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A Moral Dilemma between National Security and Children's Rights. What to do with Children Recruited by Terrorist or Violent Extremist Groups? - A Case Analysis.

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ABSTRACT

In the last recent years, there were more cases in non-conflict countries, such as Germany, of children, who are associated with and recruited by non-state armed groups such as terrorist or violent extremist groups and accused of terrorism-related offenses. There is little research regarding the criminal responsibility and prosecution of these children since it touches on children's rights but also the obligations of legal instruments concerning counter-terrorism. The following thesis shows that a more child-sensitive approach regarding the cases of children accused of terrorism-related offenses and the application of alternatives to deprivation of liberty is needed. Alternatives to deprivation of liberty reduce the chances of stigmatization and focus on rehabilitation and reintegration of these children. The thesis will analyze two German cases of individuals who are accused of terrorism-related offenses when they were under the age of eighteen and show that a child-sensitive approach is for the children and also for society more beneficial.

TABLE OF ABBREVIATIONS

AP	Additional Protocol to the Geneva Conventions
Art.	Article
Cf.	Compare
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
Et seq.	And following
EU	European Union
f.n.	Footnote
GA	General Assembly
GC	General Comment
GC I, II, III, IV	Geneva Conventions
CPWG	Child Protection Working Group
IAC	International armed conflict
Ibid.	In the same place
ICC	International Criminal Court
ICL	International Criminal Law
IHL	International Humanitarian Law
ILO	International Labour Office
JGG	Jugendgerichtsgesetz - German Juvenile Court Act
MS	Member States
NGO	Non-Governmental Organization
NIAC	Non-international armed conflict
OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
SC	United Nations Security Council
StGB	Strafgesetzbuch - German Criminal Code
UNICEF	United Nations Children's Fund

TABLE OF CASES

Court	Title	Number	Reference
Bundesgerichtshof (Federal Court of Justice of Germany) Third Criminal Division	Order of the court, Jan. 11th. 2017	StB 40/16 (preliminary proceedings against Abdullah S.K.)	http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2017-1-11&client=2&nr=77273&pos=21&anz=34
Bundesgerichtshof (Federal Court of Justice of Germany) Third Criminal Division	Order of the court, June 1st, 2017	AK 25/17 (criminal proceedings against Abdullah S.K.)	http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78692&pos=0&anz=1
Bundesgerichtshof (Federal Court of Justice of Germany) Third Criminal Division	Order of the court, June 1st, 2018	AK 74/17 (criminal proceedings against Omaid N.)	http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=80803&pos=0&anz=1
International Criminal Court TrialChamber II	*The Prosecutor v. Thomas Lubanga Dyilo*	ICC-01/04-01/06	https://www.icc-cpi.int/drc/lubanga
International Criminal Court Trial Chamber IX	*The Prosecutor v. Dominic Ongwen*	ICC-02/04-01/15l.	https://www.icc-cpi.int/uganda/ongwen.

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1. INTRODUCTION

"Our focus should shift from 'children with arms' to 'children who are affected by arms'" is a quote by Mrs. Fatou Bensouda, the Prosecutor at the International Criminal Court.[1] One of the most vulnerable groups of humankind are children, who are recruited by non-state armed groups, such as terrorist or violent extremist groups. Not only are these children exploited for their work as a fighter or support rules, but they often experience violence during the time of the association, which can influence the affected children substantially.

Justice for those children is a little more relevant nowadays with judgments such as the case *The Prosecutor v. Thomas Lubanga Dyilo* in front of the International Criminal Court.[2] The recruitment and use of children for armed conflict is punishable now and gives justice to the most vulnerable of our society. In this regard, children who were recruited and used in armed conflict are direct victims of war crimes. However, it is questionable how children associated with and recruited by terrorist or violent extremist groups should be treated if they have committed terrorism-related crimes or war crimes during the time of the association with these groups themselves and are now faced with being prosecuted for their actions.

On the one hand, the United Nations General Assembly stated in its Resolution 60/288 that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes […] constitutes one of the most serious threats to international peace and security.[3] Hence, under the International Legal Framework related to Counter-Terrorism, which is composed of multiple international conventions and protocols, the United Nations Security Council Resolutions, the United Nations Global Counter-Terrorism Strategy, UN General Assembly resolutions, and customary law, States have an obligation to criminalize and prosecute terrorism-related offenses in a way that duly reflects the seriousness of those crimes.[4]
[accessed 11 August 2020]

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[1] Speech of Mrs. Fatou Bensouda: Office of the Prosecutor at the ICC, "The Incidence of the Female Child Soldier and the International Criminal Court", before the Eng Aja Eze Foundation in New York, 4 June 2012, <http://cpcjalliance.org/international-day-african-child/>. [accessed 11 August 2020]
[2] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber II.
[3] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, 20 September 2006, A/RES/60/288, available at: https://www.refworld.org/docid/468364e72.html. [accessed 11 August 2020]
[4] UN Security Council, S/RES/1373, 28 September 2001, para. 2.

On the other hand, there is a whole international legal framework that incorporates the respect, protection, and fulfillment of children's rights. The United Nations (UN) created with its legal instrument of the Convention on the Rights of the Child[5] (CRC) specific provisions which specifically safeguard children, who are alleged as, accused of, or recognized as having infringed the penal law. The 2007 Paris Principles and Guidelines state that children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offenses against international law.[6] Furthermore, under the 1967 International Covenant on Civil and Political Rights[7], United Nations Standard Minimum Rules for the Administration of Juvenile Justice of 1985 ("The Beijing Rules")[8], the United Nations Guidelines for the Prevention of Juvenile Delinquency of 1990 ("The Riyadh Guidelines")[9], and the Paris Principles[10] alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice whenever possible.

However, it is questionable if domestic courts consider and apply the legal framework even if countries have ratified and implemented it on a domestic level. International law may be neglected by domestic courts when it comes to unusual circumstances such as criminal cases of children associated and recruited by terrorist or violent extremist groups. Alone in the year of 2017, an amount of 1.500 children were detained on the grounds of national security in non-conflict countries.[11] In those cases, the judicial systems may favor a punitive over a child-sensitive approach from a counter-terrorism perspective, even though the affected individuals are still children.

1.1 Purpose of Thesis

The purpose of this thesis is to address the question of how Western judicial systems, such as the German one, deal with cases that involve children associated with terrorist or violent extremist groups and to what extent those children can be held criminally responsible for their actions. It

[5] United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989.
[6] UNICEF, *The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, para. 3.6.
[7] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,
[8] UN General Assembly, Resolution A/RES/40/33, 29 November 1985.
[9] UN General Assembly, Resolution A/RES/45/112, 14 December 1990.
[10] 2007 Paris Principles, para. 3.7.
[11] UN Global Study on Children Deprived of Liberty, A/74/136, November 2019, p. 640.

addresses the question in which regard the incarceration of children associated with terrorist or violent extremist groups is legally allowed and in which ways and circumstances it is not. Domestic criminal law cases of former members of terrorist or violent extremist groups are highly political, draw a lot of attention, and often get discussed by the public and media. However, the part that usually does not get addressed by the public or the domestic courts is the question of whether or not a terrorist or violent extremist group recruited and used the individual at a very young age. The consideration of a different approach often falls short. This thesis will provide two concrete examples of German domestic trials. The domestic courts applied a very punitive approach to the complicated matter of the prosecution of children associated with and recruited by terrorist or violent extremist groups. The author will analyze these cases with a child-sensitive approach and discuss alternatives to incarceration.

1.2 Innovative aspects of the Research

The author found that there is more research regarding the criminal responsibility and prosecution of child soldiers than children who are associated with and recruited by terrorist or violent extremist groups and accused of terrorism-related offenses. For example, Grover argues that the different age limits of States create a 'discriminatory element' which should be a reason for "immunity from prosecution for international crimes related to child soldiering."[12] Other voices, such as Amnesty International and Human Rights Watch, support the criminal responsibility and prosecution of child soldiers of any age for grave international crimes.[13] The arguments supporting the prosecution of child soldiers brought forward by Amnesty International include the danger of encouragement of the use of children for atrocities, the support of impunity, and a denial of justice to their victims if the child soldiers will not be prosecuted.[14] However, it is largely not discussed what measures should be taken into consideration by States once the child is associated with terrorist or violent extremist groups and accused of terrorism-related offenses. By analyzing two court orders of the German Federal Court of

[12] Grover, 'Child Soldier' as 'Non-Combatants': The Inapplicability of the Refugee Convention Exclusion Clause, *International Journal of Human Rights*, 2008, p. 60 et seq.
[13] Amnesty International, *Child Soldiers - criminals or victims?*, 22 December 200, p. 6, https://www.amnesty.org/en/documents/IOR50/002/2000/en/> [accessed 10 August 2020]; Human Rights Watch, *Witness: A Child Soldier's. Darfur Confession – 'I shot her. She is dead*, 9 September 2015, https://www.hrw.org/news/2015/09/09/witness-child-soldiers-darfur-confession-i-shot-her-she-dead> [accessed 11 August 2020]: "Ibrahim is both a perpetrator and victim. He should face criminal charges, but with all the protect ions provided to children implicated in crimes who have suffered the trauma and indoctrination of being a child soldier."
[14] Amnesty International, *Child Soldiers - criminals or victims?* p. 6.

Justice[15], the author found that a rather punitive approach regarding the nature of the crime instead of a child-sensitive approach towards those affected children was preferred and applied by the court. When it comes to children associated with and recruited by terrorist or violent extremist groups, the focus of the jurisdiction is often on the particular groups, who recruited and used those children in armed conflicts. The prosecution of children who may have committed terrorism-related offenses themselves is often not discussed. This current work is innovative in a way that applies the legal framework concerning children's rights to cases that deal with terrorism-related offenses and shows that alternatives to deprivation of liberty are necessary to fully comply with the provisions of the legal framework. By providing case examples, the necessity of alternatives to deprivation of liberty for children associated with and recruited by terrorist or violent extremist groups is evident. The research can be used as an argument to implement changes towards a rather child-sensitive approach concerning children accused of terrorism-related offenses.

1.3 Structure and Methodology

This thesis is divided into six main chapters. Following this introductory chapter, chapter 2 will focus on the legal framework applicable to children accused of having committed terrorism-related offenses during the time of their association with terrorist or violent extremist groups. It will introduce the framework regarding children's rights, on the one hand, which includes International Human Rights Law and International Humanitarian Law and, on the other, the International Legal Framework related to Counter-Terrorism. Chapter 3 focuses on the criminal responsibility of children who are associated with terrorist or violent extremist groups and accused of terrorism-related offenses. It will be discussed in which way those children are criminally responsible regarding international criminal law, domestic criminal law, which implied the previously mentioned international legal framework, and German domestic criminal law. Chapter 4 discusses the criminal consequences for children who are associated with and recruited by terrorist or violent extremist groups and accused of terrorism-related offenses. This thesis will focus on two approaches, which are the deprivation of liberty with the argument of the protection of national security on one side and alternatives to deprivation of liberty, such as diversion measures on the other. Chapter 5 will analyze under the previously described framework two German

[15] Bundesgerichtshof (BGH, Federal Court of Justice of Germany), *StB 40/16*, Third Criminal Division, Order of the Court, 11 January 2017; Bundesgerichtshof (BGH, Federal Court of Justice of Germany), *AK 74/17*, Order of the Court, Third Criminal Division, 11 January 2018.

cases of individuals who were investigated and detained on the grounds that they might flee the country and were prosecuted on the grounds of participation in a terroristic group as part of a case study. In the first step, this chapter will describe the details of both cases, the recruitment situation in Afghanistan, and the application of International Law in Germany. In a second step, the author will discuss the application of the previously mentioned framework regarding the two individual cases, the lack of the application of international standards on a domestic level and the need for specialized alternative measures for children who are associated with terrorist or violent extremist groups and accused of terrorism-related offenses.

In its foundations, this thesis is based on explanatory research. The work was mainly conducted based on literature revision, with the support of studies, reports and other documents such as the United Nations Global Study on Children Deprived of Liberty and the Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups of the United Nations Office on Drugs and Crime. In addition, the author reviewed literature, legal documents, and qualitative data, which included academic peer-reviewed journals, reports, and website postings from different UN or international bodies or internationally-recognized NGOs. The core objective of the study was the analysis of two German cases of individuals who are accused of terrorism-related offenses when they were under the age of eighteen. The two cases were selected based on the punitive approach the court had applied. Contrary to the approach of the court, the cases are analyzed from a child-sensitive perspective regarding the international legal framework concerning children's rights. Although the present work has followed a traditional legal analysis, some elements of history and psychology were used to create a more comprehensive understanding of children associated with and recruited by terrorist or violent extremist groups.

2. INTERNATIONAL LEGAL FRAMEWORK ON CHILDREN'S RIGHTS APPLICABLE TO CHILDREN ACCUSED OF TERRORISM-RELATED OFFENSES

The international legal framework applicable to children accused of having committed terrorism-related offenses provides States with provisions and guidance on the appropriate treatment of these children. The offenses that will be analyzed in this thesis are terrorism-related as defined by national law. The legal framework addressing children accused of terrorism-related offenses is based

on International Human Rights Law, International Humanitarian Law, and the International Legal Framework related to Counter-Terrorism.

