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The Legal Framework

SUMMARY

International humanitarian and human rights law provides the basis for all action to protect children associated with fighting forces. This chapter argues that agencies need to know international and national law, both to advocate with parties to the conflict, and to advocate with the international community to fulfil their legal responsibilities. This legal knowledge will also guide their own actions in protection of children.

All agency staff should therefore be familiar with the UNCRC and key humanitarian principles, while those dealing with governments or the military need wider legal knowledge.

This chapter outlines the main international legal standards relating to the recruitment and use of children in armed conflict. It also outlines the legal standards relevant to reintegration of child soldiers, and their protection in the justice system, while highlighting legal developments relating to the prosecution of those responsible for the recruitment of children.

Web references for the legal instruments or declarations mentioned are given at the end of the chapter, and extracts from key standards are given in Appendix 1.

2A. Why agencies need to know international and national law

Agencies usually become involved in child protection when states and parties to the conflict are unable, or unwilling, to fulfil their responsibilities to children

under international humanitarian or human rights law. While this cannot be a substitute for action by those who have a legal responsibility to protect children and their communities (see Chapter 1), agencies need to understand the key elements of international law and the law of the country concerned for two purposes:

- To lobby parties to the conflict (both state and non-state armed actors) and the international community to fulfil their legal responsibilities.
- To guide the assistance and protection of children.

Agencies need to understand the key provisions of international humanitarian law as it applies to state and non-state armed actors involved in the conflict, and those of international human rights law – in particular, the UNCRC – as it applies to the country where they are working.

Non-state armed actors are not bound by international human rights treaties such as the UNCRC, but both they and state actors are subject to international humanitarian law: in particular, Article 3 common to the four Geneva Conventions and Protocol II Additional to the four Geneva Conventions of 1949. These distinctions are important when planning advocacy strategies: for example, when seeking to stop the recruitment of children.

With respect to the UNCRC, agencies need to have some knowledge of national law concerning the protection of children and of the policies and mechanisms that exist for implementing it. In practice, however, the national law is often inadequate while policies for implementation may be lacking. Enforcing the law can be difficult for countries which lack capacity and resources, and is likely to be even more difficult during conflict (see Chapter 13, section C).

The UNCRC and other legal standards not only set standards for states, they also provide a framework for the policies and practice of agencies (see section 2C below). However, the law on its own cannot stop the military recruitment of children, and agencies need to adopt a much broader approach taking into account the different circumstances of children's lives.

At the local level, the reasons why children are recruited into fighting forces are rooted in the conditions of their lives: poverty, lack of opportunity and the denial of basic rights make them vulnerable to becoming involved in hostilities.

Rather than national or international law, it is the customary law and practices of communities which will chiefly influence how people protect their children during times of conflict. Equally, they can influence who fights: boys are often sent to join armed groups. In such circumstances, a legal prohibition on children joining fighting forces will have little effect on its own (see Chapter 4).

Agencies and others concerned with protecting the rights of children must, therefore, find ways of making global standards more relevant to the day-to-day circumstances of boys and girls and their families. Although such standards provide the foundation for their work, agencies and their partners need to develop policies and practices sensitive to the very different social, cultural and economic contexts children are living in. This is the approach adopted throughout this book.

What is protection?

‘Protection’ means all activities aimed at securing full respect for the rights of an individual – in this case a child – as set out in the relevant human rights instruments and international humanitarian law. There are essentially three complementary types of action:

- responsive action: aimed at preventing, putting a stop to, and/or alleviating the immediate effects of a specific pattern of abuse;
- remedial action: aimed at restoring dignified living conditions through rehabilitation, restitution and reparation;
- environment building: aimed at creating and/or consolidating an environment (political, institutional, legal, social, cultural and economic) conducive to full respect for the rights of the individual.

An overall protection framework must guide all actions on behalf of separated children.¹

Agencies should also have an understanding of the political framework for action at the international level. UN Security Council members have made important pledges to give greater protection to children during armed conflict. UN Security Council Resolutions 1261 (1999) and 1314 (2000) show that the international

community is starting to recognise that children's safety and welfare are directly relevant to peace and security.

Since they provide important benchmarks for policy, planning and co-ordination, agencies need to know what these resolutions say and should cite them when advocating at international level: for example, when lobbying for resources for disarmament, demobilisation and reintegration (DDR).

2B. Which agency staff need to know the law?

Generally speaking, all staff working with children should be familiar with the principles of the UNCRC. However, when agencies are specifically focusing on the recruitment of children to fighting forces, the extent of knowledge required by different members of staff will depend upon their role and responsibilities.

For example, any staff member involved in advocacy with government civil servants, or the commanders of fighting forces, must be confident in their knowledge of what the law says – and must be able to communicate this competently. They also need to know about relevant legislation in the country they are working in and the key humanitarian principles.

