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LIABILITY AND PROTECTION OF CHILD SOLDIERS UNDER INTERNATIONAL CRIMINAL LAW*

Abstract

The issue of child soldiers within the realm of international law presents a complex and multifaceted challenge, encompassing considerations of human rights, humanitarian law, and the protection of vulnerable populations - children. This paper delves into the legal framework and debates regarding child soldiers in international law, analysing key international instruments such as the UN Convention on the Rights of the Child and its Optional Protocol, the Rome Statute, and the Protocols Additional to the Geneva Conventions. At the heart of the discussion lies the tension between viewing child soldiers solely as victims deserving protection and recognising their potential liability for crimes committed during armed conflicts. The absence of a uniform minimum age for criminal liability complicates the prosecution of child soldiers, raising questions about their capacity for intent and understanding of the previously committed acts. However, international humanitarian law outlines the obligations of parties to armed conflicts to protect children from recruitment and involvement in hostilities. Moreover, the jurisdictional limitations of international courts, such as the International Criminal Court, pose challenges in addressing crimes committed by child soldiers. While efforts have been made to prosecute those responsible for recruiting children, the specific circumstances surrounding child soldiering demand a careful balance between accountability and protection. This paper navigates these complexities, examining the evolving legal landscape and offering insights into the ongoing discourse on the prosecution and protection of child soldiers within the framework of international law.

Keywords: *child soldiers, child recruitment, criminal liability of children, child recruitment as a war crime*



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1. INTRODUCTION

The international legal landscape concerning child soldiers reflects a complex interaction of treaties, customary norms and non-binding, soft law instruments. The issue of child soldiers has long been a matter of concern in the realm of international law, prompting significant legal developments aimed at protecting the rights of children involved in armed conflicts (Vautravers, 2008, 98; Hart, 2006, 219; Druba, 2002, 274). This scientific paper delves into the multifaceted legal framework and challenges surrounding child soldiers within the context of international law.

Beginning with the definition of a child under international instruments such as the UN Convention on the Rights of the Child (United Nations, Treaty Series, vol. 1577, 20 November 20 November 1989; hereinafter: CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (A/RES/54/263, 25 May 2000), this paper navigates through the detailed provisions aimed at safeguarding children's rights in times of armed conflict. It clarifies the key concepts of international humanitarian law, particularly the 1977 Additional Protocols to the Geneva Conventions (Protocol relating to the Protection of Victims of International Armed Conflicts, United Nations, Treaty Series vol. 1125, 8 June 1977; hereinafter: Protocol I) and Protocol relating to the Protection of Victims of Non-International Armed Conflicts, United Nations, Treaty Series vol. 1125, 8 June 1977; hereinafter: Protocol II), which outline the protections afforded to children in armed conflicts, including prohibitions on their recruitment and participation in hostilities. Furthermore, the paper will delve into the ambiguities regarding the minimum age for criminal liability and the prosecution of child soldiers under international criminal law, addressing the complex interplay between children's status as victims and perpetrators of war crimes.

In the second part, the paper examines child recruitment as a war crime, analysing the legal mechanisms for prosecuting individuals responsible for the enlistment of children in armed groups. It highlights the evolving jurisprudence in international criminal tribunals and emphasizes the obligation of states to align their domestic legislation with international treaties to protect the status of child soldiers effectively.

2. THE PROTECTION AND PROSECUTION OF CHILD SOLDIERS IN INTERNATIONAL LAW

When talking about children in international law, firstly, it is essential to define who the child is. A general definition of a child under the CRC includes every human being below the age of 18 years, unless under the law applicable to the child, the majority is attained earlier (Art. 1 of the CRC). With the aim to protect a child as long as possi-

ble and bearing in mind the child's best interest (Art. 3 of the CRC), this definition is certainly applicable in defining a child as a victim. However, the same definition may differ if we consider a child to be a perpetrator of international crimes. CRC recognizes that children are vulnerable and, therefore, entitled to special care and protection. In regard to child soldiers, CRC, as a fundamental international document for the protection of children's rights, does not define the child soldier. However, it addresses the recruitment of children in armed conflicts. In its provisions, the CRC specifies an exception setting the age of fifteen years of age as a limit below which recruiting a child is prohibited (Art. 38 of the CRC). Nevertheless, that was shortly amended by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which increased the minimum age for the recruitment of individuals into hostilities to 18 years of age (Art. 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). This Protocol obliges State Parties to take all "feasible measures" to prevent compulsory recruitment of children under the age of 18 into their armed forces (Art. 2 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). Furthermore, the Optional Protocol widened this requirement, asserting that State Parties shall prevent armed groups that differ from the armed forces of the State from recruiting persons under 18 in hostilities (Art. 4, para. 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). This provision is vital for non-international armed conflicts as it extends the prohibition on child recruitment to non-state armed groups, which are often key actors in these conflicts. It strengthens protections for children by ensuring they are not exploited by either state or non-state forces, even in internal conflicts. On that note, it is worth mentioning the great value the Optional Protocol showed through its revision of the age limit, resulting in a subsequent increase. By raising the minimum age for recruitment, the Optional Protocol reflects an international shift toward stronger protections for children, acknowledging the physical and psychological harm caused by their involvement in warfare. The revised age limit aligns with broader efforts to enhance children's rights and safeguard them from exploitation.

