War Crimes relating to child soldiers and other children that are otherwise associated with armed groups in situations of non-international armed conflict.
An incremental step toward a coherent legal framework?

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1. Introduction

This essay will explore how a legal and conceptual framework on child soldiers can be built on the loose coordination of different fields of international law, such as international humanitarian law (IHL), international human rights law (IHRL), and international criminal law. It will analyse how effectively such a 'legal patchwork' can meet the challenge posed by a number of novel (or often side-lined) issues relating to child soldiers or other children who are associated with non-state armed groups in the context of non-international armed conflict (NIAC).

The paper starts with making general inquiries into two conceptual issues in Section Two: how the recruitment of foreign child fighters in NIAC is encompassed within the normative framework of IHL and international criminal law; and the types of activities that constitute the proscribed form of the ‘use’ of children under the age of 15. Section Three explores issues of release and repatriation of child soldiers and

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1 The UNICEF-led Paris Principles (2007) define ‘a child associated with an armed force or armed group’ as 'any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes'. It confirms this wider meaning associated with support-based activities, adding that 'It does not only refer to a child who is taking or has taken a direct part in hostilities'. 'Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' (2007) 7 available at <www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>. See also ICRC, ‘Children Associated with Armed Forces or Armed Groups’ available at <www.icrc.org/en/publication/0824-children-associated-armed-forces-or-armed-groups>. QIL, Zoom-in 60 (2019) 25-48
children otherwise associated with an armed group. Section Four briefly questions if one can conceive the idea of ‘child mercenaries’ in NIAC. Section Five turns to specific issues affecting girl soldiers and foreign minor brides in NIAC, including sexual and gender-based violence (SGBV). Section Six analyses the question of the age below which the recruitment of children should be interdicted.

2. The legal framework of IHL and International Criminal Law in relation to the recruitment and the use of children in the context of NIAC

2.1. Recruitment of foreign child fighters in NIAC

When issues of child soldiers are compared with the more general perspective of (forced or voluntary) recruitment of persons of adult age, it comes to light that the IHL on NIAC lacks any pertinent rule. This is the case for recruitment both into armed forces of the national government and into an armed group. The ban on conscripting, enlisting or using children under the age of 15 constitutes the only notable exception.

The ongoing NIACs around the world reveal the heterogeneous nature of issues relating to ‘child soldiers’ or children who are otherwise associated with (or gruesomely exploited by) armed groups. One such key issue is the recruitment and use of foreign child fighters by a non-state armed group (and by private military/security companies). The concept of recruitment, which is employed in Additional Protocol I of 1977 (AP I) and Additional Protocol II of 1977 (AP II), is not the term

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2 There is no ban on inducing or propagating civilians to enlist voluntarily the armed forces of a state or the armed group. There is no rule of IHL that forbids recruitment or voluntary enlistment of any person (civilians or detained fighters). See S Darcy, To Serve the Enemy – Informers, Collaborators and the Laws of Armed Conflict (OUP 2019 forthcoming) Ch 2.

3 Committee of the Rights of the Child, ‘Concluding Observations on the report submitted by Morocco under article 8, paragraph 1 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol to the CRC)’ (13 November 2014) UN Doc CRC/C/OPAC/MAR/CO/1, section IV.

4 Additional Protocol I, art 77(2).

5 Additional Protocol II, art 4(3)(c).
used in the Rome Statute of the International Criminal Court (Rome Statute) which prefers the two words ‘conscription’ and ‘enlistment’. According to the Trial Chamber of the International Criminal Court (ICC) in *Lubanga*, recruitment consists of two forms, ‘conscription’ and ‘enlistment’. While the former pertains to forcible recruitment, the latter denotes voluntary recruitment. Yet, the assessment of the precise nature of ‘voluntariness’ is inevitably relative and ought to be contextual, with due regard to sensitivities to the primordial interests of the children, their gender and other considerations (such as the age being infant or teens, health conditions, and disability). It may well be that such children ‘voluntarily’ enlist in an armed group with the encouragement of their families or community. Similarly, voluntariness is dubious when an armed group (or an armed force) recruits or press-gangs children by taking advantage of the plight of their family circumstances (as when they are orphaned or ostracised). It may well be that children are refugees or internally displaced persons. Recruitment in such circumstances verges on the term ‘conscription’ which entails an element of compulsion. Clearly, this element is present in the case of abduction. Further, it should be noted that conscription into armed groups has become the reality in situations of NIAC. Starting with the premise that ‘a child’s consent cannot be a valid defence to the crime’ of enlisting children under the age of

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7. *Paris Principles* (n 1) para 7.44.

8. Ibid para 6.11.

9. SCSL, Trial Chamber, *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment (2 March 2009) (RUF Trial Judgment) para 1695 (holding that ‘either the abduction of persons for specific use within an organisation or the forced military training of persons is independently sufficient to constitute conscription, as both practices amount to compelling a person to join an armed group’).

10. The latter point is noted by S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) at 319.
there is much of a grey zone between the terms ‘conscription’ and ‘enlistment’ in case of child soldiers. Accordingly, this paper prefers to employ the more generic concept of ‘recruitment’ unless such distinction is clear-cut (as in the case of the juveniles of the age range between 15-17 years).

2.2. Types of activities that constitute the use of children under the age of 15 to participate actively in hostilities

With regard to the genres of activity that fall within the valves of the notion of ‘active participation in hostilities’, the ICC in Lubanga\textsuperscript{12} has made a nuanced differentiation of this notion from the cognate ‘direct participation in hostilities’.\textsuperscript{13} The ICC has then admitted of a wider range of support activities that amount to ‘indirect participation in hostilities’. The inclusion of a variety of support activities is consistent with the case-law of the Special Court for Sierra Leone (SCSL). This ad hoc UN tribunal has considered the term ‘active participation in hostilities’ to encompass ‘[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict’. As regards such support activities, the SCSL has referred to specific examples of ‘carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields’.\textsuperscript{14} It is plausible that such support-re-


\textsuperscript{12} ICC, Trial Chamber, \textit{Prosecutor v Thomas Lubanga Dyilo}, ICC-01/04-01/06, Judgment (14 March 2012) para 628.