Other staff, such as the outreach workers helping children and communities to prevent recruitment, probably do not need to know what the law says in detail, but they should understand its core principles. To complement this, they may also need to know about local norms relating to child protection (see Chapter 12, section D).

If more specialised knowledge is needed, this can be provided by legal advisers or experts from other organisations, such as the International Committee of the Red Cross (ICRC).² Advisers must be able to explain the key principles of the law in clear language and in a manner relevant to the work of agency staff.

2c. The main legal standards

The main international legal standards are summarised here according to their functions and to how they can be used to help:

- Protect children in armed conflict, including those associated with fighting forces.
- Prevent the recruitment of children and their use in hostilities, and to secure their release from fighting forces.
- Reintegrate children with their family and community.
- Protect children in the justice system.
- Pursue and prosecute those responsible for child military recruitment.

I. Protection of children and promotion of their rights

The UNCRC provides the core principles for protecting the rights of all children in armed conflict, not solely those associated with fighting forces.

States have the main responsibility for implementing the UNCRC through their own national law – although, as already mentioned, their capacity to do this may be limited. Agencies with specialist knowledge of the UNCRC can work with government counterparts to develop capacity in key areas.

The standards particularly relevant to children associated with fighting forces concern:

- protection in armed conflict (Article 38)
- protection of children without families (Article 20)
- recovery and social reintegration (Article 39)
- the right to education (Articles 28 and 29)
- prohibition of torture and the deprivation of liberty (Article 37)
- treatment in the juvenile justice system (Article 40).

The UNCRC also sets out principles that should inform all work with children: for example, promoting the best interests of the child, the importance of family

unity, and the need to listen, and give due weight to children's opinions and wishes (see Chapter 12, section A).

2. The prevention of recruitment and securing children's release during conflict

This section should be used with Chapters 4 and 6.

The law relating to the recruitment of children into fighting forces is complicated, particularly on the question of age. Although the international community is moving towards a ban on the compulsory recruitment of children under 18, individual states will set their own minimum age for voluntary recruitment (the UNCRC stipulates that this should be over 15). Agencies must therefore keep track of developments in the countries where they are working.

Programme managers and other staff who engage with state and non-state armed actors must also be familiar with the law of the country and how it is enforced. Until the Optional Protocol (OP) to the UNCRC on the Involvement of Children in Armed Conflict comes into force, the position is as follows:

International law bans the recruitment and direct involvement in hostilities of children under 15 years, in any form of armed force or armed group and during any type of armed conflict. UNCRC Article 38; 1977 Additional Protocol I to the Geneva Conventions, Article 77(2); 1977 Additional Protocol II to the Geneva Conventions, Article 4(3)(c).

In other words, government armed forces, informal armed forces – such as militias, civil defence or local defence forces – and opposing armed groups should under no circumstances have children below the age of 15 years amongst their fighters.

Where national law sets an age higher than 15 years as the minimum age of recruitment, that higher age applies. Furthermore, if governments are recruiting children aged between 15 and 18 years, they should recruit those who are oldest first. UNCRC Article 38(3); Additional Protocol I to the Geneva Convention, Article 77(2).³

The UNCRC generally defines a child as any person under 18 (Article 1). But the above shows that a lower age applies where the military recruitment and participation of children in armed conflict is concerned.

The new Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict – adopted by consensus by the United Nations General Assembly in May 2000 – helps to correct this anomaly (see Appendix 1). It raises, from 15 to 18 years, the minimum age for *direct* participation in hostilities, for *compulsory recruitment* and for *any* recruitment by non-governmental armed groups. It also calls on states to raise the minimum age and introduce strict safeguards for any voluntary military recruitment under 18.

The new Protocol is a major advance in tackling the problem of children being used in fighting forces. The agreement on 18 as the minimum age for participation in hostilities will provide a strong legal basis for prevention and for efforts to secure the release of children from fighting forces; it also reaffirms the distinction that the UNCRC makes between childhood and adulthood. But the Optional Protocol leaves unsolved two major problems:

- It does not deal with the voluntary recruitment of 16- and 17-year-olds into the armed forces or the indirect use of under-18s in military forces. It also allows states to add their own declarations, thus weakening the Protocol's provisions. The phrase 'all feasible measures' used in the main provision is weak by comparison with other possible wording, such as 'in all circumstances'.
- The Protocol sets different standards for non-state armed actors and for state armed forces. Non-state groups are prohibited both from recruiting under-18s and from using them in hostilities, whereas states can set a lower age for voluntary recruitment (with safeguards). This could cause tension when agencies are working with non-state actors to develop local agreements to stop the recruitment of children.