As per international humanitarian law that regulates conduct in armed conflict, the main source of regulation are the 1977 Additional Protocols to the Geneva Conventions - Additional Protocol I, which focuses on international armed conflicts, and Additional Protocol II, which concentrates on non-international armed conflicts. They both include crucial provisions aimed at protecting children in armed conflicts. Additional Protocols divide children into two categories: those who have not yet attained the age of 15 and those who are between 15 and 18.

Additional Protocol I highlights the special protection, care, and aid children require during times of conflict (Art. 77 of the Protocol I). In further provisions, Protocol I

imposes an obligation for parties involved in a conflict to adopt all measures to prevent children under the age of 15 from directly participating in hostilities and even more to abstain from recruiting them into the armed forces (Art. 77, para. 2 of the Protocol I). However, if a person aged 15 to 18 is recruited, the parties to the conflict should make an effort to prioritize those who are older (Art. 77, para. 2 of the Protocol I). In this context, Additional Protocol II explicitly prohibits the recruitment of children under the age of 15 into armed forces or groups (Art. 4, para. 3c of the Protocol II). It emphasizes the obligation of parties involved in the conflict to take all feasible measures to secure the release of children who have been recruited or used unlawfully with a focus on safeguarding the well-being of children during armed conflicts, ensuring their access to necessary care, aid, and education (Art. 4, para. 3d of the Protocol II). In that regard, the departure from the age of 18 in Additional Protocols is largely due to historical precedents and compromises made during negotiations, reflecting the norms of the time when adolescents over 15 were often considered capable of military service. The protocols aimed to balance protection of children with the practical realities of conflict zones, where enforcing stricter age limits might be difficult. Over time, international law evolved, with later treaties like the CRC setting 18 as the clear standard, recognizing the vulnerabilities of all minors in armed conflict.

Another relevant document regarding this issue, the Rome Statute (A/CONF.183/9, 17 July 1998; hereinafter: Rome Statute), supports the above-mentioned Additional Protocols and defines recruiting of child soldiers under the age of 15 as a war crime (Art. 8, para. 2b(xxvii) of the Rome Statute). In that regard, the International Criminal Court (hereinafter: ICC) has the authority to prosecute and punish those who violate the provisions of the Statute regarding child soldiers (Rosen, 2009, 95). Nevertheless, despite the categorization of child recruitment as a war crime, the ICC does not have jurisdiction over individuals who were below the age of 18 at the time of the alleged commission of the crime (Art. 26 of the Rome Statute). On that point, some scholars argue that the limit of 18 is not justified by the maturity or immaturity of a child below that age (Schabas, 2010, 443; Clark and Triffterer, 2008, 1030; Frulli, 2002, 7). It is worth mentioning that this exclusion from the prosecution does not establish an international minimum age of criminal responsibility but simply shows that individuals under the age of 18 cannot be subjected to the restricted jurisdiction of the ICC (Aptel, 2010, 105). On the contrary, the Establishing Act of a Special Court for Sierra Leone (hereinafter: SCSL) does explicitly invoke its jurisdiction over children at the age of 15 and above (Statute of the Special Court for Sierra Leone, UN Security Council, 16 January 2002). Nevertheless, Art. 7 further states that in case of bringing a person between 15 and 18 of age before the court, *"...he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the*

rights of the child.” (Art. 7 of the Statute of the Special Court for Sierra Leone). This provision in the Statute of the Special Court for Sierra Leone reflects a careful balance between accountability and rehabilitation for child soldiers aged 15 to 18. While the court has jurisdiction over these individuals, it emphasizes treating them with dignity and recognizing their young age and vulnerability. The focus on both rehabilitation and reintegration aligns with international human rights standards, prioritizing their return to society as constructive members rather than subjecting them to purely punitive measures. On that note, the Secretary-General of the United Nations recognized the challenge of prosecuting child soldiers for war crimes and crimes against humanity due to their complex role as both victims and perpetrators (Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, 2000). Notably, even though SCSL recognizes the possibility of criminal prosecution of children between 15 and 18, it finds it ‘extremely unlikely’ (Letter from the President of the Security Council to the Secretary-General, 2001). The Rome Statute of the ICC diverges from the SCSL by explicitly excluding jurisdiction over individuals under 18, reflecting a stronger emphasis on the protection of children from criminal liability for war crimes. In contrast, the SCSL permits the prosecution of children aged 15 to 18 but emphasizes rehabilitation, making prosecution unlikely. Other tribunals, such as the East Timor Special Panels for Serious Crimes (United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000), also focused on rehabilitation over punishment for minors, showing a broader trend in international criminal justice toward viewing child soldiers primarily as victims. This suggests a general reluctance among courts to hold minors criminally accountable, favoring reintegration instead.

3. BALANCING ACCOUNTABILITY AND REHABILITATION OF CHILD SOLDIERS IN INTERNATIONAL LAW

There is still no unique minimum age for criminal liability within the international law because states cannot find consensus on that issue (Leveau, 2013, 65; Lafayette, 2012, 321). However, within the sphere of international criminal law, particularly in relation to child soldiers, there is an ongoing discussion on how to reconcile the dual nature of children as both victims of war and perpetrators of the most severe war crimes (Grossman, 2006, 346; Happold, 2006, 6).

