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Childhood  
and  
Children's Rights

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*Including a case study of the practice of child  
combatants in Rwanda and the Netherlands*

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Child

Your clear eye is the one absolute beautiful thing.  
I want to fill it with color and ducks,  
The zoo of the new

Whose names you meditate  
April snowdrop, Indian pipe,  
Little

Stalk without wrinkle,  
Pool in which images  
Should be grand and classical

Not this troublous  
Wringing of hands, this dark  
Ceiling without a star.

- Sylvia Plath

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# Introduction

In philosophy, historically, much attention has been given to the central question of philosophical anthropology, namely, ‘*what constitutes a human being?*’. However, it seems that the answers to this question are in fact answers to the question ‘what constitutes the adult human being?’, or even ‘what constitutes the adult, male human being?’. In discussing this question, an important group of human beings has often been left out, which currently consists of more than 25% of the world’s population, and this is precisely the group on which I want to focus: children.<sup>1</sup> Studies in philosophy, when discussing children, focus on education - on how to raise the child to become the full human being that was formulated in answer to the first question. The question ‘*what constitutes a child?*’ has been disregarded, by philosophers hurrying on to give an account of the human being (adult) they expect or wish everyone to be (or: become).

I personally first arrived at this fundamental question after I saw a documentary featuring L.Gen. Roméo Dallaire and his battle against the practice of child combatants.<sup>23</sup> This documentary, and the speech of L.Gen. Dallaire who was present at the screening of the film, were both shocking and impressive. I had never realized that child combatants are not just kids carrying guns, but include children who are being used by armed forces as sex slaves, spies and pack donkeys. As a philosopher, contemplating the practice of child combatants and children’s rights relating to the issue, I realized that the central question to this issue is the question of the child. What is “a child”? What does “childhood” mean? Is the concept of childhood a culturally and

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<sup>1</sup>In 2013, 26% of the world’s population is <15 years: [http://www.prb.org/pdf13/2013-population-data-sheet\\_eng.pdf](http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf)

<sup>2</sup>“Fight Like Soldiers, Die Like Children” (2012)

<sup>3</sup>In 21<sup>st</sup> century literature on child soldiers, these children are generally referred to as “child combatants” rather than child soldiers, since this term is clearer on including any child that is part of an armed force. This will be the term that I will employ in this thesis.

temporally bound concept, or is it a universal, timeless fact (as international law seems to claim)? How are children different from adults and where do we draw a line, if there even is one?

The uncertainty on the meaning of the concept of childhood is reflected in international law. For example in the 1989 Conventions on the Rights of the Child, “a child” is defined as every human being below the age of eighteen years, ‘unless under the law applicable to the child, majority is attained earlier’ (article 1). Also, the child has the right to be ‘protected from [...] performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’ (article 32). But then specifically on the subject of child combatants, the convention states that ‘State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces (article 38). Here an important opportunity lies for a socio-politically relevant philosophical research question.

So the main question for the current research project is ‘*What is the meaning of the concept of childhood and how does it relate to children’s rights?*’. To find answers I have performed traditional literature research, also I have travelled through Rwanda and The Netherlands, to ask people (both from the military and “ordinary” people) what they think is the meaning of the concept (see attachment 4: methodology). The idea to do field research originated when speaking to L.Gen. Dallaire, who advised me to ‘go and get my boots dirty’. This was a worthy advise; not only did I gain a great deal of interesting input for thinking about the concept of childhood, but also by investigating different legal/social cultures by means of experience and conversations, I developed a new and more profound understanding of international law, and understanding that I would never have reached if I had written the whole thesis solely sitting behind a desk in Amsterdam.

In the first part of the current research I will focus on trying to find a meaning of the concept of childhood. I will look for a meaning of this concept in the works of Plato, Kant and Rousseau, investigating the notion of the child as pre-rational, pre-moral and pre-social being, respectively. Under §1.2 I will presents the results from the field research that I performed in Rwanda and the Netherlands, in which I asked respondents about the meaning of childhood in order to question both the meaning of the concept in language and it being culturally bound. I will continue with a discussion of the distinction between body and mind which is often referred to in relation to the meaning of childhood (§1.2.2) and the notion of the developing

mind, using John White's work (§1.2.3). Ultimately under §1.3 I will give a tacit definition of universal childhood, combining philosophical insights and results from field research.

The second chapter of the research will focus on the idea of children's rights. I will start §2.1 wondering if children can be said to have rights at all in relation to the meaning of the concept of childhood. Secondly, under §2.2 I will discuss the relation between children's rights and society. I will start with taking a position in the legal vs. moral rights debate. Secondly, I will question how children's rights are related to social reality and under §2.2.3 I will analyse the concrete meaning of childhood in the Rwandan and the Dutch legal systems. Under §2.3, lastly, I will discuss why (or: whether) children should have rights.

The appendix includes, besides a description of the methodology, some legal and empirical work relating to the topic that I had to leave out of the thesis being not completely philosophically related. They include a discussion of Dutch and Rwandan child combatants and an overview of international and national laws applicable to (the situation of) child combatants in Rwanda and the Netherlands.

I would like to thank firstly my supervisors: Dr. R. Celikates and Dr. G. van Donselaar, who allowed and helped me to do research on this in some ways unusual topic and with this in some ways unusual approach (compared to regular MA theses in philosophy). Secondly my unofficial supervisors: Dr. J. Bos, Prof. Dr. G.C.G.J. van Roermund, Prof. Dr. R.M. Letschert and Prof. Dr. J.P. Pronk, who found the time and interest to read and discuss my thesis with me. And of course to everyone who, through my crowdfunding project, financially or otherwise contributed to the project. A list of thanks and acknowledgement can be found on page 8.

So the main question taken up in this thesis is the question '*What is the meaning of the concept of childhood and how does it relate to children's rights?*', including several questions related to this extensive question, as mentioned before. It is only when these questions are answered that one can start to look at the more normative, legislative and practical questions underlying the lives of children and specifically child combatants. I personally consider it the task of the philosopher to in this sense provide a fundament, a framework for rational thought and further research by other disciplines. Hopefully this thesis can serve as such a basis for further research into international children's rights.

To conclude, I would like to offer a thought to accompany you while reading this document, by quoting Plato's Athenian: 'But as you and your friend [...] have both been brought up under such venerable [legal] institutions, I trust you will not find it disagreeable to spend the time, as we walk this morning, in conversation on questions of politics and jurisprudence.' (Laws: 625 a,b).



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# Chapter 1

## The meaning of the concept of childhood

The concept of childhood underlying the idea of children's rights is of course a universal concept - at least theoretically. The 1989 Convention on the Rights of the Child (hereafter: CRC) assumes there is a class of people worldwide, that regardless of different historical and cultural contexts, can be referred to as "children". It is however unclear what this concept is supposed to mean, or to refer to, exactly. To address this question, I have looked for the meaning of childhood in the works of Plato, Kant and Rousseau.<sup>1</sup> This will be discussed under §1.1. §1.2 starts by presenting and discussing results of the field research. It continues to look into the meaning of a distinction often made in relation to childhood, between "physical development" and "mental development", discussing recent neurological research. Also, I will critically examine the notion of the developing mind. Following these results, under §1.3 I will try to formulate a tentative universal definition of the meaning of childhood, using results from field research, the analysis of Plato, Kant and Rousseau and the idea of the developing mind.

### 1.1 Plato, Kant and Rousseau on Childhood

Children are mostly neglected as a group of interest in philosophy. Even in Plato's dialogues in which childhood is mentioned several times, it is never

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<sup>1</sup>For a justification of choosing these philosophers for finding an answer, see attachment 4: Methodology.

questioned. Rousseau's *Émile* is most famous for being the first work on childhood, however it does not address the question of the essence of childhood, but rather it focuses on education of the child. Therefore, now that I pose the question about the essence of childhood, to discuss some views of well-known philosophers, I have to distil their answer to the question of childhood by examining the child as the not-yet human, the becoming-adult.

### 1.1.1 Plato on childhood: the pre-rational

When looking at several works by Plato, searching for a meaning of childhood in his dialogues, obviously it is hard to distinguish what would be the opinion of the author. As Kohan (2013) puts it: ‘There is no way of having direct contact with Socrates or Plato. [...] to reach Plato we must go ‘through Socrates’ (p. 315). In the following, I have chosen to present the arguments that I ascribe to Plato whenever in a dialogue the participants agree on a subject (mostly after discussion). I will include comparison of certain remarks throughout the different works by Plato.

For Plato, the child is the becoming-adult, who has to be educated. He prescribes education in reading, writing, music, poetry, physical education, virtue (*Republic* [RE], chapter V and XIII). Yet, he is inconsistent with respect to the question whether virtue can be taught. In *Protagoras*, Protagoras argues that goodness is something ‘imparted by teaching’ (324d) but initially Socrates refutes this (320b). At the end of the dialogue, Socrates and Protagoras conclude that virtue is knowledge and therefore it can be taught (361b). In *Meno*, it is stated that ‘men cannot be good by nature’ (89a), that virtue is wisdom (88e), and then Socrates gives many examples of wise and virtuous men who were apparently not able to turn their sons into good men by teaching, concluding that since ‘there turn out to be neither teachers nor students of virtue, so it would appear that virtue cannot be taught’ (96c). This dialogue concludes that one only possesses virtue when it is granted by divine dispensation (100a).

In the *Republic*, it is implied that the adult decides what would be the right morals for children to learn. By means of stories, children will ‘receive in their minds ideas [...] we shall think they ought to have when they are grown up’ (p. 69).<sup>2</sup> This seems to imply that (at least some) adults have developed

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<sup>2</sup>Pagenumbers from the *Republic* all refer to MacDonald Conford, F. (1941) (Trans.). *The Republic of Plato*. Oxford: Oxford University Press.

virtue. But only a God seems to be in a so-called satisfactory state, where he is immune to change from the outside (*RE*: p. 72-73). Human beings on the other hand can always be taught and will always become better, as Socrates tells Protagoras: ‘Protagoras, [...] even you, for all your years and wisdom, would become better, if someone were to teach you something that you didn’t happen to know’ (318b). In this quote we can again observe the close relation between virtue and knowledge. But, since people in general need education according to Plato, the need for education is not a defining characteristic of childhood. However, when Kohan (2013) discusses childhood and education in the works of Plato, he mentions the view voiced by Callicles in *Gorgias* that philosophy is something particularly meant for children, and that philosophy corrupts men when they remain in it too long; it makes them inexperienced for public life in the polis. For a child it is still natural to talk ‘in that way, lisping or playing some trick’ (p. 323, referring to *Gorgias* 484c-485b). Kohan also refers to Adeimantus who in the *Republic* argues that those who do not abandon philosophy after embracing it as part of their education when they are children, become strange or evil adults (p. 232, referring to *RE*: VI 487c,d). I would argue that here we only find voiced arguments of the opponents of Socrates (and Plato), the ones who ultimately sentence Socrates and perhaps consequently philosophy to death. Clearly, the philosopher cannot be childlike as Kohan argues, except maybe in the eyes of sophists or other ignorant people, since philosophy is the highest form of education and the polis is in need of a philosopher-king (*RE*: 473d). In this sense, every person who is not yet virtuous needs philosophy, because philosophy leads to the highest form of knowledge, which is knowledge of the Good.<sup>34</sup>

In chapter XIII of the *Republic*, Plato discusses the human (adult) soul. According to Plato, the individual soul contains three elements: reason, irrational appetite and spirit. Spirit is found as the third element, being distinct from reason *because* ‘you see that much in children: they are full of passionate feelings from their very birth; but some, I should say, never become rational and most of them only late in life [...]’ (p. 137-138). So apparently

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<sup>3</sup>However, I do appreciate Kohan’s remark that ‘the political force of Socrates’ philosophy lies in its childhood form: it does not know, but always desires to know [...]’ (p. 324), although I am not sure if the child truly always desires to know.

<sup>4</sup>Scolnicov (1988) commenting on the relation of knowledge and ethics, with Socrates as the teacher, writes that Socrates’ aim is ‘practical; knowledge [is] ultimately for the sake of action and the good life’ (p. 13).

children are irrational beings, and their souls are incomplete - in some way they must lack the element of reason. This is affirmed by Pausanias who in the *Symposium* argues that ‘no boy can please the man who is governed by elder Love, until [the boy] has shown the first signs of dawning intelligence, signs which generally appear with the first growth of beard’ (181d). But then, without possessing reason, how can children learn? In *Phaedo* the process of learning is described; the immortal soul has knowledge of equality, beauty, goodness, and all other absolute things, but it loses this knowledge at the moment of birth, and then recovers it by the exercise of the senses upon sensible objects. Learning in this way is recollection (75c-e). So the child is born both without any knowledge, and possessing all knowledge at the same time. Could this *anamnêsis* also explain the absence of the element of reason in the child’s soul? Is this element lost, or veiled, at the moment of birth? I prefer to use the term “veiled” since it seems possible to imagine how this element can be “unveiled” in the process of growing up, by means of education. However, recollection as the essence of learning is explained in *Phaedo* as ‘when knowledge comes in a particular way [...] Suppose that a person on seeing or hearing or otherwise noticing one thing not only becomes conscious of that thing but also thinks of a something else which is an object of a different sort of knowledge’ (73c). Scolnicov (1988) attributes the ability to learn, in Plato’s words, to the possibility to know new things building upon prior knowledge. Crucial in this respect is the question Socrates asks when he introduces the slave with whom he will demonstrate knowledge as *anamnêsis*; he asks whether the boy is Greek and speaks Greek. This means that according to Scolnicov,

‘the words that will be used during the interchange (and especially such terms as ‘square’, ‘side’, ‘double’, which are part of the everyday language but will have a semi-technical function in the argument) arouse in the boy certain associations which are more or less common to all Greek speakers.[...] Socrates can assume, to a certain extent, a minimal conceptual world common to him and the boy, from which the inquiry can make a start’ (p. 53).

However, this cannot explain initial knowledge occurring after *anamnêsis*. It is hard to see how ‘to become conscious of a thing’ and ‘thinking of something else’ and ‘thinking of a different object of knowledge’ is possible without

the element of reason – it is hard to understand how a young child could do this using only the soul’s elements of irrational appetite and spirit. Plato insists on the need for education for all people (e.g. *RE*: p. 149), and the child in particular (*RE*, chapter IX), so there must be an element of reason in the child’s soul, even when at the beginning of early childhood it is only very slightly unveiled.

If the idea of unveiling the element of reason is right, then the child during the period of childhood will increasingly become virtuous, since ‘justice is the power which produces individuals of whom each exercise of his nature is exercising his proper function, ruling or of being ruled’, referring to the three elements of the soul, of which reason should be the ruler over the other two elements (*Meno*: 81c,d). Reason as a ruler of the soul creates a balanced individual, and we need reason as a ruler for temperance (a part of virtue) (*RE*: p. 140-141). So the child must also lack temperance. This is affirmed by Socrates, remarking in *Charmides* to the young boy, that at his age he can hardly be expected to understand the meaning of temperance (162e). The child, lacking the soul-element of reason, has an unbalanced soul. However, this is not just so for children, but for every human being, because only the Gods have a balanced soul, possessing souls consisting solely of good steeds and good charioteers (*Phaedrus [PH]*: 246a,b, 247b), whilst man’s soul consists of one charioteer who controls a pair of steeds, one noble and good and one of the opposite character (246b). Therefore, human reason (for which the charioteer stands) is always struggling to keep the soul balanced, to keep both steeds under control. Here a possible line between childhood and adulthood seems to blur. There might be a difference in the skill of the charioteer. But then again, this difference can also be found among different adults; the philosopher being far more well-developed in this respect than for example the sophist (*PH*:248e). This idea of the child’s soul having an unable (inexperienced) charioteer (reason), is affirmed in *Laws* where Plato argues that a man ‘who is thoroughly soaked with drinking’ possesses ‘the mental condition of his remote infancy’, that is, ‘the condition in which his self-command is at its lowest.’ (645e). This is ‘degradation of soul’ (646b). Moreover in Book II of the *Laws* the Athenian argues that ‘a child’s first infant consciousness is that of pleasure and pain; this is the domain wherein the soul first acquires virtue or vice. For wisdom and assured true conviction, a man is fortunate if he acquires them even on the verge of old age, and, in every case, he that possesses them with all their attendant blessings has come to the full stature of man [...] pain and dislike, are formed in the soul on



right lines before the age of understanding is reached, and when that age is attained, these feelings are in concord with understanding [. . .] this concord, regarded as a whole, is virtue.’ (653a,b). If “the full stature of man” can be understood to be the adult-state, then the adult-state is something only few men will attain during their lives. However, it seems that throughout his texts, Plato actually distinguishes the child from the uneducated adult. So what does this difference consist of?

In *Laches*, Socrates even seems to suggest that the young child’s soul also lacks spirit, because when discussing courage, it is explained that animals and young children cannot be said to be courageous; ‘Do you imagine that I should call all little children courageous, who fear no danger because they have no understanding?’ (197b). Of course the lacking element here is once again reason, for a lack of understanding, but it is also implied that one needs reason for courage, which is an element of spirit. It is more often that both the animal and the child are used by Plato as examples of irrational creatures – for example in the *Republic* when it is argued that you can see that children are full of passionate feelings, yet do not possess rationality, this may be ‘also seen in animals’ (p. 138). But although this is not directly discussed, it seems unlikely that the soul of the animal and the soul of the child would be equal, since there is never a mention of a need for education for animals, or an ‘adult state’ of an animal, or a polis which includes animal citizens.

An answer to the question of education and the unveiling of reason in children might be found in chapter XXIV of the *Republic*, where education of the guardians is described in terms of the objects of knowledge and the corresponding states of mind. For the related diagram see Figure 1.1 (the gaining of knowledge as Plato describes, visualized in: MacDonald Conford, F. (1941) (Trans.): p. 222).

In chapter XXV then, Plato uses the allegory of the cave to describe ‘the degrees in which our nature may be enlightened or unenlightened’ (p. 227). Here the attaining of knowledge is a gradual process, with the subject who leaves the cave to find the truth first looking at shadows and reflections, then the things themselves, the heavenly bodies and the sky, and finally the Sun (p. 229,230). This is described as ‘standing for the upward journey of the soul into the region of the intelligible’ (p. 231). According to Plato, ‘we must conclude that education is not what it is said to be by some, who profess to put knowledge into a soul which does not possess it, as if they could put sight into blind eyes. On the contrary, our own account signifies that

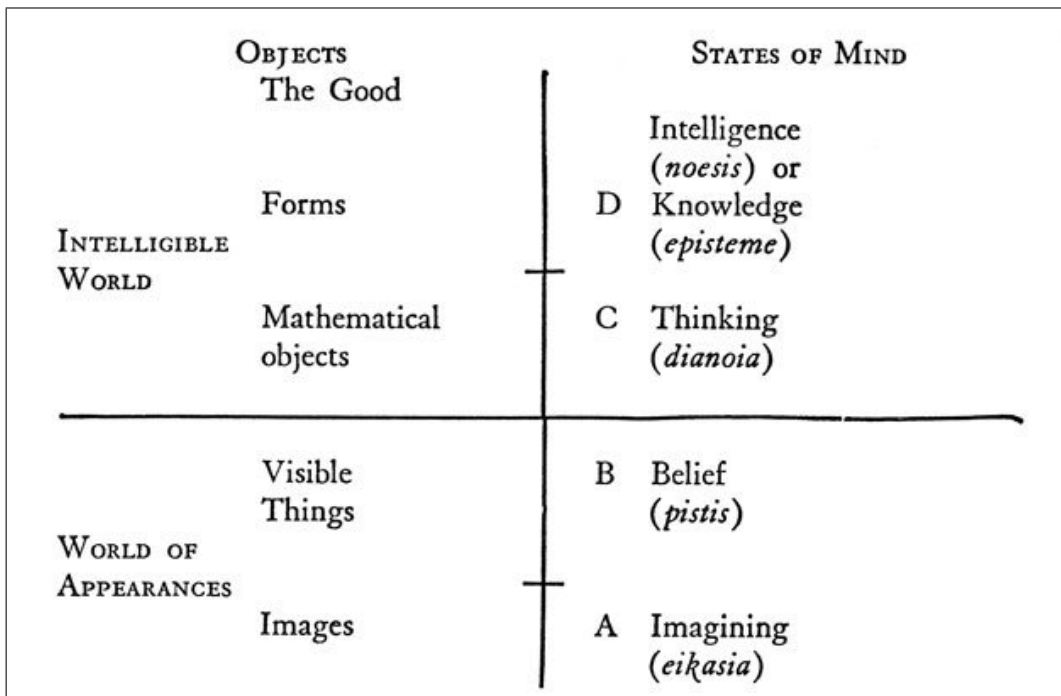


Figure 1.1: State of mind related to knowledge of certain objects, visualization of view in Plato's Republic

the soul of every man does possess the power of learning the truth and the organ to see it with; and that, [...] the entire soul must be turned away from this changing world, until its eye can bear to contemplate reality and that supreme splendour which we have called the Good' (p. 232). This growth has to be 'pruned from earliest childhood' (p. 233). It is clear that for Plato, every man from birth at least possesses a potential to learn. Kohan (2013) argues that for the education of children, to bring them into the world both literally and as a metaphor for knowledge, there is a need to use *pharmakia* (translated as remedy, poison, drugs and medicine), of which Socrates is an expert.<sup>5</sup> To underline this, Kohan uses the fragments of *Theaetetus* in which Socrates compares himself as a teacher to a midwife, 'making men give birth to the examination of their souls' (p. 317). Kohan continues to point out that in *Meno*, it is shown that to learn is to reconnect with knowledge that one already has – and this is the purpose of teaching (p. 321). So maybe in

<sup>5</sup>And consequently, I would argue, philosophy.

this sense the child's soul needs a cure, a medicine, to begin the development of reason and to balance its soul, to realize its potential for knowing the truth – which according to Kohan is possibly found in the dialectic, and the contradiction of philosophy, of which the latter is both a way of learning to question knowledge and of acquiring positive knowledge for leading a good life (p. 319,322).

To conclude, for Plato the child possesses a soul with a potential to learn, to see true knowledge – as do adults. The child's soul is unintelligible; it is probably still focussed on the world of appearances and can by means of education gradually develop higher 'states of mind', possibly with the use of a *pharmakon*. Its soul must in some way already possess the three elements of a human soul, since the child is human (although repeatedly equated to the animal), but it does not yet count as fully human. It has to learn virtue to be 'instructed and corrected until by punishment he is [...]formed', even to earn his right to existence and his right to be a citizen, since 'whoever does not respond to punishment and instruction must be expelled from the state or put to death as incurable [...]' (*Protagoras*: 325a).

### 1.1.2 Kant on childhood: the pre-moral

When discussing Kant I want to focus on his concept of the adult as a moral actor, a free subject in possession of practical reason by which he or she can align his or her will with the categorical imperative.

According to Kant, the human will is part of the faculty of desire, that is determined by the subject's inner reason – it has no other determining ground, it is practical reason itself (*Metaphysics of Morals* [MoM]: 6:213). Human beings possess a capacity for free choice. This is what makes them different from animals; the animal choice is determined only by inclination. The human choice can be affected but not determined by impulses. Choice is therefore not in itself pure, but can be determined to actions by pure will (*MoM*: 6:213,214). It is reason that has to transcend the animalistic inclinations that are present in every human being, by commanding 'how we are to act even though no example of this [can] be found' (*MoM*: 6:216). The moral law is laid down as a principle of the deduction of freedom as a causality of pure reason, and its existence proves the existence of freedom (*Critique of Practical Reason* [CoPR]: 5:48). Moral laws hold as laws only insofar as they can be seen to have an a priori basis and to be necessary

(*MoM*: 6:215). So, moral laws need an a priori basis, and without it there is no freedom (because its existence proves the existence of freedom, and the moral law is a principle of the deduction of freedom as a causality of pure reason - without it, there would be no free will and human beings would be animals acting on inclinations only). Freedom and the moral law are mutually dependent.

So now we have to look for this a priori moral law and a priori freedom. According to Kant, freedom is innate to human beings; a child is born endowed with freedom (*MoM*: 6:237,6:280). Also, human beings are born with moral feeling ('the susceptibility to feel pleasure or displeasure merely from being aware that our actions are consistent with or contrary to the law of duty') and a conscience (*MoM*: 6:399,400). However, virtue ('moral strength of a human being's will in fulfilling his duty') is not innate; it must be taught (*MoM*: 6:405,477). It is based on inner freedom, and it contains 'a positive command to a human being, namely to bring all his capacities and inclinations under his (reason's) control and so to rule over himself [...]' (*MoM*: 6:408). It follows that the will is not pure in itself, but this purity must be developed in human beings. Adding to this line of thought, Kant writes that we become immediately conscious of the moral law, as soon as we draw up maxims of the will for ourselves (*CoPR*: 5:29,30). Here there is some room for a child to be in the process of learning to draw up maxims of the will for him or herself; for development.

However, Kant also states quite a few things to the contrary. For example he writes that 'the most common understanding can distinguish without instruction what form in a maxim makes it fit for a giving of universal law and what does not' (*CoPR*: 5:27). Therefore, every understanding (reason?) should be able without instruction to apply the categorical imperative, even the child. Or perhaps the child's understanding is not a "common understanding", and/or there is no (or only a vague hunch of a) maxim in the child's mind. Kant also writes that 'the positive concept of freedom is that of the ability of pure reason to be in itself practical. However, this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as a universal law' (*MoM*: 6:213,214). If the child's mind is not yet able to draw up maxims of the will for itself, it cannot subject the maxim of every action to the condition of its qualifying as a universal law. Does this mean that the child is not free? It makes sense to say that the child (or specifically its mind, or reason, or will) is unfree, since there is no room for free will to determine by means of maxims the action of the subject

and in this act to overrule inclinations. This is what Kant says too in a way: ‘[...] freedom, the causality of which is determinable only through the [moral] law, consist just in this: that it restricts all inclinations, and consequently the esteem of the person himself, to the condition of compliance with its pure law’ (*CoPR*: 5:78). In this sense the child is pre-moral. But then, firstly how would the unfree child (much like an animal) ever develop into a free moral actor - how would this transition be able to take place? Again, we encounter the problem of transition in development. And secondly, this contradicts Kant’s statement that a person possesses innate freedom, from birth.

