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**THE PROBLEM OF RESPONSIBILITY OF CHILD SOLDIERS FOR WAR
CRIMES**

Master Thesis

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LIST OF ABBREVIATIONS

AIDS	Acquired Immunodeficiency Syndrome
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
CRC	United Nations Convention on the Rights of the Child
FARC	Revolutionary Armed Forces of Colombia
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICC Act	International Criminal Court Act
ICRC	International Committee of the Red Cross
ILO	International Labour Organisation
ISIL	Islamic State of Iraq and the Levant
JEP	Colombia`s Special Jurisdiction for Peace
KIA	Kachin Independence Army
LTTE	Liberation Tigers of Tamil Eeklam
LOAC Manuals	The Law of Armed Conflict at the Operational and Tactical Levels Manuals
LRA	Lord`s Resistance Army
MACR	Minimum Age of Criminal Responsibility
NGO	Non-Governmental Organisation
OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SPLA	Sudan People's Liberation Army
UN	United Nations
UN Office on Drugs and Crime	United Nations Office on Drugs and Crime
UNICEF	United Nations Children`s Fund

INTRODUCTION

Problem of research

Armed conflicts constitute a stable global feature of the nowadays world. Despite their type – international or non-international armed conflict – it affects all members of the population, including the most vulnerable – children. According to the UN Secretary-General Annual Report on Children and Armed Conflict, in 2020 more than 8 thousand boys and girls have been drawn in the frontline fighting.¹ Somalia through years remains the country with the highest index of child recruitment and use – 1,716, followed by Myanmar – 790.² However, we can only presume the real numbers as parties to conflicts would rather keep them in the `black` zone of their statistics.

The list of children`s roles within State military personnel or non-State actors` troops is endless. They perform the functions of cooks, porters, security guards, spies. Girls are mostly used as sexual slaves and military `wives`.³ However, the main part is dedicated to the active participation in a warfare.

The primary factors of involving children as direct participants in armed conflicts are the repressive conditions of the state, the current state economic development, and the duration of the armed conflict.⁴ Furthermore, children are perceived as perfect recruits due to their `purity` from the outer world, physical and mental vulnerability.⁵

Children become the most horrible `creators` of cruelty to their families and communities. Through children, commanders of armed forces and leaders of organized armed groups realize their hatred to society, to those whom they consider `impure` and unworthy of existence.

While being in the State armed forces or organized armed groups, children not only function as `supporters`, but take a direct part in hostilities: torture and kill the members of their native communities, use explosive devices to maim enemies of their commanders, act as suicide bombers.

As it is prescribed in Art.8 of the Rome Statute of the International Criminal Court, the enlistment, conscription of children under the age of 15 years in the armed forces or groups, and using them directly in the hostilities, are war crimes.⁶ However, children by themselves are the

¹ U.N. Secretary-General, *Children and Armed Conflict: Report of the Secretary-General*, A/75/873–S/2021/437 (6 May 2021), <https://undocs.org/A/75/873%E2%80%93S/2021/437>.

² Ibid.

³ Ibid.

⁴ Astri Halsan Høiskar, "Underage and Under Fire: An Enquiry into the Use of Child Soldiers 1994-8", *Childhood: A Global Journal of Child Research*, 8,3 (2001): 340-360.

⁵ Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law*, 38 (2007): 327.

⁶ The Rome Statute of the International Criminal Court, 17 July 1998, Art. 8, para. 2(e(vii)).

executors of atrocities. In the Lord's Resistance Army, Northern Uganda, children are abducted and forced to kill and maim civilians, burn up civilian objects, kidnap other children.⁷

Despite the numerous provisions of international law regarding the legitimizing of children's usage by the State armed forces and organized groups, in the international law sphere there is no common approach among representatives of legal doctrine whether child soldiers should be prosecuted for their actions.

The majority of scholars believe that due to the children's immaturity and low level of psychological development, they should be treated as victims of human rights violations, not as perpetrators.⁸ Moreover, States are considered to be responsible for the rehabilitation, reintegration, and resocialization programmes for the child soldiers to be demobilized from the armed forces and groups.

Meanwhile, some of the authors suggest that children may be prosecuted for their actions due to the gravity of crimes they commit.⁹ Nonetheless, a number of mitigating factors should be taken into consideration since child soldiers are still children.

Problematic aspects raised in the research

This Master thesis focuses on the problem of responsibility of child soldiers for war crimes. The Rome Statute of the International Criminal Court does prescribe that its jurisdiction does not cover any person of the age under 18 years at the moment of crime commitment.¹⁰ The Special Court for Sierra Leone has jurisdiction over a person of 15 years of age.¹¹ In the international legal community, there is no common approach on question should child soldiers be prosecuted for the atrocities they have perpetrated. The ambiguous aspect of the child soldiers' accountability for war crimes should be critically examined to define the best way to resolve this issue.

Relevance of the final thesis

The usage of children as soldiers by State and non-State actors in armed conflicts is gaining momentum. Because of the low level of mental and physical development children cannot resist forcible abduction, followed by the incorporation in to the military forces with corresponding violent orders of commanders to kill, to kidnap, to torture. After being demobilised, former child

⁷ "Stolen Children: Abduction and Recruitment in Northern Uganda", Human Rights Watch, accessed 25 November 2021, <https://www.hrw.org/report/2003/03/28/stolen-children/abduction-and-recruitment-northern-uganda>.

⁸ Cecile Aptel, "Children and Accountability for International Crimes: The Contribution of International Criminal Courts", *Innocenti Working Paper*, 20 (2010).

⁹ Megan Nobert, "Children at War: The Criminal Responsibility of Child Soldiers Children at War: The Criminal Responsibility of Child Soldiers", *Pace International Law Review Online Companion* 3,1 (2011): 38.

¹⁰ The Rome Statute, Art. 26.

¹¹ Statute of the Special Court for Sierra Leone, 14 August 2000, Article 7.

soldiers and children associated with armed groups face challenges to come back to their hometowns due to the physical and physiological abuse from the members of their communities. Communities demand child soldiers' prosecution for the atrocities they had committed while being part of the armed forces and groups. Otherwise, they will be out of the territory of their birth.

The abovementioned factors raise the urgent need for clarification at the international law level whether, when, and in which circumstances children should or must hold the responsibility for the crimes they have made. The proper analysis and response to the present legal question are necessary to fulfil the rights and guarantees granted to the children and to find the best solution in accomplishing the concept of individual criminal responsibility.

Scientific novelty and overview of the research on the selected topic

The literature review demonstrated that there is a substantial number of research dedicated to the issue of child soldiers' use in the armed conflicts. The most complete analysis was conducted by Ann-Charlotte Nilsson¹², and Astri Halsan Høiskar¹³. All of them are of an opinion that the involvement of children in the hostilities as soldiers, spies, porters, etc. should be taken to an end. They underline that the phenomenon of 'child soldier' violates the general principle of the best interest of a child and by its own legal nature constitutes the violation of international humanitarian law.

The problem of accountability of child soldiers for the crimes committed during armed conflict is observed in the research of Megan Nobert¹⁴, Nienke Grossman¹⁵, Nina H.B. Jørgensen¹⁶, Cecile Aptel¹⁷, Ilene Cohn¹⁸, Chein Reis¹⁹, Matthew Happold²⁰, and Jean

¹² Anne-Charlotte Nilsson, *Children and Youth in Armed Conflict, volume 1* (Martinus Nijhoff Publishers, 2013).

¹³ Astri Halsan Høiskar, "Underage and Under Fire: An Enquiry into the Use of Child Soldiers 1994-8", *Childhood: A Global Journal of Child Research*, 8,3 (2001): 340-360.

¹⁴ Megan Nobert, "Children at War: The Criminal Responsibility of Child Soldiers Children at War: The Criminal Responsibility of Child Soldiers", *Pace International Law Review Online Companion* 3,1 (2011): 1-39.

¹⁵ Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law*, 38 (2007): 323-361.

¹⁶ Nina H.B. Jørgensen, "Children associated with terrorist groups in the context of the legal framework for child soldiers", *Questions of International Law*, 60 (2019): 5-23.

¹⁷ Cecile Aptel, "Children and Accountability for International Crimes: The Contribution of International Criminal Courts", *Innocenti Working Paper*, 20 (2010).

¹⁸ Ilene Cohn, "The Protection of Children in Peacemaking and Peacekeeping Processes", *Harvard Human Rights Journal*, vol. 12 (1999): 129-194, http://www.peacewomen.org/sites/default/files/pk_protectionchildrenpeacekeeping_hhrj_1999_0.pdf.

¹⁹ Chein Reis, "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict", *Columbia Human Rights Law Review* (1997): 629-655.

²⁰ Matthew Happold, "Child Soldiers: Victims or Perpetrators", *University of La Verne Law Review* 29 (2008): 56-87.

Chrysostome K. Kiyala²¹. Moreover, international non-governmental organisations issued their guidelines regarding former child soldiers and children associated with armed groups as well, namely Amnesty International, Save the Children, Human Rights Watch. The prevalent opinion is that child soldiers should be primarily regarded as victims, not as perpetrators. However, the research of Megan Nobert had shown that despite the fact of needed basic presumption of childhood innocence, in the case of possible prosecution process several mitigating factors should be taken into consideration, in particular the age of a child and the level of mental development.²²

Nevertheless, none of the mentioned researchers examined and outlined the definitive criteria to determine the level of responsibility of child soldiers for the war crimes as the issue remains very controversial on the international legal doctrine level. Consequently, the Master thesis is actual, and the corresponding results of the present research will be considered original in the light of other researchers.

Significance of research

The conclusions elaborated in the present research after broad and deep analysis of controversial and ambiguous viewpoints regarding the scope and potentiality of child soldiers' accountability for war crimes could be applied by other scholars examining this issue in the modern international legal framework. Taking into account substantial extent of child's usage by State and non-State actors in armed conflicts, and the urgency of the raised issue, the recommendations developed on the basis of an exhaustive analysis of the problems concerned could be considered as guidelines by any State in the development of their legislation on liability of child soldiers for war crimes and on definitive criteria in criminal responsibility establishment.

Aim of research

The aim of the present research is to analyse whether and under which circumstances child soldiers should be held responsible for the committed war crimes.

Objectives of the research

This Master's thesis research is aimed at the achievement of the following objectives:

- To analyse the concept of a child soldier in international law and international humanitarian law;
- To examine legal regulations regarding the involvement of children in armed forces at the international and national levels;

²¹ Jean Chrysostome K. Kiyala, *Child Soldiers and Restorative Justice* (Cham: Springer, 2019).

²² Nobert 2011, *supra* note 9, at 30.

- To describe the main factors of children`s involvement in the armed conflicts such as repressive conditions of the state, the duration of the armed conflict, and the level of the state economic development;
- To overview state practice in using child soldiers in the armed forces and the participation of children in the armed groups and terrorist organizations;
- To analyse the problem of children`s accountability age in the framework of international law and state practice;
- To identify the applicable mitigating factors for a proper evaluation of the child soldier`s responsibility for committed atrocities;
- To examine the applicability of amnesty for child soldiers in regard to the war crimes` commission.

Methods of the research

The following methods were used to achieve the aim and the intended objectives of the Master thesis:

- An analytical method, (General scientific method). The analytical method applied to summarize different attitudes expressed by scholars, international courts, and international bodies.
- Method of logics, (General scientific method). Method of logics used for deduction and induction, analysis, and synthesis. This method applied in conjunction with other methods of research while raising assumptions and following conclusions.
- Comparative method, (General scientific method). The comparative method used to compare the opinions of different scholars regarding the issue of child soldiers` accountability. This method used as well as to study and examine the differences in the international courts` and states` approaches towards the age of accountability for crimes committed.
- Method of legal analysis. Legal analysis method is used for the determination of the concept of child soldiers in international law and, namely, in international humanitarian law.

Structure of research

The present thesis consists of an introduction, 4 chapters that are divided into subchapters, conclusion, recommendations, and the list of bibliography.

Chapter 1 will provide an analysis of the concept of a child soldier in international law and international humanitarian law. Moreover, it will research of the main international legal document governing children`s recruitment into State armed forces and non-State military groups.

Chapter 2 will define the main factors of children`s involvement in the armed conflicts such as the repressive conditions of the state, the duration of the armed conflict, and the level of the

state economic development. It will examine state practice in using child soldiers in the armed forces and the participation of children in the armed groups and terrorist organizations.

Chapter 3 will research the number of approaches regarding the age of child's accountability for war crimes in the international legal framework, in the practice of international courts (International Criminal Court, Special Court for Sierra Leone), and the state practice as well.

Chapter 4 will be dedicated to the comprehensive and comparative analysis of the differences of child soldiers' perception at the international law level: whether they should be regarded as victims or as perpetrators. The acceptability of prosecution and restorative justice model will be assessed. The admissibility of amnesty for child soldier will be examined. Furthermore, the applicable standards of a proper evaluation of the child soldier's responsibility for committed atrocities will be elaborated.

Defence statement

There is no unified approach on child soldiers' responsibility for war crimes in international law. Accordingly, appropriate legal mechanisms for child soldiers' accountability have to be established where certain mitigating factors would be taken into consideration while amnesty should be perceived as inadmissible

1. CONCEPT OF A CHILD SOLDIER IN INTERNATIONAL LEGAL FRAMEWORK

1.1. Definition of `Child Soldier`

Phenomenon of child soldier is not an exclusive feature of some definite region. Despite the common opinion that the African continent is the primary for the use of the children, we can find the facts of children's presence in hostilities throughout the world, from South America to the Middle East and Asia. According to the Report of Secretary General on the impact of armed conflicts on children in the timeline from January to December 2020, around 8,521 cases of children recruitment by State and non-State actors were established.²³

The purpose of this subchapter is to research the conception of `child soldier` at the international and regional level.

1.1.1. International Law

Before considering the notion of "child soldier", it is necessary to determine what the definition "child" entails.

The major document which provides "child" definition at the international level is the United Nations Convention on the Rights of the Child (hereinafter – CRC), adopted in 1989.²⁴ CRC is the most widely adopted international treaty: as of 2021, 196 states are parties to it. Among the states that have it signed but not yet ratified, only the United States remains.²⁵

As it is stated in the Art. 1 of CRC, "[...] a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".²⁶ The reference to the national law of State Parties indicates that there is no rule of international customary law according to which the definition of a child would apply to all people under the age of 18, so that the age may vary depending on the law of a particular country. The influence of such non-unification in the child age's limits will be further analysed in the Chapter 2, which deals with children's use in armed forces.

In the humanitarian law terminology people legally participating in hostilities are named "combatants".²⁷ The very recruitment and use of children in hostilities are prohibited in the international legal framework. For this reason, in order to exclude feasible legalization, child

²³ Children in armed conflict: Report of the Secretary-General, *supra* note 1.

²⁴ Convention on the Rights of the Child, 20 November 1989, U.N.T.S.1577, p. 3.

²⁵ Status of Ratification: Interactive Dashboard, Office of the United Nations Higher Commissioner for Human Rights, accessed 25 November 2021, <https://indicators.ohchr.org/>.