Firstly, as previously indicated, the CRC classifies anyone up to the age of 18 as a child. In that regard, for the purpose of this paper, we can observe the difference between defining ‘child’ and ‘child soldier.’ The term ‘child soldier’ also refers to an individual below the age of 18 who is or has been involved with a regular or irregular

armed group (Knudsen, 2004, 498). Nevertheless, CRC inclines to a softer approach regarding child soldiers, where it establishes a limit of 15 years of age for the absolute prohibition of recruitment. In that realm, Art. 38 of the CRC says: “*States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.*” And further “... *In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.*” Here, a question arises: do we apply a different standard of 18 years of age for children in usual circumstances, compared to child soldiers, where we attribute them with greater maturity and set the age limit lower, at 15? In that context, the distinction in age standards arises from the unique circumstances of armed conflict, where child soldiers are often exposed to extreme conditions that force them into premature roles of responsibility and violence. International legal instruments like Additional Protocol I set a lower age limit of 15 for child soldiers, reflecting this harsh reality, while outside of conflict, the general standard for defining childhood remains 18. This discrepancy highlights the tension between recognizing the vulnerability of children and the practical need to regulate their involvement in conflicts. Ultimately, both frameworks emphasize the protection and rehabilitation of children, despite the differing age thresholds. Furthermore, CRC suggests that State Parties should establish a minimum age for children below which they can not be held liable for the violation of the law (Art. 40, para. 3(a) of the CRC). However, same as Additional Protocols to the Geneva Conventions, the CRC does not explicitly say what that age should be. On that note, the Committee on the Rights of the Child had addressed this matter. The Committee released General Comment No. 10 (UN Committee on the Rights of the Child, CRC/C/GC/10, 25 April 2007; hereinafter: General Comment No. 10), declaring that setting a minimum age of criminal responsibility below 12 years is deemed internationally unacceptable by the Committee (para. 11 of the General Comment No. 10). Further, the Committee encourages States to increase the mentioned lower minimum and keep increasing it. Consequently, with the expenditure of human and particularly children’s rights, the Committee on the Rights of the Child once again addressed the subject of the minimum age for criminal liability. In General Comment No. 24 on children’s rights in the child justice system (UN Committee on the Rights of the Child, CRC/C/GC/24, 18 September 2019; hereinafter: General Comment No. 24), the Committee raised the recommendation for the age limit to at least fourteen years of age (para. 6 of the General Comment No. 24). In this context, it is unavoidable to mention the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the so-called Beijing Rules from 1985 (A/RES/40/33, 29 November 1985; hereinafter: Beijing Rules). Although those Rules are not binding, they explicitly say that the well-being of the juvenile has to be the guiding factor (Rule 17.1(d) of the Beijing Rules), whereas the age of criminal responsibility should not be fixed too low, considering emotional, mental, and intellectual maturity

(Rule 4.1 of the Beijing Rules). Once again, this international document proposes State Parties set the age at which a child can be criminally responsible, but it does not say at what age this limit should be fixed. Since then, there has been no international consensus on what the age limit at which children can be held legally responsible for their actions should be (Lafayette, 2012, 198).

For a person to be liable for the committed crime, one has to act in a way that his behavior constitutes the element of a crime (*actus reus*.) In addition to that, *mens rea* (Novoselec and Bojanić, 2013, 115) refers to the intent of committing a crime, including the ability to be aware of the wrongdoing. In that aspect, the *mens rea* element is crucial in establishing a minimum age of criminal responsibility because a person who lacks the ability to fully comprehend the consequences of their actions cannot be held accountable for their crimes (Letter from the President of the Security Council to the Secretary-General, 2001, 301). Furthermore, it is argued that children's lack of maturity prevents them from selecting right from wrong or fully understanding the ramifications of their actions (Schmidt, 2007, 59). Considering all the things stated above and so far conducted scientific research in this field, it can be concluded the appropriate age for criminal responsibility should take into account the complexity of child development and the varying circumstances that can affect a child's capacity to understand their actions. Setting the minimum age in the mid-teens (Leveau, 2013, 42; Happold, 2006, 9) might provide a broad guideline, but this age should not be applied rigidly, as cognitive, emotional, and moral maturity differ from child to child. Additionally, the unique challenges posed by child soldiers—often coerced or conditioned to commit crimes—require a different approach from that of children in non-conflict environments. Therefore, rather than a fixed universal age, a more flexible framework should be adopted, taking into account individual assessments of maturity and responsibility while still emphasizing rehabilitation and protection in line with evolving international standards and human rights norms.

