

**THE RIGHT TO RECOVERY AND REINTEGRATION OF  
CHILD VICTIMS OF ARMED CONFLICT -  
A PUBLIC SUBJECTIVE RIGHTS APPROACH**

by

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## **OPSOMMING**

### **Die reg van kinderslagoffers van gewapende konflik op herstel en herintegrasie – 'n publieke subjektiewe regte benadering**

Die reg van kinderslagoffers van gewapende konflik op herintegrasie is in wese 'n besondere vergestaltung van die publiekregtelike verhouding. In hierdie studie word na die publieke subjektiewe regsteorie soos dit in die Duitse reg toepassing vind verwys om hierdie verhouding te verklaar. Daar word op tekortkominge in die teorie gewys waarna aspekte van die Reformatoriese regstradisie onder die loep geneem word om bepaalde gebreke aan te suiwer. Vervolgens word gepoog om 'n teoretiese raamwerk daar te stel aan die hand waarvan die verhouding na behore verklaar kan word.

Daar word tot die gevolgtrekking gekom dat bepaalde statusaspekte van die kinderslagoffer in sy/haar verhouding met die Staat geaktiveer word. Dit is slegs uit hoofde van die negatiewe en positiewe statusaspekte wat met die juridiese bestemming van die Staat verband hou dat die kind negatiewe en/of positiewe staatsoptrede in sy/haar guns kan eis.

**Sleutelwoorde:** aktiewe statusaspek, gewapende konflik, beste belang van kind, kind, kindersoldaat, kinderslagoffer, dualisme, internasionale gewoontereg, monisme, negatiewe statusaspek, passiewe statusaspek, publieke subjektiewe regte, herintegrasie en herstel, soldaat, staat, statusaspek, Verenigde Nasies Konvensie oor die Regte van die Kind, slagoffer, oorlog

## **SUMMARY**

### **The right to recovery and reintegration of child victims of armed conflict – a public subjective rights approach**

The right of child victims of armed conflict to recovery and reintegration in essence is a particular exposition of the public law relationship. In this study reference is made to the theory of public subjective rights as it applies in German law to explain the relationship. Shortcomings in the theory are identified after which aspects of the Reformed Tradition are discussed to come to sound solutions. An effort is made to establish a theoretical framework in terms of which the relationship can be explained comprehensively.

The conclusion is reached that particular status aspects of child victims are activated in their relationship with the State. It is only in terms of the negative and positive status aspects (which relate to the juridical destination of the State) that child victims may demand negative or positive State conduct in their favour.

**Key Words:** active status aspect, armed conflict, best interest of child, child, child soldier, child victim, dualism, international customary law, monism, negative status aspect, passive status aspect, public subjective rights, reintegration and recovery, soldier, state, status aspect, United Nations Convention on the Rights of the Child, victim, war

***For Zabeth***

***In U lig sien ons die lig!***

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## **ABBREVIATIONS**

CRC	United Nations Convention on the Rights of the Child (1989)
IJHR	The International Journal on Human Rights
ILO	International Labour Organisation
NILR	Netherlands International Law Review
NUPI	Norwegian Institute of International Affairs (Norsk Utenrikspolitisk Institutt)
SAPL	South African Public Law
SAYIL	South African Yearbook of International Law
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund

## CHAPTER 1

### INTRODUCTION, HYPOTHESES AND DEFINITIONS

#### 1 Introduction

In 1996 Ms Graça Machel submitted a report to the General Assembly of the United Nations. The report related to the impact of armed conflict on children.<sup>1</sup> In the report she describes how millions of children are caught up in conflicts in which they are not merely bystanders but indeed targets.<sup>2</sup> She explains that in the decade prior to 1996 30 major conflicts had raged in different countries around the world. These conflicts took place within States and between factions split along ethnic, religious or cultural lines and destroyed crops, places of worship and schools. Nothing was spared, protected or held sacred – not even children, families or communities.<sup>3</sup> After mentioning some statistics she concludes that "more and more of the world is being sucked into a desolate moral vacuum" – a space devoid of the most basic human values. In these conflicts children are slaughtered, raped, maimed, starved and exposed to extreme brutality. Indeed, there are "few further depths to which humanity can sink".<sup>4</sup>

Patterns and characteristics of modern armed conflict contribute to an increased risk for children. Distinctions between combatants and civilians seem to disappear as battles are fought from village to village and even from street to street. Any and all tactics are employed in such conflicts and include systematic rape, ethnic cleansing and genocide. Standards are also often abandoned which means that there is no bar against the violation of the fundamental rights of children.<sup>5</sup>

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1 Machel 1996 *Impact of armed conflict on children*.

2 Machel 1996 *Impact of armed conflict on children* par 1. See too Maher 1989 *Boston College Third World Law Journal* 298.

3 Machel 1996 *Impact of armed conflict on children* par 2.

4 Machel 1996 *Impact of armed conflict on children* par 3.

5 Machel 1996 *Impact of armed conflict on children* par 22-24.

In par 24 Machel relates that in recent decades the proportion of war victims who are civilians has leaped from 5% to over 90% in struggles that claimed more civilians than soldiers. There are approximately 50 countries around the world where children are suffering because of the waging of armed conflict. This suffering bears many faces; children are being killed, made orphans, uprooted from their homes *et cetera*. Over the last decade 2 million children were killed in conflict situations, more than 1 million were made orphans, over 6 million have been seriously injured or permanently disabled and over 10 million have been left with grave psychological trauma. A large number of children, especially young women, have been made targets of rape and other forms of sexual violence as a deliberate instrument of war. At present there are more than 20 million children who have been displaced by war within and outside their countries and approximately 800 children are killed or maimed by landmines every month.<sup>6</sup>

The magnitude of this abomination attests to a new phenomenon. There has been a qualitative shift in the nature and conduct of warfare and armed conflict. Several developments mark this transformation. Almost all the major armed conflicts in the world today are civil wars. They are protracted, lasting years if not decades. They are fought amongst those who know each other well and pit compatriot against compatriot, neighbour against neighbour. They are furthermore characterized by widespread social breakdown and lawlessness, the proliferation of small arms and light weapons, the indiscriminate use of anti-personnel

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6 See Nylund 1998 *The International Journal of Children's Rights* 23. The number of children affected by armed conflict can only be estimated. See eg Mulira *International Legal Standards* 1-6; Renteln 1999 *Whittier Law Review* 191 who estimate that approximately 200,000 – 300,000 children were involved in armed conflict. Mulira conveys that over the past two decades, twenty million children have died as a result of participation in armed conflict and that despite the development of international law, policies and programmes national armies and rebel groups continue to recruit and use children in armed conflict. See too Kuper *International Law* 76. Between 2004 and 2007 children actively took part in armed conflict in government forces or non-state armed groups in 19 countries, including Afghanistan, Burundi, Central African Republic, Chad, Colombia, Ivory Coast, India, Indonesia, Iraq, Israel, Myanmar, Nepal, Philippines, Somalia, Sri Lanka, Sudan, Thailand and Uganda.

landmines and the involvement of multiple and often semi-autonomous armed groups. A key-feature of this struggle is the 'demonization' of the enemy community – often defined in religious, ethnic, racial or regional terms and the orchestration of vicious hate campaigns. This shift in the nature and conduct of warfare results in 90% of casualties in ongoing conflict around the world being civilians, the vast majority of whom are women and children. This figure must be compared to the 5% in WW I and 48% in WW II.

The purpose of international law is to mitigate the inherent inhumanity of war by providing guidelines of acceptable conduct for international actors. It aims at providing guidance with regard to the moral boundaries in situations where the exercising of power will most likely breed excess. The object of international law is therefore primarily aimed at protecting and aiding victims of armed conflicts. However, despite the severity of the situation, there is no uniform international standard which can be applied to monitor the standard of conduct in these situations.<sup>7</sup> In the last century the concept of children's rights has been a focal point of international law. The *United Nations Convention on the Rights of the Child* (1989) (hereafter CRC) is the single most internationally ratified human rights instrument, yet neither international human rights law, nor humanitarian law (including the Geneva Conventions of 1949 and the Additional Protocols to the Conventions of 1977) has succeeded to reduce the suffering of child victims of armed conflict.

Article 39 of the CRC provides that States Parties to the CRC have an obligation to ensure that, *inter alia*, child victims of armed conflict receive appropriate treatment for their recovery and social integration. The question to be addressed in view of the provision therefore relates to the legal status in public law of child victims of armed conflict in respect of their right to recovery and reintegration.

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7 Maher 1989 *Boston College Third World Law Journal* 300.

## 2 Hypotheses

The points of departure of this study are diverse due to the different nature of the contents of the respective chapters. However, it may be accepted as fundamental that the best interests of the child are of paramount importance in all matters concerning them. In chapter 2 it will be argued that armed conflict affects all fundamental rights of children. It will further be explained that modern law views children under 15 as *culpa incapax* for crimes during armed conflict so that child soldiers should not be prosecuted for such crimes. As far as child soldiers between the ages of 15 and 18 are concerned there appears to be uncertainty internationally whether they should be prosecuted. The argument is put forward that recovery and reintegration into society will better serve their best interests as such children should also be viewed as victims of armed conflict. The question whether a State follows a dualist or monist approach to the incorporation of treaties into municipal law may also directly impact on the right of the child victim to enforce his rights in terms of section 39 of the CRC.

In chapter 3 the legal position of the child and the State is contextualized. It is accepted that both the State and the individual are legal subjects endowed with legal subjectivity.<sup>8</sup> In their relationship it must be accepted that the State is not only endowed with State sovereignty, but also that it

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8 It is conceded that this submission may be out of step with accepted views in Public International Law. Dugard for instance is of the firm opinion that only States can be "full subjects" of international law. He concludes that "[A]lthough entities other than states participate in the contemporary international legal order, it is essential to recall that states and intergovernmental organizations are the main actors in the international community, the only entities with true international personality and the principal creators of rules of international law." See Dugard *International Law* 2. However, there appears to be a growing consensus that individuals may indeed in the public law relationship be considered as subjects for purposes of International Public Law. In this respect one may refer, *inter alia*, to Malan 2008 *De Jure* 81 *et seq* who argues that multilateral human rights conventions are in the nature of *stipulationes alteri* so that the rights negotiated for particular individuals accrue simultaneously with the convention entering into force. He contends that such treaties are self-executing in nature and that individuals acquire such rights at the very same moment as the particular States Party incurs duties under International Law pursuant to such treaty. (See ch 2 n 57).

prescriptively makes use of its authority. However, there is a legal relationship characterized by reciprocal rights and duties so that the balance point in their relationship must as a matter of course be determined legally. As an explanatory model the theory of public subjective rights, which is of German origin, is applied. This theory can only serve as a starting point, though, as it fails to address certain fundamental questions. The viewpoints of authors of the so-called Reformed Tradition will therefore be applied to elaborate on the theory. By applying the theory of public subjective rights in conjunction with the views of authors from the Reformed Tradition, it is endeavoured to explain that the relationship between the State and the individual may not be viewed as one characterized by abuse of State authority or excessive individual claims against the State. In chapter 4 the conclusions reached in chapter 3 are applied to explain the position of child victims of armed conflict in terms of article 39 of the CRC.

### **3 Definitions and explanations**

#### ***3.1 Armed conflict***

Despite the fact that different international protocols apply to the position of child victims in situations of war between two (or more) countries and armed conflict of a national character,<sup>9</sup> article 39 of the CRC specifically refers to armed conflict. Therefore, and also in view of the explanation in paragraph 1 *supra*, reference will herein be made to armed conflict.

#### ***3.2 Child***

In terms of article 1 of the CRC a child is every human being below the age of 18 years unless majority is attained earlier under the law applicable to the child. This age limit corresponds with the Geneva Conventions and the Additional Protocols to the Conventions and also the Optional Protocol on the Involvement of Children in Armed Conflict.<sup>10</sup>

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9 See ch 2 n 2.

10 See ch 2 n 2 and n 101.

### **3.3 Legal subject**

In similar fashion as in private law, a legal subject may typically be described as the bearer of juridical competences and subjective rights. Such competences and subjective rights distinguish the legal subject from the legal object in the sense that the legal subject acts as subject in legal intercourse and not as object. Being a legal subject means, *inter alia*, that the subject is endowed with legal subjectivity which encompasses the subject's legal capacity/competence, his competence/capacity to act and capacity/competence to litigate.

### **3.4 Legal object**

A legal object may simply be viewed as that to which a legal subject has a subjective right. In private law corporeal things, immaterial property, performance and aspects of personality have been identified as legal objects. In public law there appears to be a measure of uncertainty regarding the nature of such objects. However, there seems to be fairly wide consensus that by its very nature, a legal object in public law must at least be capable of being applied in ordaining fashion with regard to the legal community.

### **3.5 Competence/Capacity**

The term *competence/capacity* (Afrikaans – "*kompetensie*"; German - "*Kompetenz*") refers to the ability to take part in legal intercourse. However, in German jurisprudence the concept is also seen as the ability to cause legal change. It is submitted that *prima facie* ability to take part in legal intercourse and ability to cause legal change are interchangeable concepts. The concept comprises *legal capacity* (the capacity to hold offices as a legal subject and have the rights and obligations resulting from the holding of such offices), *capacity to act* (the capacity to conclude

juridically relevant acts<sup>11</sup> and *capacity to litigate* (capacity to act as a litigant). The extent to which a legal subject disposes of these capacities indicates his *legal status*.

### 3.6 State Sovereignty

In this study *State sovereignty* is seen as a legal competence/capacity – the competence of the State to be the bearer of legal subjectivity and to take part in legal intercourse.<sup>12</sup> It is vitally important, though, to

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11 A juridically relevant act may be described as a lawful act to which the law attaches the same consequences as had been contemplated by the acting legal subject.

12 It must at the outset be made clear the idea of State sovereignty as an absolute power is an outdated concept. This is due, *inter alia*, to a growing trend of interdependence and cooperation between States. See Ferreira-Snyman *The Erosion of State Sovereignty* 32. She refers to MacCormick *Questioning Sovereignty* 127 who explains that "[P]ower of one kind, normative power or 'authority', is conferred by law. This may be a power of law-making in a certain territory conferred by a certain constitutional order that is effectively observed in that territory. Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, as long as the constitution places no restrictions on the exercise of that power ... If the constitution then confers such a power but contains no limits upon the power (other than the discretion and judgment of those who exercise the power) we may say that sovereignty is vested in the holder of the law-making power. But what of political sovereignty? ... Political power is interpersonal power over the conditions of life in a human community or society. It is the ability to take effective decisions on whatever affects the distribution of the economic resources to them." It is therefore clear that the concept of sovereignty can be neither fixed nor constant. Makinda "Recasting global governance" 168-172 consequently explains that three types of sovereignty may be discerned:

External or juridical sovereignty which stems from the notion that the State is under exclusive authority of international law;

Internal or empirical sovereignty which results from the point of departure that States have the right and capacity to control the people, resources and institutions within their territories; and

Individual or popular sovereignty which is based on the claim that all people are entitled to fundamental freedoms and that the State may only exercise control over them because they have consented to it. In terms of this type of sovereignty States dispose of rights and responsibilities that other international actors do not possess.

The emergence of the concept of sovereignty as a responsibility to protect, it is submitted, stems from individual sovereignty. Falk "Sovereignty and human dignity" 697 explains that government legitimacy that validates the exercise of sovereignty involves *adherence to minimum humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse conditions within a country*. It is suggested that this exposition corresponds with the discussion in ch 3 par 2.1.3, 4.2 and 6 where it is conveyed that the State is called upon to provide an '*Existenz-minimum*' to the individual in terms of its juridical destination. At 55 Ferreira-Snyman refers in this respect to the report of the Independent International Commission on Intervention and State Sovereignty (*The Responsibility to*

understand that the concepts legal subjectivity and status are inextricably linked. Every legal subject disposes of legal subjectivity – that is trite. However, the status of a legal subject will be the determining factor to establish the extent to which the legal subject can participate in legal intercourse. Therefore, even though the status of the State to be a subject in legal intercourse cannot be doubted, its competence to exercise its authority (capacity to act) may legally be curtailed. This may happen for instance, if a State becomes a signatory to an international convention in terms of which limitations are placed on its capacity to act. On the other hand, as will be explained in chapter 3 *infra*, there are also internal qualifications to the sovereignty of the State. These flow from its internal calling. It is therefore clear that State sovereignty should not be seen as an unbridled power accruing to the State.<sup>13</sup>

### **3.7 State authority**

State authority denotes the capacity of the State to act. By virtue of its authority the State acts prescriptively through its organs towards other legal subjects. The capacity of the State to act flows from the sovereignty of the State and the extent to which it may be exercised may be

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*Protect: Report of the International Commission on Intervention and State Sovereignty* (December 2001) which indicates that sovereignty should be seen as a duty to protect. Sovereignty should therefore be seen, in the first place, that State authorities bear the responsibility for the functions of protecting the safety and lives of citizens and for the promotion of their welfare. In the second place, and flowing from its duty to protect, it suggests that political authorities have a responsibility to citizens internally and to the international community through the United Nations. In the third place agents of the State are responsible for their actions and therefore accountable for their acts of commission or omission. Against this background sovereignty as a duty to protect intervention for human protection is supported when major harm to civilians is occurring and the State in question is unwilling or unable to end it, or is itself the perpetrator.

For the sake of completeness it may also be mentioned that sovereignty may be viewed as a status consideration in the sense that the exercise of sovereignty requires participation in international and regional organizations. Against this background sovereignty is not measured by the extent of a State's autonomy but rather by the extent of its membership and participation in international and regional organizations. See Ferreira-Snyman *The Erosion of State Sovereignty* 57-58.

13 See discussion in n 12 *supra*.

determined by, *inter alia*, a municipal Bill of Rights, legislation, the internal calling of the State, *et cetera*.

### **3.8 Status aspect**

With status aspect in this study is meant that different aspects of the individual status *vis-à-vis* the State are activated in different situations in his various relations with the State. In certain relationships he can practically be a pure duty subject in respect of certain of his status aspects, but in respect of other aspects of his status he can be endowed with competences to claim that the State should to act towards him according to law or comply with legally binding provisions to provide him with an "*Existenz minimum*".

### **3.9 Reintegration and recovery**

The duty of the State to reintegrate and recover child victims may generally be seen as the obligation to provide for the survival of the child through the provision of medical and food assistance, for the security of the child and for a psychologically sound environment within which a routine (for example, education) can be maintained. More particularly, as far as former child-soldiers are concerned, it may include the process of facilitating their transition to civilian life. It may include social reintegration which would typically include the provision of food and medical assistance and psychological reintegration recovery from the experience and learning to live with it.

## CHAPTER 2

### THE CHILD VICTIM'S RIGHT TO REINTEGRATION AND RECOVERY

#### 1 Introduction

Article 39 of the CRC provides as follows:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

It certainly needs no elaboration that article 39, in similar fashion than other articles of the CRC, is broadly formulated. It is generally accepted that such general exposition not only provides a 'common denominator approach' which allows for more States to ratify the CRC, but also enables a submerging of ideological divisions amongst States Parties to the CRC. The nature and effect of this article therefore depend on various factors as provisions of the CRC *qua* international instrument are not enforceable *per se*.

This chapter explains which children are victims of armed conflict. Specific reference is also made to the question whether the former child soldier may be viewed as such a child victim. In the second place the question how a monist or dualist approach in terms of which treaty law is incorporated into municipal law influences the rights of child victims in terms of article 39, is addressed. Thirdly, article 39 is discussed against the background of the CRC as an international human rights instrument.

#### 2 The child as victim of armed conflict

##### 2.1 Introduction

There is no single source for the international law of the child. It is found in specific and general treaties both at universal and regional level, the rules

of international humanitarian law, customary international law and the law and practice of States.<sup>1</sup> This exposition also holds true for the right to reintegration and recovery of child victims of armed conflict. The focus of this discussion will therefore be on the right to reintegration and recovery of child victims of armed conflict in terms of article 39 of the CRC and reference to humanitarian law (and other treaties) will only be made where applicable.

Various factors and situations may influence the exercising of the child victim's right to rehabilitation and recovery. Such may include questions like who is a child victim and whether former child soldiers may be seen as victims of armed conflict. This aspect will be covered in paragraph 2 by merely referring to the debate.<sup>2</sup> In paragraph 3 the relevance of a monist or

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1 Cohn & Goodwin-Gill *Child Soldiers* 55.

2 As the focus of this study primarily falls on the right of children to recovery and reintegration in terms of art 39 of the CRC qua human rights document, the protection of child civilians in armed conflict in terms of humanitarian law is not addressed. For the sake of completeness, however, a brief outline of humanitarian law is provided in this note. Various provisions in international humanitarian law and human rights law provide for the protection of child victims of armed conflict. The Law of Geneva, the so-called *Geneva Conventions* (hereafter GC) qua body of law relates to the protection of victims of war. There are four conventions - *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* Aug 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*Geneva Convention I*); *Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Prisoners of War* Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*Geneva Convention III*); and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* Aug. 12, 1949 6 U.S.T. 3114, 75 U.N.T.S. 287 (*Geneva Convention IV*).

More specifically it is *Geneva Convention IV* (hereafter GC IV) that relates to the protection of civilian persons, including children, in time of war. Prior to the 1949-Conventions international humanitarian law made no specific mention of children as a particularly vulnerable group requiring special protection. GC IV remedies this omission and contains various provisions relating to the protection of children. The value of GC IV for the protection of child victims is, however, doubtful. It indeed purports to render protection to victims where victims are those who are vulnerable. Unfortunately the notion of vulnerability is narrowly defined to include the sick, shipwrecked and wounded. The concept of vulnerability was not readily conceived to include all civilians. Furthermore the main function of GC IV is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to military operations as such. This result flows from the fact that the Law of Geneva serves to provide protection for all those who as a consequence of armed conflict have fallen into the hands of the enemy so that protection from the hostilities itself falls outside the scope of GC IV. It is also clear that the principle of children's entitlement to special treatment is nowhere provided for in GC IV. The Convention does contain some provisions

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that provide for special treatment in specific situations, but one searches in vain for a general definition of childhood or an acknowledgement of children's entitlement to special treatment.

The conclusion can safely be drawn from this rather cryptic overview of GC IV that the protection afforded by the Convention is limited and that it only covers a restricted group of children in the population, namely children in occupied territory. The *Additional Protocols to the Geneva Conventions* of 1977 (hereafter AP) also contain provisions for the protection of children. There are two additional protocols, namely *Protocol Additional to the Geneva Convention* of August 12, 1949, and *Relating to Victims of International Armed Conflicts* June 8, 1977, 1125 U.N.T.S. 3 1725 (Protocol I) and *Protocol Additional to the Geneva Convention* of August 12, 1949, and *Relating to the Protection of Victims of Non-International Armed Conflicts* June 8, 1977, 1125 U.N.T.S. 609 (Protocol II). It is especially article 77(1) of AP I that applies widely to all children in the territories of the parties to the conflict. It articulates the fundamental precept that children "shall be the object of special respect and shall be protected against any form of indecent assault". Parties to the conflict "shall further provide them with the care and aid they require, whether because of their age or for any other reason." This provision was intended to prevent injury to children and to provide for their normal development as far as is possible in situations of armed conflict. This article reflects the general precept of the entitlement of all children in the power of parties to a conflict to special treatment. Art 77(5) specifically provides that the death penalty for an offense related to the armed conflict shall not be executed on persons who have not attained the age of 18 years at the time the offense was committed. See too Maher 1989 *Boston College Third World Law Journal* 307.

AP I applies only to international armed conflicts. In essence it requires that fighting parties must at all times distinguish between military and civilian objects so that civilians and civilian objects may not be the object of attack. The only targets that may be attacked legally are those which by their nature, purpose, location or use make an active contribution to military action and whose total or partial destruction, capture or neutralization in the particular circumstances offers a definite military advantage. It is clear that the protection afforded by AP I extends only to civilians who may not be the direct or intended targets of attack. The significance of art 77 for the protection of child civilians must be established against the background of the aims of AP I. The conclusion reached by authors that its value for children is minimal, therefore appears to be correct. Three main arguments are put forward to substantiate their conclusion.

Art 77(1) provides for children to be the object of special respect. This term, however, has no specific meaning and no definition is provided. It may mean no more than that children should be treated differently in the way specified in humanitarian law, eg that children should not be imprisoned or detained or recruited under the age of 18 years and that they should be among the first to receive relief.

The term 'protection' cannot be equated with, and is fundamentally at odds with, the meaning given to protection in international children's instruments. 'Protection' as intended by AP I, reflects a compromise between humanitarian ideals and military necessity. Any provision which allows for loss of civilian life, provided the loss is not excessive in relation to the anticipated advantages, is essentially incompatible with the right to life provisions of the CRC and the 1924 and 1959 Declarations on the Rights of the Child. According to the CRC and the Declarations the right to life is an intransgressible norm. This is not, however, reflected in the definition of protection under AP I which does not uphold a child's fundamental right to life or to survival.

No mention is made of the *Declaration on the Rights of the Child* (1959), notwithstanding the fact that the drafters were aware of the existence of the document. In the preamble to the Declaration it is stated that "mankind owes the

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child the best it has to give", but there is no indication that AP I seeks to uphold this notion.

AP II extends to conflicts of non-international nature and is a watered-down version of AP I. The Protocol provides in art 4(3) that children shall be provided with the care and aid they require, yet it makes no mention of children's need for special respect and their protection from indecent assault as does art 77(1) of AP I. AP II is extremely limited in its application leading to various problem situations. In terms of art 1(2), AP II does not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature. It would therefore only apply if

- there is an armed conflict not covered by AP I;
- the armed conflict takes place in the territory of the particular High Contracting Party;
- the conflict involves the armed forces of a High Contracting Party and dissident armed forces or other armed groups;
- the dissident armed forces are under responsible command; and
- such armed groups have control over a part of the territory of the High Contracting Party so as to enable them to carry out sustained and concerted military operations and to implement GP II.

Many states view the suppression of those who challenge its authority as a legitimate right and would not readily concede that a situation within their territory amounts to an armed conflict meeting the requirements set out above. It goes without saying that for a child caught up in such situations there is little distinction between armed conflicts meeting and not meeting the requirements – the effects of war are not limited by their classification under humanitarian law.

Of further importance is the fact that particular principles pertinent to child civilians enjoy customary status. These principles are found both in human rights and humanitarian law and include the right not to be arbitrarily deprived of life, the entitlement of children to special treatment generally, the entitlement of civilians to protection in situations of armed conflict and the entitlement of child civilians to special treatment in situations of armed conflict. The customary law status of these norms generally renders them binding on all States even States that are not party to treaties that articulate these norms. The fact that they are enshrined in a treaty means that these principles may not be subject to derogation, reservation or withdrawal. Yet, notwithstanding the customary status of these norms and the fact that humanitarian and human rights law contain specific provisions regarding child civilians, the position regarding child civilians has reached a point that Maçhel describes as a desolate moral vacuum. (See text accompanying n 9 infra).

It frequently happens that there are gaps and contradictions when humanitarian need is opposed to military necessity. In this instance, the so-called *Martins clause* finds application. This clause (which is a clear example of customary international law in this field) confirms the most basic standard. It is set out as follows in AP I: "[I]n cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." See Cohn & Goodwin-Gill *Child Soldiers* 56.

See too Dinstein "Human Rights in Armed Conflict" 345-368; Sandoz "Implementing International Humanitarian Law" 268; Detrick *A Commentary on the UN Convention* 649; Happold 2000 *NILR* 31; Hampson *Legal Protection afforded to Children* par 2.1.1; Hamilton & El-Haj 1997 *The International Journal of Children's Rights* 1; Robinson 2002 *TSAR* 697; Renteln 1999 *Whittier Law Review* 192; Van Bueren *The International Law* 329, 340; Van Bueren 1994 *International and Comparative Law Quarterly* 809 *et seq*; Pictet 1951 *The American Journal of International Law* 462 *et seq*; Singer 1986 *International Review of the Red Cross* 134. See too Maher 1989 *Boston College Third World*

dualist system for the integration into municipal law of international treaties by individual States will be considered.<sup>3</sup> In as much as these issues are largely settled law only scant attention will be directed at these principles of International Law. Paragraph 4 will be directed at the provisions of article 39. No attention will be paid to the debate concerning the influence of the evolving capacity of the child on his criminal liability.<sup>4</sup>

## **2.2 The child as victim of armed conflict**

### **2.2.1 Background**

Many children are caught up in armed conflicts in which they are the targets of violence. Some are victims of a general onslaught against civilians while others die as part of a calculated genocide. Some suffer the effects of sexual violence or multiple deprivations which result in, *inter alia*, lack of food, educational facilities, deprivation of parental care and a family environment and contribute to the spread of diseases.<sup>5</sup> It is trite that armed conflict to a lesser or greater extent violate the fundamental rights of children, *inter alia*, the right to life, to be with family and community, to the

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*Law Journal* 312; McCoubrey *International Humanitarian Law* 171 *et seq*; Boothby 2006 *Intervention* 244-259; Cohn 1991 *International Journal of Refugee Law* 100-111; Kalshoven 1995 *The American Journal of International Law* 849-852; McIntyre 2002 *International Humanitarian Law* 15; Pictet *Development and Principles* 29 *et seq*; Plattner 1984 *International Review of the Red Cross* 140 *et seq* and Cohn & Goodwin-Gill *Child Soldiers* 55 *et seq* for a critical discussion of the AP's.

