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Chapter 05

Getting Tambo Out of Limbo: Exploring Alternative Legal Frameworks that are More Sensitive to the Agency of Children and Young People in Armed Conflict

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5. Getting Tambo Out of Limbo: Exploring Alternative Legal Frameworks that are More Sensitive to the Agency of Children and Young People in Armed Conflict

Karl Hanson and Christelle Molima

In the summer of 2017, Christelle Molima undertook field-work for her doctoral dissertation on the criminal responsibility of children who left the armed forces and armed groups in eastern Democratic Republic of the Congo (DRC). She interviewed a former judge who recounted the intriguing story of Tambo, an ex-child soldier. Tambo had been prosecuted and convicted for desertion. During the 1998 war against Ugandan and Rwandan troops, the 14-year-old Tambo had integrated into the Congolese armed forces (Forces Armées de la République Démocratique du Congo – FARDC).[1] Tambo had been deployed in the territory of Uvira near the border with Burundi and Rwanda in the DRC's South Kivu province. After three years of service, he had had enough of the military life that no longer corresponded to his conception of the army and decided to run off, but without respecting the conditions for resigning from the armed forces. During his escape, Tambo found himself in the middle of a battle between the Congolese armed forces and a Mai Mai rebel group. He fell into the hands of the FARDC. Tambo was recognized by Congolese soldiers and was sent to the Military Tribunal of the Uvira legion which convicted him for desertion because, as the former judge explained, he had left the army in an illicit manner and, moreover, while in the presence of the enemy, which constituted an aggravating circumstance.

Tambo's case evokes the absurdity of military bureaucracy described in Joseph Heller's renowned satirical novel *Catch-22* from 1961 that narrates the story of Captain John Yossarian, a bombardier enrolled in the American Army during World War II and who is deployed in Italy. In the novel, the original Catch-22 rule states that to escape from flying dangerous military missions, one must ask for a mental evaluation that can determine if one is crazy, which is required for being dismissed from flying crazily dangerous missions. However, by demanding a mental evaluation to escape flying crazy missions, a pilot demonstrates his mental capacities, hence making it impossible to be declared crazy. Considering the current international legal framework concerning child soldiers, the prosecution and conviction of a child soldier for desertion indeed seems a Catch-22. At the time of his enrolment, Tambo was below the minimum age for recruitment into the armed forces and deployment in conflict both under national and international law. Under DRC legislation operative at the time, the minimum age for recruitment in the armed forces was established at 16 years.[2] The DRC ratified the United Nations Convention on the Rights of the Child (CRC) in 1990 (which sets 15 as the minimum age) and ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) in 2001 (which increases that minimum age). How can a boy, who was not allowed to be a member of the military in the first place, be convicted for having deserted from the military? If Tambo's enrolment as a soldier was against the law, it is illogical that a law enforcement authority, here a military tribunal, convicts him for having escaped such an unlawful situation.

Tambo's fate raises questions as to how to cover the distance between the international normative framework that prohibits child soldiering under a certain age, and the social world where children and young people, regardless of their age, at times deliberately decide to join or to leave the military. International law and policy regarding children and armed conflict, which has largely been informed by humanitarian advocacy perspectives, is built on the presumption of children's victimhood and hence considers children incapable of voluntarily taking part in the military.[3] According to Claudia Seymour, who conducted empirical research in eastern DRC, the nearly exclusive focus on children's vulnerability and victimhood renders the international protectionist approach to children in the context of war and

[1] For further discussion of the FARDC, see Parmar and Lebrat in this volume.
[2] Law No. 81-003 of 17 July 1981 on the staff regulations for State public service personnel and Ordinance No. 72/060 of 25 September 1972 instituting the military code of justice, cited in: CRC Committee 2011: [43].
[3] Rosen 2007.

armed conflict 'simplistic and decontextualized from the lived realities of children and young people'.[4] However, such a protectionist view forecloses that children and young people, like many other human beings, often do make well-informed and conscious decisions to actively engage in armed conflict, as has been amply demonstrated in anthropological and ethnographic research on conflicts around the globe.[5] The denial of children's agency at times of social, economic and political instability also presents problems for dealing with the social implications and consequences of children's actions once the conflict ends.[6] One of the difficulties is how societies can honour those young persons who have contributed to ending violent oppression by their deliberate engagement and actions, but whose courage cannot be officially recognized because of the dominant image of child soldiers' victimhood. Another point is how victims and communities to which former child soldiers seek to return after the conflict can come to terms with individual children who have committed atrocities without being able to hold them accountable.[7] A manual edited by the International Committee of the Red Cross (ICRC) on the domestic implementation of IHL provokes another Catch-22 in dealing with the criminal responsibility of child soldiers. This manual states:

> Children who are alleged to have committed war crimes should be primarily considered as victims and should be treated as such. On the other hand, to ignore their criminal responsibility could imply impunity and have the reverse and perverse effect of rendering them attractive to armed forces and armed groups since crimes committed by them would go unpunished. A solution to this problem has yet to be found by the international community.[8]

The present chapter aims to explore alternative legal frameworks that could be more sensitive and responsive to young people's active agency throughout the peace–war–recovery continuum, without abandoning their rights to protection. What are, in other words, the challenges for international children's rights law of the 'conceptual shift' that is needed 'to embrace the possibility that the young may engage voluntary in military action'.[9] In doing so, we wish to contribute to 'reimagining child soldiers in international law and policy', as was the title of Mark Drumbl's book.[10] A first section herein presents the theoretical framework that informs our thinking. This framework actuates Hanson and Nieuwenhuys' proposal to include children's conceptions and practices of their rights when studying particular children's rights claims and is composed of the notions of living rights, social justice and translations.[11] Next, we examine how international humanitarian and human rights law considers young people who are legally allowed to be recruited into the armed forces, such as children over 16 years of age who have, in compliance with international rules, voluntary joined government forces. Building further on the findings from this legal analysis, we examine literature on youth activism and on citizenship to explore young people's rights to participate in violent political struggles or in the military. In conclusion, we contend that the right of children to participate in contexts of violence and armed conflict is not necessarily a violation of children's rights. In the local contexts in which they come to have meaning, rights that recognize children's subjectivities can even be understood as empowering if they do justice to children and young people's efforts and sufferings in the dramatic and adverse contexts of armed conflict.

