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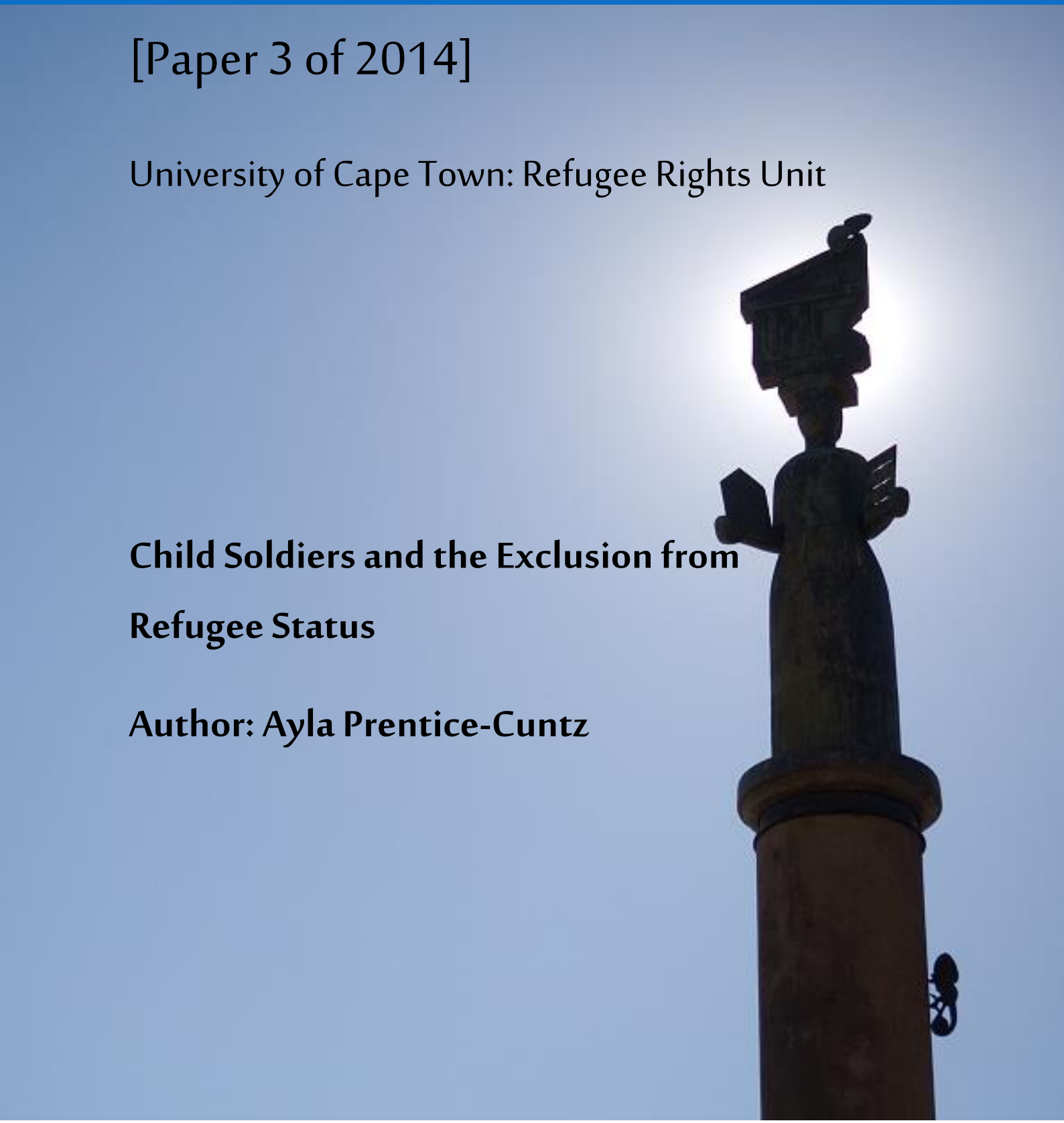

Child Soldiers and the Exclusion from Refugee Status

Author: Ayla Prentice-Cuntz

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Ayla Prentice-Cuntz
PRNAYL001
University of Cape Town
Refugee & Human Rights

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Child Soldiers and the Exclusion from Refugee Status