²⁶ CRC, Art. 1.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, U.N.T.S. 1125, p. 3, Art. 43(2).

protection agencies created the term “child associated with an armed forces or armed groups”, sometimes interchanged with “child soldier”.²⁸

The importance of broad interpretation of “child soldier” laid down in “children associated with an armed forces or armed groups” term is explicated in the need to respect the rights of all children presented in armed forces or armed groups.²⁹ It emphasizes the need for inclusive support programmes for all child soldiers, not just those provided with weapons.

Within the armed forces or armed formations, the child's role may be relatively unclear, but whether he or she is a cook, porter, or “wife,” the level of danger to which he or she is exposed is the same as for ordinary combatants. It is therefore crucial that the definition is comprehensive and might be used to protect children whose lives and well-being are at risk.

In 2007 the Paris Commitments to Protect Children Unlawfully Recruited or Used by Armed Forces or Armed Groups (hereinafter – the Paris Commitments) and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (hereinafter – the Paris Principles) were adopted under the auspices of the United Nations Children’s Fund – UNICEF. The Paris Principles stipulate that States and armed groups are the main bearers of responsibility for the appropriate protection of the civilian population. The most important aspect of the Paris Principles is the accumulation of world practice in the safeguards to children's rights.³⁰

According to the purposes established in the Paris Principles, “[...] “child associated with an armed force or armed group” refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.”.³¹ The age limits of “child” are under 18-year threshold, as it is established in CRC.³²

The definition of child associated with armed forces or armed groups, set in the Paris Principles, is affirmed in the Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups, drafted by the International Committee of Red Cross in 2011: “a child associated with

²⁸ *Children and Armed Conflict: A guide to International Humanitarian and Human Rights Law* (Montreal: International Bureau for Children’s Rights, 2010), 131.

²⁹ *Child Soldiers – and Other Children Used by Armed Forces and Groups. Policy Brief* (Save the Children, 2010), 1, <https://resourcecentre.savethechildren.net/pdf/1538.pdf/>.

³⁰ The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, United Nations Children's Fund, 1.6.

³¹ The Paris Principles, 2.1.

³² The Paris Principles, 2.0.

armed forces or armed groups refers to any person below 18 years of age who is, or has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children – boys and girls – used as fighters, cooks, porters, messengers and spies or for sexual purposes”.³³

1.1.2. Regional Level

At the regional level the notion of “child soldier” is embodied in the Cape Town Principles and Best Practices (hereinafter – Cape Town Principles), adopted at the Symposium on Prevention and Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa in 1997, conducted by UNICEF and NGO Working Group on the Convention on the Rights of the Child³⁴.

As it is stated in the definition part of the Cape Town Principles, “child soldier [...] is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms”.³⁵

At this point it should be noted that the Cape Town Principles were used as one of basic components for the Paris Principles` formation. Since 1997, when the former was adopted, its nature of a regional character was broadened to the international, further accepted at the national level. New legal norms in the domain of children`s rights` protection in armed conflict evolved, namely equating of conscripting of children under age of 15 to war crimes under the Rome Statute of International Criminal Court.³⁶ All these factors culminated in the need to review principles enshrined in the Cape Town Principles in the light of new “summons”.

This factor should be taken into consideration when observing and comparing definitions established in the Paris Principles and the Cape Town Principles. Through this method the modern approach to the “child soldier” notion can be revealed, which was already mentioned in the subchapter 1.1.1. After consideration of children use, particularly children under age of 15, in armed forces or armed groups as a war crime, the term “child soldier” should be interchanged in

³³ *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Group*, (International Committee of the Red Cross, 2011): 379, <https://resourcecentre.savethechildren.net/pdf/Guiding-Principles-for-the-Domestic-Implementation-of-a-Comprehensive-System-of-Protection-for-CAAFAG-ICRC-2011.pdf/>.

³⁴ Cape Town Principles and Best Practices, 1997, United Nations Children's Fund, 2.

³⁵ Cape Town Principles and Best Practices, 8.

³⁶ The Rome Statute, Art. 8 (2)(b)(xxvi).

order to deflect from the potential connection to the combatants. As the result, the new concept of “child associated with armed forces or armed groups” was developed.

For the aim of the present thesis, the term “child soldier” will be used as a shortened version of the above-named definition, i.e. “child soldier” refers to “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in [...] capacity, including [...] children, boys and girls, used as fighters, [...] [and] spies”.³⁷

It is necessary to highlight that the term “child soldier” should be interpreted as a term of art instead of its usage in a direct meaning when it would legalize the use of children as combatants. Moreover, for the purpose of the present research the term “child soldier” should include children associated with terrorist organizations as well.

1.2. International Legal Standards on Recruitment of Children

1.2.1. International Humanitarian Law

The Additional Protocols to the Geneva Conventions, adopted in 1977, are the first binding international instruments where the practice of use of children in armed forces has been condemned³⁸:

- Additional Protocol 1 (hereinafter – API) – concerning protection of victims of international armed conflicts³⁹;
- Additional Protocol 2 (hereinafter – APII) – relating to the protection of victims in non-international armed conflicts.⁴⁰

Under Art. 77, para. 2 of API, State Parties to it has an obligation to “*take all feasible measures*” to prevent direct participation of children under the age of 15 in hostilities, and “they shall refrain from recruiting them into their armed forces”.⁴¹ If there is a choice of recruiting children of an age of 15 and 18, the preference should be given to the oldest. After being adopted, this provision was strongly criticized due to its vague and weak language.

Firstly, the use of “*feasible measures*” leaves the way for States to argue their interest in child soldiers as the purpose of military need.

³⁷ The Paris Principles, 2.1.

³⁸ *Children and armed conflict: A guide to International Humanitarian and Human Rights Law*, *supra* note 31, 137.

³⁹ *Supra* note 27.

⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, U.N.T.S. 1125, p. 609.

⁴¹ API, Art. 77 (2).

Secondly, the division of degree of participation into direct and indirect provoked strong discussions on the issue of “hostilities” definition.⁴² The lack of explicit and distinguished circumstances in which States could define the ability for children to act as combatants in international armed conflicts has been considered a significant legal gap⁴³. Moreover, the non-inclusion of voluntary enlistment left behind the clarification whether this issue is either acceptable under international humanitarian law or should be prosecuted. The ICRC, however, while interpreting the para. 2 of Art. 77 of API, stated that the “recruiting” includes both obligatory and voluntarily.⁴⁴

Thirdly, para. 3 of Art. 77 questions the scope of prevention of use of children under 15 in armed forces: “If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”⁴⁵ Through this exemption the whole extent of protection provided for children under age of 15 is underestimated. This provision makes States’ hands untied in recruiting children by appealing to “*exceptional cases*”. Some researchers even define the possibility for youth between age of 15 and 18 to be beyond the scope of “child” definition, and thus losing a considerable part of their protection.⁴⁶

According to Art. 4, para. 3(c) of APII, “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”.⁴⁷ Unlike API, the present provision of APII prohibits the use of children under age of 15 as such with no distinction between direct and indirect forms of participation. Additionally, it impedes the forceable and voluntary enrolment in the armed forces or organised armed groups. By this Van Bueren presupposed that “indirect participation in international conflicts is safer than indirect participation in civil wars: an assumption which deserves Bentham’s epithet of “nonsense upon stilts””.⁴⁸

⁴² Julie McBride, *The War Crime of Child Soldier Recruitment* (The Hague: T.M.C. Asser Press, 2014), 21.

⁴³ Ibid.

⁴⁴ *Supra* note 33, 383.

⁴⁵ API, Art. 77 (3).

⁴⁶ Bennet T. W., “Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising the Recruitment of Child Soldiers”, Halfway House: Institute for Security Studies (1998), quoted in Volker Druba, “The Problem of Child Soldiers”, *International Review of Education* 48 (3-4) (2002): 272.

⁴⁷ APII, Art. 4(3)(c).

⁴⁸ Geraldine Van Bueren, “The international legal protection of children in armed conflicts”, *The International and Comparative Law Quarterly* Vol. 43, No. 4 (1994): 815 p.

The lack of harmony between API and APII didn't belittle the value which these two international instruments have. For the first time the issue of children's recruitment was recognised on the international arena, giving the starting point for further discussions. The basis for age limitation has been provided, which is an issue of great importance till today, as it will be analysed in the following chapter.

1.2.2. International Human Rights Law

As it was earlier mentioned, CRC was the first step in the codification of universal children rights of binding nature for the State Parties to it. Notwithstanding the evidence of being the fastest and most widely ratified international treaty, it was highly criticized for its provisions regarding children's participation in an armed conflict, particularly covered by Art. 38.

Under Art. 38 of CRC, State Parties make two main commitments: firstly, "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"⁴⁹; and, secondly, "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces".⁵⁰

The leading innovation, presented in Art. 38 of CRC, is an express incorporation of rules of international humanitarian law into international human rights law by virtue of para. 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".⁵¹ Moreover, text of CRC does not envisage the derogation permission for Art. 38 provisions, despite the common approach to the human rights' insuring in the times of war and state emergency.⁵²

The main failures of the composition of Art. 38, as it was indicated by Van Bueren, include the applicability of the present article only to State actors, deficiency of "feasibility" stipulation, and the delay of ratification by the United States.⁵³ It can be added with the criticism over universality of solutions, highlighted by Freeman and Veerman, where no "*recognition of the local complexities*" was made.⁵⁴ It was then developed by Jo de Berry, that in order "to move CRC from its position of universal idealism to practical implementation, there must be

⁴⁹ CRC, Art. 38(2).

⁵⁰ CRC, Art. 38(3).

⁵¹ CRC, Art. 38(1).

⁵² McBride, *supra* note 42, 26.

⁵³ Van Bueren, *supra* note 48, 820.

⁵⁴ Michael Freeman and Philip E. Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992).

consideration of how the CRC can engage with local contexts”.⁵⁵ Until now the present issue has not been solved yet, leaving the question of terms` applicability to the considerations of States.

Significant attention should be paid to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (hereinafter – OPAC), adopted in 2000.⁵⁶

The leading purpose of the present treaty`s development was to provide sufficient protection for children during the armed conflicts, keeping in mind the harsh dissatisfaction left behind after negotiations on the wording of Art. 38 of CRC.⁵⁷ A considerable number of scholars and advocates for the protection of children's rights over the years have urged on an increase of the minimum age for participation in hostilities, from 15 to 18. However, there was no unique consolidation on this topic among non-governmental groups and academics prior to OPAC conclusion.⁵⁸ Authors such as Breen and Coomarasmany indicated that the focus of such a treaty should be addressed to implementation of the practical steps.⁵⁹ McBride stated that the mere narrowing to the “straight eighteen” movement may lead to underestimation of the “law on child soldiers” evolution.⁶⁰

Despite all expectations, the provisions of the OPAC still illustrate its imperfections, as due to the reluctance of a number of States to set a minimum level of 18 years there is still permission to voluntary recruitment of children under 18 in the armed forces. Moreover, there is no improvement from the times of CRC through repeating the vague wording of “*all feasible measures*”, allowing the children`s use “in exceptional circumstances or where it is ‘justified’ by military contingencies”.⁶¹

⁵⁵ Jo de Berry, “Child Soldiers and the Convention on the Rights of the Child.” *The Annals of the American Academy of Political and Social Science* 575 (2001): 102, <https://www.jstor.org/stable/1049182>.

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000.

⁵⁷ McBride, *supra* note 42, 29.

⁵⁸ *Ibid*, 32.

⁵⁹ Claire Breen, “The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict”, *Human Rights Quarterly* 25, no. 2 (2003): 453, <https://www.jstor.org/stable/20069672>; Radhika Coomaraswamy, “The optional protocol to the convention on the rights of the child on the involvement of children in armed Conflict—towards universal Ratification”, *The International Journal of Children`s Rights* 18 (4) (2010): 535.

⁶⁰ McBride, *supra* note 42, 32.

⁶¹ *Ibid*, 33.

Art. 3 of OPAC prescribes the raise of “the minimum age [of] the voluntary recruitment of persons into their national armed forces”⁶², referring to par. 3 of Art. 38 of CRC. Nonetheless, due to the differences in national legislations, States proceed to put the age limit under 18 for voluntary enrolment into their armed forces.

Webster pointed out to the state-oriented nature of OPAC, as, according to Art. 4, “armed groups that are distinct from the armed forces of a State”⁶³ are proscribed from recruitment and use of children. The researcher denotes to the irreconcilable situation where State can enrol children of 17 years old, whilst non-State armed group is prosecuted for doing the same.⁶⁴

The peculiarity of OPAC lays in the Art.8 and Art. 9, pursuant to which there is no obligation for the State to be Party to both, CRC and OPAC.⁶⁵ As it was reflected by Stohl, through this the drafters of OPAC put the original spirit of CRC in jeopardy.⁶⁶

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict is an example of cooperation and negotiation between the actors on the international plane, namely State and non-governmental organisations, in response to the rigid events happen during hostilities. Due to the compromise nature, OPAC does not provide a strict framework for the recruitment and involvement of children in the armed forces and armed groups, which leads to the preserving the same weaknesses which were made during the drafting process of Convention on the Rights of the Child. The consequences of this will be described in the following subchapter.

1.2.3. International Criminal Law

With the adoption of the Rome Statute of the International Criminal Court in 1998, the conscription, enlistment, and use of children in armed conflicts were equated to the war crimes, regardless of whether those actions were done during international or non-international armed conflict.⁶⁷

⁶² OPAC, Art. 3.

⁶³ OPAC, Art. 4.

⁶⁴ Timothy Webster, “Babes with Arms: International Law and Child Soldiers”, *George Washington International Law Review* 227 (39) (2007): 242, https://scholarlycommons.law.case.edu/faculty_publications/556/.

⁶⁵ OPAC, Art. 8; Art. 9.

⁶⁶ Rachel Stohl, “Children in conflict: assessing the optional protocol”, *Conflict, Security & Development* 2 (2002): 135-140.

⁶⁷ The Rome Statute, Art. 8² (b)(xxvi).

The wording of this provision has mostly been taken from the CRC⁶⁸, API⁶⁹, and APII⁷⁰. Additionally, the Rome Statute augments the security of children by virtue of “*conscripting or enlisting*”, including *de jure* and *de facto* their involvement in the composition of armed forces or armed groups⁷¹.

Some discussions covered the matter of ethnic and culture peculiarities. Lebanon representative specified that developing countries may face difficulty in realisation of provision regarding children`s enrolment in armed forces caused by their local culture. In addition, it was stipulated that in the situation of fighting against an occupying Power the circumstances in which recruitment would be done can differ.⁷²

At the end of the long-term discussions and negotiations Art. 8² (b)(xxvi) received its current formulation. The outcome could be perceived as a goal achieved in covering the widest range of potential cases, leaving beside the limitations attributable to cultural norms in particular societies.

1.2.4. International Labour Law

The first time the limit of 18 years old was defined in regard to the prohibition of forced recruitment in 1999 International Labour Organisation (hereinafter – ILO) Convention No. 182 – the Worst Forms of Child Labour Convention.⁷³

Art. 3 delineates that one of the “worst forms of child labour” constitutes “forced or compulsory recruitment of children for use in armed conflict”.⁷⁴ Taking into consideration, that “for the purpose of [the present] Convention, the term child shall apply to all persons under the age of 18”⁷⁵, it can be stated that the ILO Convention No. 182 is the only international instrument where the term “child” preserves its age “boundaries”.