1 Living rights, social justice and translations

The claim that children's opinions need to be taken more seriously, which is frequently made by children's rights advocacy groups with reference to Article 12 of the CRC, generally aims at promoting children's participation in uncontroversial settings, such as schools, sport clubs or local politics. 'We need to recognize and enhance children's constructive roles in society, consider them as social actors

[4] Seymour 2012: 373.
[5] Hart 2006; Lee 2009; Rosen 2005. See also the references in: Hanson 2011: 58; Seymour 2012: 374; Drumbl 2012.
[6] Shepler 2014.
[7] Drumbl 2012.
[8] International Committee of the Red Cross 2015: 17.
[9] Hart 2006: 224.
[10] Drumbl 2012.
[11] Hanson and Nieuwenhuys 2013.

and acknowledge their citizenship more fully, the main argument goes, in particular when children "do the right thing."'[12] However, in situations with an undesirable undertone, such as child labour or child soldiering, the same advocacy groups tend to defend the opposite viewpoint, and argue that when children 'don't do the right thing', high minimum ages should be established in order to protect them from participating in such hazardous activities. International legal and policy documents on child labour that set a minimum age for admission to work are a case in point where protective concerns are preferred over participatory ones. The approaches adopted in relation to child labour do not leave much space for recognizing working children's agency: children under a certain age are deemed to be unable to decide for themselves if they want to work or not, or what kind of work they would like to do. For more than two decades, working children's organizations that disagree with the prevailing aim to prohibit all child labour and instead claim a right to work in dignity have relied on norms and discourses about the importance of children's participation to try to influence the discussions. However, they have met with only very limited success.[13]

The discussions among representatives of working children's organizations who argue in favour of a right to work in dignity and the UN agencies charged with developing international legal and policy responses in the field of child labour illustrate that there is not necessarily a consensus about the content, meaning and consequences of children's rights. Relying on perceptions of their own agency, child soldiers also might advance claims about their rights that do not necessarily correspond with how other people think of children's rights when related to political violence or armed conflict, such as the right to fight for their ideas or to defend their community from oppression. In order to investigate alternative pathways to understanding children's agency and their rights in armed conflict we take as a starting point the notions of living rights, social justice and translations that can open our thinking about alternative, child-centred approaches to children's rights.[14]

Instead of approaching children as the helpless objects of well-meaning interventions, this framework seeks to include children and young people's own conceptions of their rights in determining how legal and policy frameworks for children's themes are crafted. Starting from the lived experiences in which rights take shape, the notion of living rights suggests that children implicitly or explicitly understand what children's rights mean to them. This notion encompasses the idea that if children have rights, including agency and participation rights, they also have the right to participate in the production of knowledge about their rights. This notion also encourages looking beyond abstract formulations of rights and focusing on the specific situations and circumstances where rights claims come alive. Children as well as other actors are active producers of knowledge about children's rights. The notion of living rights hence expresses the idea that:

> [A]ll social practices that are conventionally identified as rights may be understood as 'living rights.' They are alive through active and creative interpretations, association, and framing of what constitutes in a given context a child's right in people's hearts and minds.[15]

The notion of social justice refers to the underlying normative beliefs when human rights claims are invoked. Especially since the almost universal ratification of the CRC, there is a broad consensus that children have fundamental human rights. However, notwithstanding the CRC's detailed provisions and its authoritative interpretation by the UN Committee on the Rights of the Child, conflicting viewpoints over the precise meaning and consequences of children's rights persist. Academic literature on the CRC, for instance, still reveals divergence between those who abundantly praise the CRC and how the text is interpreted and implemented, and those who are very critical as to how the CRC and its monitoring is apprehended.[16] Social justice deals with discussions about the normative beliefs that make rights appear legitimate and beyond question for some but not for others. Diverging ideas about what children are, what they are capable of, what they deserve and the relative importance of the differences between adults and children all have a strong bearing on the way children's rights get interpreted.[17]

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[12] Hanson 2016: 471.
[13] Hanson and van Daalen 2016; van Daalen and Hanson 2018.
[14] Hanson and Nieuwenhuys 2013; Hanson and Nieuwenhuys 2018.
[15] Hanson and Nieuwenhuys 2013: 11.
[16] Arts 2014; Reynaert et al. 2009.
[17] Hanson 2012.

Struggles over interpretations of children's rights amount to translations that designate fluctuations between different beliefs and perspectives.[18] Challenging the idea that children's rights norms and their fixed meaning merely need to be implemented, the notion of translation expresses the idea that when rights are transposed from one context to another, for instance from international norms to national legislation, their sense can be altered. Translation of norms is not only what happens between international and national legislation, but also between children's conceptualizations of their rights and the rights defended by spokespersons of social movements who speak on children's behalf; between national legislation and local administrators charged with putting the legislation into practice; between representations of children's rights upheld by donors and the actual work undertaken by development NGOs; and between decisions made at the headquarters of international organizations and the field workers in country offices. Different series of translation processes take place, in varying directions, whereby rights are not only translated 'down' from international to national levels but are also translated 'up' from the local to the international.[19] The translation of children's rights is not confined to the transfer of one idea into another context, but it is a dynamic process whereby meanings are actively reproduced and changed. By using the notion of translation over implementation or norm diffusion, the active re-production of meaning of children's rights can be made more explicit and open for debate.[20]

Taken together, the notions of living rights, social justice and translations remind us that discussions on children's rights do not exist in a social vacuum but are inescapably related to specific themes and take place in distinct situations where different normative ideas around children's rights coexist. We mobilize this conceptual framework to take the opposite route compared to the one most travelled in international law and policy-making concerning child soldiering. Instead of looking at how to prevent children from becoming soldiers by declaring their enrolment in the military and participation in combat unlawful, at least under certain age limits, we want to look at the rights related to joining the military or engaging in violent conflicts, whereby 'the idea of living rights re-frames the way we think about rights, young people and citizenship'.[21] By looking at children's active roles in armed conflict, the aim is not to pass over children's suffering or be blind to the potentially detrimental consequences of children's participation in warfare. On the contrary, as argued by Pamela Reynolds, recognizing children's agency and acknowledging their participation in society, including children and young people's participation in wars and revolutions, might be the best way to protect them.[22] As with other vulnerable groups who are often considered to be 'non-citizens', the language of living rights might in fact enhance protection for child soldiers rather than increase their suffering.