3 Reservations by States Parties to a treaty no doubt may also be of particular significance. However, as no States Party has made a reservation to art 39, no reference will be made to this aspect.

4 See Van Bueren *The International Law* 335 for a discussion of some other fundamental problems raised by child participation in armed conflict. Also see Fox 2005 *Human Rights Review* 30; Kuper *International Law* 74; Breen 2007 *Human Rights Review* 76; Grover 2008 *IJHR* 54; Singh 2007 *African Human Rights Law Journal* 206, 214; Mulira *International Legal Standards* 22 *et seq*; Abatneh *Disarmament, Demobilization, Rehabilitation and Reintegration* 89.

5 See Machel 1996 *Impact of armed conflict on children*; Kuper *International Law* 75; McCoubrey *International Humanitarian Law* 171; Cohn & Goodwin-Gill *Child Soldiers* 58; Nylund 1998 *The International Journal of Children's Rights* 23; Otunnu *Address at the Conference on Atrocities Prevention and Response*; Otunnu *Report of the Commission on Human Rights*. See further Abatneh *Disarmament, Demobilization, Rehabilitation and Reintegration*. Aldrich and Baarda "The rights of children in armed conflict" 1994; Alfredson 2002 *Disarmament Forum* 17-27.

development of one's personality, to be nurtured and to be protected.<sup>6</sup> Many conflicts last the length of a 'childhood' resulting in those children experiencing multiple and accumulative assaults. Disrupting the social networks and primary relationships that support children's physical, emotional, moral, cognitive and social development in this way and for this long duration, invariably causes severe physical and psychological disadvantages for them.<sup>7</sup>

Machel conveys that in the decade before 1996 an estimated two million children had been killed in armed conflict and that three times as many had been seriously injured or permanently disabled. Countless others had been forced to witness and even to take part in "horrifying acts of violence".<sup>8</sup> She concludes that:

These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a place in which children are exploited as soldiers; a space in which children are starved and exposed brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.<sup>9</sup>

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6 See accompanying text to n 89 and 90 *infra* for a discussion of the treatment of civil and political rights on the one hand and socio-economic rights on the other.

7 Machel 1996 *Impact of armed conflict on children* par 30. See too Mulira *International Legal Standards* 4; Fonseka 2001 *Asia-Pacific Journal on Human Rights and the Law* 70 *et seq*; Breen 2007 *Human Rights Review* 72; Singer 1986 *International Review of the Red Cross* 152. Plattner 1984 *International Review of the Red Cross* 142 refers to a report of UNESCO which explains that it is not the facts of war itself (bombings, military operations etc) which affect the child emotionally. However, it is the repercussions of events on the family affective ties and the separation with his customary framework of life which affect the child.

8 Machel 1996 *Impact of armed conflict on children* par 2. See too Van Bueren 1994 *The International and Comparative Law Quarterly* 812 *et seq*; Russell & Gozdziaik 2006 *Georgetown Journal of International Affairs* 57.

9 Par 3. See too Otunnu Report of the Commission on Human Rights par 6-12; Maher 1989 *Boston College Third World Law Journal* 306.

## 2.2.2 Who is a child victim? – child soldiers as victims of armed conflict

### 2.2.2.1 Child soldiers as victims of armed conflict

From the exposition above it is clear that war and armed conflict invariably result in children being direct and indirect victims of such conflict. However, it is progressively accepted that former child soldiers may also be considered victims of armed conflict.<sup>10</sup> This stems from the point of departure of international law to focus on those who recruit children rather than on their participation. As an outflow of this approach it is argued that children participating in conflict should not forfeit their special protection under the law so that prosecution should be reserved for those who bear the greatest responsibility for serious violations of humanitarian law.<sup>11</sup>

Regarding child soldiers as victims of war results from practice in particular circumstances where children are forced into armies or armed groups. In essence this conclusion stems from the way in which children are recruited and the reality in which they find themselves once so recruited. Life for children is often harsh. They may suffer from a variety of physical health risks as they are frequently tasked to do the most dangerous jobs. Many fight on the front lines<sup>12</sup> or serve as couriers, spies or carriers of (often)

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10 It is estimated that more than 300,000 children actively participate in conflict in 41 countries around the world. An additional 200,000 are recruited into paramilitary and guerilla groups and civil militias in 87 countries. The use of child soldiers is more prevalent in Africa where more than 120,000 children are actively engaged in combat. However, children are also involved in the developed world where about 7,000 children under the age of 18 were in the British armed forces in 2001. See Amnesty International, *Child Soldiers: One of the Worst Abuses of Child Labor* (sic!) AI Index IOR 42/01/99 at <http://web.a.mesty.org/library?Index/engIOR420011999>. See too Grossman 2006-2007 *Georgetown Journal of International Law* 323-361. For a discussion of the reintegration and recovery of child soldiers, see par 4.4 infra. See too Mulira *International Legal Standards* 8 *et seq.*

11 Musila 2005 *African Human Rights Law Journal* 329, 331; Custer 2005 *Temple International and Comparative Law Journal* 449-476; Breen 2007 *Human Rights Review* 75; Fonseka 2001 *Asia-Pacific Journal on Human Rights and the Law* 77; Renteln 1999 *Whittier Law Review* 202; Cohn & Goodwin-Gill *Child Soldiers* 25, 61; Singer 1986 *International Review of the Red Cross* 152.

12 This is made easier by the use of light-weight weapons. Weapons have become so light that a child of 10 can use, strip and reassemble them. See Grossman 2006-2007 *Georgetown Journal of International Law* 327; Sainz-Pardo 2008 *IJHR* 558 *et seq.*; Van Bueren *The International Law* 334; Mulira *International*

heavy loads. In addition to engaging in combat, girls are frequently victims of sexual exploitation through rape, sexual slavery and abuse. Younger children are often malnourished and may suffer from respiratory and skin infections. It is also likely that child soldiers are at higher risks of drug and alcohol abuse, sexually transmitted diseases, pregnancy and also of auditory and visual impairments due to frequent exposure to landmines.<sup>13</sup> It goes without saying that the psychological trauma of soldiering is severe as children under these conditions witness "the worst of humanity on a daily basis".<sup>14</sup>

#### 2.2.2.2 Recruitment practices

##### a. Forced recruitment

Forced recruitment entailing the threat or actual violation of the physical integrity of the child or someone close to him is practiced not only by armed groups but also by some national forces. In some States where conscription is legally regulated systemic forced recruitment is commonly practiced where there are shortages of manpower.<sup>15</sup> Brutal indoctrination is used to turn young children into fierce fighters. A typical recruitment practice amongst certain armed groups would be to take a boy soldier back to his village and force him to kill someone known to him, usually a family member or a close friend. The killing takes place in such a way that the whole community knows that the boy has committed the murder. In this manner the child is effectively barred from returning to the village and per

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*Legal Standards 4 et seq; Fox 2005 Human Rights Review 28; Breen 2007 Human Rights Review 73.*

13 *Grossman 2006-2007 Georgetown Journal of International Law 327-328.*

14 *Grossman 2006-2007 Georgetown Journal of International Law 328.* Most brutal forms of abuse are reported by authors and reports. See eg *Wessells 2004 Cornell International Law Journal 514; Ramos-Horta 1989 Family and Conciliation Courts Review 335.*

15 *Cohn & Goodwin-Gill Child Soldiers 24.* See too *Brett 1996 The International Journal of Children's Rights 125; Kargbo 2004 Cornell International Law Journal 486; Mulira International Legal Standards 6.*

force develops a relationship of dependency with his captors, eventually coming to identify with their cause.<sup>16</sup>

b. Coercive or abusive recruitment

This form of recruitment comprises instances where it cannot be proved that there is a direct physical threat or intimidation, but there nevertheless is evidence indicative of involuntary enlistment.<sup>17</sup>

c. Children joining armed forces not being recruited or coerced into joining

Children are often not forced or coerced into participating in conflict but are rather subject to subtly manipulative motivations and pressures. Such may include, *inter alia*:

- the continued presence of highly militarized State involvement;
- personal exposure to extremes of physical violence (often producing a desire for revenge);
- social and economic injustice within the community;
- joining an armed group as the better of the bad alternatives, normally in the case of internally displaced, homeless, orphaned or fearful children; and

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16 Cohn & Goodwin-Gill *Child Soldiers* 27; Van Bueren *The International Law* 335; Mulira *International Legal Standards* 18; Renteln 1999-2000 *Whittier Law Review* 202. One may refer in this respect also to the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, January 31, 2007, adopted in Paris (hereafter the Paris-Principles). Representatives from 58 countries adopted the Paris-Principles in February 2007 with the aim of providing practical actions to implement developing global legal standards. The principles aim to prevent the unlawful recruitment or use of children; to facilitate the release of children associated with armed forces and armed groups and to facilitate the reintegration of children associated with armed forces and armed groups. In particular they are also aimed at putting an end to impunity for those unlawfully recruiting or using children in armed conflict. These principles therefore call on States to ensure that perpetrators of violence against children associated with armed forces or groups, including sexual violence against girls, are prosecuted either through national legislation or through the International Criminal Court. See Sainz-Pardo 2008 *IJHR* 558.

17 Cohn & Goodwin-Gill *Child Soldiers* 28; Fox 2005 *Human Rights Review* 30; Singh 2007 *African Human Rights Law Journal* 212; Sainz-Pardo 2008 *IJHR* 564.

- inadequate education.<sup>18</sup>

Children under the circumstances set out above are both victims of violence and perpetrators of atrocities. Deciding whether to prosecute or to reintegrate them into society when the conflict has come to an end consequently is a complex issue.

### 2.2.2.3 Prosecution or reintegration of child soldiers?

#### a. States' obligations towards child soldiers

In coming to a decision whether to prosecute or re-integrate former child soldiers, the application of international law is of decisive importance.<sup>19</sup> In particular, the prescripts of international humanitarian law and international human rights law as reflected in the CRC need to be considered.<sup>20</sup> Article 38 of the CRC is of specific relevance in this respect.

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18 Mulira *International Legal Standards* 4; Cohn & Goodwin-Gill *Child Soldiers* 30-39. At 62 the authors refer to a report which conveys that in many developing countries boys of 14 are considered to be adults and therefore would automatically be combatants. The authors point out that from a physical and psychological perspective this is manifestly incorrect. However, this is also incorrect from an international humanitarian law perspective the aim of which is protection.

19 In particular the sources of international law are provided in art 38 of the Statute of the International Court of Justice 59 Stat. 1055, T.S. 993 (1945) of 26 June 1945. Art 38 provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties;

international custom, as evidence of general practice accepted as law;

the general principles of law recognized by civilized nations;

subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

38(2): The provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

20 Kuper *International Law* 75; Renteln 1999 *Whittier Law Review* 197; Fonseca 2001 *Asia-Pacific Journal on Human Rights and the Law* 79; Mulira *International Legal Standards* 8; Van Bueren 1994 *The International and Comparative Law Quarterly* 818. See too Jesseman 2001 *African Human Rights Law Journal* 140. At 149 *et seq* the author deals with the so-called participation rights of children and the influence of the autonomy of the child on his criminal liability. The focal point of the argument is that not all children are forcibly recruited into armed forces.

- 38(1): States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- 38(2): States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.
- 38(3): States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.<sup>2122</sup>

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21 It needs to be noted that this provision is similar to art 77 of AP I and also Part II, article 4 of AP II (n 2 supra). These two protocols specifically provide that children who have not attained the age of 15 shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. See discussion in n 2 supra.

22 The provisions of art 6(3) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict G.A. Res. 54/263, Annex. 1, art.1, U.N. GAOR, 54th Sess, Supp. No 49, U.N.Doc. A 54/49 (2000) (hereafter Optional Protocol) should be read together with art 38(3). Art 6(3) provides that States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilized or otherwise released from service. They shall also when necessary accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration. The Protocol entered into force on 12 February 2002. See too Vandewiele "Optional Protocol" 63; Olivier 1999 *SAYIL* 246; Cohn 2004 *Cornell International Law Journal* 532; Singh 2007 *African Human Rights Law Journal* 216.

For purposes hereof the question whether these provisions can be described as obligations erga omnes will not be considered. However, for the sake of completeness it may be mentioned that specific features typically pertain to such obligations.

Such obligations protect fundamental values such as human rights or peace;

Such obligations are obligations erga omnes – that is towards all member States of the international community (or in the case of multilateral treaties, all the other contracting States);

These obligations are attended by a correlative right that belongs to any State (or to any other contracting State in the case of obligations provided for in multilateral treaties) which may be exercised by any (other) contracting State whether it has materially or morally been injured by the violation. This right is exercised on behalf of the whole international community (or the community of the contracting States) to safeguard fundamental values of this community. An example may be used to illustrate this aspect. When a State makes a remonstrance to, or forcefully protests against, another State which commits atrocities against its own nationals, and demands immediate cessation of such atrocities, it is not motivated by a desire to protect its own interests or to prevent future harm; rather its sole purpose is to vindicate humanitarian values on behalf of the entire international community. See Cassese *International Law* 16.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts bear out on the notion of the obligations of States. Art 1 states that every internationally wrongful act of a State entails the international responsibility of that State. Art 2 determines that there is an internationally wrongful act of a State when conduct consisting of an action or omission is (a) attributable to the State under International Law; and (b) constitutes a breach of an international obligation

38(4): In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care for children who are affected by an armed conflict.<sup>23</sup>

Article 38(3) prohibits the recruiting of children under fifteen years of age. As indicated in note 21 *supra*, this prohibition corresponds with AP (II) under the GCs of 1949. As a consequence hereof children below this age may not even volunteer to participate directly in armed conflict. The Rome Statute for the International Criminal Court (hereafter Rome Statute) specifically provides that it is a "war crime" to conscript or enlist children under the age of fifteen years into national armed forces or to use them to participate actively in hostilities. However, recent international treaties raise the age of permitted participation in armed conflict to eighteen years.<sup>24</sup> States incur specific obligations towards children during armed conflict irrespective whether such conflict is of internal or international

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of the State. In terms of art 3 the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by characterization of the same act as lawful by internal law. See Draft Articles on Responsibility of States for Internationally Wrongful Acts GA Res 56/63 2001/12/12.

23 For a comprehensive discussion of this article, see, *inter alia*, Kuper *International Law* 98 *et seq*; Cohn & Goodwin-Gill *Child Soldiers* 68; Fonseka 2001 *Asia-Pacific Journal on Human Rights and the Law* 80. See n 101 *infra* for a discussion of art 6 (3) of the AP.

24 See Art 1 of the Optional Protocol which amends the age of allowed direct participation in armed conflict to 18 years for parties to the Protocol. It stipulates that States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. It would appear therefore that a child under the age of 18 years may not compulsorily be drafted into the armed forces of a State Party, yet it may still volunteer to do so provided he or she is not participating directly in hostilities. In terms of the Optional Protocol armed groups, as distinct from States' armed forces must refrain from both using and recruiting children under the age of 18 (art 4). In fact, States Parties are required to take all feasible measures to prevent such recruitment and use and must adopt necessary legal measures to prohibit and criminalize such practices. Children between the ages of 15 and 18 may therefore not join armed groups but may nevertheless voluntarily join the armed forces of States to the Protocol. See discussion of Mulira *International Legal Standards* 26, 33.

Other treaties which aim to raise the age of permitted participation in armed conflict to 18 years, include I.L.O. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. Convention 182 of 1999) June 17, 1999, 38 I.L.M. 1207 (1999) and various articles of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) which considers a child a person under age of 18 and calls upon African States to ensure that no child take part in hostilities and to refrain from recruiting children.

dimension. Children must receive special affirmative protection under humanitarian law<sup>25</sup> in addition to the blanket guarantees under Common Article 3 of the GCs which provides as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- a. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- i. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii. taking of hostages;
- iii. outrages upon personal dignity, in particular humiliating and degrading treatment;
- iv. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affecting all the judicial guarantees which are recognized as indispensable by civilized peoples.

- b. The obligation to prosecute those who commit crimes under international law

There appears to be a growing international consensus towards requiring prosecution and punishment for those responsible for international crimes. The preamble to the Rome Statute affirms that the most serious crimes of concern to the international community must be punished and that their effective prosecution must be ensured by States taking measures at national level and by enhancing international cooperation.<sup>26</sup> It would

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25 Grossman 2006-2007 *Georgetown Journal of International Law* 336; Fox 2005 *Human Rights Review* 37; Cohn & Goodwin-Gill *Child Soldiers* 59; Breen 2007 *Human Rights Review* 83.

26 Art 8 of the *Rome Statute of the International Court*, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 reads as follows:

therefore appear that a State that fails to prosecute a child (or, for that matter, an adult) who has violated international criminal law may be acting in violation of its international law obligations. If a child consequently commits certain crimes of concern to the international community a State may be under an obligation to prosecute him under international treaty and customary law even if these crimes are committed against a State's own nationals.<sup>27</sup>

However, contrary to the approach set out above, some authors argue that in the event of internal strife the decision to prosecute rests on the domestic criminal law. This line of argument gains some strength from common article 3 of the four GCs of 1949 which, while prohibiting parties to a conflict from harming unarmed civilians in an internal conflict, contains no "grave breaches" provision that mandates criminal punishment. The decision whether to prosecute is therefore dependent on municipal law. Article 6(5) of AP II to the GCs relates to the protection of victims of internal conflicts and appears to favour amnesty over prosecution. It provides that after hostilities have ceased the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict.

There is consequently a measure of uncertainty with respect to a State's obligation to prosecute a child for serious crimes under international law. It

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The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy as part of a large-scale commission of such crimes.

For purposes of this Statute, "war crime" means:

(b)(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

See too Grossman 2006-2007 *Georgetown Journal of International Law* 337; Renteln 1999 *Whittier Law Review* 199; Fox 2005 *Human Rights Review* 30.

27 Sainz-Pardo 2008 *IJHR* 556; Musila 2005 *African Human Rights Law Journal* 323; Grossman 2006-2007 *Georgetown Journal of International Law* 336. Grossman refers to the Convention on the Prevention and Punishment of the Crime of Genocide which explicitly compels States to undertake to prevent and to punish the crime of genocide. In similar fashion the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment obliges States Parties to criminalize torture under its domestic law and to make these offenses punishable by appropriate penalties which take their grave nature into account.

appears on the one hand that at least in the case of internal conflicts amnesty is encouraged, but on the other hand a State's failure to prosecute a child who has committed serious violations of international law may itself be in breach of international law.<sup>28</sup>

c. The minimum age of criminal liability for child soldiers

The age of the child soldier may be of particular importance to establish whether a child should be prosecuted or be treated as a victim. Also in this respect it appears that there is uncertainty in international law as, *inter alia*, the Rome Statute and statutes of recent human rights tribunals do not provide clear direction in this respect – the emphasis seems to fall on those responsible for the infringements of international humanitarian law.<sup>29</sup> The prosecution of children under these instruments is therefore not necessarily precluded. On the other hand the Report of the Secretary-General of the Establishment of a Special Court for Sierra Leone specifically allows for individuals over the age of fifteen to be prosecuted as they may be considered "most responsible" for crimes against humanity and war crimes.<sup>30</sup>

Within the meaning attributed to it in the present Statute, the term 'most responsible' would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position ... the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.<sup>31</sup>

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28 Sainz-Pardo 2008 *IJHR* 564; Grossman 2006-2007 *Georgetown Journal of International Law* 338.

29 Rome Statute (n 26). Renteln 1999 *Whittier Law Review* 196. Grossman 2006-2007 *Georgetown Journal of International Law* 338 illustrates the point by referring to the International Criminal Tribunal for the Former Yugoslavia and for Rwanda where the minimum age for criminal responsibility was not addressed but rather the importance of prosecuting those responsible for serious violations of international humanitarian law. It should be noted, though, that the Rome Statute does not provide for persons under the age of 18 at the time of commission of a crime to fall within its jurisdiction. See too Grover 2008 *IJHR* 58; Singh 2007 *African Human Rights Law Journal* 218; Williams 2007 *Legal Studies* 261-287; Musila 2005 *African Human Rights Law Journal* 326.

30 UN Scor, 23. U.N. doc. S/2000/915 (Oct. 4 2000). See too Van Bueren *The International Law* 333; Fox 2005 *Human Rights Review* 34; Breen 2007 *Human Rights Review* 76 *et seq.*

31 See Report of the Secretary-General (n 30) par 31.

The provision of the Rome Statute which provides that a Court shall not have any jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime is, however, indicative of a move not to hold persons under the age of eighteen criminally accountable for their war crimes and infringements of humanitarian law.

As far as treaty law on the treatment of juveniles in the process of ordinary domestic criminal prosecution is concerned Grossman conveys that there is also a lack of consensus on the minimum age for criminal responsibility which indicates an absence of both customary and treaty norms.<sup>32</sup> In article 1 the CRC considers a child as every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier. In article 40 the divergence of views when a child may be prosecuted is accommodated by requiring in sub-article (3)(a) that States Parties shall promote the establishment of laws, procedures, authorities and institutions specifically applicable to children who have infringed the penal law. In particular States Parties are required to set a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. To some extent the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereafter Beijing Rules) also acknowledge the different views by stipulating that:

It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety coming under the definition of 'juvenile', ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems ...<sup>33</sup>

Particularly illuminating is a further statement in the Beijing Rules that the minimum age of criminal responsibility differs widely due to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal

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32 Grossman 2006-2007 *Georgetown Journal of International Law* 339. See too Van Bueren *The International Law* 338; Fox 2005 *Human Rights Review* 35.  
33 GAR 40/33, Annex, cmt. U.N. GAOR, 40th Sess., Supp. No 53/207 (1985).

responsibility; that is, whether a child, by virtue of his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.<sup>34</sup>

Grossman convincingly argues that despite the lack of explicit consensus in the statutes of international criminal tribunals and the absence of a customary norm regarding the exact minimum age of criminal responsibility for international humanitarian crimes, interpretation of the CRC against the background of the Vienna Convention on the Law of Treaties may point to a legal obligation to at least refrain from prosecuting children under fifteen years of age for serious crimes arising from armed conflict. This conclusion is arrived at by referring to the preamble to the CRC which requires of States Parties to provide special protection for children; by recalling the Universal Declaration of Human Rights in which the United Nations proclaim that childhood is entitled to special care and assistance and also by considering the Declaration of the Rights of the Child which provides that a child, by reason of physical and mental immaturity needs special safeguards and care. By requiring fifteen years as the minimum age for recruitment and use, it is clear that the drafters of the CRC emphasized the need to protect children from the dangers of war in accord with international humanitarian law. She proceeds to argue that in addition to the psychological and physical dangers of war, the prohibition on both forced recruitment and use of children under the age of fifteen years in direct hostilities seems to suggest that the States Parties to the respective treaties believed that children under the age of fifteen do not possess the mental maturity to express valid consent to join an armed group. If children under the age of fifteen are therefore not sufficiently mature to consent to engage directly in armed conflict they must be protected from

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34 Ibid commentary to Rule 4. See too United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, annex, U.N. GAOR, 45 Sess., Supp. No. 49A 205, U.N. Doc. A/45/49 (1990) which define a juvenile as a child under the age of eighteen years.

the dangers of war under the provisions of the CRC and are arguably more likely victims of armed conflict than perpetrators.<sup>35</sup>

With regard to children between fifteen and eighteen years of age there also appears to be an emerging consensus that they should be exempted from criminal liability. This stems from the provisions of the Rome Statute<sup>36</sup> and the Optional Protocol.<sup>37</sup> The Rome Statute makes it clear that it is a war crime to enlist or conscript children under the age of fifteen but the fact that the International Criminal Court's jurisdiction is limited to persons who were eighteen years and older at the time of commission of the crime serves as a clear indication on the part of the international community not to prosecute children between fifteen and eighteen years of age. Further evidence of this preference is to be found in article 41 of the CRC which provides that measures "most conducive to the realization of the rights of the child" are to be preferred when the CRC and domestic law or domestic treaty obligations differ.<sup>38</sup>

Once it has been decided to prosecute a former child soldier the CRC, the Rome Statute and the Beijing Rules contain specific prescriptions providing for special protection of such a child. Besides the prescript in article 3 of the CRC that the child's best interest shall be a primary consideration where action against him is taken by, *inter alia*, courts of law and administrative authorities, article 40 sets out a variety of safeguards for such children. Such include the presumption of innocence, knowledge of the charges against him or her and rights of privacy and appeal.<sup>39</sup> In

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35 Grossman 2006-2007 *Georgetown Journal of International Law* 341 *et seq*; Renteln 1999 *Whittier Law Review* 203; Breen 2007 *Human Rights Review* 81; Musila 2005 *African Human Rights Law Journal* 327.

36 See n 24 *supra*.

37 Optional Protocol (n 22) *supra*. Art 1 provides that States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. The protocol entered into force on 12 February 2002. See too discussion by Renteln 1999 *Whittier Law Review* 196; Olivier 1999 *SAYIL* 247.

38 Grossman 2006-2007 *Georgetown Journal of International Law* 342.

39 The article provides that such a child should be treated in a manner consistent with the promotion of the child's sense of dignity and worth so that it will reinforce the child's respect for human rights and the fundamental freedoms of others. It also stipulates that the treatment of the child must take into account the age of the

similar fashion Rule 5 of the Beijing Rules requires that the aims of juvenile justice should include an emphasis on the well-being of the juvenile and a consideration of the individual circumstances of the offense and the offender. In this respect an evaluation of the individual's social status, his or her family situation and gravity of the crime must be conducted when considering an appropriate response. In terms of article 54 of the Rome Statute the prosecutor of the International Criminal Court is charged to consider incriminating as well as exonerating circumstances (which might include the age of the offender) in coming to a decision whether to investigate and prosecute crimes. Both the CRC and the Beijing Rules prohibit the imposition of capital punishment for persons under the age of eighteen and both provide that deprivation of liberty of a child may only be used as a measure of last resort and then also only for the shortest period of time.<sup>40</sup>

It goes without saying, of course that as far as substantive law is concerned, it is the obligation of the State to prove the necessary *mens rea*. In situations where severely abused children were forced to commit crimes under duress or the influence of desensitizing drugs, the requisite *mens rea* may be absent. Although an order of a supervisor does not ordinarily shield an actor from liability in the commission of crime, it may be accepted that since a child under fifteen presumably does not possess the mental maturity to volunteer to participate directly in armed conflict, such a child will probably be insufficiently mentally developed to resist an order from a supervisor.<sup>41</sup>

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child and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

40 See art 37(b) of the CRC and rule 17(b)-(c) of the Beijing Rules. See too discussion of the articles by Grossman 2006-2007 *Georgetown Journal of International Law* 343-344.

41 Mulira *International Legal Standards* 47. See too Grossman 2006-2007 *Georgetown Journal of International Law* 345. In the event of genocide, Grossman explains, the requirement of *mens rea* is more complex and may be even more difficult to prove. In terms of art 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* a child must possess the "intent to destroy, in whole or in part, a national, ethnic, racial or religious group". A child soldier under the age of fifteen or even eighteen may not satisfy the requirement as such child may not be able to understand the meaning of the crime itself.

d. Conclusion

There is a measure of uncertainty regarding the question whether to treat child soldiers as victims who have a right to recovery and reintegration, or as perpetrators of crimes against humanity who should be prosecuted. However, from the above discussion it appears that it is generally accepted that children under fifteen should not be prosecuted. On the other hand, as far as children between the ages of fifteen and eighteen are concerned there appears to be an ever growing consensus that such children should also be reintegrated into society rather than being prosecuted. The reason for this line of argument is fairly simple – children should primarily be viewed as victims because of their emotional, mental and intellectual immaturity.<sup>42</sup> Grossman argues strongly that such children should occupy a role in the peacemaking process that recognizes their vulnerabilities with a view to their rehabilitation.<sup>43</sup>

It is suggested that the provisions of the CRC, the Beijing Rules and the Machel Report which all call for the establishment of a minimum age of criminal responsibility should now be heeded to.<sup>44</sup> The setting of a minimum age of criminal responsibility should maximize opportunities for

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42 Machel 1996 *Impact of armed conflict on children* par 251.