2.1 International Human Rights Law

Last year the UN Convention on the Rights of the Child celebrated its 30th anniversary. 196 Member States have ratified the CRC except for the United States of America.[16] The CRC is the most ratified convention in the world and was specifically created for children since they are physically and psychologically different from adults and have different emotional and educational needs.[17] The CRC defines a child as every human being below the age of eighteen years.[18] Additionally, all actions concerning children have to be non-discriminatory,[19] in the best interests of the child,[20] to ensure the child's rights to survival and development,[21] and to be heard.[22] The CRC does not allow significant limitations to its provisions, which is the reason why the CRC continues to apply for all children, even children who are accused of terrorism-related offenses.[23] In this context, the key provisions such as the right to personal liberty, Art. 37 CRC, and the administration of justice, Art. 40 CRC, are particularly relevant and give these children the certainty of a fair trial that explicitly considers children's needs. One of the vital provisions is Art. 37 (b) CRC, which demands that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

Equally important is Art. 40 (1) CRC, which recognizes the right of every child alleged as, accused of or recognized as having infringed criminal law, in a manner consistent with the promotion of the child's sense of dignity and worth and reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of

[16] United Nations Treaty Collection, Chapter IV, 11., https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [accessed 11 August 2020]; States Parties can also enter reservations or declarations regarding the provisions of the treaty, Ibid.
[17] Todres, 'Emerging Limitations on the Rights of the Child: the U.N. Convention on the Rights of the Child and Its Early Case Law, *Columbia Human Rights Law Review*, p. 159, et seq.; UN Global Study, A/74/136, p. 622.
[18] CRC, Art. 1.
[19] Ibid., Art. 2
[20] Ibid., Art. 3 (1).
[21] Ibid., Art. 6.
[22] Ibid., Art. 12 (2).
[23] UN Global Study, A/74/136, p. 622.

promoting the child's reintegration and the child's assuming a constructive role in society.[24] This provision entails that the focus of any measure taken against a child in contact with the justice system must be on rehabilitation and reintegration of the child. Art. 40 (2) CRC provides additional procedural guarantees such as having the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law and also taking into account his or her age or situation.[25] Under Art. 40 (3) (a) States Parties are required to establish a minimum age below which children are presumed not to have the capacity to infringe the penal law. Moreover, Art. 40 (3) (b) CRC states 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, and, in particular, whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings."[26] These provisions apply for any accused offense committed by a child, regardless of the seriousness of it, including offenses related to groups of terrorism or violent extremism.[27]

2.2 International Humanitarian Law

International Humanitarian Law (IHL) prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population in international armed conflict[28] and acts of terror against the civilian population in non-international conflicts.[29] Although the Additional Protocols (AP) were the first treaties to acknowledge the recruitment of children as combatants in armed forces and groups[30] and explicitly protect children from being recruited into armed forces or armed groups and used in direct hostilities under the age of 15,[31] IHL does not provide for the criminal responsibility of children or their treatment by domestic justice systems.

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[24] Committee on the Rights of the Child, GC 24, CRC/C/GC/24, 18 September 2019, para. 3.
[25] CRC, Art. 40 (2).
[26] CRC, Art. 40 (3) (b).
[27] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System, 2017, p. 71 et seq., https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf [accessed Aug. 11th, 2020]
[28] The Geneva Conventions of 1949 and its additional protocols of 1977, Additional Protocols (AP) I and II can be found here: https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols [accessed 11 August 2020]; AP I, Art. 51 (2).
[29] AP II, Art. 4 (2) (d), Art. 13 (2).
[30] ICRC, Legal Protection of Children in Armed Conflict, 2003, https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet. [accessed 11 August 2020]
[31] AP I, Art. 77(2), AP II, 4 (3) (c).

Nevertheless, IHL contains provisions regarding criminal proceedings in the context of conflict, which can also be relevant for conflict in relation to terrorist acts.[32] In general, IHL distinguishes between permissible and non-permissible acts of violence. Perpetrators of acts of violence are prescribed to be prosecuted unless the act of violence was permissible. E.g., the direct attacks against wounded and sick combatants or non-combatants or civilian persons who take no part in hostilities are prohibited.[33] In contrast, acts of violence against members of the opposing party to the conflict, who are engaged in hostilities, are permissible, unless the acts violate particular rules concerning the means or methods used. Moreover, the common Art. 3 of the Geneva Conventions prohibits the violence to life and person, in particular, murder in combination with outrages upon personal dignity, in particular, humiliating and degrading treatment against persons not or no longer taking part in hostilities.[34]

Under IHL, acts that amount to war crimes have to be prosecuted. However, if individuals have obtained combatant status, they enjoy immunity from prosecution if they participate in hostilities in international armed conflicts and comply with the laws and customs of war.[35] In the context of non-international armed conflicts, "participation in hostilities can be subject to national criminal laws and criminal punishment, including for national security offenses and under counter-terrorism legislation."[36] Nevertheless, AP I also contains the provision that encourages authorities in power to grant the broadest possible amnesty to persons who have participated in the non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[37]

2.3 Soft law: The 2007 Paris Principles and Guidelines

In 2007, another essential legal instrument, the Paris Principles and Guidelines on Children associated with armed forces or armed groups were published by the United Nations Children's Fund (UNICEF).[38] The 2007 Paris Principles are not legally binding; however, up to this day, they represent

[32] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 73.
[33] Geneva Conventions IV, the Protection of Civilians Persons in Time of War, Art. 15.
[34] Geneva Conventions, common Art. 3.
[35] AP I, Art. 43.
[36] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, 2017, p. 74.
[37] AP II, Art. 6 (5).
[38] 2007 Paris Principles.

very crucial guidelines and standards for the promotion and fulfillment of children's rights and for assisting those children already involved with armed forces and groups.

The 2007 Paris Principles defined a child associated with an armed force or armed group as a "person below eighteen years of age who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porter, messengers, spies or for sexual purposes.[39] Furthermore, the Principles shifted the focus of children, who are associated with armed forces or armed groups, and accused of crimes under international law, from being perceived as perpetrators to being primarily considered as victims of offenses against international law.[40] From a counter-terrorism law, international and domestic law perspective, there is a distinction between terrorist groups and groups not designated as terrorist groups. However, there is no difference for children from an international humanitarian law and human rights law perspective, protecting children against being used in armed conflict. Because of this reason, "justice authorities should recognize the 'primarily victim' status of children recruited by terrorist and violent extremist groups, particularly in situations of armed conflict."[41]

However, the treatment of children recruited by terrorist or violent extremist groups primarily as victims does not entail immunity for terrorism-related crimes committed during the association with such groups. To a higher degree, States should recognize, integrate, and consider the notion of primary victimization of these children during any stage of the justice process. In this context, the children affected "should be awarded the safeguards and guarantees of child victims, concerning safety, safeguards, and appropriate assistance, including reparations."[42] The notion also entails that States have to fully respect and apply the previously discussed international legal framework, which includes the provision that the prosecution of children should be regarded as a measure of last resort.[43]

In addition, one of the provisions states that "children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups."[44] Moreover, any national or international

[39] Ibid., para. 2.1.
[40] Ibid., para. 3.6.
[41] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 75.
[42] Ibid., p. 75 et seq.
[43] Ibid.
[44] 2007 Paris Principles, para. 8.7.

prosecution should be in accordance with international standards for juvenile justice[45], promote rehabilitation and reintegration into the community[46] , and seek alternatives to judicial proceedings wherever possible.[47] In accordance with the CRC, the Paris Principles focus on the rehabilitation and reintegration of children associated with armed groups rather than the prosecution of these children.

2.4 International Juvenile Justice Standards

The following list provides additional international juvenile justice standards for the protection of children in contact with the justice system,[48] which is not the scope of this thesis to completely analyze: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[49], the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)[50], the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)[51], the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)[52], United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[53], United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)[54], the Child Protection Working Group (CPWG)[55], the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice,[56] and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).[57]

[45] Ibid., para. 8.8.
[46] Ibid., para. 3.6.
[47] Ibid., para. 3.7.
[48] The list was published by the GCTF in the Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context. 2016, p. 2 et seq.
[49] GA, Resolution A/RES/40/33, 29 November 1985.
[50] GA, Resolution A/RES/43/173, 9 December 1988.
[51] GA, Resolution A/RES/45/112, 14 December 1990.
[52] GA, Resolution A/RES/45/113, 14 December 1990.
[53] GA, Resolution A/RES/ 45/110, 14 December 1990.
[54] GA, Resolution A/RES/65/229, 21 December, 2010.
[55] CPWG, Minimum Standards for Child Protection in Humanitarian Action, 2012.
[56] GA, Resolution A/RES/69/194, 26 January 2015.
[57] GA, Resolution A/RES/70/175, 17 December 2015.

2.5 International Legal Framework Related to Counter-Terrorism

The international legal framework related to counter-terrorism is primarily composed of nineteen international conventions and protocols, the United Nations Security Council (SC) Resolutions[58], complemented by the UN Global Counter-Terrorism Strategy, UN General Assembly resolutions, and customary law.[59] The international conventions and protocols create an obligation for States to criminalize and prosecute certain acts, such as terrorist bombings, hostage-taking, crimes against internationally protected persons, offenses linked to dangerous materials, and the financing of terrorism. The UN Security Council decided in its resolution 1373 that all States have to take the necessary steps to prevent the commission of terrorist acts and ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, that such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.[60] Therefore, States are required to adopt legislation that punishes terrorism-related crimes and also the different forms of participation of such crimes, such as complicity, planning and directing, aiding and abetting, and participation in a joint enterprise.[61] The resolution does not distinguish between adults and children since it only refers to 'persons committing terrorist acts' and, therefore, does not address children individually. In this regard, counter-terrorism legislation has been given little if any consideration to the fact that some individuals accused of terrorism-related offenses could be under the age of eighteen.[62]

One relatively recent resolution of the UN Security Council addressed children associated with all non-state armed groups and stressed "the need to pay particular attention to treatment of children associated or allegedly associated with all non-state armed groups, including those who commit acts of terrorism, in particular by establishing standard operating procedures for the rapid handover of these children to relevant civilian child protection actors."[63]

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[58] United Nations Security Council, Resolutions 1267 (1999), 1373 (2001), 1540 (2004), 1566 (2004), 1624 (2005), 1735, 2178 (2014), and 2396 (2017).
[59] United Nations and the Rule of Law, Counter-Terrorism, https://www.un.org/ruleoflaw/thematic-areas/transnational-threats/counter-terrorism/ [accessed 11 August 2020]; UN Global Study, A/74/136, p. 625.
[60] UN Security Council, S/RES/1373, 28 September 2001, para. 2.
[61] The requirement to make those offences punishable under the domestic law is also embedded in universal counter-terrorism instruments such as the International Convention for the Suppression of Terrorist Bombings of 23 May 2011, Art. 4 (b).
[62] Brett, Juvenile justice, counter-terrorism and children, *Disarmament Forum*, 2002, p. 33.
[63] UN Security Council, S/RES/2427, Jul. 9th, 2018, para. 19.

In the same resolution, the Security Council urges "The Member States to consider non-judicial measures as alternatives to prosecution and detention that focus on rehabilitation and reintegration for children formerly associated with armed forces and armed groups taking into account the deprivation of liberty of children should be used only as a measure of last resort and for the shortest appropriate time, as well as to avoid wherever possible the use of pretrial detention for children, […]."[64] It further emphasizes "that children who have been recruited in violation of applicable international law by armed forces and armed groups and are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law."[65] Further, the SC urges States to comply with the CRC and "encourages access for civilian child protection actors to children deprived of liberty for association with armed forces and armed groups."[66] Moreover, it urges States to consider non-judicial measures as alternatives to prosecution and detention that focus on the rehabilitation and reintegration for children formerly associated with armed forces and armed groups […]. Deprivation of liberty should only be used as a measure of last resort and for the shortest appropriate time. However, the last paragraph only addresses children associated and recruited by armed forces and armed groups and not non-state armed groups, such as terrorist or violent extremist groups. In this way, the UN Security Council distinguishes between children recruited by armed forces and armed groups and children recruited by non-state armed groups and also uses a different approach for the latter.

In addition, the universal counter-terrorism instruments do not contain a requirement to criminalize the association with or membership in a terrorist group.[67] In this regard, children should not be detained and prosecuted for the mere association with terrorist or violent extremist groups.[68] On a regional level, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism criminalizes the participation "in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offenses by the association or the group."[69]

[64] UN Security Council, S/RES/2427, para. 21.
[65] Ibid., para. 20.
[66] Ibid., para. 20.
[67] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 72 et seq.
[68] Ibid., p. 80.
[69] Council of Europe, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series – No. 217, Art. 2 (1).

In 2018, the UN Counter-Terrorism Implementation Task Force released a guide for states concerning human rights-compliant responses to the threat posed by foreign fighters, which pressed for an "appropriate response by States that is grounded in international human rights law and the rule of law."[70] The guide does not exclude the prosecution in appropriate cases; however, it emphasizes that the focus should be on rehabilitation and reintegration.[71] It refers to the Global Counterterrorism Forum Memorandum and the paragraph that "particular attention should be given to alternatives to prosecution" and further that prosecution should be handled in accordance with the CRC, especially regarding the best interests of the child, and child justice standards for children under the age of eighteen. It also urges states to "develop child-sensitive and rights-based rehabilitation and reintegration programmes for children involved in terrorism-related activities to aid their successful return to society."[72]

Even though the framework advises states to criminalize and prosecute certain criminal acts which correlate with terrorism, States also need to be aware of the fact that "children alleged or accused of committing terroristic acts, may themselves be victims of terrorism"[73] and that "children and youth are often the most vulnerable victims of the scourge of radicalization and violence […]."[74] Moreover, it is stressed that States should take measures for the effective reintegration of children formerly associated with armed groups, including terrorist groups, and in general, comply with international law, especially the CRC.[75]

The initiative on juvenile justice in a counter-terrorism context by the Global Counterterrorism Forum (GCTF) addresses "the emerging questions regarding children involved in terrorism, and the different phases of a criminal justice response, which include prevention, investigation, prosecution, sentencing, and reintegration."[76] The initiative presses for a criminal justice response that works towards

[70] OHCHR, UN Counter-Terrorism Implementation Task Force, Guidance to States on human rights-compliant responses to the threat posed by foreign fighters, 2018, para. 50.
[71] Ibid., para. 52.
[72] Ibid.; para. 53; Ibid., see "Guidance" section, p.29.
[73] UN Global Study, A/74/136, p. 626; UN General Assembly, UN Global Counter-Terrorism Strategy Review, A/RES/70/291, para. 18.
[74] The Beam, Volume 11, June 2016, p. 7, https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/ctitf_beam-no11-web.pdf. [accessed 11 August 2020]
[75] UN Global Counter-Terrorism Strategy Review, A/RES/70/291, para. 18.
[76] GCTF, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context, 2016, http://strproject.oijj.org/document/39. [accessed 11 August 2020]

rehabilitation and reintegration of children who were previously involved in terrorism.[77] It tries to advise the executive but also inform legislative and judicative of states to react reasonably to children associated with terrorism, which should be handled in the best interests of the child and respect international juvenile justice standards. The initiative urges states to pay particular attention to alternatives to prosecution and, in the case of prosecution alternatives to incarceration such as diversion programs, which have to be carefully tailored to the characteristics of the child and the offense committed."[78]

In conclusion, the international legal framework related to counter-terrorism does not exclude the prosecution of children associated with terrorist or violent extremist groups for terrorism-related offenses. Nevertheless, a State's measures taken to combat terrorism, which includes the investigation and prosecution of children suspected of terrorism-related offenses, have to comply with all obligations regarding children's rights in accordance with international law, especially human rights law and humanitarian law. The focus of these measures should be on the rehabilitation and reintegration of the child. Additionally, there is an international consensus that children associated with armed, terrorist, or violent extremist groups should be primarily treated as victims of a violation of the international normative framework instead of perpetrators. Lastly, the child's mere association and membership with terrorist or violent extremist groups should never be a reason for the prosecution, punishment, or threat with prosecution or punishment of the child.