2 Children legally allowed to be involved in armed forces or armed groups

Even though minimum ages for child soldiering have increased over the past few decades – especially with the adoption in 2000 of the OPAC – situations arise where it is not unlawful for young people to be involved in the military. Taking a similar approach to the analysis of children's rights in relation to education or the media,[23] we consider different aspects of children's rights related to the military and comment on children's rights to, in and through engagement in military activities.

At the time of the CRC's adoption in 1989, several states, UN agencies and humanitarian organizations were deeply disappointed by CRC Article 38 that sets 15 years as the minimum age for the recruitment of children into the armed forces and their direct participation in hostilities.[24] The dissatisfaction with this provision gave rise to revived efforts by a large coalition of humanitarian advocacy groups to raise the minimum age for recruitment and participation in hostilities to 18 years. This push coaxed the adoption, in 2000, of OPAC. The Committee on the Rights of the Child, the body established to monitor progress made by state parties in fulfilling their duties regarding CRC provisions and which played an instrumental role in the elaboration of OPAC,[25] had found that 'persons under the age of 18 should never be involved in hostilities, either directly or indirectly, and should not be recruited

[18] Hanson and Nieuwenhuys 2013.
[19] Merry 2006.
[20] Freeman 2009; Hanson and Nieuwenhuys 2018; I'Anson et al. 2017; Zwingel 2012.
[21] Sanghera et al. 2018: 553.
[22] Reynolds 1998: 55.
[23] Verhellen 2000.
[24] Hammarberg 1990; Kuper 2000.
[25] Hanson 2011.

into armed forces, even on a voluntary basis'.[26] Most of the provisions contained in OPAC correspond with this 'Straight-18' position. OPAC Articles 1 and 2, which deal with state armed forces require state parties to ensure that persons who have not attained the age of 18 years do not take direct part in hostilities and are not compulsory recruited into their armed forces. OPAC Article 4 concerns armed groups which are distinct from the armed forces of a state, such as non-state rebel groups or private armed militias: these entities are forbidden to compulsorily and voluntarily recruit and to use in hostilities persons under the age of 18 years. However, OPAC does not totally align to the minimum age of 18 years, as it does not specify a minimum age for indirect participation in hostilities. Furthermore, OPAC Article 3 leaves states with the option to adopt a lower age than 18 as the minimum age for voluntary recruitment into armed forces and also exempts military schools from complying with the minimum age requirement.[27]

Regarding the minimum age for the voluntary recruitment of persons into their national armed forces, states must 'raise the minimum age' above that age set out in Article 38(3) of the CRC. Therefore, under OPAC states should set at least 16 years as the minimum age for voluntary recruitment.[28] According to OPAC Article 3(2), states must deposit a binding declaration that clarifies the minimum age at which voluntary recruitment into national armed forces is permitted and must also adopt safeguards that ensure that such a recruitment is neither forced nor coerced. These safeguards are detailed in OPAC Article 3(3). States must ensure that such recruitment is genuinely voluntary and is carried out with the informed consent of the recruit's parents or legal guardians. In addition, these young persons who are voluntary recruited must be fully informed of the duties involved in military service and provide reliable proof of their age prior to their acceptance. OPAC Article 3(4) allows state parties to strengthen their initial declaration by raising the minimum age for voluntary recruitment, for instance from 16 to 18 years, but they cannot lower the minimum age that was announced in the initial declaration.[29]

As of 23 September 2018, out of the 167 state parties to OPAC, 37 states had declared that persons under 18 could voluntary join their armed forces; 23 countries have set 17 years, 13 countries 16 years old and one country 15 years as the minimum age for voluntary recruitment.[30] The Committee on the Rights of the Child, which already before the adoption of OPAC had been trying to convince state parties to raise the minimum age of all forms of recruitment (including voluntary recruitment) to 18 years,[31] continued after the adoption of OPAC Article 3 to invite States to raise the minimum age to 18 years. For instance, in its Revised Guidelines regarding initial reports submitted by state parties under OPAC Article 8(1), the Committee on the Rights of the Child asks states that have submitted a declaration that allows voluntary recruitment under the age of 18 'to indicate whether there are plans to raise this age to minimum eighteen and a tentative timetable for doing so'.[32] Four countries, including Japan, Luxembourg, Paraguay and Poland, have followed up on the Committee's recommendation by amending their initial declaration that had been made upon ratification of the Protocol and have raised the minimum age for voluntary recruitment to 18 years.[33] In the case of Paraguay, the withdrawal of its initial declaration allowing voluntary recruitment at 16 years and the subsequent increase to 18 years is attributed to the advocacy activities of the Coalition to Stop the Use of Child Soldiers in Paraguay that have been undertaken with the support of UNICEF,[34] a decision that is positively welcomed by the Committee on the Rights of the Child.[35]

However, as shown above by the number of countries that have adopted a lower minimum age for voluntary recruitment, the Straight 18 position adopted by the Committee has not been followed by about 20 percent of OPAC state parties. The proportion is remarkably higher amongst the permanent members of the UN Security Council, where only one country has set the minimum age at 18 (Russian Federation), whereas three countries (China, France and United States of America) have established 17

[26] Commission on Human Rights 1996: [39].
[27] Sheppard 2000. See also Rosen; Crilley; Kamara; and Odongo, all in this volume.
[28] Hanson 2011: 54.
[29] Vandewiele 2006: 37.
[30] See Status of Treaties. See also Crilley in this volume.
[31] Hanson 2011: 54.
[32] CRC Committee 2007a: [5].
[33] Note that Chile amended its declaration in 2008 to raise the minimum age from 16 to 17 years, and Guyana amended its declaration in 2010 to raise the minimum age from 14 to 16. See Status of Treaties.
[34] CRC Committee 2012a: [9-11].
[35] CRC Committee 2013a: [4].