The primary focus of international humanitarian law (hereinafter: IHL), beginning with the Geneva Conventions of 1949, is on the protection of victims of war rather than on the legal tactics and methods of warfare. While IHL does define permissible conduct during armed conflict, its core objective is to safeguard individuals who are not participating in hostilities, such as civilians, prisoners of war, and the wounded. This emphasis on humanitarian protection underscores the fundamental principle that even in times of war, the rights and dignity of individuals must be upheld, prioritizing their safety and well-being over the strategies employed in combat. The basic notions are laid out in the Geneva Conventions and Additional Protocols which do not explicitly exempt children from prosecution for crimes committed in the armed conflict (Quénivet, 2017, 437). Nevertheless, while the Statute of the Special Court for Sierra Leone allows for the criminal liability of individuals aged 15 and older for violations of humanitarian

law (Statute of the Special Court for Sierra Leone; Rome Statute), it is important to note that the international community does not provide explicit provisions regarding the minimum age at which child soldiers should be held accountable (Grossman, 2006, 923). Each state retains the right to set its age limit for criminal liability, leading to variations in how different jurisdictions approach the issue of accountability for child soldiers. This lack of consensus on a specific age limit creates inconsistencies in international humanitarian law and can cause a potentially concerning situation.

Because of the diversity of domestic laws that can apply, a child could be legally accountable for the same action in one jurisdiction while in another jurisdiction, the identical act may be viewed as lacking criminal intent, which would, therefore, make the prosecution impossible (Davison, 2004, 144). The reasoning for that could be behind the fact that various cultures hold different values and standards regarding the behavior and emotional maturity required from children at different ages (for a detailed overview see: Rogoff, 2003). This matter has been made more complex by different domestic courts, which have fixed a minimum age of criminal responsibility oscillating from 10 to 18 years old (Lafayette, 2012, 298).¹

International human rights law (hereinafter: IHRL), consists of a set of international treaties that define rights that every individual should have, regardless of whether it is a time of peace or conflict (The Expert of the Secretary General, 1996, 62). On that note, CRC, as a fundamental document for the protection of children's rights, does not forbid the prosecution of children. Moreover, it affirms that in the event of prosecuting a child, a state must ensure that the procedure respects not only the guaranteed human rights but also the special rights recognized for children (Art. 40 of the CRC). Although both the provisions of IHL and the provisions of IHLR allow for children above the age of 15 to be prosecuted, their rehabilitation and reintegration should be the main goal (para. 3 of the General Comment No. 10). In this context, the criminal liability of a child refers not only to criminal prosecution before court but encompasses a variety of measures providing education and inclusion in society, bearing in mind the best interest of a child (Begaliev *et al.*, 2020, 1582). Certainly, all the aspects mentioned above pertain to children aged 15 and above. Subsequently, children below this age, due to their limited capacity and lack of criminal liability, cannot be subjected to criminal prosecution or any criminal procedure or measure. Exactly that immaturity makes them vulnerable to manipulation and influence. Nevertheless, in some circumstances, children between the ages of 15 and 18 might have the necessary mental capability and

¹ I.e., Germany and Italy have the limit set to 14 of age, France at 13 years, and Ireland at 12, while the minimal age for criminal responsibility in the United Kingdom is set at 10 years of age. For comparison, the author should also mention some examples of other criminal legislation, not only of European States. What about African States, where child recruitment is not an unusual practice and therefore, the question of criminal liability of child soldiers is an important issue.

psychological maturity to be considered accountable for their actions (Lafayette, 2012, 303). To demonstrate, it is crucial to underscore the significance of assessing whether a particular child has reached sufficient psychological development to comprehend their criminal actions (Leveau, 2013, 43). In light of these complexities, the Lubanga case² (*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, judgment from 12 March 2012) before the ICC enrolled an expert witness to delve into the psychological repercussions faced by minors engaged in armed conflicts as child soldiers (Randelović, 2020, 132) which confirmed there is a long-term impact on the development of a child's personality. Due to the absence of a defined age range, international law resulted in the exclusion of children under the age of 18 from the jurisdiction of the ICC (Schabas, 2010, 443). Specifically, Art. 26 of the Rome Statute states that the Court has no jurisdiction over any person who was under the age of 18 at the time of the alleged crime, thereby reinforcing the legal framework that differentiates between juvenile and adult accountability in international criminal law. This provision underscores the international community's recognition of the need to protect minors from prosecution for actions taken while they are still children. The lack of unified rules regarding the minimum age at which children can be accountable for criminal acts, together with the prohibition on recruiting anyone under the age of 15 and the exclusion of those under the age of 18 from the jurisdiction of international courts, creates a legal gap that leaves children between the ages of 15 and 18 without protection (Davison, 2004, 133). Moreover, this gap may lead to increased recruitment of children within this age range, as their actions remain without legal consequences (Freeland, 2005, 324).

The question of whether children who have committed heinous crimes in armed conflicts should be prosecuted lacks a universal definitive answer. According to certain perspectives, the principles of international law permit the criminal prosecution of individuals above the age of 15 for the offenses they have committed (refer to Amnesty International, 2000). Nevertheless, those advocating for prosecuting children who participated in armed conflicts restrict such prosecution to the most severe offenses, bearing in mind the CRC, which allows for children above 15 to be prosecuted if the procedure is in accordance with the children's dignity and special requests of their vulnerable age (Art. 40 of the CRC). From this perspective, it could be argued that child soldiers should face prosecution for the most serious offense they have committed to