The Worst Forms of Child Labour Convention was supplemented with Recommendation No. 190.⁷⁶ According to the provisions of Recommendation, States should criminalize “forced or

⁶⁸ CRC, Art. 38 (3).

⁶⁹ API, Art. 77 (3).

⁷⁰ APII, Art. 4(3)(c).

⁷¹ Webster, *supra* note 64, 240 p.

⁷² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, 5th meeting of the Committee of the Whole, at 17, A/CONF.183/C.1/SR.5

⁷³ Worst Forms of Child Labour Convention (No. 182), 1 June 1999, International Labour Organization.

⁷⁴ ILO Convention No. 182, Art. 3(a).

⁷⁵ ILO Convention No. 182, Art. 2.

⁷⁶ Worst Forms of Child Labour Recommendation (No. 190), 1999, International Labor Organization.

compulsory recruitment of children for use in armed conflict”.⁷⁷ The implementation and the further steps on the States` domestic level will be observed in the next subchapter.

1.2.5. National legislation

The majority of States have adopted legislation where the use of children in the armed forces under age of 18 is genuinely prohibited.⁷⁸ In certain cases the age for voluntary recruitment is put on the identical level of 18 years old.⁷⁹

The lowest limits for voluntary recruitment and further participation in the hostilities could be found in the legislation of Canada, the UK, and France.

The Law of Armed Conflict at the Operational and Tactical Levels Manuals (LOAC Manuals) of Canada of 1999 and 2001 respectively provide the ban on the enlistment and participation of children under 15 years old in warfare, however, only with regard to the armed conflicts of non-international character.⁸⁰ Regarding the implementation of API provisions concerning preference for older children in the situation of choice, Canada replied that “the Canadian Human Rights Act prohibits discrimination on the basis of age in relation to employment, except where the age requirement is a bona fide occupational requirement. It also permits termination or refusal of employment on the basis of failure to reach a minimum age provided for in a law or regulation that applies to that employment”.⁸¹

The United Kingdom adopted in 2004 the Manual of the Law of Armed Conflict, where the main elements of Art. 77 of API and Art. 4 of APII were echoed: ensuring of non-recruitment of children under age of 15 into the State armed forces and non-participation in armed conflicts; prohibition of conscription, enlistment, and use of children under 15 years old in the armed groups or armed forces in times of internal conflict.⁸²

Comparing to the provisions in national criminal legislation of Canada and the UK, France`s Penal Code prosecutes the recruitment or engaging of children under the age of 18 into

⁷⁷ ILO Recommendation No. 190, Art. 12(a).

⁷⁸ See the legislation of Afghanistan, Belgium, Nepal, Liberia, Norway, CAR, Argentina.

⁷⁹ The Declaration of the Kingdom of Belgium declaration upon signing the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 6 September 2000, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en#EndDec

⁸⁰ Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, p. 17-3, para. 22; Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 13 August 2001, para. 1714.1.c.

⁸¹ Ibid.

⁸² United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, para. 9.9.1., para. 15.7-15.7.1.

the State armed forces or armed groups by 20-year imprisonment.⁸³ Meantime, the voluntary enlistment of children over 15years old is allowed and is not punishable.⁸⁴

The definition of “child soldiers”, enshrined on the international and regional levels by virtue of Paris and Cape Town Principles respectively, covers all variants of children` participation in an army or an armed group: from food delivers to the actual gun-keepers. It keeps the original age limitations of 18, repeating the initial concept of the “child”.

Provisions of the Additional Protocol I, II, and the Rome Statute led to the formation of “grey zone” in the use of children for military aims. When originally a person preserves status of the child till the age of 18, States and non-State actors are able to recruit them on the compulsory or voluntary basis starting from the age of 15. The Worst Forms of Child Labour Convention puts more complexity. According to it, the forced presence of children under age of 18 is equated to the worst forms of labour and should be prohibited.

From the perspective of international humanitarian law, it can be seen that for children from 15 to 18 years old it is permitted to be a member of State armed forces or non-State armed groups. In the meantime, children remain children with corresponding rights and special regime. These two factors frame the difficulty in observing and reaching the common understanding in question of plausible responsibility of child soldiers.

⁸³ France, Penal Code, 1992, as amended in 2010, Art. 461-7.

⁸⁴ Ibid.

2. CHILD USE IN ARMED FORCES

2.1. Factors of Involvement

The children's involvement in the State and non-State armed forces, armed groups, and terroristic groups arises out of range of aspects. Commonly they are interdependent and follow from each other. For the purposes of the present thesis the factors concerned are divided into two groups contingent upon the level where they take place with no distinction in their hierarchy: socio-economic and individual level. It should be noted that there would be no identification of causes' reference to 'push' and 'pull' typology as to little relevance to the present research.

2.1.1. Socioeconomic Level

On the level determined by social and economic development of the State there can be identified following factors which constitute the basis of children's use in armed forces and groups: repressive conditions of a state, duration of an armed conflict, level of the state's economic development.⁸⁵

1. Repressive conditions of state

The period of the statehood formation and change of political forces and political system is characterized by a decrease in respect for legal norms of both national and international level. As a result, the weakening of the military forces' control makes it easier to use children in their ranks.⁸⁶

Militants being out of possible adult recruitees consider children's plenitude as a chance to fulfill their armies.⁸⁷ Through increasing the size of the army at the expense of children, commanders ensure a lasting impact on society. Moreover, in the state of repression there is no way for children to confront recruitment in comparison to democratic societies.

Mental and physical characteristics of a child make him or her perfect "material" for formation an ideal "soldier" for an armed group. By use of patronalism recruiters cultivate the desired behaviour and personal qualities.⁸⁸ Physical features of children, namely their size, weight, and quickness, determine their suitability for activities which are more hazardous for adults: setting landmines and further demining.

⁸⁵ Høiskar, *supra* note 4, 340-360.

⁸⁶ Ibid, 345.

⁸⁷ Webster, *supra* note 64, 233-234.

⁸⁸ Tim Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009), 298.

Additionally, the technological progress apart from repressive conditions constitutes the reason for recruiters to pay their attention to child use. Elaboration of small arms and light weapons are stated to be another proof of minors' engagement.

The suppression of human rights abets children to voluntarily enlist in armed forces or armed groups to fight for situation enhancement.⁸⁹ Furthermore, juvenile may be eager to participate in the politics to promote better standards of life, while ending on the frontline, as it was the case in the Mozambique Liberation Front and the Mozambique National Resistance movements.⁹⁰

To a degree of participation in politics, the promise of social and health services assistance can be regarded as an attractive option in affiliating with certain non-State organisations. The prospects which are declared to the contrary of government's position perceived promising in establishing desirable community with corresponding principals and priorities.⁹¹

2. Duration of armed conflict

The protracted state of war is depleting national resources, undermining moral standards and principles. In such a chaotic situation of an economic crisis, depletion of human capital and labour occurs, children lose faith in justice and hope for the future.⁹² Growing up and socializing in the context of a conflict "with no peace or stability in living memory"⁹³ ends up in children accustomed to cruelty, as it would be further analysed in the case of FARC.

As it was indicated by Webster⁹⁴, the repercussions of low-intensity hostilities include split of a family when children lose the support provided by parents. Instead of panhandling on the streets they choose to join militia as a source of supervision.

The decline in the State's economy and financial resources results in the lack of funding for all spheres except military. Høiskar noticed that at that point "the population considers the war as turned against them, and thus feel compelled to resort to arms".⁹⁵ Moreover, insufficient number

⁸⁹ Høiskar, *supra* note 4, 345.

⁹⁰ Angela McIntyre, "Rights, Root Causes and Recruitment: The youth factor in Africa's armed conflicts", *African Security Review* 12, 2 (2003): 94.

⁹¹ Nicolas Argenti, "Youth in Africa: a major resource for Change", *Africa World Press*, (2002): p. 145 quoted in McIntyre, *ibid*.

⁹² Høiskar, *supra* note 4, 346.

⁹³ McIntyre, *supra* note 90. 94.

⁹⁴ Webster, *supra* note 64, 233.

⁹⁵ Høiskar, *supra* note 4, 346.

of schools in the areas disrupted by long-standing war constitutes a background of children enabled learning anything except soldiery.⁹⁶

After years of enduring conflicts, armed groups become part of communities' everyday life. Acting as a dispute settler, they gain support from local population, obtaining the ability to control their actions. Presence of the non-State organisations turns into legitimate course. Therefore, children perceive fighters as role models in "understanding and responding to their chaotic environment".⁹⁷ However, not all cases of armed groups occurrence are characterised by voluntary enrolment.

The movement of Liberation Tigers of Tamil Eeklam (hereinafter LTTE), based on Sri Lanka, reportedly used the policy of "donation" one person from every family.⁹⁸ Representatives from the *Tatmadaw* – State armed forces of Myanmar, – exercised the recruitment of children into the army by virtue of forcible apprehension in public places with corresponding threatens of imprisonment and by imposition of "quotas" on each settlement on the territory of Myanmar.⁹⁹

Other approach was held by Taliban. Representative militants adopt a practice of convincing children in their duty to execute jihad – the holly struggle. Under stressing of their fate to sacrifice life the main purpose was to use them in a function of suicide bombers.¹⁰⁰

3. Level of state's economic development

Scholars believe that a high level of economic development is an important factor in the formation of peace, and that armed actions are closely linked to the prevalence of poverty among the population. Thus, protracted conflicts worsen the economic and social conditions, forcing people to seek means of survival in the absence of choice.¹⁰¹

⁹⁶ Rachel Brett "Armed and Dangerous – Child Soldiers", *In the Firing Line: War and Children's Rights* 59 (1999): 58.

⁹⁷ Siobhan O'Neil and Kato Van Broeckhoven, *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict* (New York: United Nations University, 2018), 48.

⁹⁸ Clayton A. Hartjen and S. Priyadarsini, *The Global Victimization of Children: Problems and Solutions* (New York: Springer Science+Business Media, LLC, 2012), 116.

⁹⁹ "Child Soldiers Global Report 2001 – Myanmar", Child Soldiers International, accessed 30 November 2021 <https://www.refworld.org/docid/498805dfc.html>; Wheeler Reiterate Commitment Not to Enlist Children", Office of the Special Representative of the Secretary-General for Children and Armed Conflict, accessed 30 November 2021 <https://childrenandarmedconflict.un.org/2019/03/south-sudan-government-armed-forces-reiterate-commitment-not-to-enlist-children/>.

¹⁰⁰ "Afghanistan: Taliban Child Soldier Recruitment Surges". Human Rights Watch. Accessed 29 November 2021, <https://www.hrw.org/news/2016/02/17/afghanistan-taliban-child-soldier-recruitment-surges>.

¹⁰¹ Høiskar, *supra* note 4, 347.

The decrease in the State's economy leads to decline in the family means to survive. Household poverty was indicated as the most prominent factor among children who became members of the armed forces and non-State armed groups.¹⁰² According to the studies, the majority of child soldiers come from poor families. The absence of basic needs and poverty-related complications as lack of food makes the joining to the armed groups a favourable option. There they can be supplied with everything they need including shelter, protection, and possibility to get through the tough times.

The level of unemployment constitutes another aspect in the decisions to be voluntarily enlisted in military troops.¹⁰³ Policy of armed organisations aimed at assurance of children and their families that if minors or youth join their units, they will get payment to be enough to make a living¹⁰⁴, status among their peers, and “*national pride*”¹⁰⁵ of their communities. During Colombian conflict “Children [were] lured into the AUC [Autodefensas Unidas de Columbia][...] by salaries ranging between 900,000 and 1,200,000 Colombia pesos [...] reportedly paid every 3 months, with bonuses for special missions”.¹⁰⁶ There was evidence of promise on the behalf of Boko Haram members to pay a “salary” an amount of 600-800\$ a month, with one-time payment of about 3,000\$ while entering the organisation.¹⁰⁷ Commanders of Sudan People's Liberation Army (hereinafter – SPLA)), currently South Sudan People's Defence Forces – State armed forces of the Republic of South Sudan¹⁰⁸, used children, recruited through forcible abduction¹⁰⁹ and

¹⁰² Emma de Vise-Lewis, Bavon Mupenda and Stefano Schwarz, *Tug-of-War: Children in Armed Groups in DRC* (War Child, 20117), 44.

¹⁰³ Ibid, 45.

¹⁰⁴ U.N. Security Council, Report of the Secretary-General on children and armed conflict in Chad, S/2007/400 (3 July 2007), para. 20.

¹⁰⁵ Hartjen and Priyadarsini, *supra* note 98, 113.

¹⁰⁶ *Colombia's War on Children* (Watch List on Children and Armed Conflict, 2004), p. 26, <https://resourcecentre.savethechildren.net/pdf/2384.pdf/>.

¹⁰⁷ Janine Morna, “*Who Will Care for Us?*” *Grave Violations Against Children in Northeastern Nigeria* (Watchlist on Children and Armed Conflict, 2014), 27. https://resourcecentre.savethechildren.net/pdf/2111-watchlist-nigeria_lr.pdf/; “BBC Meets Gang ‘Paid to Join Boko Haram’ in Niger”, BBC News, accessed 2 December 2021 <https://www.bbc.com/news/av/world-africa-27107375>.

¹⁰⁸ Skye Wheeler, “*We Can Die Too*”: *Recruitment and Use of Child Soldiers in South Sudan* (New York: Human Rights Watch, 2015), 4.

¹⁰⁹ “South Sudan: Terrifying Lives of Child Soldiers. Children Describe Forced Recruitment, Trauma, Abuse.”, Human Rights Watch: “*They said we must join the army, if not they would beat us. My two colleagues refused to go and they beat them*”, accessed 30 November 2021 <https://www.hrw.org/news/2015/12/14/south-sudan-terrifying-lives-child-soldiers>.

voluntarily join by promise of payment and providing of food, however, the latter was not always a reality.

Notwithstanding the influence of joblessness, there have been viewpoint about the lack of direct link between the economic devastation and the probability of children` use by non-State armed groups and the further absence of sufficient evidence to conclude such causal relationship.¹¹⁰ Moreover, the real state of affairs shows that the participation in State armed forces does not indicate the in-time payment of salary.¹¹¹

2.1.2. Individual Level

On the level characterised by personal circumstances of each child there are the scope of factors laying at the basis of decision to join armed forces and groups.

Family may be identified as one of these factors which acts as a push and pull cause at the same time. The already associated family members may motivate and further facilitate the involvement of their minors.¹¹²

Children can be sent to military organizations and terroristic groups as a part of arrangements and requests from them via so called policy of “*one-recruit-per-family*”.¹¹³

Home atmosphere can emerge as a factor of involvement but with contrary decomposition. Domestic violence motivates children to join militia and, in this way, to escape the aggressive oppression from parents` side.¹¹⁴

The absence of parental support leads to the vulnerability of being recruited. In Democratic Republic of Congo camps of internally displaced and refugee children are of great interest for armed forces and armed groups.

The same degree of influence on the children`s decision to join soldiery may be carried by their friends and surrounding peers. Peers` impact is indicated as a main cause of affiliation

¹¹⁰ O'Neil and Van Broeckhoven, *supra* note 97, 47.