\textsuperscript{13} See International Criminal Tribunal for Rwanda (ICTR), Trial Chamber, \textit{Prosecutor v Jean-Paul Akayesu}, ICTR 96-4-T, Judgment (2 September 1998) para 629 (holding that ‘direct’ and ‘active’ ‘are so similar that, for the Chamber’s purposes, they may be treated as synonymous’).

\textsuperscript{14} SCSL, Trial Chamber, \textit{Prosecutor v Brima, Kamara and Kanu}, SCSL-04-16-T, Judgment (20 June 2007) (AFRC Trial Judgment) para 736, referring to Dissenting Opinion of Justice Robertson to CDF Appeal Chamber Decision on Child Recruitment, para. 5; \textit{Prosecutor v Taylor}, SCSL-03-01-T, Judgment (18 May 2012) (Taylor Trial Judgment) para 444. See also AFRC Trial Judgment, para 1267; and Taylor Trial Judgment, para 1459 (guarding a diamond mine found to fit the notion of use in active participation in hostilities).
lated activities undertaken by child soldiers or ‘associated children’ include covert intelligence service, including the role of proxy for their parents, of spies or of (one-time or repeated) informers.

3. Release and repatriation of child soldiers and children associated with an armed group

Under IHL and international criminal law, the nationality of juvenile victims does not matter at all for the purpose of identifying the war crime of conscripting or enlisting them, or using them to participate actively in hostilities. In contrast, clearly, nationality is of special relevance to ascertaining the question of the repatriation of (former and current) child soldiers or other ‘associated children’ to their home countries. The repatriation may be considered necessary for the purpose of shielding them from the risk of violations of their human rights. Above all, they may be exposed to inhumane treatment while in captivity or to the infringement of due process guarantees when tried for offences of which they are accused. They may be the target of retaliatory attacks at the hands of the local population that feels vengeful toward the armed group. Such risk arises whether their detaining power is either a territorial government’s armed force or another armed group against which they have fought.

It may well be that child soldiers or other ‘associated children’ need to be repatriated to their home countries with a view to standing a trial for the crimes which they have committed at an age above that of liability according to their national law. In this light, it should be clarified that the option for an asylum in a third country will not avail children who have perpetrated an international crime. In accordance with Article 1F(a) of the 1951 Geneva Convention Relating to the Status of the Refugees,

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15 See Darcy (n 2) Ch 5, section 2.
16 H Cohen, R Dudai, ‘Human Rights Dilemmas in Using Informers to Combat Terrorism: The Israeli-Palestinian Case’ (2005) 17 Terrorism and Political Violence 229 at 236 (discussing also children’s indirect participation in hostilities based on their role as ‘proxy spies’ for their parents or other family members who are ‘officially’ recruited as spies by the adversary).
17 See art 77 of AP I, art 8(2)(b)(xxvi) and (e)(vii) of the Rome Statute; and art 4 of the Optional Protocol to the CRC.
18 In this respect, see the Convention on the Rights of the Child (CRC) art 40(3).
they are excluded from the status of refugees.\textsuperscript{19} Still, a caveat ought to be entered swiftly that those children should not be (threatened to be) prosecuted or punished solely for their membership of an armed group. On this score, it does not matter that in the national law of their country the group is designated as an illegal organisation.\textsuperscript{20}

In the context of international armed conflict (IAC), the repatriation of children is envisaged both for child civilian detainees under the Fourth Geneva Convention of 1949 (GC IV) and for child prisoners of war (POW) under the Third Geneva Convention of 1949 (GC III). For civilians who are interned or administratively detained in the territory of their adversary or in occupied territory, Article 132 of GC IV\textsuperscript{21} contemplates a mechanism of concluding agreements among the parties with a view to repatriating certain categories of them (above all, children, pregnant women, and mothers with infants and young children) even during the course of hostilities. With respect to the POWs, Article 118 of GC III obligates their prompt repatriation upon the cessation of active hostilities. Those POWs may include the male and female juvenile POWs of the age range between 15 and 17. The nature of this obligation is unvarnished (‘shall be…repatriated without delay…’). Article 18 GC III is unencumbered by any lenient duty implied by the expression of the kind appearing in Article 132 of GC IV (‘shall…endeavour…to conclude agreements for the release, the repatriation…’).

In contrast, the law of NIAC speaks only of the release of prisoners or detained civilians (captured either by the governmental force or by an armed group).\textsuperscript{22} The authoritative Customary IHL Study compiled by the International Committee of the Red Cross and Red Crescent (ICRC) in 2005 makes no reference to repatriation in the situations of NIAC.\textsuperscript{23}

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\textsuperscript{20} Paris Principles (n 1) para 8.7.

\textsuperscript{21} Admittedly, the obligation of this provision is limited to making an effort to reach agreements for the purpose of release, repatriation, return to places of residence or the accommodation in a neutral country of certain classes of internees with special needs (children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time).

\textsuperscript{22} AP II, art 5(4).

\textsuperscript{23} See ICRC’s Customary IHL, Rule 128 and explanator notes.
members of armed groups (as in the Al-Qaeda or ISIS) in the context of NIAC.\textsuperscript{24} Indeed, even the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 (Optional Protocol to the CRC), despite being of more recent origin, contemplates only the release of child soldiers. It falls short of mentioning the repatriation of foreign child soldiers.