² The *Prosecutor v. Thomas Lubanga Dyilo* case is significant as it was the first trial conducted by the ICC concerning war crimes related to the recruitment and use of child soldiers in the Democratic Republic of the Congo. Lubanga was charged with enlisting and conscripting children under the age of 15 to participate actively in hostilities during the armed conflict. The trial focused on establishing his responsibility for these crimes and aimed to reinforce the international legal framework prohibiting the use of child soldiers, highlighting the ICC's commitment to holding individuals accountable for such grave violations of humanitarian law. Ultimately, Lubanga was convicted in and sentenced to 14 years in prison, marking a landmark decision in the context of international criminal law and children's rights.

ensure justice for the victims. On the contrary, the opponents of prosecuting children argue that such prosecution would contravene international standards for the protection of children (Ramgoolie, 2001, 154). They often emphasize the best interest of the child, invoking the potential negative impact that trials could have on their mental and psychological development (Grossman, 2006, 323-324). An additional argument arises from the fact that children are frequently coerced to engage in such acts of aggression, which can raise doubts about the necessity (but also morality) of prosecuting them, considering the principles of justice and the best interest of a child (refer to Amnesty International, 2000). In light of the complexities surrounding the criminal liability of children, particularly in armed conflicts, the author advocates for a nuanced approach that recognizes the dual roles of children as both victims and perpetrators. While acknowledging the arguments for prosecuting child soldiers for serious offenses, it is crucial to prioritize rehabilitation and reintegration into society, aligning with the principles outlined in international human rights law. To address the existing legal gap, the author suggests establishing a flexible framework that considers individual assessments of maturity and the circumstances of each case rather than adhering to a rigid age threshold. This framework should emphasize restorative justice mechanisms, ensuring that the best interests of the child remain paramount while balancing accountability for serious crimes. Ultimately, fostering dialogue among states and international organizations could lead to the development of more consistent standards that protect children's rights while addressing the grave realities of armed conflict.

4. CHILD RECRUITMENT AS A WAR CRIME

Before the recruitment of children was formally recognized as a war crime in international law, various international legal instruments and customary practices offered limited protection. Early efforts, such as the Geneva Conventions and Additional Protocols, focused on the general protection of civilians and did not specifically address the issue of child soldiers. In that context, the CRC marked a significant step by raising awareness about children's rights, though it initially set the minimum age for participation in hostilities at 15. However, the international community gradually acknowledged the need for more explicit legal measures, culminating in the recognition of child recruitment as a war crime in the Rome Statute.

Despite their involvement in armed conflict as perpetrators of serious crimes, children should primarily be acknowledged as the victims of such conflicts (Grossman, 2006, 346). In that regard, when talking about children in armed hostilities, the question arises of not only the accountability of child soldiers for war crimes but also the legal liability of those recruiting children as soldiers (Rosen, 2009, 82). Although war crimes are the oldest kind of international crimes, the specific crime of child recruitment was

only recognized as a war crime in the Rome Statute prohibiting the conscription or enlistment of children under the age of 15 into armed groups or national armed forces (Art. 8 b(xxvi) of the Rome Statute). On that note, the first significant contribution to the development of the protection of child soldiers within the realm of international criminal law was made by the SCSL. Despite the fact that happenings occurring in the Sierra Leone civil war were prior to the implementation of the Rome Statute, SCSL determined that the prohibition of child recruitment and exploitation was considered customary international law at that time.³ This conclusion was based on the consistent practice of numerous states in punishing this offense in accordance with their domestic laws (Kirs, 2006, 100) and, as such, was confirmed in the *Prosecutor v. Sam Hinga Norman* (*Prosecutor v. Sam Hinga*, SCSL-2004-14-AR72, judgment from 31 May 2004), explicitly stating “prior to November 1966, the prohibition on child recruitment had crystallized as customary international law.” On that note, it is worth emphasizing that since the Additional Protocols to the Geneva Conventions, the prohibition of child recruitment has become a more important right in international humanitarian and human rights treaty law, as well as in customary international law (Grejfer, 2013, 184).

Furthermore, the ICC’s jurisdiction, as established by the Rome Statute, extends to the offense of enlisting children, whether by state military forces or other armed groups, in both international and internal armed conflicts. According to some opinions, the expression ‘conscribing or enlisting’ indicates that both forced solicitation of children and passively allowing them to join the armed forces are prohibited (Webster, 2007, 235). It must be highlighted that forced recruitment does not always happen by the use of physical force but also includes the use of threats. Sometimes, children ‘voluntarily’ join the armed forces because of difficult family situations, violence, hunger, or poverty. In that context, the distinguishment between the two forms of recruiting was established by the Pre-Trial Chamber in the *Lubanga case* (Pre-Trial Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, para. 246, 29 January 2007). Nevertheless, considering the above-stated poor living conditions and the limited ability to decide on their own best interests due to their young age, the question arises as to whether we can truly distinguish between ‘forced’ and ‘voluntary’ recruitment (Kirs, 2006, 94; Tock, 2004, 180; Abbott, 1999, 517). The recruitment of child soldiers raises complex issues of accountability in armed conflicts. While international law prohibits the enlistment of children under 15, the distinction between ‘forced’ and ‘voluntary’ recruitment can be blurred by coercive factors such as poverty and lack of opportunities. This complicates the notion of consent, suggesting that children may not genuinely have the capacity to make such decisions.