¹¹¹ Wheeler, *supra* note 108.

¹¹² Ari W. Kruglanski and Shira Fishman, “Psychological Factors in Terrorism and Counterterrorism: Individual, Group, and Organizational Level of Analysis”, *Social Issues and Policy Review* 3,1 (2009): 17.

¹¹³ This practice is highly used by Taliban, LTTE, as well as in Kachin Independence Army (hereinafter – KIA). Despite denial of practice existence by representatives of Kachin Independence Army, such rule was identified in the flow of interviews held by Child Soldiers International among members of KIA in *A Dangerous Refuge: Ongoing Child Recruitment by the Kachin Independence Army* (Child Soldiers International, 2015), 21.

¹¹⁴ O'Neil and Van Broeckhoven, *supra* note 97, 51.

with Islamic State by 75 % of European members of the latter.¹¹⁵ In addition, Islamic State uses close friends as a tool to translate the idea of taking up arms against parents` authority.

The contribution of Internet activities is presumed as the other aspect through which armed organisations can send “massages” to children, specifically to youth. Regardless of the need to research this issue in a more detailed and deeper way, the present-day experience of Islamic State illustrates that with certain image and communication the thought of enlistment to their society can be rather perspective.¹¹⁶

Through the virtual environment organizations can alter their commonly pervasive image as bloody and brutal. Evasion from this concept and endorsement of the aim to develop “a utopian paradise of an autonomous[...]state with global jurisdiction” which would encompass strength, respect, and solidarity presupposed to broaden the extent of group`s supporters.¹¹⁷

The factor of revenge plays a signification role in the range of motivations to join armed groups. The death of parents, friends may be accompanied with wish to retaliate. In the study conducted by Wheeler, interviewed child soldiers of South Sudan designated vengeance as a main impetus for fighting.¹¹⁸

Through activities offered from the association with armed groups children and youth pursue self-fulfillment. Prosocial opportunities provided by troops serve as a tool to embody personal will in embracing one`s ideology, defending own culture and community. In this context children may be driven “by their love for their own group, rather than hatred for another”.¹¹⁹ The building-up of a bond between child and existing organization helps to create purpose in life and meanwhile to devotedly serve the goals of it. As a consequence, children become ideal soldiers in the hands of armed groups` commanders.

The range of aspects which lay beneath the child motivation to be enlisted in armed groups or armed forces are varied and derive from different levels of a child life. The minor may be driven by his or her personal wish to survive, earn money for family or own living, become a part of something more than simple being.

¹¹⁵ Scott Atran, “The Role of Youth in Countering Violent Extremism and Promoting Peace”, Address to the UN Security Council, 23 April 2015, accessed 29 November 2021 <https://apo.org.au/sites/default/files/resource-files/2015-04/apo-nid57229.pdf>.

¹¹⁶ O'Neil and Van Broeckhoven, *supra* note 97, 54.

¹¹⁷ Amanda E. Rogers, *Viewing Non-State Armed Groups through a Brand Marketing Lens: A Case Study of Islamic State* (New York: United Nations University, 2017).

¹¹⁸ Wheeler, *supra* note 108.

¹¹⁹ O'Neil and Van Broeckhoven, *supra* note 97, 57.

Nevertheless, the voluntarily enrolment into military troops does not preclude the existence of children abduction. Precisely, the street children are highly relevant in these circumstances as their disappearance would not provoke social outcry.¹²⁰

It should be noted that indicated causes can not be regarded as separate notions. The occurrence of children involvement has as its backbone the mixture of social, economic, and interpersonal features, where the differentiation between may be made only for the theoretical purpose.

The combination of the above factors not only illustrates the causal relationship in the background of the use of children as active participants in hostilities, but also provides an in-depth analysis to design further actions and formulate strategies in answering the question whether former child soldiers should bear criminal responsibilities for war crimes.

2.2. Members of State Armed Forces

The conscription of children into armed forces exercised by the States to date is lower in numbers comparing to the end of XIX c.¹²¹ The main reason of such decline was the adoption in 2000 of OPAC, provisions of which were discussed in the Chapter 1 of the present thesis.

Unfortunately, the precise statistic of the corresponding children's participation is not available as to the unwillingness of States to experience international community's public disgrace. However, as a consequence of a report mechanism's introduction by virtue of Art. 8 of OPAC¹²², accompanied by "shadow" reports from non-governmental organizations, UN agencies, coalitions, national organizations and research institutions¹²³, the awareness on the use of children in armed forces was improved.

One of the first and the most important steps was the request from Security Council to the Secretary-General on creation of "a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them".¹²⁴ The 1st list was issued in 2002, and already in 2003 among 50 parties to armed conflicts having recruited children 9 of them were the State armed forces.¹²⁵

¹²⁰ Peter W. Singer, *Children at War* (Berkeley: University of California Press, 2006), 59.

¹²¹ Chaditsa Poulatova, *Children and Armed Conflict* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013), 295.

¹²² OPAC, Art. 8.

¹²³ Tiny Vandewiele, *Optional Protocol: The involvement of Children in Armed Conflicts* (Boston: Martinus Nijhoff Publishers, 2006), 62.

¹²⁴ Security Council resolution 1379 (2001), S/RES/1379 (2001) (20 November 2001), at 16.

¹²⁵ U.N. General Assembly, Security Council, *Children and Armed Conflict: Report of the Secretary-General*, A/58/546-S/2003/1053 (10 November 2003), Annex I, Annex II.

In 2005 The Security Council adopted Resolution 1612, which called on the Secretary-General to establish a monitoring and reporting mechanism in countries where the parties to the armed conflict were included in the “shame list” and provided detailed guidance on the monitoring and reporting process.¹²⁶

As it is stated in the Report of the Secretary-General on Children and Armed Conflict, as of December 2019, 6 States are still enlisted in the enumeration of parties to armed conflicts infringing international provisions on child recruitment: Afghanistan, Iraq, Somalia, South Sudan, Yemen, and Syrian Arab Republic.¹²⁷

As to 2019, the evidence of child recruitment was found in Afghan National Police, Afghan Local Police, Afghan National Army, and in the other units of Afghan security forces.¹²⁸ As it was indicated in the 2020 Report on child soldiers in South Sudan, only 25 % of the children used in hostilities referred to children recruited by South Sudan security forces, which indicates the decrease in total number of children participated in the armed forces of South Sudan.¹²⁹

Acting as members of State armed forces child soldiers were ordered to commit atrocities against opposition armed groups as well as against civilians, including “rounding up villagers for forced labour, burning villages, and carrying out executions”.¹³⁰ In some interviews of former child soldiers members of *the Tatmadaw* they confessed to be forced to kill non-combatants despite their clear civilian appearance.¹³¹

Due to the interval reporting process, it is complicated to assert precise number of children use as State soldiers. Moreover, the unwillingness of States to confirm their commitments out of self-interests and political goals deepens the gap between nominal and factual situation in child recruitment practice.

2.3. Participation in Non-State Armed Groups and Terroristic Groups

Under Art. 4, para. 3(c) of APII armed groups are not permitted to enlist children under age of 15 into their troops. Similarly, participation in the armed hostilities is not allowed for this

¹²⁶ Security Council resolution 1612 (2005), S/RES/1612 (2005) (26 July 2005), at. 3.

¹²⁷ U.N. General Assembly, Security Council, *Children and Armed Conflict: Report of the Secretary-General*, A/74/845-S/2020/525 (9 June 2020), Annex I, Annex II.

¹²⁸ U.N. Security Council, *Report of the Secretary-General on children and armed conflict in Afghanistan*, S/2019/727 (10 September 2017), at 25.

¹²⁹ U.N. Security Council, *Report of the Secretary-General on children and armed conflict in South Sudan*, S/2020/1205 (14 December 2020), at 19.

¹³⁰ Kai Chen, *Comparative Study of Child Soldiering on Myanmar-China Border: Evolutions, Challenges and Countermeasures* (Dordrecht: Springer, 2014).

¹³¹ *Ibid*, 29.

age group.¹³² The provisions of international humanitarian law preclude all possible variations of jeopardising children rights, whereas the actual situation among non-state armed groups and terroristic groups differs.

As to the Annual report of the Secretary-General on Children and armed conflict, approximately 8,5 thousand children are identified as being recruited in the armed groups, namely on the territories of Afghanistan, Democratic Republic of the Congo, South Sudan, Syrian Arab Republic, Yemen, Mali, Somalia.¹³³ These are the States where the number of children participating in the hostilities as members of armed groups are over than 50. Other States are Lebanon, Libya, Iraq, Sudan, Burkina Faso, Cameroon, Chad, Nigeria. There the number of children in armed groups varies from 1 to 15. In Cameroon, Chad, and Nigeria the main “employee” is a terroristic organisation Boko Haram and its affiliated groups.

The use of children in non-State armed groups and terroristic groups is not a new feature of a contemporary warfare. Irish Republican Army, one of the oldest recognised modern terroristic groups, has involved children from the time as it had been revived in 1969.¹³⁴ From the beginning of 1990s children have been widely exploited in non-state armed groups, starting from the events in Sierra Leone, to the military actions in the East of Ukraine, an ongoing conflict started in 2014.

A number of children were accused of partaking in the Rwanda genocide of 1994 committed by militias groups under the lead of Hutu ethnic leaders. It is stated that the implication of children was done intentionally to assassinate their peers and complete other perpetrator’s “work”.¹³⁵ As it was indicated in the Special Report of UNICEF, total of 1191 children were detained during trial processes in the aftermath of genocide. 15 % of them were under age of 15.¹³⁶ Majority was incriminated by their own neighbours.

It is evaluated that from 5 to 7 thousand children took part in the civil war in Sierra Leone of 1991-2002 arose between Revolutionary United Front (hereinafter – RUF) and the official government.¹³⁷ Half of the RUF corps’ members was up to 14 years old, where the minimum age

¹³² APII, art. 4 (3)(c).

¹³³ *Children and Armed Conflict: Report of the Secretary-General*, A/75/873–S/2021/437, at 4.

¹³⁴ Helen Brocklehurst, 1999, “Children as Political Bodies: Concepts, Cases and Theories”, Doctoral Dissertation, University of Wales.

¹³⁵ Elizabeth D Wiseman, “Child Perpetrators on Trial: Insights from Post-Genocide Rwanda”, *New York University Journal of International Law and Politics* 53, 1 (2020): 293.

¹³⁶ “Child Prisoners as a Result of War Situations – UNICEF Responds” (undated report) in Reis 1997; Philip Gourevich, 1995, “Letter from Rwanda: After the Genocide”, *New Yorker*, December 18. <https://www.newyorker.com/magazine/1995/12/18/after-the-genocide>: “In the children’s cell, sixty-three boys, ranging in age from seven to sixteen”.

¹³⁷ Rachel Brett and Margaret McCallan, *Children: The Invisible Soldiers* (Sweden: Save the Children, 1996), 222.

was 8.¹³⁸ Reportedly guerrillas provided their co-combatants with cocaine and amphetamines, in order to make them fearless and easier to encourage. The broad use of children as soldiers, reasoned by numerous ranges of factors, from economic to cultural led to the permission to try them in the Special Court for Sierra Leone, the only international court where it is legally authorized to sue children from the age of 15.¹³⁹

The Lord's Resistance Army (hereinafter – LRA), is a well-known for the ideology of its founder Joseph Kony, referring to which children are “clean” from the influence of the modern world.¹⁴⁰ For this reason LRA is identifies as “*an army of children*”.¹⁴¹ According to the research conducted by The Berkeley-Tulane Initiative on Vulnerable Populations, till 2006 LRA members have kidnapped from 24,000 to 38,000 children.¹⁴² As evidence, children constituted between 70% and 80% of LRA's troops.¹⁴³ It was reported that minors from 7 years old were coerced to kill their relatives, ordinary civilians.¹⁴⁴

As of 2021, the U.S. Department of State recognises 72 foreign terroristic organizations.¹⁴⁵ Number of them are reported of conscripting, recruiting, and using children in their arms. The most prominent examples may be found in the practice of ISIL, Boko Haram, and Revolutionary Armed Forces of Colombia.

Islamic State of Iraq and the Levant (hereinafter – ISIL) is reported as one of the numerous children's “recruiters” on the territory of Iraq, Syrian Arab Republic, Lebanon.¹⁴⁶

¹³⁸ Krijn Peters and Paul Richards, “Why We Fight: Voices of Youth Combatants in Sierra Leone”, *Africa: Journal of the International African Institute* 68, 2 (1998): 186.

¹³⁹ Ilene Cohn, “The Protection of Children and the Quest for Truth and Justice in Sierra Leone”, *Journal of International Affairs* 55, 1 (2001): 1-34.

¹⁴⁰ “Stolen Children: Abduction and Recruitment in Northern Uganda”, Human Rights Watch, accessed 30 November 2021 <https://www.hrw.org/report/2003/03/28/stolen-children/abduction-and-recruitment-northern-uganda>.

¹⁴¹ Refugee Law Project, *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda. Working Paper No. 11* (Kampala: Makerere University, 2004), 20.

¹⁴² Phuong Pham, Patrick Vinck and Eric Stover, *Abducted: The Lord's Resistance Army and Forced Conscript in Northern Uganda* (Berkeley, University of California: Human Rights Centre, 2007), 3. <https://escholarship.org/uc/item/7963c61v>.

¹⁴³ Happold, *supra* note 20, 12.

¹⁴⁴ *Ibid*, 1.

¹⁴⁵ “Foreign Terrorist Organizations - United States Department of State,” U.S. Department of State, 16 March 2021, <https://www.state.gov/foreign-terrorist-organizations/>.

¹⁴⁶ *Children and Armed Conflict: Report of the Secretary-General*, A/75/873-S/2021/437, Annex 1 A.

Children are taken to the soldier training camps, where they are taught of different military tactics. They are encouraged to witness the captives' execution, sometimes are "honoured" to conduct beheading by themselves.¹⁴⁷

Bloom identified two main peculiarities of the ISIL use of children:

1) In comparison with non-state armed groups, where it is demanding to find out the evidence of children's presence, ISIL blatantly shows young recruits of their corps. The videos, published by ISIL, demonstrate children's enjoyment of being in the organisation, their participation in the processes of execution.¹⁴⁸

2) Along with Bloom, Benotman and Malik indicated the common approach of ISIL using adults and children in the same manner: performing the same functions, receiving the same training, participating in the attacks shoulder to shoulder.¹⁴⁹

It is estimated that from 2009 till 2017 approximately 8,000 children from the age of 4 were enrolled in Boko Haram – terrorist organization of Jamā'at Ahl as-Sunnah lid-Da'wah wa'l-Jihād.¹⁵⁰ In the 2020 Report of the Secretary-General, it was stated that within the 3-year period 1,385 cases of recruited children were confirmed.¹⁵¹

The prominent function assigned to children is the suicide bombing. Despite the decrease in the recent years, the present feature notably characterise the practice run by Boko Haram.¹⁵² In the period of January 2014 – February 2016 it was assessed that every 5th suicide bomber was a child.¹⁵³ The youngest were 7-year-old girls.¹⁵⁴ Child bombers usually positioned on the crowded

¹⁴⁷ Samantha Bradley, "What If Goliath Killed David: The Coalition to Counter ISIS and the Status and Responsibility of ISIS' Child Soldiers", *American University International Law Review* 33, 3 (2018): 578-580.