years and one country has set 16 years (United Kingdom of Great-Britain and Northern Ireland) as the minimum age. The discussions between the Committee on the Rights of the Child and China, France, the US and the UK illustrate two competing approaches to the voluntary engagement of children under 18 years of age in the military. In its concluding observations concerning these countries' reports under OPAC, the Committee, holding on to a long-held view, systematically repeats its recommendation to review and raise the current voluntary recruitment age in the armed forces to 18 years 'in order to promote and strengthen the protection of children through an overall higher legal standard'.[36] To make this argument, the Committee does not refer to the precise wording of OPAC, which does not sustain its view as it allows state parties to adopt a minimum age below 18 years, but instead draws on 'the spirit and principles of the Optional Protocol and the Convention' with which it finds minimum ages under 18 years inconsistent.[37]

In its initial report under OPAC, France underscores its active international involvement to address the situation of children in armed conflict, including its financial contribution to the 'Coalition to Stop the Use of Child Soldiers' (now called 'Child Soldiers International'),[38] an NGO that defends a strict Straight 18 position and which has for instance been instrumental in raising the minimum age in Paraguay as noted above. The Committee welcomes France's efforts on the international scene, but remains concerned that young people under 18 can be voluntary recruited in the armed forces, including non-nationals who can be recruited at 17 in the Foreign Legion.[39] France does not give effect to this demand, and neither do China, the UK and the USA that explicitly state that they have no plans to modify the extant age limitations for young people's voluntary recruitment.[40] During its latest dialogue with the Committee, the US representative found it worthwhile to recall 'that the Optional Protocol provided for the recruitment of volunteers under the age of 18 to national armed forces, subject to parental consent'.[41] As these countries follow the ordinary meaning of the terms of OPAC Article 3(2) and hence respect Article 31 of the 1969 Vienna Convention on the Law of Treaties, they did not need to provide an elaborate legal argumentation to sustain their position. Arguments invoked to maintain lower minimum ages for voluntary recruitment refer to the benefits for the young people as well as to the needs of the armed forces. China for instance finds that voluntarily enlisting in the army at the age of 17 years old is not only an individual desire and honour for young people, but also that the army offers them a means 'to acquire greater knowledge, which made them more competitive in the labour market'.[42] In addition, the social realities in China also need to be considered.[43] During its dialogue with the Committee, the Chinese representative explained that, because of the deferment of the entry into the armed service of students in higher education, the number of recruits had fallen, 'which was why it was not possible to raise the age of conscription to 18'.[44] The UK State Party report of 2007 provides similar arguments why young people aged 16 and above are attracted to pursuing careers in the armed forces and why the government welcomes their participation: 'the armed forces provide valuable and constructive training and employment to many young people, giving them a sense of great achievement and worth, as well as benefiting society as a whole'.[45] These discussions do not however mention a 'right' of young people to join the military but rather revolve around the right to leave the armed forces for military staff under 18 years of age.[46]

Regarding armed groups that are distinct from the armed forces of a state, OPAC Article 4 prohibits voluntary recruitment of persons under the age of 18 years and requests state parties to take measures to prevent, prohibit and even criminalize such recruitment. What contracting state parties found lawful for their national armed forces is criminalized if undertaken by competing non-state armed groups who cannot, as for instance the Chinese and UK Governments did to justify the recruitment of 16 and 17 years old, refer to potential benefits for the young recruits in terms of educational training and skills.

[36] See, for instance, CRC Committee 2013b: [21].
[37] CRC Committee 2008: [54]; CRC Committee 2007b: 2.
[38] CRC Committee 2006: [29].
[39] CRC Committee 2007b: 2.
[40] CRC Committee 2012b: [17] CRC Committee 2016: [66]; CRC Committee 2017: [76].
[41] CRC Committee 2017: [63].
[42] CRC Committee 2013c: [41].
[43] CRC Committee 2012b: [17].
[44] CRC Committee 2013c: [41].
[45] CRC Committee 2007c: [18]. For a different perspective, see Crilley in this volume.
[46] CRC Committee 2016: [66].

Like in OPAC Article 3(2), the terms used are straightforward and do not leave much room for interpretation.

However, the Straight 18 position for the voluntary recruitment by non-state armed groups gets complicated in cases when a rebel group succeeds in overthrowing the Government in place and supplants the national army, as has been the case for example in Rwanda, Timor-Leste and the DRC.

In Rwanda, many children were incorporated in the ranks of the Rwandan Patriotic Front (RPF) that seized power in the aftermath of the 1994 genocide. Upon its victory, the RPF became a regular army, the Rwandan Patriotic Army. Many of the under-18s who were in the ranks of the RPF while it was still an armed group were retained in the national Rwandan armed forces, especially those in strategic positions.[47]

In Timor-Leste, many young people participated in the country's liberation process from Indonesian occupation that was marked by many acts of violence. After the country's independence that came about after a popular referendum in 1999, the rebellion Armed Forces for the National Liberation of East Timor, with whom many young people had been associated, became Timor-Leste's national armed force. The young people who had participated in the fight for the liberation of the country were excluded from the peace process.[48]

Already at the time of its independence in 1960, the DRC was experiencing rebellions led by schoolchildren. These events prompted the enactment of legislation in 1981 that set 16 years as a minimum age for entry into the armed forces.[49] During the First Congo War of 1996-1997 that saw the Mobutu regime brought down by the Alliance of Democratic Forces for the Liberation of Congo, a significant number of people under 18 years of age joined the rebellion. Following the overthrow of the regime, the rebellion army morphed into the new national armed forces retaining all combatants between 16 and 18, in conformity with the 1981 law. Following pressure from the international community, the new Congolese government decided to order the demobilization of all children under 18 years of age from the armed forces.[50]

Would it be possible, under OPAC Articles 3(2) and 3(4), to 'legalize' the unlawful recruitment of 16- and 17-years olds by non-state armed groups in cases where these rebellion groups become the national army? In the three countries described above, this question no longer applies as all three have declared upon their ratification or accession to OPAC that the minimum age for voluntary recruitment into their national armed forces is 18 years.[51] But the possibility of legalizing the previously unlawful recruitment is not completely inconceivable and might be relevant in other situations where young people lawfully form part of the military.