³ In the mentioned *Lubanga case*, the Defence Counsel of an accused, Sam Hinga Norman raised an objection regarding this issue claiming this prosecution was the violation of the principle of *nullum crimen sine lege*.

Thus, accountability should extend beyond the child soldiers themselves to include the systemic issues and individuals who exploit these vulnerable children.

Besides prosecuting individuals who recruited children for a war crime, another possibility for prosecuting could be under the notion of crimes against humanity, as defined in Art. 7 of the Rome Statute, "... acts when committed as part of a widespread or systematic attack directed against any civilian population." This opinion can be supported by the fact that international documents⁴ grant children a unique status, while any acts of aggression towards them can be seen as actions targeting civilian populations in accordance with the customary international law that regulates crimes against humanity (Tock, 2004, 181). In addition to that, unlike war crimes that are strictly regulated by the law, the concept of crimes against humanity is well-established in customary international law, which provides higher flexibility and thus improves the likelihood of more effective prosecution of the offenders (Tock, 2004, 184).

Besides the possibility of applying the norms of international criminal law, enabling States to punish those who are responsible for the recruitment of child soldiers tackles a nation's sovereignty when it comes to implementing human rights and humanitarian law (Tock, 2004, 185). Nevertheless, the international community finds children's rights to have greater value regarding this issue. While State Parties are expected to align their domestic legislation with treaty provisions, it is important to note that they are obligated to implement their international legal obligations directly simply by being parties to legally binding treaties. This means that they must ensure compliance with treaty obligations irrespective of domestic legislative changes, emphasizing the immediate effect of international law on state behavior. In this regard, the international treaties call for the criminalization of the recruitment of children in armed conflict in domestic laws as well (Grejjer, 2013, 169).

5. CONCLUSION

International criminal law is a relatively young legal field that originated as an interest in public international law and domestic law (Stahn, 2019, 8). The multifaceted examination of international law concerning children in armed conflict reveals a delicate balance between protection and accountability. The CRC establishes a framework for children's rights and obligations of States in that regard, highlighting their vulnerability

⁴ Some examples of those documents are: CRC, International Covenant on Civil and Political Rights (United Nations, Treaty Series, vol. 999, 16 December 1966), International Covenant on Economic, Social and Cultural Rights (United Nations, Treaty Series, vol. 993, 16 December 1966), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (A/RES/54/263, 25 May 2000).

and rights in particular. IHL, as outlined in the Additional Protocols to the Geneva Conventions, aims to prohibit the recruitment and participation of children in armed conflicts, acknowledging their entitlement to specific protections. Furthermore, considering their dual roles as victims and perpetrators, there are still ongoing difficulties in establishing the precise age at which children can be held accountable and thus prosecuted for criminal actions. However, most states believe that children who are coerced into participating in armed conflicts cannot be held accountable for committing international crimes. Instead, these children are viewed as victims rather than perpetrators (Grejter, 2013, 170).

Despite efforts to establish explicit guidelines for addressing child recruitment, as seen in the provisions of the Rome Statute and the actions of the SCSL, challenges persist in determining the best way to safeguard the rights of children involved in armed conflict.

On this note, the international community faces the task of balancing justice with the best interests of the child to achieve a balance between protecting children engaged in armed hostilities, determining their level of accountability, and establishing the legal liability of those who recruit children.

Furthermore, the fact that children are raised in a society of violence, poverty, hunger, and political instability has a lasting impact on children who, due to their young age, already lack the ability to select their own well-being. This stimulates an ongoing cycle of vulnerability and manipulation, as these children are frequently coerced or manipulated into joining armed groups.

The repercussions of employing children in armed conflict can have profound consequences for the future generations of the States where it occurs (Grejter, 2013, 185). Without adequate protection, these children are at risk of enduring long-term physical and psychological consequences, leading to perpetuating patterns of violence and instability. Thus, it is crucial to address the root causes of child recruitment and focus on peace, stability, and socio-economic development. Only in that society is it possible to break this cycle and ensure a brighter future for all children affected by armed conflict. However, the legal gap between child protection and the criminal liability of children for war crimes must also be addressed. A more cohesive legal framework is essential to ensure that children are recognized as victims first and foremost, with a clear understanding of when, if ever, they can be held criminally accountable. Establishing a minimum age for criminal responsibility, in line with international standards, would help protect vulnerable children from prosecution while emphasizing their rehabilitation and reintegration into society. By doing so, we can work toward a more just and compassionate response to the challenges posed by child soldiers in armed conflict.