3. CRIMINAL RESPONSIBILITY OF CHILDREN ASSOCIATED WITH TERRORIST OR VIOLENT EXTREMIST GROUPS

This chapter discusses the question of whether children recruited by terrorist or violent extremist groups can be held legally responsible for terrorism-related offenses. The question consists of whether a specific criminal responsibility might be envisaged for these children and, if so, how may it operate in case of prosecution.

[77] Ibid., p.2.
[78] Ibid., p. 7.

3.1 Criminal Responsibility according to International Criminal Law

International Criminal Law (ICL) is set out to criminalize and prosecute certain international crimes. On 17 July 1998, the ICC was established, and with it, the prosecution of the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[79]The Statute of the International Criminal Court (ICC) in The Hague included in its list of war crimes of 1998 the active involvement in hostilities of children under the age of 15 or their recruitment into armed forces during an armed conflict[80] or armed forces or armed groups during a non-international armed conflict.[81] Consequently, "children recruited and exploited by violent extremist and terrorist groups in armed conflict […] must be considered victims of war crimes.[82] Since then, there have been convictions at the ICC regarding the involvement and recruitment of children during conflict, which set an important precedent that those actions are illegal and punishable. Moreover, courts such as the Special Court for Sierra Leone convicted individuals for the same crimes.[83] In 2012, the individual Thomas Lubanga Dyilo from the Democratic Republic of the Congo (DRC) was convicted for the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities amongst other war crimes.[84] The prosecution of Thomas Lubanga Dyilo was possible since the DRC ratified the Rome Statute in the year of 2002. In the year of 2004, the Government of the DRC referred to the court the situation, and an investigation started in June 2004.[85] After an application for the issuance of an arrest warrant was filed by the prosecution in January 2006, the Pre-Trial Chamber of the ICC issued a warrant of arrest for Thomas Lubanga Dyilo in February 2006. One month later, the Congolese authorities surrendered the individual, who was detained and transferred to the Court's Detention Centre in the Hague. In the same month, Thomas Lubanga Dyilo made his first appearance in the court. The prosecution of the individual was very particular in a way that it triggered the Court's reparations mandate for the first time. A total number of 146 persons were granted the status of victim

[79] International Criminal Court, Rome Statute, 17 July 1998, Art. 5.
[80] ICC Rome Statute, Art. 8, para. 2(b)(xxvi).
[81] ICC Rome Statute, Art. 8, para 2(e)(vii).
[82] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 75.
[83] UN Global Study, A/74/136, p. 573, f.n. 26.
[84] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber II.
[85] ICC, Case Information Sheet, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf.

and authorized to participate in this case.[86] A total number of 129 persons with victim status participated in the proceedings through a legal representative.[87]

In the case *The Prosecutor v. Dominic Ongwen* in front of the ICC, the defendant was accused of 70 counts of crimes against humanity and war crimes allegedly committed after 1 July 2002, in northern Uganda[88]. The trial began 6 December 2016, and the judgment of the Trial Chamber IX is awaited in a reasonable period of time after the closing statements took place from 10 to 12 March 2020. Until then, the defendant remains in ICC custody. This case is especially compelling since Mr. Ongwen is accused of several crimes against or affecting children but claimed that he was also abducted into an armed group at the age of 14. The Prosecutor of the ICC, Mrs. Fatou Bensouda, responded in her opening statement with no sympathy:

> "[H]aving suffered victimization in the past is not a justification, nor an excuse to victimize others. Each human being must be considered to be endowed with moral responsibility for their actions. And the focus of the ICC's criminal process is not on the goodness or badness of the accused person, but on the criminal acts which he or she has committed. We are not here to deny that Mr. Ongwen was a victim in his youth. We will prove what he did, what he said, and the impact of those deeds on his many victims."[89]

In conclusion, Mr. Ongwen is charged with the same war crimes that were committed against him.[90] In this regard, children under the age of fifteen and, therefore, child soldiers cannot be prosecuted for the crimes they committed as children; however, "there is no provision for child soldiers who become adults who are responsible for their crimes."[91]

In this context, the question arises in which way children, who have been associated with terrorist or violent extremist groups and accused of committing terrorism-related offenses while still being children, are criminally responsible. Even though there is the possibility that civilians, who participate

[86] Ibid.
[87] Coalition for the International Criminal Court, 'Thomas Lubanga Dyilo, http://www.coalitionfortheicc.org/cases/thomas-lubanga-dyilo.
[88] *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15l, Trial Chamber IX.
[89] ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case against Dominic Ongwen, 6 December 2016.
[90] Hyndman, The question of 'the political' in critical geopolitics: Querying the 'child soldier' in the 'the war on terror', *Political Geography*, June 2010.
[91] Ibid.

in hostilities, or combatants, who breach the rules of war, face criminal prosecution, Art. 26 of the ICC Rome Statute makes it clear that "[t]he court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of crime."[92] Moreover, the 2007 Paris Principles demand that "children should not be prosecuted by an international court or tribunal."[93] Both the European Court of Human Rights and the Inter-American Court of Human Rights lack criminal jurisdiction.[94] In conclusion, children who are associated with terrorist or violent extremist groups and accused of terrorism-related offenses cannot be held criminally responsible by those courts.

One legal instrument which allowed the prosecution of children between the age of fifteen and eighteen for acts defined as international crimes, including acts of terrorism[95], was the Statute of the Special Court of Sierra Leone.[96] Sentencing for imprisonment was excluded, however, under Art. 7 (2), the court was able to order any or in a combination of the following measures: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programs, approved schools and, as appropriate, any programs of disarmament, demobilization and reintegration or programs of child protection agencies.[97] However, in practice, there was no trial of an individual between the age of fifteen and eighteen.[98] The statutes of the International Tribunals of the former Yugoslavia and Rwanda did not set a minimum age for criminal responsibility. Hence, it was possible to prosecute children for their crimes, yet, no individual under the age of eighteen was prosecuted.[99]

In this way, the ICC does not envisage criminal responsibility for children associated with terrorist or violent extremist groups who committed terrorism-related crimes under the age of eighteen. In other circumstances, such as special international courts or tribunals, the criminal responsibility of these children was not excluded; however, authorities decided against the prosecution.

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[92] ICC Rome Statute, Art. 26 - Exclusion of jurisdiction over persons under eighteen.
[93] 2007 Paris Principles, Art. 8.6.
[94] Charney, Progress in International Criminal Law?, *The American Journal of International La*wp. 453.
[95] UN Security Council, Statute to the Special Court for Sierra Leone, 16 January 2002, Art. 3 (d).
[96] UN Security Council, Statute of the Special Court for Sierra Leone.
[97] Ibid., Art. 7 (2).
[98] Grover, 'Child Soldiers' as 'Non-Combatants', p. 55: The Sierra Leone Truth and Reconciliation Commission (TRC) dealt with these cases in accordance with Art. 7 of the Statute of the Special Court for Sierra Leone and with a focus on rehabilitation.
[99] Grover, 'Child Soldiers as 'Non-Combatants', p. 56; Bosch, Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities', *The Comparative and International Law Journal of Southern Africa*, November 2012, p. 359.

3.2 Criminal Responsibility for terrorism-related offenses in Domestic Criminal Law

There is no explicit provision excluding the criminal responsibility for children accused of terrorism-related offenses. The two legal instruments, the CRC and OPAC, which are specifically designed to protect children regarding armed conflict, do not define a 'universal minimum age' for the criminal responsibility of such crimes committed by children under the age of eighteen. The only provision regarding a minimum age for criminal responsibility is Art. 40 (3) (a) CRC, which requires States Parties to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law" on the domestic level.[100] Additionally, the Committee on the Rights of the Child concluded in its General Comment No. 10 that "a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable."[101] At the same time, it encourages States Parties to set a higher minimum age, for instance, 14 or 16 years of age, and discourages States Parties from lowering the minimum age at any time.[102] The age for juvenile criminal responsibility varies from as low as six up to eighteen years, and the median age worldwide is 12 years.[103]

Regarding the age limit of criminal responsibility, one could make the argument that children should not be prosecuted in general for committing crimes, such as war crimes. The International Criminal Court, which has the task to prosecute individuals for committing such crimes, does not have jurisdiction over persons under the age of eighteen at the time of the alleged commission of crime.[104] This instance raises the question of why the ICC does not, but domestic criminal courts have jurisdiction over persons under the age of eighteen at the time of the alleged commission of crime. In general, it seems that the international community does not find a common consensus regarding the age limit of children affected by armed conflict. While States Parties to the CRC shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces,[105] armed

[100] CRC, Art. 40 (3) (a).
[101] Committee on the Rights of the Child, GC 10, CRC/C/GC/10, 25 April 2007, para. 32.
[102] Ibid., para. 33.
[103] Penal Reform International, *The minimum age of criminal responsibility*, Justice for Children Briefing No. 4, February 2013, p. 1.
[104] ICC Statute, Art. 26.
[105] CRC, Art. 38 (3).

groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen years.[106]

Double standards, as such, create confusion and do not reflect an international united front for the support and protection of children in armed conflict. Regarding criminal responsibility for severe crimes arising from armed conflict, one solution might be to set a 'universal minimum age' at eighteen years. In this way, the State's jurisdiction system "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."[107] Besides, if children only follow orders, do not know how to question organized authority, and do not understand the concept of their rights, they should not be held criminally accountable.[108] A universal age limit of eighteen years for criminal responsibility would also fall in line with the goals of the CRC: to promote the best interests and well-being of the child.[109] This instance constitutes on two factors. On the one hand, trials are not in the best interests of former child soldiers or children associated with terrorist or violent extremist groups with a comparable situation.[110] The rehabilitation, reintegration, and well-being of the children are often not the focus of criminal trials.[111] On the other hand, even if the trial does not result in the deprivation of liberty of the individual, "the process itself may threaten the child's psychological healing by making [the accused] re-live trauma, delaying the return of any semblance of normalcy, and making it more difficult for [the individual] to reintegrate into society, particularly if the trial is public."[112]

However, from a counter-terrorism perspective, States have the right and the duty to hold individuals accused of terrorism-related offenses criminally responsible. As previously stated, States should treat these children primarily as victims than perpetrators. A distinction between voluntary and forced[113] recruitment could lead to the assumption that only children who have been recruited against their will

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[106] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (OPAC), Chapter IV, 11.b., 25 May 2000, Art. 4 (1).
[107] Grossman, Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations, *Georgetown Journal of International Law*, Winter 2007, Vol. 38, p. 347.
[108] Ibid, p. 348.
[109] Ibid. p. 349.
[110] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 79: For a significant number of these children, their situation may be directly comparable to that of child soldiers in that the children find themselves involuntarily caught up in a situation of armed conflict, where they associate themselves (whether voluntarily or through force) with a terrorist or violent extremist group."
[111] Grossman, Rehabilitation or Revenge, p. 350.
[112] Ibid. p. 350 et seq.
[113] The forced recruitment of children works through force, coercion, or deception.

should be primarily treated as victims since voluntarily recruited children chose to join terrorist or violent extremist groups and therefore should take full responsibility for their actions.[114] This argument constitutes on the assumption that the children who "join" freely provide informed consent, can understand the whole spectrum of what it means and entails to be a member of a terrorist or violent extremist group, can make an entirely voluntary choice and, therefore, can be held fully accountable for their actions. However, with this perspective, the blame is placed primarily on the child and not on the members of the terrorist or extremist groups who recruited these children.[115] The blame on the child can also entail stigmatization of the child, rather than being perceived as a victim.

Even if it may seem that children join armed forces or especially armed groups voluntarily, it is often connected with other circumstances such as poverty, a lack of infrastructure or health, an option of last resort, being an orphan, no education, no prosperity, family and peer pressure, search for identity or status.[116] Research regarding children and their motives to join armed forces or groups showed that "the distinction between voluntary and compulsory or forced recruitment is not clear-cut."[117] Multiple reasons influence the voluntary or involuntary recruitment of children. Misleading information or the fact that they will be paid might be some reasons. For others, who have lost or are separated from their families and homes, the 'volunteering' is a means of survival and last resort.[118] Many 'volunteers' find themselves in situations in which it is nearly impossible to decide for themselves if they want to continue their participation. Moreover, the researchers concluded that most individuals who described themselves as volunteers had objectively "no real choice, and certainly that one or more of the Optional Protocol safeguards was not fulfilled."

The circumstances, in many cases, were compared to forced labor, which entailed misleading contracts, including 'enticements,' ill-treatment inflicted on the worker, sometimes resulting in death, long working days up to eighteen hours without water or proper food and no, or unreasonable restrictions on freedom or to terminate the employment.[119] Children can be easily exploited for their work in support roles or even as a fighter, which costs less than an adult, has particular propaganda value, and who can

[114] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 26.
[115] Ibid., p. 26 et seq.
[116] UN Global Study, A/74/136, p. 620.
[117] ILO, Young Soldiers – Why They Choose to Fight, 2004, p. 112.
[118] Ibid.
[119] Ibid., p. 112 et seq.; Unfortunately, 'voluntary' recruitment was not listed in the Worst Forms of Child Labour Convention of 1999, which only mentioned forced or compulsory recruitment of children in armed conflict, cf. Worst Forms of Child Labour Convention, cf. Art. 3 (a).

be strategically effective.[120] Consequently, the recruitment of children cannot be perceived as genuinely voluntary "because of the cognitive abilities of the child, and the different forms of coercion or influence associated with recruitment methods."[121]

The recruitment situation of children recruited by terrorist or violent extremist groups can be compared to one of child soldiers since "the children find themselves involuntarily caught up in a situation of armed conflict, where they associate themselves (whether voluntarily or through force) with a terrorist or violent extremist group." [122] Consequently, the principle, that children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups[123] should also apply for children associated and recruited by terrorist or violent extremist groups. Therefore, "States should refrain from charging and prosecuting children associated with terrorist or violent extremist groups for mere association with those groups, in particular in any such cases where the child's association with the terrorist or violent extremist group is comparable to the situation of a child soldier who is associated with an armed force or armed group."[124]

In this regard, "the capacity of the child to provide consent should always be regarded as hindered."[125] A distinction between compulsory, forced and voluntary conscription or enlistment would entail disadvantages for children who, most of the time, did not even have a choice. Therefore, States should treat all children recruited by terrorist or violent extremist groups primarily as victims and should also consider the reasons for recruitment. Additionally, because the recruitment situation of children recruited by terrorist or violent extremist groups is very similar to the one of child soldiers, States should refrain from charging and prosecuting children for the mere association with these groups.