The divergent outcome of the Committee's recommendation to follow the spirit rather than the letter of OPAC shows the persistence of asymmetries in international politics about young people's recruitment in armed forces and armed groups. Well-established democracies and permanent members of the Security Council who are generally confident about their place in the concert of nations do not feel compelled to change their national practices and yield to pressure from advocacy groups to raise the minimum age for voluntary recruitment to 18 years. Akin to social evolutions in the USA and the UK that – because of a backdrop of its enlistments in a concomitant context of persistent demands for military staffing – have increased efforts to attract young people into a future career in the military,[52] China, for instance, argues that the needs of the armed forces make it impossible to raise the age of conscription to 18. Conversely, less powerful regimes as well as more recent democracies are more disposed to showing the international community their willingness to depart from their past and look to the future where human rights must prevail, including the adoption of an outright Straight 18 position concerning children's involvement in the military.[53] The Coalition to Stop the Use of Child Soldiers provides an example of these contrasts: Without impacting its own legislation, France has financially supported this NGO whose activities have been instrumental for raising the age of voluntary recruitment in Paraguay. An apparently unintended, but not impossible, consequence is that a 17-year-old

[47] Internationale des Résistant(e)s à la Guerre.
[48] Kurtenbach and Pawelz 2015.
[49] Art. 8 of the Law No. 81-003 of 17 July 1981 on the staff regulations for State public service personnel.
[50] Decree-Law No. 066 of 9 June 2000 providing for the demobilization and reintegration of vulnerable groups present within fighting forces.
[51] See Status of Treaties.
[52] Hart 2006: 221. For a critique of recruitment campaigns in the UK, see Crilley in this volume.
[53] See Hathaway 2002; Hathaway 2007; Moravcsik 2000.

Paraguayan national who can no longer voluntarily join his own country's armed forces can still be legally recruited to voluntarily serve in the French Foreign Legion.

International law and international humanitarian law prohibit the participation of child soldiers in hostilities. CRC Article 38(2) as well as Article 77(2) of Additional Protocol I and Article 4(3)(c) of Additional Protocol II to the Geneva Conventions establish the minimum age for participation in hostilities at 15 years; the active use of children under the age of 15 years to participate in hostilities constitutes a war crime under the Rome Statute of the International Criminal Court.[54] As discussed above, these age limitations have been raised to 18 years in OPAC Articles 1 and 4(1) which oblige both national armed forces and non-state armed groups to refrain from deploying in hostilities persons who have not yet attained the age of 18 years.[55] In countries that allow their national armies to recruit persons under 18 years of age, special provisions must be adopted to ensure that members of their armed forces who are younger than 18 are not deployed to any theatre of hostilities. This is the case in Canada, for example, that allows voluntary recruitment of persons under the age of 18 years but precludes them from being deployed into any area where hostilities are taking place.[56] However, the legal prohibition of the deployment of child soldiers does not preclude that in many armed conflicts around the globe children do actively take part in hostilities. Even armed forces that themselves strictly abide by all international rules pertaining to minimum ages for the recruitment and deployment of their soldiers cannot avoid having to fight an enemy who engages child soldiers in their battles. In 2017, Canada for instance developed rules of engagement for its armed forces when they encounter under 18-year-old soldiers on the battlefield.[57] This Doctrine aims to offer the Canadian Armed Forces guidance on how to balance, in armed conflicts involving child soldiers, the rights of the child soldier to special protection with the attainment of military objectives as well as the soldiers' right to self-defence.[58] Where the CRC and OPAC are silent on how to deal with child soldiers from rival armies, international humanitarian law (IHL) does contain some relevant provisions but these do not settle this complex area of law.[59]

International law regarding the recruitment and deployment of children in armed conflict aims at ending the recruitment and deployment of young people and children under the age of 18 years and is built on the premise that persons under a certain age are unable to exercise agency.[60] Law and policy are characterized by a negative view of the military. This view presumes that children should not be associated with militaries, either as part of a wider undertaking that wishes to end all wars and bring peace to the world, starting with children, or out of considerations to protect the vulnerable from conflicts for which they are too young. However, a detailed analysis of international human rights law, especially of the provisions contained in OPAC, reveals that some exceptions persist to this general view. We suggest that the study of the margins of the dominant protectionist doctrine can reveal interesting new insights and approaches to analyse, understand and evaluate the complex situation of children's involvement in armed conflict. Here we will analyse these exceptions as deriving from children's rights to, in and through engagement in military activities.

States that allow voluntary recruitment under the age of 18 years must provide safeguards that ensure that such recruitment is in every instance 'genuinely voluntary',[61] but no mention is made of any rights related to join national armed forces. In the case of China, France, the USA and the UK that we have inspected above and where young people can voluntarily join the military once they reach 16 or 17 years of age, no mention is made of a subjective right of the child to join the military. Reasons given to justify this arrangement refer to the primacy of the nation's own interests or *raison d'état* to maintain its capacity to defend the country's engagements, and that the military needs to recruit young talents who are much sought after in a competitive employment market. The only reference to a subjective right is to the negative corollary, namely, the right for young people *to leave or exit* the armed forces. But can there be a right to *leave* an institution without a pre-existing right to *join* it?

Rights *in* the military for young people are regularly mentioned in international law, for instance with regards to the special protection of young combatants who cannot under OPAC be deployed to any

[54] Rome Statute, Article 8(2)(b)(xxvi) and (e)(vii).
[55] Note that the minimum age for participation in hostilities has also been established at 18 years under art. 22 of the African Charter on the Rights and Welfare of the Child.
[56] CRC Committee 2005: [4]
[57] Canadian Armed Forces 2017. See also Rosen in this volume.
[58] See also Kuper 2008: 15.
[59] Henckaerts and Doswald-Beck 2005: 17.
[60] Hanson 2011.
[61] Art 3(3) OPAC; See also International Committee of the Red Cross 2015: 14; Crilley in this volume.

theatre of hostilities. Another example of special protection rights for young combatants concerns children who are alleged as, accused of, or recognized as having infringed the penal law whilst associated with armed forces or armed groups.[62] They must be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth', which considers 'the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.[63] In line with the 'cross-cutting standards' of the CRC,[64] there are indeed a whole set of rights available to juveniles in the military that relate to the right to be free from discrimination while serving, to be free from bullying, to respect for one's family life, the right to be heard, etc.

