child rather than their rights.<sup>114</sup> The modern meaning of the principle borrows from the traditional concept with some significant differences. One difference is that the provision applies to a wide number of decision makers in both the public and private sphere unlike in the past where it was only in the province of the court to make a decision.<sup>115</sup>

Another difference is that it creates less room for paternalism and discretion.<sup>116</sup> Whereas in the past decision-makers would decide for the child on what they thought would be best for them, CRC requires that a child should participate in the decision-making process.<sup>117</sup> The framers of CRC regarded the participation of a child to be a critical component in determining the best interests of the child.<sup>118</sup>

Additionally, the BIP is to be applied in accordance with the other guiding principles of CRC; participation (Article 12),<sup>119</sup> non-discrimination (Article 2),<sup>120</sup> and the survival and the development of the child (Article 6).<sup>121</sup> Hence, it is not subordinate nor of greater importance than other principles.

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December 1979, 1249 UNTS 13.

<sup>111</sup> Korczak J Lecture: "The child's best interest: a generally applicable principle" Stockholm, 9 September 2008 <https://wcd.coe.int/ViewDoc.jsp?id=1341155> on 29 November 2015.

<sup>112</sup> Breen C, *The standard of the best interests of the child; A Western tradition in international and comparative law*, Martinus Nijhoff Publishers, The Hague, 2002.

<sup>113</sup> Covell K and Howe B, *Education in the best interests of the child*, University of Toronto Press, Toronto, 2013.

<sup>114</sup> Moloney L and McIntosh J, 'Child-responsive practices in Australian family law: Past problems and future directions', 10 *Journal of Family Studies* (2004) 71.

<sup>115</sup> Covell and Howe, *Education in the best interests of the child*.

<sup>116</sup> Covell and Howe, *Education in the best interests of the child*.

<sup>117</sup> Flekkoy M and Kaufman N, *The participation rights of the child: Rights and responsibilities in family and society*, Jessica Kingsley, London, 1997.

<sup>118</sup> Covell and Howe, *Education in the best interests of the child*.

<sup>119</sup> Article 12, CRC.

<sup>120</sup> Article 2, CRC.

<sup>121</sup> Article 6, CRC.

Therefore, the best interests of a child has to do with special protections for children's rights in laws and policies, justified limitations on their freedom and the responsibility of adults to provide support and a conducive environment for their full development.<sup>122</sup>

### *iii. The role of the BIP*

#### a) To aid in interpretation of the CRC

The BIP supports and clarifies a particular approach of issues that may arise from the CRC.<sup>123</sup> Alston suggests that it is an aid to construction and an element which needs to be taken into full account in implementing other rights.<sup>124</sup>

#### b) Helps to resolve conflicts among rights

The courts may be guided by the BIP in determining which right overrides the other in the event of a conflict between children's rights.<sup>125</sup>

#### c) Basis for evaluating laws, policies and practices

The principle applies when failure to observe it would adversely affect the child's exercise or enjoyment of their rights.<sup>126</sup> Thus, the BIP is used to identify conditions necessary for the enjoyment of the child's rights.

### *iv. Application of the BIP*

The application of the principle has been a difficult task as the principle remains uncertain for most courts.<sup>127</sup> The Chief Justice of the Supreme Court of Canada stated that the principle is incapable of 'being identified with some precision.'<sup>128</sup>

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<sup>122</sup> International Bureau for Children's Rights, 'Children and Armed Conflict; A guide to International Humanitarian and Human Rights law' (2010), 441.

<sup>123</sup> Alston P, 'The best interests principle; Towards a reconciliation of culture and human rights' 8 *International Journal of Law and the family*, 1 (1994), 1-25.

<sup>124</sup> Alston P, 'The best interests principle', 1-25.

<sup>125</sup> Detrick S, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, The Hague, 1997.

<sup>126</sup> Alston P, 'The best interests principle', 1-25.

<sup>127</sup> Dolgin J, 'Why has the best interests standard survived? The historic and social context' 16 *Children's Legal Rights Journal* 1, (1996), 2.

<sup>128</sup> *Canadian Foundation for Children, Youth and the Law v A-G (Canada)* [2004] 1 SCR 76, at 95.