[120] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 15; A significant number of the Islamic State in Iraq and Syria operations directly involve children, e.g. to carry out suicide bombings. Boko Haram in Nigeria relies heavily on the use of children as suicide bombers, p. 14.
[121] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p.75.
[122] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 79 et seq.
[123] 2007 Paris Principles, para. 8.7.
[124] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 80.
[125] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 27.

3.3 Criminal Responsibility under German Domestic Criminal Law

Since this thesis is analyzing two German criminal law cases, it is necessary to describe the criminal responsibility of non-German citizens under German criminal law as well. The provisions of §§ 129, 129a and 129b of the German criminal court concern the formation of terrorist organizations. The provision of § 129a (1) No. 1 punishes anyone with a prison term of one to ten years, which is part of an organization, in which its purpose or its activities are directed towards murder (§ 211) or homicide (§ 212) […].[126]

Since 2002 and after the 9/11 attacks on the United States of America, the German Government changed § 129b of its criminal code in a way that holds individuals criminally responsible for crimes they committed outside of the territory of Germany and the EU.[127] § 129b (1) sentence 3 of the German Criminal Code provides for the prosecution of acts in the sense of §§ 129, 129a of the Criminal Code concerning organizations based outside the EU, subject to a power of persecution to be issued by the Federal Ministry of Justice and Consumer Protection (BMJV). § 129b of the Criminal Code was introduced to close a law enforcement gap concerning foreign criminal or terrorist organizations. It permits the persecution of people who set up such organizations, participate in or support them, whereby there is a distinction between such organizations inside and outside of the EU. There are two additional requirements for the prosecution regarding foreign associations. On the one hand, the "crime" must have a domestic connection[128]; on the other hand, the BMJV must authorize criminal prosecution.[129] However, a mere domestic stay in Germany, an entry without association-related activity, is sufficient for the first additional requirement and, therefore, the persecution of the offender.[130] Thus, the application of German criminal law is extended beyond its §§ 3 et seq. of its criminal code, hence the German territory.

[126] German Criminal Code (Strafgesetzbuch), §129a.
[127] Statement of the German Bundestag, 258/2001, 9 October 2001, http://webarchiv.bundestag.de/archive/2005/0113/bic/hib/2001/2001_258/01.html. [accessed 11 August 2020]
[128] German Criminal Code, §129b, (1), sentence 2.
[129] Ibid., sentence 3.
[130] Ambos, Die Verfolgungsermächtigung i.R.v. §129b StGB, *Zeitschrift für Internationale Strafrechtsdogmatik*, August 2016, p. 505, para. 1.

Germany does have a juvenile criminal code which is applicable for juveniles between the age of 14 to 17 and young adults between the age of 18 and 20.[131] According to the Juvenile Court Act (JGG) of 1974 in conjunction with § 10 of the Criminal Code, criminal liability begins at the age of 14 if the juvenile was mature enough at the time of the deed after his moral and intellectual development, to see the injustice of the deed and to act accordingly to this insight.[132] The Juvenile Court Act considers the age of the child at the time of the offense. If the crimes were committed while the accused was of the age of a juvenile,[133] the provisions of the Juvenile Court Act (JGG) are applicable. Under § 3 JGG, a juvenile is criminally responsible if, at the time of the crime, the individual is mature enough, after the individual's moral and intellectual development, to recognize the injustice of the crime and to act accordingly. For the education of the individual, the juvenile court judge can order the same measures as a family court if the juvenile is not legally responsible because of a lack of maturity.[134]

In conclusion, under German juvenile criminal law, children, who were recruited by terrorist or violent extremist groups and were 14 years or older at the time of the crime, can be held criminally responsible for terrorism-related crimes. Their legal responsibility is dependent on their maturity and intellectual development at the time of the crime.

4. DISCUSSION OF LEGAL CONSEQUENCES

This chapter will discuss the legal consequences for children who are associated with and recruited by terrorist or violent extremist groups and accused of terrorism-related offenses. Regarding the response to terrorist crimes, the universal counter-terrorism instruments do not preset a specific framing for those responses.[135] Instead, the instruments generally guarantee fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and appliable provisions of international law, including human rights law.[136] The specific framing of responses is still left to domestic criminal justice systems. Therefore, the third part

[131] Bundeszentrale für politische Bildung, *Jugendstrafrecht*, JGG, §1 (2).
[132] Jugendgerichtsgesetz (JGG, German Juvenile Court Act), § 3 sentence 1.
[133] JGG, § 1 (2).
[134] JGG, § 3.
[135] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 82.
[136] Cf. UN GA, International Convention for the Suppression of Terrorist Bombings, 15 December 1997, Art. 14.

of this chapter will describe the legal consequences in Germany for foreign children accused of terrorism-related offenses.

4.1 Deprivation of Liberty with the Argument of the Protection of National Security

The General Assembly stated in its Resolution 60/288 that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes […] constitutes one of the most serious threats to international peace and security.[137] As previously stated, a State's measures against any person who participates in the financing, planning, preparation, or perpetration of terrorist acts or in supporting terrorist acts should reflect the seriousness of such terrorism-related offenses.[138] Nevertheless, States have the obligation "to have adequate legal, institutional and operational frameworks to respect, protect and fulfill children's rights in the administration of justice."[139]

In the past years, especially after the 9/11 attacks in the United States of America and the violent attacks in Europe in the years of 2015, 2016 and, 2017[140], there was a new "approach" regarding the handling of terrorism and its enforcement with the argument of protecting national security, especially in Europe.[141] For example, Germany passed a bill in October of 2016, which grants the federal intelligence service the power to intercept, collect and process the communications of non-EU citizens outside Germany when the interception point is in Germany (bulk and targeted surveillance). When deemed necessary, the agency can 'identify and prevent threats against internal or external security' and maintain Germany's 'capacity to act' or 'gain other insights of importance concerning foreign affairs and security politics.'[142] In this way, the German Government can collect a lot more data of people inside its borders who could potentially pose a threat to its national security. Unfortunately, in

[137] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, A/RES/60/288, 20 September 2006, available at: https://www.refworld.org/docid/468364e72.html. [accessed 11 August 2020]
[138] Cf. f.n. 60.
[139] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 70.
[140] IEP, *Global Terrorism Index 2017 – measuring and understanding the impact of terrorism*, University of Maryland, p. 49: "[...] since 2015 there has been a marked increase in armed assaults as well as attacks on facilities and infrastructure."
[141] Amnesty International, Dangerously Disproportionate – the ever expanding National Security State in Europe, January 2017, section 4, p. 38.
[142] Ibid., section 3.4, p. 31; Gesetz über den Bundesnachrichtendienst (German Law on the federal intelligence service), § 6 (1).

some cases, new laws and bills that were passed to prevent terrorism have "been used extensively against minors."[143]

In the wake of increasing counter-terrorism measures, several possibly dangerous individuals were detected, investigated, and prosecuted by officials. Mullins describes this process of the investigation and prosecution of 'terrorist asylum-seekers' as "complex and fraught with difficulty, not least due to evidentiary challenges."[144] The author created a list of all publicized criminal law cases since 2011, up until April 2018, of 101 individuals who were either convicted of terrorist or relevant non-terrorist offenses at home or abroad, facing related legal allegations insider or outside of Europe, subject to administrative sanctions based on suspected terrorist activity, including deportations, confiscation of passports and preventive detention, killed during/ after conducting acts of terrorism, publicly alleged to have been involved in terrorism by a credible government agency and were in some way connected to the migrant flows towards Europe.[145] This particular list names two German cases of two individuals who were detained as a juvenile and young adult and accused of committing terrorism-related crimes.[146] Mullins describes all individuals of these specific cases as "jihadist terrorists."[147]

Research for the recent UN Global Study, 'Children deprived of liberty,' found that children were incarcerated on the grounds of national security in at least 31 conflict and non-conflict countries.[148] In 2017, an amount of 1.500 children were detained on the grounds of national security in non-conflict countries.[149] One particular example is France with placing 275 children in administrative detention, in 2017 alone, for a range of suspected offenses, including terrorism.[150] The study also described that "many states invoke national security in order to ignore or abandon established child rights standards, including the use of detention only as a measure of last resort, and the obligation to provide rehabilitation and reintegration assistance for children affected by armed conflict."[151] It further outlines

[143] OHCHR, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France, May 2018, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23128&LangID=E. [accessed 11 August 2020]
[144] Mullins, *Jihadist Infiltration of Migrant Flows to Europe, Perpetrators, Modus Operandi and Policy Implications*, Springer AG, 2019, p. 97.
[145] Ibid., Methodology, p. 12.
[146] Ibid., Appendix A, No. 47, 67.
[147] Ibid., Methodology, p. 12.
[148] UN Global Study, A/74/136, p. 639; A non-conflict country "is a country where children from a conflict country are detained outside of the State engaged in active conflict on the ground." See f.n. 101.
[149] Ibid., p. 640.
[150] Ibid., p. 641, f.n. 105.
[151] Ibid., p.651.

how children with non-state armed group backgrounds get treated differently than children associated with "traditional armed conflicts." Those particular children get treated like criminals and sentenced to prison as terrorists.[152] The approach of not considering alternatives to formal judicial proceedings, detention, and incarceration is exceptionally harmful to the development, well-being, and reintegration processes of the child associated with and recruited by terrorist or violent extremist groups.[153]

This particular perspective and punitive approach on the matter treat these individuals, who might have been recruited at a very young age, as perpetrators, rather than victims of an unlawful act. The focus of public attention regarding children associated with terrorist and violent extremist groups is often on the indoctrination, and "radicalization" process and possible danger, that those children could impose in the future. With the adoption of specialized and punitive procedures and measures concerning terrorism, children associated with terrorist and violent extremist groups might not enjoy the standards of child rights but rather experience stigmatization by 'getting put' into a particular category of offenders. This approach can harm the development of these children and also negatively impact the children's opportunity to reintegrate into society.[154]

Contrary to this approach, the UN Secretary-General stated in his report on children and armed conflict in 2016, that priority should be given to the reintegration of children associated with groups perpetrating violent extremism and further, that "depriving children of liberty following their separation is contrary not only to the best interests of the child but also to the best interests of society as a whole."[155] After all, international standards demand that the detention of children should only be a measure of last resort and for the shortest appropriate time. Moreover, the UN General Assembly and the Human Rights Council emphasized the inclusion of children associated with non-state armed groups designated as terrorists concerning the reintegration of children formerly associated with armed groups.[156]

Considering the above mentioned, the detention and deprivation of liberty of children associated with and recruited by terrorist and violent extremist groups entail a lot of negative effects on the well-being,

[152] Ibid.
[153] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 82.
[154] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 70 et seq.
[155] Report of Secretary-General, Children and armed conflict, A/70/836-S/2016/360, para. 16.
[156] UN Global Study, A/74/136, p. 651.

reintegration, and rehabilitation of the concerned child. Therefore, other approaches and measures should be considered by States to handle the cases of these children, who are detected, investigated, detained, or prosecuted in non-conflict countries such as Germany.

4.2 Diversion as an Alternative to Deprivation of Liberty

In 2007, the Committee on the Right of the Child stated in its General Comment No. 10 regarding children's rights in juvenile justice that "juvenile justice, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children but also the short- and long-term interest of the society at large."[157]

The Committee emphasized that States parties have to respect and protect children's human rights and legal safeguards while using measures resorting to judicial proceedings and measures without resorting to judicial proceedings.[158] In this regard, the Committee stressed the necessity "to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offense committed.[159] Such measures should include the ones listed in the CRC, Art. 40 (4).[160] Furthermore, the Committee set out principles for the use of diversion measures.[161] Therefore, diversion measures should only be applied if there is enough evidence that the child committed the alleged crime. The authorities also need the consent of the child and the parents if the child is under the age of 16 regarding the specific measure, the duration of the measure, and the legal consequences if the child failed to cooperate. Once the child completed the diversion measure, the case has to lead to final closure.[162] Moreover, the Committee emphasized that States parties should apply diversion and special measures to all children, who were at the time of the alleged crime below the age of eighteen years.[163] General Comment No. 24 of the

[157] Committee on the Rights of the Child, CRC/C/GC/10, para 3.
[158] Ibid., para. 22.
[159] Ibid., para. 23.
[160] CRC, Art. 40 (4): 'A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'
[161] The Committee on the Rights of the Child defined diversion measures as: measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings; see para. 27.
[162] Some of the diversion principles by the Committee on the Rights of the Child, CRC/C/GC/10, para. 27.
[163] Ibid., para. 36.

Committee on the Rights of the child added the principle that diversion measures should not include the deprivation of liberty.[164] It also stressed that: "[d]iversion should be the preferred manner of dealing with children in the majority of cases.[165]

In the last recent years, the issue of children associated with terrorist groups drew more attention, and the matter of reintegration and reintroduction of these children into society was put more into the focus of the international community. Reintegration programs were developed to support children associated with armed conflict with a long-term, multi-year funding mechanism.[166] However, since those programs require a lot of time and funding, some are not as progressive and helpful as they should be. The psychological scars of these children are deeply rooted and need more than just a short-term solution and attention. In a recent analysis by Julia Runte, it was discussed that reintegration works best when stigma reduction and reintegration get promoted.[167]

In this regard, the UN Global Report on children deprived of liberty recommended: "a tailored and individual case management approach to children associated with non-state armed groups designated as terrorist or armed groups termed violent extremist, including specialized services for health-related assistance, educational and vocational measures and economic and social support."[168] The report emphasized that the best interests of the child should have priority. In addition, the Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context of the Global Counterterrorism Forum (GCTF) emphasized that States should consider diversion measures to avoid the negative consequences of criminal proceedings, such as higher levels of vulnerabilities and a criminal record.[169]

[164] Committee on the Rights of the Child, CRC/C/GC/24, para. 18 (e).
[165] Ibid., para. 16.
[166] UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Reintegration of child soldiers, 21 January 2018.
[167] Runte, *Community Intervention as a Means to Destigmatize Child Soldiers*, Global Campus of Human Rights, p. 62.
[168] Un Global Report, A/74/136, p.653, para. 11.
[169] GCTF, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context, p. 7, Good Practice 7.