Finally, reference is also made to rights that can be realized *through* engaging in the military, especially related to children's education and vocational training. In contrast to the Straight 18 philosophy, OPAC Art. 3(5) exempts state parties from the obligation to raise the minimum age for voluntary enrolment in military schools, where children must receive an education that is directed, in accordance with CRC Art. 29, to the child's personal development, to the cultivation of respect for human rights and fundamental freedoms, as well as respect for the child's parents and for cultural and national values. In sum, the education offered in military schools must aim at 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'.[65] The military thereby functions as 'a school for the nation'.[66] Armed forces may also provide work-based training and education for all young people, without any distinction, who can acquire qualifications and skills that are equally recognized outside the armed forces.[67] Working within the army can enable young people to acquire administrative and organizational skills and help develop a personal discipline, self-confidence and leadership skills as in any civil trade. Empirical studies conducted in the USA show that amongst the reasons why young people enlist in the army, in addition to their commitment to serve their country, is precisely the goal to develop such skills.[68]

3 On the thin line between children and the military: youth activism and citizenship

Studies in the field of youth activism and young people's engagement in political struggles indicate that consideration of children's voices is relatively uncomplicated when they concern issues that already benefit from broader community support, for instance the conservation of a community forest with which most civil society actors agree. But taking into account the perspective of children is less straightforward when children challenge extant community voices or broadly shared assumptions such as when they want to work rather than go to school.[69] Because of the dominant view on children and young people as persons who lack the capacity for autonomous decision making, very few studies have examined the significant and autonomous nature of children's participation and their respective experiences in political violence. On the contrary, the direction has been to rather carelessly consider political violence as unvaryingly bad for them.[70] According to Barber, 'the dominant focus in the approach to the study of children's and youths' experience with political violence remains the chronicling of violence exposure and the documentation of its correlation with stress or other forms of psychological impact',[71] even if this narrowly focused linkage has often been found to be weak and inconsistent. Political action therefore habitually remains a privilege of adults whereby the entry of children into this universe is considered as being transgressive.[72]

From our review of literature on youth activism and political violence, we discern three possible ways of looking at children's involvement in political violence: these are characterized, respectively, by manipulation, compliance and difference.

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[62] International Committee of the Red Cross 2015: 16.
[63] Art 40(1) CRC.
[64] Hanson and Lundy 2017.
[65] Art. 29(1)(d) OPAC.
[66] Krebs 2004.
[67] CRC Committee 2007c: [19].
[68] Eighmey 2006.
[69] Duncan 2016: 55.
[70] Barber 2008: 303; Hammack 2010: 180-81.
[71] Barber 2008: 298.
[72] Hermant 1995.

The first approach maintains that children bluntly follow the instructions received from adults who manipulate them. Children do not have the required capacity to make political choices and to defend them. This is the position generally taken in international law as discussed above as well as in research on children and violence, whereby it is the manipulating adult who must pay for having transgressed the prohibition of engaging children in violent political struggles.[73]

Pursuant to the second approach, to wit compliance, children who live in a violent environment share the same vision and understanding as their adult counterparts and comply with the latter's viewpoints. Here children's capacity for action is recognized because their views correspond with the aspirations of the entire community. As their autonomy is preserved, children are not considered as manipulated by adults, but owing to the dominance adults exert over them, in effect they (the children) have no choice but to comply with the directives of the adults. The recognition of children's capacity is also limited as it is very often inclined to be ignored upon returning to peace. This latter aspect is highlighted by Kurtenbach and Pawelz who noted that, following the conflict in Timor-Leste, young people who had fought alongside adults for the liberation of their country were not permitted to participate in negotiating the peace process.[74] Adults wanted to maintain the political community's hierarchy by being the only persons allowed to dominate the public arena. Similar findings were revealed by Pamela Reynolds in her study of children who participated in the struggle against apartheid in South Africa. Analysing the functioning of the South-African Truth and Reconciliation Commission, she found that 'the testimonies have added little to our understanding of the complexity of children's engagement, … or the development of their political ideas and the range of their reflections on broad issues to do with morality, duty and the nature of society'.[75]

The third approach finds that children have a different understanding compared to adults with respect to political violence. This approach posits that children have an independent response to experienced political violence, a phenomenon Duclos terms as 'children's autonomous political violence'.[76] Studies on children and violence consider that youth violence is related to social obstructions such as the breakdown of the long-established organization of the traditional community,[77] or to poverty of a population composed largely of young males between the ages of 15 and 35 who are unemployed, illiterate and live in poor socio-economic conditions.[78] Although under this optic young people have an ability to make choices, the scope thereof is tainted with a negative connotation that can reduce the efforts of these young people to merely reproducing violence rather than seeing it as a way of appropriating and subverting it.[79] Moreover, this optic does not allow for consideration of the fact that young people 'have political knowledge through their lived experience' and that 'this knowledge may translate into actions in multiple ways', especially into small everyday actions.[80] Even if the second and third approach open up some space for considering children's collaborative and independent agency, we find that none of these three approaches deals in a sufficiently elaborate manner with children's involvement in political violence.

Besides providing nuanced empirical accounts of the active role played by young people in the mobilization, demobilization and reconciliation process,[81] the recognition of children's agency as political actors also resonates with citizenship studies. Recent literature on childhood studies and children's rights has explored the intersection of children's agency and participation rights with the notion of citizenship. This literature argues for a more inclusive form of citizenship.[82] But what are the consequences of an enlarged view on citizenship that encompasses children's political rights, and even their right to vote, for children's rights related to the military? If children are granted full citizenship rights, does that imply that they also have a right to join the military, which is one of the attributes of citizenship status? We will explore the links between children's citizenship and the military by following

[73] Hermant 1995: 5.
[74] Kurtenbach and Pawelz 2015: 148-9. For a discussion of very similar dynamics of exclusion that operated in the Truth and Reconciliation Commissions in South Africa, Sierra Leone and Liberia, see Drumbl 2012.
[75] Reynolds 1998: 50.
[76] Duclos 1995: 5 (writing in French, the author uses the words 'la violence politique autonome des enfants' or also 'la violence politique juvenile autonome').
[77] Hermant 1995.
[78] Özerdem and Podder 2015: 21-2.
[79] Argenti 2002: 133.
[80] Duncan 2016: 58.
[81] Özerdem and Podder 2015.
[82] See e.g. Baraldi and Cockburn 2018; Cockburn 2012; Invernizzi and Williams 2008; Oswell 2012.

two countervailing directions. First, we consider soldiering as a pathway to citizenship and, second, we will reflect on how being a citizen might be linked to the right of joining the military.