Still, the 2002 Optional Protocol is crucial in extending the duty to release beyond the child soldiers deployed by the national armed forces. Article 6(3) of the Optional Protocol provides that the state parties are bound to ‘take all feasible measures to ensure’ that children recruited or used in hostilities contrary to its stipulations within their jurisdiction be released. While not explicitly mentioning armed groups, the text suggests that the state parties must discharge the positive duty to endeavour the release of the child soldiers appertaining to them. Such a positive obligation does not become moot even when a state loses its control over parts of its national territory.\textsuperscript{25} It can be suggested that even in such non-controlled areas, that territorial state is not relieved of the obligation under IHRL. For the purpose of safeguarding the civilian population from danger to their life posed by armed groups, it should take any measure to engage itself in political dialogues and negotiations with them.\textsuperscript{26} In this vein, the territorial state should do utmost to secure the release of child soldiers and other associated children not least where their right to life or freedom from ill-treatment is at risk at the hands of the armed group. Overall, in the situations of NIAC, there is no rule of IHL regulating the repatriation of foreign civilians who are associated with an armed group. This dire legal situation looms large particularly for foreign civilian children who are affiliated with an armed group either by having enlisted as fighting members or in any other way. Confronted with such normative

\textsuperscript{24} That regulatory gap relating to foreign members of armed groups in NIAC is confirmed by the text of art 47 of AP I. This provision contemplates the crime of mercenarism only in the context of IAC, albeit this is broadened to cover the special genres of internationalized armed conflicts defined in art 1 of AP I.

\textsuperscript{25} The discharge from the obligation in the case where a state has lost territorial control is envisaged in an arms-control treaty: art 5 of Amended Protocol II to the Conventional Weapons Convention (1996).

\textsuperscript{26} G Giacca, \textit{Economic, Social, and Cultural Rights in Armed Conflict} (OUP 2014) at 123. See also Human Rights Committee (HRC), ‘General Comment No. 36 (2018) on Article 6 on the International Covenant on Civil and Political Rights, on the right to life’ UN Doc CPR/C/GC/36 (30 October 2018) para 21.
lacunae concerning those foreign civilians (and *a fortiori*, concerning foreign civilian children) who are captured and detained by the governmental armed force, I suggest that the parties to NIAC should conclude a special agreement pursuant to Article 3(3) common to the Geneva Conventions of 1949 with a view to applying the relevant rules on repatriation (namely, Article 118 of GC III and Article 132 of GC IV). Failing such a special agreement, the parties to the NIAC should give effect to the relevant soft-law instruments that go beyond the obligations under IHL relating to the release of child soldiers and children otherwise associated with an armed group (and with an armed force). The Paris Principles commend the parties to the armed conflict to release those children from the armed group (or the armed force) even before hostilities cease or before the parallel process of Disarmament, Demobilisation and Reintegration (DDR) sets in motion for adults. They recommend that the release, protection and reintegration of ‘children unlawfully recruited or used’ be sought ‘at all times, without condition’. This means that in the triage process of DDR, children’s interests must come foremost. With regard to the timing of release, clearly, their release during active hostilities may be unfeasible and detrimental to the safety of the children. Even so, the Paris Principles suggest that demobilisation and release of those children be undertaken at any appropriate lull or interval of hostilities. Another crucial contribution of the Paris Principles is their gender-sensitive recommendation tailored to girl soldiers. They exhort that in whatever way girls have been associated with an armed group, when released, special regard be had to effects of their experience of having been in an armed group upon their physical, social and emotional wellbeing. The Paris Principles also highlight the need of special sensitivities to such onerous experience when ascertaining measures to facilitate their rehabilitation and social reintegration.

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27 Paris Principles (n 1) para 3.11.

28 See also ibid para 2.6 (stating that ‘release can take place during a situation of armed conflict’, and that ‘it is not dependent on the temporary or permanent cessation of hostilities’).

29 ibid para 4.0.
4. **Child mercenaries in NIAC?**

The scholarly debates on IHL have yet to coin or recognise any such inflammatory notion as ‘child mercenaries’ or ‘juvenile mercenaries’ (whether in situations of IAC or of NIAC). Yet, as provocative as this may be, the phenomenon of ‘child mercenaries’ is not a totally hypothetical scenario. Children may be lured by hefty private gains and desirous of directly participating in hostilities without becoming a member of the armed forces of a party to the conflict. Conceivably, some child soldiers are recruited from a state which is not a party to the conflict, and they do not reside in the territory controlled by any of the parties to the conflict. In such circumstances, it is possible that children may meet the narrow definition of mercenaries stipulated in Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), albeit this Convention is far from mustering an extensive degree of ratification. This treaty is silent on the age of mercenaries.30

As far as concerns the field of application of the rules on mercenaries in general, Article 47 of AP I contemplates the crimes of mercenarism only in the context of IAC.31 The only exception to this is the special genres of armed conflicts that are defined as ‘international’ under Article 1(4) of AP I. Still, the problem of the narrow ambit of application *ratione loci* of AP I is rectified by the Organization for African Unity (OAU)32 Convention for the Elimination of Mercenarism in Africa (1977)33 and

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30 Still, this treaty states applies without prejudice to the rules of IHL relating to combatant (hence including their age of qualification): art 16 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

31 Among the detailed definitional elements, note above all the requirement that they must not be nationals of parties to a conflict or resident of a territory controlled by a Party to the conflict: AP I, art 47(2)(d). Yet, those elements narrow overly the scope of definition of mercenaries. Compare J-M Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) at 391 (finding only the absence of the right to combatant or POW status of mercenaries as part of their definitional elements and their entitlement to the due process guarantees to be bolstered by customary IHL). Yet, a jarring note is that the *Study* approvingly cites the definition of mercenaries ‘as defined in Additional Protocol I’ in its formulation of Customary Rule 108, alongside its concession that ‘[t]his definition is very restrictive because it requires that all six conditions be cumulatively fulfilled’: ibid at 392.