The Optional Protocol builds on other standards:

- The African Charter on the Rights and Welfare of the Child (which came into force in November 1999) prohibits the recruitment or direct participation in hostilities or internal strife of anyone under the age of 18 (Article 22).
- The International Labour Organisation (ILO) Convention 182: Convention

Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (which came into force November 2000) defines a ‘child’ as all persons under the age of 18 (Article 2) and includes ‘forced or compulsory recruitment of children for use in armed conflict’ among the worst forms of child labour (Article 3).

- The Rome Statute of the International Criminal Court (ICC) defines ‘conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities’ as a war crime when committed in either an international or non-international (internal) armed conflict (Article 8).
- The Guiding Principles on Internal Displacement (1998) are based on international humanitarian and human rights law. They say: ‘In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular, any cruel, inhuman or degrading practices that compel compliance or punish non-compliance are prohibited in all circumstances’ (Article 13).

Other provisions:

Many children are coerced into joining fighting forces by methods such as press-ganging and abduction. As well as being mentioned implicitly in the African Charter (which refers to ‘all recruitment’) and explicitly in the ILO Convention 182, these and similar methods are prohibited by: the UNCRC (Article 37, relating to torture and deprivation of liberty), the Guiding Principles on Internal Displacement (1998) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

3. The reintegration of children who have been involved in fighting forces

This section should be used with Chapters 7, 9 and 10.

Agencies should be aware of the standards relating to the reintegration of

children so that they can advocate for adequate provision – for example, as part of a formal DDR agreement – and can plan effective reintegration programmes.

Family reunification is one of the most important stages in a child's reintegration. But some children may not be able to rejoin their families immediately, and may need temporary care while their families are traced, and while they prepare for their return to civilian life. Children who cannot return to their families are entitled to alternative arrangements (Article 20 of the UNCRC).

The UNCRC and other instruments recognise that children affected by armed conflict may require special care. Where necessary, efforts should be made to promote the 'physical and psychological recovery and social reintegration' of children in armed conflict 'in an environment which fosters the health, self-respect and dignity of the child' (Article 39).

Article 4(3) of the Additional Protocol II to the 1949 Geneva Conventions states that children (under 15) who have 'taken a direct part in hostilities' should not be excluded from the provisions of care due to all children affected by conflict. These include family reunification and education.

Access to education and opportunities for play and recreation are crucial in helping children to re-establish their lives away from the military. The importance of providing education to displaced children is emphasised in the Guiding Principles on Internal Displacement (principle 23), and in the Additional Protocol II to the 1949 Geneva Conventions (article 4), which applies to non-international armed conflicts.

Finally, the UNCRC (Article 28) firmly establishes the right to education in all circumstances.

4. The protection of children in the justice system

This section should be used with Chapters 6 and 11.

Children who have taken part in hostilities risk further violations of their rights if they enter the justice system. For example:

- If they are captured by government forces.
- If their participation in the opposition armed forces is deemed a criminal offence.

- If those under 18 are included when prosecuting war crimes, crimes against humanity or genocide.
- If children commit offences under the criminal law while in military service or if they desert.

Agencies concerned with protecting children in the juvenile or adult justice system need to be familiar in particular with: the UNCRC; the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985); UN Rules for the Protection of Juveniles Deprived of Their Liberty (1990), and the International Covenant on Civil and Political Rights (1976) (Articles 6 and 10).

Article 40 of the UNCRC states that judicial proceedings against children should be avoided wherever possible, and sets out the minimum guarantees for children accused of infringements of the law. Those particularly relevant to child ex-combatants are:

- access to legal assistance in the preparation of defence
- the case should be heard without delay in a fair hearing
- the child should not be compelled to give testimony or confess guilt
- respect for privacy
- the child should be able to appeal against any decision to a higher tribunal.

Article 37 of the UNCRC prohibits torture of children, cruel treatment or punishment, capital punishment, life imprisonment and unlawful arrest or deprivation of liberty. It also specifies that if children are arrested or detained they should be given special treatment; they should be separated from detained adults and should have contact with their family and access to legal assistance.

5. The prosecution of those responsible for recruitment

This section should be used with Chapters 4, 11, and 14.

Agencies must keep up to date with developments relating to the prosecution of individuals who have committed war crimes, crimes against humanity or genocide. These establish precedents and show the importance of documenting abuses. Agencies have an important role in monitoring and documenting abuses

against children, including their recruitment and use in fighting forces, as well as rape and other forms of violence.

As a major step towards ending individual impunity for acts that constitute crimes under international law, the Rome Statute of the International Criminal Court includes as a war crime ‘the conscription and enlistment of children under the age of 15 into armed forces or groups or using them to participate in hostilities’ (Article 8). However, the weakness of this provision is that the Court’s jurisdiction will apply only to abuses against children up to 15 rather than up to 18.

The Rome Statute of the International Criminal Court

The Statute of this, the first permanent International Criminal Court (ICC), was agreed by 120 States in July 1998. The ICC is intended to complement national justice systems. Under the principle of ‘complementarity’, primary responsibility for bringing to justice those responsible for serious violations of international humanitarian and human rights law will remain with States. The Court will not supersede the International Criminal Tribunals for Rwanda and former Yugoslavia.