43 Grossman 2006-2007 *Georgetown Journal of International Law* 347. See also Sainz-Pardo 2008 *IJHR* 556; Breen 2007 *Human Rights Review* 72.

44 Art 40(3)(a) of the CRC provides that States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law. In particular provision must be made for the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. When appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings must also be promoted, providing, of course, that human rights and legal safeguards are fully respected. In par 251 of her report Machel (1996 *Impact of armed conflict on children*) argues that the severity of the crime involved does not provide justification to suspend or to abridge the fundamental rights and legal safeguards accorded to children under the CRC. States Parties should establish a minimum age below which children are presumed nor to have the capacity to infringe penal law. While the CRC does not mention a specific age, the Beijing Rules stress that such age should not be fixed at too low a level, bearing in mind the child's emotional, mental and intellectual maturity. Assessment of a child's criminal responsibility should not be based on subjective or imprecise criteria, such as the attainment of puberty, age of discernment or the child's personality.

rehabilitation of former child soldiers. In this regard it is suggested that the understanding conclusion of Grossman is correct:

Choosing the age of eighteen as the lower limit for criminal accountability recognizes the state of adolescents' psychological and moral development, and refraining from prosecuting persons below this age promotes the underlying rehabilitative goals of the CRC.<sup>45</sup>

It is suggested that it is not in the best interests of a former child soldier to stand trial for war crimes as such trials are less likely to promote their well-being and social reintegration. The submission is put forward that rehabilitative measures in terms of article 39 are better suited to conform to the goals set by the CRC. Rather than prosecuting children below the age of eighteen, alternative methods should be investigated to address the needs of victims of child soldiers and their communities while the child soldiers are being rehabilitated. It must be emphasized again that even children who volunteer to join armed groups often do so for reasons of hunger, poverty, fear, desire for protection and so forth. After being

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45 Maher 1989 *Boston College Third World Law Journal* 309; Grossman 2006-2007 *Georgetown Journal of International Law* 347. The author advances a number of reasons in coming to this conclusion. See too Godfrey 2005 *African Human Rights Law Journal* 321-334.

Psychological studies show that a child's understanding of the world is fundamentally altered during adolescence which suggests that the child does not possess the same abilities to act independently or appreciate the rights of others as an adult.

Younger children find it difficult to understand the concept of individual and minority rights juxtaposed with state power – if children therefore do not know how to question state authority or if they do not know how to understand the concept of rights, they should not be held criminally responsible for following orders.

Significant changes in moral development may occur during adolescence. This may support the idea that holding children responsible for violations of the laws of war may be inappropriate when they are too young to hold independent moral views.

If a child does not understand that he or she may choose to disobey an order to protect community welfare or to avoid self-condemnation, it may be inappropriate to hold him or her accountable for crimes when ordered by a superior or in the context of collective armed action.

Prosecuting children under the age of eighteen is inconsistent with the underlying goals of the CRC which in essence is to promote the best interests and well-being of the child. In art 3 the CRC specifically states that the best interests of the child shall be a paramount consideration in all actions concerning the child and in art 38 it is stipulated that States Parties should undertake all feasible measures to care for and protect children in armed conflict. As will be discussed in ch 3 infra, States parties also undertake in terms of art 39 to seek to promote physical and psychological recovery of child victims of armed conflict.

deliberately exposed to severe human rights violations like rape, murder and maiming or being forced to commit such crimes themselves, many become desensitized to violence. As Grossman puts it: "These children have been more wounded by the world than *vice versa*."<sup>46</sup>

### 2.2.3 *Monist or dualistic system of implementation*

In as far as the contents of this paragraph are settled law, the distinction between a monist and a dualistic approach to the incorporation of treaties into municipal law will only be cursorily discussed with a view to illuminate the exposition in chapter 3 *infra*.<sup>47</sup> As the CRC *qua* international treaty is an agreement among the signatory States Parties to the treaty, it is trite that its provisions do not vest individual children with rights enforceable against particular States Parties.<sup>48</sup> However, general public international

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46 Grossman 2006-2007 *Georgetown Journal of International Law* 351.

47 See *S v Harksen, Harksen v President of the Republic of South Africa, Harksen v Wagner and Another* 2000 1 SA 1185 (CPD) par 47 *et seq* for a comprehensive exposition of the nature of treaties.

48 See, *inter alia*, Fortin *Children's Rights and the Developing Law* 43 *et seq*. The CRC is an enormously influential instrument and may well be regarded as the cornerstone of children's rights throughout the world. See eg Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141. It constitutes the most comprehensive list of human rights for children *qua* group. It is with approval referred to on the basis that it can be utilized to promote a change in the way children as bearers of rights are viewed. It is also seen as an instrument by means of which the active and responsible participation of children within the family and society can be achieved. The CRC provides a framework for implementation of the rights of children through government policies and programmes. There are two main concerns with the provisions of the CRC, though. The first is that many of the rights included in the CRC are moral claims rather than 'juridical' rights since they are too vague to be translated into domestic law. There consequently are authors who argue that there is a danger that a "proliferation of the language of rights" devalues its appeal. Listing 40 substantive rights as does the CRC, it contributes to the process of rights devaluation. As Fortin points out, many of the rights included in the 40 rights provided for in the CRC are in reality no more than aspirations regarding what should happen if governments were to take children's rights seriously. In this respect she argues that it is unrealistic to maintain that either art 24 which requires governments to recognize the child's right to enjoyment of the highest attainable standard of health and to facilities for treatment of illness and rehabilitation of health, or art 27 which recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, can be translated into genuine legal rights. She convincingly concludes that such rights are no more than an insistence on certain ideals or goals. In addition she refers to art 4 which acknowledges that the resource implications of such provisions may rule out their immediate or long-term fulfillment.

The second concern relates to the fundamental weakness of the CRC that it has no direct method of formal enforcement available to children who are the rights-

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holders. No court can assess a claim that its terms have been infringed since governments are merely directed to undertake all appropriate legislative, administrative and other measures to implement the rights contained in the CRC. To evaluate the progress governments have made in achieving the realization of the obligations contained in the CRC a committee, the Committee on the Rights of the Child is established in art 43 *et seq.*

Article 43(2) provides for the composition of the Committee. It reads that the Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to principal legal systems. Of particular importance is to note that members are elected in their personal capacity and not as representatives of governments as are members of an instructed committee; from this exposition it is clear that the Committee is a so-called uninstructed committee and the members are therefore expected to be impartial and objective when they attend to the reports of States Parties, even if it is that of their own country. Contrary to the position with uninstructed committees the position with instructed bodies is quite eloquently described as follows by Forsythe quoted in Le Blanc *The Convention on the Rights of the Child* 192:

[i]nstructed bodies "contain a built-in brake on effective protection of human rights. The foxes (states) are charged with protecting the chickens (human rights)". ... this arrangement is unsatisfactory because the states, which are "generally interested in protection of power and national sovereignty" are "in a position to elevate those interests over human rights."

In terms of art 44(1) States Parties undertake to submit to the CRC reports on the measures they have adopted which give effect to the rights recognized in therein and on the progress and enjoyment of those rights. This must be done within two years of the entry into force of the CRC for the States Party concerned and thereafter every five years.

What is required is not a mere exposition of legal prescripts but in fact a comprehensive discussion of the factual position in which children in the particular State find themselves in relation to the provisions of the CRC. The Human Rights Committee of the United Nations laid down guidelines to give effect to requirements States have to adhere to when reporting in terms of a human rights treaty. These guidelines include the following:

The fundamental characteristics of the country and its peoples including demographic and ethnical properties;

The more important socio-economic and cultural characteristics;

The general political dispensation in the jurisdiction;

The framework within which political rights are protected (including judicial and administrative institutions that have jurisdiction in respect of fundamental rights);

The nature of remedies available to individuals;

How internationally recognized obligations in relation to fundamental rights are accounted for nationally; and

Steps taken to improve an awareness and better understanding of fundamental rights by society and the particular States Party.

The Committee has refined these general guidelines as follows to give effect to the provisions of the CRC:

General measures of implementation, including information about the measures that have been taken "to harmonise national law and policy with the provisions" of the CRC; the existing or planned mechanisms at all levels "for co-ordinating policies relating to children and for monitoring the implementation" of the CRC; and the measures that States have planned or are taking to publicise information about the CRC and to spread awareness of their reports to the committee.

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Definition of the child, including information concerning the attainment of majority and the legal age for such things as compulsory education, marriage, employment, imprisonment, etc.

General principles, including information about the principal legislative, administrative, judicial and other measures that are in force or are planned for implementing the general principles of the convention, eg, non discrimination, and the right to life, survival and development.

Civil rights and freedoms, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing the civil rights and freedoms of the convention, eg, the rights to a name and nationality, freedom of expression, thought conscience, assembly, etc.

Family environment and alternative care, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing rights that are relevant to the family and alternative care, eg, parental responsibilities, adoption, and illicit transfer of children.

Basic health and welfare, including information about the principal legislative, administrative, judicial and other measures that are in force, the institutional infrastructure for implementing policy in this area, and the difficulties encountered and progress achieved in implementing rights relevant to health and welfare, eg, survival and development of the child, health and health services, social security, etc.

Education, leisure and cultural activities, including information about the principal legislative, administrative, judicial and other measures that are in force, the institutional infrastructure for implementing policy in this area, and the difficulties encountered and progress achieved in implementing provisions of the convention regarding such things as education, leisure and cultural activities of children.

Special protection measures, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing provisions of the convention that relate to refugee children, children in armed conflicts, and children subjected to exploitation of various kinds. Le Blanc *The Convention on the Rights of the Child* 245-246.

Art 45 establishes the position what is to happen upon receipt of a State report:

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialised agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialised agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities.
- (b) The Committee shall transmit, as it may consider appropriate, to the specialised agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications.
- (c) The Committee may recommend to the General Assembly to request the Secretary General to undertake on its behalf studies on specific issues relating to the rights of the child;

law requires States to ensure that their legislative and executive Acts conform to their international treaty law duties (*in casu* the provisions of the CRC) and does not permit such States to rely on national law to justify

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- (d) The Committee may make suggestions and general recommendations based on information received ... Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

This article raises issues that need to be elaborated upon. In the first place it must be remarked that it is a pity that similar provisions to those of the African Charter on the Rights and Welfare of the Child (adopted in 1990) which establishes a committee that may also carry out investigations have not been provided for. In this respect, it appears that the Committee may only make a recommendation to the General Assembly to request the Secretary General to undertake studies on its behalf. Article 45(d) furthermore does not make it clear whether the Committee can make specific recommendations and suggestions to particular States, general recommendations to individual States or only general recommendations to all States Parties together. The Committee interprets article 45(d) as authorizing it to make general comments on articles of the Convention and general recommendations in the field of the rights of the child. It furthermore decided that after it has examined the report received from a States Party, it will issue 'concluding observations' which will be 'an authoritative comment with the purpose of defining outstanding problems and discussing remedies.' These observations form the basis for discussions about technical advice or assistance.

It is submitted that the CRC's reliance on State reports and its lack of inter-state or individual complaints mechanisms limits its capacity to strengthen state observance of international legal norms pertaining to children in armed conflict. Kuper expresses concern regarding the performance of the Committee in monitoring state reports from countries embroiled in armed conflicts. This author's criticism focuses on the Committee's apparent failure, when examining reports from such countries, to question the government representatives on their observance of international law applicable in situations of armed conflict. This omission is considered to be significant since a lack of proper scrutiny when grave violations of human rights and/or humanitarian law are taking place, seriously undermines the purpose and impact of the reporting process in improving observance of the relevant standards. See Kuper *International Law* 137; Le Blanc *The Convention on the Rights of the Child* 267; Hamilton & El-Haj 1997 *The International Journal of Children's Rights* 44.

From the description of the functions of the Committee it appears that its principal tools are persuasion and mobilization of shame. Of course it is not suggested that persuasion does not have effect, but rather that its effect is conditional and variable. The object of the dialogue between the Committee and the representatives of a particular reporting States Party is indeed to promote improved respect for the treaty commitments. This object is vital indeed as human rights undertakings are unilateral and objective in character and also in the CRC qua international human rights law there is no element of reciprocal interest present. On the other hand, even though the only 'sanction' pertaining to the CRC is an adverse report, this should not be allowed to detract from the valuable work the Committee is doing. Its detailed scrutiny of a State Party's report may help that State to define its own priority for improved compliance. The public nature of the report, particularly if widely reported in the media, will also assist local NGOs in their campaigning.

non-compliance with their international obligations.<sup>49</sup> The issue that bears an influence on the child victim of armed conflict's right to recovery and reintegration pertains to the question how the provisions of the CRC will come to operate in the national area of jurisdiction as States are obliged to comply with their CRC-treaty duties and must take steps to harmonize their national law with the provisions of the CRC.<sup>50</sup> In this respect the position of individual States differ with reference to the question whether the so-called monist or dualist approach to express the theoretical relation between municipal and international law is followed.<sup>51</sup> It also has to be borne in mind that even though the terms monist and dualist are used to explain different types of domestic legal systems, the actual systems of many States do not fit neatly into either of these categories.<sup>52</sup>

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49 Roodt 1987-88 *SAYIL* 72; Rosa "The Interpretative use of the Convention". Rosa specifically addresses the question how the CRC can be strengthened to provide greater assistance to the interpretive power of South African courts in bringing about the realization of the socio-economic right of children. As a point of reference she conveys that several human rights treaties have been adopted under the auspices of the United Nations since it was founded in 1945. However, a concern about the lack of effective implementation of such envisaged human rights frameworks has dampened the excitement concerning the prospects of such frameworks.

50 Roodt 1987-88 *SAYIL* 74.

51 Dugard *International Law* 47; Roodt 1987-88 *SAYIL* 75; Roodt explains that one can actually distinguish between subdivisions of the monist and dualist approaches. Such may include a traditional monist approach (which accord primacy to public international law) and moderate monism. As for dualism the distinction lies between moderate dualism and the harmonization approach. See too Sloss *The Role of Domestic Courts in Treaty Enforcement* who uses the term "hybrid monist state" as it is doubtful whether there are any states actually adopting a pure monist system.

52 Sloss *The Role of Domestic Courts in Treaty Enforcement* 5-6. The author explains that one would expect domestic courts to play a more active role in (hybrid) monist States than they would in traditional dualist States but that an empirical survey has shown that this is not the case. He conveys that in the five traditional dualist States that have been examined, (Australia, Canada, India, Israel and the United Kingdom) domestic courts play a fairly active role in treaty enforcement, but that they apply treaties indirectly and not directly. There are many variations on the theme of indirect application but the most common approach would be for legislatures to enact legislation to incorporate a treaty into domestic law and for courts to apply a presumption that statutory and/or constitutional provisions should be interpreted to conform to international obligations codified in unincorporated treaties. In Australia, Canada, India and the United Kingdom the judicial presumption of conformity, combined with the legislative practice of enacting statutes to implement treaties that require domestic implementation, means that private parties who are harmed by a violation of their rights flowing from a treaty can normally avail themselves of domestic legal remedies even though the courts do not apply treaties directly.

In essence the monist theory maintains that all municipal systems, together with the international legal system, constitute a single legal structure/ universal legal order. In terms of this line of reasoning international and municipal law are essentially similar and must be regarded as manifestations of a single conception of law.<sup>53</sup> In terms of this approach no contextual or formal change is required when international law is applied on a national level. It is also clear that the point of departure of the monist approach concedes a more fundamental competence to public international law – if capacities are derived from the idea of law and the law grants jurisdiction to exercise such capacities, the law to which jurisdictional reference should be made determines its limits. The monist approach therefore deduces from the unity of all law the inherent jurisdictional superiority of international law in municipal courts.<sup>54</sup> Due to the incorporation of international law into municipal law, no act of adoption or incorporation is needed. The monist approach is consequently often described as supporting a doctrine of incorporation.<sup>55</sup>

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China, Germany, the Netherlands, Poland, Russia, the United States of America and South Africa serve as examples of hybrid monist States. At least some treaties in these States have the force of law within the domestic legal system. Courts sometimes apply treaties directly as law since some treaties have the status of law within their municipal legal systems. Especially in South Africa, Germany, Poland and the Netherlands there is evidence that courts play a fairly active role in the enforcement of treaties. In general private parties whose treaty-based rights have been violated can obtain domestic legal remedies in these jurisdictions.

A further distinction that applies in this respect is that between treaties and customary international law. In this respect the South African Constitution determines in sec 231(4) that any international agreement becomes law in the Republic when it is enacted into law by the national legislator. A self-executing provision of an agreement that has been approved by Parliament is law unless it is inconsistent with the Constitution or an Act of Parliament. Customary international law, on the other hand is in terms of sec 232 law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

53 Dugard *International Law* 47; Sloss *The Role of Domestic Courts in Treaty Enforcement* 5 *et seq.* Roodt 1987-88 *SAYIL* 76 explains that, depending on the will of the State, international law is viewed as an incorporated part of municipal law. She continues that the so-called adoption doctrine is closely associated with the monist theory and refers to Kelsen, one of the leading exponents of the monist school. According to his hierarchical doctrine, legal rules are conditioned by other rules or principles from which they derive validity and binding force – the latter rule depending on the former thereby constituting a 'bond of dependence' which in turn constitutes the principle of unity in the legal order.

54 Roodt 1987-88 *SAYIL* 76.

55 Dugard *International Law* 47.

Contrary to monism, the dualist approach departs from an *a priori* dichotomy of international and municipal law. International and municipal law govern a dualism of sources, contents and relationships respectively and are autonomous, co-ordinate independent legal orders which represent two totally different legal spheres.<sup>56</sup> Should the provisions of a treaty be applied in a jurisdiction following a rigid dualist approach, the court will be constrained to apply municipal law and will only be allowed to follow international law when expressly authorized to do so by its constitution. In the absence of such express constitutional authorization, a national court simply lacks the capacity to declare municipal law invalid with reference to international law – the rule that States must ensure that their legislative, executive and judicial acts conform with international treaty law is interpreted to mean that public international law is supreme in the international sphere only and not that it governs national law – national law therefore determines if and when international law will have an overriding effect.<sup>57</sup>

To be applicable in municipal law, international rules and norms must be transformed into national law.<sup>58</sup> Such process is required both to avoid the

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56 Roodt 1987-88 *SAYIL* 77.

57 Roodt 1987-88 *SAYIL* 77-78. In this respect reference may also be made to the contribution of Malan 2008 *De Jure* 81 *et seq.* The author argues that multilateral human rights conventions (such as the CRC) are in the nature of stipulationes alteri so that the rights negotiated for the particular individuals (children) accrue at the same time as the conventions enter into force between the State Parties to the treaties. He proceeds that such treaties are self-executing in nature and consequently do not need to be incorporated into the domestic law of the relevant State Parties before individuals in such States acquire rights under such conventions. In fact, individuals acquire such rights at the very moment a State Party incurs duties under international law pursuant to such treaties. This line of argument leads the author to conclude that individual beneficiaries to such treaties are fully-fledged parties to such human rights conventions and within the context of such treaties subjects of public international law. Indeed they are not parties to the conclusion of such treaties but they are subjects of international law in consequence thereof. A further conclusion to be drawn from this exposition is that the rights under these conventions cannot be diminished by a consecutive treaty among the States who originally entered into the convention, neither may it be diminished by legislation passed by the legislature of any of the contracting parties.

58 Transformation is a formal process of specific introduction of international law on the national level. There are two methods to transform treaties; by way of a statute of parliament or through an authorization of the executive in a pre-existing parliamentary act to grant applicability to the terms of an agreement. See Rosa

potential for conflict situations and to turn international rules into binding municipal rules. It is the rules and norms of municipal law that create specific rights and obligations for subjects of a State adopting the dualist approach to international law.<sup>59</sup> Therefore, acts of a State retain their validity if contrary to international law even though States are obliged to ensure that their own acts are in conformation with the prescripts of the international order. Transgression of international law consequently has ramifications in the international sphere only.

The position of a State following either a monist or dualist approach influences the status of an individual *vis-à-vis* the State in terms of a treaty. It has been mentioned earlier that the provisions of the CRC do not endow children with legally enforceable rights. This is trite.<sup>60</sup> However, the effect of ratification of a treaty by a State following a monist approach may entail that a particular individual is endowed with the rights provided for in the treaty which may be enforceable on the domestic level against the particular State. On the other hand it would appear that before taking action against the State in the municipal sphere, an individual in a State following a dualist approach will only be able to rely on the treaty once the particular State has transformed it into domestic law.<sup>61</sup> This exposition bears relevance to the right of child victims of armed conflict to recovery and reintegration as the availability of any action for them will to a substantial extent depend on the question whether the State within which they find themselves follows a dualist or monist approach.<sup>62</sup>

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"The interpretative use of the Convention" par 2; Sloss *The Role of Domestic Courts in Treaty Enforcement* 5 and 555-612.

59 Roodt 1987-88 *SAYIL* 78.

60 It may be of relevance to note that international treaties may indeed create rights and obligations for private individuals so that they may be the third-party beneficiaries of a treaty that has come into existence between two states. See Van Alstine "The role of domestic courts" 2.

61 Against this background the view of Malan 2008 *De Jure* 82 that rights negotiated for individuals in human rights treaties accrue at the same moment as the conventions enter into force between the States Parties to these treaties, is doubtful.

62 Even though it may be of relevance, no attention will be paid to the notion of self-executing treaties and reservations to treaties. A self-executing treaty may broadly be described as one forming part of the law of the land without any enabling action by the legislature whereas in art 2 of the *Vienna Convention on*

Admittedly the exposition set out in the previous paragraph may reflect a margin of generalization since it has become imperative to nuance the concepts of monism and dualism.<sup>63</sup> However, for the sake of convenience it is accepted as a point of departure that in a dualist system it is the enacting legislation that forms the basis of the child's right (and not the CRC itself) while in a monist system the CRC may simultaneously function as law in both the international and domestic sphere.<sup>64</sup>

It needs to be emphasized that irrespective of which system a State follows, the provisions of article 18 of the Vienna Convention on the Law of

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*the Law of Treaties* May 23, 1969, 1155 U.N.T.S. 331 a reservation is defined as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". See in this respect, *inter alia*, Levi *Contemporary International Law* 24 and 206-208; Brownlie *Principles of Public International Law* 612-615; Aust *Modern Treaty Law and Practice* 183-197, 125-161; Alston & Crawford *The Future of UN Human Rights* 318-322, 235-237; Cassese *International Law* 226-227, 173-175; Shearer *Starke's International Law* 421-424, 74-77. Van Alstine "The role of domestic courts" 43 explains with reference to Netherlands law that the treaty must be "clear enough to serve as objective law". To establish whether this standard are met courts and scholars have identified two factors to assess the direct effect of treaty provisions: the intent of the parties to the treaty; and whether the treaty provision at issue is sufficiently clear from its content that it can serve as objective law without formal legislative implementation.

63 See n 52 supra.

64 In its reporting guidelines on general measures of implementation, the Committee starts by inviting the States Party to indicate whether it considers it necessary to maintain the reservations it has made, if any, or has the intention of withdrawing them. States Parties to the CRC are entitled to make reservations at the time of their ratification of or accession to it (art 51 CRC). The Committee's aim of ensuring full and unqualified respect for the human rights of children can be achieved only if States withdraw their reservations. It consistently recommends during its examination of reports that reservations be reviewed and withdrawn. Article 2 of the *Vienna Convention* (n 62) defines 'reservation' as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. The *Vienna Convention* notes that States are entitled, at the time of ratification or accession to a treaty, to make a reservation unless it is 'incompatible with the object and purpose of the treaty' (see art 19). However, art 51(2) of the CRC reflects that a reservation incompatible with the object and purpose of the present Convention shall not be permitted. The Committee therefore expresses concern about the reservations of some States which are incompatible with art 51 (2) by suggesting, for example that respect for the Convention is limited by the State's existing Constitution or legislation, including in some cases religious law. In this respect the Committee refers to art 27 of the *Vienna Convention on the Law of Treaties* which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Treaties must be borne in mind. This article provides that even though a State is not bound by a treaty that it has signed but not ratified, it is still obliged to refrain from acts which might defeat the object and purpose of the treaty until it has made its intention clear not to be bound by the particular treaty.<sup>65</sup>

#### **4 The provisions of the CRC**

##### ***4.1 Historical background to article 39***

International human rights law developed in importance after World War II. However, in 1924 already the League of Nations adopted the Declaration of the Rights of the Child.<sup>66</sup> This Declaration stipulates that "[m]ankind owes the child the best it has to give". Furthermore it is provided that "[b]eyond and above all considerations of race, nationality or creed" the following provisions which are referred to as rights of the child, must be accorded to the child:

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood and must be protected against any form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

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65 See too Dugard *International Law* 408; Rosa "The interpretative use of the Convention" 6; Liebenberg & Pillay *Socio-Economic Rights in SA* 82.

66 *Declaration on the Rights of the Child*, 1924 adopted by the Assembly of the League of Nations. See too Malan 1996 *Transnational Law and Contemporary Problems* 358; Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 139; Renteln 1999 *Whittier Law Review* 195.

There is little doubt that even though the Declaration refers to rights of the child, the provisions set out above merely provide for children as persons in need of specific care and treatment. And even though the use of the imperative word 'must' is used, it cannot be argued that the Declaration was ever intended to be an instrument which places binding obligations upon States. In fact, it is the "[m]en and women of all nations" who are placed under a burden to live up to these provisions.<sup>67</sup>

Despite the provisions of the Declaration not having the force of enforceable law, it is of significance for a number of reasons. Firstly it was an international document that established the concept of rights for children internationally. As such it was one of the first examples of international human rights law. In the second place it enshrined economic and social rights for children which in turn can be considered evidence that the development of international human rights law did not focus exclusively on civil and political rights. Thirdly, applying the terminology of "rights of the child" indicates a link between child welfare and the rights of the child.<sup>68</sup>

In 1959 the United Nations General Assembly adopted a new Declaration of the Rights of the Child.<sup>69</sup> The accompanying resolution urged national governments to recognise the rights set forth in the Declaration and to strive for their observance. In this respect the 1959 Declaration clearly went further than its 1924 predecessor which did not contain any explicit reference to the obligations of States. In its preamble the 1959 Declaration reiterates the obligation of mankind to give the child the best it has to give. It also affirms that a child has special needs, such as special safeguards and care and appropriate legal protection due to physical and mental immaturity. The Declaration furthermore comprises of ten principles which include, *inter alia*, a child's entitlement to a name and nationality; to growth and development in health; to adequate nutrition, housing, recreation and

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67 See Liefgaard *Deprivation of Liberty of Children* 22; Van Bueren *The International Law* 7.

68 Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141; Liefgaard *Deprivation of Liberty of Children* 22 *et seq*; Van Bueren *The International Law* 8.

69 *Declaration on the Rights of the Child* 1959 (n 2).

medical services and to education. It furthermore embodies provisions regarding special care and protection to children and their mothers; to special treatment, education and care for a physically, mentally or socially handicapped child; to support of the child without a family and to the protection of every child against all forms of neglect, cruelty and exploitation.<sup>70</sup>

Principle 2 contains the provision that the best interests of the child shall be the paramount consideration in the enactment of laws for the child's realization of the enjoyment of special protection and opportunities and facilities by law and by other means to enable him or her to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. This 'best-interests' principle is the predecessor of article 3 of the CRC.

It appears that the 1959 Declaration addressed the position of children more elaborately than its 1924 predecessor. Although the Declaration was a resolution that was not legally binding as such, it had a significant moral value and stimulated conceptual thinking of children's rights.<sup>71</sup> Most importantly, though, while the child was considered as an object of international law in the 1924 Declaration, the 1959 Declaration acknowledged the child as a subject of international law by providing for entitlements albeit limited to economic and social aspects. It did not address the civil and political rights of children.<sup>72</sup>

Already during the drafting process of the 1959 Declaration a number of States indicated that they preferred a convention on the rights of children rather than a declaration. This suggestion was opposed by the majority of States. However, in 1978 Poland submitted a draft text of a convention

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70 See too Liefgaard *Deprivation of Liberty of Children* 24.