To clarify the principle, some states have developed in their national laws, factors to guide courts in determining what is in the best interests of a child. For instance, the Children's Act of South Africa (SA) has provisions on the factors to be considered in determining a child's best interests.<sup>129</sup> These include: consideration of a child's age, maturity, stage of development, gender, background, and physical and emotional security.<sup>130</sup>

a. Case Law

This part reviews case law from two European countries concerning immigration where the best interests of the child was considered.

1) *Norway Supreme Court*

In the case of *Hussein Shabazi and family*,<sup>131</sup> (hereinafter the *Shabazi Case*) the Supreme Court upheld the decision of the Norwegian Immigration Appeals Board (hereinafter UNE) to reject the asylum application.<sup>132</sup> The Shabazi family included a seven year old whose best interests were to be determined in the decision making process. The Court upheld the decision of the UNE that the immigration control considerations outweighed the best interests of the child.<sup>133</sup> The Court stated that when two competing legal norms conflict, the argumentative power on the rights of the child might have to give way when upholding the legal norm of immigration control considerations.<sup>134</sup>

In another case of *Verona Delic and family*,<sup>135</sup> the Court upheld the UNE's decision to deport the family to Sarajevo. The Delics had two daughters: Verona, who was ten years old at the time of the trial and Aurora, who was ten-months old.<sup>136</sup> The UNE had to determine whether the best interests of the children outweighed immigration considerations. The Court in quoting the *Shabazi Case* stated that their role in assessing UNE decisions is to control their understanding of the concept of the best interests of the child on the relevant subject matter, and to ensure that considerations are properly considered and weighed against

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<sup>129</sup> *Children's Act* 38 of 2005 (South Africa).

<sup>130</sup> Section 7 (1) (g) and (h), *Children's Act* 38 of 2005 (South Africa).

<sup>131</sup> 688 of 2012, Norway Supreme Court.

<sup>132</sup> 688 of 2012, Norway Supreme Court.

<sup>133</sup> Section 163, 688 of 2012, Norway Supreme Court.

<sup>134</sup> Section 163. 688 of 2012, Norway Supreme Court.

<sup>135</sup> 1042 of 2012, Norway Supreme Court.

<sup>136</sup> 1042 of 2012, Norway Supreme Court Sandelson M., 'Norway Supreme Court rules against asylum seekers' *The Foreigner* on 21 December 2012. <http://theforeigner.no/pages/news/norway-supreme-court-rules-against-asylum-seekers/> on 5 December 2015.

potential opposing considerations.<sup>137</sup> In doing so, the Court upheld UNE's decision to deport the applicants.

## 2) *The UK Supreme Court*

In the landmark case of *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,<sup>138</sup> the UKSC overruled the removal of an asylum seeker and upheld the children's best interests.<sup>139</sup> The leading judgment stated that the: 'best interests of the child' broadly means the well-being of the child. A consideration of where the best interests lie will involve asking whether it is reasonable to expect the child to live in another country.<sup>140</sup> Another important part of discovering the best interests of the child is to determine the child's views.<sup>141</sup>

In conclusion, the BIP has gained worldwide acceptance considering that all states apart from the USA have ratified the treaty.<sup>142</sup> Nonetheless, there is difficulty in its application due to varying interpretations amongst States, especially in immigration cases.

## V. Article 1F (a) and the BIP

From the above sections, there is a conflict between Article 1F (a) of the Refugee Convention and the BIP. Article 1F (a) excludes anyone whom there are serious reasons to consider that they committed international crimes, this includes minors. BIP on the other hand, requires that a child's best interests be a primary consideration in all actions concerning children. Conversely, it would be rare, if ever, that the exclusion of a child from refugee protection would be in his or her 'best interest'.<sup>143</sup> In analysing this conflict, the following are the issues that arise.

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<sup>137</sup> Section 146, 6818 of 2012, Norway Supreme Court; Langbach, T, 'Shall consider whether decisions are valid' Aftenposten, January 28 2013 <http://www.aftenposten.no/meninger/debatt/Skal-vurdere-om-vedtak-er-gyldige-%207104275.html#.UWLmkpN7Ito> on 5 December 2015.

<sup>138</sup> [2011] UKSC 4.

<sup>139</sup> [2011] UKSC 4.

<sup>140</sup> [2011] UKSC 4, 29.

<sup>141</sup> [2011] UKSC 4, 34.