¹⁴⁸ Joanna Paraszczuk, 2015, "Islamic State's Teenage 'Caliphate Cubs' Appear in New Killing Video", *RadioFreeEurope, RadioLiberty*, March 30, <https://www.rferl.org/a/islamic-state-beheading-video-killing-video-alawites/26928149.html>.

¹⁴⁹ Mia Bloom, John Horgan and Charlie Winter, "Depictions of Children and Youth in the Islamic State's Martyrdom Propaganda", *CTC SENTINEL* 9, 2 (2016): 29-32.; Noman Benotman, Nikita Malik, *The Children of Islamic State*, (Quilliam Foundation, 2016), 25-26.

¹⁵⁰ U.N. Security Council, *Report of the Secretary-General on children and armed conflict in Nigeria*, S/2017/304 (10 April 2017), at 29-30.

¹⁵¹ U.N. Security Council, *Report of the Secretary-General on children and armed conflict in Nigeria*, S/2020/652 (6 July 2020), at 24.

¹⁵² *Report of the Secretary-General on children and armed conflict in Nigeria*, S/2020/652, at 25.

¹⁵³ UNICEF, *Beyond Chibok* (UNICEF Regional office for West and Central Africa, 2016), 2 <https://www.unicef.org/wca/media/906/file/Beyond%20Chibok%20Report%20English.pdf>.

¹⁵⁴ O'Neil and Van Broeckhoven, *supra* note 97, 194.

places with high likelihood to strike many people: markets, bus stations.¹⁵⁵ According to the report of former group member, there are cases when children consciously take the role of suicide bomber due to the loss of family, relatives, familiar environment.¹⁵⁶

The broad use of children by the Revolutionary Armed Forces of Colombia – People’s Army (hereinafter – FARC) was officially revealed during the hearings conducted by the Colombia’s Special Jurisdiction for Peace (hereinafter – JEP).¹⁵⁷ Totally no less than 18,500 children were used as soldiers for more than 20-year period of FARC existence.¹⁵⁸ The recruitment of children nowadays is still in force, conducted primary by the dissident groups of FARC.¹⁵⁹

The variety of push and pull factors determines the complexity of children’s use in the State and non-State armed forces and troops. The combination of social, economic, and individual components contributes to the voluntary and forced enrolment. Protracted armed conflicts which lead to the constant state of violence with the corresponding economic decline could be identified in most regions where the phenomenon of child soldier is of common nature. It can be traced mostly in the practice of the non-State actors – armed groups and terroristic organizations. Furthermore, the pursuit of became powerful, obtain new “family”, shelter and sufficient living are detected as a background of enlistment.

From the review of terroristic groups, it can be seen that the children constitute the important part of their combat. The social perception of their purity makes them perfect for mining and suicide bombing execution along with the contribution they make on the actual battlefield.

To this end the participation of child soldiers is not diminished. Despite the attempts to arrange and control the demobilisation processes, the interest in children in the war zones does not subside.

¹⁵⁵ Ibid; U. N. General Assembly, *Violations and abuses committed by Boko Haram and the impact on human rights in the countries affected: Report of the United Nations High Commissioner for Human Rights*, A/HRC/30/67 (9 December 2015), at 44: “In May 2015, for example, a 12-year-old girl was used to detonate a bomb at a bus station in Damaturu, State of Yobe, killing seven people”.

¹⁵⁶ O’Neil and Van Broeckhoven, *supra* note 97, 195.

¹⁵⁷ Luis Jaime Acosta, 2021, “Over 18,000 children recruited by Colombia’s FARC rebels -court”, *Reuters*, August 11, <https://www.reuters.com/world/americas/over-18000-children-recruited-by-colombias-farc-rebels-court-2021-08-10/>.

¹⁵⁸ Ibid.

¹⁵⁹ According to the Report of the Secretary-General on Children and armed conflict A/75/873–S/2021/437, 66 children were recruited in the troops of dissenting groups of former FARC during 2020.

3. AGE OF CHILDREN'S CRIMINAL RESPONSIBILITY FOR WAR CRIMES

The issue of minimum age of criminal responsibility is one of the core questions dealing with potential accountability of child soldiers. Age limits are the keystone in the scope of general matter of prosecution. They define the boundaries of personal jurisdiction and in this manner identify the prospective of an individual person to be brought to justice. Therefore, considerable attention should be paid to the study of main legal approaches towards the age of criminal responsibility of a child, especially related to the commitment of war crimes.

The age of criminal responsibility varies depending on the country's national law. Meanwhile, international human rights law clearly states that the best interests of the child are paramount despite the fact being in violation with the law without precise specification on the terms of age. This position will be analysed in more detail in this chapter.

3.1. Scope of International Statutory Framework¹⁶⁰

3.1.1. The Beijing Rules

The first recognition of the necessity to set the universally approved minimum age of criminal responsibility was enshrined in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice – “Beijing Rules” (hereinafter – Beijing Rules).¹⁶¹

On the Sixth Congress on the Prevention of Crime and the Treatment of Offenders held by United Nations in 1980 it was decided to develop the regulation through which the basic principles of administration of juvenile justice would be prescribed on the international level.¹⁶² The Committee on Crime Prevention and Control¹⁶³ was requested on behalf of the Congress to generate complex of rules which would “serve as a model for Member States” of the United Nations. Along with the Committee on Crime Prevention and Control the part in development had

¹⁶⁰ In subchapters 3.1.1. and 3.1.2. the notion of “age of criminal responsibility” would be observed in the scope of general international legal framework.

¹⁶¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), U.N. General Assembly resolution 40/33, A/RES/40/33 (25 November 1985) <https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf>.

¹⁶² United Nations Standard Minimum Rules for the Administration of Juvenile Justice, U.S. Department of Justice, National Institute of Justice, 145271, 1986, 2, accessed 2 December 2021 <https://www.ojp.gov/pdffiles1/Digitization/145271NCJRS.pdf>.

¹⁶³ The Committee on Crime Prevention and Control was further displaced by the newly established Commission on Crime Prevention and Criminal Justice. CCPCJ: Commission on Crime Prevention and Criminal Justice: Principal Policymaking Body of the United Nations in the Field of Crime Prevention and Criminal Justice, *United Nations Office on Drugs and Crimes*, accessed 2 December 2021 <https://www.unodc.org/unodc/en/commissions/CCPCJ/index.html>.

been taken by the United Nations Social Defence Research Institute, the United Nations regional institutes and the United Nations Secretariat.

The topic of age of criminal responsibility is regulated under Rule 4 of the Beijing Rules: “In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”¹⁶⁴ The peculiarity of the settled designation of the age of criminal responsibility is the reference to the subjective feature of the level of maturity.

As it is specified in the accompanying commentary to the Rule, the assessment of the possible accountability of a child should be based on “the moral and psychological components”¹⁶⁵ of child’s understanding of his/her actions in the frame of criminal responsibility. This approach is imprecise and leaves the decision to the discretion to court and judges.

Moreover, the margin of appreciation set in Fundamental perspectives of Beijing Rules grants the right to Member States to perform the corresponding rules “in the context of [their] economic, social and cultural conditions”.¹⁶⁶ By the desire of drafting group for Beijing Rules to be seen as universal and comprehensive international instrument in the sphere of juvenile justice, it may be seen as a path to the risk of disproportionality and discrimination. Each State is given the choice to define the minimum age of criminal responsibility according to its domestic customs and cultural particularities, which may transpire to be in violation of the universal basic rights and freedoms of a child.

The absence of a strict age limitation undermines the role of the Beijing Rules in the resolving and safeguarding the children’s rights in the fair administration of juvenile justice. The next step in attempts to regulate this issue was made by virtue of the Convention on the Rights of the Child.

3.1.2. Convention on the Rights of the Child

The issue of juvenile justice was indicated as one of the main questions to be included in the final text of CRC.¹⁶⁷ However, the first draft didn’t contain the relevant provisions. This was strongly criticized by the Social Development Division of the United Nations Centre for Social Development and Humanitarian Affairs in its Comment on the tentative text of CRC: “Paragraph

¹⁶⁴ The Beijing Rules, rule 4.

¹⁶⁵ The Beijing Rules, rule 4.

¹⁶⁶ The Beijing Rules, rule 1(5).

¹⁶⁷ UN. Commission on Human Rights, Working Group on a Draft Convention of the Rights of the Child, *Report of the Working Group*, E/CN.4/L.1468 (12 Mar 1979), at 6, reprinted in Office of the UN High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 1, New York, 2007.

1 does not make any reference to the fact that children, in principle, should neither be considered criminally responsible, nor be incarcerated...Accordingly, and with due respect to national laws, it should be clearly stated that there should be no criminal responsibility of children until they reach a certain age”.¹⁶⁸

Subsequently, the subject of children`s criminal responsibility was referred to the Crime Prevention and Criminal Justice Branch of the Social Development Division (hereinafter – the Branch). The Branch has already worked on the text of the Beijing Rules and thereof the language of one of the versions was borrowed mainly from the Beijing Rule No. 4:

States Parties recognize the right of children who are accused or recognized as being in conflict with the penal law not to be considered criminally responsible before reaching a specific age, according to national law, and not to be incarcerated. The age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts and circumstances of emotional, mental and intellectual maturity and stage of growth.¹⁶⁹

The offered wording was taken by the drafting group as a basis for a final provision on juvenile justice, introduced in para. 4, subpar. a of Art. 40 of CRC:

4. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a.) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.¹⁷⁰

The present provision lacks examination of “facts of emotional, mental and intellectual maturity”¹⁷¹, used as a basis for identification of age of criminal responsibility in Beijing Rules. Conversely, CRC designates the only criteria which should be taken into consideration – the minimum age below which children, accused to infringe the law, should be granted the presumption of innocence. The obscure interpretation of “minimum age” was castigated by

¹⁶⁸ “Comment by the Social Development Division, Centre for Social Development and Humanitarian Affairs,” E/CN.4/1989/WG.1/CRP.1, reprinted in Office of the UN High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, vol. 2, New York, 2007.

¹⁶⁹ “Background note submitted by the Crime Prevention and Criminal Justice Branch, Centre for Social Development and Humanitarian Affairs,” E/CN.4/1989/WG.1/CRP.1/ Add.2, reprinted in Office of the UN High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, vol. 2, New York, 2007.

¹⁷⁰ CRC, Art. 40 (3)(a).

¹⁷¹ The Beijing Rules, rule 4(1).

Cipriani to be “not sufficiently descriptive or practical [...] to serve as a conceptual foundation or meaningful legal provision for children’s rights”.¹⁷²

After revision of States Parties’ to CRC first reports, the Committee on the Rights of the Child (hereinafter – the Committee) reached the conclusion that the absence of clear understanding of CRC provision regarding juvenile justice was the obstacle for the implementation of appropriate measures in national legislation in safeguarding of children’s rights.¹⁷³ In 2007 the Committee issues General Comment No. 10 on Children’s Rights in Juvenile Justice with corresponding recommendations for establishing of “an administration of juvenile justice in compliance with CRC”.¹⁷⁴

The examination of provisions of Art. 40(3)(a) is presented in chapter C of the General Comment. In particular, “the Committee understands this provision as an obligation for States”¹⁷⁵ rather as an option of actions, where the minimum age of criminal responsibility means the following:

- children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure...
- children at or above the MACR¹⁷⁶ at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years ... can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC ...¹⁷⁷

The Committee recognises the possibility of committing the crime by “(very) young children”, whilst it stresses on the prohibition of conduction of “*penal law procedure*”, bearing in mind the principle of best interests of a child.¹⁷⁸ Moreover, the Committee underlines that the children’s age should be scrutinized at the time of crime commitment and “if there is no proof of age... the child shall have the right to the rule of the benefit of the doubt”.¹⁷⁹

¹⁷² Don Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (England: Ashgate Publishing Limited, 2009), 56.

¹⁷³ U.N. Committee on the Rights of the Child, *General Comment No. 10 (2007) Children’s Rights in Juvenile Justice*, CRC/C/GC/10 (25 April 2007), at 2.

¹⁷⁴ *General Comment No. 10 (2007)*, at 3.

¹⁷⁵ *General Comment No. 10 (2007)*, at 31.

¹⁷⁶ MACR – the minimum age of criminal responsibility.

¹⁷⁷ *General Comment No. 10 (2007)*, at 31.

¹⁷⁸ *General Comment No. 10 (2007)*, at 31.

¹⁷⁹ *General Comment No. 10 (2007)*, at 39, 72.

In para. 32 of the General Comment Committee contests its position on justification of Beijing Rules that the bottom line for the minimum age of criminal responsibility should be 12 years old. Through this the Committee encourages the perception of 12 years to constitute universal minimum age of criminal responsibility. States Parties` should either establish, in the event of absence on their domestic legislation the minimum age of criminal responsibility or increase the low level “to the age of 12 [...] and continue to increase it to a higher age level”.¹⁸⁰

Concurrently, the Committee recommends not to decrease the already existing age limit of 12: “At the same time, the Committee urges States parties not to lower their MACR to the age of 12”¹⁸¹ meanwhile appreciating the application of age of 14 or 16, which, according to the Committee, “contributes to a juvenile justice system”.¹⁸²

Furthermore, the Committee holds the position of elimination the use of two minimum ages of criminal accountability where the level of maturity is taken into consideration. Committee condemns this approach which can lead to misuse of judicial power resulting followed by the discriminatory traditions.¹⁸³

The States` practice in implementation of the Committee`s recommendations varies from State to State. The minimum age of criminal responsibility diverges respectively. The most prominent precedents can be found in the following cases:

- In Australia the age of criminal accountability was increased to 10 years old¹⁸⁴;
- In Georgia the minimum age of criminal responsibility was decreased from 14 to 12 years old in 2008, but then has reinstated 14-age limit¹⁸⁵;
- In Japan the corresponding age was lowered from the age of 16 to 14¹⁸⁶.

In its Concluding observations regarding the abovementioned alterations in the national legislation, the Committee expresses its dissatisfaction and resentment with the state of affairs in

¹⁸⁰ General Comment No. 10 (2007), at 32.

¹⁸¹ General Comment No. 10 (2007), at 33.

¹⁸² General Comment No. 10 (2007), at 33.

¹⁸³ General Comment No. 10 (2007), at 30.

¹⁸⁴ U.N. Committee on the Rights of the Child, the Sixteenth session, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, *Concluding observations of the Committee on the Rights of the Child: Australia*, CRC/C/15/Add.79 (10 October 1997), at 29.

¹⁸⁵ U.N. Committee on the Rights of the Child, the Forty-eighth session, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, *Concluding observations of the Committee on the Rights of the Child: Georgia*, CRC/C/GEO/CO/3 (6 Jun 2008), at 73.

¹⁸⁶ U.N. Committee on the Rights of the Child, the Forty-eighth session, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, *Concluding observations of the Committee on the Rights of the Child: Japan*, CRC/C/15/ Add.231 (26 Feb 2004), at 53.

juvenile justice of those States. Moreover, it strongly insists on the adjustment of the relevant provisions in the national legislation.

The scope of national legal framework in respect to the question of minimum age of criminal responsibility will be observed in subchapter 3.3.