Under Article 1A of the United Nations 1951 Convention Relating to the Status of Refugees (henceforth "the Convention"), asylum seekers who have a well-founded fear of persecution based on the exhaustive[1] reasons of race, religion, nationality, membership of a particular social group or political opinion can generally be recognized as refugees by the relevant authorities. However, States are not obliged to do so if the person concerned falls under the so-called "exclusion clause" contained in Article 1F of the Convention. This provision stipulates that anyone with respect to whom there are serious reasons for considering that he has committed (a) an international crime or (b) a serious non-political crime, or (c) that he has been guilty of acts contrary to the purposes and principles of the United Nations (henceforth "UN") can be excluded from refugee status even though he would fall under the definition contained in Article 1A; meaning that he would fear persecution if returned to his country of origin. Determining whether an asylum seeker falls under the exclusion clause is a difficult procedure and requires diligent research because of the grave consequences resulting from the exclusion from refugee status for the applicant. The impact of this decision becomes even more serious when the applicant is a minor falling under one of the enumerated reasons for exclusion, such as a child soldier. Children taking part in armed conflicts often do commit or assist in committing war crimes and/or crimes against humanity. On the face of it, it would seem that child soldiers should therefore be excluded from refugee status because they would fall under Article 1F(a). However, it should be considered whether child soldiers, although having committed atrocities, are the victims rather than perpetrators[2] of such crimes. This paper seeks to answer the question whether child soldiers who committed war crimes and/or crimes against humanity can and should be excluded from refugee status in the sense of Article 1F. In the following, I will first give a brief overview of the concept of

[1] UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003) par. 3.
[2] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1135.

child soldiers, secondly I will explain the relevant international humanitarian law rules, followed by an examination of exclusion under Article 1F. Lastly, I will first apply Article 1A to the concept of child soldiers in order to see if, generally, they could be included as refugees and then look into Article 1F in order to see if they could be excluded from refugee status.

Child Soldiers

The concept of child soldiers is, unlike in some scholars' view[3], with the proportions it has reached a historically unprecedented phenomenon[4]. However, the loopholes in the legal sphere pertaining to this new concept of child soldiers are being filled[5] by various international instruments mentioned below. The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups[6] defines child soldiers in paragraph 2.1 as any person under 18 recruited by an armed force/group in any capacity. This means that not only actual fighters, but also cooks and messengers used by the armed force fall under this category. In times of armed conflict, armed forces or groups often resort to enlisting child soldiers. Reasons for this are, among others, because children are considered to be easier to condition[7], more manipulative and vulnerable. In addition to that, however, child soldiers also represent a cheaper option for armed forces or groups than adult soldiers because they eat less[8]. Moreover, a child's underdeveloped sense of fear makes it easier for the armed group to send him or her into combat[9]. Although the recruitment is sometimes actively sought by children, many are brutally abducted and forced to work for the armed force or group[10]. It has been estimated that there are about 250,000 child soldiers in the world, 40% of which are girls usually serving as sex slaves[11]. It is out of question that these children are subjected to immensely damaging conditions physically as well as mentally. Many of them are forced to partake in military operations and commit atrocities against their own people[12], often against their own families[13]. The relevant provisions pertaining to child soldiers are found in International Humanitarian Law (henceforth "IHL"), International Criminal Law (henceforth "ICL") and International Human Rights Law (henceforth "HRL"). Despite the fact

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[3] Wessels M 'How We Can Prevent Child Soldiering' (2000) 12(3) *Peace Review* 407.
[4] Fox M 'Child Soldiers and International Law: Patchwork Gains and Conceptual Debates' (2005) 7(1) *Human Rights Review* 27 at 28.
[5] Ibid at 45.
[6] Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (as adopted by UN General Assembly Resolution 48/134 1993).
[7] War Child 'Child Soldiers' available at http://www.warchild.org.uk/issues/child-soldiers [accessed on 19 May 2014].
[8] Ibid.
[9] Ibid.
[10] International Committee of the Red Cross 'Children Associated with Armed Forces or Armed Groups' available at http://www.icrc.org/eng/assets/files/publications/icrc-002-0824.pdf [accessed on 19 May 2014].
[11] War Child 'Child Soldiers' available at http://www.warchild.org.uk/issues/child-soldiers [accessed on 19 May 2014].
[12] Plante J 'The Children of War' available at http://www.du.edu/korbel/hrhw/researchdigest/slavery/children.pdf [accessed on 19 May 2014].
[13] UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers' available at http://www.refworld.org/pdfid/440eda694.pdf [accessed on 30 May 2014].