<sup>142</sup> Humanium; Together for children's rights, 'The CRC; Signatory States and Parties to the Convention' <http://www.humanium.org/en/convention/signatory-states/> on 10 December 2015; UN News Centre, 'UN lauds Somalia as country ratifies landmark treaty' on 20 January 2015 <http://www.un.org/apps/news/story.asp?NewsID=49845#.VmkPtZMnI30> on 10 December 2015; UN News Centre, 'UN lauds South Sudan as country ratifies landmark child rights treaty' on 4 May 2015 <http://www.un.org/apps/news/story.asp?NewsID=50759#.VmkOR5MnI30> on 10 December 2015.

<sup>143</sup> European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status* (London, 2004), 281.

*i. Interpretation of the Refugee Convention and the CRC using the Vienna Convention of the Law of Treaties*

To resolve the conflict between CRC and the Refugee Convention, regards may be given to the Vienna Convention on the Law of Treaties (hereinafter VCLT). Article 30 of VCLT provides that successive treaties modify prior treaties.<sup>144</sup> Therefore, it would mean that CRC should modify the exclusion provisions of the Refugee Convention, making the exclusion of children on the grounds of Article 1F illegal. Nevertheless, this rule of interpretation only applies where there is significant overlap between the treaties.<sup>145</sup> In this case, the overlap between the Refugee Convention and CRC is minimal and unlikely to fall under Article 30.

VCLT calls for interpretation ‘in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose’ which could help resolve the conflict.<sup>146</sup> Scholars like Happold argue that WWII was fresh in the minds of the drafters of the Refugee Convention who did not see the participation of children in armed conflicts as a problem since children were mostly used as partisans and resisters during hostilities.<sup>147</sup> Hence, exempting children from the application of Article 1F (a) would be desirable for purposes of public policy. However, this would constitute a misleading application of the rules of statutory interpretation of international treaties.<sup>148</sup>

Consequently, the interpretive instruments and techniques cannot solve the conflict. There is need to revise the exclusion clause of the Refugee Convention to reflect the rights accorded to children in CRC.

*ii. The minimum age of criminal responsibility (MACR)*

One of the issues that arise from the conflict between the Refugee Convention and CRC is that of MACR.<sup>149</sup> CRC requires State parties to establish a minimum age below which children shall be presumed not to have the capacity to

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<sup>144</sup> Article 30, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>145</sup> Mohammed J, ‘Exclusion in international refugee law: 20th Century principles for 21st Century practice?’ Unpublished LLB dissertation, University of Ottawa, 10.

<sup>146</sup> Article 31, *VCLT*.

<sup>147</sup> Happold M, ‘Excluding children from refugee status’, 1136.

<sup>148</sup> Mohammed J, ‘Exclusion in International Refugee Law’, 11.

<sup>149</sup> The acronym was coined by the Committee of the Rights of the Child in General Comment No. 10 of 2007.

infringe penal law.<sup>150</sup> This discretion left to States further complicates the conflict between the exclusion clause and the BIP.

a. MACR in individual states

States currently have set different standards for the MACR. For instance, for Kenya, which is party to CRC, eight is the MACR.<sup>151</sup> In contrast, in South Sudan, which ratified the CRC recently,<sup>152</sup> the MACR is 12.<sup>153</sup> In Canada, the MACR is also 12.<sup>154</sup> These differences in the MACR present a problem in the application of Article 1F (a) of the Refugee Convention. A child asylum seeker who committed crimes between the ages of 8 to 12 may be held criminally responsible in Kenya but in Canada and South Sudan they will be considered incapable of having committed the crimes.

b. MACR of the international criminal courts

1) *The ICC*

The issue of MACR has been a topic of discussion in ICC which is the Court of last resort with jurisdiction over international crimes. ICC is an ideal model that should serve as a guide to state parties. The Rome Statute provides that war crimes include the conscription or enlisting of children under the age of 15 years or using them to participate actively in hostilities.<sup>155</sup> Article 26 of the Rome Statute prohibits the prosecutor from investigating and prosecuting individuals who commit crimes when they are under the age of 18.<sup>156</sup> These two provisions if read together create a legal vacuum for children between the age of 15 to 18. In the case of child soldiers, they are considered victims until they reach the age of 15, then from the age of 15 through to 17, they have no status as child soldier victims or as potential perpetrators, nor can they be considered the subject of child soldier crimes.<sup>157</sup>

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<sup>150</sup> Article 40 (3) (a), *CRC*.