32 Now re-baptised the African Union (AU).

33 Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977) art 1(1)(a). As an aside, the fact that this treaty was speedily adopted by the then
by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, both of which speak of ‘armed conflict’ in a generic sense for their field of application. Commonly, mercenaries, whether adult or juveniles, are recruited by governments fighting against insurgents. Even so, it is not excluded that they may be recruited by wealthy armed groups and private military/security companies against a governmental force or another armed group in situations of NIAC.

In relation to the legal status of ‘child mercenaries’, it should be recalled that in NIAC, the absence of the legal notion of combatant/POW status does not automatically mean that all fighting members of armed groups are civilians. As stated in the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, the law of NIAC distinguishes between civilians and members of ‘armed forces’ of a non-state party to the conflict (viz, members of an organised armed group). It is reasonable to assume, as proposed by the ICRC’s Interpretive Guidance, that the latter personal category be discerned on the basis of the test of ‘continuous combat function’. Nevertheless, the definition of mercenaries requires that they ‘not [be] a member of the armed forces of a party to the conflict’. Hence, ‘child mercenaries’ are, as with adult mercenaries, always classified as civilians. One question that then arises is if ‘child mercenaries’ may become

OAU leaders (less than one month after the adoption of the AP I) corroborates their sensitivity to issues of mercenaries that were abundantly deployed by the former colonial powers against national liberation movements (NLM).


35 This is the case despite the fact that the then OAU adopted the Convention for the Elimination of Mercenarism in Africa in the same year as the Additional Protocols. Rule 108 of the ICRC’s Customary IHL only speaks of mercenary in the context of IAC.

36 At least, there have already been reported cases of ex-child soldiers being employed by private military/security companies: A Ross, ‘UK firm “employed former child soldiers” as mercenaries in Iraq’ The Guardian (17 April 2016).

37 In the situations of IAC, the juvenile mercenaries, as with the adult mercenaries, are devoid of the combatant status and of the POW status when captured. They are treated as civilians, subject to the derogation that may be permitted under art 3 of GC IV. Still, they are entitled to the relevant rights as children, above all, under art 77 AP I.

38 The crux is ‘whether a person assumes a continuous function for the group involving his or her direct participation in hostilities’ (‘continuous combat function’): ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ed by N Melzer) (Geneva 2009) at 32-36.
the target of attacks when taking direct part in hostilities. There is every ethical reason to follow a policy recommendation that, the relevant law (Article 13(3) AP II) notwithstanding, lethal targeting of those who are under the age of 15 should be avoided as much as possible.

5. Special issues affecting girl child soldiers and other ‘associated girls’ in NIAC

5.1. Girl child soldiers

Several contemporary NIACs (and IACs) are characterised by the recruitment and use in hostilities of many female child soldiers (‘girl soldiers’ or ‘girl child soldiers’). Needless to say, because of their gender, girl child soldiers are more vulnerable than boy counterparts in many respects. Unlike boys, girls have distinct physical and reproductive experience and health concern, including pregnancy, and child bearing and rearing. Such special onus compounds their material and psychological hardship in dire situations of armed conflict. As the Paris Principles note, while boys and girls may share common experiences, the reasons and the manner in which girls become associated with an armed group may differ from those relating to boys. In that sense, it is of special importance not to subsume experiences of girls under the general rubric of child soldiers. Girl soldiers may be doubly victimized in the sense that apart from the possibly forced recruitment into armed groups, they may fall victims to SGBV. Whether on a battlefield or in captivity, there is

39 See AP II, art 13(3).
40 This is the case notwithstanding that this provision is categorical, without differentiating between the adult and the child.
42 Park (n 41) at 322.
43 Park Principles (n 1) para 4.0.
44 Park (n 41) at 321.
always risk that they may be vulnerable to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, forced marriage and enforced female genital mutilation.\(^45\)

It is not excluded that perpetrators of SGBV against child soldiers or other ‘associated children’ may be other than members of the adversary (governmental armed forces or opponent armed groups). Indeed, not infrequently, SGBV is committed against (female or male) child soldiers at the hands of their fellow (often adult male) members within the same armed group (or within the same national armed force). Such ‘intra-party sexual violence’ committed against child soldiers is one of the focal points that has been confirmed by the Trial Chamber of the ICC in Ntaganda.\(^46\)

More disturbingly, we have witnessed the appalling extent of SGBV against civilian children (mostly girls) perpetrated by the UN peacekeepers\(^47\) or other multinational forces.\(^48\) It is not excluded that child fighting members or other ‘associated children’ of an armed group who are captured may become a prey to such SGBV at the mercy of the UN peacekeepers or other multinational forces.\(^49\)

5.2. Other ‘associated female children’ – the case of foreign minor brides

Girl soldiers are not the only female children associated with an armed group in NIAC. Silence of IHL is conspicuous again with respect to the treatment of such girls associated with an armed group who may be engaged in various types of support activities for the members of the

\(^{45}\) See Paris Principles (n 1) para 7.72.

\(^{46}\) ICC, Trial Chamber, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 (8 July 2019). For a commentary to this, see L Poltronieri Rossetti’s paper in the current issue of this journal.


\(^{48}\) These include members of multinational forces or of a foreign armed force, which are deployed with the consent of the territorial state or with the authorisation of the UN Security Council.