REFERENCES

BOOKS AND SCIENTIFIC ARTICLES:

1. Abbott, A. B. (1999). Child soldiers-The use of Children as Instruments of War. *Suffolk Transnational Law Review*, 23, 499–537.
2. Aptel, C. (2010). International Criminal Justice and Child Protection. In: S. Parmar, M. Jane Roseman; S. Siegrist; T. Sowa (Eds.), *Children and transitional justice: truth-telling, accountability and reconciliation*. (pp. 67–114). Cambridge: United Nations Children's Fund (UNICEF).
3. Begaliyev, Y. N.; Sakhatova, S. Y.; Temirova, A. Z.; Paryzkyi, I. V.; Kuprienko, V. M. (2020). Features of criminal liability of Juvenile criminals: International legal and comparative analysis. *International Journal of Criminology and Sociology*, 9, 1579–1586. DOI: <https://doi.org/10.6000/1929-4409.2020.09.180>.
4. Clark, R. S.; Triffterer, O. (2008). Jurisdiction, admissibility and applicable law. In: O. Triffterer (Ed.). *Commentary on the Rome Statute of the International Criminal Court* (pp. 111–948). München, Oxford, Baden-Baden: C. H. Beck, Hart.
5. Davison, A. (2004). Child soldiers: no longer a minor incident. *Willamette Journal of International Law and Dispute Resolution*, 12(1), 124–157.
6. Druba, V. (2002). The problem of child soldiers. *International Review of Education*, 48(3/4), 271–277.
7. Freeland, S. (2005). Child soldiers and international crimes-how should international law be applied? *New Zealand journal of public and international law*, 3(2), 303–328.
8. Frulli, M. (2002). Jurisdiction *ratione personae*. *The Rome Statute of the International Criminal Court: A Commentary*, 1, 527–541.
9. Greijer, S. (2013). *The crimes of recruiting and using children in armed conflict (doctoral thesis)*. Florence: European University Institute.
10. Grossman, N. (2006). Rehabilitation or revenge: Prosecuting child soldiers for human rights violations. *Georgetown Journal of International Law*, 38, 323–361.
11. Happold, M. (2006). The age of criminal responsibility in international criminal law. In: K. Arts; V. Popovski (Eds.), *International Criminal Accountability and Children's Rights* (pp. 1–13). The Hague: T.M.C. Asser Press.
12. Hart, J. (2006). The Politics of "Child Soldiers". *The Brown Journal of World Affairs*, 13(1), 217–226.
13. Kirs, E. (2006). Save the Children of War-Thoughts on Child Recruitment. *Acta Societatis Martensis*, 2, 93–107.
14. Knudsen, C. (2004). Demobilization and reintegration during an ongoing conflict. *Cornell International Law Journal*, 37, 497–524.
15. Lafayette, E. (2012). The prosecution of child soldiers: Balancing accountability with justice. *Syracuse Law Review*, 63, 297–326.
16. Leveau, F. (2013). Liability of child soldiers under international criminal law. *Osgoode Hall Review of Law and Policy*, 4(1), 36–66.
17. Novoselec, P.; Bojanić, I. (2013). *Opći dio kaznenog prava (četvrto, izmijenjeno izdanje)*. Zagreb: Sveučilište u Zagrebu, Pravni fakultet.
18. Quénavet, N. (2017). Does and should international law prohibit the prosecution of children for war crimes? *European Journal of International Law*, 28(2), 433–455.
19. Ramgoolie, M. (2001). Prosecution of Sierra Leone's Child Soldiers: What Message is the UN Trying to Send?, *Journal of Public and International Affairs-Princeton*, 12, 145–162.
20. Randelović, V. (2020). Maloletna lica kao žrtve međunarodnih krivičnih dela. *Revija za kriminologiju i krivično pravo*, 58(1–2), 127–144. DOI: 10.47152/rkkp.58.1.2.7.

21. Rogoff, B. (2003). *The cultural nature of human development*. New York: Oxford University Press.
22. Rosen, D. M. (2009). Who is a child? The legal conundrum of child soldiers. *Connecticut Journal of International Law*, 25, 82–118.
23. Schabas, W. A. (2010). Jurisdiction admissibility and applicable law. In: W. A. Schabas (Ed.). *The International Criminal Court: A Commentary on the Rome Statute* (pp. 101–402). Oxford: Oxford University Press.
24. Schmidt, A. (2007). Volunteer child soldiers as reality: a development issue for Africa. *New school economic review*, 2(1), 49–76.
25. Stahn, C. (2019). *A critical introduction to international criminal law*. Cambridge: Cambridge University Press. DOI: 10.1017/9781108399906.
26. Tock, S. (2004). Recruiting and using children as soldiers: the case for defining the offence as a crime against humanity. *Dalhousie Journal of Legal Studies*, 13, 157–185.
27. Vautravers, A. J. (2008). Why child soldiers are such a complex issue. *Refugee Survey Quarterly*, 27(4), 96–107.
28. Webster, T. (2007). Babes with arms: international law and child soldiers. *George Washington International Law Review*, 39, 227–254.

LEGAL SOURCES:

1. UN Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, 20 November 1989. Available: <https://www.refworld.org/legal/agreements/unga/1989/en/18815> (accessed: 30 April 2024).
2. United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000. Available: <https://www.legal-tools.org/doc/c082f8/pdf> (accessed: 5 May 2024).
3. International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, 16 December 1966. Available: <https://www.refworld.org/legal/agreements/unga/1966/en/17703> (accessed: 7 May 2024).
4. International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, 16 December 1966. Available: <https://www.refworld.org/legal/agreements/unga/1966/en/33423> (accessed: 7 May 2024).
5. Rome Statute of the International Criminal Court (last amended 2010), A/CONF.183/9, 17 July 1998. Available: <https://www.refworld.org/docid/3ae6b3a84.html> (accessed: 30 April 2024).
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), International Committee of the Red Cross (ICRC), United Nations, Treaty Series, vol. 1125, 8 June 1977. Available: <https://www.refworld.org/docid/3ae6b36b4.html> (accessed: 2 May 2024).
7. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), International Committee of the Red Cross (ICRC), United Nations, Treaty Series, vol. 1125, 8 June 1977. Available: <https://www.refworld.org/docid/3ae6b37f40.html> (accessed: 2 May 2024).
8. General Comment No. 10 (2007): Children's Rights in Juvenile Justice, UN Committee on the Rights of the Child, CRC/C/GC/10, 25 April 2007. Available: <https://www.refworld.org/docid/4670fca12.html> (accessed: 5 May 2024).