that the Paris Principles set the threshold age at 18, the recruitment of all children under the age of 15 is prohibited by other international law instruments: Article 77(2) of the Additional Protocol I to the Geneva Conventions[14] (henceforth "AP I") and Article 4(3)(c) of the Additional Protocol II[15] (henceforth "AP II") make the enlisting of child soldiers in international as well as non-international armed conflicts unlawful. From an ICL perspective, the Rome Statute[16] criminalizes the recruitment of children under the age of 15 in international armed conflicts under Article 8(2)(b)(xxvi) and in non-international armed conflicts under Article 8(2)(d)(vii). Other international instruments prohibiting the use of child soldiers are the Statute of the Special Court of Sierra Leone[17] (in Article 7) and the ILO Convention on Worst Forms of Child Labor (in Article 3(a)). In the case *Prosecutor v Norman, Fofana and Kondewa*, the Special Court for Sierra Leone (henceforth "SCSL") decided that this provision on child soldiers was already existent under customary international law before it was included in the Rome Statute[18]. This means that the prohibition on recruitment of children under 15 is binding on all States, even those that are not party to either of the mentioned treaties. Article 38(2) of the Convention on the Rights of the Child[19] (henceforth "CRC") contains the same provision. It is noteworthy that the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict makes illegal in Articles 2 and 4 the recruitment of any children under the age of 18. However, it is possible for children under the age of 18 to join the State's national armed forces if done so voluntarily under Article 3(3). The Rome Statute, in Article 8, makes the enlisting of child soldiers under the age of 15 a war crime and thus attaches individual criminal responsibility to it. It is further noteworthy that in Article 26, the Rome Statute only allows for prosecutions of persons who were not under the age of 18 at the time that the crime was committed. Nevertheless, for the purpose of this paper, the atrocities committed by the child soldiers themselves have to be looked at in order to determine whether former child soldiers can be excludable under Article 1F.

Child Soldiers as Refugees?

In its preamble, the CRC recognizes that the child needs safeguards and special care due to his or her physical and mental immaturity. Not only need children be protected because of their immaturity, but also because they are very vulnerable and dependent on adults. It has been acknowledged that refugee

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977).
[15] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (1977).
[16] Rome Statute of the International Criminal Court (1998).
[17] UN Security Council 'Statute of the Special Court for Sierra Leone' (2002) available at http://www.refworld.org/docid/3dda29f94.html [accessed on 11 June 2014].
[18] *Prosecutor v Norman, Fofana and Kondewa* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-04-14-AR72(E) (31 May 2004).
[19] Office of the High Commissioner for Human Rights 'Convention on the Rights of the Child' (1989) available at http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf [accessed on 11 June 2014].

children are even more so vulnerable and in need of assistance and special care[20] because they find themselves in a foreign area away from home. In respect of refugee claims, under Article 22 of the CRC States are required to provide appropriate protection and humanitarian assistance for refugee children, whether accompanied or not. The 1951 Convention in Article 1A stipulates that the conditions for the determination of refugee status applies to "any person" and hence does not distinguish between adults and children. It thus seems that children, generally, can easily be recognized as refugees provided that the conditions contained in Article 1A are satisfied: the child has to have a well-founded fear of being persecuted in his/her State of origin based on his/her race, religion, nationality, membership of a particular social group or political opinion and he/she cannot or is unwilling to avail him-/herself of the protection of that country. The difficulty that arises with respect to child soldiers is that they might fall under the exclusion clause contained in Article 1F due to the atrocities committed. News and NGO reports provide us with some ideas of the atrocities child soldiers are made to commit: for example the killing of 240 people residing in a refugee camp in Uganda[21] or beheadings, amputations, rape, and burning people alive[22]. Usually, the child soldiers are given drugs to overcome their fear[23] or become more brutal in their fighting. Because of the heinous measures used by armed forces and groups to recruit children, the Paris Principles mentioned above state in paragraph 3.6 that child soldiers should be viewed primarily as victims and not as perpetrators. This paragraph also emphasizes the importance of restorative justice and social rehabilitation which should be at the heart of the prosecution of a child. It has been argued that children should never be subject to the exclusion clause contained in Article 1F[24]. However, when looking at Articles 31 and 32 of the Vienna Convention on the Law of Treaties, it becomes apparent that such a reading will not find much acceptance since it is contrary to the wording and drafting history of Article 1F[25]. Moreover, State practice shows that children already have been subjected to the exclusion clause and have been, as a result, excluded from refugee status[26]. In the following, after a brief overview of exclusion clauses, it will be examined under which conditions child soldiers can be included as refugees under Article 1A and thereafter, in the case of an affirmative result, whether they can be excluded under Article 1F. In so doing, the principle of inclusion before exclusion articulated by the UNHCR in its