The GCTF also set out some principles for a possible diversion program for children involved in terrorism:

> "The child will be assessed before entering a diversion program. Diversion programs for children involved in terrorism-related activities need to be carefully tailored to the characteristics of the child and the offense committed. Diversion programs that intend to target children radicalized to violence or recruited for terrorism-related offenses should include disengagement and de-radicalization components as well as educational elements, vocational training, and psychological support, all aimed at supporting reintegration. The successful completion of the diversion program by the child should result in a definite and final closure of the case, and no criminal or other forms of public records should be kept."[170]

Measures regarding children accused of terrorism-related offenses could be ones such as restorative justice, mediation, or community-based programs.[171] Diversion measures, as well as alternatives to detention, have the advantage that the risk of victimization and stigmatization of long-term detentions can be prevented. In comparison to detention, diversion measures and alternatives to detention focus more on the developmental needs of children and "can tackle the root causes of the problem" by focusing "on the impact of criminal behavior, forms of reparation for the victims, and at the same time, they provide an opportunity to work on and improve positive skills."[172] The gravity of the offense does not limit the applicability of diversion measures. Additionally, they can and should be applied at any stage of the proceedings, during the trial and also as a replacement for arrest and a juvenile sentence. The advantage of diversion is that authorities can tailor the measures towards the individual and the individual's but also society's needs by varying degrees of monitoring and accountability. This way, diversion measures can create some sort of proportionality between the individual's needs but also public safety interests.[173]

An increase in the number of children associated with and recruited by terrorist and violent extremist groups and the caseload of children accused of having committed terrorism-related crimes during the time of the association forced justice professionals to deal with unfamiliar cases they have never had to

[170] Ibid.
[171] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 88.
[172] Ibid.
[173] Ibid.

deal with before. This instance created difficulty in determining "an applicable legal framework for cases where children are involved with terrorist and violent extremist groups."[174]

Therefore, it is crucial for the proper application of the previously discussed measures that the professionals and justice authorities in charge have available specialized knowledge about the treatment of children but also about the intricacies of cases regarding terrorism-related offenses.[175] The Committee on the Rights on the Child stated in its General Comment No. 10 that professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, and social workers, should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities.[176] The necessity for the professional's specialized knowledge of terrorism is based on the fact that "terrorism-related cases involve particular considerations, especially in terms of security concerns, specialized legal competencies, and special investigation techniques and resources."[177] Specialized training and adequate resources regarding the handling of cases concerning children associated with and recruited by terrorist or violent extremist groups
for professionals should be therefore available.

Considering the previously stated and the numbers of cases in non-conflict countries,[178] diversion measures that are tailored to the individual child accused of terrorism-related offenses pose a good alternative in comparison to arrest, detention and imprisonment, avoids its negative consequences and focuses on the effective rehabilitation and reintegration of these children into society. Moreover, to apply these measures in the best possible way, professionals and justice authorities in charge should undergo specialized training and receive adequate resources for the best possible outcome.

[174] Ibid., p. 70.
[175] Ibid., p. 78.
[176] Committee on the Rights of the Child, General Comment, CRC/C/GC/10, para. 40.
[177] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p.78.
[178] Cf. f.n. 149.

4.3 Legal Consequences under German criminal law

As previously stated, § 129a (1) No. 1 of the German Criminal Code punishes anyone with a prison term of one to ten years, who founds an association whose purposes or activities are aimed at murder (§ 211) or homicide (§ 212) […] or who participates in such association as a member.[179] The German provision falls in line with Art. 2 (1) of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.[180] Under § 18 JGG, the minimum sentence for juvenile sentences is six months, the maximum five years. If the crime is a crime for which a maximum sentence of more than ten years' imprisonment is threatened under general criminal law, the maximum is ten years. The criminal framework of general criminal law does not apply.[181] The juvenile sentence is to be measured in such a way that the necessary educational influence is possible.[182] However, under § 17 (2) JGG, the court can only order a juvenile sentence if due to the adolescent's harmful tendencies that have indeed arisen, educational measures or means of correction are not sufficient for the upbringing or if punishment is required due to the seriousness of the guilt. A German juvenile court judge also has the possibility to sentence juveniles to 'educational measures,' such as an order to follow instructions relating to the place of residence, to live with a family or in a home, to take up an apprenticeship or job, to perform work or the order to use educational assistance. There is also the possibility to sentence juveniles to 'means of correction,' such as warnings, placing of restrictions, or juvenile arrest.[183] A juvenile court judge also has the possibility to combine the sentencing options.[184]

The German Juvenile Court Act also includes the possibility for diversion, which is a juvenile crime policy, geared primarily to the idea of education. Priority should be given to diversion and the application of the principle of "education instead of punishment."[185] It was created to "strengthen the informal response options of the juvenile prosecutor and juvenile court judge," which entailed that both

[179] Cf. f.n. 126.
[180] Cf. f.n. 69.
[181] JGG, § 18 (1).
[182] JGG, § 18 (2).
[183] JGG, § 9 et seq.
[184] JGG, § 8.
[185] Dünkel, Jugendstrafrecht im europäischen Vergleich im Licht aktueller Empfehlungen des Europarats, *Neue Kriminalpolitik*, 2008, p.102.

could complete the case without judgment.[186] Notably, a juvenile court judge can stop the proceedings if the accused is not responsible under criminal law for lack of maturity.[187]

In addition, Germany has specific laws, which make it easier to deport individuals under certain circumstances. For example, the provision of § 53 (1) of the German Residence Act[188] reads:

> 'A foreigner whose residence jeopardizes public security and order, the free democratic order or other significant interests of the Federal Republic of Germany will be expelled if the interests in the departure to be weighed up against the interests of a person, taking into account all circumstances of the individual in case further residence of the foreigner in the federal territory shows that the public interest in the departure prevails.'

The particular interest in expulsion is further defined in § 54 of the German Residence Act, which weighs particularly heavily if the foreigner has been legally sentenced to imprisonment or a juvenile sentence of at least two years for one or more willful offenses or has been ordered to be in preventive detention at the last conviction[189] or has been legally sentenced to imprisonment or juvenile sentence of at least one year for one or more willful offenses against life, against physical integrity, […].[190] Paragraph 2 of § 54 clarifies that the interest in expulsion within the meaning of § 53 para. 1 weighs heavily if the foreigner has been legally sentenced to imprisonment of at least six months for one or more willful offenses[191] or has been finally sentenced to a youth sentence of at least one year for one or more willful offenses and the execution of the sentence has not been suspended, […].[192] With the second law for better enforcement of the obligation to leave the country from Aug. 15th, 2019, the German Legislation inserted its new provision of § 54 (1) No. 1 (a) and changed the sentence length in the provision of § 54 (2) No. 1 from one year to six months.[193]

The special interest of deportation is a factor that German judges have to take into consideration while assessing certain criminal cases. Judges should pay especially attention to the fact that the membership

[186] Heinz, Diversion im Jugendstrafverfahren, *Zeitschrift für Rechtspolitik,* p. 7.
[187] JGG, § 47 (1) No. 4.
[188] Aufenthaltsgesetz (AufenthG - German Residence Act), § 53 (1).
[189] AufenthG, § 54 (1) No. 1.
[190] AufenthG, § 54 (1) No. 1a.
[191] AufenthG, § 54 (2) No. 1.
[192] AufenthG, § 54 (2) No. 2.
[193] Bundestag, Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht, Artikel 1, § 54.

of a terrorist organization, for example, in Afghanistan, entails a "medium-term imprisonment"[194] and that there is no exception to children.[195] Although the Law on Combat against Terrorist Offense in Afghanistan states that children, who are accused of or charged with a terroristic offense, must be handled in accordance with its child justice law, this provision is not guaranteed in practice.[196] Furthermore, Afghanistan is one of some countries that allow unlimited extensions of detentions for 'crimes against internal or external security.'[197]

The previously stated concludes that the prosecution and incarceration of children associated with and recruited by terrorist or violent extremist groups are possible under German Juvenile Criminal Law. However, even in the case of Sierra Leone, a prison sentence under Art. 7 of the Statute of the Special Court of Sierra Leone was excluded, and the court was able to order corrective methods such as supervision orders, foster care, correctional, educational and vocational training programs, and more.[198] The German Juvenile Juristic System provides the possibility to apply educational or diversion measures. This instance raises the question, if the incarceration of those children is necessary or if there may be different approaches to handle the cases of children associated with and recruited by terrorist or violent extremist groups, who are detected, investigated, or prosecuted in non-conflict countries such as Germany.

5. CASE ANALYSIS

As previously stated, Mullins provided a list of 'jihadist terrorists' of which three cases are of former members of the Taliban. The source of the investigation for these specific cases is not yet known, but "it seems likely that it was confessions they made during their asylum interview." Mullins claims that a confession during an asylum interview is a strategy of asylum seekers and known as the 'Taliban Trick.[199] He claims that 'numerous Afghans' have implicated themselves in terrorist activities on purpose, blocking the possibility to be sent back to Afghanistan since Germany declared

[194] Child Rights International Network (CRIN), *Caught in the Crossfire? An international survey of anti-terrorism legislation and its impact on children*, Nov. 2018, p. 15; Law on Combat against Terrorist Offences of Afghanistan, Sections 91(1), 3(2).
[195] CRIN, Caught in the Crossfire, p. 25.
[196] UN Global Study, A/74/136, p. 648.
[197] UN Global Study, A/74/136, p. 642.
[198] Cf. f.n. 97.
[199] Mullins, Jihadist Infiltration of Migrant Flows to Europe, p. 105.

Afghanistan as a safe country after an EU agreement in 2016, which means that they could face a risk of ill-treatment or death. There are two factors that Mullins does not consider. One is the fact that two out of the three cases of previous members of the Taliban were individuals who both "joined" the Taliban under the age of eighteen years; one of them was only 13 years old. Furthermore, it seems very unlikely that the three individuals of the list Mullins provided "joined" the Taliban on purpose a lot earlier before Germany declared Afghanistan a safe country. This upcoming chapter will analyze under the previously described framework two of these three listed cases of individuals who were investigated and detained on the grounds that they might flee the country and were prosecuted on the grounds of participation in a terroristic group.

5.1 Description of cases

The two cases that will be analyzed by this thesis are the ones of Abdullah S.K., an alleged member of the Taliban, who was arrested in Karlsruhe, Germany, on 17 November 2016 and of Omaid N., an alleged member of the Taliban, who was arrested in Germany on 19 May 2017.

The case of Abdullah S.K.

On 17 November 2016, the investigative judge of the German Federal Court of Justice released an arrest warrant (5 BGs 409/16). The accused, Abdullah S.K., was arrested on the same day and remained in custody since then.[200] On 5 December 2016, the accused lodged a complaint against the arrest warrant in a letter from his defense counsel. However, the investigative judge of the Federal Court of Justice did not remedy the appeal by a decision of 7 December 2016. The Attorney General has requested that the warrant be upheld. The arrest warrant relates to the allegation that the juvenile is accused of being a member of the "Taliban" in Afghanistan and other places abroad between the years of 2013 and 2015 in Afghanistan and thus in a non-European terrorist organization whose purposes or activities were aimed at murder (§ 211 of the Criminal Code) or homicide (§ 212 of the Criminal Code), punishable under § 129a (1) No. 1, § 129b (1) sentences 1 and 2 of the Criminal Code, §§ 1 and 3 of the Juvenile Court Act (JGG).[201]

[200] Bundesgerichtshof (BGH, Federal Court of Justice of Germany), *StB 40/16*, Third Criminal Division, Order of the Court, 11 Januarry 2017.
[201] BGH, *StB 40/16*.

By order of 11 January 2017 (StB 40/16), the Third Criminal Division of the Federal Court of Justice rejected the accused's appeal against a remand in custody in the time of preliminary proceedings. In addition, because of the seriousness of the allegations, the Office of the Attorney General filed charges at the State Protection Division of the Munich Higher Regional Court against 17-year-old Afghan citizen Abdullah S. K. on 6 April 2017.[202] The charges of the Office of the Attorney General were based on the accusation of being sufficiently suspicious of being a member of the foreign terrorist association "Taliban" (§§ 129a, 129b of the German Criminal Code) and the violation of the War Weapons Control Act (§ 22a (1) No. 6 War Weapons Control Act[203]). In addition, Abdullah S.K. is accused of attempted joint murder in three cases (§§ 211, 22, 23, 25 para. 2 of the German Criminal Code).[204] However, at the time of the court order, the additional accusations were not sufficiently suspicious.

On 1 June 2017, the Third Criminal Division of the Federal Court of Justice ordered a continuance of the pretrial detention for an additional period of six months.[205] At that point, the main proceedings had already started, and the charges were brought against the accused for the membership in a foreign terrorist organization. The extension of the pretrial detention was justified with the particular difficulty and the scope of the proceedings, which to that point in time, have not yet allowed a judgment.[206] At this point, the 17-year old accused remained almost seven months in pretrial detention, and an extension of 6 months extends the pretrial juvenile detention to more than a year. It remains unclear to this point if Abdullah S.K. was sentenced by the Higher Regional Court Munich and how long he stayed in pretrial detention. Criminal juvenile proceedings are strictly protected under German Criminal Law, and the court's decisions are not made public. The author of this thesis tried to contact the court; however, the author's attempts to gain more information on the proceedings of this particular case remained unsuccessful. However, the orders of the Federal Court of Justice of Germany already give reason to be analyzed under the previously described framework.

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[202] Oberlandesgericht München (OLG, München, Higher Regional Court Munich), Press release (No. 30), *Criminal proceedings against Abdullah S.K. on suspicion of membership in a foreign terrorist organization (Taliban)*, 15 April 2017, https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2017/30.php. [accessed 11 August 2020]

[203] Gesetz über die Kontrolle von Kriegswaffen (War Weapons Control Act), § 22a (1) No. 6 punishes anyone with imprisonment from one up to five years if the individual exercises actual violence over weapons of war without the acquisition of actual power.

[204] OLG München, Press release No. 30.

[205] Bundesgerichtshof (BGH, Federal Court of Justice of Germany), *AK 25/17*, Third Criminal Division, Order of the Court, 1 June 2017.

[206] Ibid., para. 6.

The Federal Court of Justice of Germany described in its court order the background of the Taliban.[207] In this context, the Taliban operating in Afghanistan - guided by radical religious beliefs - have set themselves the goal of expelling all foreign armed forces from the territory of Afghanistan and establishing an Islamic state on the entire territory of the country under Sharia law as the sole legal basis. By doing so, they also accept civilian casualties. The court described further the strict hierarchy of the association, which is headed by the unrestricted political and religious leader, who is also a military commander. Initially, it was Mullah Mohammed Omar Mudjahed, who, according to the knowledge available to date, died in either 2013 or 2015. His successor, Maulawi Akhtar Muhammad Mansur, was killed on 21 May 2016, in an American drone attack at the border area between Afghanistan and Pakistan. The current leader of the organization is Maulwai Haibatallah Akhundzada, who is represented by Sirajuddin Haqqani and Maulawai Muhammad Ya'qub (son of the first leader Mullah Omar).