71 Liefgaard *Deprivation of Liberty of Children* 25; Van Bueren *The International Law* 12.

72 Van Bueren *The International Law* 12; Liefgaard *Deprivation of Liberty of Children* 24 *et seq.* It must be noted that the *International Covenant on Civil and Political Rights* 16, 1966, 999 U.N.T.S. 171 also contains provisions relating to the position of children. For purposes hereof, however, no further attention will be paid to this instrument.

aiming at its adoption in 1979, the International Year of the Child. The CRC was only adopted in 1989 – the year of the 30<sup>th</sup> birthday of the 1959 Declaration and eleven years after the Polish proposal. Van Bueren suggests seven reasons for the change in attitude of States towards the idea of rights for children:

- From national law reforms in many States it appeared that children were no longer merely considered as individuals in need of care and protection but indeed as bearers of rights;
- States progressively recognised that instruments granting specific, positive rights to specific groups of individuals (eg children) were necessary to effectively combat and prevent discrimination against children – the mere prohibition of denial of rights for children was no longer considered to be enough;<sup>73</sup>
- There was recognition that a higher standard of protection than provided for in existing international instruments was needed to meet the specific needs of children. This was due to children's vulnerability and immaturity which could result in specific rights being inappropriate for adults being afforded to children;
- To have an effective instrument States recognised that a margin of appreciation had to be left for local customs and culture. This was achieved by embodying different principles of interpretation. Liefwaard explains that this challenge must be viewed as the wish to create an effective and legally binding instrument on the one hand and the ability to adapt to local and cultural needs and customs on the other;<sup>74</sup>
- A need for uniformity in international standards in view of the many international, regional and bilateral agreements that had come into

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73 Van Bueren *International Law* 12. See too Liefwaard *Deprivation of Liberty of Children* 27.

74 Liefwaard *Deprivation of Liberty of Children* 27.

existence and which reflected a serious diversity in approaches and points of departure;

- A growing awareness that a comprehensive instrument was needed on the issue of children's rights; and
- Growing emotional and public opinion fuelled by designating 1979 as the year of the child.

The CRC was adopted on 20 November 1989. As such it covers all categories of human rights, and civil, political, economic, social and cultural rights. Van Bueren mentions that it has developed far beyond its original draft which, like the 1959 Declaration had focused primarily on the three last-mentioned rights.<sup>75</sup> It only took one year before it entered into force when 20 States have ratified it. Currently 193 countries have ratified the CRC; the only two outstanding are the United States of America which lacks the political will to ratify it and Somalia which lacks effective control over the State territory.<sup>76</sup>

#### **4.2 The nature of the CRC – some brief remarks**

As mentioned in paragraph 4.1 *supra*, the 1959 Declaration reflected a pure needs-based approach towards the status of children. The CRC deviates from this approach in that it also encompasses a rights-based approach. This approach stems from the development in terms of which a child was no longer seen purely as a person in need of protection, but

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75 Van Bueren *International Law* 14. See too Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141; Liefwaard *Deprivation of Liberty of Children* 13.

76 See n 57 and text accompanying n 61 and 62 *supra* in respect of the enforceability of CRC rights. Montenegro was the last country to ratify the CRC (23 October 2006). Some authors refer to the paradox that despite the CRC's characterization as the most successful UN treaty or as a universal treaty ("[i]t is not difficult to find superlatives to describe the achievements of the CRC"), it is just as easy to recite examples of terrible abuses which continue to be committed against children, some of which seem to be even more chronic and less susceptible to resolution than they were before the CRC existed. See Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 141 *et seq*; Liefwaard *Deprivation of Liberty of Children* 28.

rather as a bearer of rights.<sup>77</sup> Van Bueren indicates that the CRC had the following objectives:<sup>78</sup>

- The creation of new rights under international law, some of which had already been developed under judicial systems of regional human rights treaties; for instance the right to be heard and have the child's views taken seriously;
- The establishment of binding standards in a global treaty on aspects that had until then only been covered by non-binding recommendations; for example the Beijing Rules;<sup>79</sup>
- The imposition of new obligations concerning the provision for, and protection of children; for instance the obligation to provide for the rehabilitation of the abused, neglected or exploited child; and
- The provision of an additional ground by which States Parties are under a duty not to discriminate against children in their enjoyment of the rights set out in the CRC; for example the obligation on States

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77 Liefwaard *Deprivation of Liberty of Children* 29-30 distinguishes various aspects of the CRC that have contributed to the wider recognition of the scope of children's rights. Some of these include the following:  
Accountability – by recognizing the child as bearer of rights and by providing for legally binding obligations for public authorities, the CRC provides for a full set of universally recognised norms and standards that can be applied in any situation and in all social-cultural environments;  
Empowerment, ownership and participation – the child is recognized as an actor who is progressively empowered according to his or her evolving capacities to exercise his or her own rights;  
Remedy – by setting standards that are legally binding, the CRC provides for a legal instrument which the child or his/her representative can invoke in a court of law. As such the CRC provides for a legal remedy against violations of the CRC or of a lack of will to implement;  
International scrutiny – by ratifying the CRC States Parties are under an obligation to report to the UN Committee on the Rights of the Child and stand under international scrutiny as explained in n 48 supra; and  
The CRC as a comprehensive and holistic analytical tool to serve as a basis for research from a multi-sectoral angle on the rights of children. See too Hammarberg 1990 *Human Rights Quarterly* 97-105.

78 Van Bueren *The International Law* 16. See too Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 148; Liefwaard *Deprivation of Liberty of Children* 29.

79 Liefwaard *Deprivation of Liberty of Children* refers to David *Human Rights in Youth Sport: A critical Review of Children's Rights in Competitive Sport* (dissertation 2004 VU, Amsterdam) who argues that it can safely be assumed that the CRC has placed crucial issues that were still negated, ignored or neglected during the 1980s on the agenda of many politicians, legislators and administrators.

to take effective measures to abolish traditional practices prejudicial to the health of children. Such would, for example, include female circumcision.

Articles 2, 6, 12 and 3(1) of the CRC set out the general principles on which the CRC is premised. Article 2 contains the principle of non-discrimination by way of embodying the obligation of States Parties to respect and ensure the rights set forth in the CRC to each child within their respective jurisdictions without any discrimination of any kind. In terms of article 6 every child has the inherent right to life and States Parties are under the obligation to ensure to the maximum extent possible the development and survival of the child.<sup>80</sup> The third principle is reflected in article 12 which provides for the right of the child to express his opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. States Parties must ensure that those views are given due weight. In article 3(1) the fourth principle is embodied - the best interests of a child as a primary consideration in all matters concerning the child. The article makes it clear that this principle refers to actions undertaken by public and social welfare institutions, courts of law, administrative authorities and legislative bodies. In fact, it requires active measures throughout government, parliament and the judiciary.<sup>81</sup> The Committee on the Rights of the Child<sup>82</sup> explains that "[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions".<sup>83</sup>

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80 The Committee on the Rights of the Child expects States to interpret 'development' in its broadest sense as a holistic concept to embrace the development of the child's physical, mental, spiritual, moral, psychological and social development. See General Comment No. 5 (2003) General measures of interpretation of the Convention on the Rights of the Child (arts 4, 42, 44, par 6) CRC/GC/2003/5, 27 November 2003 (GC No. 5) (hereafter GC No. 5).

81 See Liefwaard *Deprivation of Liberty of Children* 31.

82 See n 48 supra for a discussion of the functioning of the Committee.

83 GC No. 5 (n 80) par 12. It must be noted that despite the fact that the CRC focuses on children as bearers of human rights, it still considers them within the family environment. See eg art 18 which acknowledges the position of parents as those who have the primary responsibility for the upbringing and development of the child and that States Parties shall render appropriate assistance to them. It is

The CRC provides for the equal enjoyment of human rights for children while taking into consideration that the child, due to age and immaturity, cannot be regarded as an adult and has to be seen as in a phase of development. It goes without saying that this point of departure influences the level of protection afforded a child, the nature of the child's participation and the exercising of a right by a child personally.<sup>84</sup>

#### ***4.3 General measures regarding the implementation of the provisions of the CRC***

The Committee on the Rights of the Child has drafted a general comment to outline States Parties' obligations to develop what it has termed "general measures of implementation".<sup>85</sup> In the comment the Committee refers to the general principles on which the CRC is premised<sup>86</sup> and it is at pains to point out that it is fundamental to ensure that all domestic legislation is fully compatible with the CRC and that the CRC's principles and provisions can be directly applied and appropriately enforced.<sup>87</sup> Against this background it refers to article 4 of the CRC which provides as follows:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.<sup>88</sup>

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therefore important to note that the CRC does not view the child independently from his or her family.

84 Rios-Kohn 1998 *Georgetown Journal on Fighting Poverty* 147; Sainz-Pardo 2008 *IJHR* 558; Liefwaard *Deprivation of Liberty of Children* 32.

85 See n (105 and 106) *infra*.

86 GC No. 5 (n 80) par 12.

87 GC No. 5 (n 80) par 1.

88 In international human rights law, there are articles similar to article 4 of the Convention, setting out overall implementation obligations, such as article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have issued general comments in relation to these provisions which should be seen as complementary to the present general comment and which are referred to below. See GC No. 5 (n 80) par 5. In terms of article 42 States Parties undertake to make the contents of the CRC widely known to children and adults and in terms of article 44(6) States Parties 'shall' make their reports to the

It is clear that article 4 serves as a general measure of implementation.<sup>89</sup> However, while reflecting States Parties' overall implementation obligation, it may also be indicative of a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. The Committee, correctly so, it is submitted, indicates that there is no simple or authoritative division of human rights in general, or of CRC rights into the two categories. It explains that the Committee's reporting guidelines group some articles under the heading "civil rights and freedoms", but indicate by the context that these are not the only civil and political rights in the CRC. Indeed, it is clear that many other articles, including articles 2, 3, 6 and 12 of the CRC, contain elements which constitute civil/political rights, thus reflecting the interdependence and indivisibility of all human rights. Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights. The Committee believes that economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable. The Committee therefore emphasizes that economic, social and cultural rights as well as civil and political rights must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.<sup>90</sup>

It furthermore needs to be borne in mind that the second sentence of article 4 reflects a realistic acceptance that lack of resources, financial and other, can hamper the full implementation of economic, social and cultural rights in some States. This introduces the concept of "progressive realization" of such rights - States need to be able to demonstrate that they have implemented "to the maximum extent of their available resources" and, where necessary, have sought international cooperation.<sup>91</sup>

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Committee on the Rights of the Child widely available to the public in their own countries.

89 GC No. 5 (n 80) par 2.

90 GC No. 5 (n 80) par 25.

91 The sentence is similar to the wording used in the *International Covenant on Economic, Social and Cultural Rights* (n 80) and the Committee entirely concurs with the Committee on Economic, Social and Cultural Rights in asserting that "even where the available resources are demonstrably inadequate, the obligation

The general measures of implementation identified by the Committee and described in the present general comment are intended to promote:

- full enjoyment of all rights in the Convention by all children, through legislation,
- the establishment of coordinating and monitoring bodies - governmental and independent - comprehensive data collection, awareness-raising and training; and
- development and implementation of appropriate policies, services and programmes.

The Committee explains that a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. The review needs to consider the CRC not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. States parties need to ensure with all appropriate means that the provisions of the Convention are given legal effect within their domestic legal systems. The Committee indeed welcomes the incorporation of the provisions of the CRC into domestic law. Incorporation should mean that the provisions of the CRC can be directly invoked before the courts and applied by national authorities and that the CRC will prevail where there is a conflict with domestic legislation or common practice.<sup>92</sup> Incorporation by itself does not

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remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ..." Whatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups. Mulira *International Legal Standards* 18 explains that even though it may be expected that fulfilment of formal requirements may be complicated by a lack of resources and political will, certain obligations like physical integrity, humane treatment and freedom from torture are not dependent on the availability of resources and must be fulfilled by States. See Doek 2003 *University of Florida Journal of Law & Public Policy* 125. Doek explains that six-hundred million children have to live – that is to be housed, clothed, fed and educated – with less than one U.S. dollar a day. The implementation of the CRC is directly affected by poor socio-economic conditions.

92 Despite this explanation of the Committee one must still bear the distinction between monist and dualist legal systems in mind. See n 52 for a discussion of the position in South Africa.

avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the CRC. In case of any conflict in legislation, predominance should always be given to the CRC in the light of article 27 of the Vienna Convention on the Law of Treaties.

The Committee points out that if Governments are to promote and respect the rights of the child, they need to apply a unifying, comprehensive and rights-based national strategy,<sup>93</sup> rooted in the CRC. It commends the development of a comprehensive national strategy or national plan of action for children, built on the framework of the CRC. The Committee expects States Parties to take account of the recommendations in its concluding observations on their periodic reports when developing and/or reviewing their national strategies. If such a strategy is to be effective, it needs to relate to the situation of all children, and to all the rights in the CRC.<sup>94</sup> Particular attention will need to be given to identifying and giving priority to marginalized and disadvantaged groups of children. The strategy must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of children throughout the State; it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and civil and political rights for all children.

In examining States Parties' reports the Committee has almost invariably found it necessary to encourage further coordination of government to ensure effective implementation: coordination among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society. The purpose of coordination is to ensure respect for all of the CRC's principles and standards for all children within the State Party's jurisdiction; to ensure that the obligations inherent in ratification of or accession to the Convention are not only recognized by those large departments which have a substantial impact on children - education, health or welfare and

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93 In ch 3 infra the rights of child victims will be discussed.  
94 GC No. 5 (n 80) par 29-32.

justice - but right across government, including for example departments concerned with finance, planning, employment and defence, and at all levels. The Committee also emphasizes that decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State Party's Government to fulfil its obligations to all children within its jurisdiction, regardless of the State structure.<sup>95</sup> Furthermore, States Parties to the CRC have a legal obligation to respect and ensure the rights of children as stipulated in the CRC which includes the obligation to ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations on such actors.<sup>96</sup>

Ensuring that the best interests of the child are a primary consideration in all actions concerning children as set out in article 3(1) of the CRC and that all the provisions of the CRC are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.<sup>97</sup>

As far as data collection is concerned the Committee notes that collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation. The Committee reminds States Parties that data collection needs to extend over the whole period of childhood up to the age of 18 years.<sup>98</sup> It also stresses the identification and analysis of resources for children in national and other budgets.<sup>99</sup> No

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95 GC No. 5 (n 80) par 40.

96 GC No. 5 (n 80) par 43.

97 GC No. 5 (n 80) par 45.

98 GC No. 5 (n 80) par 48.

99 GC No. 5 (n 80) par 51.

State can tell whether it is fulfilling children's economic, social and cultural rights "to the maximum extent of ... available resources", as it is required to do under article 4 unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. States Parties' obligation to develop training and capacity-building for all those involved in the implementation process - government officials, parliamentarians and members of the judiciary - and for all those working with and for children is also emphasized. These include, for example, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and armed forces, including peacekeeping forces, those working in the media and many others. Training needs to be systematic and ongoing. The purpose of training is to emphasize the status of the child as a bearer of human rights, to increase knowledge and understanding of the CRC and to encourage active respect for all its provisions.

With regard to the required cooperation between States and civil society the Committee expresses the need for States Parties to engage all sectors of society, including children themselves. It concurs, for example, with paragraph 42 of General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the Right to the Highest Attainable Standard of Health which conveys that while only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society, individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector, have responsibilities regarding the realization of the right to health. It is therefore the responsibility of States Parties to provide an environment which facilitates the discharge of these responsibilities.

Article 4 emphasizes that the implementation of the CRC is a cooperative exercise for the States of the world. This article and others of the Convention highlight the need for international cooperation. Articles 55

and 56 of the Charter of the United Nations identifies the overall purposes of international economic and social cooperation, and members pledge themselves under the Charter "to take joint and separate action in cooperation with the Organization" to achieve various purposes, *inter alia*, the alleviation of poverty. The Committee advises States Parties that the CRC should form the framework for international development assistance related directly or indirectly to children and that programmes of donor States should be rights-based.<sup>100</sup> The Committee specifically refers to article 42 of the CRC. It provides that States Parties undertake to make the principles and provisions of the CRC widely known to adults and children alike by appropriate and active means. In view of the fact that traditionally in most, if not all, societies children have not been regarded as rights bearers, article 42 assumes particular importance. If the adults in the lives of children, for instance their parents and other family members, teachers and carers do not understand the implications of the CRC, and above all its confirmation of the equal status of children as subjects of rights, it is most unlikely that the rights set out in the Convention will be realized for many children.<sup>101</sup>

#### **4.4 The provisions of article 39**

Article 39 of the CRC provides that States Parties must ("shall") take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment and also of armed conflict. It specifically provides that such recovery and reintegration must ("shall") take place in an environment which fosters the health, self-respect and dignity of the child.<sup>102</sup>

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100 GC No. 5 (n 80) par 60-64.

101 See par 65-73. See too De Berry 2001 *The ANNALS of the American Academy of Political and Social Science* 92 *et seq.*

102 It is of some significance to refer to art 6(3) of the Optional Protocol (n 22 *supra*) in this respect. This article concerns the demobilisation and recovery of child soldiers and to some extent serves to illustrate the provisions of art 39. In terms of this article States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are

It is clear that article 39 comprises of two parts; the first relates to recovery and reintegration and the second to the type of environment in which activities to achieve that aim should take place.<sup>103</sup> As such the second part provides a framework for the level of quality of action to be taken.<sup>104</sup>

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demobilised or otherwise released from service. When necessary such States Parties shall accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

To implement this provision the reporting guidelines to the Committee reads as follows:

"When relevant, please indicate the all measures adopted with regard to disarmament, demobilisation (or release from service) and the provision of appropriate assistance for the physical; and psychological recovery and social reintegration of children, taking due account of girls, including information on – Disaggregated data on children involved in that proceeding, on their participation in such programmes, and on their status with regard to the armed forces and armed groups (eg when do they stop to be members of the armed forces or groups?);

The budget allocated to these programmes, the personnel involved and their training, the organization concerned, cooperation among them, and participation of civil society, local communities, families, etc.;

The various measures adopted to ensure the social reintegration of children, eg interim care, access to education and vocational training, reintegration in the family and community, relevant judicial measures, while taking into account the specific needs of children concerned depending notably on their age and sex;

The measures adopted to ensure confidentiality and protection of children involved in such programmes from media exposure and exploitation;

The legal provisions adopted criminalizing the recruitment of children and the inclusion of that crime in the competence of any specific justice seeking mechanisms established in the context of conflict (eg war crimes tribunal, truth and reconciliation bodies). The safeguards adopted to ensure that the rights of the child as a victim and as a witness are respected in these mechanisms in light of the *Convention on the Rights of the Child*;

The criminal liability of children for crimes they have committed during their stay with armed forces or groups and the judicial procedure applicable, as well s safeguards to ensure that that the rights of the child are respected;

When relevant, the provisions of peace agreements dealing with disarmament, demobilization and/or physical and psychological recovery and social reintegration of child combatants."

It is of further importance to note that the Optional Protocol, contrary to the provisions of art 39 of the CRC, explicitly imposes the obligation to demobilise, rehabilitate and reintegrate children who have been recruited or used in armed conflict. See Vandewiele "Optional Protocol" 50; Van Bueren *The International Law* 348; Malan 1996 *Transnational Law and Contemporary Problems* 350.

103 Mulira *International Legal Standards* 18 *et seq*; Nylund 1998 *The International Journal of Children's Rights* 28. See too Shepler 2005 *Journal of Human Rights* 198; Robinson 1997 *Global Legal Studies* 258.

104 Nylund 1998 *The International Journal of Children's Rights* 30. Art 6(3) of the Optional Protocol provides a framework for the interpretation of art 39. As noted in n 101, art 6(3) specifically pertains to the position of child soldiers qua victims of war. The first obligation in terms of this article is that of States to take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilized or otherwise released from service. Demobilization in this context may be seen as the process of converting a

Physical and psychological recovery cover a number of situations, but neither the Committee on the Rights of the Child, nor the *travaux préparatoires* to the CRC give a clear guideline as to the type of special protection that would be necessary to fulfill the legal obligation towards

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soldier to a civilian. As such it is a process by which armed forces (government and/or opposition or factional forces) either downsize or completely disband as part of a broader transformation from war to peace. It seems to require a formal procedure, yet there are also other ways to release children from service, the aim being that children concerned are liberated from their military obligations regardless of the way to achieve the goal. Demobilized children should be dispersed or transferred as expeditiously as possible to interim care sites or centres under civilian control where child protection agencies and other international institutions need to be involved in providing them with health care, counseling and psycho-social support. It must be noted that art 6(3) does not limit the obligation of States to their own citizens. In fact, they are also responsible for children who have been recruited on the territory of another State but who are within their jurisdiction now as there are refugee and migrant children who have been involved in hostile activities in their home countries. The requirement of 'all feasible measures' to be taken reflects an obligation of means. Vandewiele "Optional Protocol" 51.

The second part of art 6(3) reads that States Parties shall when necessary accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration. This aspect has been held to emphasize the need to assess and respond to the needs of child victims to provide for psychological assistance and to ensure family and social reintegration. If necessary, international cooperation should be sought.

The Optional Protocol does not specify what is to be understood by recovery and reintegration. Generally reintegration may be seen as the process of facilitating the ex-soldiers' transition to civilian life. Reintegration programmes are therefore assistance measures provided to former combatants that would increase the potential for their and their families' economic and social reintegration into civil society. Cash assistance or compensation in kind, as well as vocational training and income-generating activities may be included in such programmes. Since most child soldiers are physically and psychologically marked, their recovery should be included in recovery programmes. Vandewiele "Optional Protocol" 54 also argues that psycho-social support should not be reduced to individual psychological assistance but should form part of social reintegration. Other social reintegration measures may include interim care, access to education and vocational training, reintegration in the family and community and relevant judicial measures. A first priority, however, should be family tracing, reunification and reconciliation. Child soldiers can be accepted back into their families and communities through traditional forgiveness rituals and ceremonies. Vandewiele "Optional Protocol" 56 urges that measures taken need to be effective. They should preferably be situated within a framework of long-term and comprehensive programmes for assistance, rehabilitation and reintegration for all children affected by armed conflict. National institutions dealing with the recovery and reintegration of children should be allocated sufficient human and financial resources to effectively demobilize and reintegrate children in society and to provide for the necessary follow-up.

Justice is also a means of recovery. Legal provisions should be adopted to criminalize the recruitment of children. In this fashion the rights of the child as victim and witness will be respected. In this respect the right of the child to be heard (art 12 of the CRC) springs to mind. See too Mulira *International Legal Standards* 43; Grover 2008 *IJHR* 57.

child victims of armed conflict. However, Nylund indicates that social reintegration may include food and medical assistance, aspects that are usually referred to as social rights. Psychological recovery may include recovery from the armed conflict experience and learning to live with it. In fact, Nylund points out that the need for after-care and rehabilitation of children traumatised by war has been recognised as an urgent matter by the World Conference on Human Rights in 1993.<sup>105</sup>

The aim with social reintegration will only be achieved if actions for recovery are taken simultaneously with those associated with the social reintegration. Social reintegration may include actions against poverty and action on behalf of the family and the community. Such may include

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105 Nylund 1998 *The International Journal of Children's Rights* 29. Nylund explains that the general obligation under art 39 includes providing the necessary medical care for children who have been wounded in or as a result of armed conflict (including from landmines that remain after the conflict is over) and who are the victims of sexual violence. Hodgkin & Newell "Rehabilitation of child victims" 581 refer to the guidelines which are set for periodic reports by the Committee on the Rights of the Child which reads as follows: "Please provide information on all measures taken pursuant to article 39 ... to promote the physical and psychological recovery and social reintegration of the child involved with the system of the administration of justice, and to ensure that such recovery and reintegration take place in an environment which fosters the health, self-respect and dignity of the child. Reports should also identify, *inter alia*, the mechanisms established and the programmes and activities developed for that purpose, as well as the education and vocational training provided, and indicate relevant disaggregated data on the children concerned, including by age, gender, region, rural/urban area, and social and ethnic origin. They should further indicate the progress achieved in the implementation of article 39, difficulties encountered and targets set for the future." See too Zack-Williams 2006 *Social Work Education* 124. Maslen 1997 "The reintegration of war-affected youth" 1-55 describes the training and employment needs in Mozambique qua war-affected country. See too Russell & Gozdzia 2006 *Georgetown Journal of International Affairs* 60; Marques "Rehabilitation and reintegration of the former child soldiers in Mozambique" 1-40. In terms of art 4 of the CRC States Parties shall undertake all appropriate legislative, administrative and other measures to implement the rights recognized in the CRC. In respect of socio-economic rights they must undertake such measures to the maximum extent of their available resources and where needed, within the framework of international cooperation. In the South African context, the provisions of the CRC and the Constitution have played a significant part in legislative reform since its ratification in 1995 and various statutes refer explicitly to the CRC. Reference may in this respect be made to the *Children's Act* 38 of 2005 which provides in its heading that the purpose of the Act is to give effect to certain rights of children as contained in the Constitution. In the preamble it is stipulated that there is a need to extend particular care to the child as it has been stated in, *inter alia*, the CRC. It is therefore clear that the principles and norms in both the CRC and the Constitution serve to guide the legislator in the enactment of legislation.

provision for education, family reunification or adoption for those children who cannot be reunited. This part of the article is obviously aimed at making provision for a safe environment within which the turning from a conflict situation to one of peace may take place.

The second part of article 39 providing for an environment which fosters the health, self-respect and dignity of the child must be read together with article 3 of the CRC which provides for the best interests of the child to be a paramount consideration in all actions undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. This part of the article covers some of the basics in terms of providing for a safe environment in turning from conflict to peace. Nylund consequently argues that it should put an obligation on the State and the international community to strive towards establishing a sound environment to deal appropriately with those who have participated in the armed conflict; such environment may be provided for through demobilization that takes into consideration the interests of the child.<sup>106</sup>

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106 Mulira *International Legal Standards* 18. See too Awodola 2009 *Peace and Conflict Review* 1-10; Gislesen *A childhood lost?* 2006 Norwegian Institute of International Affairs; Nylund 1998 *The International Journal of Children's Rights* 30. Hodgkin & Newell "Rehabilitation of child victims" 586 refer to the following dicta in various reports of the Committee on the Rights of the Child: "The Committee ... urges the State Party to take all necessary measures in cooperation with national and international NGOs ... to address the physical needs of children victims of armed conflict, in particular child amputees, and the psychological needs of all children affected directly or indirectly by the traumatic experiences of the war. In this regards, the Committee recommends that the State Party develop as quickly as possible a long-term and comprehensive programme of assistance, rehabilitation and reintegration. ... [t]he Committee expresses its concern at the lack of rehabilitation services for the children affected by the armed conflict. The Committee urges the State Party to take every feasible measure, including through international mediation, to have all child abductees and combatants released and demobilized and to rehabilitate and reintegrate them into society. ..."

At 587 general measures for the implementation of art 39 are reflected:

"Have appropriate general measures of implementation been taken in relation to article 39, including:

identification and coordination of the responsible departments and agencies at all levels of government (article 39 is relevant to departments of social welfare, health, employment, justice, defence, foreign affairs)?

identification of relevant non-governmental organizations/civil society partners?

a comprehensive review to ensure that all legislation, policy and practice is compatible with the article, for all children in all parts of the jurisdiction?

adoption of a strategy to secure full implementation

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which includes where necessary the identification of goals and indicators of progress?

which does not affect any provisions which are more conducive to the rights of the child?

which recognizes other relevant international standards?

which involves, where necessary, international cooperation?

budgetary analysis and allocation of necessary resources?

development of mechanisms for monitoring and evaluation?

making the implications of article 39 widely known to adults and children?

development of appropriate training and awareness-raising (including the training of all those responsible for child protection, teachers, social workers and health workers)?

It certainly needs no elaboration that these measures are an embodiment of the provisions of art 4 of the CRC which require of States Parties to undertake all appropriate legislative, administrative and other measures to the maximum extent of their available resources and within a framework of international cooperation, to implement art 39.

See too Malan 2000 *African Security Review* <http://www.issafrica.org/pubs/ASR/9No5And6/Malan.html> . Arguing as he does that indoctrination of militaristic and often revolutionary ideologies and values must be reversed, he conveys that demobilization needs to be comprehensive enough to uproot both the instruments and organization, as the ideology of violence. He identifies the following examples of material, physical, judicial and psychological needs for demobilized child soldiers:

nutrition;

medical treatment (including for sexually transmitted diseases and substance abuse);

respect and self-esteem;

human dignity and confidentiality;

consultation and participation in determining their fates;

reintegration packages and benefits;

community sensitisation in advance of family reintegration;

amnesty from prosecution and/or protection from retribution for acts committed during hostilities;

protection from repeat recruitment;

mental 'disarmament';

education, peace education and vocational training; and

employment creation.