Roth (2012) quotes Kant, who says in his *Lectures on Pedagogy*: ‘In order to ground a moral character in children [...] [o]ne must teach them the duties that they have to fulfil as much as possible by examples and orders’. According to Roth, this means that ‘moral education [...] can use examples to make those concerned capable of moral reasoning by enabling them to use their reason in practice, and by actively encouraging them to think for themselves, etc.’ (p. 272). I think there is a subtle misinterpretation here; to ‘actively encourage children to think for themselves’ is not the same as ‘to teach children the duties they have to fulfil by examples and orders’. And the difference here lies exactly with the notion of freedom. If a child were truly free, it would have no need to be taught the duties they have to fulfil – because they would be free to choose their own duties, to impose duties on themselves with the use of the categorical imperative. This is exactly what autonomy is; auto-nomos, to give law to one’s self.<sup>6</sup> Precisely because the child does not yet possess this capacity, it needs to be taught.

I suggest we can understand the child’s innate freedom as a potentiality in every human being, much like Plato’s potential reason; a potentiality that has to be actualized by the practicing and developing of virtue. Roth (2012), drawing mostly on Kant’s *Lectures on Pedagogy*, stresses the importance of “moralization” in the educational view of Kant. For the development of morality in students, conditions have to be created for human beings to ‘acquire the disposition to choose nothing but good ends’. One of these conditions is education ‘in cosmopolitan terms’, which can enable students to ‘cultivate their power of judgment’ (p. 270). Kant himself suggests that this teaching of virtue has to be done through catechistic moral instruction combined with Socratic dialogue; ‘the advantage of this is not only that it is

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<sup>6</sup>See: <http://en.wikipedia.org/wiki/Autonomy>, accessed 16-06-2014.

a cultivation of reason most suited to the capacity of the undeveloped, and so it is the most appropriate way of sharpening the understanding of young people in general [...]’ (*MoM*: 6:483,484). Consequently, it is clear that Kant indeed recognizes room for the development of the child’s practical reason.

One of the difficulties of this view is the gradual development of the child’s mind, its freedom of choice, etc. This is a problem that we see daily in educational and nurturing practices involving children. How much responsibility can a child at a certain moment in life, at a certain time during its development, take on? How free is its choice, how free is its will at a certain moment in development?<sup>7</sup> Schapiro (1999) on this subjects argues that the adult-child distinction cannot just be a matter of degree of cultivation, because the attribution of the status concept (“child” or “adult”) draws a distinction in kind (1999: p. 724,725). She uses Kant’s conception of the person in the state of nature to solve this problem. Schapiro writes that according to Kant, ‘the state of nature is one in which individuals acknowledge a need for certain normative concepts which they nevertheless lack. This makes the state of nature a normatively unstable condition, and it is precisely this normative instability which Kant thinks we have an obligation to reject’ (p. 726). This notion she then uses to explain how children in the same sense have an obligation to push to unity in themselves (rather than in society), because of ‘the instability of the claims undeveloped beings make on themselves, combined with the inescapability of reflection’ (p. 728). But then, doesn’t this “pushing to unity” lead to a gradual development of virtue in the child? According to Schapiro, the task of the agent is to determine which of the different claims that present themselves as conforming to the law of the agent’s will, really conforms to the law of their will. This can only be done if the law of the agent’s will is already in effect, and here we find the distinction between developed and undeveloped agents (p. 729). I would argue that the person’s will and the ability to align it with different claims presenting themselves as confirming with the agent’s will, develop gradually during childhood. Schapiro, in a different manner, comes ultimately to the same conclusion as we just did regarding the child-adult distinction, since here she defines the adult as ‘one who is in a position to speak in her own voice, the voice of one who stands in a determinate, authoritative relation to the various motivational forces within her’ (p. 729). In this sense, I would add, the adult is free whereas the child is not (yet).

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<sup>7</sup>For a discussion of this question, see Anderson & Claassen (2012): p. 512-514.

A second difficulty is that it is unclear whether human beings ever fully realize their freedom. Are they not always developing virtue, ever imperfect? Then what is the difference between the child and the adult? Kant puts the end of childhood at the point when a person is able to support himself (*MoM*: 6:282). This hardly seems a moral requirement – unless being able to support yourself is taken in a broad sense, meaning being able to be in the world as a moral agent. Kant argues that every human being is obligated to cultivate moral feeling and virtue (*MoM*: 6:399,400,408). So the human being is always becoming, realizing his freedom to a greater degree and making his will ever more pure. Childhood, I would argue, can however be understood as a pre-responsible period, in which reason can make itself acquainted with the moral law gradually, a period of developing virtue, of practicing making value judgments based on the categorical imperative, but being allowed to make mistakes. This is what Anderson & Claassen (2012), making use of the text by Schapiro, refer to when they write about the child, whose action is ‘a kind of pretending or play’, enjoying a ‘suspension of full responsibility’, which is ‘part of the social reality within which children act’. ‘Playing is a form of experimentation which allows the child to adopt different roles and positions, so as to build up experiences about the world and one’s place in it’ (p. 506, 507). This is why there is a need for tutelage for the child; during this period of experimentation they need a safety net – and here we find the justification of parental authority and responsibility (p. 511). When the person leaves the period of childhood he can be supposed to have finished this process and therefore can be held accountable for his actions as an autonomous, rational being in possession of free will.

### 1.1.3 Rousseau on childhood: the pre-social

Rousseau has not literally answered the question about the essence of childhood either; he too has focussed on how to educate the child to become the adult. However, when we combine his work *Émile* [E] (1761) with his *Discourse on Inequality* [DOI] (1754), an image emerges of the child, comparable to natural man as described in the *Discourse*. The child, contrary to the natural man in a state of nature, finds himself in civil society from birth and there he ultimately encounters institutional law. The child needs education to become a good civilian. Parry (2001) recognizes a core dilemma in Rousseau’s work; how can we start again, to ‘create a virtuous circle in which transformed human beings [can] live in a transformed society in which

all [can] equally enjoy a sense of both self-fulfilment and community with others’, when modern society is ‘dominated by competitive self-interested behaviour, resulting in inequality and social and economic exploitation’ (p. 248)? According to Parry, for Rousseau education might be the key. This education is not citizen education, but rather an education *against* society (p. 263). To understand this answer, I believe we have to compare *Émile* to the natural man in the state of nature, and see what the effect of education could be, according to Rousseau. In Rousseau’s work the aforementioned fragments of childhood come together; the child as a pre-rational, pre-moral, yet growing and developing creature, adding and emphasizing a pre-social element. I will elaborate on this below, using the two works of Rousseau previously mentioned.

In *Émile*, Rousseau, in the process of instructing the teacher, divides childhood into four phases. During each phase there is a different educational need, up until adulthood. I have tried to deduce a picture of childhood according to Rousseau by studying the characteristics that Rousseau attributes in *Émile* to the developing human being during these phases. The following scheme then emerged: <sup>8910</sup>

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<sup>8</sup>After studying these characteristics, I sorted them according to the scheme with results from field research, for comparison and clarity.

<sup>9</sup> I have added page numbers for *Emile: or On Education*, the 1979 translation by A. Bloom (see literature).

<sup>10</sup>With regard to the names of these phases of childhood; Rousseau does not name the stages in childhood. Phase three and four are referred to as “adolescence”, but only phase four is referred to as “puberty.”



Table 1.1: Rousseau on childhood

	phase 1:	phase 2:	phase 3:	phase 4:	phase 5:
<b>characteristics</b>	<b>baby</b> age: 0-2?	<b>“child”</b> age: 2?-12	<b>adolescence (not puberty)</b> age: 12/13-15 (p. 139)	<b>puberty</b> age: 15-20/25	<b>adult</b> 25 on
<i>mind</i>					
reason	- (p. 50)	- (p. 50)	starting (p. 207)	x (p. 207)	x (p. 207)
memory	- (p. 111)	starting (p. 112)	x (p. 112)	x (p. 112)	x (p. 112)
imagination	- (p. 161)	- (p. 161)	starting (p. 184)	x (p. 259)	x (p. 259)
knowledge	x (p. 125)	increasing? (p.161)	increasing?	increasing?	?
power of					
generalisation	- (p. 207)	- (p. 207)	- (p. 207)	?	?
skill in abstraction	- (p. 207)	- (p. 207)	- (p. 207)	?	?
able to look into					
the future	- (p. 102)	- (p. 102)	?	?	x (p. 102)
<i>non-independent</i>					
weak	x (p. 88)	x (p. 91)	x (p. 165)	?	- (p. 91)
physically fully					
developed	- (p. 334)	- (p. 334)	- (p. 334)	starts at 20 (p. 334)	x (p. 334)
dependent	x (p. 88)	x (p. 88)	x (p. 88)	?	x (p. 85)
needs guidance	on caregiver	on caregiver	on caregiver		on other me
/education	x (p. 51)	x (p. 51)	x (p. 51)	x (p. 51)	- (p. 51)
innocent	x (p. 79)	x (p. 79)	x (p. 212)	decreasing (p. 212)	- (p. 212)
capable of learning	x (p. 207)	x (p. 207)	x (p. 207)	x (p. 51)	?
power goes beyond needs	- (p. 165)	- (p. 165)	x (p. 165)	- (p. 165)	- (p. 165)
needs are <i>i</i> self-preser-	- (p. 80)	- (p. 80)	starting (p. 80)	x (p. 80)	x 80
vation + beyond power					

	phase 1:	phase 2:	phase 3:	phase 4:	phase 5:
	baby	“child”	adolescence	puberty	adult
	age: 0-2?	age: 2?-12	age: 12/13-15 (p. 139)	age: 15-20/25	age: 25 on
<b>characteristics</b>					
<i>ethics</i>					
knows good and evil	- (p. 207)	- (p. 207)	- (p. 207)	x (p. 235)	x (p. 235)
(morality)	- (p. 233)	- (p. 233)	- (p. 233)	starting (p. 233)	x (p. 233)
to love	- (p. 252)	- (p. 252)	- (p. 252)	x (p. 252)	x (p. 252)
virtue	- (p. 63)	- (p. 63)	- (p. ?)	?	?
self-control					
<i>social</i>					
knows difference between					
self and not-self	- (p. 64)	- (p. 38)	starting (p.193) (p. 152)	x (p. 207, 209)	x (p. 207, 209)
(conscious of)					
social relations	- (p. 193)	- (p. 193)	- starting (p. 193)	x (p. 233)	x (p. 233)
(engaging in)				starting (p. 187,	
social relations	- (p. 193)	- (p. 193)	- (p. 193)	starting (p. 327))	x (p. 213)
pity	- (p. 222)	- (p. 222)	- (p. 222)	starting (p. 222)	x (p. 222)
lives in society	- (p. 327)	- (p. 327)	- (p. 327)	starts at 20 (p. 327)	x (p. 327)
sex	- (p. 316)	- (p. 316)	- (p. 316)	starting (p. 316)	x (p. 316)
marriage	- (p. 317)	- (p. 317)	- (p. 317)	- (p. 317)	x (p. 317)
<i>legal</i>					
able to understand					
the law	- (p. 235)	- (p. 235)	- (p. 235)	x (p. 235)	x (p. 235)
can carry duties	- (p. 91)	- (p. 91)	- (p. 334)	starts at age 20 (p. 334)	x (p. 334)
<i>other</i>					
to speak	- (p. 77)	x (p. 77)	x (p. 77)	x (p. 77)	x (p. 77)
happy	x (p. 85)	x (p. 85)	x (p. 85))	? Only Emile?	? Only Emile?

At first sight it seems that the main characteristic defining the difference between the child and the adult for Rousseau is reason. He often talks about the child who has not yet reached ‘the age of reason’ (e.g. *E*: p. 79). The problem that we encountered when discussing Plato and the child who possesses no reason, yet learns, is solved by Rousseau by saying that ‘childhood is reason’s sleep’ (*E*: p. 107). However, it is clear when reading *Émile* that Rousseau is inconsequent with regard to attributing reason to children. He admits to this on p. 108 in a footnote: ‘One time I say children are incapable of reasoning; another time I make them reason quite keenly. I do not believe that with that I contradict myself in my ideas; but I cannot gainsay that I often contradict myself in my expressions’. Besides, since the child in puberty already possesses reason, but is not yet mature, reason cannot be the defining difference between the child and adult. It is clear however that childhood is a period of development of the mind, for which education is needed.

More importantly, the child is non-social and therefore natural and good. In this sense the child and the natural man (savage) in the state of nature are alike. In his *Discours on Inequality*, Rousseau describes the savage who lives in a state of nature. The savage lives in an unsocial condition (because he lives alone), his desires do not exceed the desire for self-preservation (p. 137,138), he has no knowledge of good and evil (p. 128-130), and lacks reason in general (p.137). Civilized man on the other hand finds himself in society, his desires exceed his power to acquire the things he desires, which leads to unhappiness (*DOI*: p. 147,156, *E*: p. 85) and as of the age of reason he forms ideas of morality (*E*: p. 235). In natural man we find an embodiment of the pure soul. For Rousseau, natural man, the savage and the hypothetical state of nature are the instruments used to study pure man in its essence. The child, in its turn, is a natural being born in the unnatural condition of civil society. Due to this condition, the child needs education. There is no escaping this condition of society, because men left the state of nature, and has thereby forced others to do the same (*E*: p. 193). The child cannot stay pure and natural, because ‘[i]n the present state of things a man abandoned to himself in the midst of other men from birth would be the most disfigured of all.’ (*E*: p. 37). Rousseau writes that ‘Émile is not a savage to be relegated to the desert. He is a savage made to inhabit cities. He has to know how to find his necessities in them, to take advantage of their inhabitants, and to live, if not like them, at least with them.’ (*E*: p. 205). So the whole goal of the *Émile* as a teachers guide, is to let the human being become as pure a soul as possible in civil society even at adult age, to raise him ‘above

prejudices and ordering [his] judgments about the true relations of things’ (p. 185), so that one day the child will ‘judge well of the good and bad order of civil society’ (*E*: p. 190). The surest way to do this, according to Rousseau, is to put him ‘in the place of an isolated man and to judge everything as this man himself ought to judge of it with respect to his own utility’. (*E*: p. 185). To this purpose, the first book Emile reads in the third phase of childhood is Robinson Crusoe (*E*: p. 158).<sup>11</sup>

Except for the conditions they find themselves in, there are more differences between the child and the savage. The freedom of the child is different from the freedom of the savage. The child is weaker than the (adult) savage, therefore the child is not self-sufficing and this compromises his liberty, whether in a state of nature or in society. ‘Children, even in the state of nature, enjoy only an imperfect freedom, similar to that enjoyed by men in the civil state.’ (*E*: p. 85), while the savage is completely free (*DOI*: p. 164,165). However, this last difference is really the difference between adult and child rather than between child and savage.<sup>12</sup> Secondly, the savage has no curiosity, whereas the child does (*E*: p. 205). The savage on the other hand possesses a natural and innate capacity for pity, which according to Rousseau precedes reason (*DOI*: p. 91, 130), a capacity which the child only develops during the fourth phase of childhood. Quite contradictory, in *Émile*, Rousseau writes that a young child does not possess pity, because the child does not know the difference between the self and the not-self, and lacks imagination - since ‘it is only imagination which makes us feel the ills of others’ (p. 222,231). Apparently the (adult) savage<sup>13</sup> is aware of this difference and can use imagination to this purpose. Although both the child and the savage are naturally good (*DOI*: p. 193, *E*: p. 37,220), this “goodness” seems to derive from their lack of ethical conscience. Both have no ethical knowledge and are therefore innocent – there is no morality in their actions (*DOI*: p.128, *E*: p. 207). This lack of ethical knowledge and of morality in

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<sup>11</sup>Parry (2001) on this point writes that Rousseau’s ultimate subject is ‘the “idea” of an education that [will] not corrupt the natural goodness of humanity’ (p. 250).

<sup>12</sup>Here it has to be remarked that obviously, “child” and “savage” are not mutually excluding concepts. I have added some comments on the savage being an adult – I hope to have distinguished these terms clearly.

<sup>13</sup>I assume the savage as described by Rousseau in the Discourse is an adult, firstly because of the description that does not seem to match children’s capacities, secondly because in *Émile* Rousseau remarks that ‘Even in a state of nature children only enjoy an imperfect liberty’ (p. 57).

action, makes the child in society unfit for the moral order of society (*E*: p. 178). Until the age of 16, the child is not able to understand the law, because ‘the love of others is the source of human justice and the child does not yet feel this love’ (*E*: p. 235). Consequently the child is not subjected to duty (*E*: p. 334).

It is during the third phase of childhood, when the child starts to develop reason, that the savage and the child seem to start parting ways.<sup>14</sup> For the savage there is no education and no improvement, so according to Rousseau ‘the species was [grows] old, while the individual still remain[s] in a state of childhood’ (*DOI*: p. 87). In the fourth phase of childhood, then, the child gains ethical knowledge and understanding as a precondition for living in civil society. The last phase of childhood is a time of mistakes, the time when the child practices and learns how to live in social reality, the time at which he learns the law, which is the law of human civil society (*E*: p. 247). Parry (2001) writes that ‘Émile is always intended for society but he must be armoured against its baneful effects. The constant effort of his teacher must be directed to delaying entry into the social world’ (p. 250). ‘Modern education could scarcely be better designed to prevent the emergence of the true citizen who, rather than engaging in trading personal and sectional advantages, will self-consciously lay aside partial interests and impartially consult his general will in pursuit of the general good’ (p. 254). And here it is exactly that we find the pre-social element of childhood, which to Rousseau is both a natural condition and an ethical, prescriptive necessity.

To conclude, even though Rousseau recognizes both the pre-rational and pre-moral elements of childhood, he emphasizes its pre-social element. The child is a natural, good being born in the unnatural condition of civil society. Because of this situation, it needs education, of which the purpose is to raise the child to become a good citizen, who lays aside partial interests, pursuing the general good.

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<sup>14</sup>Shell (2001) argues that the savage and the child only part ways when at age 15 the child becomes open to erotic sentiments (p. 279). As I argue, I think she is wrong, since she has disregarded the capacities of reason that start developing in the child at age 12.

## 1.2 Universal childhood?

Besides studying philosophical texts, I felt that I had to go out and question people about this concept of childhood, to find out what the concept means, assuming that the meaning of a concept can be understood by analyzing its use in language.

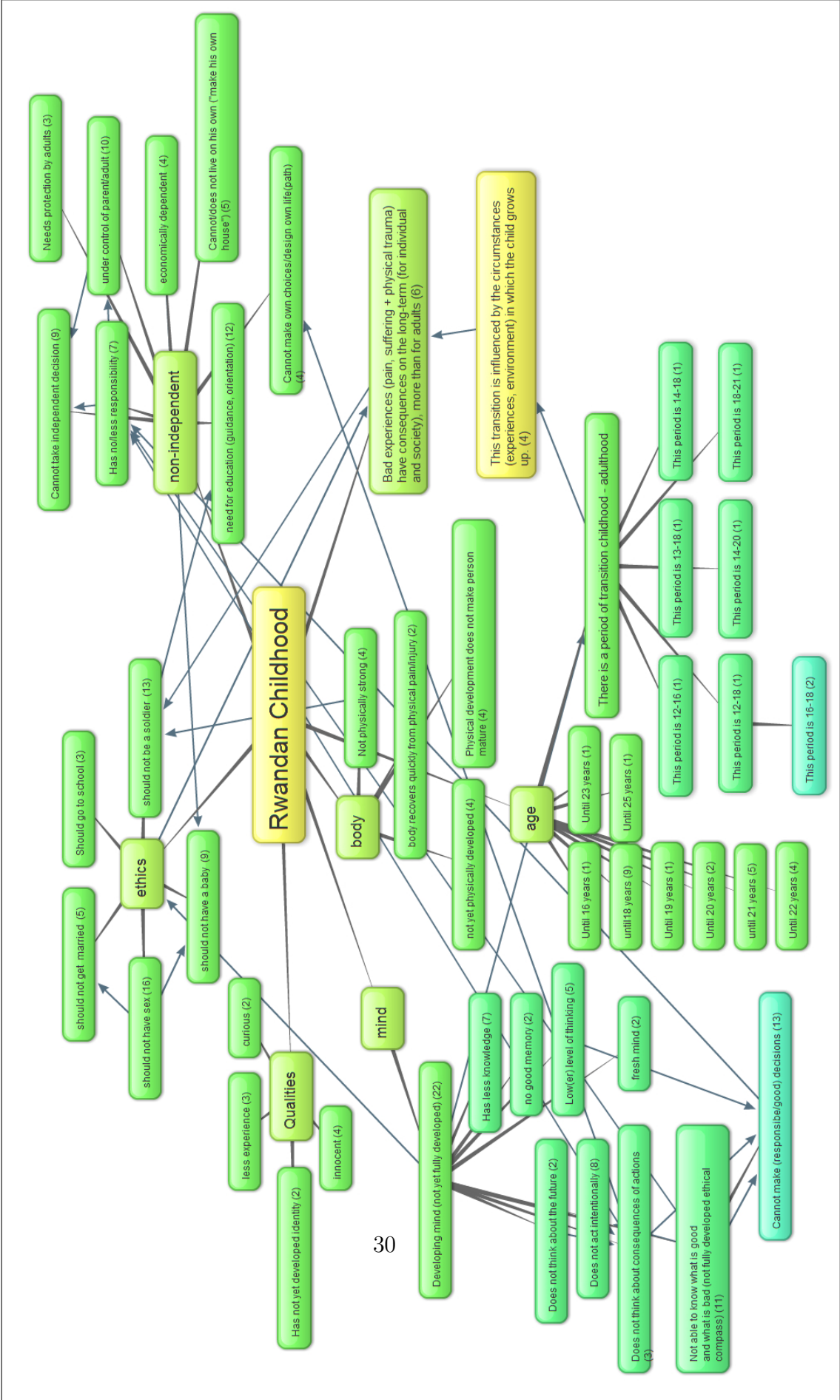
### 1.2.1 Dutch childhood and Rwandan childhood: results from field research

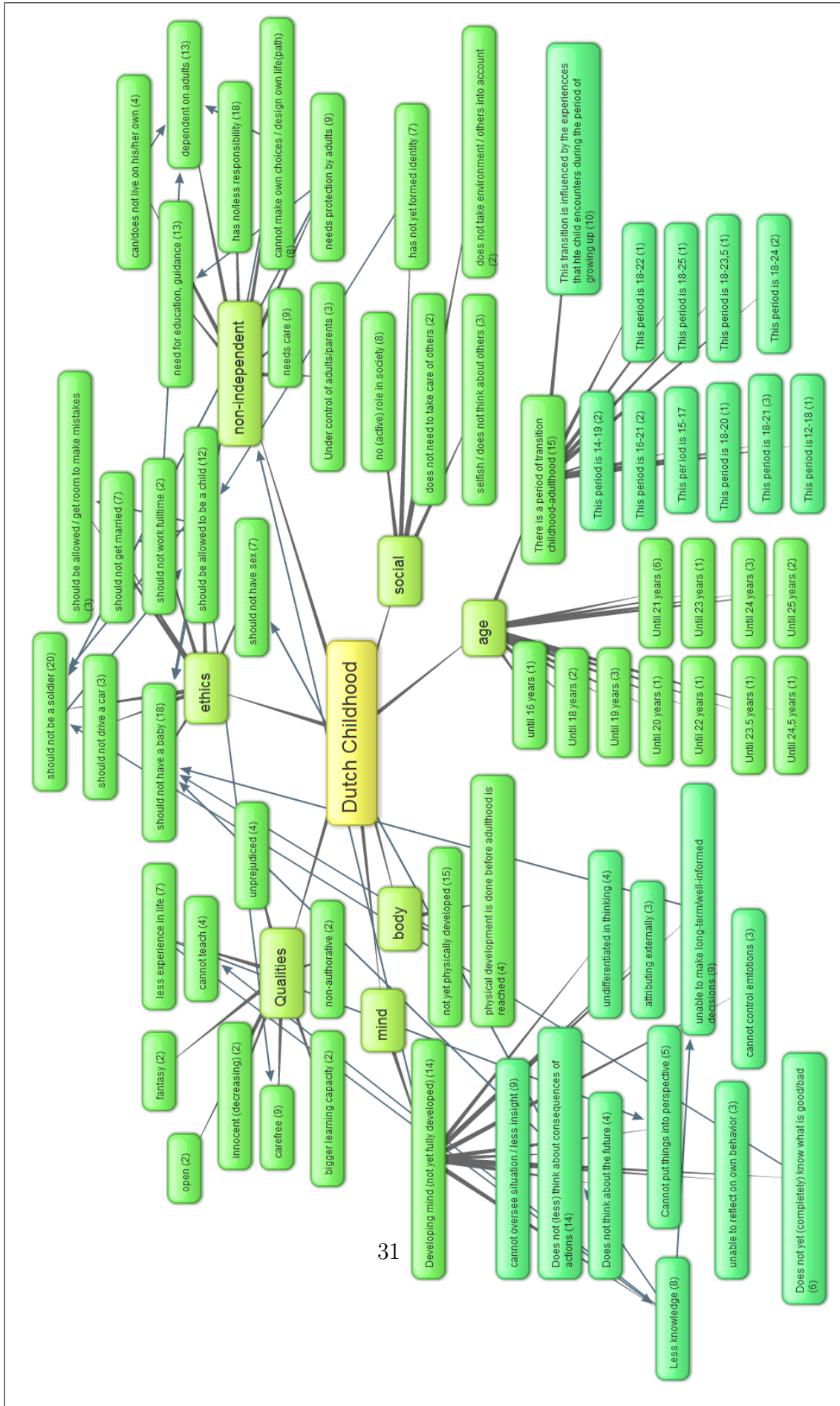
To find the meaning of the concept of childhood by analyzing its use in language, I held conversations with 29 Rwandan respondents and 26 Dutch respondents (see: attachment 4: methodology). This way of doing field research, and interpreting the results, are both done bearing in mind Wittgenstein's idea of the meaning of a concept – the idea of a language game.<sup>15</sup> This resulted in the following<sup>16</sup>:

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<sup>15</sup>In the Investigations, Wittgenstein argues that to understand the meaning of a concept, we have to understand it in the context of a language game, which is the whole of language and the actions into which it is woven. In language we find different kinds of word (1958: p. 7,17). The concept of childhood is used in different language games, and therefore it has a different meaning in different contexts. It is only within a language game, when the overall role of the word in language is clear, that an ostensive definition is able to explain its meaning (1958: p. 30). For any word to have meaning, it does not necessarily need a referent. It makes sense to speak about a tool with the name “N”, even when this tool is broken. Even a word that has never been used for a tool has a meaning. ‘For a large class of cases - though not for all - in which we employ the word “meaning” it can be defined as thus: the meaning of a word is its use in the language’ (1958: p. 39-44). The notion of a language game refers to both the totality of language, and to the use of language in a specific context, when playing a specific game, maybe only between two individuals. Within the bigger game that all users of a language play together (here the notion of language is understood in the broadest sense) there seems to be something like “sub-language-games”, as a context within a context.