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[20] Human Rights Watch 'Promises Broken' An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child, (1999). Available at http://www.hrw.org/legacy/press/1999/nov/children.htm [accessed on 21 May 2014].
[21] Macrae C 'Killed in the Name of the Lord' News Article for The Guardian Website, (2004). Available at http://www.theguardian.com/world/2004/feb/29/theobserver1 [accessed on 21 May 2014].
[22] Human Rights Watch 'Promises Broken' An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child, (1999). Available at http://www.hrw.org/legacy/press/1999/nov/children.htm [accessed on 21 May 2014].
[23] Ibid.
[24] Kingsley Niynah M 'Exclusions Under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 *International Journal of Refugee Law* 295 at 308.
[25] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1136.
[26] UNHCR 'The Exclusion Clauses: Guidelines on Their Application' Report Prepared for the Facilitation of the Application of Exclusion Clauses, (1996) 3.

Guidelines on the Application of Exclusion Clauses will be adhered to: paragraph 31 states that inclusion should generally be considered before exclusion, "but there is no rigid formula". It further explains that exceptions to this principle are (i) existence of an indictment of an international tribunal, (ii) evidence pointing strongly to the applicant's involvement in the commission of a crime enumerated in Article 1F, and (iii) "at the appeal stage in cases where exclusion is the question at issue".

The Exclusion Clause

Paragraph 7(d) of the 1950 UNHCR Statute, Art. I(5) of the 1969 OAU Convention and Art. 1F of the 1951 Convention oblige States and UNHCR to deny refugee status to certain individuals who would otherwise qualify as refugees. This means that the principle of *non-refoulement* under Article 33 of the Convention becomes unavailable[27] to those applicants that are excluded and can lawfully be sent back to his or her country of origin although they might be persecuted there. The two aims that this provision seeks to achieve are according to the *travaux prépartoires*: (i) the protection of the refugee status from abuse by excluding individuals undeserving of its benefits and (ii) to fight impunity by ensuring that the individual concerned cannot avoid prosecution by receiving asylum in another State[28]. Because of the serious consequences resulting from exclusion the UNHCR has explained that the exclusion clauses should always be interpreted in a restrictive manner[29] . However, States have shown an increased interest in exclusion of refugee status[30] and the Michigan Guidelines on the Exclusion of International Criminals warn against States misapplying Article 1F because of the failure to take into account the continuous evolution that ICL has been going through[31]. The New Zealand Refugee Status Appeal Authority excluded former child soldiers on the ground that there was evidence proving the cessation of systemic recruitment of children[32]. For the purpose of this paper, only Article 1 F(a) will be examined and explained in the following. The temporal scope of Article 1F(a) covers crimes whenever and wherever committed[33]. Article 1F(a) lists three different international crimes: crimes against peace, war crimes and crimes against humanity. These crimes are easiest to define by

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[27] Geoff G 'Current Issues in the Application of the Exclusion Clauses' Paper Commissioned by the UNHCR as a Background Paper for an Expert Roundtable Discussion on Exclusion Organized as Part of the Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, (2001) 1.
[28] Ibid at 2.
[29] UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003) par. 2.
[30] Geoff G 'Current Issues in the Application of the Exclusion Clauses' Paper Commissioned by the UNHCR as a Background Paper for an Expert Roundtable Discussion on Exclusion Organized as Part of the Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, (2001) 5.
[31] Sixth Colloquium on Challenges in International Refugee Law 'The Michigan Guidelines on the Exclusion of International Criminals' Guidelines Reflecting the Consensus of Colloquium Participants on How Decision Makers Can Best Ensure the Application of Article 1(F)(a) in a Manner that Conforms to International Legal Principles, (2013) preamble.
[32] New Zealand Refugee Status Appeal Authority *Appeal No. 76125* (2008) par. 50.
[33] UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003) par. 5.

looking at the international criminal tribunals' Statutes, most importantly the International Criminal Court's (henceforth "ICC") Rome Statute.