\(^{49}\) There is a report suggesting hundreds (or thousands) of allegations of rape against girls and boys at the hands of the UN peacekeepers. See, for instance, O Bowcott, ‘The UN accused of “gross failure” over alleged sexual abuse by French troops’ *The Guardian* (17 December 2015).
group (including rendering domestic chores and sexual service). On this matter, again, the soft-law documents such as the Paris Principles (alongside the 1997 Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa) reinforce the 1989 Convention on the Rights of the Child (CRC) and the 2000 Optional Protocol to the CRC. Note should also be taken of the Integrated Disarmament, Demobilisation and Reintegration Standards (IDDRS) modules on children, youth, and women and gender. They provide guidelines on how children should undergo a DDR process, which is usually grasped through the lens of a post-conflict restorative model of justice.

Female juveniles may be affiliated with an armed group by being spouses of (adult or juvenile) members of that group. For instance, ISIS has included a number of foreign minor brides who have ‘voluntarily’ got wedded to its members. The situation of foreign girls joining ISIS may be differentiated from the case in which girls have been abducted to become victims of sexual enslavement or forced marriage (as in Boko Haram in Nigeria or the Yazidis at the helm of ISIS). With special regard to ISIS, it may well be that children are born into foreign male fighters and their Syrian or Iraqi spouses who have joined (or have been forced to join)
ISIS. This is a distinct way in which children become associated with terrorist or other armed groups.\(^{58}\)

In a marked contrast to the IHL of IAC, the IHL framework on NIAC is divested of the concept of ‘civilian followers’ as defined in Article 4A GC III. This concept might be of special pertinence to ‘associated girls’ of the age between 15 and 17 who are engaged in welfare services for fighting members of an armed group without being members of the ‘armed forces’ of a non-state party to NIAC. In case a special agreement predicated on Article 3(3) common to the Geneva Conventions is reached among the parties to NIAC to apply GC III, such associated girls (including brides) may be treated as analogous to the ‘civilian followers’ under Article 4A(4) of GC III and accorded the POW status (while not being combatants). In that case, the detaining power would be allowed to prolong their detention and release (as well as repatriation) until the termination of hostilities in accordance with Article 118 of GC III. Yet, in the absence of such a special agreement to give effect to GC III, the default position of the law of NIAC is that such associated female juveniles, as with girl soldiers under the age of 15, are civilians. An optimal solution is to recommend that the parties to NIAC should conclude a special agreement in such a way as to prioritise the application of Article 132 of GC IV over the pertinent provisions of GC III. By way of this, all ‘associated girls’, together with girl soldiers under the age of 15, may be released (and repatriated if they are of foreign nationals) whenever the situation of safety allows even during the course of hostilities. One question that remains after their repatriation is if ‘associated girls’, who have participated in the perpetration of a crime in one way or another, should be regarded as victims of forced marriage or sexual enslavement (taking into account pressures of their family and closely knit social milieu) or as perpetrators.\(^{59}\)

\(^{58}\) See Jørgensen, *ibid*.

\(^{59}\) Needless to say, the expertise of child psychologists and psychiatrists helps to ascertain if they have become victims of forced marriage or sexual enslavement while due regard is taken of their age, informed consent, or family pressure.
5.3. Sexual and gender-based violence (SGBV) as part of the use of children under the age of 15 to participate actively in hostilities

If it is determined that girl members of an armed group under the age of 15 are victims of sexual violence, forced marriage or bush wives, one subsequent strategy to bolster their case is to add another count of war crimes based on their use in active hostilities. The kernel of this proposition is that forcibly exposing those minor girls under the age of 15 to the horror of SGBV in the context of NIAC should be considered to constitute their use in ‘active participation in hostilities’, as defined under Article 8(2)(e)(vii) of the Rome Statute.

As discussed above, the ICC has found that the notion of using children to participate actively in hostilities encompasses indirect forms, and hence a raft of activities in support of fighting. However, in *Lubanga*, the ICC has tethered the notion of an ‘indirect’ role played by children to the stringent test of ‘real risk’ of a potentially life-threatening nature. It seems that such a high threshold has been proposed as a trade-off aimed to restrain the impact of a potentially broader compass of the notion of active participation of children under the age of 15 in hostilities. As criticised by several writers (including by Jørgensen in this issue), by so doing, the ICC’s Trial Chamber in *Lubanga* sidestepped the crucial question if sexual enslavement and other forms of SGBV could be read as tantamount to the use of children (female and male) to participate actively in hostilities.

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60 The ICC has narrowed the scope by requiring a life-threatening environment. It has focused on the question ‘whether the support provided by the child to be combatants exposed him or her to a real danger as a potential target’: ICC, Trial Chamber, *Lubanga* (n 12) para 628. See also ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009’ (2008) 90 Int’l Rev Red Cross 991, at 1013-14.

61 Jørgensen (n 6) at 659 and 679; N Urban, ‘Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC’s Decision in Lubanga’ EJIL: Talk! (11 April 2012). See also M Bergsmo, Wu Ling Cheah, ‘Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes’, in M Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 2 (criticizing that the Lubanga judgment focused on ‘a very narrow range of criminality’ that excluded killings or rape or torture).
6. Dissonance of international law in relation to child soldiers and children associated with an armed group in NIAC

With special regard to the minors of age between 15 and 17, it should be recalled that there is a well-known gap in the Rome Statute between the age of liability for the crimes and the minimum age at which recruitment of children or their participation in hostilities is forbidden. Article 26 of the Rome Statute fixes the age of criminal responsibility of children at 18. Admittedly, some writers have pointed out that this should be deemed as a procedural rather than substantive question. The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) has lent succour to the view that Article 26 of the Rome Statute provides only a jurisdictional bar destined to block both prosecution and investigation. According to the Trial Chamber of the ICTY in Orić, the Defence’s submission denying any liability for war crimes committed by an

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62 Art 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the ICC.
63 On the other hand, both the Statute of the ICTY and the Statute of the ICTR are silent on the age of liability. The prosecutors have decided, on a policy ground, not to prosecute any person under the age of 18 (though the youngest individuals that have been prosecuted were Anto Furundžija and Dražen Erdemović, both 23 years old): Quénivet (n 56) at 446. The Statute of the Special Court for Sierra Leone (SCSL) has been one notable deviation among international criminal tribunals in admitting of trying juveniles who are of the minimum age of 15: Article 7 of the Statute of the SCSL. On this matter, see discussions in Y Yamashita, ‘Kodomo no Hogo’, in S Murase, Z Mayama (eds), Boryoku-Funso no Kokusaiho (Law of Armed Conflict) (Toshindo 2004) 581 at 587-588.