The court further clarified that a shura council is significantly involved in the management's decisions. It consists of the - currently around 22 - highest military commanders and non-military representatives, some of whom are responsible for various areas such as "politics," "military," "finance," "prisoners' affairs," or "public relations." The Shura Council also has ten commissions that advise on specific issues. Furthermore, the court stated that the Taliban have a large number of fighters at the lowest hierarchy level, some of whom are organized by local Pashtun tribes and act as combat groups. For the planning and implementation of military operations, the recruitment of Mujahideen in Afghanistan and the training of fighters in training camps is the responsibility of the Commission for Military Affairs, which includes the military leaders of all Afghan provinces. The court further expressed that the Taliban are committing suicide bombings, mine and bomb attacks, kidnapping, hostage-taking, and targeted killings - geographically limited to the territory of Afghanistan to achieve their goals. The targets of attack are the foreign "invaders," especially the former ISAF forces, as well as the political and religious leaders of the Afghan state, the Afghan army, and the police. The Taliban's actions, which use modern weapons and means of communication, often result in numerous civilian casualties, which the Taliban use for propaganda purposes. Furthermore, the court stated that the Taliban are funded locally by material from local tribal structures and religious communities and donations, as well as criminal activities such as smuggling, extortion, and kidnapping. On the transregional level, the drug

[207] BGH, StB *40/16*, para. 7-12.

trade, as well as donations from home and abroad, are the primary sources of income for the organization.

Regarding the case of Abdullah S.K., investigations found up until the court order by the Federal Court of Justice that the accused joined the Taliban in 2013. Up until this point in time, it was unclear whether he was still under the age of criminal responsibility at that time. However, the court clarified that the accused was criminally responsible after his 14th birthday on 22 May 2013. The court stated he was a member of the association for at least one and a half years after his 14th birthday. The accused was supposedly trained in a training camp in Afghanistan and learned combat techniques and how to use weapons. He then received a fully automatic AK 47 (Kalashnikov) assault rifle from his commandant. The court order described that he was transferred to Pakistan in early 2014, where he received Islamic classes for six months. After that time, the accused returned to Afghanistan and was stationed in the city of Baghlan, where he supposedly took part in at least three combat missions against the Afghan police and army, armed with his assault rifle. The court stated that concerning the terrorist unification of the Taliban, the urgent suspicion of a crime is based on the relevant evaluation reports from the Federal Criminal Police Office. Additionally, regarding the accused's membership-related acts of participation, namely his participation in combat operations, the urgent suspicion arises from his admitted information when the police questioned him on 17 November 2016. The information given by the accused is presumed credible. The court also stated that authorities have evidence that shows the accused armed with a Kalashnikov and round belt attached.[208]

The Attorney General clarified in the charges against the accused of the membership of the foreign terrorist group "Taliban" from 24 April 2017, that the accused supposedly joined the Taliban in Afghanistan after an argument with his brother at the beginning of 2014 at the latest. In line with the statements of the court order, the accused presumably received military training for the next six months from the Taliban, where they taught him how to use a fully automatic rapid-fire rifle and a machine gun, among other things. After his training, he then stayed in Pakistan for several months as instructed. The charges stated that he presumably fought in a Taliban combat unit operating in Baghlan province in Afghanistan, where he received a rapid-fire rifle "Kalashnikov" and associated ammunition. The accused was supposedly involved in at least one attack on an Afghan police station, a national army post, and a convoy of foreign and domestic troops. In those attacks, the accused and his fellow

[208] BGH, *StB 40/16*, para. 13-14.

combatants presumably fired numerous shots at the opposing police officers and members of the military. However, at the time of the charges, it was not yet known whether those attacked were injured or killed. The charges also mentioned that the accused used a night watch to escape when he heard that members of his unit were planning to rape a boy. In 2015 the accused presumably left Afghanistan.[209]

For the court, the above-mentioned gives reason for a high probability that the accused is in violation of being a member of a terrorist organization abroad, punishable according to § 129a Paragraph 1 No. 1, § 129b Paragraph 1 Clauses 1 and 2 of the Criminal Code, §§ 1, 3 JGG.[210]

Regarding the young age of the accused, the court stated the accused was responsible within the meaning of §§ 1, 3 JGG, since his 14th birthday on 22 May 2013. For the court, it can be assumed that according to his moral and intellectual development he was mature enough to recognize the injustice of his actions and act on this insight, at least since he returned to Afghanistan after his stay in Pakistan in 2014 and participated in combat missions there, in which he targeted people.[211] A news agency called "Rechtslupe," which broadcasts court decisions stated with the headline 'The 13-year-old Taliban' on 6 February 2017 that anyone participating in a terrorist organization abroad and incapable of crime […] is criminally responsible from the 14th birthday onwards within the meaning of §§ 1 and 3 JGG.[212]

In the appeal against a remand in custody, the defense counsel of Abdullah S.K. asked the court concerning the political situation in Afghanistan and the fact that he may have been only 13 years old when he joined the Taliban not to hold the accused criminally responsible.[213] The court replied that it is out of question to discuss the criminal responsibility of the accused 'as part of an overall assessment.' In contrast to the view represented by the defense lawyer, the court stated that it is irrelevant in this context that, according to Article 38, Paragraph 3, Clause 1 of the UN Convention on the Rights of the Child, the contracting states "distance themselves" from recruiting persons who do not have yet reached the age of fifteen into their armed forces. Further, the court stated that this instance leaves the responsibility of the accused unaffected, as well as the fact that the person involved in international or

[209] Der Generalbundesanwalt beim Bundesgerichtshof (The Attorney General at the Federal Court of Justice), Charges against a suspected member of the foreign terrorist group "Taliban", 24 April 2017.
[210] BGH, *StB 40/16*, para. 15.
[211] Ibid., para. 16.
[212] Rechtslupe, *Der 13 jährige Taliban (the 13-year-old Taliban)*, 6 February 2017, https://www.rechtslupe.de/strafrecht/der-13jaehrige-taliban-3119353. [accessed 11 August 2020]
[213] BGH, *StB 40/16*, para. 17.

non-international armed conflicts commits war crimes when recruiting or using children within the meaning of Art. 8 (2) (b) xxvi, Art. 8 (2) (e) vii ICC Statute and Section 8 para. 1 No. 5 Code of Crimes Against International Law.[214] Concerning the justification of the pretrial detention of the accused, the court stated that 'the urgent suspicion of membership in a non-European terrorist organization bears the persistence of pretrial detention.'[215]

The court further stated that in the event of his conviction, the accused could expect a juvenile sentence in no small measure, even with the consideration of his minor age and the specific circumstances to be assessed to alleviate the punishment, under which he joined the Taliban. For the court, the incentive to take flight is not precluded by sufficient circumstances preventing flight. This instance was justified by the notion that the accused had no personal or solid social ties in Germany. Therefore, the court expected the accused to avoid criminal proceedings if he was released. For the court, the circumstances mentioned above justify the danger that the punishment for the crime could be thwarted without further detention of the accused. The duration of the pretrial detention, even with the restrictive interpretation of the regulation, was justified with the liability of serious crimes, according to § 112 para. 3 Code of Criminal Procedure[216].'[217]

Regarding alternatives to detention, the court stated that a provisional order on education or other measures (§ 72 (1) sentences 1 and 3, § 71 JGG) are not suitable for fulfilling the purpose of pretrial detention in the same way (§ 72 (4) JGG). The decision not to consider the issuance of a placement order under § 71 (2) JGG or an exemption from detention linked to conditions under § 116 of the Code of Criminal Procedure, § 2 (2) JGG was justified with a communication from the municipal youth welfare office S., which stated that it is not possible to accommodate the accused in a youth welfare home.

In addition, the court justified its decision not to apply those alternative measures since they require the certainty that the person concerned is accessible to them and that it could not be assumed with certainty with regard to the accused at any rate at the present time. The court stated further that youth welfare

[214] Völkerstrafgesetzbuch (VStGB - German Code of Crimes Against International Law), 26 June 2002; Rechtslupe, *Der 13 jährige Taliban*.
[215] BGH, *StB 40/16*, para. 18.
[216] Strafprozessordnung (StPO - German Code of Criminal Procedure).
[217] BGH, *StB 40/16*, para. 21.

homes are not in the same way escape-proof as juvenile detention centers. The court did not find the further execution of pretrial detention disproportionate concerning the importance of the matter and the punishment to be expected in the event of a conviction, even with the consideration of the special burdens the detention entails for the accused (§ 120 (1) sentence 1 StPO, § 72 (1) sentence 2 JGG).[218]

The case of Omaid N.

The accused, Omaid N., was provisionally arrested on 18 May 2017. The investigative judge of the Federal Court of Justice of Germany released an arrest warrant on 19 May 2017 (5 BGs 149/17), which was replaced by the extended arrest warrant of 20 June 2017 (5 BGs 166/17). The arrest warrant relates to the allegation that the accused killed jointly with others in connection with a non-international armed conflict a person protected under international humanitarian law in 2013 when he was a juvenile with the required maturity of understanding. Further, he is accused of being a member of the terrorist organization "Taliban" in Afghanistan, exercising actual violence over a weapon of war and, together with others, killing a person for low motives, punishable under § 8 para. 1 No. 1 Code of Crimes Against International Law, § 129a para. 1 No. 1, § 129b para. 1 Sentence 1, Sentence 2, §§ 211, 25 Paragraph 2, § 52 Criminal Code, § 22a (1) No. 6 War Weapons Control Act[219], §§ 1, 3 Juvenile Court Act.[220]

On 10 November 2017, the Attorney General brought charges against the accused in front of the Higher Regional Court Munich for the allegations contained in the arrest warrant. With a decision by the Higher Regional Court Munich on 15 November 2017, the court considered the pretrial detention as necessary.[221] On 11 January 2018, the third Third Criminal Division of the Federal Court of Justice dismissed the accused's complaint against the arrest warrant issued by the Federal Supreme Court's judge on 17 November 2017, after hearing the Attorney General, the complainant and his defense lawyer.[222] The court also extended the pretrial detention of another six months. On January 18th, 2018, the accused was indicted for war crime and murder committed as a member of the Taliban and

[218] Ibid. para. 22.
[219] Cf. f.n. 203.
[220] Bundesgerichtshof (BGH, Federal Court of Justice of Germany), *AK 74/17*, Order of the Court, Third Criminal Division, Jan. 11th. 2018, para. 1.
[221] Ibid., para. 2.
[222] Ibid.

violation of the German gun control legislation. Since then, Omaid N. remained in custody pending his trial.[223]

The court states that during the time of the crime there was a non-international armed conflict in Afghanistan between the Taliban and various other non-state armed groups on one side and the Afghan government armed forces, supported by the troops of the "International Security Assistance Force" (ISAF), on the other side. The Federal Court of Justice of Germany defined the "Taliban" relatively similar than before with the addition of naming the Taliban a foreign terrorist organization. Furthermore, the court described that they have set themselves the goal - guided by radical religious beliefs - to overthrow the current Government […].[224]

Regarding the case of Omaid N., investigations found up until the decision by the Federal Court of Justice that the accused presumably joined the Taliban in Afghanistan, incorporating their association's life and structures, at a time that was not precisely determinable but by spring 2013 at the latest. According to the court, he was trained at a Koran school in the village of Parsa/ Paja in the province of Parwan and assumedly belonged to the local Taliban subgroup, which was led by at least three leaders. The court stated that the accused worked actively with the leaders of the group on recruitment and followed their instructions. In the evening hours of an unspecified day at the beginning of 2013, the accused presumably was led into a forest near the town of Parsa/ Paja by a leader of the Taliban group together with other "students" from the Koran school. It is described that other leaders of the group were waiting with a police officer, who was around 24 years old and tied to a tree. According to the court, first the leaders and then the accused, who also presumably wanted revenge for the death of a friend, and five to six other group members, attacked the police officer's head with wood slats to kill him. The accused allegedly hit at least twice with a wood slat. He then received an AK 47 (Kalashnikov) rapid-fire rifle from one of the leaders. In addition, the accused allegedly shot the already motionless police officer with a trigger that triggered several shots and hit him above the chest at the leader's command. The court stated that either the police officer was killed by the bullets or by the previous slashing of the wood slats. After returning to the Koran school, the accused was presumably taken with other group members to a basement room in which weapons and vests filled with explosives were found. According to the court, two of the leaders asked the accused to kill more

[223] TRIAL International, *Omaid N.*, last modified: 15 July 2020, https://trialinternational.org/latest-post/omaid-n/. [accessed 11 August 2020]
[224] Cf. f.n. 207; BGH, *AK 74/17*, para. 6-12.

people by bombing them. It is described that the accused was not ready for a suicide bombing and fled to the following night. With the help of smugglers, he came to Austria via Iran, Turkey, and Greece and further via the so-called Balkan route and reached Germany in November 2013.[225]

For the court, the urgent suspicion of offense[226] is based on the evidence listed in the annex to the indictment of 3 November 2017. With regard to the terrorist association of the Taliban, it is based in particular on the relevant reports by the Federal Criminal Police Office and the expert opinion of Dr. M. of 19 March 2017. Concerning the accused's membership in the Taliban Association and his acts of participation, the urgent suspicion arises from his - later partially revoked – confessing testimony of 18 May 2017. He repeated and supplemented those statements in his hearing of the application in front of the Federal Office for Migration and Refugees within the meaning of §25 of the German Asylum Act. They are confirmed in essential points by the records, which the accused had secured of his stay with the Taliban.

In addition, for the court, the above-mentioned gives reason for a high probability that the accused, through the same act, killed jointly a person, who was protected under international humanitarian law, with others in connection with a non-international armed conflict, was a member of the foreign terrorist organization "Taliban" and exercised actual force over a weapon of war (§ 8 para. 1 No. 1 Code of Crimes Against International Law, § 129a para. 1 No. 1, § 129b para. 1 Sentence 1, Sentence 2, §§ 211, 25 Paragraph 2, § 52 Criminal Code, § 22a (1) No. 6 War Weapons Control Act, §§ 1, 3 Juvenile Court Act).