He also recommends the following practical, albeit ambitious, measures for the demobilization of former child soldiers:

preparations for child demobilization in ongoing conflict by dispersing children or transferring them from zones which are under the control of their former commanders to avoid repeat recruitment or reprisals;

special programming for former child soldiers who are demobilized as adults;

protection of children from further abuse during the time of demobilization by separating them immediately from adult soldiers;

early removal of children from the formal assembly site to a site where interim care can be provided;

systematically assessing the presence and special needs of girl soldiers in a way that reflects their military roles (fighters, cooks, messengers, spies, labourers, 'wives' or sexual slaves; and

plans for tracking, documenting and supporting the high percentage who routinely do not enter the formal disarmament, demobilisation and reintegration process.

It is clear that the principle underlying the article is the provision of a physically safe environment for child victims of armed conflict.<sup>107</sup> It also relates to the situation of displaced children. Such children are particularly vulnerable since they are not only displaced, but they also need special protection and provision for a safe environment for recovery in exile if the conflict in their place of origin is still ongoing. In similar vein one may ask whether extended stay in refugee camps is compatible with the prescripts of article 39. In essence the question is whether the environment provided for refugee children meets the standards of article 39 if one considers the holding of refugees in confined areas for extended periods of time. Does this environment foster the health, self-respect and dignity of children so that they may recover from the effects of war? The suggestion is put forward in this respect that life in a refugee camp must be "as normal as possible" and include activities for children that promote their social reintegration.<sup>108</sup>

#### *4.4.1 The psychological recovery and social reintegration of the child*

It has been pointed out that the primary aim of article 39 is to provide special protection and care through psychological recovery and social reintegration for child victims of armed conflict. To achieve this goal the actual experiences of the child must be established. It is self-evident that the child needs a safe environment within which he or she will be able to recover psychologically. Such environment may be provided by enabling the child to be reunited with his or her family or through an alternative environment within which he or she can feel safe. Post-conflict reconstruction which generally also safeguards social reintegration is an expensive exercise. Machel<sup>109</sup> emphasizes in this respect that the most effective and sustainable approach would be to mobilize existing social care systems. An important aspect for psychological recovery for

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107 This would include de-mining of areas where children would otherwise not be able to live safely.

108 Nylund 1998 *The International Journal of Children's Rights* 31.

109 Machel 1996 *Impact of armed conflict on children* par 177; Malan 2000 *African Security Review* <http://www.issafrika.org/pubs/ASR/9No5And6/Malan.html> .

purposes of both policy and credibility is sustainability. Providing for the survival of the child would also include action against poverty. Article 6(2) of the CRC serves as the basis for such provision. It provides that States Parties shall to the maximum extent possible ensure the survival and development of the child.

Education is a means of both psychological recovery and social reintegration. Various covenants contain provisions in this respect and article 28 of the CRC specifically provides for the right to education of every child. States are to make primary education compulsory and available free to all to progressively achieve this right. In view of the fact that the provisions of the CRC apply equally to all children within the jurisdiction of a State Party such State is to provide education similar to that accorded to its nationals also to refugee children.<sup>110</sup> Education is also of particular importance for displaced children to provide for durable solutions as they invariably are more vulnerable than children who have a family.

Voluntary repatriation to facilitate the recovery of children must be considered against the consideration whether such return will ensure continued care and the well-being of the child. Appropriate questions in this respect may include whether the return will be in the best interests of the child or whether other solutions may be more appropriate.<sup>111</sup> It may, for instance, appear that the return of a child may lead to family reunification but that the community within which the reunification is to take place is unsettled.

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110 Mulira *International Legal Standards* 20; Nylund 1998 *The International Journal of Children's Rights* 33; Malan 1996 *Transnational Law and Contemporary Problems* 351.

111 Nylund 1998 *The International Journal of Children's Rights* 34; Mulira *International Legal Standards* 20. See too McCoubrey & White *International Law and Armed Conflict* 173.

#### 4.4.2 *Tracing a child's family and the reunification of the child with his or her family*

In terms of article 22(2) of the CRC governments of States Parties have a positive obligation to protect and assist child refugees and to trace the parents or other family members of any refugee child in order to secure information necessary for reunification with his or her family.<sup>112</sup> The Committee has consequently on numerous occasions recommended that States Parties take all necessary measures to ensure that applications for asylum made for purpose of family reunification be dealt with in a humane, positive and expeditious manner.<sup>113</sup> Articles 9 and 10 of the CRC must be read in conjunction with the provisions of article 22. Article 9 requires of States Parties to ensure that a child shall not be separated from his or her parents<sup>114</sup> and article 10 provides for the positive obligation for States Parties to deal in a positive, humane and expeditious manner with the application filed by a child or his or her parents to enter or leave a State Party for purposes of family reunification.<sup>115</sup>

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112 It is interesting to note that the wording of the article does not extend the protection to internally displaced children.

113 Concluding Observations on Spain in Report of the Committee on the Rights of the Child GA Supplement No. 41 (A/51/41) par 287.

114 There are, however, limitations provided for by this article. Art 9(1) provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will unless it is established by process of law that such separation is necessary for the best interests of the child.

115 Nylund 1998 *The International Journal of Children's Rights* 36. In the drafting process it was suggested that art 22 must include an obligation to investigate whether the child has a family or other close relations. Probably as a result of practical considerations the suggestion has been watered down and art 22(2) now reads that "[S]tates Parties shall provide, as they consider appropriate, co-operation" in any efforts by the United Nations and other competent inter-governmental organizations or non-governmental organizations co-operating with the United Nations, to protect and assist such child to trace the parents or other members of the family.

As for humanitarian law provisions in this respect, suffice it to refer to -  
Art 74 of GC I which provides that States must facilitate in every possible way the reunification of families separated as a result of armed conflict and also that they must provide support for humanitarian organizations engaged in this task; and  
Art 26 of GC IV which reads that each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war with the object of renewing contact with one another and of meeting, if possible. In particular, States must encourage the work of organizations engaged in this task provided however, that such organizations are acceptable to it and conforms to its security regulations.

It may safely be concluded from the discussion above that the positive obligation to ensure family reunification is firmly established in international law. This obligation on the State also includes internally displaced children. There is, however, no obligation on States to trace the family of a child.<sup>116</sup>

#### 4.4.3 Demining

The effects of landmines continue long after a war is over. These weapons have indiscriminate effects and tend to victimize the poorest sectors of society – people who cultivate their fields, look for firewood or herd their animals. Children who survive a landmine explosion suffer severe medical problems. Machel<sup>117</sup> therefore urges change and progress in four major areas: a ban on landmines, mine clearance, mine awareness and rehabilitation programmes to help children recover.

## 5 Conclusion

The discussion in this chapter involves the provisions of article 39 of the CRC, *qua* human rights law. As point of departure it is accepted that armed conflict infringes various fundamental rights of children. It is clear that they are indeed victims of such conflict. However, it has been argued that child soldiers may also be regarded as victims. Even though there is a

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International refugee law adds little to the provisions of the CRC. It bears no reference to the word "child" neither does it contain elaborate references to a right to family life. Art 12(2) of the Convention Relating to the Status of Refugees GA Res 429 (v) 14 December 1950 is the only provision relating to the family of a refugee and provides that rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State. Nylund 1998 *The International Journal of Children's Rights* 37 also refers to the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons that adopted the text of the above mentioned Convention, but recommended in ch 4 Part B that governments take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country. Special protection must also be afforded to refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption. Various other human rights instruments contain provisions relating to the right to family life.

116 Nylund 1998 *The International Journal of Children's Rights* 40.

117 Machel 1996 *Impact of armed conflict on children* par 116.

measure of uncertainty, it appears that the position is settled that child soldiers under 15 years should not be prosecuted. There also appears to be growing consensus that child soldiers between 15 and 18 years of age should be recovered and reintegrated into society rather than prosecuted.

The status of a child victim of armed conflict *vis-à-vis* the State is influenced by the State's following either a monist or a dualist approach to the incorporation of treaties, *in casu* the CRC, into their domestic law. Certain possibilities can be discerned in this respect:

- States have not ratified the CRC. Such States do not incur obligations in terms of the CRC towards child victims.
- States Parties following a monist system. Ratification of the CRC creates rights against the State for child victims which are legally enforceable.
- States Parties following a dualist system. In this instance two possibilities present themselves -
  - States Parties have ratified the CRC, but have not incorporated it into their domestic law. Such States have obligations towards other contracting States Parties in terms of the CRC and also in terms of article 18 of the Vienna Convention. However, child victims in the jurisdiction of such States are not endowed with legally enforceable rights.
  - States Parties have ratified the CRC and incorporated it into their domestic law. In this instance the rights of child victims flow from domestic law in the same fashion as with States following a monist system.

There is no authoritative division of fundamental rights between civil and political rights on the one hand and socio-economic rights on the other. As a consequence all rights in the CRC should be regarded as justiciable.

However, a lack of resources may hamper the full implementation of socio-economic rights.<sup>118</sup>

Article 39 requires of States Parties to recover and reintegrate child victims and to provide an environment in which activities to achieve this goal can take place. States Parties are required to provide both a physically safe environment for child victims and for their psychological recovery. In addition the social reintegration of such children must be accomplished. States Parties can meet these demands by providing (at least) primary education and reuniting the child with his family. States Parties should also demine areas to protect children (and adults) from their devastating effect.

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<sup>118</sup> See Mulira *International Legal Standards* 18.

## CHAPTER 3

### THE CONTEXTUALISATION OF THE RIGHTS OF CHILD VICTIMS IN TERMS OF ARTICLE 39 CRC – A PUBLIC SUBJECTIVE RIGHTS APPROACH

#### 1 Introduction

In chapter 2 it was concluded that a child victim of armed conflict may have claims in terms of article 39 CRC against a States Party to the CRC **of which he is a national** to act in his interest. In terms of this article a child may claim that the State will re-unite him with his family, provide education, de-mine an area *et cetera*. This chapter aims at providing a legal theoretical framework within which the claims of the child may be explained and therefore merely serves to contextualise the legal relationship between the child and the State. In paragraphs 2 to 6 the framework within which the relationship may be explained will be set out. For the sake of convenience it will be done theoretically and in the abstract. However, in chapter 4 the theoretical exposition will be applied to the position of child victims in terms of article 39. No reference will therefore be made to the provisions of the CRC in this chapter.

The discussion in paragraphs 5 and 6 reflects the author's argument and viewpoints expounded in his unpublished doctoral thesis *Die subjektiewe regsposisie van die geloofsbeswaarde militêre dienspligtige*.<sup>1</sup> However, these views and argument have been elaborated upon and refined to serve as a basis for the conclusions in paragraph 7.

#### 2 Public subjective rights

It is accepted as a point of departure that the child *qua* individual and the State are involved in a legal relationship as legal subjects endowed with

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1 Unpublished doctoral thesis presented in 1986 at the then Potchefstroom University for Christian Higher Education. Robinson 2001 *SAPL* 210-231.

legal subjectivity.<sup>2</sup> For purposes hereof the relationship will be referred to as the public law relationship. Within the relationship it must be accepted as a *sine qua non* that the State is not only endowed with State sovereignty, but also that it makes use of authority to act prescriptively. As an explanatory model for the public law relationship the theory of public subjective rights, which is of German origin, recognises that the relationship is multi-dimensional and it also accepts the existence of State sovereignty as a given. However, as will be set out *infra*, it does not consider the State as a legal subject in the relationship. In order to substantiate the argument that this approach is fundamentally wrong, viewpoints of authors of the so-called Reformed Tradition will be superimposed on the German exposition.<sup>3</sup> It will be argued not only that the State is by its very nature called upon to recognise the (public subjective) rights of the individual and to create legal channels by means of which the rights may be enforced, but also that it must provide an infrastructure that makes provision for the fundamentally secure living of the everyday lives of the individual. In this fashion it is endeavoured to nuance the legal position of the State and the individual *vis-à-vis* each other in order to move away from the idea of the public law relationship as one characterized by an abuse of State authority or one characterized by excessive individual claims against the State.

It will be argued that the public law relationship's balance-point should be determined legally and that it is indeed possible to balance the State's competence to act prescriptively with the reciprocal claims, rights and obligations of the individual. This conclusion flows from the fact that the public law relationship should be characterized by the subjective legal claims of both the State and the individual to certain legal objects on the one hand, and on the other that the subjective legal claims and obligations of both the State and the individual can be traced back to the fact that the

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2 See, however, par 2.1.1 *infra* from which it is clear that in German jurisprudence only the individual is viewed as a legal subject in the public law relationship.

3 See eg Kuyper *Antirevolutionaire Staatskunde; Rechtfertigung und Recht* and the works of Dooyeweerd referred to in n 24 *infra*. See too the references to other works of Kuyper in n 2.

State, being a social entity, is historically founded and juridically destined. As will be explained later herein, this viewpoint of the State activates different status aspects of the individual which not only serves to explain the obligation of the individual to respect the sovereignty of the State, but also his competence to establish subjective rights against the State.

## **2.1 The notion of public subjective rights**

### **2.1.1 Introduction**

The concept at the core of this chapter is that of public subjective rights. Public subjective rights are similar to private subjective rights and can in essence be regarded as a legal subject's legally protected claims to a certain legal object.<sup>4</sup> Epping provides the following explanation for the concept:

Ein subjektives Recht ist die Rechtsmacht die dem Einzelnen von der Rechtsordnung zur Wahrung seiner Interessen verliehen worden ist. Dem steht das objective Recht gegenüber, dem eine solche Rechtsmacht des Einzelnen nicht zu entnehmen ist.

A modern, authoritative exponent of the theory is Alexy. He explains that the theory in essence entails that A (natural or juristic person) has a right

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4 Epping *Grundrechte* 438. See too Ipsen *Staatsrecht II* 20 who describes the structure of public subjective rights as follows: "Zu dem Begriffsmerkmales des subjektiven Rechts gehört die dem Einzelnen Eingeräumte (klagbare Rechtsmacht, von einem anderen ein Tun oder Unterlassen zu verlangen." He explains that there are always three entities involved in the relationship; the subject as bearer of rights, the third party against whom the right is enforceable and the legal object. See too Schmidt *Grundrechte* 5; Sachs *Verfassungsrecht II* 36; Klement *Verantwortung* 264; Detterbeck *Öffentliches Recht* 300. Detterbeck explains that legal prescripts do not always clearly afford the individual claims against the State. However, such prescript will be considered as a public subjective right if it also aims at the protection of the interest of the individual. Scherzberg 2006 *Jura* 839 *et seq* summarises public subjective rights as a model for explaining the public law relationship as follows: "Im subjektiv-öffentlichen Recht verwirklicht sich die Subjektstellung des Bürgers, der nicht nur dem Recht unterworfen und durch das Recht verpflichtet sein soll, sondern sich auch auf das Recht berufen und aus ihm Befugnisse ableiten kann. Die Subjektstellung des Bürgers verwirklicht sich *materiellrechtlich* in den Grundrechten und in einer Vielzahl einfachgesetzlicher subjektiver Rechte, mit denen der Gezeitsgeber dem Verfassungsauftrag zur Konkretisierung, Ausgestaltung und wechselseitigen Begrenzung grundrechtlich geschützter Güter und Interessen nachkommt, und prozessrechtlich in der Eröffnung des gerichtlichen Rechtsschutzes." See too Baur 1988 *Archiv des Öffentliches Rechts* 133, 582.

to O, an object, against S (the State).<sup>5</sup> In this example A is the bearer of a right whereas S is the addressee of the right. In the public law relationship S is always the State. A and S are in their respective capacities not only in a legal relationship *vis-á-vis* each other but also in respect of O. In the public law relationship the object of A's right is conduct of S.<sup>6</sup> Alexy elucidates the relationship between A, S and O by providing a practical example commonly found in Bills of Rights, namely that everyone has the right to life. Clearly O is the condition of A to be alive and as such is an object of a subjective right of A's. However, A's relation to O is only an abbreviated exposition of a complex relationship of subjective rights and competences also in relation to S in terms of which A is endowed with the subjective right to demand from S "*negativ ein Recht auf Leben*"<sup>7</sup> and positively that S shall protect and further his life ("*sich schützend und fördernd vor dieses Leben stellt*").<sup>8</sup> In terms of this exposition A therefore does not only have a right against S (negatively) not to kill him, but also (positively) that S must protect his life from wrongful infringement. A distinction can therefore be drawn between individual rights to negative State conduct ("*die Rechte auf negative Handlungen*") which may be

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5 Alexy *Theorie der Grundrechte* 171. "Die allgemeinste Form eines Satzes über ein Recht auf etwas lautet: a hat gegenüber b ein Recht auf G." For purposes hereof a in Alexy's definition is A (individual); b is S (the State) and G is O (the legal object).

6 Alexy *Theorie der Grundrechte* 172. "Der Gegenstand eines Rechts auf etwas ist stets eine *Handlung* des Adressaten. Dies ergibt sich aus seiner Struktur als dreistellige Relation zwischen einem Träger, einem Adressaten und einem Gegenstand. Wäre der Gegenstand keine Handlung des Adressaten, so würde es keinen Sinn haben, den Adressaten in die Relation einzuschließen."

7 BVerfGE 1, 97 at 105.

8 BVerfGE 46, 160 at 164. It needs to be noted, though, that the distinction between negative and positive State conduct is progressively coming under fire. In *Government of the RSA v Grootboom and Others* 2001 1 SA 46 (CC) par 23 the Constitutional Court argued that the Constitution entrenches both civil and political rights (negative) and socio-economic (positive) rights. These rights are inter-related and mutually supporting since the foundational values of human dignity, freedom and equality are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people consequently enables them to enjoy the other fundamental rights which are enshrined in the Constitution. See too Currie & De Waal *The Bill of Rights Handbook* 567. The authors also refer to the International Covenant on Economic, Social and Cultural Rights (1966) which conveys that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

termed preventative rights ("*Abwehrrechte*") and rights to positive State conduct ("*Leistungsrechte*").<sup>9</sup>

### 2.1.2 Preventative Rights ("*Abwehrrechte*")

Preventative rights may be sub-divided in three categories. The first is the right of A that S will not prevent or impede particular conduct of his, the bearer of the right. The second is the right that S will not prejudice certain qualities ("*Eigenschaften*") or situations ("*Situationen*") of A. The third is the right of A that S will not terminate particular relations of A, the bearer of the right.

#### ***A's right that S will not prevent or impede specific conduct of A's ("*Nichthinderung von Handlungen*")***

Typical examples of conduct that may be prevented or impeded may include the prevention or impeding of A's right to *movement* ("*Fortbewegung*"), *expression* of opinion ("*Meinungsäußerung*") and *confession* of faith ("*Kundgabe des Glaubens*"). The difference between prevention and limitation of A's preventative rights can be explained as follows: Conduct of A will be prevented when S creates conditions which make it factually impossible for A to exercise his rights. On the other hand, S will limit the right to act of A when he (S) creates conditions that might cause an impediment for A to exercise his right. Alexy explains it as follows:

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9 It will be accepted for purposes hereof that there is a distinction between negative and positive State conduct. However, this is not generally accepted. See text accompanying n 89 and 90 in chapter 2. See too par 6.1 and 6.2 *infra*. A particular question that arises in this respect is whether A or S can renounce their subjective rights. It is submitted that it is indeed possible. As discussed in par 3.2 *infra* the subjective rights of a natural or juristic person flow from his legal subjectivity. Disposing of these competences directly relates to his legally being able to be the bearer of a subjective right and to enforce his subjective right, ie to participate in legal intercourse – see par 3 *infra*. Against this background it may safely be assumed that in the situation where A and S have the legal ability to be the bearer of a subject right and to enforce it, it is also within their legal ability to eg renounce enforcing their respective subjective rights. See Van Zyl & Van der Vyver *Inleiding tot die Regswetenskap* 371-439.

Definiert man die Begriffe der Ver- und der Behinderung auf diese Weise, so verhindert eine Erhöhung der subjektiven Zugangsvoraussetzungen für einen Beruf, die A, wenn auch unter größten Mühen und Opfern, erfüllen kann, das Ergreifen dieses Berufs durch A nicht, sie behindert es aber.<sup>10</sup>

In relation to preventative rights, one must also distinguish the possibility that S can make it legally impossible for A to exercise his right. In this respect it is important to note that it is only a "*Rechtsakt*" that can be made legally impossible. A "*Rechtsakt*" is one which came into force in terms of constitutive legal prescripts ("*konstitutive Rechtsnormen*") and which may only be exercised in terms of such legal prescripts. For instance, it would not be possible to exercise the right to elect (members of parliament) if it was not made possible by legal prescripts allowing for, and regulating elections. Due to the fact that such acts come into existence by reason of constitutive norms, they may be described as institutional acts ("*institutionelle Handlungen*"). Institutional acts become impossible when the constitutive norms in terms of which they exist are terminated. It will be explained *infra* that when a "*Rechtsakt*" is made impossible the competence of A is directly affected as he is deprived of the opportunity to

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10 Alexy *Theorie der Grundrechte* 174. It is clear that this distinction relates to the limitation of constitutional rights. S 36 of the *Constitution of the Republic of South Africa*, 1996 in essence provides that rights provided for in chapter 2 of the Constitution may be limited by law of general application. The leading authority in South African jurisprudence in this respect is *S v Makwanyane* 1995 3 SA 391 (CC) par 104 where the Constitutional Court elaborated as follows on the provisions on s 36: "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in s 33 (of the Interim Constitution). The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) (of the Interim Constitution) and the underlying values of the Constitution, bearing in mind that ... 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."

effect legal change/take part in legal intercourse in terms of the particular constitutive legal prescript. The right that this may not happen falls in the category of rights to negative State conduct ("*Abwehrrechte*") as it entails that S may not terminate constitutive norms in terms of which A's institutional acts are made impossible.

***A's right that S will not terminate qualities and situations of A ("Eigenschaften und Situationen")***

The second group of negative acts of S which serve as basis for individual rights comprises individual qualities or situations which may not be terminated by S. Such include A's right to life and to be healthy.

***A's right that S will not terminate certain legal relations ("Rechtlichen Positionen")***

The third group of rights to negative acts of State include the right that S will not terminate certain legal relations of A. Such may include the right to property.

***2.1.3 The right to positive State action ("Leistungsrechte")***

Two categories of rights to positive State action may be distinguished; the right to factual and the right to normative conduct of State respectively. The right to factual conduct of State would, for instance, include the right to provision of an "*Existenz-minimum*". The right to positive normative conduct of State on the other hand, would include the right that S establishes legal norms ("*staatliche Normsetzungsakte*"). Alexy provides examples to explain the nature of these rights, but regrettably refrains from furnishing reasons for the activation of this right of A. It will be argued in paragraph 6.2 *infra* that this right of A relates to the juridical destination of the State.

**3 Competence/Capacity ("*Kompetenz*")**

In chapter 1 it was conveyed that legal subjectivity concerns the legal ability of participating in legal intercourse as a legal subject. The extent to

which it is possible for a legal subject so to participate is determined by his legal status.<sup>11</sup> The term competence/capacity is typically applied to refer to this ability.<sup>12</sup> Competence *qua* ability does not pertain to a legal object. In this way the term corresponds with the Afrikaans concept "*kompetensie*".<sup>13</sup> For purposes hereof the term competence will be used.

### **3.1 Private Law**

In private law a legal subject's competence indicates his ability to participate in legal intercourse by, for example, concluding a contract, entering into a marriage, drawing up a will, *et cetera*.<sup>14</sup> The nature and extent of a person's competences depend on a variety of factors. Such include, amongst others, age, domicile and extra-marital birth. A legal subject disposes of the following competences which are referred to as capacities: legal capacity, capacity to act and capacity to litigate.

#### **3.1.1 Legal capacity**

The capacity to participate as a subject in legal intercourse is referred to as legal capacity. Legal capacity includes the capacity to

- hold offices as a legal subject, for example, to be a spouse, testator, contracting party, owner, company director, and so forth; and
- have the rights and obligations which result from holding such offices.<sup>15</sup>

All persons have legal capacity, but it is self-evident that a person's legal capacity can be limited. As such, a person under the age of puberty

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11 Robinson *et al Introduction to the SA Law of Persons* 9.

12 Van der Vyver & Joubert *Persone- en Familiereg* 2.

13 Robinson *et al Introduction to the SA Law of Persons* 9; Jordaan & Davel *Law of Persons* 6; Heaton *The South African Law of Persons* 33.

14 Van der Vyver & Joubert *Persone- en Familiereg* 4 explain that the capacities that a person has to be a legal subject and to perform certain acts in legal intercourse, are his or her competences and that which a person cannot legally do, is that in respect of which he is not competent.

15 Van der Vyver & Joubert *Persone- en Familiereg* 4.

cannot hold the office of a spouse. A person under the age of 16 years cannot hold the office of testator because statutory provisions make it clear that a person must be at least 16 years old to draw up a legally valid will.

### 3.1.2 *Capacity to act*

Capacity to act relates to the capacity to enter into legal transactions. Where in the case of legal capacity the issue relates to what a person legally is and can be, capacity to act relates to the capacity of a legal subject to perform in legal intercourse. It more specifically deals with the capacity of a legal subject to conclude judicially relevant acts. Such an act is one that involves a voluntary performance by the person performing the act – such person (contracting party, testator, prospective spouse) wants to bring about a specific legal consequence (contract, will, marriage). In this regard it should also be borne in mind that the capacity to act deals with lawful *acts*. These are acts that are performed in compliance with the law; for example a contract that is concluded according to the prescriptions of the law of contract in order to be valid and enforceable.

### 3.1.3 *Capacity to litigate*

A further way in which a legal subject can participate in legal intercourse is as a litigant in private law actions. Capacity to litigate is therefore defined as that legal competence which enables a person to act as plaintiff, defendant, applicant or respondent in a private law suit.

## 3.2 *Public law*

In German jurisprudence the concept goes under various names such as "*Macht*", "*Rechtsmacht*", "*Kompetenz*", "*Ermächtigung*", "*Befugnis*", "*Gestaltungsrecht*", or "*rechtliches Können*".<sup>16</sup> Alexy defines it as:

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16 This explanation corresponds with the view commonly held that capacity reflects the (juridical) ability of the legal subject to take part in legal intercourse. See eg Van der Vyver & Joubert *Persone- en Familiereg* 53.

[d]aß durch bestimmte Handlungen des oder der Inhaber der Kompetenz die rechtliche Situation geändert wird.<sup>17</sup>

The concept is not further refined in the public law sphere. However, it will be endeavoured to indicate that in principle there is no reason to limit the classification to private law. It will also be accepted for purposes hereof that participation in legal intercourse and the ability to effect legal change as Alexy describes it, are interchangeable.

The State is a legal subject. As such it has competences accruing to it, which competences stem from its **legal subjectivity**. It will be argued *infra* that the **State's** foundation in the historical aspect of reality activates its competence to be the bearer of subjective rights that relate to its foundation and to enforce them. On the other hand, its destination in the juridical aspect of reality activates the competence of the individual to be the bearer of subjective rights against the State and to enforce them.

The above exposition can be illustrated by referring to capacity to act in private law. If an individual meets the necessary legally prescribed age requirements he has the competence (capacity to act) to conclude a contract. When he does so, he has a subjective right to performance from the other contracting party. As far as the public law relationship is concerned it can be said that the State is a legal subject endowed with the competence to have subjective rights to certain conditions (State security, law and order) certain property and immaterial property and to specific conduct. In other words, it has subjective rights which stem from its foundation to these legal objects and it may demand of the individual to respect its subjective rights to these objects.

The competence of the individual to be the bearer of subjective rights against the State is activated when the State makes legal provision for his claim to negative or positive State conduct in his favour, for instance if an Act of Parliament creates a right to specific State conduct for owners of fixed property, such owners are endowed with the competence to hold the

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17 Alexy *Theorie der Grundrechte* 211.

State liable in terms of the particular legislation. In this instance the individual's legal capacity, capacity to litigate and capacity to act is activated by the statutory provision. In terms of legal capacity he is the bearer of subjective rights against the State as set out in the relevant legislation and in terms of his capacity to act he can demand from the State to act in terms of the relevant legislation.