As for ‘hybrid tribunals’ established under national law, they have been more permissive of prosecuting juvenile offenders. This can be seen in the case of the Serious Crimes Panels in East Timor, which have exercised jurisdiction over minors over twelve years of age (in line with the UN Transitional Administration in East Timor, Regulation 2000/30, 25 September 2000, Section 45), and of the War Crimes Chamber in the Court of Bosnia-Herzegovina, which has been entrusted to prosecute individuals over the age of 14 (in accordance with art 18 of the Criminal Code of Bosnia Herzegovina). Yet, according to Quénivet, the only case of trial of minors under those ‘mixed tribunals’ was that of X: Judicial System Monitoring Programme, The Case of X: A Child Prosecuted for Crimes against Humanity, Dili, Timor Leste (January 2005) available at <www1.essex.ac.uk/armedcon/story_id/000386.pdf>: Quénivet (n 56) at 448.
65 There is, however, a suggestion that art 26 of the Rome Statute be comprehended as auguring a catalyst for a change in the substantive law when read in tandem with the concurrent development in the field of IHRL: M Druml, Reimagining Child Soldiers in International Law and Policy (OUP 2012) at 119-122. Contra, see M du Plessis, ‘Children under International Criminal Law’ (2004) 13 African Security Rev 103, at 110.
individual below the age of 18 is unfounded in both conventional and customary law.\textsuperscript{66}

On the other hand, the authors of the Rome Statute have set the age of 15 as the threshold below which it is criminalised under international law to conscript or enlist children into armed forces or groups, or to use them to participate actively in hostilities. The approach of the Rome Statute runs counter to the parallel development of IHRL. Raising to 18 the minimum age at which recruitment or use of children is forbidden is corroborated by the African Charter on the Rights and Welfare of the Child of 1990\textsuperscript{67} and by the International Labour Organisation (ILO) Convention No. 182 (Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) of 1999.\textsuperscript{68}

It should be pointed out that as compared with the corresponding provisions of AP I and AP II, the elements of the war crime relating to the recruitment and use of children under the age of 15 in accordance with Article 8 of the Rome Statute (which are essentially identical both in IAC and NIAC) are fine-tuned. Following AP II, the categorical denunciation of recruiting or using in hostilities children under the age of 15 is confirmed under Article 8 of the Rome Statute. Nevertheless, this provision steps back from the more protective approach (namely, the stronger prohibition) of AP II.\textsuperscript{69} The framers of the Rome Statute have favoured

\footnotetext[66]{ICTY, Trial Chamber II, \textit{Prosecutor v Naser Orić}, Judgment (30 June 2006) para 400.}

\footnotetext[67]{The African Charter on the Rights and Welfare of the Child, art 22(2) (containing the absolute ban on recruiting children under the age of 18 years and a more pliable duty to take all necessary measures’ to ensure the prevention of children directly participating in hostilities).

\footnotetext[68]{The International Labour Organisation (ILO) Convention No 182 (Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) art 3 (treating ‘forced or compulsory recruitment of children for use in armed conflict’ as part of ‘forced or compulsory labour’). See also Committee of the Rights of the Child, ‘Concluding Observations on the second report of the United States of America’ UN Doc CRC/C/OPAC/USA/CO/2 (28 January 2013) in particular paras 9 and 10; ‘Concluding Observations on the report submitted by Morocco under article 8, paragraph I of the Optional Protocol to the CRC UN Doc CRC/C/OPAC/MAR/CO/1 (13 November 2014) section IV.

\footnotetext[69]{Under IHL, while both AP I and AP II prohibit the recruitment or participation in hostilities of children under the age of 15, the latter is more protective of children than the former in two respects: (1) the categorical nature of the interdiction under Article 4 of AP II, which marks a contrast to the more nuanced tone of Article 77 of AP I based on the flexible expression ‘shall take all feasible measures’; and (2) the application not}
the expression ‘active participation in hostilities’ that features in Article 3 common to the four Geneva Conventions of 1949 over the unqualified (and hence broader) words ‘participation in hostilities’ employed under Article 4(3)(c) of AP II.70 Nevertheless, the states which are parties to both the CRC (nearly all the states on this planet!) and AP II remain bound to a more stringent interdiction, with the forbidden conduct covering all forms of participation in hostilities.71 This is because Article 41 of the CRC sets forth the ‘more favourable principle’, according to which, of all the pertinent rules, primacy should be given to the rule that furnishes the most effective and broadest scope of guarantees.72

In case the juvenile members of an armed group in the age spectrum between 15 and 17 have committed any of the crimes defined in the Rome Statute, and assuming that there is no question of superior responsibility defined in Article 27 of the Statute, the ICC is precluded \textit{ratione personae} from prosecuting those atrocities under international law.73 As observed by Cassese, ‘a person between 15 and 17 is regarded as a lawful combatant and may commit a crime without being brought to court and punished’.74 In such circumstances, the question of individual criminal responsibility75 ought to be addressed under domestic laws.76 In this light, states are given the ‘margin of discretion’ to fix the age of liability under their laws.77 This understanding is consistent with the idea that the role of the ICC is subsidiary to the responsibility of the national organs. This only to direct participation but also to \textit{indirect} participation orchestrated either by governmental forces or by insurgent armed groups. See Jørgensen (n 6) at 668; and Sivakumaran (n 9) at 316-317 (explaining, albeit without reference in this respect, that the more protective nature of AP II than AP I ‘was inadvertent, rather than being due to its heightened importance or to make recruitment by armed groups more difficult’); and Y Dinstein, \textit{Non-International Armed Conflicts in International Law} (CUP 2014) at 142 para 443.