Concerning the justification of the pretrial detention and the detention during the trial of Omaid N., the court stated that there was a reason for the risk of flight (§ 112 (2) No. 2 StPO in conjunction with § 2 (2), § 72 JGG). According to the court, in the event of a conviction, the accused may face a substantial youth sentence even with the consideration of his age and the circumstances under which he joined the Taliban, which have to be assessed as mitigating punishments. Furthermore, for the court, the resulting high incentive to flee does not conflict with sufficiently strong personal and social ties of the accused, which justify the assumption that he would face the proceedings in Germany. In addition, the court mentioned that Omaid N. is charged with the commission of a serious crime (§ 112 Abs. 3 StPO). For

[225] BGH, *AK 74/17*, para. 13-16.
[226] StPO, § 112 (1) sentence 1.

the court, a provisional order about education or other measures. (§ 72 (1) sentences 1 and 3, § 4, §71 JGG) are not suitable for fulfilling the purpose of pretrial detention in the same way. The court further stated that issuing a placement order under § 71 (2) of the JGG or exemption from imprisonment subject to conditions under § 116 of the Code of Criminal Procedure and § 2 (2) of the JGG are out of the question. The court justified its decision not to apply these measures since they require the certainty that the person concerned is accessible to them and that it cannot be assumed concerning the accused who has grown up in the meantime. According to the court, youth welfare homes are also not as safe from taking flight as juvenile detention centers.[227]

Omaid N. was supposedly born in 1997 in Afghanistan and allegedly joined the terrorist organization "Taliban" in early 2013[228], concluding that the accused was 16 years old when he "joined" the Taliban. The court did not see any grounds for justification or exclusion of criminal responsibility. The court also stated that there are no indications that the accused was not mature enough, after his moral and intellectual development, to recognize the wrong of his actions and to act according to this insight (§ 3 sentence 1 JGG).[229]

5.2 Children associated with Non-State Armed Groups such as the Taliban in Afghanistan

In Afghanistan, children were recruited explicitly for the Soviet-backed Government during the 1980s[230] and also used in Afghanistan's civil war after the Soviet Union's withdrawal from Afghanistan in 1989. In the years after the September 11th terrorist attacks of 2001, the Taliban and numerous armed militant groups challenged the Afghan Government, which was set in place in 2006, with multiple attacks and also recruited and used children for them. With the ongoing conflict within the country, the militia groups were able to "continue to operate in many parts of Afghanistan, many of whom use children in some way."[231] The recruitment of children constitutes a variety of reasons. From

[227] Ibid., para. 24-25.
[228] TRIAL International, *Omaid N.*
[229] BGH, *AK 74/17*, para. 20.
[230] The Government founded the Democratic Youth Organization, which recruited children as spies and soldiers for the military.
[231] Tallon, *A Special Report on Child Soldiers in Afghanistan*, NAOC, 20 June 2019, http://natoassociation.ca/a-special-report-on-child-soldiers-in-afghanistan/. [accessed 11 August 2020]

a psychological perspective, children are easier to "manipulate, scare, and torment into committing acts of grave violence."[232]

Even though non-state armed groups such as the Taliban claim that they do not recruit children who have not achieved 'mental and physical maturity,' a report by Human Rights Watch found that some children who were recruited by the Taliban are 13 years old or even younger.[233] Furthermore, in its report from January 13th, 2019, The New York Times interviewed some of the boys that where held in the Badam Bagh juvenile center in Kabul, of whom most were charged with planting, carrying or wearing bombs and accused of trying to become suicide bombers. The report found that "nearly all of the boys arrested on charges related to suicide attacks were educated in madrasas, conservative religious schools that can serve as recruiting and indoctrination centers for suicide bombers."[234] This way, the Taliban recruit children under the disguise of education. Patricia Grossman[235] stated that "[t]he Taliban's apparent strategy to throw increasing numbers of children into battle is as cynical and cruel as it is unlawful." Moreover, she expressed that "Afghan children should be at school and at home with their parents, not exploited as cannon fodder for the Taliban insurgency."[236] Another instance, which deserves attention, is the fact that the recruitment and use of children by terrorist and violent extremist groups often entail serious forms of violence against children. Violence against children can substantially influence the child's personal, intellectual and social development and even its relationship towards committing future crimes; concluding, that exposure to such violence does not only have extensive consequences for the affected children but also for society.[237]

The Afghan Government ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict in 2003.[238] In 2014, it further endorsed a 'Road Map Towards Compliance' to end and prevent the recruitment of children in the Afghan national security

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[232] Ibid.
[233] Human Rights Watch (HRW), *Afghanistan: Taliban Child Soldier Recruitment Surges*, 17 February 2016, https://www.hrw.org/news/2016/02/17/afghanistan-taliban-child-soldier-recruitment-surges.
[234] The New York Times, *The Taliban Made Me Fight: What to Do With Child Recruits After They Serve Time?*, 13 January 2019, https://www.nytimes.com/2019/01/13/world/asia/afghanistan-children-suicide-bombers.html. [accessed 11 August 2020]
[235] Former Senior Researcher for South Asia and now associate director for the Asia division at Human Rights Watch, https://www.hrw.org/about/people/patricia-gossman. [accessed 11 August 2020]
[236] HRW, *Afghanistan: Taliban Child Soldier Recruitment Surges*.
[237] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 16.
[238] United Nations Treaty Collection, Chapter IV, 11.b., https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en. [accessed 11 August 2020]

forces. The Road Map entailed 15 measures "to fully implement an Action Plan signed with the UN in 2011."[239] Programs such as the United Nations Assistance Mission in Afghanistan (UNAMA) work actively on the "coordination of efforts to support the Government of Afghanistan to implement the Action Plan."[240] These actions represent significant milestones in preventing the recruitment and use of children in armed forces; however, the commitments and actions by the Afghan Government do not prevent the recruitment and use of children by non-state actors in the country.[241]

The Annual Report of the Secretary-General on Children and Armed Conflict of 20 June 2019, and 9 June 2020, listed in Annex I parties in Afghanistan that have not put in place measures during the reporting period from January to December 2018 and 2019 to improve the protection of children. The list included four non-state actors called the Haqqani Network, the Hizb-i Islami of Gulbuddin Hekmatyar, the Islamic State in Iraq and the Levant-Khorasan Province, and the Taliban forces and affiliated groups.[242] The report of 2019 found that during the reporting period 46 cases of child soldier recruitment were verified, of which some were as young as eight years old and "used for combat, at checkpoints, to plant improvised explosive devices, to carry out suicide attacks or other violations, or for sexual exploitation. At least 22 boys were killed during their association. Of those violations, 67 percent of the instances of recruitment and use were attributed to armed groups (31)." Eleven children were recruited and used by the Taliban.[243] The report of 2020 found that during the reporting period, "a total of 64 boys, some as young as 10, were recruited and used by the Taliban (58)" for combat, support roles, and sexual purposes.[244]

Afghanistan has a history of armed forces and also non-state actors recruiting and using children for armed conflict. As much as the Afghan Government tries to prevent child recruitment, it is challenging

[239] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *UN Welcomes Afghan Government's Endorsement of Road Map to End Recruitment and Use of Children in National Security Forces*, 1 August 2014, https://childrenandarmedconflict.un.org/2014/08/un-welcomes-afghan-governments-endorsement-of-road-map/. [accessed 11 August 2020]
[240] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Twenty Years to better protect Children Affected by Conflic*t, 2016, p.36.
[241] Kona, Child Soldiers in Afghanistan, *IPCS Special Report No. 44,* June 2007, p. 2.
[242] Report of the Secretary General, Children and armed conflict, A/73/907-S/2019/509, 20 June 20 2019, Annex I, A., parties in Afghanistan, https://www.un.org/ga/search/view_doc.asp?symbol=S/2019/509&Lang=E&Area=UNDOC [accessed 11 August 2020]; Report of the Secretary General, Children and armed conflict, A/74/845-S/2020/525, 9 June 2020, Annex I, A., parties in Afghanistan, https://reliefweb.int/report/world/children-and-armed-conflict-report-secretary-general-a74845-s2020525. [accessed 11 August 2020]
[243] Report of the Secretary General, Children and armed conflict, A/73/907-S/2019/509, 2019, para. 18.
[244] Report of the Secretary General, Children and armed conflict, A/74/845-S/2020/525, 2020, para. 17.

to do so in regard to non-state armed groups. The verified numbers by the reports of the Secretary-General indicate that non-state actors continue to recruit and use children. There is also the chance that the numbers of children associated with non-state armed groups could be a lot higher than the verified numbers show. Moreover, terrorist groups, such as the Taliban, use children for severe crimes and atrocities, do not consider the young ages of their recruitees nor the negative consequences for those children. In conclusion, the situation in Afghanistan still creates conditions in which children get exploited, used, and mistreated at very young ages by terrorist or violent extremist groups, such as the Taliban.

5.3 Application of International Law in Germany

Germany signed the CRC on 26 January 1990 and ratified it on 6 March 1992.[245] Since 5 April 1992, the CRC came into force in Germany. However, Germany also listed reservations in a declaration upon ratification of the CRC. One of Germany's reservations was the "foreigner reservation." With it, Germany intended to avoid any obligations resulting from the Convention towards foreign children.[246] Another reservation stated that the Convention merely established state obligations and is also not directly applicable internally. With this declaration, the CRC had played almost no role in German legal practice in the past.[247] After diverse and persistent criticism - including from the UN Committee on the Rights of the Child - the German Government notified the Secretary-General on November 1st, 2010 that it had decided to withdraw its declaration made upon ratification in line with Art. 3 (2) CRC to ensure the well-being of the child. For almost a decade, Germany did not have any reservations towards the CRC.

With the withdrawal of its declaration, the German Government also declared that domestically the Convention does not apply directly and that the Convention's obligations under international law are met with national law conforming with the Convention.[248] By setting a domestic law enforcement order, the adoption of contract law in Germany gives the content of the international treaty validity in the German legal area. In addition, the international treaty is also ranked within the German judicial

[245] UN Treaties Collection, Chapter IV, 11., https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en. [accessed 11 August 2020]
[246] Cremer, Die UN-Kinderrechtskonvention, *Deutsches Institut für Menschenrechte*, June 2011, p. 15.
[247] Ibid.
[248] See UN Treaties Collection, Chapter IV, 11., Declarations and Reservations, f.n. 36.

order. In this way, the CRC enjoys the rank of simple federal law in Germany since April 5th, 1992.[249] Under German constitutional law, the German law enforcement bodies, the courts, and the executive are therefore bound by the provisions of the international treaty.[250]

5.4 Discussion

5.4.1 Assessment of Cases

As a positive, the court applied for both cases juvenile criminal law. The individual Abdullah S.K. was between the ages of 13 and 15 years old in the time of the accused terrorism-related offense. In contrast, the individual Omaid N. was 16 or 17 years old in the time of the accused terrorism-related offense (in the year 2013). Therefore, juvenile criminal law is applicable in both cases in line with § 3 JGG. Moreover, in both cases, the accused were under the age of eighteen and, therefore, children during recruitment.

The Case of Abdullah S.K.

As previously stated, the treatment of children recruited by terrorist or violent extremist groups primarily as victims does not grant these children immunity from criminal prosecution for acts committed during the time of the association with these groups. Therefore, the argument of the defense counsel that the accused should not be held criminally responsible because States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces in line with Art. 38 (3) CRC and the circumstance that the accused was only 13 years of age when he was recruited is indefensible. The accused is associated with the Taliban, a foreign terrorist organization, which the court also defined as such, and not with armed forces. Moreover, the armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen years,[251] which sets the age limit to eighteen years and not fifteen years. However, the court failed to take the circumstance that the accused was recruited at a very young age by a terrorist organization, more into consideration. It did not explain in which way the accused was mature enough to recognize the injustice of his actions. Furthermore, the court did not acknowledge the young age of the accused when he "joined" the Taliban and did not consider the

[249] Cremer, Die UN-Kinderrechtskonvention, p. 16.
[250] Ibid.; German Constitution, Art. 20 (3).
[251] OPAC, Art. 4 (1).

instance whether or not it is influential on the moral and intellectual development of the accused. The court simply just cited § 3 of the Juvenile Court Act. Moreover, it did not investigate if the individual may have been a victim of violence within the terrorist organization and did not consider the young age in any part of the order. It was described in the statement of the Attorney General of 24 April 2017, that the accused fled from the Taliban because other members of the group planned to rape a boy, which gives reason to believe that there were cases of sexual violence within the group. The experience of the accused and the fear of being a victim of sexual violence as well should have definitely been considered in the next court order of the Federal Court of Justice of 1 June 2017.

Instead, the court stated that the accused could expect a juvenile sentence in no small measure in the event of his conviction. This punitive approach is contrary to the one which was discussed earlier and stigmatizes the accused based on his association with a terrorist organization. The court did not mention any diversion or detention alternatives and did not focus on the rehabilitation and reintegration of the accused in line with Art. 40 (1) CRC.

Furthermore, the individual Abdullah S.K. was both in the preliminary and criminal proceedings accused of being a member of a terrorist organization abroad. There is no requirement in the universal counter-terrorism instruments to criminalize association or membership in a terrorist group.[252] The Paris Principles state that children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership in those forces or groups.[253] Contrary to the mentioned above and the fact that States should refrain from charging and prosecuting children associated with terrorist or violent extremist groups for mere association with those groups in particular in any such cases where the child's association with the terrorist or violent extremist group is comparable to the situation of a child soldier who is associated with an armed force or armed group[254] the German authorities arrested, detained, and prosecuted the individual Abdullah S.K. The accused was at the time of recruitment, most likely 13 years old. Under any age limit, the individual should not have been recruited this young and can be subsumed under the definition of a child soldier.

[252] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 72 et seq.
[253] 2007 Paris Principles, para. 8.7.
[254] Cf. UN Global Study, A/74/136, p. 652, Recommendations, para. 2.; UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 80.

In addition, and as previously stated, there should be no distinction between voluntary and forced recruitment of children into armed forces and groups. However, the court explicitly used the word 'joined,'[255] which is often perceived as a voluntary choice, places blame, and at the same time, even more stigmatization on the child. Instead, the court could have considered the power imbalance between the accused, a 13-year-old child, and the Taliban, which represent an organized terrorist organization with the focus on shared criminal objectives. In this regard, it would have been appropriate to use the term 'recruitment' and not the voluntary-related term of 'joining' since it treats the accused primarily as a victim instead of a perpetrator and allows to blame the recruiters instead of the child.

Apart from the fact that States should refrain from charging and prosecuting children associated with terrorist or violent extremist groups for mere association with those groups, the most critical point of this analysis might be the length of the pretrial detention of the accused. Art. 37 (b) CRC states that arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Abdullah S.K. was arrested on 17 November 2016. The court order by the Federal Court of Justice of Germany of 1 June 2017, extended the pretrial detention period of another six months, amounting to more than a year and not even considering the time of detention during the main proceedings. A pretrial detention period of one year cannot be considered as 'the shortest period of time' and also not interpreted as an action in the best interests of the child in line with Art. 3 (1) CRC.