#### **4 A brief evaluation of the notion of public subjective rights**

It is submitted that the theory of public subjective rights can only serve as a starting point to explain the public law relationship; it needs to be elaborated upon as it fails to define the relationship comprehensively. An evaluation of the concept should be conducted with reference to two of its key concepts; firstly the bearer of the subjective right and secondly the nature of a legal object.

##### ***4.1 The bearer of a subject right in the public law relationship***

Alexy makes it clear that in the public law relationship the individual is endowed with subjective rights which rights are enforceable against the State.<sup>18</sup> The State is not endowed with subjective rights in the

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18 See too eg Bühler *Die subjektiv-öffentlichen Rechte* 224 who defines public subjective rights as follows: "Subjektives öffentliches Recht ist diejenige rechtliche Stellung des Untertanen zum Staat, in der er auf Grund eines Rechtsgeschäftes oder eines zwingenden, zum Schutz seiner Individualinteressen erlassenen Rechtssatzes, auf den er sich der Verwaltung gegenüber soll berufen können, vom Staat etwas verlangen kann oder ihm gegenüber etwas tun darf." Scherzberg 2006 *Jura* summarises public subjective rights as model for explaining the public law relationship as follows: "Im subjektiv-öffentlichen Recht verwirklicht sich die Subjektstellung des Bürgers, der nicht nur dem Recht unterworfen und durch das Recht verpflichtet sein soll, sondern sich auch auf das Recht berufen und aus ihm Befugnisse ableiten kann. Die Subjektstellung des Bürgers verwirklicht sich *materiellrechtlich* in den Grundrechten und in einer Vielzahl einfachgesetzlicher subjektiver Rechte, mit denen der Gesetzgeber dem Verfassungsauftrag zur Konkretisierung, Ausgestaltung und wechselseitigen Begrenzung grundrechtlich geschützter Güter und Interessen nachkommt, und prozessrechtlich in der Eröffnung des gerichtlichen Rechtsschutzes". It is submitted that the public subjective rights of the individual may be enforced in municipal courts and tribunals and also international tribunals if the particular State happens to be a contracting party to an international treaty creating such a tribunal.

relationship.<sup>19</sup> From this exposition it becomes clear that he does not view the State as a legal subject, but indeed as a subject bearing obligations ('*duty subject*') only. It is suggested that this viewpoint reflects an impoverished perspective of the position of the State and it may well be concluded that from the State's perspective the theory of public subjective rights views the relationship as one of obligations and duties. Weight is added to this argument by Alexy's exposition of a competence. If it is accepted that a competence is the ability to cause legal change, it follows as a matter of course that State sovereignty which underlies the authority of the State to act prescriptively, must be a "*Kompetenz*". As it is trite that a competence of a legal subject is inherently related to his legal subjectivity, there can be little doubt that the State is a legal subject also in the public law relationship and that its sovereignty enables it to be the bearer of subjective rights and to exercise and enforce them.

From the above conclusion it follows logically that the State must have subjective rights flowing from its sovereignty. It will be argued later herein that the competence of the State (in other words its sovereignty) to exercise its authority (capacity to act) flows from its historic foundation and that it is indeed its historic foundation that serves as the basis of the State's subjective rights to legal objects such as State security and law and order.

#### **4.2 The legal object**

It is suggested that the recognition of only "*Leistungs*" and "*Abwehrrechte*" to State conduct as legal object does not only fail to take into

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19 If it is accepted that the State functions as a legal subject in the public law relationship, the following argument of Van der Vyver is bound to create uncertainty. "[W]anneer dit egter om die publiekregtelike funksies en optrede van die staat en staatsowerheid gaan ... kom daar 'n bykomstige element ter sprake as integrale deel van die staat en staatsowerheid se regspersoonlikheid, naamlik staatsgesag: dit wil sê as subjek van die publiekreg is die staat en staatsowerheid, bo en behalwe die elemente van regspersoonlikheid ... ook nog die draer van staatsgesag." Van Zyl & Van der Vyver *Inleiding tot die Regswetenskap* 440. It will be argued infra that the "staatsgesag" does not elevate the State to a position over and above the public law relationship with the individual; the existence and application of State sovereignty is not sufficient reason for excluding the State as a legal subject from the public law relationship.

consideration that the State is also a legal subject in need of legal objects, but also that other *things* may qualify as legal objects. The viewpoint of Venter may, it is suggested, be applied fruitfully in this respect. He rejects arguments to the effect that something must be susceptible of a monetary value before it may be recognised as a legal object. In fact, the determining aspect to establish whether *something* qualifies as legal object is to ask whether *it* can be applied in the creation and maintaining of legal order ("of die "iets" in die juridiese ordeningsproses aangewend kan word om die gemeenskap te orden"). Such determination is done in *ad hoc* fashion.<sup>20</sup> He suggests a classification of legal objects with reference to their nature and identifies the following categories:

- property; for instance the *territorium* of a State;
- conduct of other legal subjects; for instance the right to be registered as a voter when application is made by someone entitled to vote, to disclose one's income to the Receiver of Revenue, to

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20 Venter *Die Publiekregtelike Verhouding* 158. Van Zyl & Van der Vyver *Inleiding tot die Regswetenskap* 442 maintain a similar view even though their exposition relates to the private law relationship. They argue that both individual members of society and society itself have a need for certain things for their sensible participation in legal intercourse and their existence. Since these things have qualities that gratify the needs of humans and society, they are valuable. In order to gratify the needs of human beings peacefully and in orderly fashion, the law giver ("regsvormer") must protect the needs of every member of society against unwanted infringement by other members of society. The law giver does this by demarcating and harmonizing the interests in value objects of the different members of society. It can therefore be said that the value of a value object is assigned to a legal subject vis-à-vis other legal subjects. In this sense the value becomes juridically 'objectified'. Their definition of a legal object therefore reads as follows: "[a]s daardie aspek (faset, sy of funksie) van 'n entiteit wat 'n regswaarde vir 'n bepaalde regsobjek behels op grond daarvan dat een of meer buite-juridiese waardes van daardie entiteit regtens bestem is om, ter uitsluiting van ander regsobjekte, die regsobjek tot behoeftebevrediging te dien." (at 402-405.) Qualities an entity should possess to qualify as a legal object, may include that it has a value for the legal subject (since if it didn't, it would be rather senseless to consider it as a legal object) and the value that is made a legal value must be such that the juridical assignment thereof to a legal subject must have community ordaining value. (at 406-407)

The gratification of a legally recognised need of the legal subject therefore lies at the core of a definition of a legal object. In the public law relationship it is submitted that the same argument holds true and it needs no further elaboration that this exposition would comfortably sit with Venter's definition of a legal object even though he relates the concept to the public law relationship.

assist a police official with an arrest when ordered to do so by the official *et cetera*;<sup>21</sup>

- conditions; for instance the conditions of State security, law and order;<sup>22</sup> and
- certain immaterial property; for instance the national anthem or national flag.

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21 Venter *Die Publiekregtelike Verhouding* 160 argues that the law grants legal subjects who are active in public law claims to certain actions/conduct of other legal subjects. Such conduct bears an ordaining value and may therefore be considered as a legal object. Examples that may be alluded to are the duty to disclose which entails that persons and companies must disclose their income to the Receiver of Revenue; the act of registration by an election officer when a person who is entitled to vote applies for such registration; the duty of an individual to assist with an arrest when a police officer orders him to, and the duty which rests on the Master under certain circumstances to grant a person access to documents under his supervision.

Venter concludes that it is evident in these cases that the relevant conduct is the object in the relationship between the State and other legal subjects in the public law relationship. The Receiver of Revenue has a subjective right to the disclosure of the tax payer's income and the policeman as State organ has a subjective right to assistance during arrest. Likewise, the person who is entitled to vote has a subjective right to register as a voter and the interested party has a subjective right to insight in a will at the Master's office. In this way these rights can also be said to be subjective rights.

22 In public law various legally created conditions/situations can be objectified as legal objects with an ordaining value. Due to their ordaining value such conditions/situations may serve as valuable objects in the relationship and may therefore also be objects of (public) subjective rights. However, not all public law relevant conditions/situations are capable of being legal objects. This so because not all such conditions/situations relate to the public law relationship; the State form, for example, is a condition/situation with regard to which the State does not stand in a public law relationship. Conditions/situations which can indeed be seen as legal objects in the public law relationship is the condition/situation of citizenship which is of material importance in the State-citizen relationship, the condition/situation of State security which is especially important to the State *qua* juristic person and which applies in the relationship of the State with other legal subjects and also the condition/situation of law and order which as a condition/situation serves as a legal object worthy of protection. See Venter *Die Publiekregtelike Verhouding* 160.

According to Venter conditions/situations are juridically multi faceted and a variety of rights, competencies and obligations may result from it. However, in the event where a pure condition/situation is the object of a right, a person who meets all the requirements for example for citizenship can rely on a subjective right against the State to appropriate action to confer citizenship on him. The safety of the State and the consequent continued existence of the legal order are likewise legal objects with ordaining value accruing to the State. In his opinion the State definitely has a subjective right to State security and 'law and order' *qua* legal objects.

Taking Venter's exposition as point of departure it is clear that it is insufficient to acknowledge only "*Leistungs*" and "*Abwehrrechte*" *qua* conduct as does Alexy. These concepts correspond with the concepts of "*facere*" and "*non facere*" as they apply to the legal object in private law. It is suggested, however, that the view of a legal object should be elaborated not only to include "*dare*" as a legal object in public law, but also certain conditions, property, conduct, immaterial property and situations. It would appear with regard to "*dare*" that socio-economic rights of the individual (rights to an "*Existenz-minimum*") may serve as an example of the subjective right of the individual that the State provide him with tangible goods. On the other hand, the objects identified by Venter may serve as examples of a subjective right accruing to the State in terms of its historical foundation. It will be argued in paragraph 6 *infra* that the juridical destination of the State activates the so-called negative and positive status aspects of the individual as described by Alexy and which endow him with the competence in terms of which subjective rights are established to demand *inter alia* State conduct ("*Abwehr*" or "*Leistungsrechte*") *qua* legal objects in his favour.

#### **4.3 Conclusion**

It is suggested that both the State and the individual dispose of subjective rights to legal objects in the public law relationship. It may also be concluded that the view of a legal object in the public law relationship as merely a negative or positive act in the individual's interest, is fundamentally wrong. It is suggested that it may include both a "*dare*" and, *inter alia*, situations and conditions which for instance fall in the category of State security and law and order and also other objects which Venter has identified. In this respect it is argued that the State is indeed a legal subject in the public law relationship and that it also disposes of subjective rights to legal objects.

There is a clear difference in the situation of for example the individual's subjective right to official languages on the one hand, and the act of registration of the registration officer when a person who is entitled to vote

applies for it, on the other. It seems as though an entity will in certain cases first be recognised as a legal object when a specific legal subject is endowed with a subjective right. In other situations the legal object may exist generally.

It is not the intention to provide a comprehensive exposition of the theory of public subjective rights. In as much as it accepts that the individual is the bearer of rights against the State it may be accepted. However, it must be borne in mind that the theory does not provide definite answers to certain fundamental questions. It does not explain, for instance, why the State is not seen as a legal subject in the public law relationship or why a narrow approach is followed in the definition of a legal object so that only "*Abwehr*" and "*Leistungsrechte*" are considered as legal objects of subjective rights in the relationship. In what follows the so-called *Wijsbegeerte der Wetsidee* of the so-called Reformed Tradition<sup>23</sup> will be alluded to for further dimensions to the relationship.<sup>24</sup>

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23 The theology of Jean Calvin (1509-1564) is the foundation of the Reformed tradition. His viewpoints not only lead to a theological reformation but also brought about new perspectives on the public law relationship as he set out clear principles with regard to the social calling of the State, the responsibility of Government and the obligations of Christians in everyday life. His concern primarily related to church polity and not to the civil authority. Bearing in mind that he initially was a student of law commentators conclude that Calvin's political ideas were set in the context of his theology which focused on the sovereignty and sublime majesty of God. In fact, his emphasis on the sovereignty of God determined his perspective on civil authority and individual rights. Calvin's understanding of the *ius naturae* lead him to conclude that the law of God is more than what was contained in the Ten Commandments; the law given to all people includes not only the commandments contained in the two tables but also the laws dictated to man by an internal law which is in a manner written and stamped on every heart. He explains that a concept of justice is engraved in the minds of all people. Every individual therefore has a sense of justice and civil authority bears the obligation of developing this sense of justice. From this perspective Calvin concluded that the State is charged to foster and maintain the external worship of God, to defend sound doctrine and the condition of the Church, to adapt man's conduct to human society, to form man's manners to civil justice and to cherish common peace and tranquility. Therefore civil authority should be obedient to God (because they represent His tribunal on earth) and accountable to the people in the exercising of their power. He makes it clear that civil authority must rule for the common good. The bearers of the power are not endowed with an infinite or unlimited power as their power is tied to the health of their subjects. Government may therefore not exploit it's people and is ultimately responsible to God and accountable to its subjects. It is to be noted, though, that Calvin did not proffer a particular explanation on the kind of government that would be ideal for Christians, but nevertheless took a strong

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stand against any form of tyranny as it was considered a violation of human dignity.

Calvin strongly argued that Church and State are separate entities. Although they are co-ordinate powers, the State is called upon to defend true worship and to take care of the well-being of the Church provided that such intervention does not lead to the disturbance of order and discipline in the Church. The State consequently is not a neutral institution - qua community it is a unitary Christian society under God's sovereignty and the law.

Calvin held strong views about the rights and responsibilities of individuals. According to his teachings all people are equal before God since all are totally depraved. Yet all share God's common grace. From this proposition flows that all people should be treated as equals and are equal before the law. As for individual freedom and liberty, Calvin stressed that it is the responsibility of the individual to be obedient to the ruler. However, he also acknowledged the right and the liberty of resistance against civil authority. He explained that "[W]e are subject to the men who rule over us, but subject only in the Lord. If they command anything against Him let us not pay the least regard to it, nor be moved by the dignity which they possess as magistrates – a dignity to which no injury is done when it is subordinated to the special and truly supreme power of God." It is therefore clear that Calvin argued for the limitation of the authority of the State and for rights of the individual vis-à-vis the State. See Vorster *Ethical Perspectives on Human Rights* 25-42.

Elaborating on the ideas of Calvin as far as human rights are concerned were Groen van Prinsterer (1806-1876) and Kuyper (1837-1920) whose better known works include *Het Calvinisme, oorsprong en Waarborg onzer Constitutioneele Vrijheden* (1874), *De Gemeene Gratie* Volume III, and *Calvinism. Six Stone Lectures* (1898). See too Barth *Rechtfertigung und Recht* 16-18. Vorster on 53 quotes as follows from Kuyper's Six Stone Lectures: "[L]et it suffice to have shown, that Calvinism protests against state-omnipotence; against the horrible conception that no right exists above and beyond existing laws; and against the pride of absolutism, which recognizes no constitutional rights, except as the result of princely favour.

24 The views of Dooyeweerd will in particular be alluded to. This can be found in *A new critique of theoretical thought* 414 and further; Dooyeweerd *De wijsbegeerte der wetsidee* Boek II 217; Dooyeweerd *De wijsbegeerte der wetsidee* Boek III 414; Witte *A Christian Theory of Social Institutions* 21 et seq.

The basic beliefs from which his world-views developed can be summarized as follows: All social institutions find their ultimate origin in creation where all things were separated after their own kind and vested with the right to exist and to develop.

God is the absolute sovereign over all creation both at its inception and in its unfolding. He called creation into being through His Word and through His providential plan He guides its becoming. Furthermore His sovereignty is absolute and constant.

God's authority is also a legal authority since He established creation and governs His creatures by law. He is above law and not bound by it. His will is communicated by the laws of creation which provide order and consistency, not chaos and indeterminacy.

Each social institution has a right to exist alongside other individuals and institutions. It also has a "legal duty" to function in accordance with God's creation ordinances and providential plan with the aim to fulfill its calling in history. A plurality of social institutions, each with a measure of sovereignty vis-à-vis all others, is therefore made possible by the laws of creation. The sovereignty of a social sphere is always limited by the sovereignty of co-existing spheres and limited to the task/function to which it is called. Such sovereignty is subservient to the absolute sovereignty of God since it is delegated by Him and

always remains dependent upon Him. (Witte *A Christian Theory of Social Institutions* 16 *et seq.*)

Against this background the structure of the State can be discerned. Dooyeweerd argues that in temporal reality one can distinguish modal aspects. These aspects do not appear in isolation but always in an inseparable and mutual coherence. The following 15 aspects are discerned:

<b>Aspect</b>	<b>Meaning-nuclei</b>
15 Pistic	Faith
14 Moral	Love in temporal relationships
13 Juridical	Retribution
12 Aesthetic	Harmony
11 Economic	Frugality in managing scarce goods
10 Social	Social intercourse
9 Lingual	Symbolic meaning
8 Historical	Formative power
7 Logical	Distinction
6 Sensitive (psychic)	Feeling
5 Biotic	Vitality (life)
4 Physical	Energy
3 Kinematic	Motion
2 Spatial	Continuous extension
1 Arithmetic (numerical)	discrete quantity (number)

Each modal aspect is distinct and irreducible. Irreducibility reflects what is called "sphere sovereignty" of the modality and means the inviolable and irreducible status of these various aspects that creatures display. For instance, the justice of a man's act cannot simply be understood as a product of economic, logical or mathematical calculus – that is, the jural aspect cannot be reduced to the economic, logical or numerical modal aspects.

Each modal aspect builds on the aspects below it. Dooyeweerd argues that spatial extension, for example, cannot be understood without a concept of numerical multiplicity. Beings that are alive move in space and can be counted. This means that they have physical, spatial and numerical functions.

Dooyeweerd further argues that the reason why the modalities remain distinctive and ordered is because they are ordered by the laws of creation. God created groups of specific laws for each modality. Therefore, alongside the hierarchy of modalities, there is also a hierarchy of modal laws – laws ordaining counting and arithmetic, geometry, motion, life, sensitivity, logic, history, language, society, economics, aesthetics, legal science, ethics and theology. According to his exposition, these laws which are "ontic a prioris" provide order and consistency in creation.

The plurality of modalities as set out above is an essential source of the plurality of distinct creatures and all inanimate things, living beings, cultural things and relationships, including social institutions are subject to (at least some of) these modal laws. These laws govern the function of each of these creatures in each aspect. Creatures may be classified, therefore, by the laws to which their functioning is subject. Dooyeweerd explains inorganic things are subject to the first three modal laws of number, space and motion; plants to the first four laws through the biotic laws; and animals to the first five through the psychic. Man is subject to all the laws but human social institutions are only subject to a select number of higher modal laws.

The highest modal law to which each creature is subject contributes to rendering it distinctive by furnishing the creature with its distinguishing character (unique calling). It also prescribes a creaturely form in which this calling can be fulfilled. Dooyeweerd refers to it as the structural principle, or the internal law of the creature. (See Witte *A Christian Theory of Social Institutions* 23 *et seq.*)

According to Dooyeweerd a plurality of social institutions is made possible by the plurality of modal laws which govern them. The sovereignty of these institutions

## 5 The individual and the State as legal subjects involved in the public law relationship – reflections on the points of departure of the Reformed Tradition

### 5.1 Introduction

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is guaranteed by the sovereignty of the underlying modal laws. "The abiding structural principles, the inner constitution of each social institution – and thus also its "typical" nature and function – are prescribed by the modal laws to which that institution is subject." Furthermore he identifies the grounding (foundation) and leading modal functions (destination) of each institution. (See Witte *A Christian Theory of Social Institutions* 24.)

Dooyeweerd identifies a range of social institutions by application of this modal analysis. In the first place he distinguishes between undifferentiated and differentiated societies, the former normally being found in earlier cultures that have not yet developed separate institutions each with a uniquely defined form and task. This results in one or two institutions performing several tasks. Examples of such societies are the tribe, the folk sib, the Roman family and medieval guilds. Differentiated societies, on the other hand, show a clearer separation of institutions and a greater specification of the distinctive task and social role of each. Secondly, natural institutions may be separated from social institutions. Natural institutions are characterized by their being founded on the biotic modality of life and qualified by the moral modality of love. Included in such relationships are marriage, the family and the cognate family. All other institutions are social institutions which are founded on the historical modality. In essence this means that they are the product of human cultural formation. Their destination may be found in a variety of higher functions ranging from the analytical to the faith aspects. In the third place a distinction may be made between communities and intercommunal or interindividual relationships. Communities bind people together more or less permanently as members of the same social whole. Examples in this respect are the State, church or family. Intercommunal or interindividual relationships are the cooperative or antagonistic relations between two institutions, two individuals or an institution and the individual. Lastly he distinguishes between authoritative social forms and free social forms. The first mentioned type are institutions which are organized and which have a relatively permanent internal communal character and a definite division of authority and subjects. Members are embraced non-voluntarily for their entire lives or a substantial portion thereof. The State is also an example in this regard. (See Witte *A Christian Theory of Social Institutions* 24-25; Dooyeweerd *A new critique of theoretical thought* 187 and 179-181.)

It may therefore be concluded that Dooyeweerd views the State as a social institution and more specifically as an institutional community which community can be either a natural or an organized community which by its inner nature is destined to encompass its members to an intensive degree, continuously or at least for a considerable part of their life, and such in a way independent of their will. Dooyeweerd *A new critique of theoretical thought* 187, 413. Qua institution it is founded in an organized historical power formation. The organization provides a community that lacks a natural foundation with a more or less continuous existence. In this way it becomes independent of the duration of life of its individual members. Dooyeweerd *A new critique of theoretical thought* 179-181. Durable organization of necessity implies a societal relation of authority and subordination.

The outstanding characteristic of the public law relationship is that the State, *qua* bearer of State sovereignty, exercises its authority in this relationship. One possibility for explaining the State as an institutionalized social entity is that it is a historically founded organization which finds its destiny in the juridical sphere.<sup>25</sup> Although it is not denied that other valid methods for explanation exist, this approach offers certain perspectives according to which the legal position of both the State and the individual can be satisfactorily explained.

For purposes hereof the State and the individual<sup>26</sup> are identified as the two participants in the public law relationship. There is, however, a clear distinction between their respective positions. Because of the complexity of the relationship and the multitude of relevant factors which impact on it, it will be more functional to discuss the relationship with simultaneous reference to the respective legal positions of both the State and the individual.

## ***5.2 The State as a historically founded social entity and the corresponding individual status***

It is suggested that an understanding of the State as a legal subject disposing of subjective rights is incomplete if it is not understood that legal objects such as the condition of State security and law and order typically accrue to it.<sup>27</sup> These legal objects, as indicated above, are inherent in the subjective rights of the State and the exercising of State authority should therefore be directed at maintaining and protecting them.<sup>28</sup>

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25 Dooyeweerd *A new critique of theoretical thought* 414; Dooyeweerd *De wijsbegeerte der wetsidee* Boek II 217; Dooyeweerd *De wijsbegeerte der wetsidee* Boek II 414. See eg Nagler *Über die Funktion des Staates* 107, 111 *et seq* for a brief exposition of the theories of Kant, Locke and Hobbes.

26 For the sake of convenience the term individual as one participant in the public law relationship is contended with. It is of course just as possible that juristic persons can also figure as a party in the public law relationship.

27 See par 3.2. See too De Jouvenel *Über die Staatsgewalt* 39.

28 Wiechers *Administratiefreg* 8; De Jouvenel *Über die Staatsgewalt* 29; Dooyeweerd *A new critique of theoretical thought* 413-418).

In his argument about the way in which the terms 'law' and 'power' with regard to State authority should be dealt with in a pure legal theoretical way, Dooyeweerd convincingly indicates that the unique typical nature of the State can be found in the historic sphere and that it is indeed this distinctive nature which guarantees the unity of the State as social entity.<sup>29</sup> The historic nature can be traced back to the fact that the State as institutionalized institution first came into being with the destruction of the political power which existed with non-institutionalized communities and tribes.<sup>30</sup> The founding of the State in the historic sphere therefore typically rests on the destruction of the independent (political) structures of non-institutionalized social entities.<sup>31</sup> There exists no State of which the State sovereignty does not in the final instance underlie the competence to use the 'power of the sword' – the competence to use the force of arms to suppress any armed resistance.<sup>32</sup> Therefore, the sovereignty of the State resulting in its establishing and maintaining State security and law and order *qua* legal objects typically arises from its historical foundation.<sup>33</sup>

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29 Dooyeweerd *A new critique of theoretical thought* 405, 419. See too De Jouvenel *Über die Staatsgewalt* 40.

30 From a German perspective this point of departure is substantiated by De Jouvenel *Über die Staatsgewalt* 32 who explains that: "[B]edeutet das, die Staatsgewalt verdanke ihre Kraft nicht dem Gefühl der Furcht, sondern dem des Beteiligtseins? Eine menschliche Ganzheit besäße eine gemeinsame Seele, einen Nationalgeist, einen Gemeinwillen? Und die Regierung personifizierte die Ganzheit, manifestiere die Seele, verkörpere den Nationalgeist, verkünde den Gemeinwillen? Das Rätsel des Gehorsams wäre gelöst, da wir dann im Grunde nur uns selber gehorchten."

31 Dooyeweerd *A new critique of theoretical thought* 413.

32 Dooyeweerd *A new critique of theoretical thought* 414.

33 Dooyeweerd *A new critique of theoretical thought* 413. On 416, 417 Dooyeweerd emphasizes that the 'sword power' does not merely consist of military control over a certain area, because it would for example be impossible for the State to create military organisations if it did not also possess economical, moral, religious, and other forms of authority. These other forms of authority are however, not typical of the State, while the 'monopolistic application of the sword power' is the only typical authority form which is not the founding function of any of the other social entities. The other authority forms can consequently within State context only be understood with reference to the historic founding functions of the State. Dooyeweerd indicates that in spite of the fact that it is important for the State to have well developed trade and industry, it does not represent the internal characteristic of the State. It can happen that there can be antagonism between organs of State on the one hand and trade and industry on the other if last-mentioned's behavior is contrary to the national interest, and a State with a weak military organization will therefore be a weak State despite the strong trade and industry development.

The historic foundation of the State is the structural basis on which it rests and is situated in the confirmation and application of State authority by the armed forces over a certain cultural area within certain territorial boundaries.<sup>34</sup> The power of the sword does not, however, comprise only of a disposition over military weapons, airplanes, airports and so forth, but also of an organized army and police force:

Only subjective military bearers of power can actualize this apparatus: without them it remains dead material.<sup>35</sup>

Dooyeweerd emphasizes that this structural function, the confirmation of State sovereignty by the armed forces, should not be regarded as meaningless because it embodies the calling and task of the State in a normative way; it embodies the calling to control the "normatieve roepingsmacht in den zin der vormende behersching" as its internal goal.<sup>36</sup> The State may not exercise its authority as private property in an uncontrolled fashion, but rather its authority must be aimed at protecting the development of human civilization and to promoting it in subordination to the principles set by God<sup>37</sup> - its sovereignty will only then really be developed when there is so-called obedient subjection to the assignment given by God with regard to culture development.<sup>38</sup> Ultimately God

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34 Dooyeweerd *A new critique of theoretical thought* 414. In this regard Dooyeweerd talks about the internal monopolistic application of sword power. See too De Jouvenel *Über die Staatsgewalt* 121; Nagler *Über die Funktion des Staates* 107.

35 Dooyeweerd *A new critique of theoretical thought* 422.

36 Dooyeweerd *De wijsbegeerte der wetsidee* Boek II 185. De Jouvenel *Über die Staatsgewalt* 30 explains that "[i]st die politische Wissenschaft, oder was als solche bezeichnet wird, getreulich den Direktiven des Meisters gefolgt. Da keine Gesellschaft ohne Befehlsgewalt auskommt, ist die Diskussion um ihre Form stets aktuell, müssen ihr Ausmass, ihr Aufbau, ihre Handhabung für jederman von Belang sein." See too Klement *Verantwortung* 266; Michael & Morlok *Grundrechte* 140.

37 Dooyeweerd sees this obligation of the State as an imperative. It is, however, unclear what the position will be if the State does not adhere to this task. See too De Jouvenel *Über die Staatsgewalt* 39.