<sup>16</sup>In the scheme I have added all remarks that at least two different respondents made. The numbers in between brackets indicate how many respondents mentioned this specific part of the meaning of the concept of childhood.







### **The essential meaning of childhood, according to respondents**

In the schemes you find visualized the complicated network of similarities that explain the meaning of the concept of childhood. As you can see there are striking similarities between the Rwandan and the Dutch scheme – I would even argue that essentially they have a similar meaning for the concept of childhood.<sup>17</sup> Both Rwandan and Dutch respondents recognize an existing adulthood-childhood distinction. They define “childhood” as a period of development, development towards an adult state. Childhood is a phase in a person’s life, a temporary phase, that lasts for a certain amount of time until the person reaches adulthood. This temporal element of the period is an important aspect of the meaning of childhood; it determines the form of the meaning of the concept.

So what is the substantive content of this period? There are two key-elements defining the content of the concept of childhood, namely development of the body and development of the mind.<sup>18</sup> During the period of childhood the body develops, it becomes stronger, it grows and secondary biological characteristics develop. At about two thirds through the period this process is said to be mostly finished, but physical maturity alone is said not to make the person leave the period of childhood. Consequently, the body can be mature before the period of childhood is over.<sup>19</sup>

The second and more defining element of childhood is the developing

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<sup>17</sup>The only exceptions are the ethical consequences of childhood and the pre-social element. When looking at the conceptual schemes it is not at first sight clear that these are the only two real differences – rather it is what became clear during interviews. Considering ethical consequences, this was the only level at which Dutch and Rwandan respondents clearly diverged. With regard to the pre-social aspect, it was striking to find that this was mentioned often by Dutch respondents and not at all by Rwandan respondents. Other differences are for example two Dutch people who said children are “non authoritative”. For Rwandans, connotations with authority and obedience were more related to respect and so most Rwandans argued that the child also has a form of authority because it needs to be listened to – the latter being an opinion that most Dutch respondents share, but for the Dutch, authority as a concept connotes more of a relation of power – a power that in this sense the child does not possess (according to some). Many of the differences in the schemes can be explained in this way, with the exception of the different ethical consequences and the pre-social character of childhood.

<sup>18</sup>I am aware that to assume that these two are somehow different, is to take a position of anthropological dualism. For a more elaborate discussion of this point, see §1.2.2.

<sup>19</sup>When people say that “the body is mature” this means that it is mostly done developing until reaching a stage that they understand as mature, which means to have finished developing secondary biological characteristics.

mind. Nearly every respondent, Dutch or Rwandan, mentioned in different wording that during childhood, the mind develops gradually.<sup>20</sup> This developing mind is described in (one of) the following ways: the child cannot oversee consequences, has less knowledge, is not able to know what is good and what is bad, its level of thinking is still low, it is unable to reflect on its own behaviour, etc. (see schemes). This lower level of mental development is the most basic parameter of childhood. The consequence of this undeveloped mind is that the child does not act intentionally and that the child cannot make responsible or good decisions. During the period of childhood, these capacities of the mind are acquired gradually, until adulthood is reached, at which point the person has reached a stage in which these capacities are acquired up to a certain degree, or are supposed to be acquired up to a certain degree, although not fully (see: §1.3). This is what it means to be a child; you have not yet reached the stage in which your mind is fully developed in the aforementioned sense.

To place this period of childhood in time, people are accustomed to using age. Age is often understood to define whether or not a person is in the period of childhood, but this a meaning that is wrongfully attributed to the concept of age, as can be easily shown by the conversation I had during an interview with a Rwandan judge:

Resp: '[...]16 years belongs to childhood. Because this age, brings me to what is provided by the law. The law says that every person that is under the age of 18 is a child. That's why I'm saying that any person who has this age, who is 16 years, is a child.'

MH: 'But what do you think?'

Resp: 'On what?'

MH: 'Is the person of 16 years, is it a child?'

Resp: 'Yes, he is a child.'

MH: 'So what makes him a child?'

Resp: 'Because of the age.'

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<sup>20</sup>Exceptions to this are the youngest respondents that I interviewed. The hypothesis that for children their minds are less well-developed and therefore they are not yet capable of thinking about complicated issues such as the meaning of the concept of childhood, somehow is confirmed by the fact that they are these specific exceptions. Out of those interviews, among the things the respondents said, I could hardly find any characteristics of the meaning of childhood.

MH: ‘Yes, but what about him, like, what he does, or what he thinks, or what he looks like..?’  
Resp: ‘Eh..How he looks like?’  
MH: ‘Yes, what is it about - imagine I am a 16 year old person. What is it about me that makes me a child?’  
Resp: ‘Your age.’

Age is not an essential part of the meaning of childhood. Rather, age is a designator that tells us how long a person has been on the earth (presuming someone’s age is known, because the person’s date of birth has been registered somewhere or is remembered by an adult). Using this knowledge, we have a rough idea corresponding to a stage of development that a person is in. But this conception is not to be mistaken for the essence of a stage of development, such as childhood. It is mentioned by respondents, however, that development occurs because of experiences. The child’s mental development is influenced by external experiences, and therefore respondents mention that the child is less experienced, and that the transition from childhood to adulthood is influenced (accelerated or delayed) by the experiences that the child encounters. Age can in this sense be a designator to indicate, very roughly, how much a person has experienced.<sup>21</sup>

When asked, people find it difficult to indicate until what age childhood lasts. When they say something on the topic at all, they mention something in between 16 and 25 years. But even if they take a clear stand (for example they say adulthood starts at the age of 18), they are inconsequent - they might for example later during the interview say that the person of 21 years can get married and the person of 18 years cannot ‘because he or she does not yet have a fully developed mind’. Respondents often do mention a difference in development between something like early childhood and adolescence, but do not know, let alone agree on, what age is related to these stages of development. Most respondents when asked mentioned an age for what they thought to correspond to the beginning of adulthood. For Rwandans, the average age for the start of adulthood was 19,92 (n=24, sd=2,12). For the Dutch, the average age for the start of adulthood was 21,36 (n=22, sd=2,48).

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<sup>21</sup>In this sense there has to be made a distinction between “the meaning of the concept of childhood”, which is the main concern here, and the most useful legal demarcation criterion. Under §1.3 I suggest a model for a more competence-based meaning of childhood, which might also be useful as a legal criterion. I do agree that a general guideline to demarcate childhood is useful for (legal) certainty in society. For a discussion of this dilemma, see Anderson & Claassen (2012).

### **What does the concept mean teleologically?**

The fact that childhood is defined as the period in which the child's mind is not yet fully developed has certain consequences which supervene on the meaning of the concept of childhood. These consequences broadly fall into two categories; ethical consequences and consequences of non-independence.

#### *1) Non-independence*

The child is not independent.<sup>22</sup> As he or she is in a developing stage, in the process of developing body and mind, he or she needs guidance. The child is under the control of parents or guardians – adults who are able to take responsibility, and to make the decisions, which the child is not yet able to make. This relation takes several forms, such as educational dependence, economic dependence, protective dependence. For all these aspects the child needs the adult, and this fact leads to ethical consequences, namely that the adult (parent or guardian) is expected to provide care in these areas. The adult needs to provide education, protection and economic care. In a way these needs of the child are necessities, because without any care they would not survive.<sup>23</sup> However, for most part, when we say that a child needs these forms of care from an adult, we mean that they need it to grow up well. As one respondent formulated:

MH: '[Do you think] that a child cannot survive without care?'

Resp: 'She or he can survive, she can have life and grow up and survive. But emotionally, he is not good, he is not in a good condition of thinking, of being, emotionally. It's like there is something which will be luck, luck for him, because he [...] grew up without any care from parents, from others. He grew up for life, he grow up, but his [heart will be like it's attacked]. Not feeling well. Feeling badly.[Childhood is] like [the] foundation. It's like a short tree. Which will be grow[n] up and developed and it gets more, more fruits for everyone.[...] [I] found that even the child from [a] poor family, the child from each family, the

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<sup>22</sup>Neither is the adult. But the child is said to be less independent than the adult, mainly because they are under the control of adults.

<sup>23</sup>This probably holds true only for a very specific stage in childhood, namely the stage of the very young infant who cannot feed himself in any way.

way you treat him or her, in that way will produce a good result. Even, for example, [...] the tree, when the tree is in [a] soil which is rich, the tree will grow up well. And when it is in a bad soil, it will not grow up and it will [...] not give a good result [...].

## 2) *Ethical consequences*

The understanding of childhood has certain ethical consequences that are directly related to the meaning of childhood. A few are mentioned by respondents:

- A child should not have sex (with another person)
- A child should not get married
- A child should not have a baby
- A child should not be involved in hard labour
- A child should not drive a car
- A child should not be a soldier

These ethical consequences are connected both internally and externally to the broader meaning of childhood. For example the child should not have sex with another person, because a child has no sense of responsibility, because of its not yet fully developed mind. It cannot oversee the consequences of his actions, and therefore cannot bear (full) responsibility over his actions. When it comes to sex, people feel that you have to do it wisely, responsibly. Especially in a country like Rwanda, where contraceptives are not as widely available, where the chance of getting HIV/AIDS forms a substantive threat to a person's health and having a baby before marriage often leads to rejection by the community because of existing cultural (religious) values. As a child is not able to take a responsible decision, to oversee consequences, to act intentionally, the child should not have sex, should not get married, should not have a baby. All because he or she does not have the capacity of mind that is deemed necessary for these kinds of long-term life changing decisions/actions.

### **Differences: non-essential meanings of childhood, according to respondents**

The most striking differences between Rwandan childhood and Dutch childhood are the differences in ethical consequences of being in the period of childhood and the difference in mentioning the child's pre-sociality.<sup>24</sup>

First of all, the differences in ethical consequences related to the concept of childhood. These are quite easy to explain, since they depart from the same basic principles attributed to childhood. For example the difference in opinion on whether the child should or should not have sex. In Rwanda, sex is a much more dangerous undertaking than in the Netherlands. In Rwanda, contraceptives are less widely available. There is a much higher chance of getting HIV/AIDS. Also there is a big taboo for a child to get pregnant without being married. Therefore to have sex as a child in Rwanda is a much riskier activity than in the Netherlands, since in the Netherlands contraceptives are widely accessible, as is the possibility of abortion. If a child in the Netherlands becomes a parent, this is a taboo, but not as big as in Rwanda – where young unmarried mothers are often excluded from the community. The chances of contracting HIV/AIDS in the Netherlands are close to zero.<sup>25</sup>

The arguments why children should or should not participate in certain activities (like sex, having a child, getting married, driving a car) are the same for most respondents, both Rwandan and Dutch; because children cannot oversee the consequences of their actions (e.g. sex might get you pregnant), they cannot oversee situations (which is more of a problem when driving a car in the busy traffic of the Netherlands than in the calm streets of Rwanda), they are still dependent on their own parents, cannot design their own life-path yet and since they are dependent on adults and any child is dependent on adults, a child cannot raise a child herself.

A difference in ethical consequences is that it is often mentioned by Dutch

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<sup>24</sup>Another thing to notice is how the Dutch seem to be much more opinionated. Dutch respondents per interview mentioned many more aspects of childhood than Rwandan respondents. This may have to do with difference in level of education, difference in social customs (whether or not to talk a lot and express opinions), the aspect of translation and its effect in the case of the Rwandan interviews. I have taken this into account while interpreting the results.

<sup>25</sup>In 2012, 5600 Rwandan people died due to AIDS, while in the Netherlands in 2010 there were only 12 cases of people who died due to AIDS (See: <http://data.worldbank.org/country/rwanda>, accessed 29-4-2014, and Surveillance Report HIV/AIDS Surveillance in Europe, 2010)

respondents that ‘a child should be allowed to be a child’, meaning it should grow up carefree, without responsibilities, which allows the child to form his/her identity, to learn, to develop. This is an ethical consequence that Rwandan respondents do not mention - but since going to school, learning, developing, need for guidance, less responsibility and the development of identity are also mentioned by Rwandans, I would argue that here there is no disagreement, but simply a different mode of expression.

Secondly, the difference with regard to the pre-social (and so Rousseauian) aspect of childhood. It is striking that while Dutch respondents often mention the development of the child as growing up to become “an active member of society”, to “play a role in society”, this aspect is not mentioned by Rwandan respondents at all. This difference is harder to explain. What do the Dutch mean when they say that an adult plays an active role in society? They mention having the right to vote and forming society by attributing to it, mostly due to the profession of the (adult) person. So earning money, paying taxes, which contribute to the welfare of society as a whole. The first social aspect (being an active member of society) can be explained – this difference may be caused by the different political structures of both countries. The Netherlands are governed by a political system of representative democracy. There is an almost absolute freedom of speech and freedom of press. “Active citizenship” is one of the goals of primary- and secondary education.<sup>26</sup> Therefore the Dutch adults can, in Habermas’ terms, understand themselves as both authors and addressees of the law (1998: p. 260). They are active members of society who have the possibility of engaging in public debate, living in society while creating and influencing it at the same time, in this respect. Rwandans on the other hand live in a political system of totalitarianism. Officially Rwanda is supposed to be a representative democracy and citizens have a right to vote. Nevertheless, unofficially the political system is one of repressive totalitarianism. There is no freedom of speech, no freedom of press, no room for public debate.<sup>27</sup> Therefore the concept

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<sup>26</sup>See for example <http://www.leraar24.nl/dossier/612/burgerschapseducatie>, accessed 29-4-2014.

<sup>27</sup>See for example Stern & Straus (eds.) (2011): *Remaking Rwanda: State Building and Human Rights after Mass Violence*. For more information on this subject, see for example <http://www.theguardian.com/commentisfree/libertycentral/2010/mar/02/rwanda-free-speech-genocide>, accessed 29-4-2014, <http://www.amnesty.org/en/library/info/AFR47/002/2011>, accessed 29-4-2014, <http://www.economist.com/news/middle-east-and-africa/21586597-president-tightens-his-grip-safe-and-sorry>, accessed 29-4-2014.

of “citizenship” has quite a different meaning for both cultures. This could explain the Dutch emphasis on the pre-social character of childhood. However, in Rwanda adults have full-time jobs too. It can be argued that in that way they give shape and meaning to society. Apparently this idea of society is not as apparent and on top of their mind, in relation to the child-adult distinction, as it is for Dutch people. However, both Dutch and Rwandan respondents recognize childhood as a period in which the person develops a personal identity. This does seem to relate to the pre-social aspect, since one has an identity only in relation to the other - without society there would be no need for a person to form an identity, since this person would be the only one. How could one form an identity if not by distinction, in relation to the other?

### **1.2.2 Childhood: body and mind?**

When field research and philosophical literature seem to imply that the meaning of the concept of childhood lies essentially in physical and mental development, one finds oneself immediately directed towards the ancient philosophical discussion, whether the body and mind are two separate entities or whether these are actually one and the same substance. Does the developing mind mean that something in the body (a first association would be the brain) is developing during childhood, which is expressed and experienced as mental capacities (thoughts, actions deriving from thoughts, choices, insights, etc.) or is there a separate entity, which is the mind, which is developing during childhood apart from the body? Certain philosophers, as discussed under §1.1, seem to make a dualist distinction when discussing childhood, referring to soul, mind and/or reason as distinct from the body. And even knowing that there are philosophical monists who argue that mind and body are essentially one, I have never heard of anyone arguing that since the mental is only a side-effect of the physical, children’s education should only consist of physical exercise. Respondents seem to suggest a dualist position too by arguing that the body has finished its development around two thirds through the period of childhood, but adulthood is then not yet reached because the mind is still developing. However, “the body” here refers to the outside of the body, the visible, referring mostly to the developing of secondary biological characteristics during puberty. The developing mind might therefore be a bodily development “on the inside”. To see if this makes sense, I want to take a short look at what neuroscience has to say on the subject. Is there a



stage that can be pointed to, when the brain is “mature”, and (how) is the process of development influenced?<sup>28</sup>

From reading studies on the child’s and the adolescent’s brain in neuroscience, it becomes clear that a first problem is the assigning of concepts to certain observations. It seems that often neuroscience in setting up research borrows concepts relating to stages of development from everyday language, rather than concluding from their own data when these stages of development would occur, or under what designators. This results in research titles like “Structural Brain Development in Late Childhood, Adolescence, and Early Adulthood” (Jetha & Segalowitz, 2012) and “Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood” (Lebel & Beaulieu, 2011), without explaining to what designators in development these concepts refer and implying that these stages in development are not contingent upon neurological development. Even the dualism of the physical and the mental is, surprisingly, present in neuroscientific discourse. For example Asato et al. (2010) start their article with the following sentence: ‘Adolescence is a unique period of physical and cognitive development that includes concurrent pubertal changes and sex-based vulnerabilities’ (p. 2122). So apparently “physical development” and “cognitive development” are not one and the same.

A popular belief these days is the assumption that according to neuroscience, the brain matures until its about 25 years old. This opinion is regularly expressed by neuroscientists in popular media, and referred to by several respondents. For example, Dr. Sandra Aamondt in a radio interview with the American National Public Radio (NPR) argues that ‘brain scans show clearly that the brain has not fully finished developing until about age 25’.<sup>29</sup> This would mean that scientifically a line can be drawn before which the person’s brain is “childish”, and when it is mature, around the age of 25. This would fit in nicely with the common view of respondents, arguing that 18 year olds (officially adults) cannot yet oversee long-term

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<sup>28</sup>I am very much aware that I am nowhere near an expert on neuroscience. Therefore I will probably have made mistakes in interpreting the research. However, I feel that especially since I am not an expert, I can investigate from a different point of view and therefore I can notice assumptions relating to the child/adult distinction in the neuroscientific research discourse that might escape the attention of the experts. With this in mind I have chosen to look at neuroscientific research in relation to the meaning of childhood.

<sup>29</sup>See: <http://www.npr.org/templates/story/story.php?storyId=141164708>, accessed 03-12-2013.

consequences, cannot take full responsibility for their actions, do not have a fully developed ethical compass, etc. However, neuroscientific observations are not that straightforward. To begin with, the largest white matter, the corpus callosum which allows for integration of information across the two sides of the brain, thickens “considerably” from 4 to 22 years, but its peak thickening is thought to be around one’s fifties (Jetha & Segalowitz, 2012: p. 8,11). The total brain is said to reach its adult size at age 12 (ibid, p. 3) and when it comes to grey matter, the age at which this thickening peaks differs per brain region and gender. After peaking, grey matter starts to decline, which according to Jetha & Segalowitz ‘is viewed as a reliable marker of maturation’ (ibid, p. 6).

Asato et al. (2010) studied the brain of 114 volunteers, trying to find ‘age-related changes in white matter integrity that characterize adolescence’. To this purpose, they sorted their volunteers into three groups: ‘36 children (8-12 years of age), 45 adolescents (13-17 years of age), and 33 adults (18-28 years of age)’ (p. 2122-2123).<sup>30</sup> In their results they discuss “maturation of clusters” rather than “change of clusters”, and therefore it is hard to tell what this “maturity of clusters” means. This is not explained in the article. When trying to translate the results into behavioural aspects, the areas that are said to continue to mature during adolescence are associated with reward processing (orbitofrontal cortex) and facilitating higher language skills and other associative functions (posterior portion of the corpus callosum), but the language used in this section is careful and indecisive (ibid., p. 2127).

In the end, it seems that the only possible conclusions to draw from these kinds of neuroscientific research with regard to the adult/child distinction, is that firstly, the brain indeed develops during the period of childhood. Although researchers do not yet know what functions of mind (that we recognize in everyday language) relate to what part of the brain exactly, it seems that they agree that different aspects mature during different periods in the life of a person. It is clear that no definite age can be pointed to at which moment the individual brain is mature, based solely on neuroscientific research – even if this would result from one set of neuroscientific data (which seems unlikely), data and research seems to be contradicting. On the whole

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<sup>30</sup>These ranges are said to be ‘based on our earlier findings of significant stage-like shifts in the development of cognitive control’, referring to Luna et al. 2004. In this article, several “adult-level mature performances” are found to begin in different areas at different ages - processing speed at age 15, response inhibition at age 14 and working memory at age 19. So it is hard to see how these age ranges are based on the 2004 article.

it seems that we do not really know (yet?) what all these increases and decreases in volume mean exactly.

As Steinberg writes in the New York Times (2012):

‘Indeed, some brain regions and systems do not reach full maturity until the early or mid-20s. Should this new knowledge prompt us to rethink where we draw legal boundaries between minors and adults?

Maybe, but its not as straightforward as it seems, for at least two reasons. First, different brain regions and systems mature along different timetables. There is no single age at which the adolescent brain becomes an adult brain. Systems responsible for logical reasoning mature by the time people are 16, but those involved in self-regulation are still developing in young adulthood [. . .].<sup>31</sup>

And therefore it seems that when trying to settle the philosophical and conceptual questions I am raising in this thesis concerning childhood, contrary to popular belief, neuroscience is not too useful (yet?).

### 1.2.3 The developing mind

Both Plato, Kant, Rousseau and respondents agree that childhood is a period of development. They suggest that, through education, there is a possibility for development of the mind. Childhood is understood as a period of becoming (an adult). But this notion of transition is problematic; if there is something that the child’s mind or soul does not yet possess, how can it be added, or if it is already there (perhaps as a potentiality), how can it be realized? Here I want to look into this notion of the developing mind more, and question what is meant by the developing mind in relation to the child-adult distinction.

Philosopher John White, in his work “The child’s mind” (2002) questions the notion of the child’s mind developing like a seed. He wonders whether the biological notion of the unfolding of an organism, with an initial and mature state attributed to the unfolding process, applies to the developing mind.

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<sup>31</sup>See: <http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity>, accessed 03-12-2013.

He argues that ‘[o]rdinary judgments of mental maturity lack the universality of agreement that we find over fully-grown pine trees or badgers. This is because we are in the realm of value judgments rather than of observable facts’, concluding that ‘[n]one of this means we should stop talking about the growth of children’s minds, as long as this is not interpreted in a biological way’ and refuting the ‘developmentalist project’ (p. 72-74).<sup>32</sup> It is understandable how White would make this distinction. Although not completely transpicuous, it seems easier to determine the stage of development of a pine tree than that of a human being. However, I believe this is simply because a tree has less developmental constituents than a human being (namely, only physical and no mental). Still I disagree that judgments of mental maturity lack the universality of agreement that we find over fully-grown pine trees. Attributing the states of “mature” or “immature” to both human beings and pine trees is problematic. We have to realize that we are looking for the meaning of a concept. The mature state of the mind is comparable to that of the fully-grown pine tree, when we look at the meaning of language. In the end it is a conceptual line that is drawn rather than an ontological one, although the conceptual line is obviously related to the ontological state of an organism. The pine tree, like the human mind, is ever changing. When do we say the tree is “changing” rather than “developing”? When is the change in pine trees, or human minds for that matter, attributed to the developing seed and when is it said to be change of the fully-developed tree? It is a linguistic question, a meaning that we attribute to things happening in the world, to our observations and experiences, rather than an ontological or empirical fact. So the question keeps coming back to: what do we mean when we say that the tree or the mind is developing rather than changing? What do we mean when we say that the tree is fully-grown or that the mind is mature?<sup>33</sup>

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<sup>32</sup>However, in chapter 1 he writes ‘Everyone will agree that education has to do with the development of the mind. [...] Parents and teachers are uncontroversial in the business of developing children’s beliefs, skills, desires, judgments, emotions’ (p. 24).

<sup>33</sup>Incidentally, I find it most interesting that White titles his book “The child’s mind” but does not define this notion. If “the child’s mind” as opposed to the “adult’s mind” does not exist, as he seems to suggest, then what is the book about? The first chapter of the book is actually titled “what is the child’s mind?”, but this chapter only explains what according to White is a mind, and how educators are related to the child’s mind, without explaining what a “child’s mind” is, or even, defining who he refers to when he talks about “a child”. He does write that ‘For area after area of children’s mental life, we just cannot make sense of it unless we think of it as object-directed. Children cannot

My field research seems to suggest that the judgment of mental maturity in fact does not lack universality of agreement. When people from completely different cultures, like the Rwandan (African) and the Dutch (Western-European) attribute basically the same meaning to the concept of childhood, and the notion of development and the developing mind, this seems to suggest that there actually is a universal meaning of these concepts. Research in anthropology confirms the suspicion that the concept of childhood is a universal concept. In an introduction to their book “Anthropology and Child Development: A Cross-Cultural Reader”, a collection of articles of field studies of childhood by anthropologists, LeVine and New write: ‘Every human society studied recognizes a distinction between children and adults and the age-linked emergence of children’s abilities to learn, work, and participate in community activities as they grow and develop’ (2008: p. 3). However, in the same introduction they argue that ‘the more professional experts on child rearing propagated universal concepts of the normal child, the clearer it became to anthropologists that the concepts were fashioned from local (that is, Euro-American or Western) moral standards combined with biological speculation’ (2008: p. 5). So in anthropological field research, it is found that there is a universal concept of childhood, as distinct from adulthood. However, there is no universal way of child rearing.