Crimes against Peace

Although the Convention lists this crime first, it is definitely the most uncertain international crime since there is no one accepted definition to it[34]. It is to be found in Article 5(b) as one of the crimes that the ICC has jurisdiction over and is explained further in Article 8 *bis*. It differs from the other crimes in that it is connected to the unlawful act of a State[35]. The UN General Assembly sought to define the crime of aggression in its resolution 3314 (XXIX) of 14 December 1974 in which it states that the crime of aggression is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter or the United Nations" (Article 1). The last example of a use of armed force clearly represents a catch-all provision and in Article 4 the General Assembly recognizes that the acts listed in the resolution are not exhaustive. On 11 June 2010, the Review Conference of the Rome Statute decided in Kampala that the ICC will not be able to exercise jurisdiction over the crime of aggression until after 1 January 2017[36]. Since no accepted definition is available for this crime, it remains uncertain[37] whether this crime can actually be committed and whether an applicant can be excluded from refugee status on this basis since Article 1F(a) reads "as defined in the international instruments drawn up to make provision in respect of such crimes". It is further highly unlikely that a child soldier could be committing this crime since it is usually committed by perpetrators in leadership positions in States[38].

War Crimes

Article 8 of the Rome Statute lists examples of acts constituting war crimes in international and non-international armed conflicts, such as wilful killing, torture, inhuman treatment or destruction and appropriation of property. The acts understood as war crimes are violations of IHL (also known as the laws and customs applicable in armed conflict) which give rise to individual criminal responsibility[39]. What is essential for the determination of a crime as a war crime is its *nexus* to an armed conflict[40] - the ICC Elements of Crimes require the crime to be committed "in the context of and associated with"

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[34] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 312.
[35] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 312.
[36] Coalition for the International Criminal Court 'The Crime of Aggression' available at http://www.iccnow.org/?mod=aggression [accessed on 25 May 2014].
[37] Geoff G 'Current Issues in the Application of the Exclusion Clauses' Paper Commissioned by the UNHCR as a Background Paper for an Expert Roundtable Discussion on Exclusion Organized as Part of the Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, (2001) 6.
[38] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 318.
[39] Ibid at 267.
[40] Ibid at 279.

and armed conflict[41]. War crimes can be isolated acts and may be prosecuted by the ICC as long as they are of sufficient gravity[42].

Crimes against Humanity

The aspect that separates international crimes from "normal", national crimes is the contextual element[43] – whereas war crimes, for example, have to contain a *nexus* to an armed conflict, crimes against humanity must be part of a widespread or systematic attack directed against a civilian population. Article 7 of the Rome Statue contains this requirement and lists as *actus reus*, among others, murder, torture or rape. One isolated act can constitute a crime against humanity, as long as it is part of the widespread or systematic attack[44]. The accused need not be the architect of an a crime against humanity or part of the State – if any group launches a killing campaign and the accused commits torture in the execution of that campaign, he or she is guilty of the crime against humanity of torture[45].

Child Soldiers under Article 1A

Article 1A of the Convention requires for the applicant to have a well-founded fear of persecution and must find itself outside his or her State of origin in order to successfully apply for refugee status. The concept of well-founded fear has been defined by a US Board of Immigration Appeals to mean a "realistic likelihood [the applicant] will be persecuted upon his return to a particular country"[46]. James Hathaway contents that the term "fear" implies a prospective assessment of risk and not an examination of the applicant's emotional reaction[47]. Hathaway further states that the definition contains a rather objective test than a subjective one[48] and that circumstantial evidence of persons similarly situated to the applicant may establish the foundation for a well-founded fear[49]. The requirement of being persecuted implies a form of serious harm that the applicant experiences or has reasonable grounds to believe that he or she will experience in his or her State of origin which the government cannot or will not prevent[50]. James Hathaway defines persecution as "the sustained or systemic violation of basic human rights demonstrative of a failure of State protection"[51]. It has further been recognized that the violation of an applicant's civil and political rights (which child soldiers

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[41] See e.g. Article 8(2)(a)(1) ICC Elements of Crimes.
[42] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 289.
[43] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 230.
[44] Ibid at 243, see also *Prosecutor v Kunarac et al* (Judgment) IT-96-23 and IT-96-23/1 (12 June 2002) par. 96 and *Prosecutor v Blaškic* (Judgment) IT-95-14/1-A (29 July 2004) par. 101.
[45] Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) 244.
[46] *Matter of Acosta* (In Deportation Proceedings) A-24159781 (1 March 1985).
[47] Hathaway J *The Law of Refugee Status* (1991) 66.
[48] Ibid at 69.
[49] Ibid at 89.
[50]Ibid at 105.
[51] Ibid at 105.