9. General Comment No. 24 (2019): Children's Rights in the Child Justice System, UN Committee on the Rights of the Child, CRC/C/GC/24, 18 September 2019. Available: <https://digitallibrary.un.org/record/3899429?ln=en> (accessed: 5 May 2024).
10. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, United Nations, General Assembly Resolution A/RES/54/263, 25 May 2000. Available: <https://www.refworld.org/legal/agreements/unga/2000/en/57546> (accessed: 30 April 2024).
11. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), United Nations, General Assembly Resolution A/RES/40/33, 29 November 1985. Available: <https://www.refworld.org/docid/3b00f2203c.html> (accessed: 5 May 2024).
12. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, 4 October 2000. Available: <https://www.refworld.org/reference/country-rep/unsc/2000/en/30376> (accessed: 2 May 2024).
13. Statute of the Special Court for Sierra Leone, UN Security Council, 16 January 2002. Available: <https://www.refworld.org/docid/3dda29f94.html> (accessed: 5 May 2024).

WEB PAGES:

1. *Amnesty International, Child Soldiers: Criminals or Victims?* URL: <https://www.amnesty.org/en/documents/ior50/002/2000/en/> (accessed: 5 May 2024).
2. *International Criminal Court, Pre-Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Décision sur la confirmation des charges, 29 January 2007.* URL: <https://www.icc-cpi.int/drc/lubanga> (accessed: 5 May 2024).
3. *Letter from the President of the Security Council to the Secretary-General, U.N. DOC. S/2001/95 (January 31, 2001).* URL: <http://www.un.org/en/peacekeeping/missions/past/unamsil/spcourt.htm> (accessed: 30 April 2024).
4. *Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), Special Court for Sierra Leone, 31 May 2004.* URL: <https://www.refworld.org/cases,SCSL,49abc0a22.html> (accessed: 7 May 2024).
5. *Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, 12 March 2021.* URL: <https://www.refworld.org/jurisprudence/caselaw/icc/2012/en/85486> (accessed: 5 May 2024).
6. *The Expert of the Secretary General, Ms. Graça Machel, Promotion and Protection of the Rights of Children Impact of Armed Conflict on Children, 511 Sess., Agenda Item 108, UN Doc. A/51/306 (1996).* URL: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/04/Machel-Report-Impact-Armed-Conflict-Children-EN.pdf> (accessed: 5 May 2024).

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ODGOVORNOST I ZAŠTITA DJECE VOJNIKA U OKVIRU MEĐUNARODNOG KAZNENOG PRAVA

Sažetak

Problem djece vojnika unutar područja međunarodnog prava predstavlja složen i višeznačan izazov koji obuhvaća pitanja ljudskih prava, humanitarnog prava i zaštite najranjivije skupine – djece. Ovaj članak istražuje pravni okvir i rasprave o djeci vojnicima u međunarodnom pravu, analizirajući ključne međunarodne instrumente poput Konvencije Ujedinjenih naroda o pravima djeteta i njezina Fakultativnog protokola, Rimskog statuta te Dodatnih protokola Ženevskim konvencijama. Ovaj rad u fokus stavlja raspravu između shvaćanja djece vojnika isključivo kao žrtava koje zaslužuju zaštitu i prepoznavanja njihove moguće odgovornosti za zločine počinjene tijekom oružanih sukoba. Nepostojanje jedinstvene minimalne dobi za kaznenu odgovornost dodatno otežava procesuiranje djece vojnika, otvarajući pitanja njihove sposobnosti za razumijevanje i namjeru počinjenja djela. Ipak, međunarodno humanitarno pravo propisuje obveze stranaka u oružanim sukobima za zaštitu djece od novačenja i sudjelovanja u neprijateljstvima. Nadalje, članak analizira jurisdikcijska ograničenja međunarodnih sudova, poput Međunarodnog kaznenog suda, pri postavljanju izazova u adresiranju zločina koje su počinili djeca vojnici. Iako su uloženi naponi u procesuiranje odgovornih za novačenje djece, specifične okolnosti povezane s djecom vojnicima zahtijevaju pomno promišljenu ravnotežu između odgovornosti i zaštite. Ovaj članak istražuje navedene složene odnose, analizirajući promjenjiv pravni okvir i pružajući nove poglede na aktualne rasprave o procesuiranju i zaštiti djece vojnika u kontekstu međunarodnog prava.

Ključne riječi: *djeca vojnici, novačenje djece, kaznena odgovornost djece, novačenje djece kao ratni zločin*