70 Compare the expression ‘direct participation in hostilities’ used in art 77(2) of AP I.
71 Sivakumaran (n 9) at 317.
72 This ‘neologism’ owes to SA Sadat-Akhavi, \textit{Methods of Resolving Conflicts between Treaties} (Martinus Nijhoff 2003) 219. This principle is found in art 5(2) of the International Covenant on Civil and Political Rights (ICCPR).
73 Rome Statute, art 26.
75 On this matter, see Happold (n 19) at 69; and Quénévet (n 56).
76 O Triffterer, \textit{Commentary on the Rome Statute of the International Criminal Court} (CH Beck 2008) at 777; and Happold (n 19) at 70.
77 Happold (n 19) at 79; and Quénévet (n 56) at 440 and 449.
is in conformity to the complementarity principle underlying the Rome Statute. The important string is that a state’s discretion in setting the minimum age of criminal responsibility under its domestic law must be curbed in harmony with ‘the best interests of the child’ and with the appropriate international standard of juvenile justice. On this score, due regard should be paid to the absolute minimum age, as recommended by the General Comment No. 10 of the Committee of the Rights of the Child (which sets such an age at 12). Adherence to such minimum age of liability can at least mitigate (though not resolve) the problem of non-harmonised standard in the age of criminal responsibility among different national laws.

It is well-known that the Optional Protocol to the CRC urges the ban on both compulsory recruitment of juveniles and their direct participation in hostilities by pushing the age limit to 18. In contrast, a more nuanced obligation is mentioned in relation to voluntary recruitment by states. In this respect, Article 3 of the Optional Protocol to the CRC may be seen as a modest progress. The first paragraph of this provision reads that ‘States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled

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78 Quénivet (n 56) at 452 and 453. The concept of ‘best interests of the child’ is explicitly laid down in art 3(1) of the CRC.
79 Paris Principles (n 1) para 8.7.
80 Committee of the Rights of the Child, ‘General Comment No. 10’ UN Doc. CRC/C/GC/10 (25 April 2007) para 32. Compare Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’). This recommends that the beginning of the minimum age of criminal responsibility (MACR) shall not be fixed at too low an age level, with account to be taken of the facts of emotional, mental and intellectual maturity.
81 Happold (n 19) at 79.
82 Art 2 of the Optional Protocol to the CRC.
83 Art 1 of the Optional Protocol to the CRC.
84 Still, the only unambiguous obligation incumbent on a state party is limited to the ban on compulsory recruitment of minors in its armed forces. More nuanced expressions appear in Article 1 in respect of its duty to prohibit minors from directly participating in hostilities (‘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’; emphasis added).
85 Optional Protocol to the CRC, art 3. Compare art 38(2) of the CRC.
to special protection’. As to the question by how many years the minimum age of voluntary recruitment bar should be raised, under this provision it is lawful for a state party to make just an incremental rise from 15 to 16.

As far as concerns non-state armed groups, Article 4 of the Optional Protocol to the CRC forbids both the recruitment (whether compulsory or voluntary) and use in hostilities of any child under the age of 18. Two quick remarks ought to be made. Firstly, the prohibitive force of this provision is somewhat nuanced. Its textual formula betrays a certain element of incongruity, with an elastic auxiliary verb ‘should not’ juxtaposed with a more categorical phrase ‘under any circumstances’. Secondly and more importantly, the Optional Protocol to the CRC divulges a ‘double standard’ between the national armed forces and non-state armed groups. It allows the former to undertake the voluntary recruitment of the children of the ‘borderline group’ (namely those who are between 15 and 18) for non-combat roles. Moreover, only for national armed forces (and not for armed wing of a non-state party to the NIAC) there is a special exemption from the requirement to raise the minimum age above 15 in relation to the enrolment of juveniles in military academy. By dint of this, perhaps inadvertently, the authors of the Optional Protocol to the CRC have deviated from one of the fundamental principles underlying the edifice of IHL, namely, the equality of obligations as between the parties to

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86 See also ICRC, ‘Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups’ (September 2011) at 382.
88 Helle (n 87) at 808; and Sivakumaran (n 9) at 324.
90 See ICRC, ‘Guiding Principles for the Domestic Implementation’ (n 86) at 393 (noting that while under art 3(5) of the Optional Protocol to the CRC, military schools are exempted from the requirement to raise the minimum age above 15, state practice shows that students attending military schools are not automatically considered to be formally recruited into the armed forces until they reach the age of 18).
War crimes relating to child soldiers and other children

the conflict.91 Still, this does not detract from the crux: under this provision the prohibited scope is extended to cover any use of children under the age of 18 in hostilities. The uncompromised outlawing is valid not just in case of active or direct participation in hostilities, but also of indirect or surreptitious participation in hostilities. The inclination toward the minimum age of recruitment at 18 is also bolstered by the relevant soft-law instruments such as the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.92

It remains to be seen how the Optional Protocol to the CRC and the Paris Principles affect the practice of both national armed forces and non-state armed groups in relation to the voluntary recruitment of children of the age range between 15 and 17. It is possible that the impact of IHRL narrows such a gap in inequality between state armed forces and armed groups, with the minimum age optimally converging at 18. At least, on the side of the practice of armed groups, it is promising that their commitment and actual practice, though hitherto ‘in a state of flux’, signifies ‘a marked tendency toward …the standard of 18 years of age’.93