The wording of Art. 40 of the Convention on the Rights of the Child and the following General Comment No. 10 do not accentuate on the issue of children accused of war crimes` commitment. These legal instruments do not provide the narrow observation related to the separate issues of children`s accountability, rather establishing the general principles of children`s rights in juvenile justice. Therefore, it should be presumed that there is no existing minimum age of criminal responsibility in regard to all children, specifically in the case of child soldiers.

3.1.3. Additional Protocols to 1949 Geneva Conventions

On the level of international humanitarian law there is no definition of the minimum age of criminal accountability in the event of war crimes` commitment. Nonetheless, the drafting process and the further interpretation of API Art. 77 had raised the question of conformity of this kind of provision`s insertion.

As it was already analysed in Chapter 1 of the present research, Art. 77 of API determines the age limits of children`s recruitment and enlistment in the armed forces, and their participation in warfare.¹⁸⁷ During the discussion on content of Art. 77, delegation from Brazil offered the following amendment: “Penal proceedings shall not be taken against, and sentence shall not be pronounced on, persons who were under sixteen years of age at the time the offence was committed”.¹⁸⁸ The age of 16 was chosen intentionally to grasp the espousal of the biggest possible number of States.

The Brazilian delegation`s proposal evoked discussions on either decreasing of age limit or denial of the offer itself. Representative from Japan argued the suggestion to lower the minimum age of responsibility to 14 in regard to the national legislations of number of States. The aim of this motion was to make the amendment “more acceptable”.¹⁸⁹

Opposed view was held by the representative of Canada. He accentuated that “the fixing of the age of criminal responsibility was a national responsibility which each State would exercise

¹⁸⁷ API, Art. 77.

¹⁸⁸ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974–1977, Volume III (Bern, Federal Political Department, 1978), Amendments to Draft Additional Protocol I and Annex: Article 68, Protection of Children [Art. 77 of the Final Act]: Brazil, CDDH/III/325 (30 Apr 1976).

¹⁸⁹ U.N. Committee III, 3rd Sess., 45th mtg., CDDH/III/SR.45 (5 May 1976), at 12.

having regard to its own peculiar culture, state of development and requirements”¹⁹⁰ and determination of this aspect would constitute the interference into sovereign rights of a State.

The delegate from Italy recalled the principle of universal recognition “a child, whatever its age, could not be sentenced if, at the time of the offence, it was incapable of cognizance”.¹⁹¹ The Committee III on behalf of which the discussions regarding the wording of Art. 77 of API were held, confirmed the existence of such principle of general international law, although stressing on assigning of this question to the domestic law of States.¹⁹²

The delegations reached the conclusion that due to the difficulty of unification of national legislation in the sphere of minimum age of criminal responsibility this point should be left to the discretion of States. However, due regard should be given to the general principle of prohibition of any prosecution of children who at the time of being in violation of penal law couldn't realize the repercussions of their acts.

Despite the absence of age limit's imposition, some researchers consider that from the wording of para. 2 of Art. 77 of API it can be presumed that the prosecution of children under 15 years is prohibited in the sphere of international humanitarian law. The reasoning for such assumption lays in the logics analysis: if children under age of 15 are immature to participate in hostilities, then they are immature to be considered criminally responsible for war crimes committed while being a part of State armed forces or non-State armed groups.¹⁹³

This way of interpretation of Art. 77 para. 2 is considered baseless as there is no evidence of demarcation of the criminal responsibility's limitation in the text itself. This reading is more determined by the drafting discussions about the possible introduction of this kind of norm.¹⁹⁴

The only restraint established in API and APII on the matter of age is the prohibition of death penalty's execution on persons who at the moment of war crime commitment were under age of 18.¹⁹⁵

3.2. International Courts and Tribunals

¹⁹⁰ CDDH/III/SR.45, at 24.

¹⁹¹ U.N. Committee III, 4th Sess., 49th mtg., CDDH/III/SR.59 (10 May 1977), at 1,17-18.

¹⁹² U.N. Committee III, *Report of Committee III*, CDDH/407/Rev. 1 (17 May – 10 June 1977), at 65.; this principle was further confirmed in the Rome Statute of the International Criminal Court, Art. 30 (2)(b).

¹⁹³ UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Working Paper No. 3, Children and Justice During and in the Aftermath of Armed Conflict* (September 2011), 34, accessed 2 December 2021 <https://www.refworld.org/docid/4e6f2f132.htm>.

¹⁹⁴ Matthew Happold, “The Age of Criminal Responsibility in International Criminal Law”, *The Hague: T.M.C. Asser Press* (2006): 3. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934567.

¹⁹⁵ API, Art. 77(5); APII Art. 6(4).

3.2.1. International Criminal Court

The question of age of criminal responsibility under the jurisdiction of the International Criminal Court (hereinafter – ICC) was subject to the numerous alterations and debates. The variety of proposed ages was dictated by the differences in the perception of members of The Rome Statute Preparatory Committee.¹⁹⁶

The premier offer, formulated by M. Cherif Bassiouni, used the age of 18 as the threshold for bearing the criminal responsibility.¹⁹⁷ However, there were no indications on the time when the accused person should be 18.

In Updated “Siracusa Draft” on the 1994 I.L.C. Draft Statute for an International Criminal Court, presented in 1996, the verge of accountability was put at the age of sixteen at the time of crime commitment. Moreover, in the event of proceedings over person between the sixteen and twenty one the decision should be based on the level of maturity.¹⁹⁸

Preparatory Committee in the Report of the Establishment of an International Criminal Court of 1996, presented two proposals with contrary views on the age of criminal responsibility:

- 1) 1. A person under the age of *[twelve, thirteen, fourteen, sixteen, eighteen]* at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time];
2. [A person under the age of *[twelve, thirteen, fourteen, sixteen, eighteen]* at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time];
- 2) [Persons *aged 13 to 18 years* at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their

¹⁹⁶ Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (München: Beck, 2016), 1030, at 6.

¹⁹⁷ M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht: Nijhoff, 1987), Appendix – General Part, article V, section 1.1, 152.

¹⁹⁸ Triffterer & Ambos, *supra* note 196, 1030, at 6.

sentence may give rise to the application of special modalities specified in this Statute.].¹⁹⁹

It should be underlined that in the notes accompanying the proposals Preparatory Committee refers to the provisions of the international human rights treaties which presumably prohibit prosecution of children. This fact was objected by Ms. McBride stating that supposition should be regarded as incorrect.²⁰⁰ Furthermore, the CRC prescribes that if the child is regarded as have been in violation of penal law, his or her “sense of dignity and worth” should be preserved through the whole process of proceedings.²⁰¹

In the result of the Rome Conference the final wording of provisions providing the age of criminal responsibility was formulated as follows: “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”²⁰²

From the title of Art. 26 “*Exclusion of jurisdiction over persons under eighteen*” it can be indicated that the drafters of the Rome Statute reached the conclusion that it would be more sufficient to indicate that the prosecution of children would go beyond the scope of ICC jurisdiction. The rationale of this decision is connected to the subsequent factors:

- Prevention of contradiction with the national judicial systems of States;
- Deficiency of appropriate capabilities to evaluate the maturity level of an accused child;
- Financial limitation of the ICC.

1. Prevention of contradiction with the national judicial systems of States

Criminal jurisdictions of States varies in their definitions of minimum age of criminal responsibility. The further search for universal criterion would be insufficient. The justification was then confirmed by the Office of the Special Representative of the Secretary-General for children and armed conflict, that “the decision on whether to prosecute should be left to [the discretion of] States.”²⁰³

2. Deficiency of appropriate capabilities to evaluate the maturity level of an accused child

¹⁹⁹ U.N. General Assembly, 51st Sess., *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II (Complication of proposal)*, Supplement No. 22A, A/51/22 (1996), 87. Emphasize is put to highlight the differences in proposed age limitation in those proposals.

²⁰⁰ McBride, *supra* note 42, 53.

²⁰¹ CRC, Art. 40(1).

²⁰² The Rome Statute, Art. 26.

²⁰³ *Working Paper No. 3, Children and Justice During and in the Aftermath of Armed Conflict*, 37.

The assessment of child's maturity and understanding of his or her acts' consequences demands the knowledge of social surroundings and behavioural peculiarities of a child. The environment where children are raised has a great impact on the formation of minor's consciousness, as it was already discussed in the Chapter 2 of the present thesis. To cover all present distinctiveness requires special facilities and training in juvenile delinquency.²⁰⁴ Unfortunately, the ICC is unequipped to exercise this level of appraisal, leaving the place to States.

3. Financial limitation of the ICC

Additionally, it was argued that the court should be primarily focused on the prosecution of political and military leaders.²⁰⁵ Under their particular guidance children are ought to commit war crimes and consequently infringe the law. The limitation of resources accessible to the ICC impedes the children's prosecution on the international level, concentrating more on the command-and-control authority.

In the light of foregoing considerations, it was concluded that "it appears not only justifiable but also preferable to leave the group under eighteen to the national courts"²⁰⁶ as to the notion of complementarity of the ICC and the primacy of States' criminal jurisdiction.²⁰⁷

It is pointed by Happold that the Art. 26 of the Rome Statute is of rather procedural nature than substantive, keeping in mind the context of the article's drafting history.²⁰⁸ Consequently the exclusion of children under age of 18 from the jurisdiction of the ICC does not lead to the full prohibition of children's prosecution for crimes under international law. They still bear the responsibility for the crimes enlisted under the Art. 5 of the Rome Statute.²⁰⁹ However, the amount of the liability would be hinged on the national law of States.

3.2.2. Special Court for Sierra Leone

The Special Court for Sierra Leone (hereinafter – SCSL) is the unique international court where it is allowed for children to be tried for committed war crimes.²¹⁰ The ground for granting this competence to the SCSL lays in the cultural consideration of the Southern Sierra Leone.

²⁰⁴ Triffterer & Ambos, *supra* note 196, 1034, at 13.

²⁰⁵ UNICEF Innocenti Research Centre, No Peace without Justice, *International Criminal Justice and Children* (Florence, 2002), 55.

²⁰⁶ Triffterer & Ambos, *supra* note 196, 1034, at 15.

²⁰⁷ Ibid; The Office of the Prosecutor, *Informal expert paper: The principle of complementarity in practice*, ICC-01/04-01/07-1008-AnxA (2003), 3. https://www.icc-cpi.int/RelatedRecords/CR2009_02190.pdf.

²⁰⁸ Happold, *supra* note 20, 79.

²⁰⁹ The Rome Statute, Art. 5: the crime of genocide, crimes against humanity, war crimes, the crime of aggression.

²¹⁰ Vesselin Popovski and Karin Arts, *Policy Brief: International Criminal Accountability and Children's Rights* (Japan: United Nations University, 2006), 4.

The widely exercised phenomenon of child soldiering arises from different practices of social relationships, one of which is the initiation in the secret societies of Poro and Sande of the region of Southern Sierra Leone. It is believed, that through initiation process, implying brutalization and killing of wildfowls, children achieve the status of adults, who are regarded as the full human beings.²¹¹

Another example of practice is patron-client relationships, where children, after “*age of sense*”, constituting from 6 to 8 years old, settled with distant relatives. There children are laboured for the foster household, “*subjected to verbal or physical abuse*”, suffering, and neglect. Those abusive relations are believed to be the mechanism through which children would acquire the personal qualities needed in the future life.²¹²

According to Hofmann, the participation in the hostilities may be compared to the process of initiation, “the passage to the manhood”.²¹³ In other instances the enlistment in the military forces is viewed as a means of security guarantee and personal development.²¹⁴ This perception, established on the social and cultural levels, displayed in the Sierra Leone’s military forces act, where, at the time of 1994, recruitment of children with parental consent was legal with no age limitation.²¹⁵

Institution of the Special Court for Sierra Leone did not lack discussions about its jurisdiction over children under 18 years old. Representatives of Sierra Leone’s community pushed for responsibility for children committed war crimes, whilst international non-governmental human rights organizations stood for children’s exclusion from SCSL jurisdiction.

In the report on the formation of SCSL Secretary-General of the United Nations determined, that “the possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma”²¹⁶. However, it should be taken into consideration that “the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability”.²¹⁷

²¹¹ Danny Hoffman, “Like beasts in the bush: synonyms of childhood and youth in Sierra Leone”, *Postcolonial Studies* 6, 3 (2003): 300.

²¹² Kelsall, *supra* note 88, 152.

²¹³ Hoffman, *supra* note 211, 303.

²¹⁴ William P. Murphy, “Military patrimonialism and child soldier clientalism in the Liberian and Sierra Leonean civil wars”, *African Studies Review* 46, 2 (2003): 74.

²¹⁵ Kelsall, *supra* note 88, 158.

²¹⁶ U.N. Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000), at 32.

²¹⁷ *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, at 35.

Sierra Leone's society sees child enrolled in armed forces as full individuals who should take responsibility for his or her illegal actions, which was pointed out one more time by Security Council mission: "In the view of the Government of Sierra Leone, the Court should prosecute those child combatants who freely and willingly committed indictable crimes".²¹⁸

The long-term process of consultations between the Secretary-General and Security Council considering wording of the present Art. 7 of the Statute of SCSL focused mainly on the age limit and the scope of guarantees prescribed for juvenile offenders.

The drafts prepared by the Secretary-General demonstrated the motivation of the latter to formulate the Statute in the way for it to be the illustration of how provisions regarding children's prosecution can be formulated on the level of international jurisdiction.²¹⁹ This approach wasn't supported by the Security Council, which preferred article to be more of general language, purporting prosecution of persons of command and leadership roles at first stage.²²⁰

The request of the Security Council was embedded in the Art. 1 of the Statute of SCSL, prescribing the prosecution of "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law".²²¹ The leadership benchmark was discarded in the Secretary-General's final draft arguing that this would cover only leadership of political and military nature, omitting other people accountable for crimes' commission.²²²

Consequently, the compromised was achieved in the following provision:

The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come 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.²²³

²¹⁸ U.N. Security Council, *Report of the Security Council mission to Sierra Leone*, S/2000/992 (16 October 2000), at 50.

²¹⁹ Happold, *supra* note 194, 7.

²²⁰ *Ibid*, 8.

²²¹ Statute of the Special Court for Sierra Leone, Art. 1 (1).

²²² *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, at 30.

²²³ Statute of the Special Court for Sierra Leone, Art. 7 (1).

In the para. 2 of Art. 7 there are the safeguards guarantying protection of juvenile offenders` rights.²²⁴

In the case history of the SCSL there has been no proceedings considering prosecution of children under age of 18. Moreover, the Founding Chief Prosecutor of SCSL David Crane underlined that he would exercise the discretion, implied by the Secretary-General, not to incriminate children.²²⁵ The attention should be given rather to those of great responsibility.²²⁶

The Special Court for Sierra Leone is the only international criminal court where we can find the place for children`s prosecution for war crimes. On the other hand, till today this feature preserves its nominative nature with no real cases.