would most probably be exposed to) will always constitute a risk of persecution[52]. As mentioned above, Article 1A lists five exhaustive grounds of persecution. For the purpose of this paper, I will only focus on the ground of membership of a particular social group since it is the one child soldiers will be most likely to base a successful claim on (see below). The American Board of Immigration Appeals defined persecution on grounds of membership of a particular social group in the *Matter of Acosta* case as an individual being persecuted because he/she is a member of a group of persons "all of whom share a common, immutable characteristic" which might be innate but the Board emphasized that the members of the group share a common characteristic that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences"[53]. The Australian Refugee Review Tribunal decided that membership of a particular social group is established where forcible recruitment happens because the applicant is identifiable as being a member of that group[54]. It is also noteworthy that a US Court of Appeals held that the inclusion under membership of a particular group does not count for past, only future persecution[55].

In the following, I will apply these provisions on a child soldier applying for asylum in a country which is not his State of origin. The requirement of a well-founded fear would have to be determined on a case-by-case basis; it is almost impossible to assess the reasonableness of a fear of a prospective risk on a general basis. Child soldiers could come from various different countries and different situations. However, it seems likely that children who are liable to be recruited by armed forces or groups can prove a well-founded fear because they could show that other children similarly situated are forcibly recruited in his or her State of origin. In the case of a former child soldier, a realistic likelihood of persecution could be established by the fact that because of the atrocities committed, they are often objects of hatred and suspicion[56]. The requirement of persecution, on the other hand, is much easier to satisfy. Former child soldiers have a range of possibilities to substantiate their grounds of persecution. It has been mentioned above that the violation of one's civil and political rights will always amount to persecution. The forcible recruitment of children under eighteen or the recruitment *per se* of any child under fifteen[57] has been defined as a form of slavery[58] which is, according to the International Covenant on Civil and Political Rights Article 8 a violation of one's civil and political rights. In addition to that, the Paris Principles in paragraph 5.3 state that unlawful recruitment or use of children can constitute one of the forms of persecution. The persecution feared could successfully be

[52]Ibid at 112.
[53] *Matter of Acosta* (In Deportation Proceedings) A-24159781 (1 March 1985) par. 10.
[54] Refugee Review Tribunal Australia *Decision No. 071959605* (2008) 29.
[55]*Bernard Lukwago v Attorney General of the United States* (Petition for Review of an Order of the Board of Immigration Appeals) No. 02-1812 (14 May 2003) United States Court of Appeals for the Third Circuit page 16.
[56] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1141.
[57] Ibid at 1140.
[58] International Labor Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention #182) Article 3(a).

based on the ground of being a member to a particular social group. This counts for potential child soldiers as well as former child soldiers seeking asylum: potential child soldiers belong to the social group of children from a specific region who are potential recruits[59] and who share a common characteristic which they cannot change voluntarily – only time can transform them into adults[60]. Former child soldiers, on the other hand, share a common immutable characteristic, namely a shared personal experience[61].

This analysis shows that (potential as well as former) child soldiers can successfully fall under the Article 1A definition of a refugee. However, the next subsection seeks to examine whether those that are included can be excluded from refugee status under Article 1F.

Child Soldiers under Article 1F

Article 1 F applies to "any person" and thus does not distinguish between adults and children[62]. It would therefore seem that children can, *prima facie*, fall under Article 1F. However, all action concerning refugee children has to be taken in accordance with the principle of the best interests of the child[63] and the following rules and conditions apply.

As explained above, the international crimes that have to be taken into consideration in this aspect are war crimes and crimes against humanity. At first glance, it would seem that child soldiers who have committed war crimes and crimes against humanity would be excludable under Article 1F(a) of the Convention. However, several defenses for exclusion apply to child soldiers. The first defense I will examine is the one of infancy[64]. It is of central importance to assess whether the child has the necessary mental capacity to commit the excludable act[65]. According to the UN Guidelines, Article 1F can only be applied to children having reached the age of criminal responsibility under international/national law at the time of the commission of the excludable crime[66]. Article 40 of the CRC, requires States to set a minimum age for criminal responsibility but the minimum ages range from 7 to 18 years in different jurisdictions[67]. However, although Article 26 of the Rome Statute sets the minimum age for criminal responsibility at 18 years, it simply excludes the Court's jurisdiction,