Historically, as Burk explains, 'members of groups not recognized as full citizens could improve their social standing by performing military service'.[83] There is generally a strong sense in public discourse that links the willingness and ability to undertake military service to citizenship, whereby the right to vote is seen as a marker of political inclusion and full citizenship.[84] Through their participation in armed conflicts, minority groups have been able to acquire citizenship status. This was, for instance, the case for granting women the right to vote in Britain which was explicitly linked to their contribution to the war effort during World War I.[85] In France, legislation enacted in 1999 facilitated naturalization of foreigners who already could apply for French citizenship after having served in the Foreign Legion for at least three years. This development further illustrates the strong link between citizenship and the military. According to Law No 99-1141 of 29 December 1999, Article 21-14-1 of the French Civil Code stipulates that French nationality can be conferred by decree to any requesting non-national who is enlisted in the Foreign Legion and who has been wounded on mission during an operational engagement of the French Army. Not only have members of specific groups gained access to a country's citizenship by contributing to its war efforts, certain groups have also instrumentalized their participation in the military as a means to gain access to citizenship status. In the USA, citizenship aspirations have been fuelled by military service of various groups including African-Americans and other racial minorities as well as undocumented migrants, women, and lesbians and gays who 'have pressed for access to the risks and sacrifices of military service as a means to gain the privileges and benefits of full citizenship'.[86] The extensive participation in the Vietnam war of young Americans under 21 years old, which was the minimum voting age at that time, had a direct influence on extending the franchise in 1971 to 18 year olds in the USA.[87] Student protests that led to lowering the voting age maintained that if young persons could fight and die for their country at 18 and 19 years old, they should not be denied the right to vote.[88] According to Sarabyn, debates went beyond the mere question of giving full-citizenship to 18-year-old soldiers who had been fighting in Vietnam, but also:

> [F]ocused on the role young people should take in civil and political society. Supporters considered young people mature and responsible, capable of bringing unique assets to the political order. Opponents, in contrast, saw young people as immature, needing a sheltered environment free from 'bad' influences.[89]

A similar movement took place in South Africa were young people's past efforts in the country's struggle against Apartheid were officially recognized, not via lowering the voting age but through the declaration of a public holiday to commemorate the 1976 Soweto uprising where black school children had taken the lead to demonstrate against the Apartheid regime. For President Nelson Mandela, this official public holiday, called South Africa Youth Day, is aimed at giving 'a fitting tribute to our young heroes'.[90]

Besides considering soldiering as a path to citizenship, citizenship confers rights related to the military. For a long time, serving in the military has been considered as the fulfilment of the social status of a citizen, amounting to a kind of rite of passage through which everyone learns and earns his or her citizenship.[91] Military service was seen as the means by which an individual could be recognized as a citizen by the members of his or her political community.[92] A number of minority groups have argued that not allowing them to join the military is not only discriminatory but also deprives them of full citizenship status.[93] Reserved for citizens, military service is one of the attributes of being a full member of a nation, together with active and passive voting rights, holding public office, pursuing a career in the

[83] Burk 1995: 504.
[84] Sarabyn 2008: 54.
[85] Carter 1998: 80.
[86] Hillman 2009: 1282; see also Sarabyn 2008; Burk 1995: 505.
[87] Amar 1991: 1164.
[88] Amendment XXVI – Right to Vote at Age 18, 1971.
[89] Sarabyn 2008: 30.
[90] Mandela 1995.
[91] Hays 1967: 19.
[92] Burk 1995: 505-8.
[93] Burk 1995; Hillman 2009; Riehl 1995.

administration and serving as jury members.[94] But is there also a right to join the military? The question whether the American Constitution protects such a right to military service was discussed amongst American legal scholars in the wake of the United States Supreme Court decision in *District of Columbia v. Heller*[95] which concerned the right to keep and bear arms. According to Justice Scalia, the right to be a soldier or to wage war would be 'an absurdity that no commentator has ever endorsed'.[96] In contrast, based on his analysis of the Second Amendment to the US Constitution, Riehl finds that there is a 'close relationship between the right of military service and full political participation in our democracy', and considers that 'the right to serve in the military is a fundamental political right'.[97] Noting that the issue of the right to military service has been left largely unexamined, Hillman agrees with this view, and asserts that access to the military is a fundamental but as of yet unacknowledged aspect of citizenship.[98] For Hillman, the protection of an individual's right to participate in the defence of the nation is 'a right rooted in the nature of citizenship itself'.[99]

In order to better frame the connection between citizenship and military service, two concepts need to be untangled: namely, the citizen-soldier from the free citizen. The citizen-soldier tradition is inherited from the Ancient Greeks[100] and was exalted by Rousseau for whom the *Pro patria mori* idea (to die for one's country) constitutes a fundamental component of his theory of the social contract.[101] This tradition rests on two core implications. The first is that military duties inherently assume the devaluation of biological life which makes it possible to enjoin citizens to sacrifice themselves for the nation.[102] The second is that a first-class citizen is the person who serves or has served in the nation's army, whereby military service produces better citizens[103] or even new forms of citizenship.[104] The citizen-soldier tradition comes into existence through conscription, which leaves an individual little room for manoeuvre as serving in the nation's army is constructed as an obligation backed up by sanctions.