David Archard, in his chapter on “the modern conception of childhood” (in his otherwise very interesting book on childhood and children’s rights), writes that

We [referring to people in Western culture] now insist upon a sharp distinction between the behaviour demanded of children and that expected of adults [...] other cultures possess the concept of childhood and so recognise a differ-

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look without looking at *something*. They cannot just be proud without being proud of *something*’ [author’s italics] (p. 21). (He does give an exception to this when discussing sensations on p. 23-24). Now I do not know how this could be any different for adults. I can imagine a person “feeling proud” (or happy or any emotion) without this feeling being object-directed. However, in this respect there is no difference between the child- and the adult mind. Maybe White does not mean to say that this object-directedness is specific for the child’s mind, but for any mind - he does not answer these questions, and disappointingly does not answer his own question “what is the child’s mind?”. The fact that he speaks of “we” who cannot make sense of children’s mental life, unless we think of it as object-directed, suggests that there is an adult reader who is reading and thinking, using his adult mind, about the child’s mind. But this is mere suggestion.

ence between children and adults. But they see children as differing from adults in a far less dramatic and obvious fashion than is implied by the modern conception. [...] It is clear that we not only think of the child as a radically separate being from the adult: we have a theoretically well-informed idea as to what this separateness consists of. (...) For us, childhood is a stage or state of incompetence relative to adulthood. The ideal adult is equipped with certain cognitive capacities, is rational, physically independent and autonomous, has a sense of identity, and is conscious of her beliefs and desires, and thus able to make informed free choices for which she can be held personally responsible. [...] Childhood is defined as that which lacks the capacities, skills and powers of adulthood. To be a child is to be not yet an adult' (2002: p. 38,39).

Unfortunately it is completely unclear where Archard gets these ideas, about "our" view and the views of "other cultures", from. My research clearly shows that (at least a part of) "we" do not think of childhood and adulthood as sharply distinct. Rather, Dutch respondents recognize a period of transition at the end of childhood. There was no clear difference between the Dutch and Rwandan respondents with regard to how dramatically they see children as differing from adults. Clearly, more field research needs to be done in this area.

### 1.3 A universal definition of childhood

To conclude the first chapter, I will give a universal definition of childhood, extracted from all of the above. In this definition views from different philosophers and results from field research will be combined. It can then serve as a basis for discussing the notion of children's rights.

No matter the differences in thought between mentioned philosophers and respondents, it is clear that childhood is a period of development, attributed to mankind in general and every newborn in particular. As a tentative definition of universal childhood, based on considerations as described throughout the first chapter, it seems that the most essential characteristic of this period is the developing mind. The child is pre-rational; it gradually acquires knowledge and the capacity to think. The child is pre-moral; it gradually acquires knowledge about morality and it develops the capacity to act morally and take responsibility for its own actions. In this sense it can be understood to be unfree; if we understand freedom to mean the capacity of moral action. The child is pre-social insofar as it is developing its identity in relation to others, insofar as it finds itself in a community or society. All of this denotes development towards an adult state. For this development, to reach the adult state, the child needs external experiences and guidance, the latter which is called "education". For the possibility of development, the rational, moral and social capacities are inherent to the child as potentialities.

To visualize the meaning of the concept of childhood, the developing mind and the transition into adulthood, one might envisage the following chart (Figure 1.2). However a more accurate picture is given in the following graph (Figure 1.3):

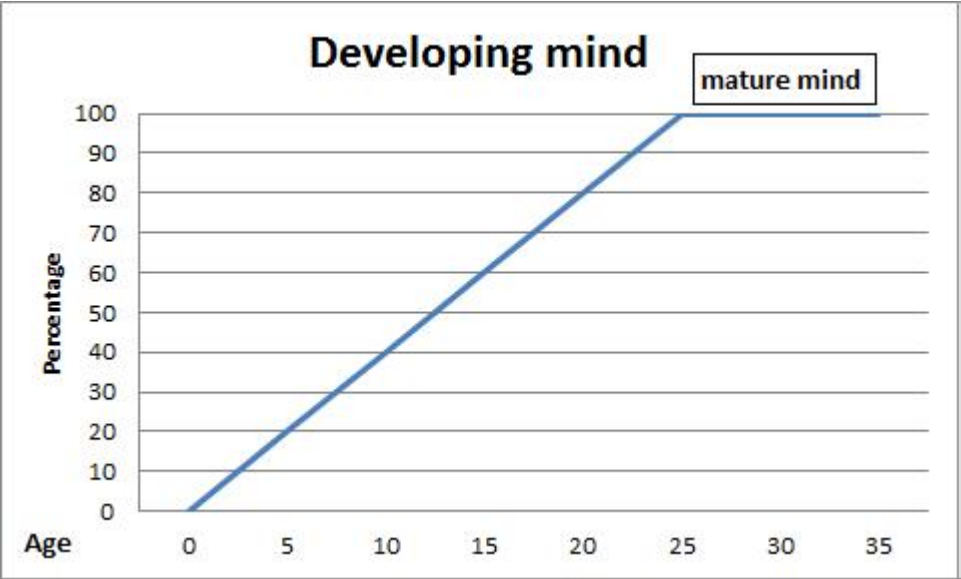


Figure 1.2: a chart of the developing mind



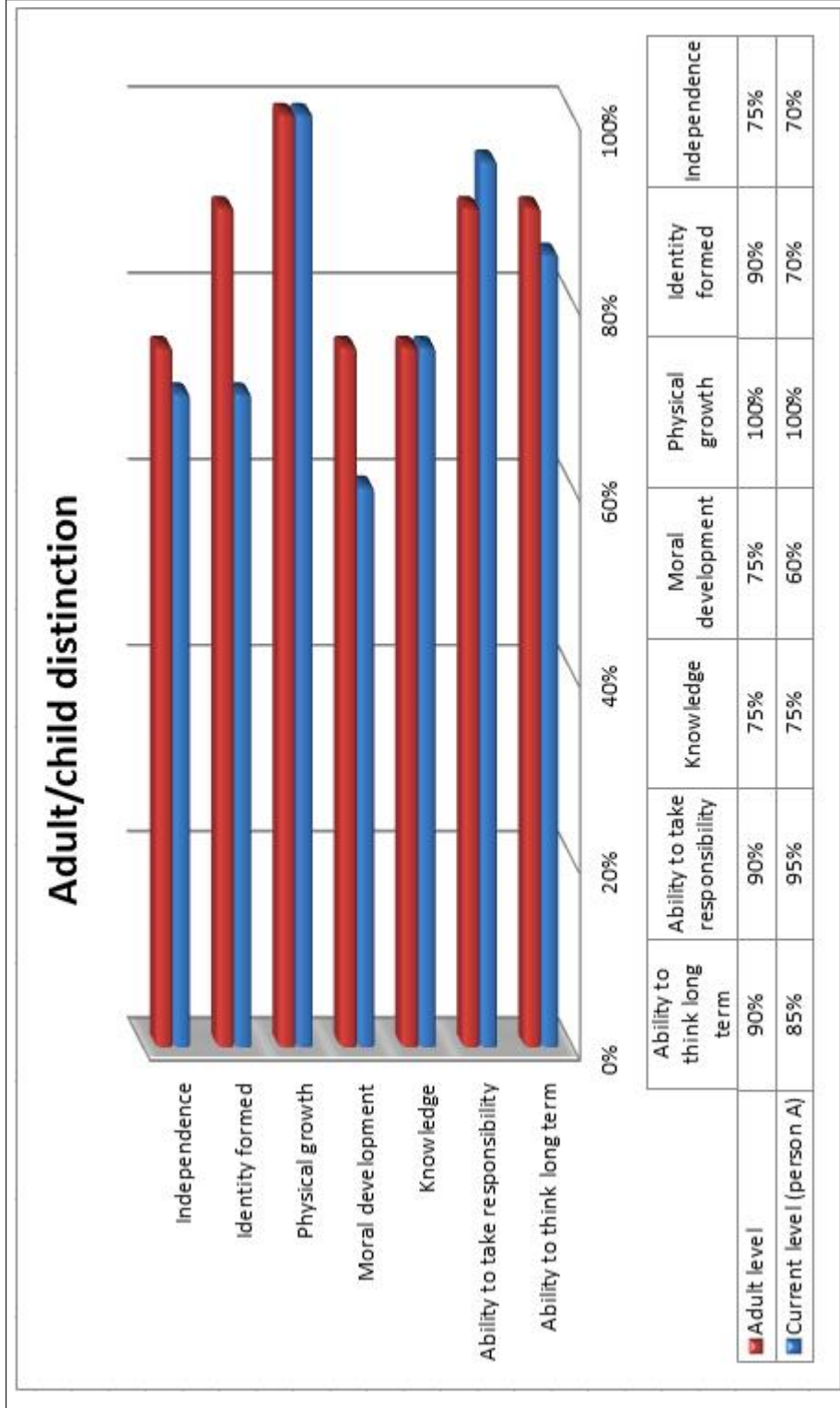


Figure 1.3: a model of the adult/child distinction in relation to the developing mind

The figure is a tentative indication of what a graph visualizing the meaning of the concept of childhood, after appropriate research, might look like. It is meant to visualize the fact that “maturity” means development of personal capacities in several different areas of personhood. The person can be said to be an adult completely if in all areas of development he or she has reached the adult level. The percentages of development that are required for labelling the mind (or person) as mature are different per (mental) capacity. Numbers are relative to the full capacity of each – which probably no human being possesses. Following Plato, we could say that the one who scores 100% on all aspects is God, who is in a satisfactory state (see §1.1.1).

Again, this is only the visualization of an idea. We can imagine this model being translated and further developed into a psychological test which could be useful for all kinds of purposes – for example regarding questions of legal responsibility, or to test whether a person is fit to become a combatant. As you can see, person A is not fully mature. The question whether person A is indeed a child depends on whether the person is still developing. This distinction is found in the word *yet*. Do we say this person is not an adult *yet*? If not, it is not a child. It might be for example an 80 year old who is suffering from early stage Alzheimer.

Anderson & Claassen (2012) argue that this kind of competence-based testing would open the door to testing “adults” (meaning people over adult age) in the same respect as children with regard to relevant competences necessary for a certain skill (the skill in the case in question in their paper is the case of 13 year old Laura Dekker, whether or not she would be allowed to sail solo around the world). In a similar case, they argue, an adult might have to be assessed on emotional maturity and relationship-skills to determine whether they should be allowed to sail solo around the world. ‘An age-neutral approach has the unpalatable result of opening the door to rampant paternalism towards adults’ (p. 503). Although an interesting point to keep in mind, it seems that they are forgetting that this kind of approach is already used in certain (legal) practices involving people of adult age, and has proven to work well – for example with regard to elderly who have to take tests to see if they are still fit to drive a car and/or manage their assets. Or, of course, in the case of anyone who wants to become a soldier – in the Netherlands, anyone who applies has to take an intensive physical and psychological test, irrespective of the age of the person applying.

## Chapter 2

# Children's Rights

In this chapter I want to focus on children's rights. I will question whether, following from the definition of childhood as revealed in the previous chapter, children can be said to have any rights at all. Obviously they do, in the sense that there is a legal instrument stating children's rights (1989 Convention on the Rights of the Child). So I start with the CRC to question the notion of children's rights, by using the concept of the child and its process of development as described Plato, Kant and Rousseau (referring to §1.1). I will question whether children should have rights at all. Secondly, I will investigate the relation between law, children's rights and society. I will start by discussing the fundamental question whether there is a distinction between legal and moral rights – arguing that the only rights are legal rights (§2.2.2). Then I will unfold a theory on the relation between (children's) rights and society and by analyzing the concept of childhood in Rwandan and Dutch law, meanwhile discussing the relation between formal law, law for the community and law for the government. I will end the chapter by under §2.3 discussing why children should have rights.

### 2.1 Children's rights?

The UN Convention on the Rights of the Child, a convention ratified by 190 members of the UN, only excluding the USA and Somalia (who have expressed intention to ratify the convention), expresses an apparently universal

idea of children's rights.<sup>1</sup> The idea is that the child 'for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding' and should be 'brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity' because the child 'by nature of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth', ultimately because 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (1989 CRC, Preamble). So there is a twofold reason for international children's rights as laws; 1) because the child, a mental and physical immature being, needs special safeguards and care, and 2) because this contributes to freedom, justice and peace in the world. This idea is ratified by all UN countries.<sup>2</sup> The CRC legally falls under the Human Rights framework of the UN.

If we are to conclude, as I did in chapter 1, that there is a universal understanding of the concept of childhood, then the question is: what is it about children that makes them eligible for special rights, different from adult's rights? There must be something inherent in the essence of (universal) children that entitles them to special rights. What is it?

Firstly, we have to understand that the idea of children's rights starts with an exclusion. Since the 1948 Universal Declaration of Human Rights, there have been rights for all human beings. But these rights are not all applicable to children. If we look at article 1 of the Declaration, it states: '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. The second article states that everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind. Nevertheless, there is a distinction with regard to certain of these rights and freedoms, based on age. For example article 16, which states that '[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled

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<sup>1</sup>See: <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0>; <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treatie>; <http://allafrica.com/stories/201311210066.html>: Both countries have expressed the intention to ratify the convention in the future. Accessed 03-01-2014.

<sup>2</sup>The UN are basically all countries in the world, except for 11 states whose sovereignty is disputed by other states.

to equal rights as to marriage, during marriage and at its dissolution'. So the child, who is not of full age, does not have this right and is therefore not "free and equal in rights" compared to the adult. The same may be the case, depending on national law, for the right to own property (art. 17), the right to take part in the government of his country (art. 21.1) and the right to work (art. 23). On the other hand, in article 7, which states that '[a]ll are equal before the law and are entitled without any discrimination to equal protection for the law' – in fact in most countries, children are protected more extensively by the law than adults and therefore adults and children are not equal before the law in this respect either.

So we keep coming back to the same question: why are children treated differently, legally, from adults? Why are human rights not applicable to all human beings? Are children not human beings?

The answer is, resulting from the previous chapters, that children are humans-to-be, that is, future adults, in the process of becoming. As long as they have not yet become, this special status of becoming means that they do not yet possess certain qualities that are present in adult thinking and behaviour. Children's bodies and minds are developing. Due to this developing mind, the child has less responsibility, is less independent, has less capacity to oversee the consequences of its actions, etc. (see chapter 1).

### 2.1.1 The child as pre-rational and children's rights

If for Plato the child does not possess reason or knowledge (or at least, not fully), do they have rights? The laws of the polis for Plato have to be imposed on children. Children are not even in a position to discuss them; 'If your laws are but reasonably good, which they are, we must reckon among the best of them the enactment that no young man shall raise the question which of them all are what they should be and which not, but that all should agree [...] that they are god-given and admirable [...] while if an old man has any reflections to make, he must impart them to a magistrate of his own age, when none of the younger men are by' (*Laws*: 634e). Education and legislation for Plato are inseparable, the legislature being the supreme educator of the Polis, the philosopher-king (*Laws*: 631d,e *RE*: 473d). And so children for Plato possess rights only in the light of this goal; the is and the ought cannot be separated when it comes to legislation. Therefore I will discuss the Platonic view on children's rights more under §2.3 ("why children should have rights (or: privileges)").

### 2.1.2 The child as the becoming-moral-actor and children's rights

According to Kant, a right: 1) has to do with the external and practical relation of one person to another, 2) signifies a relation to the other's choice, 3) is a reciprocal relation of choice, of which only the form of choice is in question, which is regarded as free – the question is whether the action of one can be united with the freedom of the other in accordance with a universal law. 'Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' ( *MOM* 6:230). Regarding children's rights, Kant writes that children have an innate right to the care of their parents until they are able to look after themselves. This parental obligation follows from the act of procreation by which parents have brought a person in the world without its consent.<sup>3</sup> Therefore parents need to 'make the child content with his condition so far as they can. – They cannot destroy their child as if he were something they had made (since a being endowed with freedom cannot be a product of this kind) or as if he were their property [...]' ( *MOM* 6:280). This again seems contradictory; how can the parents have a reciprocal relation of choice with this form of choice regarded as free, when the choice of the child cannot be understood as free? It might in some cases be the case that the right of the child to be cared for by its parents results in the parent specifically not uniting his action with the freedom of the child, but rather restricting the freedom of the child (think for example of a parent who prohibits the

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<sup>3</sup>Schapiro in her 1999 article writes about this topic, saying that 'Kant explicitly maintains not only that we can cultivate our natural and moral capacities but also that we have a duty to do so. However, Kant denies that we have a corresponding duty to cultivate perfection in others. [...] Now if children are simply adults in a less cultivated form, it would seem to follow that while children are indeed obligated to cultivate their own perfection, adults are not obligated to cultivate perfection in them' (p. 724). She gets this from the *Metaphysics of Morals*, the *Doctrine of Virtue* (6:386). However I think there is a distinction between cultivating "perfection" in others, which according to Kant is impossible, and cultivating "natural and moral capacities". The latter can and must be done by parents according to Kant. He explicitly says in this same work, the *Metaphysics of Morals*, 'From this duty [of the parent to preserve and care for its offspring] there must necessarily also arise the right of parents to *manage* and develop the child, as long as he has not yet mastered the use of his members or of his understanding: the right not only to feed and care for him but to educate him, to develop him both pragmatically, so that in the future he can look after himself and make his way in life, and *morally*, [...]' (*MoM* 6:281).

toddler to enter a lake). But then if the child does not stand in this reciprocal relation of choice to the adult, how can a child be understood to have rights at all?

In a way this question reminds one of the animal rights debate. Especially in the light of Kantian ethics, assigning no freedom to animals at all (not even as a potentiality), how can we understand animals to have rights? In this respect we need to let go of the Kantian notion of a right. Rather, we can understand rights for example as understood by an interest theory of rights, which states that the function of rights is to uphold individual well-being. The individual possesses an interest, which leads to a duty on others to ensure that this right is upheld (Garner, 2013: p. 95, paraphrasing Raz, 1986 and Kramer, 1998). But still Kantianism peeks around the corner here, wondering how an unfree individual (if we could call such a “thing” an individual) has any interests at all. Perhaps an interest in survival – but if this is purely based on inclinations, can it properly be labeled an interest? It is indeed often argued that animals cannot be possessors of rights because ‘the exercise of moral rights involves the capacity for moral judgments, namely, moral awareness of the extent of the liberty the right confers’ (Garner, 2013: p. 95 quoting McCloskey, 1987: p. 79). If this is true, children would not be possessors of rights either, since they precisely do not have this capacity (although they might somewhere along the process of development during childhood gradually acquire it – let’s say that a newborn baby does not possess this capacity). With regard to this point, Archard (2002) points at article 3.1 of the CRC, which ‘sees the child as having his own interests which need to be taken account of and indeed promoted’ (p.64). This is the article that states that ‘[i]n all actions concerning children, [...] the best interests of the child shall be a primary consideration’. Considering this article, Archard speaks about “we” (adults?) who ‘normally know what does and does not benefit a child’ (p. 62). So the “interest” of the child is understood as “what does benefit to the child”, irrespective what the child wants (although this may of course be taken into consideration). For Archard, the answer to the question what is best for the child, is ultimately the outcome of a moral discussion between adults (p. 63). I want to argue that children’s rights are in the best interest of the adult rather than the child (see: §2.3.2).

It is precisely the paternalistic legal attitude towards children that makes it hard to see them as rights bearers. This is because adults impose these rights on children, leaving out the (potentially free) choice of the child completely. Children can in no way be understood to be the authors of their own

laws (since they are not allowed to vote). In *Perpetual Peace*, Kant defines external legal freedom as follows:

‘it is the right through which I require not to obey any external laws except those to which I could have given my consent. In exactly the same way, external (legal) equality in a state is that relation of the subjects in consequence of which no individual can legally bind or oblige another to anything, without at the same time submitting himself to the law which ensures that he can, in his turn, be bound and obliged in like manner by this other’ (p. 120 footnote).

It is clear that we cannot understand children’s rights in a sense of inter-subjective reciprocal granting and taking a certain right and that the child is always legally bound – insofar as the child is bound by law – by external laws to which he cannot be understood to have given his consent. We cannot say that children’s rights uphold the interest of children because they are not the objects of their choice. They are imposed forcibly – even if this is done bearing in mind what adults think to be the best interest of the child, it cannot be called “the interest of the child” since the child is not asked to express his interest. And it might quite often be contrary to the interest of the child (do children really want the obligation to go to school?). It might even in some cases be that the paternalistic nature of this act of rights imposing actually causes resistance on the part of the child – especially when in late childhood the child is in the process of developing his capacity for free choice, but this capacity is not yet recognized by adults (this is basically the essence of “the battle of adolescence”).

### **2.1.3 The child as the becoming-citizen and children’s rights**

Obviously, if children are understood as not yet participating in civil society, this raises all kinds of problems for a notion of children’s rights. As they are not yet part of civil society, although they find themselves in society, are they nevertheless part of the legal order? Can we in this sense understand children to have rights?<sup>4</sup> According to Lindahl (2013, discussing Ricoeur, 1992 and

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<sup>4</sup>More is said about this point under §2.3



Pettit, 2001), one can understand as possessing a “self-identity” the agent who over time at a given point in time actively endorses or owns the claims and attitudes of the earlier agent (referring to the same person, I would add). This is precisely what we cannot say about the child; since childhood is a period of development and change, the child’s attitudes and claims change constantly. In this sense the child can be said not to have a “self-identity” yet (as was already mentioned under §1.1.3, §1.2.1 and §1.3), and therefore there might be an argument to make for them not being responsible for their past actions – it wasn’t them. Lindahl applies this notion of self-identity to the collective, arguing that ‘integrated collectives display self-identity in the form of inter-temporal commitment’ (p. 83). This is why a law created at point A in time still has validity at point B in time; the collective can still stick to its commitment in the past, in understanding “us”, as a collective, to be the same. This collective sameness manifests itself ‘in the form of mutual normative expectations articulated and actualized in joint action under law’ (p. 84). Again, because children lack this form of self-identity, in both first person singular and first person plural, they cannot be understood to take part in a legal order, articulating mutual normative expectations.

Maybe we are wrong in calling these laws “children’s rights” but rather we should call them “children’s privileges” – the privilege to go to school, the privilege to be supported by your parents, the privilege of children to be protected by the government, the privilege of the child to receive a name and a nationality. Children are not entitled to these because of an inherent freedom or a reciprocal relation of choice towards others, but rather autonomous adults by exercise of their free, practical will in an act of public will (which excludes children’s will) choose to give these privileges to all children on an international level. On the other side of this agreement there is the duty of parents and ultimately the government to guarantee these privileges, and there are certain rights that children lack because of being children (not yet having sufficiently realized their freedom), such as the right to vote and the right to choose to become a combatant (see also: §2.2.1 and §2.3.2).<sup>5</sup>

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<sup>5</sup>This point has also been raised, in a slightly different manner, by H.L.A. Hart (1955, as quoted by Kleinig (1978), p. 41), who argues that since children lack a capacity for choice, they cannot be understood as rightsbearers.

## 2.2 The relation between law, children's rights and society

Any law necessarily stands in a certain relation to society. Without a society there is no law. Investigating this relation can bring a better understanding of the purposes and effectiveness of law. Therefore I want to analyze the relation between law in general and specifically children's rights, and society. I will unfold my own theory on the "flow zone of law in relation to society" and a theory about the three levels of law in a legal system, in relation to society. But before I address these questions, I will first get into the more general question of the relation between legal rights and moral rights – a question which I believe is actually based on false beliefs since I think the concept of "moral rights" is a concept void of meaning. However, it is necessary to address this distinction since it is fundamental to both the modern discussion about rights in general and my view on children's rights in particular.

### 2.2.1 Legal vs. moral rights

A recurring discussion within the human rights and children's rights discourse, is about the distinction between natural rights and positive rights, or in other words: between moral and legal rights. The discussion is obviously related to the more general discussion about the relation between morality and the law. This is a longstanding debate that would take at least another thesis to fully cover. Still, because the theme keeps recurring in the children's rights debate and because it is so fundamental to the idea of children's rights in general and my idea of children's rights as privileges in particular, I want to address these questions here shortly, in relation to my thesis.

The usual claim in the modern debate is that there is a difference between a legal and a moral right (see for example Archard (2002), who makes this distinction in relation to children's rights). The idea is that there are rights that children possess under law, called legal or positive rights (like the ones stated in the CRC), and rights that children have morally (Archard, 2002: p. 53,54). These two are distinct and can, but need not, coincide. A moral right is then the outcome of 'considering the weight of moral reasons for and against' (p. 54, see also: Brandt (1983)).

I want to argue, contradicting the dominant modern rights discourse, that

there are no moral rights. To argue that person A has a moral right to X although this is not a legal right, means: “person A *should* have a (legal) right to X”. Logically, the claim “person A *should* have a right to X” shows that this person does *not* possess this right (yet), and that the person who makes this claim thinks, based on ethical considerations<sup>6</sup> that this should change – meaning, the law should change.

There is another option, an alternative understanding of the claim “person A should have a right to X”. If someone makes this claim, it can alternatively be a rights claim. In this case it means “person A has a (legal) right to X, but this right is infringed by the government and/or other relevant subjects”. To understand this case, we tread upon the distinction that I make under §2.2.3 between different levels of the law. It means that on the level of formal law person A has a right to X, but on the level of law for the community he does not (think of the example of the right to free speech and the journalist who is imprisoned for criticizing the government). This means that the formal law in this case is meaningless (see§2.2.2). A refinement of my claim in §?? about the meaninglessness of the law in the case of a discrepancy between resources/abilities and the ought of the law can be made here. Because even if not exercised, the possibility to claim a right to X can be useful, for example to alert the international community and point out a reason why they should intervene, when (children’s) rights are violated (see also footnote p. 63).

Brandt (1983) disagrees. According to him, a moral right is distinct from a legal right. He writes that ‘we speak of a moral right when it is not thought that there should be a legal right, for instance, when we speak of a moral right of a child to equal treatment within a family’ (p. 29). I have trouble seeing how this would not be an appeal to a (desired) legal right. If we feel that this is just, (meaning in Brandt’s terms that the social moral code says it is just), we must consequently subscribe to the idea that this prescriptive statement should be made into law – unless we do not feel so strongly about it that we want to go through the administrative hassle of creating a law.

Although Brandt announces in the beginning of his article that he will focus on the concept of a moral right and ‘ignore the concept of a legal right’ (p. 29), the examples of right that he gives in the article; the right to speak

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<sup>6</sup>With “ethical considerations” taken in the broad sense, including practical considerations, etc.

freely about government, the right to own capital goods, the right not to be tortured, etc. (p. 35,37), are clearly legal rights.