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[59] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1141.
[60] Ibid at 1142.
[61] Ibid at 1143.
[62] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1135.
[63] Executive Committee on Refugee Children, UNHCR 'Refugee Children' Report by the Executive Committee on International Protection of Refugees, (1987) par. 205.
[64] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1146.
[65] UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers' available at http://www.refworld.org/pdfid/440eda694.pdf [accessed on 30 May 2014].
[66] UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', (2009) par. 60.
[67] Ibid at par. 60.

thus leaving the treatment of child soldiers to national courts[68]. For those applicants over that age limit, or where no such limit exists, the mental capacity of the child has to be assessed[69]. In establishing the child's mental capacity, the child's emotional, mental and intellectual development has to be assessed[70]. This determination focuses on whether the child was sufficiently mature to understand the nature and consequences of his/her act[71]. After having established mental capacity, other defenses have to be considered; namely whether the child acted under duress, coercion or in defense of self or others[72]. As described above, often child soldiers are involuntarily drugged. Many recruiters of child soldiers threaten the children with death or torture directed against them or a family member[73]. In order to determine whether the child acted under duress or coercion, additional factors such as the reasons why he/she joined and left the armed forces or group, the consequences of refusal to join and the level of understanding of the events in question have to be taken into account[74]. Should the relevant authority find that individual responsibility exists, the proportionality of exclusion from refugee status to the seriousness of the act committed has to be determined[75]. This determination is done by "a weighing of the gravity of the offense against the degree of persecution feared upon return"[76]. In connection to child soldiers, factors to be considered include ill-treatment by military personnel and circumstances during service[77].

The required standard of proof for the exclusion of applicants in general is that of "serious reasons for considering" – a lower threshold than "beyond reasonable doubt" but a higher threshold than "balance of probabilities"[78]. In exclusion procedures, the burden of proof is on the State/UNHCR to justify the

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[68] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1154.
[69] UNHCR 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' available at file:///C:/Users/sauberberg/Desktop/UNHCR%20Background%20Note%20on%20Exclusion.pdf [accessed on 31 May 2014] par. 91.
[70] UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers' available at http://www.refworld.org/pdfid/440eda694.pdf [accessed on 30 May 2014].
[71] UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', (2009) par. 64(i).
[72] Ibid at par. 64(ii).
[73] UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers' available at http://www.refworld.org/pdfid/440eda694.pdf [accessed on 30 May 2014].
[74] UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', (2009) par. 64(ii).
[75] Ibid at par. 64(iii).
[76] Ibid.
[77] Ibid.
[78] UNHCR 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' available at file:///C:/Users/sauberberg/Desktop/UNHCR%20Background%20Note%20on%20Exclusion.pdf [accessed on 31 May 2014] par. 107.

exclusion[79]. However, the burden of proof may be reversed where the applicant has been indicted by an international tribunal, creating a rebuttable presumption of excludability[80].

Conclusion

Should a former child soldier seeking asylum after an examination of all of the above mentioned factors still be excludable under Article 1F, paragraph 5.4 of the Paris Declaration becomes relevant. Paragraph 5.4 states that children must not be returned in any manner to the borders of a State where there is a real risk of unlawful recruitment or re-recruitment. This means that even where a child is being excluded from refugee status, the State has to take all possible measures to avoid *refoulement* of the child. Additionally, although refugee status may not be available to certain applicants, HRL is still relevant and protects the excluded applicant from being returned to a country where he or she would for example be subjected to torture[81]. However, although a State may not be able to return a child soldier to his or her State of origin, war crimes and crimes against humanity give rise for universal jurisdiction and there is nothing preventing that State to prosecute the child soldier for those heinous crimes[82]. This author agrees with Max du Plessis in that children should primarily be viewed as victims in these kinds of situations and should therefore be treated as such by the international criminal justice system[83]. We have to recognize that children are particularly vulnerable and easy to manipulate; duress, coercion and drugs are only a few of the methods forcing children into committing atrocities. A child that has been used by armed forces or groups in an armed conflict and manages to escape and flee to another country should under all circumstances receive special care and protection from the host State. As seen above, a child under the applicable minimum age can never be excluded under Article 1F and those who are excludable should never be sent back to their State of origin where they fear persecution. A more humanitarian approach has to be taken when children ask the authorities for help and it should be acknowledged that children above the minimum age for criminal responsibility can still be coerced in the same way as minors.

[79] Ibid at par. 105.
[80] Ibid at par. 106.
[81] UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003) par. 9.
[82] Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131 at 1176.
[83] Du Plessis M 'Children Under International Criminal Law' (2004) 13(2) *African Security Review* 103 at 110.