3.3. National Legal Framework

The commitment to fulfil norms of international law is prescribed in the international treaties which States are party to. Under common Art. 1 of 1949 Geneva Conventions and API, States are required to “undertake to respect and to ensure respect” for international humanitarian law provisions, laid down in the present Conventions and API.²²⁷

Pursuant to articles 49²²⁸, 50²²⁹, 129²³⁰, 146²³¹ of the corresponding Conventions, States Parties are consigned to enact their domestic legislation to arrange efficient “penal sanctions to persons committing, or ordering to be committed, any grave breaches”²³² listed in Conventions. Art. 85 of API apart from breaches and grave breaches determined in itself, makes a reference to the context of Geneva Conventions.²³³

In the ICRC study of customary international humanitarian law, the Committee indicated the rules which dovetail into provisions of 1949 Geneva Conventions and API.

²²⁴ Statute of the Special Court for Sierra Leone, Art. 7 (2).

²²⁵ “Special Court will not Indict Children – Prosecutor”, *The New Humanitarian*, accessed 3 December 2021 <https://www.thenewhumanitarian.org/report/35524/sierra-leone-special-court-will-not-indict-children-prosecutor>.

²²⁶ Aptel, *supra* note 8, 33.

²²⁷ The Geneva Conventions of 12 August 1949, Common Art. 1; API, Art. 1.

²²⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 U.N.T.S. 31, Art. 49.

²²⁹ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 U.N.T.S. 85, Art. 50.

²³⁰ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 U.N.T.S. 135, Art. 129.

²³¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287, Art. 146.

²³² Fourth Geneva Convention, Art. 146(1).

²³³ API, Art. 85 (1).

Rule 157 specifies that national courts of States are provided jurisdiction over war crimes.²³⁴ The present rule is applicable during the times of either international or non-international armed conflict. “The right of State to vest universal jurisdiction in their national courts for war crimes”²³⁵ is established through the international treaties` law and the correlative domestic legislation.²³⁶

Rule 158 echoes the States` duty to examine war crimes with further prosecution of suspects.²³⁷ The criminal jurisdiction of States in regard to war crimes can be exercised over their nationals, their armed forces, and over crimes committed on their territory. Though the customary nature of rule and its exercise during times of both international and non-international armed conflicts, some States declared amnesties for war crimes committed during non-international armed conflict. Consequently, such practice was disapproved by international community and has been found as illicit by domestic courts of considered States.²³⁸

After the International Criminal Court was founded, States which ratified the Rome Statute now should be in compliance with the complementarity principle established in the Rome Statute additionally to the provisions of Geneva Conventions and API. As it was mentioned in the subchapter 3.2.1 of the present research, States are granted the right to be the first in the prosecution of international crimes, in respect of their “primary jurisdiction”.²³⁹

Despite the feasible will of States to refer the case to ICC, this “may suggest the inadequacy and inefficiency of a state's criminal justice system”.²⁴⁰

The implementation of international crimes` prosecution provisions into the national law is followed by the issue of jurisdiction *in personam*: from which age the person may be tried for purported international crimes` commitment before domestic courts and thus are children capable of being prosecuted for them?

The answer should be searched in the States` age limitation of criminal prosecution, as long as breaches and grave breaches of international humanitarian law are incorporated into

²³⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (Cambridge: Cambridge University Press, 2005), Rule 157.

²³⁵ Ibid, Rule 157.

²³⁶ Ibid, 604-605.

²³⁷ Ibid, Rule 158.

²³⁸ Ibid, 609.

²³⁹ “*Informal expert paper: The principle of complementarity in practice*, supra note 332, 3.

²⁴⁰ Knut Dormann and Robin Geib, “The Implementation of Grave Breaches into Domestic Legal Orders”, *Journal of International Criminal Justice* 7, 4 (2009): 718.

domestic legislation where States define by themselves who and in which circumstances can be taken before court and bear criminal responsibility.

As it was analysed in the subchapter 3.1., States must provide “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.²⁴¹ Consequently, the minimum age of criminal accountability was defined by the Committee on the Rights of the Child as 12 years old with possible increasing.²⁴² However, States` practice shows the opposite, by establishing at some instances minimum age lower than 12:

- England and Wales, Northern Ireland: children can hold liability from the age of 10²⁴³;
- Switzerland: minors can be prosecuted from the age of 10²⁴⁴;
- Antigua and Barbuda: the age limit of criminal responsibility constitutes 8 years old²⁴⁵;
- Cameroon: minors can bear criminal responsibility from the age of 10²⁴⁶;
- Kenya: children be held responsible from the age of 8²⁴⁷.

Small number of States prescribes no possibility of laying criminal responsibility for children. The corresponding provisions can be observed in the national law of Peru²⁴⁸, Uruguay²⁴⁹, Brazil²⁵⁰.

The range of different minimum ages of criminal responsibility at the national level alludes to the conclusion that in fact minor of 8 years old can be held liable for international crime, which would be contrary to the principle of best interests of a child. As it was pinpointed by Happold, granted permission to States to determine their own perception of jurisdiction *in*

²⁴¹ CRC, Art. 40(3)(a).

²⁴² *General Comment No. 10 (2007)*, at 32.

²⁴³ England and Wales, Children and Young Persons Act 1933, Art. 50, accessed 6 December 2021 <https://www.legislation.gov.uk/ukpga/Geo5/23-24/12>; and Northern Ireland, The Criminal Justice (Children) Order 1998, Art. 3, accessed 6 December 2021 <https://www.legislation.gov.uk/nisi/1998/1504/article/3/2006-01-01>.

²⁴⁴ Switzerland, Loi fédérale régissant la condition pénale des mineurs (2003), Art. 3(1), accessed 6 December 2021 <https://www.fedlex.admin.ch/eli/fga/2003/680/fr>.

²⁴⁵ Antigua and Barbuda, Child Justice Act 2015, Section 5.

²⁴⁶ Cameroon, Code Penal (12 June 1967), Art. 80 (1), accessed 6 December 2021 http://www.vertic.org/media/National%20Legislation/Cameroon/CM_Code_Penal_Cameroun.pdf.

²⁴⁷ Kenya, Penal Code, Section 14 (1), accessed 6 December 2021 <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2063>.

²⁴⁸ Peru, Criminal Code (9 April 1991), Art. 20 (2).

²⁴⁹ Uruguay, Código De La Niñez Y La Adolescencia (7 September 2004), Ley N° 17.823, accessed 6 December 2021 <https://www.impo.com.uy/bases/codigo-ninez-adolescencia/17823-2004>.

²⁵⁰ Brazil, Child and Adolescent Statute, Law n° 8.069 (13 July 1990).

personam in relation to grave breaches of international law would alter the extension of their international obligations.²⁵¹ From the perspective of universal nature of international crimes the fact that liability of individual bases on the place of prosecution would be seen as discriminative.

Meanwhile, the special attention should be paid to the Rome Statute's development process, where it was concluded that the question of children's prosecution should be left for States' discretion.²⁵²

In the light of all foregoing considerations, the issue of non-existence of minimum age of criminal responsibility for international crimes should be revisited, in view of the international principles of children's rights. The establishment of one universal approach will function as a facilitation tool in the fragmented international instruments.

Even though this should be executed in a way of non-violation of the principle of State sovereignty, epitome in the States' discretion mentioned earlier.

²⁵¹ Happold, *supra* note 194, 2.

²⁵² Triffterer & Ambos, *supra* note 196, 1034, para. 15.

4. POST-WAR PROSECUTION OF FORMER CHILD SOLDIERS

4.1. Dual Concept of Child Soldier

The question of child soldiers' dualism is the leading issue in answering to the matter should the children be accountable for the war crimes' commission. The oxymoron of victim and perpetrator has not reached the conclusion at the international legal and scholars' levels, therefore it should be analysed more deeply in order to resolve the issue whether child soldiers should bear responsibility for crimes committed.

There is a widespread opinion among the international institutions that children should be perceived, in the first place, as victims.²⁵³ The general prohibition of their compulsory recruitment under the age of 18 by the State armed forces and non-State armed groups correspondingly sets the concept of the *de-facto* victimization.²⁵⁴

"Victimization" embraces the scope of violence faced by children while being in the armed forces and groups. Could it be the sexual assault, loss of the closed ones or hometown, physical injuries, psychological harm caused by the surrounding military environment. Continuing on the line of "child" definition embodied in the Convention on the Rights of the Child, any actions taken against the basic rights and core needs of a child would be defined as a violation of the latter, therefore labelling children as victims of the actions considered.²⁵⁵

The illustration of child soldiers through the image of "*faultless passive victims*" was delivered by Michel Drumbl.²⁵⁶ Drumbl depicts them as powerless, weak, very young children who were targeted and manipulated by higher commanders in order to perform duties "*of war*".²⁵⁷ Contrastingly, the stories of child soldiers in Columbia and ISIL demonstrate that this is not the case for the overall view.²⁵⁸ Provided that the social obedience and coercion constitute the

²⁵³ Kiyala, *supra* note 21, 164; see Report of the Secretary-General on children and armed conflict in Nigeria S/2017/304 at 92: "...call upon the Government of Nigeria to ensure that all children allegedly associated with armed groups are primarily treated as victims"; U.N. Security Council, *Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic*, S/2018/969 (30 October 2018) at 62: "All children allegedly associated with opposing armed forces or armed groups and captured in the course of military operations should be treated primarily as victims of recruitment and use".

²⁵⁴ Convention on the Rights of the Child, Art. 38(1); OPAC, Art. 2, 4; API, Art. 77 (2); APII, Art. 4(3)(c) ; ILO Convention No. 142, Art. 3(a).

²⁵⁵ Hartjen & Priyadarsini, *supra* note 98, 1-6.

²⁵⁶ Mark A. Drumbl, *Reimagining child soldiers in international law and policy* (Oxford: Oxford University Press, 2012).

²⁵⁷ Kiyala, *supra* note 21, 118.

²⁵⁸ Johanna Higgs, *Militarized Youth: The Children of the FARC* (Cham, Switzerland: Palgrave Macmillan, 2020), 140; Islamic State's Teenage 'Caliphate Cubs' Appear in New Killing Video 2015.

significant part of general pull factors of children's involvement in the armed forces and groups, the voluntarily joining is depicted as a case in past and ongoing conflicts.²⁵⁹

Identification of child soldiers as victims of their headmen is linked with the view of their inadmissibility to bear responsibility for committed atrocities. Being the injured party diminishes their guiltiness over crimes considered.

In the works of Chein Reis²⁶⁰ and Cecile Aptel²⁶¹ the rejection of children's accountability was aligned with the conception of accountability be put on those who hold the positions of authority while planning and orchestrating violent activities, which is *the command responsibility doctrine*. *The command responsibility doctrine* provides that a military commander, a superior acting in this position in rebel group or a terrorist organization shall be criminally responsible in respect to the crimes committed by minor soldiers, where the direct or personal participation is not required.²⁶²

The doctrine was further corroborated by the international criminal jurisdiction's approach. According to it, children are excluded as not bearing the greatest liability for crimes committed.²⁶³ Authors such as Reis²⁶⁴ and Aptel²⁶⁵ indicated that the whole extent of responsibility should be put on the recruiters of children, firstly, for committing the war crime itself by enlisting the minors, turning them into "victims", and, secondly, for controlling atrocities' commitment under their supervision.

The contribution to the abovementioned approach was made by Grossman, who argued that from the language of OPAC the general possibility of children being responsible should be eliminated.²⁶⁶ However, from the perspective of international law on the human rights, "children [are not considered] to be innocent per se"²⁶⁷, which can be supported by the numerous discussions on the establishment of minimum age of criminal responsibility for minors, outlined in the Chapter 3 of the present thesis.

²⁵⁹ McIntyre, *supra* note 90, 91-99; Høiskar, *supra* note 4, 340-360.

²⁶⁰ Reis 1997.

²⁶¹ Aptel, *supra* note 8.

²⁶² Guénaél Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), 307.

²⁶³ Aptel, *supra* note 8, 20.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Grossman, *supra* note 5, 342.

²⁶⁷ Noëlle Quénivet, "Does and Should International Law Prohibit the Prosecution of Children for War Crimes?", *The European Journal of International Law* 28, 2 (2017): 440.

Despite the aim of international community to purify child soldiers through the emphasis on their victimized image, the fact of their implication in the criminal acts` execution itself should not be made incidental. As it was stated by Drumbl, according to the *circumscribed actor model* person “can do, [has] the ability not to do, and the ability to do otherwise that what he/she actually has done”.²⁶⁸ Children should be considered “as actors in their own capacity”²⁶⁹ without being fully devoid of agency, as was further indicated by Honwana.²⁷⁰

The significant role is played by the communities suffered from child soldiers` activities. The overall indignation to the phenomenon of child recruitment into armed forces and paramilitary groups is reinforced by the public requirement for children being recognized accountable for their own actions, as it was in Rwanda, Democratic Republic of Congo, Sierra Leone.²⁷¹

To give an illustration of the real ability of community to “push” desired goals one can recall the negotiation process during SCSL establishment. Despite the efforts made by the Secretary-General and the Security Council of the United Nations, the Art. 7 of the Statute of SCSL fixed the personal jurisdiction over people from the age of 15.²⁷²

It should be noted that the hunger of post-war communities does not cover children exclusively. It incorporates the whole range of perpetrators whether they are adults or minors. The amount of physical, moral, and material suffer of the victim does not alter depending on the age of the alleged perpetrator.²⁷³ Therefore the limitation of justice to the adults would only erase the right of victims to know the truth, to receive justice and corresponding reparations.²⁷⁴

In the international humanitarian law, there is no general prohibition of children`s prosecution for war crimes. What is more, it can be concluded that in fact it is permitted.

The Art. 77, para. 5 of AP I states that the death penalty is proscriptive on “persons who had not attained the age of eighteen years at the time the offence was committed”.²⁷⁵ That provision is further duplicated in Art. 6, para. 4 of AP II²⁷⁶, thereby not distinguishing the nature of, on the one hand, legal protection granted to the minors, and, on the other hand, responsibility incurred on

²⁶⁸ Drumbl, *supra* note 256, 215.

²⁶⁹ Kiyala, *supra* note 21, 158.

²⁷⁰ Honwana Alcinda, *Child soldiers in Africa* (Philadelphia: University of Pennsylvania Press, 2006), at 69.

²⁷¹ Joyce Hackel, 1995, “When Kids Commit Genocide”, *Christian Science Monitor*, December 5, <https://www.csmonitor.com/1995/1205/05062.html>; Kiyala, *supra* note 21; Kelsall, *supra* note 88.

²⁷² Statute of the Special Court for Sierra Leone, Art. 7 (1); more information can be found in the Subchapter 3.2.2. of the present Thesis.

²⁷³ Kiyala, *supra* note 21, 157.

²⁷⁴ *Ibid*, 93.

²⁷⁵ API, Art. 77(5).

²⁷⁶ APII, Art. 6(4).

them. The similar reassertion is found in the Art. 26 of the Rome Statute. Besides limiting its jurisdiction to the people above 18 years old, it did not prescribe the full forbiddance for minors' prosecution by the agency of national courts.