In the article there follows a ‘deep analysis’, which ends in defining a moral right in this manner, using Mill’s *Utilitarianism* (p. 36, 37): ‘a moral right is something the moral code of society, if not the legal code, should defend one in possession of’. ‘X has a right to Y’ then means: ‘It is justified for people in X’s society to be strongly motivated, [overridingly so and in conflict with other less strong moral claims], and to disapprove of others who are not so motivated, to enable X – always by refraining from interference, but when necessary also by co-operating substantially to bring about the opportunity – to do, have, or enjoy Y, primarily because of the importance to people in X’s situation of being able to do, have or enjoy things like Y’ (p. 37). I would argue, firstly, that the motivation of people for the pursuing of realizing a moral conviction is always just, precisely because it is their personal or collective moral conviction. A “justified” moral code is defined by Brandt as ‘when a fully rational and informed person who expected to live in that society would support bringing about and keeping in place that certain moral code, more than any other moral code, including none at all’ (p. 33). However, I would argue secondly that this is simply a definition of a moral conviction in general. Because anyone who has a moral conviction on a certain topic, will at the same time hold that any fully rational and informed person who expected to live in that society would support bringing about and keeping in place that certain moral conviction (or code).<sup>7</sup> Motivation enters the definition, because Brandt gives a motivational account of subscribing to a moral code. This means: a person subscribes to the wrongness of X, if he (a) is motivated to avoid X, (b) he tends to have uncomfortable feelings (guilt) if he comes to believe he has done X, and if he (c) tends to disapprove of people who he believes have done X without justification or excuse (p. 32). A social moral code is then ‘for something to be true of the personal moral codes of the society’s members – all of them, or most of them, or on the average’ (p. 32). In the latter we find the justification for calling a moral claim a right; because it is the dominant moral opinion in society. So, based on the premises as given by Brandt, ultimately, “X has a moral right to do Y” means: “(at least) most people in a given society feel that it is best for X to do Y (but not to make this a legal right)”. The two kinds of expansion

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<sup>7</sup>This is confirmed in Brandt’s definition by the line that says that the people who hold the moral code ‘disapprove others who are not so motivated’.

as given in the long definition of Brandt, (1) thinking everyone should think this is best, too, and (2) “it is best for X to do Y” means this is true for all people in X’s situation (basically, for all X’s), are irrelevant, because they are already inherent to any moral judgement. Again, Brandt’s definition of a “moral right” turns out to mean “a moral conviction (or judgment)” – in this case of (at least) most people.

To show again how “moral rights” is a false category, one can simply take a look at a pre-legal state of nature. Imagine I live in a state of nature, in the forest, there is no government, no laws, no (modern) society.<sup>8</sup> The most basic right that is mostly referred to as a “moral right” (whether or not it is also a legal right), is the right to life. Suppose now person B meets person A in the forest, and kills her. In this case it makes no sense to argue that person A has (or had) a right to life. Because then what would it mean, to have a right to life? Surely person A does not have any legal rights. A defender of the moral rights thesis would argue that person A has a moral right to life, meaning person B should not have killed her, and the act of killing was a violation of the moral right of person A (and any rational person would agree). But then you are simply saying that you think the act of killing another person is morally wrong. People simply invoke “moral rights” to make their personal (or collective) moral opinion into a stronger claim; “the act of killing person A is wrong because person A has a right to life”. Since there is no legal right in this situation, this statement means exactly the same as “person A has a right to life because the act of killing person A is wrong”. Clearly, it is circular reasoning. Adding the concept of “right” to this claim is conceptually meaningless, because it does not refer to anything outside of the moral conviction of the person (or group of people) making the claim.<sup>9</sup>

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<sup>8</sup>I added “modern” to avoid discussing whether or not there was the family as a social unit in the state of nature.

<sup>9</sup>Speculating, I would say that people add this rights claim to strengthen their ethical opinion because by using the concept of “right” they are unconsciously referring to its proper meaning; a collective moral agreement (not necessarily of all, but necessarily of more than one) that has been solidified in the form of a law. We as people living in a political state for as long as we can remember, might have internalized the idea of a right being protected by the power of the state. To claim a right means that that the strength of the state, the Hobbesian Leviathan, is with you, empowering your claim. It is an appeal to the support of the collective. Klein (1978) mentions something of the like when he argues that ‘a further consequence of the expansion of legal rights vocabulary into the

I understand that my current argumentation is very counter-intuitive and perhaps even undesirable in a political sense. After all, we have gotten used to claiming moral rights in the absence of legal rights that we nevertheless find desirable. My argumentation does ultimately lead to the conclusion that if there is no legal right to life, genocide does not violate the rights of the people who are murdered.<sup>10</sup> We can morally condemn genocide in the strongest way possible, but we cannot claim a right to life for the people who were murdered. As Kleinig (1978) notices: we shouldn't forget 'that the values which rights-talk was designed to assert and secure did not suddenly emerge into moral consciousness [after the first declaration of (human) rights] [...] There always existed a moral tradition emphasizing 'the inherent dignity of the human person' (p. 39). The hypothetical situation of a genocide in a society without a (legal) right to life is unlikely, if not impossible. Genocide implies a form of society, a recognition of ethnical/religious/racial/national differences, the organization of a group of people to kill another group of people, etc. This seems unlikely to occur in a state of nature. Another option could be for this to occur in a political society that does not legally recognize a right to life. However, it is hard to imagine any legal system that does not hold some principle of equal rights, of protection, of a right to life, etc. One can imagine a situation in which there is a right to life for human beings, but it is argued that some are not human – in some way a policy pursued by the Rwandan government during the 1994 genocide, continually proclaiming that Tutsi's were "cockroaches". A cockroach does not have a right to life and this is partly a justification for genocide. However, of course in this case there is a rightful appeal to be made to the right to life of the Tutsi minority, specifically because they are humans.<sup>11</sup>

But really, a "right" is only a right when it is collectively assigned to (certain) subjects, by means of legal formalization. One might worry that to leave out the option of "moral rights" is a problem, but I am convinced that we can do without. Firstly because, as I have been trying to show, it does

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moral realm [...] is the current tendency to accord rights an exaggerated role in the moral life. There has been a noticeable tendency in recent moral discussion to frame issues as far as possible in terms of rights' (p. 46).

<sup>10</sup>I thank former minister Jan Pronk for bringing this point up in discussion.

<sup>11</sup>Besides, to make an even more controversial inference – if the Rwandan government at the time was in fact right to argue that Tutsi were cockroaches without a right to life, then this was not a case of genocide.

not mean anything. Secondly because it does not diminish the importance of ethical debate – rather it emphasizes the importance of continually entering into this debate, and to (temporarily) solidify the outcome of this debate in an enforceable legal right.

## 2.2.2 Children’s rights and society

To help (the situation of) children by means of formal law, by means of children’s privileges, is only effective if the ought of formal laws is not removed too far from social reality. To explain this I want to use the flow model from psychology (Csikszentmihalyi, 1975) and adjust it to say something about the relation between law and (social) reality. In the work of Csikszentmihalyi, flow is defined as a state which gives a person a ‘holistic sensation [...] when they act with total involvement’ (p. 36). Relevant for the relation between law and society is how and when flow occurs; it happens when there is the right balance between challenges and capabilities (See: Figure 2.1) (1975: p. 49).

When things in society go well naturally, according to the legislature and the population (the norm is followed without there being a formal law to regulate this), there is a legal state of apathy. For example, a norm such as “when you are introduced to someone, you greet them” is not written down in law, because it is already regulated by society, and so the law (legislator in his role of legislator) can be apathetic in this respect. No action is required. Then there are situations in society, human behaviour, that the legislature wants to influence. This might be an existing norm that is not lived up to by everyone and which therefore needs a legal consequence when transgressed. Or the legislature wants to formalize a right they believe a certain group of people (or all people) should have, so that some time, whenever necessary, these people will be able to claim that right. To formalize “the right to breathe” or “the right to comb your hair” does not make sense in present-day society. For all laws, there is a discrepancy between an idea, a norm (the ought) and social reality (the is). This is when law (the legislature) moves from apathy into action. However, the distance that a law can take from social reality is limited. For a law to be effective, there needs to be a limited distance between social reality and the prescribed future social reality by the law, otherwise the law is either meaningless or tyrannical. In the chart, it needs to be in the “flow-zone” (Figure 2.2). And here of course we find a problem with international law, and particularly children’s rights.

International law claims to be universal, but then social realities in different countries obviously are very different. For example the child’s right to go to school is constituted as an international, universal right (CRC art. 28). However, if you live in the mountains of for example Rwanda and there is no school and there are no teachers, this right becomes meaningless.<sup>12</sup>

So, for a law to be meaningful and effective it needs to be in the “flow-zone” in relation to the relevant social reality. There is a practical dimension to this (in terms of available means, resources etc.) and an ethical/psychological dimension (the possibility of change in human behaviour is limited; it takes time, energy, etc.).

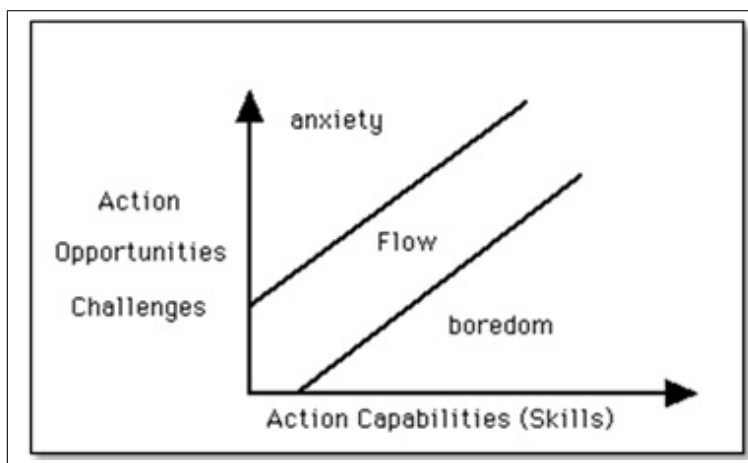


Figure 2.1: flow model based on the theory of Csikszentmihalyi (1975)

Each society is different and therefore each “flow-zone” lies at a different point. This is one of the reasons why implementation of children’s rights is

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<sup>12</sup>There is one exception to this, and that is the meaning a right has, in the sense that it can be claimed. This is of course a very important function of possessing a right, and I thank Jan Pronk for bringing this up. However, depending on when it is that we find a right “meaningful”, in the above described situation, this might still be experienced as meaningless by the relevant community. Suppose they claim “we have a right to education and the Rwandan government therefore has to provide the necessary resources”. The Rwandan government might reply that they would want to, but they have no resources to do so. One can then turn to the international community, asking them to share resources – and then it comes to whether the “we” of the UN is a genuine “we”. See also p. 64. If in the end this claiming of the right to education amounts to nothing, this is the way in which this right is still meaningless.



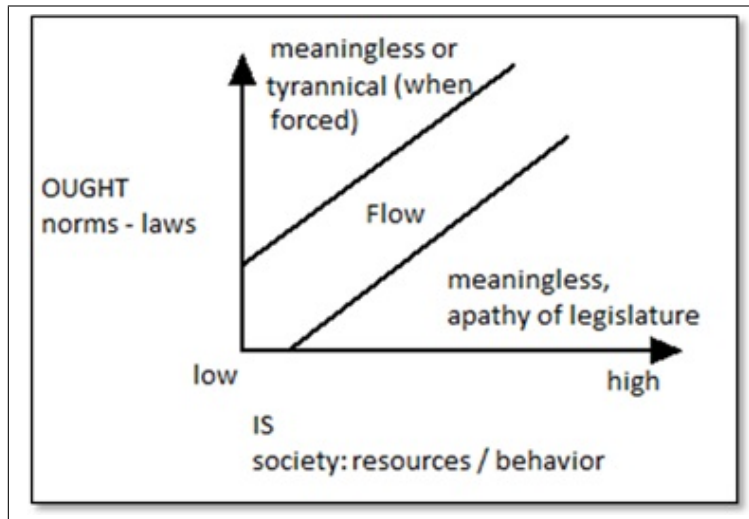


Figure 2.2: Proposed flow model of the relation between law and society

not always successful. This of course refers to a more general problem with international law imposing universal norms on different local cultures/societies. The question is whether such a global legislature such as the UN can really speak on behalf of the first person plural. This is of course the intention, since the charter of the UN starts with “we the peoples” (1945: preamble). It can formalize many collective oughts, but these must quite often be meaningless or tyrannical with regard to many societies. Does this problem occur because of the “we” not being a genuine “we”? When thinking about resources – say, the lack of schools in certain areas in Rwanda – if all means of the peoples of the UN were truly collective means, our means, there would be resources to build schools, employ teachers, install a school-bus, etc. So the limitedness of the “we” certainly seems to create a problem with regard to the relation between law and society. Another reason might be that “we” of “we the peoples” cannot be understood as a “we” since all individuals do not hold the same attitudes. It seems that there is a collective attitude regarding the meaning of childhood, arguing amongst others that a child cannot yet oversee long-term consequences of its actions. A norm deriving from this, possibly a universal norm, could be “no child should be allowed to make decisions that have long-term consequences”. Particular cases of kinds of decisions that can be meant by this norm are culturally bound. For example to say “therefore a child should not get married” is more applicable to a society

where divorce is illegal. In the kingdom of ends (see: §2.3.4), obviously, these issues have evaporated. They are contingent upon the current state of affairs in international law and the international community.

The right of children not to have to be a combatant can be taken as a case study of the relation between law, society and the “flow-zone”. My assumption before going to Rwanda was that in the situation of this post-genocide, traumatized community, possibly still involved in a war in the DRC, the formal right of children to grow up safely and protected (and consequently not to have to be combatants) (CRC art. 19), would be too far removed from social reality and therefore be meaningless. However, field research pointed out that this norm is actually strongly embedded in the Rwandan society, maybe especially because of their recent history. Unlike most Dutch people, Rwandans know from first or second-hand experience what it means for children to be combatants, both in terms of experience and consequences for the individual and for society as a whole. The norm laid down in formal law is at the most negatively related to social reality in the sense that 1) most people in society think 18 years is too young to be a combatant, and 2) child combatants are being recruited in Rwanda and sent to fight in the DRC (see attachment 1). So why is this formal law (partly) ineffective? The problem here lies at the level of the law for the government (see §2.2.2). It is not a problem of postcolonialist norms that are imposed upon a Southern society, which are too far removed from its social reality. It is a problem of a government not complying with its own laws and not (sufficiently) listening to either the international community or its own citizens.

In the case of the Netherlands, it seems that the norm of not recruiting combatants under age 18 (or 17) conflicts with the norm of having sufficient military personnel - but this is questionable. Would the Dutch army really become too small if not for child recruitment?<sup>13</sup> Would there be no other solution for this problem? And if the Netherlands should ever get in a situation alike the situation of Rwanda, with a war in a neighbouring country in which they are involved, are we certain that these underage trained combatants would not be sent to war?

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<sup>13</sup>For more on Dutch child recruitment, see attachment two.

### 2.2.3 Childhood and Children's Rights in Rwanda and the Netherlands

Within a specific, limited language game, such as a legal system, the meaning of the concept of childhood might be easy to grasp. For example, within the language game of Rwandan formal law, a child means 'anybody aged below eighteen (18) years' (art. 10, chapter 1, Law no. 54/2011 of 25/06/2012 Relating to the Rights and the Protection of the Child). But is the relation between childhood, children's rights and the law really this easily understood? During my field research, in the process of thinking more about the relation between law and society, based on many conversations and literature study, it became clear to me that for any society the legal system can be divided into three levels, that taken together make up the totality of national law. These are:

1. The formal law

Meaning the law that can be found in legal texts, decided by the legislature and open and available to the public, including the international law applicable to the society concerned.

2. Law for the community

Government rules to which the people of the relevant community abide, relate to, believe to be, live up to, break, – indifferent of personal consent or preference. So this level is not about what people agree with, but about what people believe the law actually is and what the law tells them. If there is a formal law that says "you cannot park in this street" but daily ten cars are parked there and everyone knows that there are never any consequences, even when the street is regularly visited by parking officers, then "you cannot park in this street" is not a law for the community. The same goes for "there is freedom of speech" when everyone knows that you will be arrested and sentenced to jail if you publicly criticize the government.

3. Law for the government

Government rules that the government (with "government" understood in the broad sense of the legislature, executive and judiciary, both as institutions and as the individuals that make up those institutions) abides by, relates to, believes to be, lives up to, – even when there are outside forces, such as international pressure. Since the government as

an organ is its own legislature, this is the level of hidden power. A government may decide to write A in formal law, to enforce B for the community and to themselves act under C (relating to the same subject or legal question). This is not the same as the ordinary citizen who does something illegal but hides this, and therefore knows that either formal law or the law for the community will not affect him in this respect. It is different, because the government is the legislature. When the government acts under rule C, a rule that only the government knows about, it is in a way acting legally, as opposed to the citizen acting on his private initiative. To give an example I would like to refer to the USA/NSA practice of domestic surveillance before this was revealed to the public by E. Snowden. In this case the formal law (A) states that the collections of communications without a warrant is allowed when at least one end of the communication is a non-US person (Fisa Amendments Act of 2008). However, for the NSA a “top-secret document” was created, under legal authority enabling the agency to warrant the reading of emails and tapping of phone calls between US citizens (C).<sup>14</sup>

It seems that this division applies to every legal society which involves a government that is not equal to its people (so not a pure democracy) and that employs formal law. In an ideal, just society the formal law, law for the community and law for the government are one and the same and all people believe that the law is exactly the way it should be. In reality, these three levels are never completely equal. The further these three levels are separated, the more complicated a legal and social order becomes. Separation of these levels creates room for corruption, insecurity, distrust, unsafety, etc. When there is a big gap between these levels, formal law becomes (partly) meaningless. Formal law can serve to show the international community that “we as a country abide by international conventions”, only as a farce to prevent the international community from interfering with the (national) law for the community and the law for the government. To say “we do not allow torture, you can see this, it is stated in article 25 of our constitution” turns the formal law into a tool for avoiding international interference if this

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<sup>14</sup>See: <http://www.theguardian.com/world/2013/aug/09/nsa-loophole-warrantless-searches-email-calls>, <http://www.theguardian.com/world/the-nsa-files>, <http://www.washingtontimes.com/news/2013/sep/10/documents-secret-court-rulings-nsa-operations-be-r/>, accessed 03-01-2014.

is not the law for the community and/or the law for the government.

### **Formal law on childhood in Rwanda**

As I mentioned, within the language game of Rwandan formal law, a child means ‘anybody aged below eighteen (18) years’ (art. 10, chapter 1, Law no. 54/2011 of 25/06/2012 Relating to the Rights and the Protection of the Child). Rwandan law also gives a description of the beginning of childhood, that is, of the ‘beginning of the enjoyment of the child’s rights’; namely, as of conception (art. 11, *ibid.*). And so, legally speaking in the context of the current Rwandan legal system, when we are talking about the period of childhood, it is the period of human life in between conception and reaching the age of eighteen years old. So the Rwandan legal definition of childhood is a temporal one, its beginning contingent on the beginning of life, its end contingent on age. As I have demonstrated under §1.2.1, age is only a designator subversive upon the essence of childhood – but in the context of the Rwandan legal language game, this is the most essential meaning of childhood. This age criterion is met by the law that says that newborn children have to be registered and will receive a birth certificate (art. 16, *ibid.*). This is in perfect orchestration with international law, including the UN Convention on the Rights of the Child, which defines the child as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier’ (1989: art. 1), combined with the law requiring the child to be registered immediately after birth (1989: art. 7), and the 1990 African Charter on the Rights of the Child, which defines a child as ‘every human being below the age of 18 years’ (art. 2) and states that ‘every child shall be registered immediately after birth’ (art. 6.2). For a Rwandan person, falling into the category of childhood means that they have specific rights and duties. The idea of Rwandan law is, in line with international law for children, to protect the best interest of the child (art. 6, Law no. 54/2011 of 25/06/2012 Relating to the Rights and the Protection of the Child). This is stressed more so in the child’s “right to grow” (art. 10, *ibid.*): ‘Every child shall have the right to be provided with special protection by his/her family, the Rwandan community and the Government for his/her physical, mental, spiritual, moral, psychological and social growth according to the human dignity’. From this primary consideration follow several rights and duties, like the right to an identity (art. 12), the right to a name (art. 13), the right to a nationality (art. 14) and the right to a family (art. 24), etc.,

but also “the duty to study” (art. 23).

### **Childhood in law for the community in Rwanda**

When purely looking at the Rwandan formal law, it seems clear who is a child and who is not, and subsequently who enjoys children’s rights. However, this is not the case. One reason why it is not, is the fact that the end of childhood is legally defined as contingent upon age. This might seem practical to deploy within a legal situation – assuming that “age” is such a clear and uncontested concept, that it makes for a clear and easy way to distinguish between childhood and adulthood. However, this is not the case in present-day Rwanda. Many people do not know how old they are, and this makes the distinction especially impractical. According to the latest data, in between 2005-2011 63% of Rwandan children were registered within 0-5 years after their birth.<sup>15</sup> This means that for almost 4 in every group of 10 children (and adults, if this line is continued) it is impossible to tell, according to the legal criterion, whether they are a child or not. The law of the community says: whether you are a child or not, we do not know for sure. Possibly this situation will change in the future, since new born children are required by law to be registered (art. 16, chapter 2, *ibid.*).<sup>16</sup> Of course parents might tell their children how old they are and/or when they were born. We can take this to be an answer to the legal question whether a person is a child or not. But this process turns an objective criterion into a subjective one, leaving room for manipulation and profitable interpretation. For example, the minimal age for criminal liability in Rwanda is 14 years (art. 58). One can see how without proof of age, the estimated age of the defendant might be influenced by the law on criminal liability, rather than the law being applied to the objective fact of the age of the defendant. This specifically amounts to a real and actual problem in the case of child combatants, as discussed under attachment 1.

There are more factors related to the fact that the distinction between childhood and adulthood in the Rwandan legal system is unclear, and this has more to do with the wider problem, namely the ambiguous relation between Rwandan formal law and the Rwandan law for the community. For example

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<sup>15</sup>UNICEF Report: The State of the Worlds Children 2013: Children with Disabilities. Table 9: Child Protection.

<sup>16</sup>This law in its current form was introduced in 2011. However, from 1973 up until the 1994 genocide birth registration used to be about 80%. See the UNICEF report: [http://www.childinfo.org/files/birthregistration\\_Digestenglish.pdf](http://www.childinfo.org/files/birthregistration_Digestenglish.pdf)

there is the formal law that says you can only sign a contract and get married when you have at least reached the age of 21. The Rwandan community is aware of this and often respondents argued that legally the age for maturity in Rwanda is 21. In a recent debate on the topic, a lawyer from the Government-organized National Commission for Children (NCC) was quoted by a national newspaper to have said: ‘Eighteen years of age is just too low. [...] For us we actually propose that marriage age could be increased. If it was more than 21, we would be more than happy. 25 years would be okay for us.’ Adding that ‘in a social context, even though at 18 one is grown up, that person has not attained maturity to manage life’s challenges, especially in marriage’.<sup>17</sup> The proposed amendment, to lower the age for marriage to 18 years, was refuted. It seems that the Rwandan government is very much aware of the fact that to draw the line for the end of childhood, and the start of adulthood, at the age of 18, means that before that age you are not completely mature whereas after that age you are. It makes sense to argue that since childhood is understood as a period of increasing development, if at a certain point during that period you have reached a stage in which you are 80% (so to say) mature, you are legally allowed to do certain things that need at most 80% maturity, such as, maybe, easy labour. But defining the end of childhood at 18 years old means that at that point you are 100% mature. Therefore this is why for the law of the Rwandan community, the legal end of childhood actually lies at the age of 21 years old.

So even if we would have found that Rwandan law on the formal level (1) has a clear definition of childhood and an outline of children’s rights, it seems that the legal meaning of the concept of childhood is not so clear at the level of the law for the community (2). For a discussion of childhood on the third level of law for the government, see attachment 1: Rwandan child combatants.

### **Formal law on childhood in the Netherlands**

The Netherlands does not yet have a national law specifically for children. The national government has recently drafted a “Youth Law”, which is supposed to become active starting 1st January 2015. Currently, the Dutch Civil Code speaks about “minors”, who are defined as ‘persons who have not yet reached the age of eighteen years, and who are not married or registered as

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<sup>17</sup>See: <http://www.newtimes.co.rw/news/index.php?i15343&a66434>, accessed 02-01-2014

a partner in registered partnership, nor have been married or registered as a partner in registered partnership and who have not been declared of age pursuant to Article 1: 253h' (art. 233 BW). A person under 18 years can be declared of age by a judge, if it concerns a minor female who has authority over her child (art. 253h BW). To get married a person has to have reached the age of eighteen years, unless concerning a pregnant sixteen or seventeen year old female (art. 31 BW), or unless the minor (of at least age 16) has the permission of his/her parents and/or guardian (art. 35 BW). Childhood starts at the moment of conception, if the interest of the child so requires (art. 2 BW). The father of the child is obligated to register the child within three days of its birth (art. 19e BW).

Although formally childhood in Dutch law is defined as anyone below the age of 18, there seems to be another period of age formally defining adulthood, which is not well-known to the community. This is the age of 21. In Dutch law there are certain things prohibited until the age of 21. There are still certain professions that a person can only take up if the person has reached the age of 21, for example owning a bar (art. 8 Drank- en Horecawet), and to be a prostitute (this is a draft law drawn up in 2009, still waiting to be finished and signed by the king in 2014).<sup>18</sup> A foster parent legally has to be at least 21 years old (art. 2, Wet op de Jeugdzorg) and parents are obliged to pay for their child's sustenance and studies until their 21st birthday (art. 395a-1 BW). In the draft of the new Youth Law, regulating national youth aid, a juvenile is defined as 'the person who has not yet reached the age of eighteen years, or the person who has not yet attained the age of twenty-one years if articles 779-77gg of the penal law are applicable, or the person who has not yet reached the age of twenty-three years and stands in a certain relation to youth aid' (art. 1.1 draft youth law).<sup>19</sup> Later in article 7.1.1.1 a juvenile is defined as someone who has not yet reached the age of 23 years. In this line, a new adolescent penal law has become effective as of 1st April 2014, allowing for adolescents in the age range of 16-23 years to be sentenced according to juvenile penal law.<sup>20</sup> On the whole, it seems that the age of adulthood in Dutch law is slowly shifting up – that is to say, over the last

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<sup>18</sup>See: [http://www.eerstekamer.nl/wetsvoorstel/32211\\_wet\\_regulering-prostitutie](http://www.eerstekamer.nl/wetsvoorstel/32211_wet_regulering-prostitutie), accessed 02-01-2014

<sup>19</sup>See: <http://www.voordejeugd.nl/images/pdf/Wetsvoorstel/3.PDF>, accessed 02-01-2014

<sup>20</sup>See: [http://www.eerstekamer.nl/behandeling/20131206/publicatie\\_wet\\_2/document3/f/vjfbcojsrvz5.pdf](http://www.eerstekamer.nl/behandeling/20131206/publicatie_wet_2/document3/f/vjfbcojsrvz5.pdf), accessed 02-01-2014



decades, since the official legal age for majority used to be 21 years until 1981.<sup>21</sup>

As usual, the Dutch national law is quite opaque. It is however in line with the UN Convention on the Rights of the Child, which defines the child as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier’ (1989: art. 1), combined with the law requiring the child to be registered immediately after birth (1989: art. 7).