Bibliography

Bernard Lukwago v Attorney General of the United States (Petition for Review of an Order of the Board of Immigration Appeals) No. 02-1812 (14 May 2003) United States Court of Appeals for the Third Circuit.

Coalition for the International Criminal Court 'The Crime of Aggression' available at http://www.iccnow.org/?mod=aggression [accessed on 25 May 2014].

Cryer R, Friman H, Robinson D & Wilmshurst E *An Introduction to International Criminal Law and Procedure (*2010) Cambridge University Press, New York.

Du Plessis M 'Children Under International Criminal Law' (2004) 13(2) *African Security Review* 103.

Executive Committee on Refugee Children, UNHCR 'Refugee Children' Report by the Executive Committee on International Protection of Refugees, October 1987.

Fox M 'Child Soldiers and International Law: Patchwork Gains and Conceptual Debates' (2005) 7(1) *Human Rights Review* 27.

Geoff G 'Current Issues in the Application of the Exclusion Clauses' Paper Commissioned by the UNHCR as a Background Paper for an Expert Roundtable Discussion on Exclusion Organized as Part of the Global Consultations on International Protection in the Context of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, 2001.

Happold M 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' (2002) 17(6) *American University International Law Review* 1131.

Hathaway J *The Law of Refugee Status* (1991) Cambridge University Press, Cambridge.

Human Rights Watch 'Promises Broken' An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child, (1999). Available at http://www.hrw.org/legacy/press/1999/nov/children.htm [accessed on 21 May 2014].

International Committee of the Red Cross 'Children Associated with Armed Forces or Armed Groups' available at http://www.icrc.org/eng/assets/files/publications/icrc-002-0824.pdf [accessed on 19 May 2014].

International Labor Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention #182).

Kingsley Niynah M 'Exclusions under Article 1F: Some Reflections on Context, Principles and Practice' (2000) 12 *International Journal of Refugee Law* 295.

Macrae C 'Killed in the Name of the Lord' News Article for The Guardian Website, (2004). Available at http://www.theguardian.com/world/2004/feb/29/theobserver1 [accessed on 21 May 2014].

Matter of Acosta (In Deportation Proceedings) A-24159781 (1 March 1985).

New Zealand Refugee Status Appeal Authority *Appeal No. 76125* (2008) par. 50.

Office of the High Commissioner for Human Rights 'Convention on the Rights of the Child' (1989) available at http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf [accessed on 11 June 2014].

Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (as adopted by UN General Assembly Resolution 48/134 1993).

Plante J 'The Children of War' available at http://www.du.edu/korbel/hrhw/researchdigest/slavery/children.pdf [accessed on 19 May 2014].

Prosecutor v Blaškic (Judgment) IT-95-14/1-A (29 July 2004).

Prosecutor v Kunarac et al (Judgment) IT-96-23 and IT-96-23/1 (12 June 2002).

Prosecutor v Norman, Fofana and Kondewa (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-04-14-AR72(E) (31 May 2004).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977).

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (1977).

Refugee Review Tribunal Australia *Decision No. 071959605* (2008) 29.

Rome Statute of the International Criminal Court (1998).

Sixth Colloquium on Challenges in International Refugee Law 'The Michigan Guidelines on the Exclusion of International Criminals' Guidelines Reflecting the Consensus of Colloquium Participants on How Decision Makers Can Best Ensure the Application of Article 1(F)(a) in a Manner that Conforms to International Legal Principles, University of Michigan Law School, March 2013

UNHCR 'Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers' available at http://www.refworld.org/pdfid/440eda694.pdf [accessed on 30 May 2014].

UNHCR 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' available at file:///C:/Users/sauberberg/Desktop/UNHCR%20Background%20Note%20on%20Exclusion.pdf [accessed on 31 May 2014].

UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', (2003).

UNHCR 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', (2009).

UNHCR 'The Exclusion Clauses: Guidelines on Their Application' Report Prepared for the Facilitation of the Application of Exclusion Clauses, (1996).

UN Security Council 'Statute of the Special Court for Sierra Leone' (2002) available at http://www.refworld.org/docid/3dda29f94.html [accessed on 11 June 2014].

War Child 'Child Soldiers' available at http://www.warchild.org.uk/issues/child-soldiers [accessed on 19 May 2014].

Wessels M 'How We Can Prevent Child Soldiering' (2000) 12(3) *Peace Review* 27.