The ICC will have jurisdiction over individuals who commit crimes during internal and international armed conflicts and during peace; it will not act retrospectively. The Court will be established when sixty States have ratified the Statute.

Although its jurisdiction has yet to be tested, the ICC establishes important principles relating to the protection of children in the judicial process, and has already been used as a key reference point in presentations to the Security Council on shortcomings in the draft statute of the Special Court for Sierra Leone.

Other relevant provisions of the ICC include:

- Jurisdiction over intentional attacks on educational institutions and schools (Article 8(2)(b)(ix) and Article 8(2)(e)(iv)); schools are frequently targeted for military recruitment or other purposes.
- Special provisions will protect children as victims and witnesses (Articles

43(6) and 68(1, 2)), exempt children under 18 from prosecution by the court (Article 26) and require judges and the office of the prosecutor to have expertise in violence against children (Articles 36(8)(b) and 42(9)).

6. Other declarations

Agencies can also draw upon other declarations and frameworks relating to children in fighting forces, for example:

- *The Cape Town Principles and Best Practices*, devised at a symposium in Cape Town in April 1997, outline principles and practices concerning the prevention of child recruitment, the demobilisation of child soldiers and reintegration into family and community life.
- The Maputo, Berlin, Kathmandu, Montevideo and Amman Declarations on the use of children in war will be useful for agencies working in the regions covered by these statements.

2D. Sources for legal instruments and other declarations cited

The various legal instruments and declarations concerned with the recruitment of children and their use in fighting forces are available on the web sites listed below. Unfortunately, no one site includes them all, but the best place to start is the Coalition to Stop the Use of Child Soldiers.

Coalition to Stop the Use of Child Soldiers:

<www.child-soldiers.org>

Human Rights Watch:

<www.hrw.org>

Child and Young Adult Soldiers (UNICEF, UNESCO, Ginie):

<<http://www.pitt.edu/~ginie/mounzer/conventions.html>>

United Nations High Commissioner for Human Rights:

<www.unhcr.ch>

UN Office for the Co-ordination of Humanitarian Affairs:

<www.reliefweb.int>

United Nations:

<www.un.org>

I. International law

UN Convention on the Rights of the Child (1989):

<www.unicef.org/crc/crc.htm>

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict:

<<http://www.unhcr.ch/html/menu2/6/protocolchild.htm>> or

<www.child-soldiers.org>

Additional Protocol I to the 1949 Geneva Conventions, and relating to the Protection of Victims of Non-international Armed Conflicts. Article 77, Protection of Children:

<www.hrw.org/campaigns/crp/int-law.htm>

Additional Protocol II to the 1949 Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts. Article 4, Fundamental Guarantees:

<www.hrw.org/campaigns/crp/int-law.htm>

African Charter on the Rights and Welfare of the Child (1999):

<www.child-soldiers.org>

International Labour Organisation Convention 182: Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (came into force 2000):

www.ilo.org/public/english/standards/ipecc/ratification/convention/text.htm

The Rome Statute of the International Criminal Court, Article 8:

www.child-soldiers.org

The full treaty can be seen on:

www.un.org/law/icc

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984):

www.unhcr.ch Go to 'treaties' on the homepage.

UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) ('Beijing Rules'):

www.unhcr.ch Go to 'treaties' on the homepage.

UN Rules for the Protection of Juveniles Deprived of Their Liberty (1990):

www.unhcr.ch Go to 'treaties' on the homepage.

The International Covenant on Political and Civil Rights (1976):

www.unhcr.ch Go to 'treaties' on the homepage.

2. Other principles and declarations

The Guiding Principles on Internal Displacement (1998):

www.reliefweb.int/ocha_ol/index.html

Cape Town Principles and Best Practices (1997):

<http://www.pitt.edu/~ginie/mounzer/conventions.html>

The following declarations are on:

www.hrw.org/campaigns/crp/statements.htm

Maputo Declaration on the Use of Children as Soldiers (April 1999)

Montevideo Declaration on the Use of Children as Soldiers (July 1999)

Berlin Declaration on the Use of Children as Soldiers (October 1999)

Kathmandu Declaration on the Use of Children as Soldiers (May 2000)

Amman Declaration on the Use of Children as Soldiers (2001)

Other declarations can be found on:

www.child-soldiers.org

3. Security Council Resolutions

UN Security Council Resolution 1261 (1999) on Children and Armed Conflict (25 August 1999):

www.un.org/Docs/scres/1999/99sc1261.htm

UN Security Council Resolution 1314 (2000) on Children and Armed Conflict (11 August 2000):

www.un.org/Docs/scres/2000/res1314e.pdf