### **Childhood in law for the community in the Netherlands**

For the Dutch community, it is clear that the legal age of maturity lies at 18 years. This is the age that the person growing up lives up to, when he or she will be an adult; it is the moment when a Dutch person knows he is basically allowed all things legally that he was not allowed before; to drink alcohol, to drive a car, to smoke, to vote, to enter into contracts.<sup>22</sup> However, as I described, the community is not aware of the fact that the Dutch child actually becomes an adult (completely) only at the age of 21. For a discussion on Dutch child combatants relating to this subject, see attachment 2.

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<sup>21</sup>See: <http://www.statengeneraaldigitaal.nl>, Kamerstuk Eerste Kamer 1986-1987 kamerstuknummer 15417 ondernummer 55, accessed 02-01-2014

<sup>22</sup>The legal age for consuming alcohol and cigarettes went up on the 1st of January 2014 to 18 again, after having been at 16 years during the last decade. See art. 20 Drank- en Horecawet.

## 2.3 Why children should have rights (or: privileges)

As mentioned before, there are two reasons for this act of public will, as described in the UN Convention on the Rights of the Child; 1) because the child, a mental and physical immature being, needs special safeguards and care, and 2) because this contributes to freedom, justice and peace in the world. I understand children's rights<sup>23</sup> not as innate rights, as explained under §2.1 and §2.2.1, since I argue that children cannot be understood as rights bearers and that there are no other than legal rights. Children's rights (but all rights, really) are, rather, social facts. We, adults, decide we want to grant children rights just as we decide to form nations and governments and schools. It is a joint action of "we together", as adults. If we feel like it, we might as well decide not to give children rights. Why should we do this anyway?

### 2.3.1 Essence of childhood: need for special safeguards and care

Tamara Schapiro, in a 1999 article in which she discusses Kant's ethics and the ethical basis for an adult-child distinction, writes that

'it is in virtue of children's undeveloped condition that we feel we have special obligations to them, obligations which are of a more paternalistic nature than are our obligations to adults. These special obligations to children include duties to protect, nurture, discipline, and educate them. They are paternalistic in nature because we feel bound to fulfill them regardless of whether the children in question consent to be protected, nurtured, disciplined and educated'(p. 716).

She asks whether there can be a justification for this, specifically in Kant's theory which tells us that 'each person is a sovereign authority whose consent

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<sup>23</sup>For the purpose of clarity I will keep referring to "children's rights" throughout this thesis, rather than to "children's privileges", although as I have argued I think the latter would be a more correct term.

is not to be bypassed' (p. 715). Schapiro relates the becoming of the child to undeveloped (and therefore a lack of) agency, in comparison to the adult (p. 718).

According to Kant, parents have a duty to care for their children until they are able to look after themselves, due to the act of procreation the parents have brought a person in the world without its consent (*MoM* 6:280). This may be true, but children's legal rights go beyond parental obligation. As a community of free, autonomous beings, all members of the community by means of granting children legal rights including rights to care, protection, etc., take on an obligation towards children - even for the adults who are not, and/or never will be, parents. So the reasons for these rights go beyond an initial responsibility for life.

The essential, universal character of childhood involves the fact that children are developing, they are becoming adults. During this period of development, they need care and protection because they are not yet able to survive without it. This is particularly true of the first stage of development, and it is decreasingly true for the whole period of childhood. The child during this process of development needs guidance in different forms throughout childhood, in different forms depending on the stage of development. In a Kantian moral sense, childhood can be understood as a pre-responsible period, in which reason can make itself acquainted with the moral law gradually, a period of developing virtue, of practicing making value judgments based on the categorical imperative, but being allowed to make mistakes (see §1.1.2). As the child is still practicing moral judgments, there is a need for (legal) protection – a child cannot be held fully responsible for his or her immoral actions, because they are not yet free (or supposed to be able to foresee the consequence of free choice). Since the child is not yet able to make an estimation of the long-term consequences of his actions, it is necessary to understand his or her actions in this light. The child needs guidance during the process of practicing moral judgments, so it will have developed virtue sufficiently when he or she reaches the period of adulthood.

Children's legal rights are necessary because this process of guidance, care and protection does not happen by itself. Sometimes a child in the world does not get the needed guidance, care and protection. As Michael Freeman writes: 'Rights kick in when other values [...] fail. People are likely to claim their rights when their enjoyment of the objects of those rights is threatened.' (2002: p. 62). Children need legal rights because their process of development is sometimes threatened by a lack of protection.

### 2.3.2 Incorporating children into our legal system

However, of course then we can still ask why we would want children to survive and to develop. From a legal perspective, we can grant that the latter is an existing norm that has been translated into law. The problem with all law relating to children is that, borrowing terminology from Hans Lindahl (2013), all action by children can in some sense be said to be a-legal. Lindahl gives an example of a shop, understood as an “ought-place”, where particular people ought (positively and negatively) to do particular things in a particular space at a particular time (p. 18-22). To qualify an act as illegal, one identifies an action as not legal in “our legal order”. A-legality is then defined as ‘behaviour that calls into question the distinction itself between legality and illegality as drawn by a legal order in a given situation’ (p. 30-31). I want to argue that every action by children, especially young children whose acts do not yet fall under criminal liability, are a-legal. With regard to the example of the shop as an ought-place, the child who sees some candy that he or she likes, might pick it up and start eating it in the shop, without being aware that he or she is actually supposed to stand in a queue with the candy, pay for it and then eat it: without even being aware of the shop as an ought-place. The child’s behaviour in this sense cannot be said to be illegal. One could argue that all actions by young children are necessarily legal, because of the lack of criminal liability. But then stealing is not quite legal as an act, not even if done by a child. In this act, the child is neither complying with a law or norm, nor violating it.<sup>24</sup> Or imagine a child who learns to ride a bike. They do not control the movement of the bike well yet, and consequently even though they know that they are supposed to wait at the traffic light, instead they keep going because they have not yet mastered the use of the breaks. Clearly, this qualifies as a-legality, as behaviour that calls into question the distinction between legality and illegality. On the same line of thought, the child cannot question the behaviour of the other in relation to (il)legality. They have not yet mastered legal norms – or even norms in general. As Lindahl writes, ‘engaging in legal behaviour from the first-person

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<sup>24</sup>One can of course argue that the action of the child is in fact illegal, but the child is just not legally responsible and so the parents are liable – and I thank Dr. R. Celikates for bringing this point up in discussion. However, the point of the paragraph is to show how the child falls outside the scope of the legal realm. Even if there are legal constructions to solve this situation in practical cases, for example in relation to financial responsibility etc., the child in the example is not aware of these legal constructions either.

*singular* perspective of a legal actor, i.e. an actor whose behaviour is legally coordinated with that of others, requires being able to take up the first-person *plural* perspective of a ‘we’ (2013: p. 81) [author’s italics]. The child, as I argued under §2.1.3, cannot take up this perspective of the first-person plural with regard to legality and morality. Therefore it cannot engage in legal behaviour, it cannot distinguish legal and illegal behaviour - it cannot even distinguish moral and immoral behaviour. Suppose a young child is sexually abused by a parent. The child does not understand this behaviour to be illegal or even immoral.<sup>25</sup> The child in this respect needs the adult, any adult, to point out that something is illegal and immoral. This is why they need legal privileges (or rights); they cannot be understood to be legal actors in a legal order.<sup>26</sup> Still, the problem is not completely solved, and an interesting question for further research would be why children should have rights in a non-democracy and how in this political situation adults can be said to have rights.

Actually, children’s actions and perspectives constantly undermine the existing legal order by (by acting) questioning the boundaries between legal and illegal behaviour. Adults<sup>27</sup> want to impose this order on children, they need to impose this order because it is their preferred and self-created order and they cannot allow for their children to be (completely) excluded from it. Since the child is in the process of development, during this period they need to learn how to fit into the legal order. All children’s rights that can be found in the CRC are involved in attaining this goal. It states that ‘in all actions concerning children [...] the best interests of the child shall be a primary consideration’ (CRC art. 3.1). However this is untrue; the interest of the child would be to eat the candy in the shop. It is in our best interest, as adults, to gradually integrate the child into our legal order. Perhaps in the end this can be argued to be in the best interest of the child too – because of his future situation of being an adult, and in that situation having to conform

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<sup>25</sup>Here I use the young child as an example, to make the point particularly clear. However it is decreasingly true for older children - during the period of childhood they start developing ideas about morality and legality, but as children they are not yet allowed to participate in the creation of the legal order.

<sup>26</sup>It is true that this point, in relation to a legal order (and not just a moral order), applies most to democracies. For a discussion of this point, see §1.2.1: “Differences: non-essential meanings of childhood”)

<sup>27</sup>In a non-democracy one could perhaps substitute “adults” in this argument for “the government”.

to the existing legal and social order. But in that case the legal order is posited as an opposition to the individual particular will of this hypothetical future adult, and in that situation this adult cannot understand this legal order as his own, with him or her taking up the first-person plural perspective. In this sense the child, and possibly the future adult, are both unfree. As Van Roermund (2003) writes: ‘what constitutes freedom, first and foremost, is the possibility, for a people P, to act in pursuit of what it determines as its own interests, not the condition that the interests of its rulers are the same as the interests of its ruled subjects’ (p. 237). It seems that we think a legal order has to be imposed on a child for him or her to, as an adult, take up and internalize the first-person plural perspective in society and thereby fit into the social and legal order – even falsely understanding him or herself to be the author of (the content of) that order – to understand the external legal order as something to which he or she could have consented. Then how is any legal actor ever truly free? And if, as Van Roermund writes in the same article, formulating the Reflexivity Thesis as an interpretation of Rousseau, ‘both the positivity and the validity of law lie with its legislators (the rulers) ruling over themselves’, how can we ever understand any law to be positive and valid, seeing that we all arrive into this order from childhood?<sup>28</sup>

### 2.3.3 Children’s rights as educational

Plato completely agrees with this purpose of children’s rights, the adult legal order being imposed upon children, to ultimately incorporate them as citizens. As he writes in *Laws*: ‘schooling from boyhood in goodness, which inspires the recipient with passionate and ardent desire to become a perfect citizen, knowing both how to wield and how to submit to righteous rule’ (643e). The justification for this imposing act is the fact that the child has not yet developed virtue/reason, whereas the adult and especially the legislator has – therefore, the king knows best. Children need to possess rights, because children’s souls are unbalanced (see §1.1.1), and legislation can take over the task of reason, the charioteer of the soul, to keep the steeds balanced and thereby acting virtuously (*Laws*: 644e-645b).

For Plato, the aim of legislation is educational. He writes: ‘Education is, in fact, the drawing and leading of children to the rule which has been

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<sup>28</sup>I guess this comes down to Rousseau’s famous paradox of political society; ‘man is born free, and everywhere he is in chains’ (The Social Contract).

pronounced right by the voice of the law, and approved as truly right by the concordant experience of the best and oldest men. That the child's soul, then, may not learn the habit of feeling pleasure and pain in ways contrary to the law [...] but keep them company, taking pleasure and pain in the very same things as the aged [...]' (*Laws*: 659d). Education in its turn is a means to an end; 'education is the way to produce good men, and, once produced, such men will live nobly [...]' (*Laws*: 641c). As Kohan (2013) writes:

'Plato is always motivated by the same concern - that Athenians suffer the political consequences of a bad education; the polis is unfair because it has not had the knowledge to educate its childhood and, consequently, has not provided its childhood with the knowledge necessary to transform it. The implication is that the sole means to save the polis is to educate children with true knowledge. Education exists only because there is childhood, and because we are not born educated and ready for public life' (p. 322).

A positive right of a child in this sense is really only a negative obligation on adults; "the right to education" is really the obligation for adults (the citizens) to educate their children, the "right to protection" is an obligation for adults, to protect the children so they can get educated, so they are only in contact with the good which will lead them to become virtuous citizens. To this purpose laws must regulate, even censor, the arts; for good arts, for example good music taught to boys in a choir, will result in virtue (*Laws*: 665a-657b).

In the end Plato provides a circular argumentation; people need to be good. In order to be good they have to become good, and therefore they need education. Legislation serves this purpose. By means of education men start sharing a sense of justice and develop civic virtue (they become good). This in turn is necessary for the existence of the state (*PR*: 322c, 323a, *GO*: 464b,c. *Laws*: 641c). So for the existence of the state men need to become good, and the state exists as a condition, a legal order for men to become good, or noble. But why do we need a state, why do we even have to become good, or have knowledge of the Good?

Bradley Lewis (2009) points out that in *Laws* a possible answer is given; the virtuous man is always happy. But the Athenian argues that this proposition is not necessarily true, but necessary, for 'making everybody do all

the just things willingly, and not out of compulsion'. So 'the proposition that virtue leads to happiness is *necessary* from the city's perspective [...] [author's italics] (p.77-78, referring to *Laws*: 662b, 663d,e). Earlier in *Laws*, it is stated that the aim of legislation is virtue and ultimately the happiness of all citizens (*Laws*: 630e-631b).

### 2.3.4 Towards a kingdom of ends

Kant's notion of perpetual peace and a kingdom of ends might be the ultimate purpose of children's rights. In a way it is a reason stated in the CRC when it is argued that children's rights 'contribute to freedom, justice and peace in the world'. Kant describes virtuous development of human beings as follows: first, human beings find themselves in a state of unsocial sociability: having an inclination to associate with others and at the same time wanting to isolate himself (1963, fourth thesis). This situation pushes human beings into the right moral direction (of behaviour). They develop skills for acting morally, like self-discipline. Eventually people learn to love to act morally, and find that they have a duty to familiarize themselves actively with the suffering of others elsewhere in the world and to extend their beneficence to them if necessary (Kleingeld, 2001: p. 167-168). Eventually, the world in which all people act morally is a world in which all people are happy (Kleingeld (2001): p. 162, Roth (2012): p. 262).<sup>29</sup> In his Groundwork, Kant describes this situation as a *kingdom of ends*, adding that this is only an ideal:

'The concept of every rational being as one who must regard himself as making universal law by all the maxims of his will, and must seek to judge himself and his actions from this point of view, leads to a closely connected and very fruitful concept – namely, that of a *kingdom of ends*. I understand by a '*kingdom*' a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able – if we abstract from the personal differences

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<sup>29</sup>Roth (2012) in his article stresses the fact that the end of (moral) education for Kant is rendering people capable of autonomous judgment and action, which has to be connected not just to freedom but also to 'the highest good [...] the greatest possible happiness of the human species' (p. 271). For a discussion of education as the way towards a Kantian Kingdom of Ends, see: Roth (2012).



between rational beings, and also from all the content of their private ends – to conceive a whole of all ends in systematic conjunction [...]. Since these laws are directed precisely to the relation of such beings to one another as ends and means, this kingdom can be called a kingdom of ends (which is admittedly only an Ideal)’ (1964: p. 100-101).

So for Kant, history is a process of moral progress (Kleingeld, 2001: p. 173). In some sense Plato, understanding the laws as some form of education, makes the same argument. For Plato, the “kingdom of ends” is “the heavens”, to which men get to ascend once they have lived as a philosopher thrice during a thousand years (*PH*: 249a). Now, Plato’s heavens where the Gods live seems to be an unearthly place, and to be able to enter the heavens seems to be an individual achievement rather than a collective one, and in this sense this notion is radically different from Kant’s “kingdom of ends”. However, we should not forget that for Plato the philosopher who manages to escape from the cave, who has *become* able (rather than possessing an inherent existing capacity to be able to do so; he has learned) to see the true and the Good, has a duty to descend into the cave again, to be ‘among bondsmen and share their labors and honors’, because ‘the law is not concerned with the special happiness of any class in the state, but is trying to produce this condition in the city as a whole [...]’ (*RE*: 519c-520a). So Plato’s “heavens” are also a collective accomplishment, a place of happiness to which we can only ascend collectively, leaving no one behind - and in this sense, the Platonic “heaven” may be understood as “heaven on earth”. Once we are able to see the Good, collectively, we can all be happy in the perfect State.

I would like to take these ideas one step further and point out that in the kingdom of ends, or Plato’s heavens, ultimately because all human beings have developed their virtue to the fullest, gaining complete knowledge of the Good, there is no need for laws. The legal order ceases to exist because the ought has become the immediate is. Even if Kant is pessimistic about the possibility of the actualization of such a kingdom of ends, and perhaps the Platonic human soul because of the ignoble steed seems quite unfit to collectively reach the heavens, it is necessarily something that we as human beings should strive for. It is what the ought of the current law is directed at (see: §2.2.1); a situation of ultimate justice. This is the answer to the question about the telos of practical reason, as concerns law. How we raise

our children should be directed by these considerations. Suppose we raise our children in the best manner possible – they are well-educated, they get plenty of room to practice moral reasoning, applying the categorical imperative, they are not traumatized or endowed with adult responsibility too soon in the process of development, they get room to develop their level of thinking, to gain knowledge, to become aware of social relations and position themselves within the community – then the kingdom of ends, or the heavens on earth, may be only one generation away.

# Conclusion

The main question discussed in this thesis is the question “*What is the meaning of the concept of childhood and how does it relate to children’s rights?*”. With regard to the first part of the question, “*What is the meaning of the concept of childhood?*”, this was discussed primarily in chapter one. To find an answer to the question, I have looked into the works of Plato, Kant and Rousseau. I have added results of field research and discussed these in relation to the mind-body distinction and research in neuroscientific research, and questioned the emerging notion of the developing mind. The second question, “*How does the meaning of the concept of childhood relate to children’s rights?*”, was primarily discussed in chapter two. Here I looked into the question in which sense children can be argued to have rights at all, how children’s rights are related to society and the question why children should have rights.

1. What is the meaning of the concept of childhood?

When looking for the meaning of childhood in Plato’s work, Plato emphasizes the pre-rational element of the child. A child is the becoming-adult who needs to be educated, for the rational element of the soul which is already present in the child’s soul, to become unveiled. This will lead to the child becoming virtuous and ultimately a full member of the polis.

In the work of Kant the pre-moral element of the child is emphasized. The child is the becoming-moral-actor, a not yet free subject who still has to practice aligning his or her will with the categorical imperative. The child needs education to learn to bring his inclinations under control of his reason. The capacity for free choice, the person’s innate freedom can be understood as a potentiality in the child, that has to be developed. Childhood in this sense can be understood as a pre-responsible period in which reason can make itself acquainted with the moral law gradually, a period of developing virtue.

For Rousseau, the pre-social element is the most defining element of childhood. The child finds itself born in civil society and therefore needs education to become a good civilian. Naturally, the child is non-social and good, much like the natural man (savage), but he finds himself in a radically different condition. The goal of education is to let the child become as pure as possible an adult in civil society.

Field research in Rwanda and the Netherlands pointed out that respondents from both countries ultimately define childhood in the same essential way; as a temporary phase in a person's life, a temporary phase of development towards an adult state. The two key elements of the content of childhood are physical and mental development. Mental development is considered the most defining element. According to respondents, the child's mind develops gradually, with this development including the ability to oversee consequences, increasing knowledge, ethical awareness, virtue, increasing level of thinking and reflection, etc. (see schemes on p. 30-31). This development is influenced by experiences, of which age is a designator. When asked, Dutch respondents indicated that adulthood starts at age 19,92 (n=24, sd=2,12) and Rwandan respondents indicated that adulthood starts at age 21,36 (n=22, sd=2,48). As a consequence of lower capacities, the child is non-independent and there are ethical consequences related to childhood, like the fact that a child should not have a baby. Difference in ethical consequences of childhood between Dutch and Rwandan respondents is contingent upon these same basic principles attributed to childhood. The second difference between Dutch and Rwandan views on childhood relates to the child as pre-social, an element that was not explicitly mentioned by Rwandan respondents and often by Dutch respondents. However both agree that childhood is a period of forming one's identity and this is a social feature.

With regard to the distinction made between body and mind, one can observe that this distinction is also made in neurological research. No definite stage of a "mature brain" can be found in neuroscience. By studying the brain of young people it can, however, be shown that the brain indeed develops during the period of childhood, but with regard to the philosophical and conceptual questions raised in this thesis, neuroscientific research is not too useful (yet?).

The notion of the "developing mind" of the child is contested by John White (2002), who argues that 'statements of mental maturity lacks the universality of agreement that we find over fully-grown pine trees' (p. 72). However, I argue that in fact there is universal agreement on the conceptual

meaning of the mental maturity, as is shown by my field research and which is also confirmed by studies in anthropology.

A tacit universal definition of childhood which then emerges is the following: childhood is a period in which the mind is developing into an adult state. The child is pre-rational, pre-moral and pre-social. The child is the person who does not yet possess these qualities.

2. How does the meaning of the concept of childhood relate to children's rights?

Children have rights in the sense that there is an international legal instrument that states these rights (1989 CRC). They firstly emerge because of children are excluded from certain rights being that they are not adults, and therefore they need different legal rights.

Firstly, for Plato, laws of the polis have to be imposed on children, since children are pre-rational. Secondly, for Kant, a right signifies a reciprocal relation of choice with this form of choice regarded as free. But the child's choice cannot be regarded as free, since they are becoming-moral-actors. Children cannot be understood to have given their consent to these rights, they too are imposed upon them by adults. Thirdly, regarding the child as becoming-citizen, children do not have a self-identity yet in both first person singular and first person plural, they cannot be understood to take part in a legal order. Therefore it would be more accurate to refer to children's rights as "children's privileges". These privileges are given to them by adults, by exercise of the adult's free, practical will in an act of public will.

Rights are in this sense to be understood as social facts, because they are solidified outcomes of moral debate. "moral rights" are non-existent. For children's rights to be meaningful and effective, they should be in a "flow-zone" in relation to the relevant social reality. This is often not the case with regard to current children's rights, and therefore they are often ineffective. A reason for this is that the "we" of the UN is not a genuine "we", although collective attitudes towards childhood seem to be universally shared.

With regard to national legal systems, three levels can be distinguished: 1) the formal law, 2) law for the community, 3) law for the government. When studying childhood in Rwandan law, it is clear that the law is opaque with regard to the child/adulthood distinction. Officially this would be at age 18, but at the same time some rights are only granted to people from age 21, such as the right to get married. On the level of law for the community this creates confusion too. Not only is age a contested concept in this contest because

not every Rwandan child is registered at birth, the vagueness on the topic in formal law trickles down to law of the community. When studying childhood in Dutch law, the formal law is ambiguous too, attributing maturity to the age of 18, but granting certain rights only to people of age 21, such as the right to own a bar, and different treatment of people of age 16-23 in penal law. For the law of the community the age of maturity is clearly set at age 18.

There are four main reasons why children should have rights. Firstly, following the CRC preamble, the essence of childhood requires children to have special safeguards and care – and this process of guidance, care and protection does not always happen by itself. Children’s process of development is sometimes threatened by a lack of these. Secondly, we as adults want to incorporate children into our legal system. All action by children can in some sense be said to be a-legal. Their actions and perspective constantly undermine the existing legal order by (by acting) questioning boundaries between legal and illegal behaviour. Adults want to impose this order on children because it is their preferred and self-created order.<sup>30</sup> Thirdly, following Plato, children’s rights can be understood as educational, to turn children into virtuous citizens, ultimately because the virtuous man is a happy man. Lastly, the ultimate purpose of children’s rights is to create a kingdom of ends, a tool for historical moral progress, to arrive at a perfect, collective state in which the ought has become the immediate is (and therefore there is no need for laws anymore).

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<sup>30</sup>There is a distinction to be made here between democratic and non-democratic political situations, see §2.3.

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# Appendix

Part of the work that I have been doing on this topic turned out not to fit in into a master thesis of philosophy, because of its legal and/or empirical content. Some of this work I still found very relevant to the topic and, hopefully, interesting to read. Therefore I have decided to add them to the thesis in the appendix. Here you will find an analysis of Rwandan child combatants and Dutch child combatants, an overview of laws applicable to the situation of child combatants in both the Netherlands and Rwanda (which I used for §2.2.2 and attachments 1 and 2) and an overview of the methodology that I used for the thesis, both for the philosophical part and the more empirical field research.

## Attachment 1: Rwandan child combatants

In Rwanda, legally, a child (defined as a person under 18 years) cannot be a soldier. This is prohibited by both international law (2000 Optional Protocol, art. 1-4, African Charter art. 22), and national law (Law 54/2011, art. 3, 51). Field research pointed out that this situation is also the law for the community (although most people thought the age limit for becoming a soldier is and/or should be above 18, with a mean of age 19.39 (n=23, sd=2,04)). There were two exceptions to this; two children (age 9 and 13) were convinced they could become a soldier if they wanted to. They could go to a camp somewhere near the DR Congo border, which supposedly aimed at training soldiers and was open to children. The two young respondents mentioned stories about children living on the street that are picked up by soldiers and put into the camp. Over the years there have been many accusations by the international community of Rwanda recruiting and using child combatants. The situation is extremely complicated, because of the specific situation of non-transparent war in the DR Congo. This is a war

in the eastern provinces of DR Congo, on the border with Rwanda. Historically, Rwanda has been involved in the conflict - many even argue that it was caused by the Rwandan genocide in 1994 and its aftermath, starting with president Kagame deciding to invade the DRC to exterminate the genocidaires who posed a threat to the country. As of today, it is unclear what parties are involved in the conflict at what time. Officially, the Rwandan government denies any current involvement in the conflict. However, for Rwandans it is common knowledge that the Rwandan government is in fact involved in the conflict, although the kind of and degree of involvement has differed over the years and is hard to estimate. The use of child combatants is widely spread among all armed groups involved in the DRC conflict - with the exception of UN forces. Therefore the question of the recruitment and use of child combatants by Rwanda goes hand in hand with the involvement of Rwanda in the Congolese war.