Despite states' persistent militarization, a more liberal vision of the military has emerged, giving rise to the concept of the 'free citizen'. This vision, which originated during the Enlightenment and took shape through the adoption of the Universal Declaration of Human Rights in 1948, proposes new links between military service and citizenship based on individual freedom. Indeed, even if the idea that states must be defended against external or internal aggressors continues to be acknowledged, it is no longer accepted that the interests of the state can prevail over those of an individual.[105] The citizen must be able to judge freely the dangers to which she or he would be exposed if joining the military and can for instance perform civil service as an alternative to military service by accessing the status of conscientious objector or even avoid all military service for religious beliefs. In this case a balance is possible between the rights of the individual and those of the state: serving in the national army is an individual choice whereby enrolment should be voluntary. As both conceptions about the relationship between citizenship and the military co-exist, serving in the army can be seen as an attribute of citizenship for the citizen-soldier as well as an individual freedom stemming from the status of citizen.

Unanswered in this literature is the question whether children's citizenship includes a right to join the military. This question has been almost entirely overlooked, and merits further exploration, especially considering the intense debates about the need to develop forms of citizenship that also include children and young people. Furthermore, the link between the military and citizenship posits a circular, reinforcing movement. Through their past efforts in armed conflicts, minority groups can gain access to citizenship, and through this newly acquired status they have a political base to further enlarge participation in the military which further facilitates enhancing their citizenship status.[106] In cases where full citizenship includes an individual's right to participate in the nation's defence, is obtaining full citizenship beyond reach for persons under 18 years old because they are, according to international

[94] Amar 1991.
[95] 128 S. Ct. 2783 (2008). See Hillman 2009.
[96] Hillman 2009: 1278.
[97] Riehl 1995: 394.
[98] Hillman 2009: 1279.
[99] Hillman 2009: 1283.
[100] Snyder 2003.
[101] Prélot 2003.
[102] Desmons 2001.
[103] Leal 1999.
[104] Catros 2007.
[105] Carter 1998.
[106] Cf Burk 1995.

children's rights standards, principally excluded from participating in the military? Or is there a different form of citizenship for children, that would include some political rights but not the right to joining the military?

4 Conclusion

In discussions about lowering the voting age in the USA following the Vietnam war, opponents of the 'old enough to fight, old enough to vote' argument reverted to Heller's *Catch-22* to make their point. For them, 'the thing called for in a soldier is uncritical obedience, and that is not what you want in a voter'.[107] Considering that young people's absence of maturity makes them unfit to vote but perfect soldiers, the main argument gets twisted and becomes 'young enough to fight, but too young to vote'. Today, arguments about children's capacity and incapacity for autonomous decision making continue to fuel debates over their relationship with the military. International law has been a catalyst for the present-day idea that children should never, under any circumstance, be associated with the military or warfare – children are 'too young to fight, but (not) old enough to vote'.

The perspective presented by Tambo, the child soldier who is the protagonist of the story with which this chapter began, is largely absent from these debates. Showing little concern for legal age categorizations but echoing instead a free citizen conception of his living rights related to the military, Tambo first exercised his right to join an armed group before turning to its corollary right to leave the military. Instead of being respected for his choices, he got convicted for desertion in reminiscence of the citizen-soldier conception of the military. The translation of international law at work in the case of DRC is that of a fragile state that has learned to interpret international norms differently depending on whether the purpose at hand is external or internal in nature. Powerful states can resist pressure from advocacy groups, as we have seen in the case of the permanent members of the UN Security Council. The double standards they impose upon themselves and other nations illustrate how children's vulnerability and inherent weakness, which informs the language of humanitarian concern with child soldiering, can be put to use as an effective cover 'to allow activity around "child soldiers" to be placed in the service of powerful interests rather than children themselves'.[108] Because of the DRC's precarious position among states, its government presents itself to the international community as an obedient nation. On the international scene, the DRC conforms to the internationally hailed Straight 18 approach towards child soldiering that is based on the child's vulnerability leading to a rejection of Tambo's potential status as a free citizen. However, the DRC takes a different response to young Tambo at the internal level, where he is convicted for desertion by a military tribunal, hence expressing a citizen-soldier conception that includes sanctions for citizens who breach their military obligations. Whereas the internal level takes the interests of the nation as a starting point, it is the child's perceived vulnerability that takes centre stage at the international level. Neither perspective seems to be truly concerned with doing justice to the living rights of Tambo who is left in limbo.

In this chapter, we have explored avenues that can recognize children and young people's potentially voluntary engagement in military action, an activity for which conceptual work is needed that allows 'to engage more fully with the realities of children's lives, which are inevitably shaped by ideas, practices, and power relations that are both local and global'.[109] Such conceptual work needs to attribute some legitimacy to Tambo's conceptions of his rights related to the military and that are at present lacking.

We have seen that international law does not contain a total ban on the participation of children in military life. Such participation remains possible through their voluntary recruitment as of 16 years onwards (provided certain safeguards are respected) or via their enlistment in military schools where no minimum age exists. For many observers, these possibilities are merely residual (and unattractive) exceptions which are contrary to 'the spirit' of the CRC and OPAC and that will be 'fixed' in the long and putatively progressive journey towards the universal ban of child soldiering.[110] For us, however, the study of these margins has permitted the space to grow our reflections on the real, albeit tempestuous relationship between children and the military.

[107] Sarabyn 2008: 57
[108] Hart 2006: 225.
[109] Ibid: 223.
[110] Sheppard 2000.

Taking the conceptualization of a right to join the military as a starting point, even if this right can be limited for persons under a certain age in view of protecting them, an aperture opens to an alternative entry portal into current child soldier discussions. This opening permits a stepping back from the almost exclusive 'protectionist' approach with which international law pertaining to children and armed conflict is generically understood. Even if such an approach expresses a consensus on the negative consequences of violent conflicts for children, it emerges at times in tension with the complex realities of children's experiences of political struggles and violent conflicts that are characterized not only by protectionist but also by emancipatory concerns. Relying on the notions of living rights, social justice and translations, we contend that the right of children to participate in contexts of armed conflict is not necessarily a violation of children's rights. In the local frameworks where lives are lived most intensely, rights that recognize children's subjectivities can even be understood as doing justice to children and young people's efforts and sufferings in the dramatic and adverse contexts of armed conflict.

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