<sup>151</sup> Section 14 (1) and (2), *The Penal Code* of Kenya, Chapter 63, Revised Edition 2009.

<sup>152</sup> UN News Centre, 'UN lauds South Sudan as country ratifies landmark child rights treaty' on 4 May 2015 <http://www.un.org/apps/news/story.asp?NewsID=50759#.VmkOR5MnI30> on 10 December 2015.

<sup>153</sup> Section 30, *The Penal Code Act 9 of 2009* of South Sudan.

<sup>154</sup> Section 13, *Criminal Code*, RSC of 1985, c. C-46.

<sup>155</sup> Article 8 (2) (b) (xxvi), *Rome Statute of the ICC (last amended 2010)*.

<sup>156</sup> Article 26, *Rome Statute of the ICC (last amended 2010)*.

<sup>157</sup> Chaikel D, 'The ICC's child soldier provisions: Time to close the three-year gap' International Justice Monitor on 18 August 2015 [http://www.ijmmonitor.org/2015/08/the-iccs-child-soldier-provisions-time-to-close-the-three-year-gap/?utm\\_source=CICC+Newsletter&utm\\_](http://www.ijmmonitor.org/2015/08/the-iccs-child-soldier-provisions-time-to-close-the-three-year-gap/?utm_source=CICC+Newsletter&utm_)

One can then deduce that for ICC the applicable MACR is persons under the age of 18. However, the culpability of child soldiers between the ages of 15 to 18, who have committed atrocities, before ICC is unknown. It may be argued that domestic courts may prosecute such persons but the ICC is considered an ideal model thus, the three year gap makes ICC ill-equipped to fully address child soldier crimes and failing to provide a comprehensive legislative model on the issue for States parties.<sup>158</sup>

2) *The Special Court for Sierra Leone (SCSL), the ICTY and the ICTR*

The SCSL Statute grants the Court jurisdiction over people of 15 years of age.<sup>159</sup> Therefore, the MACR for SCSL is 15 years. The ICTY Statute and the ICTR Statute are silent on the issue.<sup>160</sup> The Serious Crimes Panels in East Timor, on the other hand, have jurisdiction over minors over twelve years of age.<sup>161</sup>

c. International trend in MACR

There has been a trend internationally to set MACR at 18 years. The API,<sup>162</sup> APII and the CRC,<sup>163</sup> prohibit the recruitment of children below the age of 15 years to take part in direct hostilities. Thereafter came Optional Protocol to the CRC on the involvement of children in armed conflict that 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.<sup>164</sup> Additionally, the Paris Principles note that a majority of child protection actors will continue advocating for States to strive to raise the minimum age of recruitment to 18.<sup>165</sup>

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campaign=045b542142-8\_21\_15\_GlobalJustice\_Weely\*utm\_medium=email&utm\_term=0\_68df9c5182-045b542142-408856521&ct=t%288\_21\_15\_GlobalJustice\_Weekly%29 on 10 December 2015.

<sup>158</sup> Chaikel D, 'The ICC's child soldier provisions'.

<sup>159</sup> Article 7(1), UNSC Resolution 1315 (2000), Statute of the Special Court for Sierra Leone, 16 January 2002, <http://www.refworld.org/docid/3dda29f94.html> on 30 December 2015.

<sup>160</sup> Leveau F, 'Liability of child soldiers under International Criminal Law' 4 *Osgoode Hall Review of Law and Policy* 1 (2013), 41

<sup>161</sup> Leveau F, 'Liability of child soldiers under International Criminal Law' 41.

<sup>162</sup> Article 77 (2), Protocol I of the Geneva Conventions of 12 August 1949.

<sup>163</sup> Articles 4(3) (C), Protocol II of the Geneva Conventions of 12 August 1949 and Article 38 (2) and (3), CRC.

<sup>164</sup> Articles 1 & 2, *Optional Protocol to the CRC on the Involvement of Children in Armed Conflict*.

<sup>165</sup> Principle 1.14, UNICEF, 'Child protection from violence, exploitation and abuse; *Paris Principles and Commitments*' on 6 December 2013. [http://www.unicef.org/protection/57929\\_58012.html](http://www.unicef.org/protection/57929_58012.html) on 11 December 2015.

Even though some of the States that have been discussed above; Kenya and Canada are party to the protocol and the principles, there is hesitation in raising the MACR. This may be because the atrocities that children are accused of are so grave that it would be absurd to apply less stringent measures on them.