### **Forces Démocratiques de Liberation du Rwanda (FDLR)**

The most clear case, in relation to the question of responsibility of Rwandan child combatants in the DR Congo, are the children used by the Forces Démocratiques de Liberation du Rwanda (FDLR). According to the UN mission in the DR Congo, MONUSCO, this armed group currently consists of about 2000 militia.<sup>31</sup> MONUSCO is offensively tracking down this group, launching an attack on 10th December 2013.<sup>32</sup> According to a UN report, over the year 2012 the FDLR recruited 83 children (2013: 57).<sup>33</sup> The FDLR is the Rwandan government's worst enemy in the DRC. The FDLR historically consists of Interhamwe members ("genocidaires"), the government-backed army responsible for the killing approximately 900,000 moderate Hutu's and Tutsi's during the 1994 genocide.<sup>34</sup> After being defeated by Paul Kagame's Rwandan Patriotic Front (RPF), large numbers of Interhamwe soldiers fled the country, crossing the DRC border. In the DRC they formed new armed groups, plundering the Congolese jungle, still on a mission to one day take

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<sup>31</sup>See: <http://monusco.unmissions.org/Default.aspx?tabid10727&languageen-US>, accessed 15-12-2013.

<sup>32</sup>See: <http://www.news24.com/Africa/News/UN-troops-launch-offensive-against-FDLR-in-DRC-20131211-4>, accessed 15-12-2013

<sup>33</sup>See: <http://reliefweb.int/sites/reliefweb.int/files/resources/Children%20and%20armed%20conflict.pdf>, A/67/845, accessed 15-12-2013.

<sup>34</sup>The FDLR has over the years changed its name many times. I therefore choose to always use the name FDLR, referring to this group as described above.

over Rwanda and exterminate all Tutsi's.<sup>35</sup> Therefore the Rwandan government, still led by President Paul Kagame, has an interest opposed to backing the FDLR by for example providing them with child combatants. Of the former child combatants that I spoke to, three of them had served in the FDLR. One boy told me that when he was 8 years old, he went to the Congo with his uncle to visit family in the DRC. He was then recruited (with other children). The two other former FDLR child combatants had fathers who fled Rwanda after the 1994 genocide, and who were FDLR soldiers - therefore they, as sons, were forced to become soldiers too at a young age. Taking all this into account, the Rwandan government cannot be held responsible for the recruiting and use of (Rwandan) children by the FDLR.

### **Mouvement du 23-Mars (M23)**

The question of responsibility becomes more complicated when considering the armed group Mouvement du 23-Mars (M23). M23 is an armed group operating in the DR Congo, created in April 2012 when they split off from the Congolese national army. According to the 2013 UN Report they recruited 65 children during 2012 (2013: p. 57). According to the same report, 65 boys between 13 and 17 years old, including 25 claiming to be Rwandan, escaped and surrendered from M23 in 2012. 21 of these boys, 18 claiming to be Rwandan and 3 Congolese, said they had been recruited on Rwandan territory. In total 656 boys were said to be released from or have escaped from M23 in 2012 (2013: 59, 62). Another UN Report from the Group of Experts on the Democratic Republic of the Congo written in November 2012, claims that Rwanda has been supporting the M23 movement (2012: p. 4, 6-34).<sup>36</sup> This includes forced and voluntary recruitment of (Rwandan) combatants (2012: p. 20-26). They do not mention the age of these combatants.

A Human Rights Watch (HRW) Report written in July 2013, claims that men and boys have been forcefully recruited on both Congolese and Rwandan territory. Moreover, they provide proof of the Rwandan government backing the M23 rebel group militarily, providing them with ammunition, food and other supplies, and of Rwandan military officers training new M23 recruits.

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<sup>35</sup>These are facts I collected and discussed with several experts during my field research in Rwanda. Part of the information comes for example from former FDLR soldiers that I spoke to, from people working at the Demobilization and Reintegration office and camps, etc., but it can easily be found on several websites and in history books and other studies.

<sup>36</sup>See: [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2012\\_843.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_843.pdf), S/2012/843, accessed 15-12-2013.

On the whole, they argue that the Rwandan government is directly supporting the M23 movement. They mention weekly arrivals of Rwandan recruits and soldiers. They claim to have documented cases of seven Rwandan children, ages 15, 16 and 17 who were forcibly recruited in Rwanda in March and April 2012 to fight with M23, who were later able to escape.<sup>37</sup> In the demobilization camp, at the time when I visited the camp (August 2013), there were two children who were former M23 soldiers.<sup>38</sup>

As a result of accusations of both HRW and the UN, the US halted its military aid to Rwanda in October 2013, accusing them of backing M23 who use child combatants.<sup>39</sup> Earlier, in 2012, the US, the UK, the Netherlands and Germany suspended some of their financial aid to Rwanda because of its alleged backing of M23 rebels.<sup>40</sup>

President Kagame has repeatedly questioned these accusations and sanctions, arguing that Rwanda cannot be held responsible for the actions of others.<sup>41</sup> In several social media and national newspapers, the HRW report has been criticized in strong language, arguing that HRW is politically motivated to accuse Rwanda. This illustrates a longer history of unfriendliness, so to say, between Rwanda and Human Rights Watch.<sup>42</sup> In an official reply to the 2012 report of the UN Group of Experts (GoE), the Rwandan government questions both the evidence provided by the GoE (anonymous witness tes-

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<sup>37</sup> See: <http://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians>, accessed: 15-12-2013.

<sup>38</sup>I did not get to speak to these two children. This information was informally given to me by an adult source whom I cannot reveal. In the 2012 UN Report they state that the Rwandan Government had refused repatriation of 26 Rwandan former M23 combatants, on the grounds that their nationality had yet to be established (2012: 21).

<sup>39</sup>See: <http://america.aljazeera.com/articles/2013/10/4/u-s-sanctions-rwanda-others-over-child-soldiers.html>, accessed 15-12-2013. And <http://www.theguardian.com/global-development/2013/oct/04/us-military-aid-rwanda-m23-child-soldiers>, accessed 15-12-2013.

<sup>40</sup>See: <http://www.reuters.com/article/2012/08/31/us-congo-democratic-rwanda-un-idUSBRE87U1DX20120831>, accessed 15-12-2013.

<sup>41</sup>See: <http://www.zegabi.com/articles/?p4663>, accessed 15-12-2013. And for Kagame's reply on accusations on Twitter: <http://www.newsofrwanda.com/featured1/19801/kagame-slams-us-actress-mia-farrow-over-m23-rebels-report/>, accessed 15-12-2013.

<sup>42</sup>Examples: <http://www.newtimes.co.rw/news/index.php?i15451&a69574>, <http://www.newtimes.co.rw/news/index.php?i15429&a68947>, <http://www.trust.org/item/20130723173705-cvzs2/>, <http://travesty-of-hrw-on-rwanda.blogspot.nl/>, etc., all accessed 15-12-2013.

timonies and ‘unpersuasive physical evidence’) (2012: p. 6) and the HRW report (2012: p. 12, 13). The Rwandan Government denies involvement with M23, arguing that there is no interest for Rwanda to be involved in the DRC conflict, especially in a mutiny (2012: p. 8).<sup>43</sup> <sup>44</sup>

### **Recruiting and training**

Whether the Rwandan government is indeed recruiting and training child combatants is unclear. Officially, they do not recruit and train any person under 18. This is what is stated in formal law and this is the law for the community. However, on the level of the law for the government this is questionable, as is mentioned in the 2012 UN report and the 2013 HRW report. The Rwandan declaration to the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts states the following:

‘Minimum age for voluntary recruitment: 18 years. Minimum age for entry into schools operated by or under the control of armed forces: Not applicable. Status of pupils in these schools (are they part of the armed forces: Not applicable. What reliable proof of age is required: birth certificate. What do the armed forces comprise: Adult men and women.’

I have asked several Rwandan experts, including lawyers and judges, if they could explain to me what was meant by ‘schools operated by or under the control of armed forces’. All of them told me that they didn’t know and/or that they thought there were no such schools in Rwanda. As I said, two young respondents mentioned military training camps where children can be trained.

There is an island in Lake Kivu, known as Iwawa Island, where street children are allegedly sent after committing minor offences. This island, depending on what source you believe, is a place where children learn ‘patriotic songs and how to march like a soldier’ (according to the NY Times, 2010)

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<sup>43</sup>See: [http://www.gov.rw/IMG/pdf/rwandan-response\\_to\\_the\\_un\\_goe\\_report.pdf](http://www.gov.rw/IMG/pdf/rwandan-response_to_the_un_goe_report.pdf), accessed 15-12-2013.

<sup>44</sup>This point of view is supported by an interesting article in the Amsterdam Law Forum: Muleefu, A. (2013) ‘Beyond the Single Story: Rwanda’s Support to the March 23 Movement (M23)’. *Amsterdam Law Forum*, Vol. 5, 1.

or a place where children are rehabilitated and trained in vocational skills, according to government reporting.<sup>45</sup> Other than this I have not been able to find any concrete possible locations of training camps, facilities, etc. for children.

### **Rwandan responsibility for Rwandan child combatants in the DRC**

So the question of responsibility here is extremely complicated. One could argue that since at least it is clear that Rwandan children are involved in the DRC conflict, Rwanda is at least in violation of art. 38.2 of the 1989 CRC, art. 2 and 4.2 of the 2000 Optional Protocol, and article 22.2 of the African Charter, all stating that States Parties shall take necessary measures to ensure that no child shall take a direct part in hostilities and to prevent recruitment. These articles are of course not limited to recruitment by national armies, but by any party within the governments jurisdiction. The difficulty regarding responsibility obviously lies in “taking necessary measures”. Has the Rwandan government taken necessary measures to protect children from being recruited?

Secondly, if allegations of the UN reports and the 2013 HRW report are true, then Rwanda is actively recruiting and training child combatants, in which case the government is in violation of about 25 articles both in national and international law. Either way, the case cannot be brought before the International Criminal Court since Rwanda does not ratify the Rome Statute. It can be brought before the African Court of Human and Peoples’ Rights, through the African Commission on Human Rights, who have a mandate to protect the rights agreed on in the African Charter and hopefully this will be done.<sup>46</sup>

### **Demobilization and Reintegration**

Sometimes child combatants manage to leave the armed group that they are supposed to serve. They report usually to the UN or the ICRC. If they are Rwandan, they are sent to a special demobilization camp in the Rwandan

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<sup>45</sup>See: <http://www.myict.gov.rw/agencies/irvsdc-iwawa-rehabilitation-centre/>, [http://www.nytimes.com/2010/05/01/world/africa/01rwanda.html?\\_r1&](http://www.nytimes.com/2010/05/01/world/africa/01rwanda.html?_r1&), accessed 15-12-2013.

<sup>46</sup>For an explanation of the workings of the African Court and the Commission, see: [http://legal.un.org/avl/ls/Viljoen\\_CT\\_video\\_1.html](http://legal.un.org/avl/ls/Viljoen_CT_video_1.html), accessed 20-01-2014



western province, as part of the Rwanda Demobilization and Reintegration Program. When I visited this camp, there were 46 children, ages said to be 14-19 years. This was considered a “quiet period”, because at that moment there was a period of relative rest in the DR Congo after an outburst of violence earlier in the year. In this camp, children get some basic education (upon arrival most are illiterate), which includes reading, writing, the Rwandan language and Rwandan history. There is one nurse employed for therapeutic purposes. The children follow a weekly schedule of schooling, leisure (sports and games) and therapy.

When they come out of the Congolese jungle they have to tell their age. This determines whether they are children or adults, which has as its first consequence to which camp they are sent (the adult camp or the children’s camp). But often these children do not know their age. For example, I spoke to a boy who, when I asked about his education, said he had finished second class in primary school. He said he was recruited after, ‘at age 16, when he finished his studies’. In the second class of primary school in Rwanda you are usually 8 years old. The conversation in which I tried to find out about his current age and his age at the moment of recruitment is illustrative for the complexity of child combatants and information about age:

MH: ‘What is your education?’

Int: ‘He was recruited for soldier when he was in second primary.’

MH: ‘Second primary, and then?’

Int: ‘When he got into soldier. When he got recruited.’

MH: ‘How old was he in second primary?’

Int: ‘16 years.’

MH: ‘In 2nd primary you are 16 years?’

Int: ‘He went into..he was recruited when he had finished his studies.’

MH: ‘So, finished primary school?’

Int: ‘He was recruited when he was in two primary.’

MH: ‘But in the second of primary, you are not 16 then, are you?’

Int: ‘He was born here, in Bukavu, and he was being recruited when he was in secondary school.’

MH: ‘Secondary school?’

Int: ‘Not secondary school. In primary school.’

MH: 'So how come he was at primary school when he was 16 years old?'

Int: 'He started when he was very young.'

MH: 'He started what?'

Int: 'To study. To go to school. He thinks it was between 10 or 15.'

MH: 'When he started?'

Int: 'Yes.'

MH: 'Do you know how old you are?'

Int: 'He doesnt know. He guesses.'

The respondent said he was 18 years old now, but he looked more like 16 years old to me. Later during the conversation the respondent said he was confused 'because of the war and the bullets'. For three of four former child combatants that I spoke to, I was certain their true age was not how old they said or thought they were - they all seemed younger. These former child combatants get to stay in the camp for a minimum of three months and a maximum of nine months. During this period authorities try to locate family members and to reunite the children with their families - but, according to the stories I heard, this is often not very successful. Either families cannot be found or they are in the DRC, children who were recruited at a very young age might not know where they come from at all, etc. After finishing the Demobilization and Reintegration program, each person gets about €120 and a food package. They are encouraged by the camp leaders to group together, to stay together, add up their money to be able to rent a place and maybe buy some supplies, for example simcards or postcards or other things they can sell in the street.<sup>47</sup> There is no follow-up from the government.

The question is if in this situation the Rwandan government acts in accordance with formal law. Are these "all feasible measures" that can be taken to ensure protection and care for children who are affected by an armed conflict (CRC, art. 38.4)? Does the Rwandan government in this respect and take 'all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of [...] armed conflicts' (CRC, art. 39)?

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<sup>47</sup>All factual information comes from talking to officials at the Rwandan Demobilization and Reintegration Commission (RDRC) and from ICRC professionals who work with the RDRC.

From my experience in the camp for former child combatants, I can positively confirm that this recovery takes place in ‘an environment which fosters the health, self-respect and dignity of the child’ (CRC, art. 39). The question is, of course, if all former child combatants get to go to the camp, but this seems likely since there is a follow-up situation from the point where children report to the UN up until they get to the camp, by the ICRC. However, I worry about what happens when children leave the camp. What do you do when you are a 15 year old child who, after spending six months in the camp, is put into the streets with some money and some food (and maybe some friends)? Where do you go? What are you going to do? You are most likely traumatized by your experiences, you have hardly had proper schooling and now you have to survive, probably start your own business or work on a farm. I am not sure if the Rwandan government in this sense takes all appropriate measures. This situation, after children leave the camp, conflicts with Rwandan national law too, for example part two of art. 24: ‘A child who is temporarily or definitively deprived of his or her birth family shall be entitled [...] to a replacement protection which could consist of his or her placement in a foster family, an adoptive family or a placement in a relevant social welfare institution’. This does not happen. In this sense the Rwandan government can do more; they can for example, find foster families for these former child combatants and provide opportunities for counselling if necessary. If they were to change policy in this respect, they have to take into account the fact that age in this situation is not a good designator to decide whether someone is a child since a 15 year old child might say he is 18 years old and consequently fall out of the system.

## Attachment 2: Dutch child combatants

In the Netherlands, legally, a child cannot be a soldier. However, when a person can start military training is unclear. There is a very old law on Military Education, written in 1890, that states that a person can start certain education involving military training at age 15 (art. 3.13, 15). The 1995 Working Hours Act allows for 16 and 17 year olds to do any kind of work as long as it does not conflict with the law on education (art. 1.7, 4.4). The 1969 law on education, in its turn, ends compulsory education at the end of the school period during which the person has attained the age of 16 (art. 3). However, of course, the Dutch government in this respect is bound to obligations resulting from international conventions on the topic, specifically the Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000), leaving room for military education of persons younger than 18 years, as long as they do not take part directly in hostilities (art. 1), provided their “recruitment” (or rather, application?) is voluntary. The Netherlands have added in their declaration that voluntary recruitment into the national Armed Forces is allowed as from age 18. Persons of the age of 17 can be recruited on voluntary basis as “military personnel in probation”. The fact that persons of age 15 can sign up for education to become military personnel (recruitment?) is not mentioned.

In the Netherlands there are several options for military education at the age of 15 or 16. One example of an educational military program is called Veiligheid en Vakmanschap (Safety and Craftsmanship). You can apply for this training as soon as you are 15 years old.<sup>48</sup> According to the brochure of the program it ‘prepares you for your first function at the Defence Organization’. You are ‘trained in a place where you will possibly come to work; at

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<sup>48</sup>The webpage of this educational program starts with: ‘Je bent 15 of 16 jaar, hebt (bijna) je vmbo-diploma gehaald en twijfelt nog wat je hierna wilt doen? Dan hebben wij de oplossing voor je: Veiligheid & Vakmanschap. Deze mbo-opleiding van Defensie laat je kennismaken met de marine, de landmacht en de luchtmacht en bereidt je voor op je eerste functie bij Defensie’, which translates as: ‘You are 15 or 16 years old, you (almost) have your VMBO-diploma [which is the lowest level of secondary education in the Netherlands] and you are still in doubt about what to do next? Then we have the solution for you: Safety & Craftsmanship. This MBO-education [which is the lowest level of professional education in the Netherlands] in the Defense Organization introduces you to the marines, the ground forces and the air forces and it prepares you for your first function at the Ministry of Defense.’ See: <http://veva.nl/De-opleiding.html>, accessed 13-12-2013

the barracks or on board of a ship'. Children regularly have to wear military uniforms, which are referred to as "industrial clothing".<sup>49</sup> Six pictures and one video are added to the webpage of this educational program, all definitely suggesting (preparation for) direct participation in hostilities.<sup>50</sup> Two of these pictures are shown below.

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<sup>49</sup>In 2009 a politician of the Socialist Party, Poppe, sent a letter to the State Secretary of the Ministry of Defense, Jack de Vries, questioning an "educational camp" of this sort of educational program in Norway. One of his questions was: '6. Waarom wordt binnen de ROC-opleiding een uniform 'bedrijfskleding' genoemd? 1) Deelt u de mening dat dit een verhullende term is om elke schijn van kindsoldaten te voorkomen?' (6. Why is the uniform called industrial clothing within the ROC-education? 1) Do you share the opinion that this is a term of concealment, used to avoid any reference to child soldiers?). The State Secretary replied that it is a commonly used term within the ROC education, like the baker's uniform. See: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2009/08/18/kamervragen-scholieren-die-soldaatje-spelen-in-een-noors-bos/20090818-kamervragen-scholieren-soldaatje-spelen-in-het-bos.pdf>, accessed 15-12-2013.

<sup>50</sup>See: <http://veva.nl/De-opleiding.html>, accessed 13-12-2013. The video is on youtube: <http://veva.nl/De-opleiding.html>



Figure 2.3: Pictures advertising for education (VeVa) for military personnel in the Netherlands. This education is accessible for persons of at least age 15.

The Netherlands, in their report of States Parties on the CRC, due in 1997, write that

'Until 1993, the Netherlands armed forces consisted of conscript forces and volunteer military personnel. The minimum age of conscription was set at 18 years, but it was possible to perform the required military service voluntarily from the age of 17 onwards provided that permission was given by a parent or guardian. [...] Upon ratification of the Convention on the Rights of the Child, the Netherlands also raised the age at which personnel could be drafted into the armed forces in wartime to 18 years. Voluntary enlistment for the purpose of pursuing a military career was possible from the age of 16 onwards and also required permission from a parent or guardian (art. 317). In 1993, however, the Netherlands armed forces underwent an extensive reorganisation [...] The minimum age of recruitment was maintained at 16 years of age. [...] (art. 318). During the negotiations on an optional protocol to the Convention on the Rights of the Child, it became clear that there was growing international consensus on the need to raise the minimum age of recruitment to 17 years of age and the minimum age of participation in hostilities to 18 years of age. In 1996 the Netherlands therefore modified its recruitment policy and its selection of personnel for peace operations abroad. The minimum age of recruitment is now set at 17 and no one under 18 years of age may be posted abroad for any military operations, including peacekeeping and other international operations, in areas where hostilities are taking place' (art 319).<sup>51</sup>

In reaction to this report, the Committee on the Rights of the Child writes that 'The Committee takes note of the efforts made to raise steadily the age of recruitment into the armed forces and involvement in hostilities. It also notes the declaration stating the intention of the State party to apply a

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<sup>51</sup>Initial report of the Netherlands to UN Committee on the Rights of the Child, UN Doc. CRC/C/51/Add. 1, 24 July 1997

higher standard than that required by the Convention, and its commitment to international efforts in this regard. Nevertheless, the Committee urges the State party to reconsider its present recruitment policies, with a view to setting the age of recruitment into the armed forces at 18 years' (art. 1040).<sup>52</sup>

In their 2004 Global Report, the section on the Netherlands, Child Soldiers International wrongly state that: 'There are no military secondary schools. The minimum age of admission to military academies is 17. The Royal Military Academy and the Royal Institute for the Navy train future career officers and short-term officers. Their status is comparable to that of universities, and students must have completed secondary school to qualify for admission. The military academies are considered part of the armed forces [...]'.<sup>53</sup>

Indeed, the official institution hosting the "Safety & Craftsmanship" educational program and several other, similar educational programs, are MBO schools, state-run facilities where the Ministry of Defense seem to have their own department. As the educational programs are officially situated in these schools, rather than in Military Academies, even though the brochure says students are 'trained in a place where you will possibly come to work; at the barracks or on board of a ship'<sup>54</sup>, technically this might be argued to mean that these students are not considered part of the armed forces. This is clearly questionable. On the other hand, these students are students and therefore not employees - they do not get paid to train (or work for the Ministry of Defense). Their parents can apply for a financial arrangement called "tegemeetkoming studiekosten" (educational costs allowance), which all parents of 16- and 17 year old MBO students can apply for. However the non-payment criterion cannot be a criterion to say that Dutch military students (to label the group for the time being) are not part of the military, since often one of the reasons for armed groups to recruit children is precisely because they do not get paid (Wessels, 2006: p. 34).

Moreover, in a 2007 NATO report titled "Recruiting and Retention of

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<sup>52</sup>Report of the Committee on the Rights of the Child (2000), Supplement No. 41 (A/55/41).

<sup>53</sup>Child Soldiers International, Child Soldiers Global Report 2004 - Netherlands, 2004, available at: <http://www.refworld.org/docid/4988063dc.html>, accessed 13-12-2013

<sup>54</sup>Several respondents who are involved with this educational program, either as students or teachers, have informed me that this means the students get three weeks of education in the MBO school per month (including physical training), and one week of "bivak": military training at the barracks



Military Personnel”<sup>55</sup> , the chapter on the Netherlands (written by two employees of the Dutch Ministry of Defense) states the following:

‘[...] To sustain this all-volunteer military force of approximately 52,000, the Dutch Defence Organization each year needs to take on approximately 9,000 military personnel with fixed term contracts or indefinite contracts. To reach this goal, about 1.6% of the young people that finish school each year have to show interest in a job with the armed forces, since it is known that about 1 in 4 of these will eventually apply and be appointed. This requires a substantial structural recruitment effort that each Service conducts individually. The main tools used are television commercials, advertisements in papers and magazines, an Internet site, direct mailing, “open days” and school visits. The Army also has a network of Recruiting Offices. For interested persons that are too young to join as a soldier, special civilian preparatory school trajectories are offered in which civilian education is combined with a small amount of elementary military training. In general, after interested youngsters have contacted one of the Services, they receive detailed information on the job possibilities the Defence Organization is offering and on the recruitment and selection procedures. To this extent there are many brochures available and also some videos that try to present a realistic job preview’ [my underlining, MH] (2D 1).

The definition of “recruitment” adhered by this NATO Report is the one of Saks (2005): ‘Recruitment involves actions and activities taken by an organization in order to identify and attract individuals to the organization who have the capabilities to help the organization realize its strategic objectives. In particular, such activities should generate a pool of desirable candidates; enhance their interest in and their attraction to the organization as an employer; and increase the probability that they will accept a job offer’ (p. 48). Following their own definition, the policy of the Dutch Government and the

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<sup>55</sup>[http://www.nato.int/issues/women\\_nato/Recruiting%20&%20Retention%20of%20Mil%20Personnel.pdf](http://www.nato.int/issues/women_nato/Recruiting%20&%20Retention%20of%20Mil%20Personnel.pdf), accessed 14-12-2013

Ministry of Defense towards 15, 16 and 17 year old children can definitely be labelled recruitment. Therefore, the Dutch Government is basically recruiting child combatants, contradicting the promises made, reports written and declarations done in the field of international children's rights.

They boldly confess to this, contradicting their Report on the CRC in 2000 when they stated that 'The minimum age of recruitment is set at 17 [since 1996]'. In the 2007 NATO Report, when discussing the most important measures taken to improve the intake of military personnel, they write:

'Measure 4

Research showed that 12% of the 16-year olds with lower education are very much interested in a career with the RNLA. This figure drops to 6% by the time they [reach] the age of 21. So, from a recruiting point of view it's important to try and bind them very early, before they lose interest or choose another career path. However, 16 is too young to apply and there also was the strong wish from Parliament not to appoint anyone under the age of 18 whereas about 27% of the soldiers are 17 at the time they are appointed. To solve this, the RNLA offers a so-called Orientation Year. This is a civilian Upper Secondary Vocational Education at regional training centers across the country. The year consists of regular civilian courses, with 20% of the curriculum consisting of extra sports, military bivouacs, and information about the RNLA. It is still possible to be appointed at the age of 17.5, but only as an "aspirant-soldier", who does not have a regular function, cannot carry weapons, and is not available for deployment until he or she turns 18. This was an acceptable compromise for Parliament.