38 Dooyeweerd *De wijsbegeerte der wetsidee* Boek II 185. Here Dooyeweerd adds to Kuijper who, in his famous *Zes Stone Lezingen* under the title *Het Calvinisme* on 69 and further, came to the conclusion that only God has sovereign power. It is so because He created the earth and all institutions, including the State. As a result of the fall of man He does not directly rule over States anymore and He appoints peoples to rule over others mechanically (in contrast to organic). The sovereignty to rule over other people therefore only originates from God and the

appointed man as ruler over creation with a culture assignment. Therefore the State as institution must always serve as *res publica*, an institution in favour of the public interest – State sovereignty is indeed nothing but a public position and State authority is not private property which can be applied by the State in an unqualified way.<sup>39</sup>

It may be concluded that only the State has State sovereignty within a certain area and that it alone has the authority (capacity to act) to use armed forces for the protection thereof. The founding function of the State does not only exist in the application of State authority for purposes of military power, but it is also aimed at the orderly promotion of culture and creation controlling activities of the State.<sup>40</sup> The maxim *salus rei publicae suprema lex est* should therefore only have application within this context; if this were not the case, it would tend towards State absolutism.<sup>41</sup>

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State must, in order to rule well, keep to the principles of sovereignty in its own sphere. This means that stately authorities (whom as institutions affected by sin still want to acquire more power) still need to keep in mind that life will be unbearable without law and order and proper institutionalized government. De Jouvenel *Über die Staatsgewalt* 39 explains that "[D]er Gehorsam ist Pflicht, weil "es in der Gesellschaft ein höchstinstanzliches Befehlsrechts gibt, das sich Souveränität nennt, und das anzuerkennen wir verpflichtet sind, ein Recht die Handlung der Glieder der Gesellschaft mit Zwangsgewalt zu dirigieren, dem sich jeder einzelne unterordnen muss, dem sich niemand widersetzen kann." See too Nagler *Über die Funktion des Staates* 107; Michael & Morlok *Grundrechte* 260.

39 Dooyeweerd *A new critique of theoretical thought* 412. See to De Jouvenel *Über die Staatsgewalt* 39. Currie & De Waal *The Bill of Rights Handbook* 13 explain that at least since the French and American revolutions it has been accepted that no person or institution has a divine right to govern others. Government can consequently only be legitimate in so far as it rests on the consent of the governed. In a democratic system of government the relationship between the government and the people is not simply based on power – rather the consent of the governed is the defining characteristic of the relationship. Furthermore, the authors explain that democracy is enhanced where the role of the representative structures is supplemented by allowing and encouraging direct and participatory forms of democracy so that individuals or institutions are given the opportunity of taking part in decisions that affect them.

40 It must be borne in mind, as Nagler *Über die Funktion des Staates* explains that "[M]it Einrichtung eines Staates geben alle Personen ihren natürlichen Anspruch auf, das Rechtsprinzip nach eigenen Vorstellung auszulegen und durchzusetzen. Dieser entscheidende Vorgang wird bei allen Rechtssystemen entweder ausdrücklich benannt oder aber stillschweigend vorausgesetzt, weil sonst die Gründung eines Gemeinwesens weitgehend sinnlos wäre."

41 Dooyeweerd *A new critique of theoretical thought* 444. Venter 1977 *THRHR* 233 indicates on 237 that in spite of the fact that the historical source of this maxim cannot be determined with certainty, it still has application today in South Africa. In *S v Baker, S v Doyle* 1965 1 SA 821 (W) it is worded on 827 as the State's inherent right and obligation to defend itself. In *S v Essop* 1973 2 SA 815 (T) it is

It has been suggested *supra* that the authority (capacity to act) of the State to maintain its legal objects stems from its sovereignty. The historic founding of the State as social entity has the purpose of guaranteeing the unity of the social entity and it is imperative that the authority of the State to use armed forces exist generally to protect and promote its legal objects.<sup>42</sup> The competence of the State to maintain State security and law and order by utilizing its authority therefore relates to the necessity of the general and continued existence of State security and law and order. It speaks for itself that these legal objects are a *sine qua non* for the continued existence and unity of the State.

It appears that the position of the individual can readily be explained within the framework above. On the one hand it is clear that, with regard to the State's subjective right to State security, law and order and the other legal objects that were identified the individual has the obligation to respect it.<sup>43</sup> On the other hand it is also clear that the individual can be an organ through which the State can protect its entitlement to these legal objects.

The explanation of *Georg Jellinek* serves to illuminate the individual status in the public law relationship.<sup>44</sup> He distinguishes certain aspects of the individual status in the relationship with reference to the legal position the individual holds *vis-à-vis* the State and it seems as though the *passive and active* aspects of the individual status which he describes can indeed be

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decided on 815 that the safety of the State is "the supreme law of a state". The far-reaching competence of the State to infringe individual rights and competences in a time of emergency, is stipulated in *Krohn v Minister of Defence* 1915 AD 191 on 210 as follows: "[I]t becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interests of the state." Innes CJ explains on 197 that every State has the inherent right to protect itself if its prolonged existence is at stake. Compare in the same way *R v Bekker* 1900 SC 340 on 355; *Trümpelman v Minister of Justice* 1940 TPD 242 on 246. See too De Jouvenel *Über die Staatsgewalt* 83; Krabbe *Die lehre der rechtssouveranität* 124 *et seq.*

42 De Jouvenel *Über die Staatsgewalt* 39. See too Michael & Morlok *Grundrechte* 37.

43 De Jouvenel *Über die Staatsgewalt* 29; Klement *Verantwortung* 266 *et seq.*

44 Jellinek *System der subjektiven öffentlichen rechte.*

brought in line with the historical foundation of the State. The negative and positive aspects of the individual status are also distinguished and will be discussed *infra*.<sup>45</sup> The different status possibilities of the individual, jointly seen, offer a complete picture of the legal position of the individual as member of the State.<sup>46</sup> Jellinek wrote against a strong legal positivistic background, yet his exposition is still accepted as valid in German public law despite the fact that the current *Grundgesetz* expressly acknowledges pre-positive law principles.<sup>47</sup>

### 5.2.1 *The passive status aspect of the individual*

The background above offers the motivation for the first aspect of the individual status which Jellinek distinguishes, namely the passive status. This aspect of the individual status exists in a sphere of individual obligations (the "*individuellen Pflichten*sphäre") so that the self-determination, and consequently also the legal subjectivity of the individual, is excluded from this sphere.<sup>48</sup> Against this background it appears that the individual status may be limited. The passive aspect of the individual status would result in the individual being a pure 'duty' subject in a state of complete and 'right-less' subordination to the State if he did not also hold other status positions.<sup>49</sup>

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45 See par 6.1 and 6.2 below. It should be noted though that modern German legal theory to some extent departs from Jellinek's exposition thereof. Sachs *Verfassungsrecht II* 44 explains that the different aspects of status have in some instances changed in meaning. In this respect the so-called "Freiheitsrechte", for instance the freedom of expression of opinion is not considered as belonging to the status negativus but is now considered as part of the status positivus. This development is due to the fact that it is argued that in this way a contribution is made to democratic "Willensbildung". Furthermore other aspects of status have been identified. In this respect, one may refer to the status constituens, the status activus processualis and the status positivus socialis.

46 See too Venter *Publieke subjektiewe regte* 1980 Reeks H74.

47 Art 1 of the Grundgesetz. See too Katz *Staatsrecht* 232 and further; De Jouvenel *Über die Staatsgewalt* 33.

48 Jellinek *System der subjektiven öffentlichen Rechte* 87. According to Jellinek the legal subjectivity of the individual is the total of all his competences. See too De Jouvenel *Über die Staatsgewalt* 30 *et seq*; Alexy *Theorie der Grundrechte* 230.

49 With this exposition reference is made to the negative and positive aspects of the individual status which is discussed in par 6.1. and 6.2 *infra*. See too Krabbe *Die lehre der rechtssouveränität* 125.

Jellinek apparently sees this aspect of the individual status as purely theoretical and non-historic. Nevertheless, it fulfils an important role in his system because it serves as a point of departure for the other three aspects of individual status which he identifies. These other aspects are preceded by the assumption of the passive status and Jellinek's legal positivistic viewpoints lead him to conclude that the individual frequently finds himself 'in one or the other residual form of the passive status'.<sup>50</sup> However, he indicates that as individual legal status grows, the scope of the passive status reduces and together with that the power sphere of the State. The opposite is of course also true, namely that the power sphere of the State increases as the passive status of the individual grows.<sup>51</sup>

### 5.2.2 *The active status aspect of the individual*

Opposite the passive aspect of the individual status which Jellinek distinguishes, the active aspect thereof can be discerned. This aspect is summarized by Jellinek as follows:

Die Tätigkeit des Staates ist nur durch individuelle Tat möglich. Indem der Staat dem Individuum die Tätigkeit zuerkennt, für den Staat tätig zu werden, verzetst er es in einem Zustand gesteigerter, qualifizierter, aktiver Zivität. Es ist der aktive Status, der Status aktiver Zivität, in welchem der sich befindet, der die s.g. politischen Rechte im engeren Sinne ausgeüben berechtigt ist.<sup>52</sup>

Consequently the active status of the individual is about his involvement with acts of State regardless whether it is as an individual or member of a

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50 Van Wyk *Persoonlike status in die SA Publiekreg* 114.

51 On 86 Jellinek *System der subjektiven öffentlichen Rechte* explains the position as follows: "Ist die Leistungsfähigkeit des Staates heute eine unvergleichlich grössere als früher, so hat dies seinen Grund darin dass der Staat der Gegenwart, für die Verengerung seiner Sphäre sich nach anderer Richtung hin furthwährend entschädigt, indem er ein Gebiet nach den anderen, von dem seine Herrschermacht bisher rechtlich ausgeschlossen war, durch Erzeugung neuer Pflichten der Subjizierten zum Objekt seiner Verwaltung macht." See too De Jouvenel *Über die Staatsgewalt* 34.

52 Jellinek *System der subjektiven öffentlichen rechte* 87. See further De Jouvenel *Über die Staatsgewalt* 53; Klement *Verantwortung* 266 who explains that "[J]ede Kompetenz und Aufgabe hat der Staat durch mehr oder weniger allgemeine verhaltensermächtigende Rechtsakte. Ausserhalb dieser Ermächtigungen hat er keine Handlungsbefugnis."

group.<sup>53</sup> 'State will forming' takes place factually through individuals in their capacity as organs of State; the individual is promoted to member of the State organization and this aspect of his status then figures in his relation with the State.<sup>54</sup> It is also clear that this exposition relates to that of Dooyeweerd that the application of the power of the sword is exercised by an organized army and police force.<sup>55</sup>

The active and passive aspects of the individual status are distinguished from each other in that the individual is involved with the State will in terms of his active status<sup>56</sup> while he is subordinate thereto in terms of the passive aspect thereof. According to Jellinek two possibilities exist in which this involvement can manifest; on the one hand it may happen through obligation and on the other hand through adjudication.<sup>57</sup> Compulsory military service and the official relationship through which individuals are compelled to act as State organs serve as examples of an obligation. However, in the case of adjudication the State grants the individual the competence to act as an organ of State. This promotion to being a member of the State organization therefore is indicative of individuals' increased status - "[d]em Individuum wächst einen neuen Status zu".<sup>58</sup>

### ***5.3 Some thoughts regarding the relation between the historical foundation of the State and the corresponding individual status***

It is abundantly clear that the historical foundation of the State does not result in it being allowed to use its authority as an unbridled instrument of power. In this regard the internal calling ("*interne roepingsmacht*") as internal qualification of the State's sovereignty deserves further consideration. The question that should be asked is how the State's

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53 Van Wyk *Persoonlike status in die SA Publiekreg* 129.

54 Jellinek *System der subjektiven öffentlichen rechte* 139.

55 See par 5.2 supra.

56 Van Wyk *Persoonlike status in die SA Publiekreg* 131.

57 Jellinek *System der subjektiven öffentlichen rechte* 139.

58 Jellinek *System der subjektiven öffentlichen rechte* 139.

behaviour should be in order to meet the requirement posed by the internal calling; the balancing of its sovereignty with the achievement of justice.<sup>59</sup>

By way of introduction reference can be made to Du Plessis' explanation that the obligation of the State to maintain law and order is a legal duty; the State-order is a legal order in a bi-articulate sense. Firstly, because the State-order is the base order on which the scaffolding of the State organization rests it cannot do without a legitimizing order in terms of which inter-human relationships in its competence sphere are described. This base order which should be maintained by exercising State authority should necessarily be a legal order. The State authority which organs of State may exercise therefore finds its legitimacy in the existence of this base order. The base order of the State exists for the sake of citizens of the State to have a secure ("*geborge*") living space which the State as institution must provide in order to give content to its institutional purpose and also for them to achieve their personal goals as members of State. It is suggested that one may conclude that the achievement of personal goals as members of State corresponds with the provision of an "*Existenzminimum*" qua "*Leistungsrecht*" in the theory of public subjective rights.

Secondly the so-called primary goal order is distinguished. This is the scaffolding which aims at the legal orderly co-existence of subjects within the jurisdictional area of the State. The purpose of the State is uniquely aimed at the realization, maintenance, sustaining and promotion of a legal order in a certain territorial area in such a way that individuals in the living of their everyday lives are fundamentally secure within the State's competence sphere. The State is therefore primarily a goal ordered legal community; the legal communality of the State is public and general in nature.

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59 See Du Plessis 1981 *Koers* 248 *et seq*; Du Plessis *Reg, geregtigheid en menseregte* 176-216; Du Plessis 1980 *Obiter* 51 *et seq*.

Against this background, and more specifically to determine how the State's conduct should be in order to activate its primary goal order or rather to fulfil its function of community ordaining, Du Plessis specifically relates to the nature of justice and the exercising thereof. He mainly distinguishes between justice (as such) and institutional justice which entails the 'prevailing' of justice along the avenue of legal institutions. These institutions of justice are the result of human culture formation and therefore fallible.

As to the achievement of justice Du Plessis explains with reference to Aristotle that justice should be achieved along the lines of channels (or humanly formed institutions). In this sense it pertains to the so-called institutional justice.<sup>60</sup> These channels are the pathways along which a human being can adhere in obedience to the norms of justice. On this point it should be noted that institutional justice closely relates to the primary goal order as legal order of the State institution. The goal of the scaffolding is the legal orderly co-existence of subjects within the jurisdictional area of the State. It can therefore be concluded that the achieving of justice through channels provided by the State embodies the internal qualification of the historical foundation of the State. Should the State not provide these channels, it would be nothing but a gang of robbers. As will be illustrated later, it is indeed the internal qualification of the historical foundation of the State that needs to lead to the creation of channels along which justice can be done, and through which the individual in the public law relationship is endowed with the competence to be the bearer of (public) subjective rights with regard to (justice qualified) State behaviour as legal object.

Institutional justice, thus Du Plessis, has two forms, namely institutionalizing and institutionalized justice. Institutionalized justice mainly comes into play with the creation of appropriate, in other words fair, societal institutions. The institutions which are created by those with State

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60 Du Plessis 1980 *Obiter* 61; Du Plessis *Reg, geregtigheid en menseregte* 189.

sovereignty must be fair in the sense that they are accommodating in their relationship with other legal subjects. Institutionalized justice on the other hand is the form of justice which, given the existence of institutions, applies along the line of institutions. The achievement of justice, it is suggested, relates to "*Abwehrrechte*" in German jurisprudence.

#### **5.4 Summary**

The historical foundation of the State is qualified internally in that the State's conduct should be indicative of the fulfilment of its ordaining function. According to the exposition of Du Plessis *supra*, the conclusion can safely be made that the function of community ordaining is in nature aimed at the achievement of justice along the avenues of State created channels. As will be explained *infra* it is by the creation of 'justice achieving channels' that the positive and negative status aspects of the individual are activated by the State. The activation of these status aspects bestows the competence on the individual to be the bearer of subjective rights to legal objects such as justice qualified conduct and the provision of an "*Existenz-minimum*". Differently put, it can be said that the internal qualification of the historical foundation of the State offers the bridge between the historical foundation of the State and the accompanying passive and active status aspects of the individual on the one hand, and the juridical destination of the State and the accompanying negative and positive status aspects of the individual on the other hand.<sup>61</sup>

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61 It is submitted that the entering of a State into a human rights convention may be indicative of its internal calling. Bearing the difference in mind whether a State Party follows a monist or a dualist approach (and also the argument of Malan 2008 *De Jure* 81 that the entering of a State Party into a human rights convention creates a stipulatio alterius) it may be argued that such convention underlies the basis for State performance to the benefit of the individual. In this respect reference may again be made to Malan's explanation. In essence he argues that multilateral human rights conventions are in the nature of a stipulatio alterius which means that States who are contracting parties to a particular treaty individually pledge to all other parties to the treaty to provide the protection as set out by the convention to individuals under their jurisdiction. The third parties are the individuals in the jurisdiction of the State Parties to the particular treaty for the benefit of whom the treaty is concluded; even though they are not parties to the initial negotiation and conclusion of the treaties, they become benefiting parties immediately when the convention enters into force. He further contends that such treaties have a self-executing character so that individuals acquire rights on the

By the State's having to exercise the subjective rights which flow from its historic foundation in such a way that it presents itself as a *res publicae*, the possibility for the creation of the competence to be the bearer of subjective rights is created for the individual. This stems from the fact that he is endowed with negative and positive status aspects by the State<sup>62</sup> which means that the State is conferring the competence to activate the juridical destination of the State on the individual.

By granting the individual by way of law the competence to test its conduct against both the norm and the achievement of justice along created channels and by providing an "*Existenz-minimum*" the State already from

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plane of international law at the same time as States incur liabilities under international law pursuant to such treaties. (As for the specific construction of such agreement, see p 85. Malan also does not see any difficulties in the fact that the *stipulatio alterius* ordinarily being a private law construct is now applied as a source for public international law. He argues, *inter alia*, that there is no need to transplant private law notions with precisely the same content from the plane of domestic law into public international law and pleads for a more pragmatic rather than a pure dogmatic approach. He quotes as follows from the *International Status of South West Africa Case*: " The way in which international law borrows from this source is not by way of importing private law institutions lock, stock and barrel, ready-made and fully equipped with a set of rules. In my opinion, the true view of the duty of international tribunals in this matter is to regard terminology or any features that are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." (at 87)

With regard to the application of *stipulatio alterius*-related principles Malan remarks that the individual inhabitants in the jurisdiction of a particular State Party "[a]re the beneficiaries in the interests of whom the agreements are concluded, and it is in their favour that states compromise their sovereignty and make mutual undertakings ... " (italics added) (at 89) What a State Party therefore expressly does in terms of a human rights treaty is on the one hand to undertake to all the other parties to the treaty to act in a particular manner in relation to those under its jurisdiction, and on the other hand *to undertake to everyone under its own jurisdiction to act as defined in the treaty in question*. This conclusion stems from the true intention of human rights treaties to put an international instrument to the use and benefit of the best interests of those falling under the jurisdiction of the various States Parties.

For purposes hereof no further attention is paid to Malan's explanation of the question how individuals become beneficiaries or why such treaties are self-executing. (see 90 *et seq*) It is suggested however that the argument "that states compromise their sovereignty" by acting towards everyone in its jurisdiction as required in the treaty serves as an example of the internal calling of the State. It is this very notion that illustrates the channels the State must create to provide for justice being done to individuals and the infra structure that it has to provide in terms of a convention.

62 See par 6.1 and 6.2 *infra*.

its historical foundation, creates the possibility that the individual can have subjective rights against it in terms of its juridical destination.

## **6 The internal calling of the State and the State as social entity with a destination (leading) function and the corresponding individual status**

The destination of the State as social entity is typically found in the juridical sphere.<sup>63</sup> This is obvious seeing that State sovereignty, which is confirmed by the use of armed force, also requires that such force be subordinate to civil government. The typical characteristic of a State, namely the stability of the public legal order, will consequently be reflected in its sovereignty continually being qualified by law. It is also true that a perspective of the destination of the State will be deficient if it does not also take the historic foundation of the State into account. It is important therefore that it be understood that the destination function of the State must be directed at binding together the State government, citizens and territory as one political and juridical unit.<sup>64</sup>

The State typically represents an integrated political unit of citizens which are also active in various social relationships within the context of the State.<sup>65</sup> The State as representative of the public interest ought to harmonise these different legal interests in such a way that it regulates the community and consequently the public interest itself.<sup>66</sup> In fact, the public interest typically ought to embody order; the political unity which is guaranteed by the historic foundation of the State may not result in the State disturbing the principle of sovereignty within their own sphere of other, non-political social entities.<sup>67</sup> The relationship between the State and the individual and the State and other social entities should thus be

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63 Dooyeweerd *A new critique of theoretical thought* 434. See discussion in n 21 and 22 supra.

64 Dooyeweerd *A new critique of theoretical thought* 437.

65 Dooyeweerd *A new critique of theoretical thought* 438. See too De Jouvenel *Über die Staatsgewalt* 39.

66 See par 5.3 supra.

67 Dooyeweerd *A new critique of theoretical thought* 442. See n 71 infra for a discussion of the concept of sovereignty in own sphere.

typically legally qualified, which qualification will at the same time also imply that the rules of *distributive justice*<sup>68</sup> are applicable. This relationship is described by Dooyeweerd as follows:

The *salus publica*, thus conceived, is a political integrating principle binding all the variable political maxims to a supra-arbitrary standard. It binds the entire activity of the State to a typical leading idea of public social justice in the territorial relations between government and subjects.<sup>69</sup>

The internal authoritarian activity of the State should always be qualified by the idea of social justice; this requires the harmonising of all the interests within the national *territorium* by weighing it up in retributive sense<sup>70</sup> as well as the acknowledgement of the sovereignty within its own sphere of other social (non-political) entities.<sup>71</sup>

In conclusion it can be said that the harmonising of the community's interests is a typical occurrence of the destination function of the State and that the demands of (distributive) justice ought to determine the method of harmonising. It is thus necessary in the juridical sphere to determine the ways in which a balancing of interests can take place in order to comply with the demands of the *iustitia distributiva*. Du Plessis makes an important contribution in this regard. He considers the matter from a perspective of the security of office ("*ampsgeborghheid*") since the State's safety rests upon the institutionalised order and human beings as

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68 This is the form of justice that describes the relationship between the State and the individual in a wider context. See too Van der Vyver *Seven Lectures on Human Rights* 3.

69 Dooyeweerd *A new critique of theoretical thought* 445. It appears that Du Plessis' discussion in par 5.3 supra is influenced by the views of Dooyeweerd *A new critique of theoretical thought* 442 et seq. Dooyeweerd argues that in its qualifying juridical aspect the public interest implies the typical legal measure of distributive justice. This measure requires a proportional distribution of public communal charges and public communal benefits in accordance with the bearing power and merits of the subjects.

70 See in this regard Van Zyl & Van der Vyver *Inleiding tot die Regswetenskap* 154.

71 Dooyeweerd *A new critique of theoretical thought* 446. On 169-70 he explains that each social entity is sovereign within its own sphere. This entails that each social entity has its own nature which is determined by its internal structure. This typical structure is not determined by historical circumstances or the social condition of society. Each type of social entity (among which the State, church etc) is therefore irreducible. One entity can therefore be made an accessory of another.

the other party to the public law relationship have a typical human need for experiencing safety and freedom from want.<sup>72</sup> These different needs should be seen as supplemental to one another so that one cannot exist without the other.

According to Du Plessis the rights of the State and the individual ought to be harmonised with reference to the nature of the law. The law, according to him, is primarily aimed at the safety of office of its legal subjects by defining everyone's status in the context of order in an authoritative way. In the relationship that exists between the normative protection of subjects, the status of the subjects and the institutional order, these three relationship components correlate with a view to the safety of office of the people and community institutions. The State provides a legal order that should be mindful of individuals' and community institutions' safety of office. As a result of this obligation on the State to provide a legal order (as a result of the internal qualification of the historic foundation thereof) the State is responsible for exercising authority and maintaining law.<sup>73</sup> It

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72 Detterbeck *Öffentliches Recht* 33; Du Plessis 1980 *Obiter* 51 *et seq.*

73 Du Plessis 1980 *Obiter* 51 *et seq.*; Du Plessis 1981 *Koers* 260. It is of interest to note that this exposition corresponds with that of the International Covenant on Economic, Social and Cultural Rights GAR 2200A (XXI) 16 December 1966. In its preamble it conveys that States Parties to the Covenant agree that in accordance with the principles contained in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom and justice and peace in the world. States parties recognize that these rights derive from the inherent dignity of the individual person and agree that in accordance with the Universal Declaration of Human Rights "[t]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights" (italics added). It is furthermore stated that it is the obligation of States to promote universal respect for, and observance of, human rights and freedoms. Art 2 of the Covenant reads that each States Party must take steps to progressively achieve the full realization of the rights recognized in the Covenant to the maximum of its available resources and by all appropriate means, including the adoption of legislative steps. States Parties undertake to guarantee that the rights enunciated in the Covenant may be exercised without discrimination of any kind.

It is clear that the *raison d'être* of the Covenant is to establish definite obligations for States Parties for the full realization of the rights in the Covenant. The fulfillment of these rights poses a minimum core obligation on States Parties who must ensure at the very least minimum essential levels of satisfaction of each of these rights. Therefore, a States Party in which a significant number of individuals is deprived of essential foodstuffs, or of essential primary health care, or of basic shelter and housing or of the most basic forms of education is prima

appears that the human need for experiencing safety and freedom from want may denote an "*Existenz-minimum*" for the individual which is reflected in "*Leistungsrechte*" in German jurisprudence.

The juridical destiny of the State pertains to the justice norm according to which the interests of the State can be harmonised with that of the individual. It goes without saying that an individual can only call upon this justice norm to be implemented after he has made use of channels created by law. If no such channels exist, it is clear that nothing will come of his call upon State authorities to comply with the norms of justice. It must be stressed that norms of justice are not dependent upon the existence of channels. As was already shown above the responsibility to create channels for justice to be served rests on the State, specifically as a result of the internal qualification of its historic foundation. Consequently it is clear that the norms of justice are in principle already present in the historic foundation of the State and the internal qualification thereof. The juridical destiny of the State relates to their practical realisation.

It is submitted that this exposition of the norms of justice can be achieved by developing the notion of public subjective rights. By legally endowing an individual with both negative and positive status aspects *situ situ* endows him with the competence to be the bearer of subjective rights in his relationship with the State.<sup>74</sup> As was already shown these status possibilities are dependent on their creation by law, but it is the internal

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facie failing to discharge its obligations under the Covenant. In fact, if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would substantially be deprived of its *raison d'être*. By the same token it is also clear that any assessment as to whether a States Party has discharged its minimum core obligation, cognizance must be had of resource constraints that may apply within a particular country. In view of the fact that States Parties must take steps to the "maximum of its [their] available resources" it is incumbent upon them if they want to attribute their failure to meet at least such minimum core obligations, to demonstrate that every effort has been made to use all resources that are at their disposition in an effort to satisfy such minimum obligations as a matter of priority. See 'The nature of States parties obligations (Art. 2, par 1): 1990/12/14. CESCR General comment 3. General comments of the *Office of the High Commissioner for Human Rights* at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument)

74 See par 6.1 and 6.2 infra.

qualification of the historical foundation of the State by which the responsibility is placed on the State to endow the individual with this competence to be the bearer of subjective rights and to exercise them. When the State creates this possibility for the individual it also defines the extent of its juridical destiny.

Some of the legal objects which are created and ought to be created by this tempering of the authority of the State will not, like some of the legal objects of the State (amongst which State security, law and order) exist generally<sup>75</sup> but will be dependent upon law for the creation thereof. In these instances it would seem that this will only come into existence after the individual has stood in an individual relationship with the State.<sup>76</sup> It is clear that he will only stand in such a relationship with the State if it is being provided for by law. The example given by Venter of an individual legal object in the public law relationship testifies to this conclusion; only those who have the right to vote have a subjective legal claim to the conduct of the voting official. Consequently the individual is only endowed with this competence after he has complied with the statutory prescribed requirements.<sup>77</sup> His subjective right to specific State conduct can only exist after this competence in terms of which he disposes of such right has been recognised by law.