Furthermore, Art. 40 (2) (b) (iii) of the CRC guarantees to have the matter determined without delay […] for every child alleged as or accused of having infringed the penal law.[256] The German Juvenile Court Act also includes a provision that 'the proceedings must be carried out at a particular speed if a young person is in pretrial detention.'[257] It is highly questionable if the proceedings have been carried out at a particular speed after over one year of pretrial detention. Although the court did mention the alternatives to detention, it did not fulfill the requirements of explaining why its purpose cannot be achieved through a provisional order on education or other measures. It also stated that the particular burdens of the penal system for young people are taken into account but, yet again, did not explain in which way it was considering it.

[255] The German 'anschließen' also means 'to follow', 'to align oneself [with]'.
[256] CRC, Art. 40 (2) (iii).
[257] JGG, § 72 (5).

In conclusion, it is highly questionable if the court did consider the provisions of the CRC and acted in the best interests of the then 17-year-old accused Abdullah S.K.

The Case of Omaid N.

The case of Omaid N. is in certain ways very different from the one of Abdullah S.K. When Omaid N. was arrested, the arrest warrant and the charges, later on, did not only state that he was accused of being a member of a terrorist organization such as the Taliban, but that he also may have committed a war crime in the context of a non-international armed conflict in Afghanistan. The court order described in detail the events of the accused war crime that may have happened in the year of 2013.

Regarding the previously stated, it is questionable why the German domestic courts have jurisdiction over persons under the age of eighteen at the time of the alleged commission of crime over this particular case. Still, the ICC does not, even though the court is set up to prosecute crimes such as war crimes. It is further questionable if this specific trial is in line with the CRC and the best interests of the child. As mentioned above, trials do have a grave impact on the accused. They may force these individuals to re-live traumas and experiences, which may influence the individual's psychological healing, reintegration, and rehabilitation. On a positive note, the accused was examined by an expert, Dr. M., to determine the psychological state of the accused in line with § 3 JGG. However, the court did not consider the effects of eventual trauma or violence regarding the accused's experiences with the foreign terrorist organization. Especially not the fact that the accused was told to participate in a terrorist bombing and risk his own life. Moreover, the court did not mention the fact that the accused fled in the same year he was recruited and did not consider the reasons why the accused wanted to escape the situation. Being told to become a suicide bomber is most likely a reason to experience some sort of trauma, distress, and fear. Regardless of his teenage age, Omaid N. was still a child when he was recruited and used by the Taliban.[258]

In addition, the court described the recruitment of the accused with the word 'joining' yet again. It did not ask for the reasons why the accused 'joined' the Taliban. Additionally, although the court did

[258] CRC, Art. 1.

mention the young age of the accused and the circumstances when he "joined" the Taliban, the court did not explain why diversion measures and detention alternatives were not an option.

The duration of the pretrial detention of Omaid N. might be, yet again, the most severe circumstance of this case. The accused was arrested on 18 May 2017. According to TRIAL International, which was last updated on 15 July 2020, Omaid N. still remains in custody pending his trial.[259] Therefore, the detention period is lasting for over three years now. Contrary to Art. 37 (b), the detention of the accused is not used for the shortest appropriate period of time. The accused was 20 years old at the time of the arrest; however, he is still prosecuted for crimes he allegedly committed while he was 16 years old and, therefore, still a child. Additionally, the court stated that there was a non-international armed conflict during the time of the alleged crime. Thus, the court could have also considered Art. 6 (5) of AP II[260] which states that at the end of hostilities, the authorities in power shall endeavor 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, whether they are interned or detained. It is questionable if the court did consider 'to grant the broadest possible amnesty' in the case of Omaid N.
In conclusion, the court did not consider the circumstances of the recruitment of both accused individuals. The court did not consider the fact that the accused might have endured traumatic experiences or violence during their time of association with the Taliban, nor the fact that there might have been a possibility that both individuals were recruited and forced to commit crimes against their will. In both cases, the court assumed that the individuals "joined" the Taliban voluntarily and primarily treated the accused in a punitive, non-child friendly approach as perpetrators rather than victims of a terrorist group. Furthermore, it is very questionable if the long durations of pretrial detention in both cases can be interpreted in the best interests of the child and in line with Art. 37 (b) CRC.

5.4.2 Lack of Application of International Standards

The reason of the Federal Court of Justice of Germany for not fully applying the provisions of the CRC in both cases might constitute on a punitive approach regarding foreign individuals associated with terrorist groups and also the fact that Germany still had reservations regarding the application of the

[259] TRIAL International, Omaid N.
[260] Germany signed the Additional Protocol II to the 1949 Geneva Conventions on 23 December 1977 and ratified it on 14. February 1991.

provisions of the CRC for foreign children only ten years ago. In the last recent years, the courts were confronted with new cases that were not in the focus of the courts before. However, individuals such as Abdullah S.K. and Omaid N. still deserve a child-sensitive approach in line with the CRC.

To eliminate the punitive approach, the double standard within the international community towards children in conflict countries and children in non-conflict countries has to change. As previously stated, it is known that States "ignore or abandon established child rights standards, including the use of detention only as a measure of last resort, and the obligation to provide rehabilitation and reintegration assistance for children affected by armed conflict" for the argument of national security.[261] A child associated with a terrorist or violent extremist group in a non-conflict country deserves as much attention towards reintegration and rehabilitation as a child associated with terrorist or violent extremist groups in a conflict-country instead of being prosecuted and sentenced to prison as a terrorist, even though the experiences were similar.[262]

Furthermore, there has been no known case of a child soldier or child associated with a terrorist or violent extremist group who has been tried in front of an international tribunal. One could make the argument that if there is no international prosecution, the consequence should be that there also cannot be a domestic prosecution. If the standard of the CRC that measures have to be in the best interests of the child is equally applied everywhere, and if children are not getting prosecuted for their actions on the international level, they should not be prosecuted on the domestic level either. For example, the former president of Afghanistan, Mr. Karzai, pardoned as many as 24 boys ages eight to eighteen who had been accused of planning or attempting suicide attacks in the country in 2011. Before their release, Mr. Karzai talked to the individuals about their indoctrination, of which most reported to have been recruited by the Taliban. The former president called them "innocent children incited by the enemies of Afghanistan."[263] Whether or not countries like Germany agree with this approach, it still shows how crucial it is to talk about the recruitment and indoctrination of these children. Diversion programs, which are tailored to the characteristics of the child and offense committed with de-radicalization components, can be a compromise between the need of the protection of national security and the needs of children associated with terrorist or violent extremist groups.

[261] UN Global Study, A/74/136, p. 651.
[262] Ibid.
[263] The New York Times, *The Taliban Made Me Fight': What to Do With Child Recruits After They Serve Time?*.

5.4.3. Alternative Measures

The two German cases give reason for the assumption that the measures, the court has ordered, do not fulfill the provision of Art. 3 (1) CRC, hence that any action concerning children should primarily consider the best interests of the child. However, the court also stated that youth welfare homes are not in the same way escape-proof as juvenile detention centers. The analyzed cases might be a reason for the need of new specialized programs as part of diversion measures, that specifically deal with children associated with terrorist or violent extremist groups in a tailored and specific way, focus on reintegration and rehabilitation but also on de-radicalization. Those particular measures would also prevent excessive pretrial detention periods such as the one of Omaid N.

The CRC states that States Parties should seek the establishment of "measures for dealing with such children without resorting to judicial proceedings."[264] As previously mentioned, UN Security Council urged Member States in its Resolution 2427 "to consider non-judicial measures as alternatives to prosecution and detention that focus on rehabilitation and reintegration for children formerly associated with armed forces and armed groups […]."[265] In addition, the UN Secretary-General recommended in his report on children and armed conflict of 2020 "the adoption of a standardized referral system for the reintegration of children who have been separated from parties to conflict, released from detention and/or rejected from recruitment centres."[266]

The necessity of specific measures for children associated with terrorist or violent extremist groups also arises from the grave consequences if priority is not given to reintegration, rehabilitation, and de-radicalization. First, there is the danger of re-recruitment. In the analyzed cases, this could be an issue if the accused are legally sentenced to a juvenile sentence of at least two years or one year for one or more willful offenses against life. In this way, Germany could deport the individuals in both cases.[267] Re-recruitment by terrorist organizations like the Taliban is likely if the individuals are less likely to integrate back into their society, which could also constitute psychological problems. With no real perspective in their home country, young people can be drawn back into the war effort. Furthermore, no small number of children associated with terrorist or violent extremist groups suffer from post-

[264] CRC, Art. 40 (3) (b).
[265] UN Security Council, S/RES/2427, para. 21.
[266] Report of the Secretary-General, Children and armed conflict, A/74/845-S/2020/525, para. 26.
[267] AufenthG (German Residence Act), § 54 (1) No. 1, 1a.

traumatic stress disorder (PTSD) since they are exposed to conflict, violence, acts of abuse, and more stress generating factors. In this way, it is crucial to establish an individual case management approach that also includes specialized services for mental healthcare, which are essential for the rehabilitation and reintegration of these children. Concluding, that the recruitment of children "is a global atrocity and, in turn, a global responsibility." [268]

Additionally, it would be beneficial if criminal justice professionals would receive "specialized knowledge on the rights of children, expertise on violence against children and specific risks of secondary victimization within the justice system, risk factors and vulnerabilities, child-friendly attitudes and communication skills."[269] Criminal justice professionals might only have expertise regarding criminal law procedures for adults. If they do have specialized knowledge regarding juvenile criminal law, it might not be in combination with the expertise of children in armed conflict. Therefore, the "establishment of specialized units can improve expertise, clarify focal points, facilitate coordination with other actors responsible for the protection and support of children, and enhance cost-effectiveness."[270]

In conclusion, there is support and a certain necessity for the idea of alternative measures instead of deprivation of liberty in line with the CRC. Moreover, the reintegration focused treatment should also be applied to children associated with these groups, who are currently not in the conflict-country anymore. Measures without resorting to judicial proceedings can be in the form of diversion, which is applicable at any stage of the case, e.g., at the investigation stage, the office of the state's attorney can order a diversion measure instead of criminal proceedings or pretrial detention. For the proper application of alternative measures to deprivation of liberty, professionals should have available specialized knowledge regarding children's rights and also the specific nuances regarding children affected by armed conflict.

[268] Tallon, A Special Report on Child Soldiers in Afghanistan.
[269] UNODC, Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups, p. 20.
[270] Ibid.

6. IMPLICATIONS AND CONCLUSIONS

In the cases, such as the ones previously analyzed, it is crucial to develop a child-sensitive approach regarding children associated with and recruited by terrorist or violent extremist groups. Alternatives to deprivation of liberty, such as diversion measures, are a crucial part of this approach. The assumption that a punitive approach is necessary only blames the children, who have endured traumatic experiences and not the recruiters, who committed the crime of recruiting children. As mentioned at the beginning of this thesis, the approach has to change from 'children with arms' to 'children who are affected by arms.' Under the CRC, a child is every person under the age of eighteen. The prosecution of children under the age of eighteen is, therefore, inconsistent with the provision of Art. 3 (1) CRC. It is further inconsistent that the ICC does not, but domestic criminal courts have jurisdiction over persons under the age of eighteen at the time of the alleged commission of crime.

The best approach regarding children associated with and recruited by terrorist or violent extremist groups might be a universal age limit for the criminal responsibility of children at eighteen years for serious crimes arising from armed conflict. In this way, the international community recognizes the difference between adults and children or adolescents associated with these groups and their state of the different psychological and moral development. However, in practice, this approach will most likely not find much approval since the age limit varies from State to State. Therefore, it is crucial to consider alternatives, especially in cases that concern a State's national security and safety. One alternative is diversion measures that create a balance between the individual's but also society's needs by varying degrees of monitoring and accountability. In this way, States respect, protect and fulfill individual human rights, especially children's rights.

There also seems to be a double standard regarding children recruited by non-state armed forces and armed groups and children recruited by terrorist or violent extremist groups. In most cases, the recruitment and the experience with armed conflict are in the same way traumatizing and connected with violence. Nevertheless, States do not apply child rights standards, such as the use of detention only as a measure of last resort and for the shortest appropriate period of time, in the cases of children associated with and recruited by terrorist or violent extremist groups with the argument of national security. The hypocrisy of wanting to help children in conflict countries and portraying such children as victims of severe crimes but detaining children who are connected to non-state armed groups such as terrorist groups should be avoided and eliminated. Regarding juvenile justice, counter-terrorism, and

children, it is necessary to treat all children associated with armed forces, armed groups, and non-state armed groups primarily as victims of serious crimes instead of perpetrators or security threats.

It has been a decade since Germany withdrew from its reservations concerning the CRC. However, the legal practice before did not consider the application of the CRC towards foreign children. In this regard, a lot still has to change. The case analysis showed that practitioners need specialized knowledge concerning the cases of foreign children, who are associated with and recruited by terrorist or violent extremist groups and accused of terrorism-related offenses. In this way, the German professionals need to develop a child-sensitive approach towards foreign children, that will not allow excessive pretrial detention periods like the ones of the analyzed cases. The German domestic, juvenile judges have the option to apply diversion measures under the German Juvenile Court Act. In this way, Germany should also develop a specific diversion measure that can be applied in the cases of children, who are associated with and recruited by terrorist or violent extremist groups and accused of terrorism-related offenses. Those diversion programs should focus on the successful reintegration of children by providing psychological support, disengagement and de-radicalization components, educational elements, and vocational training. Reintegration programs, as such, provide those individuals with the opportunity to find a way to somewhat normal life and back into their old or a new community in non-conflict countries such as Germany.

The long-term goal regarding the recruitment and exploitation of children by terrorist and violent extremist groups is that there will not be any recruitment of children anymore. In this regard, it is necessary to ensure a wide-ranging prohibition of child recruitment. One part of the prevention measures would include the consensus that the 'recruitment of children' considers in a non-discriminatory way all children under the age of eighteen regardless of their association to armed groups, armed forces, terrorist or violent extremist groups, and the question if the recruitment process was compulsory or voluntary. With this approach, the blame is primarily put on the recruiters and the crimes they committed and not on the affected child and avoids stigmatization in general.

The sad reality is that conflict is never in the best interest of the child.[271] However, if children are confronted with the consequences of armed conflict and with the justice system, it is crucial to apply measures that fulfill the provision of Art. 3 (1) CRC. States such as Germany already have the tools for

[271] Bosch, Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, p. 364.

diversion and non-judicial measures. A specific measure that is explicitly designed for children associated with terrorist or violent extremist groups allows to confront the experienced trauma, and focuses on reintegration, rehabilitation and also de-radicalization of the affected child, symbolizes that those children are given a chance by not treating them as perpetrators but as victims of terrorists or violent extremists.

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