The Orientation Year has been a success. About 90% of the youngsters that start the year also finish it and about 65% are appointed to the Defence Organization. Also, at 30%, the Orientation program manages to recruit more women than by any other means. Furthermore, early turnover during initial military training among this group is much lower than among those without an Orientation Year background. Because of this success, the aim is to

eventually recruit 75% of the necessary number of soldiers for the RNLA by means of the Orientation Year.<sup>56</sup>

So, basically, 75% of Dutch soldiers are aimed to be recruited during “the Orientation Year”, which, as I pointed out, starts at age 15 - therefore the aim of the Dutch Ministry of Defence is to recruit 75% of their soldiers at age 15 (or 16 at the most). This goes against international conventions, for example the 1989 CRC art 38.3: ‘[...] In recruiting those persons who have attained the age of 15 years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest’.

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<sup>56</sup>The orientation year has been renamed the “safety and craftsmanship”-program, see <http://www.militair.net/forum/viewtopic.php?f40&t4615&start0> (2D.2.5).

### **Attachment 3: Overview of laws applicable to (the situation of) child combatants in Rwanda and the Netherlands**

Rwanda and the Netherlands are a party to several international conventions with laws on child combatants. Therefore the following formal laws (sorted from most internationally recognized to most national) related to child combatants apply:

Legal instrument	The Netherlands	Rwanda	Relevant article	Content
The UN Convention on the Rights of the Child (1989)	Signed: 1990	Signed: 1990	1	For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.
	Acceptance: 1995	Ratification: 1991	9	1. States Parties shall ensure that a child shall not be separated from his or her parents against their will (...).
			32	1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
			34	States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse (...).
	Declaration: "With regard to article 38 of the Convention, the Government of the Kingdom of the Netherlands declares that it is of the opinion that States would not be allowed to involve children directly or indirectly in hostilities and that the minimum age for the recruitment or incorporation of children in the armed forces should be above fifteen years (...)."		38	1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting those persons who have attained the age of 15 years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.

<p>Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)</p>	<p>Signed: 2000</p> <p>Ratification: 2009</p> <p>Declaration: "[...] the minimum age at which the legislation in the Netherlands permits voluntary recruitment into its national Armed Forces for both soldiers and commissioned or non-commissioned officers, remains eighteen years. However, persons that have reached the age of seventeen years, may on a strictly voluntary basis be recruited as military personnel in probation. The relevant legislation in the Netherlands provides the following safeguards to ensure that such recruitment of persons under the age of eighteen years is not forced or coerced: 1. Appointment of such persons (...) is only permitted with written consent of the parents of this person. 2. When the age of eighteen years has been reached, the member of the armed</p>	<p>Accession: 2002</p> <p>Declaration: "Minimum age for voluntary recruitment: 18 years. Minimum age for entry into schools operated by or under the control of armed forces: Not applicable. Status of pupils in these schools (are they part of the armed forces: Not applicable. What reliable proof of age is required: birth certificate. What do the armed forces</p>	<p>4. (...) States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.</p> <p>States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of (...) armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.</p>
<p>1</p>	<p>States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.</p>	<p>1</p>	<p>States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.</p>
<p>2</p>	<p>Accession: 2002</p>	<p>2</p>	<p>States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.</p>
<p>3</p>	<p>Declaration: "Minimum age for voluntary recruitment: 18 years. Minimum age for entry into schools operated by or under the control of armed forces: Not applicable. Status of pupils in these schools (are they part of the armed forces: Not applicable. What reliable proof of age is required: birth certificate. What do the armed forces</p>	<p>1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces (...) recognizing that under the Convention persons under the age of 18 years are entitled to special protection.</p> <p>2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.</p> <p>3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:</p> <p>(a) Such recruitment is genuinely voluntary;</p> <p>(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;</p> <p>(c) Such persons are fully informed of the duties involved in such military service;</p>	<p>1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces (...) recognizing that under the Convention persons under the age of 18 years are entitled to special protection.</p> <p>2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.</p> <p>3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:</p> <p>(a) Such recruitment is genuinely voluntary;</p> <p>(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;</p> <p>(c) Such persons are fully informed of the duties involved in such military service;</p>

<p>The Rome Statute of the International Criminal Court (1998)</p>	<p>forces on probation can only become a regular soldier after having given written consent to this effect. Moreover, the Law on Military Personnel 1931 ensures that a person under the age of eighteen years will not participate in an armed conflict (...).</p>	<p>comprise: Adult men and women."</p>	<p>(d) Such persons provide reliable proof of age prior to acceptance into national military service.</p> <p>5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.</p> <p>1. 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 18 years.</p> <p>2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.</p> <p>States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.</p>
<p>Signed: 1998</p> <p>Ratified: 2001</p>	<p>Signed: -</p> <p>Acceded: -</p>	<p>1</p> <p>5</p>	<p>An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.</p> <p>1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:</p> <ul style="list-style-type: none"> <li>(a) The crime of genocide;</li> <li>(b) Crimes against humanity;</li> <li>(c) War crimes;</li> <li>(d) The crime of aggression.</li> </ul>

<p>For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)</p> <p>(c) Enslavement;</p> <p>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</p>	7		
<p>2. For the purpose of this Statute, "war crimes" means: (...)</p> <p>(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:(...)</p> <p>(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.</p> <p>(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (...)</p> <p>(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities</p>	8		
Paris Principles (2007)	Endorsement: 2007	Endorsement	-
African Charter on the Rights and Welfare of the Child (1990)	Not applicable	Signed: 1991 Ratified: 2001	2 11 14 15
		For the purposes of this Charter, a child means every human being below the age of 18 years. 1. Every child shall have the right to an education. 1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.	



<p>Rwanda: Law No 54/2011 of 14/12/2011 relating to the rights and the protection of the child</p>	<p>Not applicable</p>	<p>2011</p>	<p>19</p> <p>3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.</p> <p>4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.</p>
			<p>22</p> <p>1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.</p> <p>2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.</p> <p>3. States Parties to the present Charter shall (...) take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.</p>
			<p>27</p> <p>1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:</p> <p>(a) the inducement, coercion or encouragement of a child to engage in any sexual activity (...)</p>
		<p>3</p>	<p>For the purpose of this Law, the following terms mean: (...)</p> <p>5. worst forms of child labor : the worst forms of child labor that include to <del>include</del> children in slavery or similar practices; children trafficking; (...) to have them replace grownups in forced labour; to use them in conflicts and wars; the recruitment, use, procuring or offering of a child for prostitution (...) the work which is likely to harm the health, safety or morals of a child</p>

<p>6. minimum age : it is the age from which the child is legally incompetent or it is physically impossible for him/her to pose an act determined by the law or the age from which certain protections will be lost</p>		
<p>10. a child: Any person under the age of eighteen (18 ) years. Every child shall have the right to be provided with special protection by his/her family, the Rwandan community and the Government for his/her physical, mental, spiritual, moral, psychological and social growth according to the human dignity.</p>		
<p>11 The child shall enjoy his/her rights as of conception and he/she is reputed born whenever his/her interests are concerned.</p>		
<p>23 A child has the duty to undergo basic education as ensured by parents and the Government.</p>		
<p>24 Each child has the right to have a family from his/her birth, where he/she lives, grows, develops and which ensures all the protection and affection necessary to his/her full development.</p>		
<p>A child who is temporarily or definitively deprived of his or her birth family shall be entitled (...)to a replacement protection which could consist of his or her placement in a foster family, an adoptive family or a placement in a relevant social welfare institution.</p>		
<p>50 The child must be protected and rescued first during of disaster or armed conflict. Military service is prohibited for children under eighteen (18) years. The Government shall, within its means, ensure and facilitate the physical and psychological recovery and the social reintegration of any child affected by a disaster or armed conflict.</p>		
<p>51 All forms of <del>spogopical</del> exploitation of a child by requiring him/her to accomplish a work that is likely to put him/her at risk or to compromise his or her education or to harm his or her health or his/ her physical, mental, spiritual, moral or social development such as drug trafficking and usage of alcohol and cigarette business and consumption, prostitution, beggary, child trafficking, slavery and kidnaping, pornography business, or any other form of exploitation and incitation are prohibited and punishable by Law.</p>		

<p><b>Dutch National Law</b></p>	<p>Dutch Civil Code</p>	<p>-</p> <p>1:2</p> <p>1:233</p>	<p>A child of which a woman is pregnant, is regarded to have been born already as often as its interests require so. If it is born lifeless, it is deemed to have never existed.</p> <p>Minors are persons who have not yet reached the age of eighteen years and who are not married or registered as a partner in a registered partnership, nor have been married or registered as a partner in a registered partnership and who have not been declared of age pursuant to Article 1:253ha.</p>
<p>The Netherlands: The Working Hours Act (1995)</p>	<p>-</p>	<p>1.7</p> <p>3.5</p>	<p>3. In deze wet en de daarop berustende bepalingen wordt onder jeugdige werknemer verstaan: een werknemer van 16 of 17 jaar.</p> <p>Bij de in artikel 3:2, tweede lid, toegestane arbeid neemt de verantwoordelijke persoon te allen tijde in acht, dat bij de aldaar toegestane arbeid, de veiligheid van het kind niet in gevaar komt, noch arbeid wordt verricht welke een nadelige invloed kan uitoefenen op de lichamelijke of geestelijke ontwikkeling van dat kind.</p> <p>Bij het stellen van de nadere regels, bedoeld in artikel 3:2, derde lid, en het verlenen van een ontheffing als bedoeld in artikel 3:3, eerste lid, wordt te allen tijde in acht genomen, dat bij de aldaar toegestane arbeid, de veiligheid van het kind niet in gevaar komt, noch arbeid wordt verricht welke een nadelige invloed kan uitoefenen op de lichamelijke of geestelijke ontwikkeling van dat kind.</p>
<p>Dutch law on Compulsory Education (1969)</p>	<p>-</p>	<p>4.4</p> <p>3</p>	<p>1. De arbeid van een jeugdige werknemer wordt zodanig ingericht, dat hij in staat is volgens de voor hem geldende wetgeving onderwijs te volgen.</p> <p>1. De verplichting om te zorgen, dat een jongere als leerling van een school staat ingeschreven, begint op de eerste schooldag van de maand volgende op die waarin de jongere de leeftijd van vijf jaar bereikt, en eindigt:</p> <p>a. aan het einde van het schooljaar na afloop waarvan de jongere ten minste twaalf volledige schooljaren een of meer scholen heeft bezocht;</p> <p>b. aan het einde van het schooljaar waarin de jongere de leeftijd van zestien jaar heeft bereikt.</p>

<p>Law in situation of emergency (1996)</p> <p>Has never been used, will come into force in extraordinary circumstances and by means of royal decision</p>	<p>-</p>	<p>15</p> <p>Het militair gezag is bevoegd van algemeen verbindende voorschriften, waarvan de vaststelling krachtens andere wetten toekomt aan organen van andere lichamen dan het Rijk, af te wijken, dan wel deze bij verordening voor zolang dat nodig is buiten werking te stellen en zelf ter zake een tijdelijke regeling te geven.</p> <p>1. Het militair gezag is bevoegd regels te stellen nopens de werkzaamheden, welke niet-militairen die de leeftijd van 18 jaar hebben bereikt, in het belang van de taak van de krijgsmacht moeten verrichten. Deze werkzaamheden mogen een deel uitmaken van de werkzaamheden, die aan de krijgsmacht worden toebedeeld.</p> <p>24</p> <p>1. Het militair gezag is bevoegd niet-militairen, die de leeftijd van 18 jaar hebben bereikt, op te roepen om deel uit te maken van de krijgsmacht.</p> <p>37</p> <p>2. Zij worden van het tijdstip af, waartegen zij zijn opgeroepen, aangemerkt als militair, behorende tot dat deel van de krijgsmacht, waarbij zij zijn ingedeeld. De oproeping geldt als oproeping voor de werkelijke dienst.</p> <p>Aan de Cadettenschool wordt onderwijs gegeven in:</p> <p>a. de wiskunde;</p> <p>b. de beginselen der theoretische en toegepaste mechanica;</p> <p>(...)</p> <p>p. de infanterie exercitiën.</p>
<p>Law for the regulation of Military Education at the army (1890)</p>	<p>3.13</p>	<p>15</p> <p>Nederlanders en zij, die uit anderen hoofde Nederlandsche onderdanen zijn, hebben het recht aan het toelatingsexamen voor de Cadettenschool deel te nemen, wanneer zij:</p> <p>a. op het tijdstip van den aanvang van het eerstvolgende leerjaar, den vollen ouderdom van vijftien jaren bereikt en dien van achttien jaren niet overschreden hebben, zoo zij opgeleid worden voor den dienst hier te lande,</p> <p>den vollen ouderdom van vijftien jaren bereikt en dien van achttien jaren niet overschreden hebben, zoo zij opgeleid worden voor den dienst hier te lande, den vollen ouderdom van veertien jaren bereikt en dien van negentien jaren niet overschreden hebben, zoo zij opgeleid worden voor den dienst in Nederlandsche Indië.</p>

Military Service Law (1997)		<p>1. Voor de dienstplicht wordt ingeschreven de mannelijke Nederlander die op 1 februari van het jaar waarin hij de leeftijd van 17 jaar bereikt als ingezetene in een basisadministratie persoonsgegevens is ingeschreven of had behoren te zijn ingeschreven.</p>
Military Personnel Law (1931)		<p>3</p> <p>1</p> <p>1a</p> <ol style="list-style-type: none"> <li>1. In deze wet en de daarop berustende bepalingen wordt verstaan onder:       <ol style="list-style-type: none"> <li>a. militaire ambtenaren: zij, die zijn aangesteld bij het beroepspersoneel van de krijgsmacht of bij het reservepersoneel van de krijgsmacht om in militaire openbare dienst werkzaam te zijn,</li> </ol> </li> <li>1. Tot militair ambtenaar kunnen worden aangesteld zij die de leeftijd van 18 jaar hebben bereikt.</li> <li>2. Zij die de leeftijd van 17 jaar hebben bereikt kunnen met schriftelijke instemming van hun wettelijke vertegenwoordigers worden aangesteld als aspirant-militair ambtenaar.</li> <li>3. Aan aspirant-militaire ambtenaren wordt geen functie toegewezen. Zij worden niet ingezet in buitengewone omstandigheden, voor vredes- of humanitaire operaties of voor enige vorm van gewapende dienst.</li> <li>5. Een aanstelling als aspirant-militair ambtenaar gaat over in een aanstelling als militair ambtenaar als de aspirant-militair ambtenaar daarmee na het bereiken van de leeftijd van 18 jaar schriftelijk instemt.</li> </ol>

## Attachment 4: Methodology

### Philosophical texts

For a philosophical discussion of childhood and children's rights, I have chosen to focus on works of Plato, Kant and Rousseau. I have chosen to look at Plato's works, because even though he doesn't directly discuss the notion of childhood or children's rights, his work is so fundamental to philosophy as a whole and philosophy of law and philosophical anthropology in particular. I have chosen to discuss Immanuel Kant because his work is very fundamental to western philosophy too, and especially his work on ethics - I always enjoy reading it, I find it rather brilliant and one of the best analysis of man's capacity for moral reasoning and acting. As one of my teachers used to say: 'It takes ten years to understand Kant, and then the rest of your life to get rid of him again' (Donald Loose). Lastly I chose to discuss Rousseau's *Emile* because this work is well-known for being one of the foundations of modern day childhood studies.

### Field research

Firstly I need to render a justification for the quite unusual choice to empirically collect data for the purpose of using it in a philosophical thesis. Why would an investigation into philosophical texts not be sufficient? Personally, I think that to find the meaning of a concept one has to look at its use in (daily) language (see also footnote p. 29). As Castañeda argues, as analysed by van Roermund (1989): 'to a philosopher, "data" are first and foremost: experiences and convictions. These are always embedded and structured by a certain idiolect. These structures will emerge only when we try to compare as many data as possible, within an idiolect or about idiolects. [Then] we can start to inquire whether [these experiences and convictions] say something about what might grandly be called "reality"' (p. 7) (my translation, MH). To justify the kind of data-collection used, in relation to philosophical research, I want to shortly refer to Rawls's concept of a reflective equilibrium. According to Rawls (1972), to ask for a certain judgment of a person, to get a pure judgment, 'irregularities and distortions' that judgments are subject to, need to be filtered out. This is done using the Socratic method; the regulative principles of the considered judgments are brought to light. The state [judgment] that is reached 'after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception)'

is called a reflective equilibrium (p.48-49). Rawls applies this to a person's conception of justice. If I fill in "childhood" for "justice", with Rawls, one can say: 'If we can describe one person's sense of grammar we shall surely know many things about the general structure of language. Similarly, if we should be able to characterize one (educated) person's sense of [childhood], we would have a good beginning towards a theory of [childhood]' (p. 50).<sup>57</sup> This structure becomes even more apparent, I would add, when one studies these underlying principles with multiple respondents.

For conducting the field research I made use of the method of concept mapping, as described by Trochim (1989) and Petrucci & Quinlan (2008), a 'mixed-methods strategy that captures the rich conceptual data from communities of interest on a particular question or topic' (Petrucci & Quinlan: p. 27) .

#### 1. Question and generating ideas

The main question for the interviews was "what is the meaning of the concept of childhood?". To explore this question with respondents, cards with words were used, which the respondents could sort into different categories. The words on these cards were derived from initial informal discussions with several people and from texts that were later on used in the studies. Words that were found to be associated with childhood were put on cards. For the Rwandan respondents, words were written down in English and Kinyarwanda, for the Dutch respondents words were written down in English and Dutch.

Below you find the list of words used. The first three words (childhood, adulthood, both) were put on blue cards, since they were used as categories, all the other words were put on yellow cards.

#### 2. Participants

Respondents, both in Rwanda and the Netherlands, were recruited using snowball sampling. Purposive sampling was used, focussing on divergence in age, level of education, sex and place of birth. The total amount of participants was 29 Rwandans and 26 Dutch. Furthermore extra focus was on including respondents who were in some way affiliated to armed forces.

The youngest respondent in Rwanda was 5 years old, the oldest 77. The

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<sup>57</sup>One could argue that the reflective equilibrium only applies to moral judgments. But since Rawls himself mentions the similarity with linguistics and grammar, I feel justified to apply the notion to my kind of empirical data collection.

youngest respondent in the Netherlands was 7 years old, the oldest 72. The Rwandan respondents included four former child soldiers and four former adult military, all of them who had left the Congolese war at least 1 day and at most 9 months prior to the moment of the interview (these interviews were conducted in the Rwandan demobilization camps). The Dutch respondents included two students of the VeVa education (see Attachment 2) and four adult military, of whom two were teachers at the VeVa educational program.

### 3. Collecting data

The interview was set up as being semi-structured. After collecting personal data from the respondent, the three blue cards with categories were put on a table. Respondents were given instructions to restrict themselves to personal opinion and personal culture. They were told that there were no right or wrong answers and they would remain anonymous, and permission was asked to record the interview. They were then given a yellow card and asked to put this card under one of the categories - childhood, adulthood or both - in any way that made sense to them. Here I derived somewhat from the method of concept mapping; I did not just stick to letting respondents sort the cards, but interviewed them about their choices. As an interviewer, I took up a philosophical position, mostly asking ‘why [do you think] [...]?’’, ‘what do you mean with [concept]?’’, ‘So you are saying [...] but doesn't that contradict what you said before, that [...]?’’, all with the purpose of clarifying a respondent's views. Each interview ended with the question ‘Now that we had this conversation, can you tell me, what do you think is the meaning of the concept of childhood?’.

Interviews in Rwanda were conducted in English and Kinyarwanda with help of a translator, or in English when respondents had sufficient knowledge of English. Interviews in the Netherlands were conducted in Dutch. Interviews lasted between 45 and 60 minutes. All interviews were audio recorded and transcribed.

### 4. Data analysis

After transcribing all interviews, data were analysed according to concepts mentioned and stressed by respondents in relation to childhood. These were not necessarily words on the cards, but derived from discussing them. As one can observe from the following excerpt of an interview with a Rwandan former military:



MH: [takes out card: soldier]  
Resp: [puts it under adulthood]  
Int: 'It is because adult person can make choice, what is bad, what is good.'  
MH: 'And the 16 year old [referring to card that had already been put down under childhood] cannot?'  
Int: 'It is bad for the person of 16 years old because still there [childhood], he doesnt know what he is doing.'  
MH: 'And the 18 year old?'  
Int: 'At 18 it's a child but who starts to know what is going on. Who knows like a..- who is starting to get some maturity. But for 18 [clicks tongue], it looks like bad, even.'  
MH: 'So if you were the Prime Minister, what age would you say, you can be a soldier?'  
Int: 'Like 22. 22, because at that stage, he knows what is completely bad, what is completely good.'  
MH: 'So when you were a soldier, you always knew what was good and what was bad.'  
Int: 'When he was soldier, he knew what is good and what is bad. But what he observed, he observed that there are other individuals who involved in different activities because it was the order from the superior.'  
MH: 'And the things you did, the people you killed, were always your own decision?'  
Int: 'As I told you, in the context that the mature soldier, the adult person can make choice and I did what was necessary. Normally activities, the purpose of soldier is to fight with another soldier when they are in front. But not to go attack civilians who are not holding guns.'

From this excerpt it is clear that in the respondent's view, a child is pre-moral and therefore should not be a soldier. So in this way thematic analysis was used (Braun & Clarke: 2006), which were then grouped for the concept maps as can be seen in §1.2.1.

English	Kinyarwanda	Dutch
childhood	umwana (ubuwana)	kind
both	bose	beiden
adulthood	umuntu mukuru (ubukuru)	volwassene
able to make well-informed decisions	gufata ibyemezo biboneye	in staat om weloverwogen beslissingen te maken
age: 1 year	umwaka umwe	leeftijd: 1 jaar
age: 10 years	imyaka cumi	leeftijd: 10 jaar
age: 12 years	imyaka cumi n'ibiri	leeftijd: 12 jaar
age: 14 years	imyaka cumi mi ime	leeftijd: 14 jaar
age: 16 years	imyaka cumi m'itamdatu	leeftijd: 16 jaar
age: 18 years	imyaka cumi m'umumami	leeftijd: 18 jaar
age: 21 years	imyaka makumyabiri m'umwe	leeftijd: 21 jaar
age: 8 years	imyaka umumami	leeftijd: 8 jaar
aggressive	kwiyenza	agressief
dependent	kutigenga	afhankelijk
drive a car	gutwara imodoka	auto rijden
endure pain	kubabara	pijn verdragen
go to school	kujya ku ishuri	naar school gaan
have a baby	kugira umwana	een kind krijgen
independent	kwigenga	onafhankelijk
inflict pain	kubabza undi	(iets of iemand) pijn doen
innocence	umuziranenge	onschuld
marriage	ubukwe	huwelijk
obedience	kubaha	gehoorzaamheid
own property	kugira umutungo wawe	eigendom bezitten
pubic hair (when girls/boys bodies change)	ubugimbi / ubukumi	
pubic hair / secondary sex characteristics		schaamhaar / secundaire geslachtskenmerken
sex	imibonano mpuzabitsina	seks
soldier	umusirikare	soldaat
spend money	guboresha amafaranga	geld uitgeven
to play	gukina	spelen
to speak	kuvuga	spreken
to teach	kwigisha	les geven
to think	gutekereza	(na)denken
to walk	kugemda	lopen
to work	-	werken
toilet trained	kwigishwa kujya ku musarane	zindelijk
wearing diapers	kwambara urubindo	luiers dragen
young	ukiri muto / urubyiruko	jong

Figure 2.4: Overview of words used during the interviews

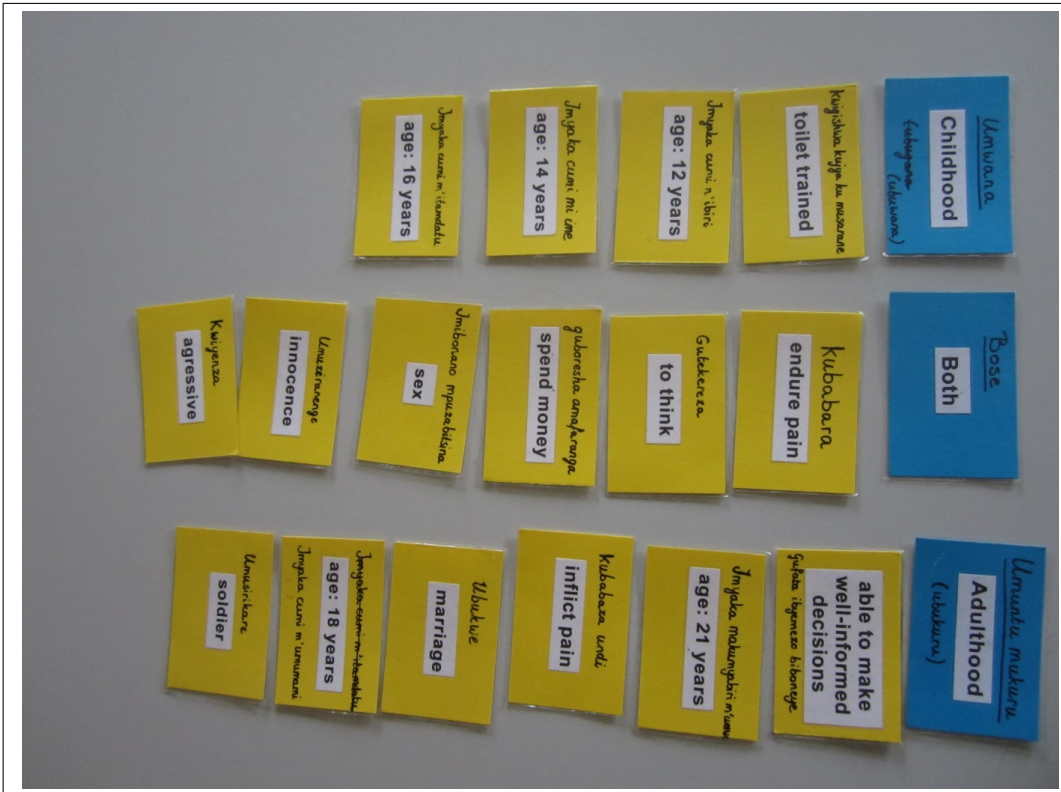


Figure 2.5: An example of cards sorted at the end of the interview by a Rwandan respondent