It may be concluded that the demands of justice which are reflected by the destiny of the State are embodied in some of the individual's legally recognised public subjective rights. It is apparent that this pertains to those legal objects which Venter identifies as conduct.<sup>78</sup> Bearing the demands made by norms of justice to State conduct in mind, the conclusion may be drawn that such conduct, as the legal object of the individual subjective right, should be qualified by the State acting in a way that does not infringe upon the demands compelled by justice. In the first

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75 In my view the existence of these legal objects is the inevitable result of the fact that the State is historically founded.  
76 See par 6.2 *infra*.  
77 Par 6.2 *infra*.  
78 See par 3.2 *supra*.

place this would mean that the individual has a subjective legal claim that the State will adhere to, *inter alia*, the rights and entitlements in Bills of Rights, rules of natural justice, presumptions in favour of the individual when interpreting legislation and the broad interpretation of statutory and common law presumptions in the individual's favour in his relationship with the State in its conduct towards him.<sup>79</sup> These rights, it is submitted, correspond with "*Abwehrrechte*" in German jurisprudence and to the extent that these presumptions and rules are recognised by law, the individual disposes of a subjective right to the legal object that the State will keep out of an *imperium-refusing freedom sphere*. The activation of the negative status aspect of the individual will be discussed in paragraph 6.1 *infra*. In the second place there can be little doubt that Du Plessis' contribution provides a theoretical explanation for the recognition of positive conduct of State in the socio-economic sphere *qua* legal object. The recognition of "*Leistungsrechte*" normatively denotes the obligation of the State to provide for the 'safety of office' of the individual. In terms hereof, the State is called upon to provide for an "*Existenz-minimum*" for the individual and opportunities in terms of which personal goals as members of State can be achieved. See paragraph 6.2 for a discussion of the positive status aspect of the individual.<sup>80</sup>

These demands of justice and provision of an "*Existenz-minimum*" should as a result of their justice creating effect be recognised as validity requirements for State conduct and consequently as legal objects for the individual. In this respect it is submitted that such demands cohere with those aspects of the individual status Jellinek identifies as the negative and positive aspects thereof.

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79 Venter's comment in accompanying text to n 20 *supra* (*Die Publiekregtelike Verhouding* 158) must however not be lost from sight. According to him unjust law which regulates affairs capable of legal regulation and which is regularly objectified and which is directive and able to maintain order, is still positive law even though it is 'bad law'.

80 See par 2.1.3; 4.2 and 5.3 *supra*.

## 6.1 *The negative status aspect of the individual*

Jellinek's opinion of legal subjectivity serves as background for his distinction between the *negative* and *positive aspects* of the individual status. He characterises the negative aspect of the individual status as:

Die Herrschaft des Staates ist eine sachlich begrenzte, im Gemeininteresse ausgeübte Herrschaft. Sie ist eine Herrschaft über nicht allzeitig Subjizierte, d.h. über Freie. *Dem Staatsmitglied kommt daher ein Status zu, in dem er Herr ist, eine staatsfreie, das Imperium verneinende Sphäre.* Es ist die der individuellen Freiheitssphäre, des negativen Status, des Status libertatis in welcher die streng individuellen Zwecke durch die freie Tat ihre Befriedigung finden.<sup>81</sup> (italics added)

By virtue of this aspect of his status, the individual can demand from the State to keep out of an *imperium-refusing freedom sphere*.<sup>82</sup> Such sphere of individual sovereignty relates to categories of actions that are irrelevant for the relationship between the State and the individual and will qualify as such if they are neither prohibited, nor demanded. Examples of such actions may be walking in one's own garden or enjoying one's own wine.<sup>83</sup>

The negative status aspect of the individual is reinforced by his claim that the State is prohibited from infringing upon his freedom sphere without a "gesetzlich begründeten Befehl(es) oder Zwang(es)". Alexy explains therefore that the negative status aspect of an individual at a given moment may be described as the totality of all protected freedoms that he may have against the State.

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81 Jellinek *System der subjektiven öffentlichen rechte* 87. See too Stern *Das Staatsrecht der Bundesrepublik Deutschland* 1216 who states that the "*Klagebefugnis*" is the most effective remedy of the individual against unlawful infringement of his "grundrechtlich gesicherten Freiheitssphäre" by organs of State. See too Loewenstein *Verfassungslehre* 333.

82 Dreier 1994 *Jura* 505 correctly indicates that "*Grundrechte*" in this context are to be understood as "*Abwehrrechte*". He emphasizes, though, that these rights do not prevail unlimitedly. On 506 he explains that "[G]enau genommen meint die Rede von der Abwehrfunktion der Grundrechte nicht vollständige Exklusion des Staates, sondern die Formalisierung und Beschränkung seines Zugriffs, also die Bindung an bestimmte prozedurale und materielle Voraussetzungen. ... Grundrechtsdogmatisch gesprochen: Eingriffe in den Schutzbereich von Grundrechten sind nicht per se unzulässig; erst der nicht Verfassungsmässige Grundrechtseingriff führt zur Verletzung." See to the discussion in par 2.1.2 supra

83 Alexy *Theorie der Grundrechte* 233.

Der Inhalt des negativen Status eines Individuums *a* zum Zeitpunkt *t* besteht aus der Gesamtheit oder der Klasse aller (unbewehrten rechtlichen) Freiheiten, die *a* im Zeitpunkt *t* in Relation zum Staat hat. Die Klasse dieser unbewehrten Freiheiten kann als "Freiheitsraum des *a* zum Zeitpunkt *t* in Relation zum Staat" bezeichnet werden.<sup>84</sup>

## 6.2 *The positive status aspect of the individual*

In terms of the positive status aspect of the individual he is placed by the State in the so-called "*Status der Zivität*" in terms of which he is not only guaranteed claims to State conduct in his favour, but also the means ("*Rechtsmittel*") to enforce such claims. In terms of the theory of public subjective rights this means that the individual disposes of rights to something (legal objects) against the State and also the right to enforce such rights. In brief it can therefore be said that the positive status aspect denotes the juridically protected ability (competence) to demand positive conduct from the State.<sup>85</sup>

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84 Alexy *Theorie der Grundrechte* 235. It is further interesting to note that there is a relation between the negative and passive status aspects of the individual. Jellinek explains that both subjection (passive status aspect) and freedom from subjection (negative status aspect) are possibilities that are available to the State in its relationship with the individual. All actions that are neither prohibited, nor demanded from the individual therefore belong to his sphere of freedom. However, all actions that are either demanded or prohibited belong to the sphere of individual obligations. "[S]o wie der Freiheitsraum der Inhalt des negativen, so ist der Pflichtenraum der Inhalt des passiven Status. ... Jede Vergrößerung des (rechtlichen) Pflichtenraumes, ist deshalb aus logischen Gründen eine Verkleinerung des (rechtlichen) Freiheitsraumes, und umgekehrt." See too the discussion in par 2.1.2. It is especially the discussion of a "Rechtsakt" that is of relevance in this regard.

85 Alexy *Theorie der Grundrechte* 238. See further Alexy 240-241 for a discussion of the difficulty to distinguish between the negative and positive status aspects of the individual. Jellinek *System der subjektiven öffentlichen rechte* 121 argues that the positive and negative status aspects are mirror images of each other: "Dem Recht des *a* gegenüber dem Staat auf dessen Handlung *h* korrespondiert die Verpflichtung des Staates gegenüber *a*, die Handlung zu vollziehen. So wie es in einem Streit um den Inhalt des negativen Status des *a* darum geht, ob dem *a* die Vornahme oder Unterlassung einer Handlung *h'* geboten ist oder ob er in Bezug auf *h'* frei ist, so geht es bei einem Streit um den Inhalt seines positiven Status darum, ob dem Staat die Vornahme oder Unterlassung einer Handlung *h* geboten ist oder ob er in bezug auf *h* frei ist; est ist also "über die Freiheit des Staates zu entscheiden". Die Rede vom Widerspiel zielt also darauf, daß dem Umfang des positiven Status des Bürgers der Umfang dessen, was man den "passiven Status des Staates" nennen kann, entspricht, sowie darauf, daß in der Staat/Bürger-Relation alles das, was nicht zum positiven Status des Bürgers gehört, zu dem, was als "negativer Status des Staates" bezeichnet werden kann, zählt."

Die gesamte Tätigkeit des Staates ist im Interesse der Beherrschten ausgeübt. Indem der Staat Erfüllung seiner Aufgaben dem Einzelnen die rechtliche Fähigkeit zuerkennt, die Staatsmacht für sich in Anspruch zu nehmen die staatlichen Institutionen zu benutzen, also dem Individuum positive Ansprüche gewährt, erkennt er ihm den positiven Status, den Status civitatis, zu der als die Basis für die Gesamtheit staatlicher Leistungen im individuellen Interesse sich darstellt.<sup>86</sup>

Van Wyk demonstrates that Jellinek's opinion of the positive status means that every act of State amounts to conduct in the general interest. The general interest and the individual interest can coincide but this is not necessarily the case. To the extent in which the interests do coincide and are recognised by the State, it guarantees the individual certain claims to State conduct and at the same time puts at his disposal legal remedies to realise his claims. The individual as "*positiv berechtigter Staatsglied*" is hereby put in the *status civitatis*.<sup>87</sup>

The connection between the negative and positive aspects of the individual status can be explained by noting that the negative aspect of the individual status finds its fulfilment in the individual being legally placed in the status – non-acknowledgement thereof by the State will consequently be unlawful and infringement thereof by the State may only occur under juridical mandate. Consequently, the negative aspect of the individual

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86 Jellinek *System der subjektiven öffentlichen rechte* 87. Dreier 1994 *Jura* 507 explains that in this respect "[N]ormstrukturell ist die Sachlage einfach: Rechte auf Staatliche Leistungen lassen sich geradezu als Prototyp einer Berechtigung ... verstehen. Das Gesetzrecht des modernen Sozialstaates kennt derartige Ansprüche auf Staatliche Leistungen in grosser Vielfalt."

87 Van Wyk *Persoonlike status in die SA Publiekreg* 20. The distinction between subjective legal claims and 'reflex actions' of the objective law is brought in connection with the positive aspect of the individual status. All stately actions taken in the general interest are also of service to a multiplicity of individual interests. Police conduct protects the lives and property of all individuals as members of the community. Legally, every individual interest is not protected separately, only the general interest is protected. According to Jellinek, the individual can request for his individual interests to be considered, but he does not have a legal claim to police conduct solely on his behalf. This exposition of the reflex actions of the objective law by Jellinek, in my view accords with the fact that the legal subject only obtains a subjective legal claim to the legal object which flows from the negative and positive aspects of his status, after the law endues him with the competence to stand in an individual relationship with the State and he so entered into this relationship. The enforcement of his subjective legal claim to a legal object is accordingly dependent upon the question whether the competence to dispose of such claims has by law been bestowed on him.

status is seen as an absolute status so that the responsibility to always and only act according to law towards the individual, applies to all organs of State.<sup>88</sup>

The positive aspect of the individual status, which pertains to State conduct in the general interest, is seen as an exact mirror image of the negative status when the legally acknowledged and protected competence of the individual to claim positive conduct on his own behalf from the State, places the juridical obligation on the State to act in his individual interest. The question whether the individual has a right to specific State conduct has, as an opposite, the question whether there is an obligation on the State to satisfy the individual need.<sup>89</sup>

Accordingly the positive aspect of the individual status is about positive State conduct towards the individual. This positive conduct naturally ought to be tempered by claims of justice and it goes without saying that through this tempered conduct the State will create a state of safety for itself and a feeling of safety of office for the individual.

On closer inspection it appears that the negative and positive aspects of the individual status are also relevant to the so-called individual relationship that may exist between the individual and the State.<sup>90</sup> The individual relationship differs from the general relationship in that, in the general relationship, the same legal rule applies indefinitely and

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88 Dreier 1994 *Jura* 506.

89 Van Wyk *Persoonlike status in die SA Publiekreg* 122. See too Detterbeck *Öffentliches Recht* 300 *et seq* who explains the position as follows: "Allein der Umstand, daß der Staat zu einem bestimmten Verhalten verpflichtet ist, bedeutet aber noch nicht, daß der Bürger einen Anspruch gegen den Staat auf dieses Verhaltens haben. Art. 20a GG gewährt den Bürgern keinen Anspruch darauf, daß er die natürlichen Grundlagen tatsächlich schützt. ... Die Bürger mögen in diesen ... Fällen zwar tatsächlich begünstigt sein, wenn der Staat seine Rechtspflichten erfüllt. Sie haben aber keinen entsprechenden Anspruch. Bei diesen lediglich rein faktischen Vorteilen der Bürger spricht man von Rechtsreflexen. Die in Rede stehenden Rechtsvorschriften sind nur objectives öffentliches Recht. Das subjektive öffentliche Recht ist dadurch gekennzeichnet, daß es nicht nur objective Rechtspflichten statuiert, sondern auch hierauf gerichtete Ansprüche einräumt."

90 Wiechers *Administratiefreg* 58. This is not to say that it can only be compatible in an individual relationship. However, as a general observation it can be stated that it will rather come into play in this relationship.

impersonally to legal subjects within that group, while a particular legal rule applies to fixed, identified legal subjects within the individual legal relationship. The individual legal relationship originates by virtue of the legal rule that governs the general relationship so that it can be said that the individual relationship is a concretisation of the indefinite, impersonal legal rule which applies within the general relationship.<sup>91</sup> Wiechers also shows that a general relationship can be characterised as that kind of relationship in which the same legal rules apply to all persons in the relationship. The individual relationship's content can however differ on a case by case basis, since different circumstances confer upon each individual relationship its own, special character.<sup>92</sup>

### **6.3 Summary**

It may be concluded that the connection that exists between the negative and positive aspects of the individual status on the one hand and the individual relationship that exists between the individual and the State on the other, is denominative of the fact that legal objects which are due to legal subjects under the public law are dependent upon the individual being legally endowed with the competence to be the subjective right bearer of the specified legal object. In these instances it would also seem that the existence of a possible subjective right to the legal object will be dependent upon the question whether the individual stands in an individual relationship with the State.<sup>93</sup> In the individual relationship the positive and negative aspects of the individual status are emphasized, seeing that the individual is not merely endowed with the claim against the State to keep out of an '*imperium-refusing freedom sphere*' and to act according to law, but it is also in this relationship that the individual can claim positive conduct from the State in his favour.

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91     Wiechers *Administratiefreg* 59.

92     Wiechers *Administratiefreg* 60.

93     This is not to say that the situation as set out above, will apply to all situations. The individual subjective right to the protection of the official languages serves as a telling example of individual legal objects of which the legal force is not dependent upon statutory recognition or the existence of a possible legal relationship.

## **7 Concluding considerations regarding the State's juridical destiny and the corresponding individual status**

From the above-mentioned discussion it is clear that when the State, owing to the internal qualification of its historic foundation, provides for compliance of individual claims for justice and an "*Existenz-minimum*", it endues the individual with the competence to establish subjective legal claims against it.<sup>94</sup> In doing so the individual is given the ability to activate the juridical destiny of the State. The opposite of this situation is that the State is rendered guilty of abuse of power if it prevents the individual (given its subjective legal claim to State security and law and order) to establish subjective legal claims to State conduct which bears witness to the embodiment of both the nature and the norms of justice. For example, by deterring the individual from testing the State's conduct against the claims of justice before a tribunal, the State is 'withdrawing' the scaffolding coupled with its historic foundation and is strongly gravitating in the direction Dooyeweerd characterises as an organised band of robbers. Similarly, if it does not provide for an "*Existenz-minimum*" it does not adhere to its destinal calling since the individual is not enabled to achieve his personal goals as member of State.

The argument is put forward that the public law relationship can be explained through legal theory which distinguishes between the State's juridical destiny and historic foundation. The status of the individual *vis-à-vis* the State should be explained within this exposition. The negative and positive aspects of the status of the individual relate to the juridical destiny of the State and comprise of justice qualified State conduct and provision of an "*Existenz-minimum*". *Qua* legal object such conduct is activated by the availability of channels through which it may be claimed that the State

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94 It is suggested that the provision of an "Existenz-minimum" as object of "Leistungsrechte" in the theory of public subjective rights, corresponds with the exposition in *S v Makwanyane* (n 10) that competing values must weighed up against each other and that ultimately an assessment based on proportionality must be made to establish whether the limitation of constitutional rights is reasonable and necessary.

adheres to the demands of justice. On the other hand the active and passive status aspects of the individual may be discerned. These aspects relate to the historic foundation of the State and it is clear that no subjective rights are created for the individual in terms of this aspect of his status. Thus, the subjective legal claim to, *inter alia*, State security and law and order relates to its historical foundation. This is clear given the fact that the State is endowed with State sovereignty and is therefore legally able to act coercively towards other legal subjects. The enforcement of the State authority in the public law relationship is only possible if one proceeds from the assumption that the individual is subject to the State's will on account of the passive status. Thus, the historical foundation of the State presumes the individual's responsibility which flows from his subjective legal claim to State conduct. On the other hand, the juridical destiny of the State presumes the responsibility (as legal object of the individual) which, for the State, flows from the subjective legal claim to State security and law and order. Differently put, it can be said that on account of the State's historic foundation it has a subjective legal claim to legal objects such as State security and law and order. The corresponding responsibility of this subjective legal claim of the State is the responsibility which, for the State, flows from its juridical destiny, as the individual has subjective legal claims to State conduct (qualified by justice) and this subjective legal claim must not only be activated by the State, but must also be respected. Against this exposition the individual, as a result of the juridical destiny of the State, has a subjective legal claim to State conduct qualified by justice and to provision of, *inter alia*, an "*Existenz-minimum*". The correlating responsibility which for the individual flows from this subjective legal claim, is the responsibility which is connected to the historic foundation of the State on account of which the individual must, in terms of the passive aspect of his status, respect the State's subjective legal claim to State security and law and order as legal objects.



## CHAPTER 4

### CONCLUSION

#### 1 The status of the child victim within the public law relationship

In chapter 3 paragraph 2 it was mentioned that the theory of public subjective rights disposes of an inherent balancing mechanism of the interest of the State and the individual respectively. It was argued that the respective relations between the State and its legal objects and the individual and his legal objects on the one hand and the corresponding obligations of the State and the individual *vis-à-vis* each other and its/his legal object on the other, serves this very purpose. It is suggested that the gratification of legally recognized needs of legal subjects by demarcating and harmonizing their subjective rights to legal objects provides the balancing mechanism of State and individual interests respectively.

From this exposition some conclusions in respect of the child victim of armed conflict may be drawn.

#### ***2.1 The passive status aspect of the child victim in relation to the historic foundation of the State***

In this respect the individual status of the child victim is limited and he stands *vis-à-vis* the State as a mere 'duty subject' in a state of complete and 'right-less' subordination. He is therefore legally obliged to respect the subjective rights of the State to its legal objects, including as it were, its rights to its territory, to State security and law and order and to certain immaterial property. In this respect the State is endowed with State sovereignty, more in particular the competence to enforce its authority (capacity to act) to compel the child to respect its subjective rights to the said legal objects.

It may be concluded that the State exercises its capacity to act in its decision whether to prosecute the ex-child soldier.<sup>1</sup>

## ***2.2 The active status aspect of the child victim in relation to the historic foundation of the State***

In conjunction with the exposition above, the State's need of individual people to exercise its subjective rights to its legal objects must be borne in mind. Such individuals may include bearers of military power to actualize military apparatus and also ordinary civil servants. As Jellinek explains, the individual may be involved with State 'will forming' through either obligation, or through adjudication.<sup>2</sup>

Article 38(3) requires of States Parties to the CRC to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. It further stipulates that in recruiting among those persons who have not attained the age of eighteen years, States Parties shall give priority to those who are oldest.<sup>3</sup> It has been explained in paragraph 2.2.2 in chapter 2 *supra* that this prohibition corresponds with that of AP (II) under the GC's of 1949. Children below the age of fifteen may therefore not even volunteer to participate directly in armed conflict. In fact, the Rome Statute for the International Criminal Court states that it is a war crime to conscript or enlist a child under the age of fifteen years into national armed forces or to use them to participate actively in hostilities. The Additional Protocol which entered into force on the 12 February 2002 amends the age of direct participation in armed conflict to eighteen years for parties to the Protocol. Clearly this means that children under 15 do not dispose of the competence to have their active status aspect activated in the sense that they are legally not allowed to be recruited. Between the ages of 15 and 18 the position is not clear but at least if such children are recruited priority must be given to older children. In as much as child

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1 See ch 2 par 2.2.1 and 2.2.2.

2 See ch 3 par 5.2.2.

3 See ch 2 par 2.2.2.

soldiers may also be seen as victims of armed conflict, there is a measure of uncertainty whether to prosecute them or to grant amnesty.<sup>4</sup>

The State organization is bound by the demands posed by its internal calling.<sup>5</sup> In the case of child victims this means that the State must provide 'channels' by means of which the child is legally enabled to demand from it to perform in terms of the obligations it incurred by ratifying the CRC and other international instruments. In essence this means that already from its historic foundation the State is called upon, *inter alia* to make provision for school facilities for child victims, de-mine areas and re-unite children with their parents where possible. It has been suggested that the legal theoretical explanation for the obligation in this respect is to be found in the *stipulatio alterius* construct.<sup>6</sup>

### ***2.3 The negative status aspect of the child victim in relation to the destination function of the State***

In this respect the *salus publica* as a principle binding the entire activity of the State to a leading idea of public social justice between government and subjects come to the fore. It is submitted that the criterion against which the *salus publica* must be measured is, *in casu*, the child's security of office ("*ampsgeborgenheid*").<sup>7</sup> It has been suggested that State conduct *qua* legal object of the individual should ideally be qualified by the State acting in a way that does not infringe upon demands made by justice. Specifically with regard to the negative aspect the individual is legally entitled to demand from the State to keep out of an *imperium-refusing freedom sphere*.<sup>8</sup>

As far as former child soldiers are concerned, it appears that the aspect of a minimum age for criminal responsibility may be of relevance in the determination of such child's negative status aspect. There appears to be

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4 See ch 2 par 2.2.2. b.

5 See ch 3 par 5.3.

6 See ch 2 n 57 ch 3.

7 See ch 3 par 6.

8 See ch 3 par 6.1 and 2.1.2.

consensus that children below the age of 15 years do not possess the mental maturity to express valid consent to join an armed group.<sup>9</sup> Such children are therefore more likely victims of armed conflict than its perpetrators. It may consequently be concluded that such children may demand from States to refrain from prosecuting them.<sup>10</sup> The position of former child soldiers between the ages of 15 and 18 years is more complicated. There are indications in treaty law that such children should not be prosecuted. In view of the fact that the CRC specifically provides that a child is someone below the age of 18 years and that a child's best interests is a primary consideration in every matter affecting him it is suggested that the best interests principle pertains to the negative status aspect of the child. As such it creates an *imperium refusing freedom sphere* in terms of which children falling in that age category may demand from the State not to prosecute them. However, should such a child indeed be charged criminally the presumption of innocence and right to privacy may in similar fashion be considered as such a freedom sphere that may not be infringed by the State.<sup>11</sup>

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9 See ch 2 par 2.2.2 b. and c.

10 See in this respect the discussion in ch 2 par 2.1.2 regarding the negative status aspect of the individual. The preventative rights ("*Abwehrrechte*") of the individual that the State will not make it legally impossible for him to exercise his rights means that the State will adhere to the prescripts of relevant international (and national) instruments to which it is bound and refrain from prosecuting him. Should he be prosecuted it may be argued that the State makes it impossible for him to rely on eg the best interest principle.

11 In as much as the Rome Statute provides that a Court shall not have jurisdiction over a person who was under the age of 18 when the crime was committed, it may be argued that such children may not be prosecuted which is indicative of the activation of their negative status aspect. Put differently, it appears that even though they may have taken part in war crimes, their active status aspects have not been activated as they are considered as not having attained the age of criminal responsibility.

A very interesting conclusion may be deducted from this exposition; there appears to be an interaction between the negative and active status aspects of the child. The active status aspect can be viewed as a 'negative' attribute in the sense that a child who committed war crimes and who is kept criminally responsible is seen as disposing of the active status aspect while committing the crime as bearer of military power. The implication of this conclusion is simply that the negative status aspect of such child is not activated if he is legally kept responsible. However, the rules of the various international instruments providing for the special protection of such child activate the positive status aspect of the child once it has been decided to prosecute him. He can legally demand from the State to adhere to relevant provisions of the CRC, the Rome Statute and the Beijing Rules. In particular Rule

The obligation of the State (and the corresponding status aspect of the child) is influenced by its following either a monist or a dualist system of implementation of treaty law into domestic law. Despite the views of Malan that human rights treaties are self-executing in nature, it is commonly accepted that the provisions of the CRC do not endow the child with legally enforceable rights.<sup>12</sup>

#### **2.4 The positive status aspect of the child victim in relation to the destination function of the State**

It can be accepted that the requirements posed by article 39 of the CRC activate the positive status aspect of child victims of armed conflict. It should be emphasized at the outset, however, that there is a close correlation between the internal calling of the State and the positive status aspect of the child – the extent to which the State adheres to its internal calling is indicative of the existence, nature and extent of the positive status aspect of the child. In practical terms it can be said that the implementation of article 39 and the extent to which its provisions are enforced reflects the existence and/or extent of the child's positive status aspect.<sup>13</sup> It also appears that the views of Malan<sup>14</sup> that multilateral human rights conventions are in the nature of *stipulationes alteri* may be indicative of the activation of the positive status aspect of the child. It may be deduced from his argument that the rights negotiated for in the CRC accrue at the same time the CRC entered into force for the particular States Party.

The provisions of article 39 must be read in conjunction with, and against the background of other provisions of the CRC to determine the child victim's positive status aspect. In this respect it goes without saying that States must adhere to article 3 which requires of them to ensure that the

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5 of the Beijing Rules states the aims of juvenile justice should include an emphasis on the well-being of the juvenile. (See ch 2 par 2.2.2)

12 See ch 2 par 3.

13 See ch 3 par 6.

14 Ch 2 n 57.

best interests of children are a primary concern in all actions concerning them. In fact, it is demanded of States to ensure that all the provisions of the CRC are reflected in legislation, policy development and delivery at all levels of government. Furthermore the CRC requires a continuous process of child impact assessment to predict the impact of any proposed law, policy or budgetary allocation to establish its impact on children. The child may certainly demand adherence to these provisions in terms of the activation of his positive status aspect.<sup>15</sup>

From the provisions of article 39 it appears that the child victim may demand to be socially reintegrated and to be recovered from the armed conflict experience. As set out above the child victim may also demand a physically safe environment from the State<sup>16</sup> and as far as psychological recovery is concerned the child victim may legally demand from the State a safe environment within which he will be able to recover psychologically. Education and reunification with the child's family may be of particular importance in this respect.<sup>17</sup>

## ***2.5 The balancing of the rights and obligations of the State and the child - the application of the internal calling of the State***

The public interest typically implies the public legal measure of distributive justice.<sup>18</sup> Distributive justice has been shown to require a proportional distribution of public communal charges and public communal benefits in accordance with the bearing power and the merits of the subjects. The public interest is therefore a political integrating principle which binds all the variable political maxims to a supra-arbitrary standard in the sense that it binds all activity of the State to the typical leading idea of public social justice in its relationship with the individual/child. It is required of the State

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15 See ch 2 par 4.3.

16 Ch 2 par 4.4.

17 Ch 2 par 4.4.1.

18 Ch 3 par 5.3.

to harmonize all the interests obtaining within its territory insofar as they are interwoven with the requirements of the body politic as a whole.<sup>19</sup>

In conclusion it is suggested that the balancing of the rights and obligations of the State and the child victim of armed conflict may be explained as follows in respect of the child's right to education: Article 39 requires of the State to recover such children and reintegrate them into society. As set out in chapter 2 paragraph 4.4 this can be done, *inter alia*, by providing education to such children. The right to education relates to the social aspect of the national community. However, the regulation of their education should be guided by the principles inherent in the public interest as set out above. Regulation of education therefore aims at serving the particular political purpose of education *qua* means of serving society. In a sense this aspect of the regulation of education may be viewed as an external juridical qualification of the measures taken by the State. However, these measures also have an internal public juridical qualification which obliges the State (government) always to weigh the various private legal interests not only against each other, but also against the "public interest" in a retributive sense so that private interests are harmonized and integrated in the public juridical interest.

It is therefore clear that the right to education of child victims of armed conflict must be considered in harmony with both the interests and rights to education of other individuals and with the interests of the State – the public interest. The question remains how to balance the (subjective) rights of the State and the child; to what extent is the State called upon to provide channels to achieve justice? It has been shown that the theory of public subjective rights does not provide a definitive answer in this respect. It merely describes the position of the State and the individual *vis-à-vis* each other and defines the demands of the individual. Drawing on the argumentation of Dooyeweerd and Du Plessis it is argued that the answer to this question is also to be found in the internal calling of the State. *In*

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19 Ch 3 par 6.

*casu* the internal calling is borne out by the provisions of article 4 of the CRC. States Parties must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRC. However, in respect of social, economic and cultural rights States Parties only need to take such measures to the *maximum extent of their available resources*. The internal calling of the State in terms of article 39 of the CRC is hereby qualified so that the child's subjective right to positive State action should not exceed what the State is reasonably able to perform.

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