While any commitment expressed by armed groups should not be taken at face value, this contributes to a wider recognition of the threshold of recruitment overall fixed at the age of 18.94 Still, what is essential for the purpose of a formation of a customary rule is the corresponding state practice95 showing that any variation in the minimum age of voluntary recruitment shrinks in favour of the age of 18. Underlying such a drift is the growing conviction that even the child soldiers who have perpetrated

91 Warner, Somer, Bongard (n 89) at 81; and Sivakumaran (n 9) at 324.
92 The commitment to the Paris Principles may be backed up by the mandatory Security Council resolutions adopted under Chapter VII of the UN Charter: Sivakumaran (n 9) at 321.
93 ibid at 323.
94 ibid at 320-323, and the examples of the action plan (most seminally, Action Plan between the Moro Islamic Liberation Front (MILF) and the United Nations in the Philippines regarding the Issue of Recruitment and Use of Child Soldiers in the Armed Conflict in Mindanao, 1 August 2009) and practice of armed groups cited therein.
95 Still, as observed by Sivakumaran, despite the importance of the ‘idea of ownership’ to be felt by non-state armed groups, whether, how and to what extent their practice can be ascertained for the purpose of customary law formation remains controversial: S Sivakumaran, ‘The Ownership of International Humanitarian Law – Non-State Armed Groups and the Formation and Enforcement of IHL Rules’, in B Perrin (ed), Modern Warfare – Armed Groups, Private Militaries, Humanitarian Organizations, and the Law (Vancouver UBC Press 2012) at 90-91.
brutal acts should be considered generally as victims who need rehabilitation and social integration96 in the context of restorative justice.97

7. Conclusion

One of the marked features of the armed groups in recent situations of NIAC (most notably, the Tamil Tigers in Sri Lanka; FARC in Columbia; and ISIS in Syria and Iraq) is that some of them have acted as if they were a ‘quasi-occupying power’.98 They have exerted control over a sizeable tract of the land for a lengthy period while taking legislative and administrative measures in relation to the local population under their control. Some armed groups are equipped with relatively sophisticated administrative and judicial structures of their own to cater to the needs of the civilian population under their control.99 A glaring downside of an armed group assuming such ‘quasi-occupation’ function is that this has facilitated the armed groups to instrumentalize children in a cycle of under-aged recruitment.100

Overall, the miscellany of international rules relating to issues of child soldiers suffers from lack of coherence. This handicaps the potential of tapping into the combined effectiveness of the relevant branches of international law (IHL, IHRL and international criminal law) in realising more enhanced protection of not only child soldiers but also of any other juveniles that are associated with armed groups in the context of NIAC.

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97 In this regard, see the ongoing trial of ICC, Prosecutor v Dominic Ongwen, ICC-02/04-01/15, the first-ever international case trying a former child soldier. It bears observing if the ICC will consider the accused's past as the victim of forcible exploitation by an armed group as a possible mitigating circumstance for his own act of forcibly recruiting child soldiers when turning to the age of 18. Even so, it is clear that such an argument should never constitute a defence for the discharge from responsibility.
98 As well-known, the legal term ‘occupation’ is reserved exclusively to the context of IAC. See art 42 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land.
100 For the assessment of how ISIS has employed ‘soft’ inducement techniques of recruitment within its controlled areas, see the Institute of International Strategic Studies, The IISS Armed Conflict Survey 2018 (above all, Prof Mia Bloom’s contribution).
Still, the foregoing assessment has shown that some resources (not least, the soft law) of IHRL provide useful policy recommendations in this regard while blazing a possible trail along which a new customary law may emerge.

With respect to the question of dissonance in relation to the age of liability that has transpired in the foregoing assessment of the relevant rules of IHL, IHRL and international criminal law, the root cause may be imputed to the fact that those appropriate rules have evolved in a fragmented way without much of close coordination.\footnote{Compare, International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law-Report of the Study Group of the International Law Commission (finalized by Martti Koskenniemi)’, UN Doc A/CN.4/L.682 (13 April 2006).} As seen above, the Rome Statute’s stance is a retreat with respect to some ingredients of the war crime relating to child soldiers and ‘associated children’, as compared with the more ‘pro-juvenile’ position of AP II and the Optional Protocol to the CRC. As regards the difference in the standards between the pertinent rules of IHL and IHRL on one hand and the Rome Statute on the other, this may be explained by the dissimilitude in the underlying rationales of each normative framework of international law. Above all, the treaties of IHRL are built on the idea of direct binding effect on states and of the consequent identification of state responsibility.\footnote{Further, this consideration is reinforced by the understanding that only serious violations of IHL give rise to war crimes.} In contrast, international criminal law is destined nothing but for identifying individual criminal responsibility. Viewed in that way,\footnote{M Sassoli, ‘The Implementation of International Humanitarian Law: Current and Inherent Challenges’ (2007) 10 YB Intl Humanitarian L 54; and Arai-Takahashi (n 102) 331.} it does not seem outright incongruent that the relevant war crime under the Rome Statute sets the threshold higher.\footnote{See Sivakumaran (n 9) at 323-324. IHL lays down obligations on both state and non-state parties to the conflict. Yet, in case of their violations this branch of international law has been traditionally geared toward state responsibility rather than toward individual criminal responsibility: Y Arai-Takahashi, ‘Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law (IHL) between State Responsibility and Individual Criminal Liability’, in F Baetens, C Chinkin (eds), Sovereignty, Statehood and State Responsibility- Essays in Honour of James Crawford (CUP 2015) 325.}
It has been criticised above that the decision of the ICC in Lubanga suffered from the narrow judicial reasoning intertwined with the perceived gender insensitivity when ascertaining the war crime of using children under the age of 15 for the purpose of their active participation in hostilities. It is crucial that the ICC overhauls its interpretive strategy and conceives SGBV as part of the activities that fall within the compass of that war crime.