The discussion above reveals that there is no universally accepted MACR, and this presents another complexity to the conflict between the Refugee Convention and the CRC. It would definitely be in the best interests of the child if the MACR is set at a standard age of 18.

### *iii. The standard of proof of Article 1F(a)*

The introductory line of Article 1F of the Refugee Convention provides that; ‘The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* that...’ The interpretation of the legal threshold of ‘serious reasons for considering’ varies from one state to another. For instance, for the Canadian courts, mere membership in an organisation linked to acts of violence is sufficient to show that there are serious reasons for considering that the asylum seeker committed the prohibited crimes.<sup>166</sup> Thereafter, the Court moved away from ‘mere membership’ and held that an asylum seeker’s knowledge of acts of violence could amount to serious reasons for considering that they committed the prohibited crimes.<sup>167</sup>

In the UK, courts have held that the burden of proof is discharged when it is proven that a person voluntarily contributed to an organisation’s ability to pursue its purpose of committing war crimes and was aware that their assistance would in fact further that purpose.<sup>168</sup> The Dutch courts, on the other hand, have taken a different approach in requiring that an asylum seeker’s personal responsibility for the commission of the crimes alleged must be assessed.<sup>169</sup>

In conclusion, the lack of a uniform interpretation of the legal threshold is not in the best interests of the child. There is a need to reach a common ground as to its interpretation.

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<sup>166</sup> *Ramirez v Minister of Employment and Immigration.*

<sup>167</sup> *Saridag v Canada* (Minister of Employment and Immigration), [1995] 1 F.C.

<sup>168</sup> [2010] UKSC 15, 123.

<sup>169</sup> European Council on Refugees and Exiles - Country Report 2004 – Netherlands, 9.

## VI. Recommendations and Conclusion

### *i. Recommendations*

These recommendations are based on the finding that the current application of the exclusion clause by states to child soldiers seeking asylum is against the best interests of the child. The following are the recommendations for the exclusion clause to uphold the best interests of child soldiers.

#### a. Universally accepted MACR

The CRC is the most ratified human rights treaty.<sup>170</sup> If the members agree on a common MACR, it could be termed as universally accepted and would apply to all except the USA, which is the only non-state party. This will encourage a uniform application of Article 1F (a) that will endorse the BIP. A uniform MACR would help in achieving the purpose of article 1F (a) of ensuring that persons who have committed the crimes are held legally accountable for their acts.

#### b. Need for higher standard of proof

The standard of proof set by Article 1F (a) is higher than a balance of probabilities but lower than beyond reasonable doubt.<sup>171</sup> UNHCR stated that reliable, credible and convincing evidence going beyond mere suspicion is required to demonstrate that there are ‘serious reasons for considering’ that individual responsibility exists.<sup>172</sup> They further add that it is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met.<sup>173</sup>

The above requirements are uncertain and leave a lot of room for discretion of a court. This would not be in the best interests of a child soldier as they are more of subjective than objective and there would be little or no room for their participation in the litigation process that is complex. Furthermore, most child soldiers would arrive at host countries unaccompanied as they have been separated from their parents or their legal/customary caregivers, thus, they have no guidance during the review of their asylum application. There is need to raise

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<sup>170</sup> CRC, ‘Frequently asked questions’ [www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) on 29 December 2015.

<sup>171</sup> UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

<sup>172</sup> UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

<sup>173</sup> UNHCR, Criminal Justice and Immigration Bill, Briefing of the House of Commons at Second Reading, July 2007, 5.

the legal threshold of Article 1F(a) to reflect the current standards in international criminal law. Nonetheless, this acknowledges that a higher burden of proof will discourage states from taking up such cases.

*ii. Conclusion*

In conclusion, Article 1F(a) of the Refugee Convention has been used by States to exclude child soldiers, who are alleged to have committed atrocious crimes, from the benefits of refugee status. Different courts of law have interpreted and applied the exclusion clause differently to child soldiers. The issue of the application of the exclusion clause has been compounded by the uncertainty of what the BIP entails. It has emerged that the current application of the exclusion clause to child soldiers seeking asylum is against the BIP. In order for the BIP to be upheld, it is necessary that states agree on a uniform MACR and to revise the legal threshold of the exclusion clause to reflect the legal threshold in international criminal law.