In the preamble of the Rome Statute to the International Criminal Court it is prescribed that "the most serious crimes of concern to the international community as a whole must not go unpunished".²⁷⁷ Under the term "*the most serious crimes*" the following range of war crimes should be understood: grave breaches of 1949 Geneva Conventions and Additional Protocol I to them; serious violations of customary law in the time of international armed conflicts; and serious violations of common Article 3 to 1949 Geneva Conventions during armed conflict of non-international character.²⁷⁸

In relation to the children who are members of terroristic organisations, their offences do not fall from the responsibility scope. As it is prescribed by API and APII, the acts of terrorism with the spreading of fear and panic among the civilian population is prohibited.²⁷⁹

Thereof, the activities exercised by minor members of non-State armed groups and terroristic organisations must be penalized as constituting the "most serious crimes".

The selection of crimes was exercised in regard to the following aspects: the norm should be the one of international customary law nature and lead to the individual criminal responsibility.²⁸⁰

In the light of individual criminal responsibility principle child soldiers' correspondence can not be denied. According to the Art. 25⁸ of the Rome Statute, person should be found guilty and bear responsibility if he or she commits the crime which is recognised as such under the jurisdiction of the ICC.²⁸¹ Although children fall out of the ICC personal jurisdiction, the provisions of SCSL set the same range extent of individual criminal responsibility within its own jurisdiction.²⁸²

The Art. 33 of the Rome Statute may be perceived as a key clause which could be contributing to the "victimization" of children. Pursuant to it a person can be relieved of criminal responsibility if he or she committed the crime under the order of the Government or a superior,

²⁷⁷ The Rome Statute, preamble.

²⁷⁸ The Rome Statute, Art. 8².

²⁷⁹ API, Art. 51(2); APII, Art. 4(2)(d), Art. 13(2).

²⁸⁰ Knut Dormann, "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Plank Yearbook of United Nations Law* 7 (2003): 345.

²⁸¹ The Rome Statute, Art. 25⁸(3)(a).

²⁸² Statute of the Special Court for Sierra Leone, Art. 6 (1).

where either it was his or her legal duty, or the order was not evidently unlawful for the person.²⁸³ It is worth noting that, comparing to the provisions of the Rome Statute, the Statute of SCSL does not number the required factors to be established in acquiring whether the person under command still bears the responsibility. On the contrary, the abovementioned component may be considered as mitigating factor but not as a way to the amnesty.²⁸⁴

The knowledge of activity's unlawfulness ties strongly with the *mens rea* – necessary element of war crimes' *corpus delicti*.

In accordance with wording of the Rome Statute, which enshrines the traditional common law, *mens rea* – “guilty mind”, – person shall have the intent to commit a crime along with the knowledge of further consequences.²⁸⁵ However, the application of *mens rea* to the children is believed to be irreconcilable. Due to the low level of psychological and mental development it is difficult for children to differentiate between right and wrong, to resist superiors' order.²⁸⁶

Meanwhile, after joining the military troops, children are to obtain “military mentality” through the cycle of constant violence.²⁸⁷ What's more, as it was shown in the Chapter 2 of the present thesis, children acquainted to the violence perceive it as a tool in reaching personal goals with clear understanding of what the nearest consequences would be.²⁸⁸

The abandonment of pure “victimhood” approach in favour of dual status would resolve the present legal impasse. In addition to this, the perception of children as perpetrators would elucidate the complexity of their criminal responsibility issue. While regarding children in a separate victimized way, the part of their, children's, victims would be left unseen.

Different cultural backgrounds and political contexts induces diverge local societies' views on the former child soldiers. That led to the ambiguous perception of children by numerous scholars as victims of their perpetrators, and, in turn, perpetrators of others, which in turn indicates the growing awareness of the issue's resolution need.

The crimes committed by child soldiers shall not be left disregarded. The appropriate justice would bear, firstly, the educative character. Quénivet accentuated on the need of understanding by children the blameworthy nature of their actions.²⁸⁹ Moreover, society in the person of international and national justice should point out the realistic imagines of child soldiers

²⁸³ The Rome Statute, Art. 33 (1).

²⁸⁴ Statute of the Special Court for Sierra Leone, Art. 6 (4).

²⁸⁵ The Rome Statute, Art. 30 (1), (2).

²⁸⁶ Nobert, *supra* note 9, 38.

²⁸⁷ Ibid, 33.

²⁸⁸ Higgs, *supra* note 258, 233.

²⁸⁹ Quénivet, *supra* note 267, 451.

being perpetrators.²⁹⁰ In particular cases, the recognition of children's accountability would be in their best interests, bearing in mind the possibility of child soldiers' full awareness and intent to perform atrocities, which contributes to *the mens rea* evidence.²⁹¹

Child soldiers should be recognised accountable for the war crimes enlisted in the Rome Statute. Prosecution of child soldiers would have the deterrent effects on the further recruitment of child soldiers.²⁹² While perceiving them as fully escaped from the responsibility, the enlistment into the State armed forces, non-State rebel groups, and terrorist organizations would be never terminated.

4.2. Accountability of Child Soldiers

Accountability of crime perpetrators remains crucial for the human rights' protection. Victims' suffering should not be kept ignored. The restoration of the truth and dignity lies in the very core of safeguarding the basic human rights.

Child soldiers within the framework of military "everyday life" execute massacres, torture, set the landmines, act as suicide bombers.²⁹³ All the set of children's commitments are classified among war crimes due to their seriousness and customary law's violative nature.²⁹⁴ The preamble of the Rome Statute embeds the due obligation to provide appropriate punishment for such crimes.²⁹⁵ Consequently, the justice for child soldiers' criminal activities should be restored.

In spite of the fact that the perception of children as perpetrators and corresponding justice should be done under "the auspices" of best interests of a child, the need for prosecution must be determined as conforming to the needs and interests of a child.²⁹⁶

However, firstly, the level on which child soldiers would be brought to the justice should be determined. In other words, whether the issue of child soldier's accountability should be settled through the international justice or it is more sufficient to bring it to the national courts, which will be discussed in the following subchapter.

4.2.1. Justice at International and National Levels

The issue of delivering justice regarding child soldiers could be settled at the international level owing to the number of reasonable grounds. As was indicated by Happold, by virtue of

²⁹⁰ Amnesty International, *Child Soldiers: Criminals or victims?*, 2000, 13.

²⁹¹ CRC, Art. 3.

²⁹² Quéniwet, *supra* note 267, 451.

²⁹³ For more details see Chapter 2 of the present thesis.

²⁹⁴ The Rome Statute, Art.8².

²⁹⁵ The Rome Statute.

²⁹⁶ Quéniwet, *supra* note 267, 441.

international nature it is more rational to solve war crimes on the international judicial platform.²⁹⁷ The universal character of the atrocities concerns international community itself. Subsequently, all States should provide the same approach towards perpetrators of crimes considered, acting “*as agents of the international community*”.²⁹⁸

Furthermore, considering the territorial jurisdiction, Happold presumed that the dependence on the place of crime’s prosecution would be inequitable, as regarding to the universality of the crime.²⁹⁹ Finally, as a result of an absence of internationally recognised minimum age of criminal responsibility, authorizing States to provide justice on the basis of their national law would modify the amount of their international obligations.³⁰⁰

The option of bringing child soldiers to the international justice is supported by the universal character of war crimes, whereas the alternative of national prosecution finds its ground as well.

In the first instance, the national courts are more flexible in the access to the local cultural particularities of child soldiers’ phenomenon. The knowledge of main push and pull factors would facilitate in the assessment of influence exercised over the children, identifying the way how they were recruited into the armed forces or troops: either compulsory, or voluntarily. Secondly, as a result of divergence in the minimum age of criminal responsibility all over the world, national courts would be more efficient in outlining their personal jurisdictions.

The lack of the universal minimum age of criminal responsibility provides the States with full discretion in deciding over child soldier’s liability.³⁰¹ However, the freedom of decision-making should be limited. Despite the advantages of providing justice at the national level, children should not receive different approach in regard to their accountability. The universally recognized minimum age of criminal responsibility for war crimes to be developed. It should facilitate national courts to comply with the principle of non-discrimination, enshrined in CRC provisions.³⁰²

The negotiation process regarding the drafting of the Rome Statute, namely the determination of its jurisdiction over minors, reached its conclusion in the delegating of this issue

²⁹⁷ Happold, *supra* note 20, 73.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ In the General Comment No. 10, the Committee on the Rights of the Child issued its support in establishment of the minimum age of criminal responsibility of 12 years old, however, only as a recommendation.

³⁰² CRC, Art. 2.

to the consideration of States.³⁰³ Similarly, the principle of primacy jurisdiction is of essential role in the advocating of choice towards national courts. This suggests that the prosecution of child soldiers should be delivered at the national level, whereas it should not be left to the full autonomy of States.

4.2.2. Restorative Justice Model and Prosecution

The criminal trial can be hurtful for minor offenders. As it was noted by Grossman, the process of prosecution may deepen the already traumatized children's psychological health, make the reintegration more difficult due to the social stigmatization in the case of public trials.³⁰⁴

The widespread accentuation of the alternatives to the prosecution justice prevalence confirms the evidence of the mentioned approach's pervasiveness. In the Art. 40, para. 3, subpar. b, CRC promotes the establishment "whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings".³⁰⁵ Where in the Paris Principle the obligatory nature of this clause can be grasped from the wording of principle 8.9.0.³⁰⁶

Currently there is an increased attention and recognition of restorative accountability method in frame of juvenile justice.³⁰⁷ Drumbl notes that "[the] criminal trials are ill-fitting in [regard to the child soldiers]".³⁰⁸ Its initialisation lacks the appropriate features to ensure that children are brought to the justice and that the rights of victims to the justice are met at the same time.

Restorative justice is seen as a tool to bring victim and offender under one roof, where victims will be able to be involved in the process of determination of an essence of a crime, its gravity, and define the way to restore the harm. Resulting in the assignment of active responsibility, restorative justice is considered to have real means which could assist children in acknowledgment of their responsibility.³⁰⁹

³⁰³ *Working Paper No. 3, Children and Justice During and in the Aftermath of Armed Conflict* (September 2011), 37.

³⁰⁴ Grossman, *supra* note 5, 351.

³⁰⁵ CRC, Art. 40(3)(b).

³⁰⁶ The Paris Principles, 8.9.0.: "Alternatives to judicial proceedings should be sought for children at the national level".

³⁰⁷ Kiyala, *supra* note 21, 184.

³⁰⁸ Drumbl, *supra* note 256.

³⁰⁹ "Tutorial: Intro to Restorative Justice", *Centre For Justice & Reconciliation*, accessed 6 December 2021 <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/#sthash.VKw6UK6.dpbs>.

Comparing to the prosecution, restorative justice does not impose passive responsibility, which does not have ability to influence children`s attitude towards crimes committed without producing additional violence to their immaturity.

The main types of restorative programmes are identified by the UN Office on Drugs and Crime as following: victim offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, reparative probation and community boards and panels.³¹⁰ The exercising of justice in the broader context, where the crime is regarded as a part of larger conflict, is of considerable importance in the case of child soldiers. There all scope of background would be taken into account in justifying the hostilities of offenders. That in turn would effect the promotion of better and more proportional “sanctions”.

Another key point is the position of scholars on the coexistence of restorative justice and prosecution. Noëlle Quénivet suggests putting child offenders under prosecution process only under the circumstances when children object to the participation in restorative justice.³¹¹ The rejection to recognise one`s own responsibility fades the very nature of justice. For this reason, prosecution should serve as the last resort for child soldiers with the adherence to the certain universal principles of juvenile justice: no imposition capital punishment and the prohibition of life sentencing without possibility to release towards minors who didn`t reach the age of 18 at the moment of crime commission.³¹²

4.2.3. Child Soldiers` Circumstance Mitigating

During prosecution over child soldiers process the number of circumstances to be taken into account. The adjudication should observe the range of actions taken by accused children, their age, and cultural background that was the basis for their involvement into the armed forces, armed groups, or terrorist organization. In the meantime, these hallmarks may amount to mitigating factors and lessen charges against child soldiers.

The age of a child convicted of a war crime`s commitment should be the first to discovered during the litigation process. As long as the minimum age of criminal responsibility remains uncertain, the age of the child should form the basis of a court decision concerning him or her. To this end, the age of 15 should be considered as the threshold being the most widespread age in the international instruments in relation to the prohibition of recruitment of children in the

³¹⁰ UN Office on Drugs and Crime (UNODC), *A Handbook of restorative justice programmes* (New York: Criminal justice handbook series, 2006), 14-15, accessed 6 December 2021 <https://www.un.org/ruleoflaw/files/Handbook%20on%20Restorative%20Justice%20Programmes.pdf>.

³¹¹ Quénivet, *supra* note 267, 455.

³¹² API, Art. 77(5); APII Art. 6(4).

armed forces and groups.³¹³ From the further language of OPAC, it can be presumed that the voluntarily enrolment is allowed, however, not specifying the age from which it is possible. Consequently, children then are able to esteem the choices to be made with corresponding consequences.

This suggests that the children below age of 15 should acquire special attention in identifying their liability, whereas the children from the age gap from 15 to 18 should be justified on the case-by-case basis.

As it was already mentioned, the cultural background of States with their political and economic situation plays a key role in the recruitment and enrolment of children into the armed forces and rebel groups.³¹⁴ It may identify the scope of mens rea evidence, along with distinguishing the level of crime's consequences comprehension. Provided that the child does not fulfil the requirements of mens rea, this should not stand for prosecution exclusion, rather as reducing the sanctions to be put.

Within determination of level of mens rea, the state of mind should be evaluated as well. The common cases of drugging children question the state in which they perpetrated crimes. The Art. 31, para. 1, subpar. b of the Rome Statute could be taken as a basis for such a mitigating factor, where the state of intoxication can serve as a ground for excluding criminal responsibility.³¹⁵

The last but not less important factor to be observed is the functions performed by child soldiers. Not all activities in which children participate should be prosecuted. Moreover, as it is stated in the Paris Principles, the mere association of children "with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment".³¹⁶ Only actions that fall under the definition of war crimes should be punished.

4.3. Admissibility of Amnesty for Children Accused in Commission of War Crimes

Amnesty composes the mechanism of prosecution impediment. By the present time there is no official legal definition of amnesty. According to ICRC, amnesty is defined as "an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group

³¹³ CRC, Art. 38; API, Art. 77(2); APII, Art. 4(3)(c).

³¹⁴ See Chapter 2 of the present thesis.

³¹⁵ The Rome Statute, Art. 31(1)(b).

³¹⁶ Paris Principles, 8.7.

or class of persons and/or certain offences is prospectively or retroactively barred, and any penalties cancelled.”³¹⁷

Amnesty is commonly used by States to implement national reconciliation after the long-term period of an armed conflict.³¹⁸ The mere nature of the amnesty is still debatable among the scholars, whereas at the international level the approach is more precise.

In the international instruments governing humanitarian issues there is no indication on permissibility and forbiddance of amnesty. Neither 1949 Geneva Conventions, nor API contain provisions on the matter of precluding person`s accountability. The only clause to be considered in this matter is Art. 6, para. 5 of APII. It prescribes granting “the broadest possible amnesty to persons who have participated in the armed conflict”.³¹⁹ Despite the fact that this provision was widely used by the States to support the validity of amnesties³²⁰, the ICRC interprets it in a different way. According to the head of ICRC Legal Division, Art. 6, para. 5 should be read as a prohibition of prosecution for mere fact of participating in atrocities.³²¹ The drafting history of APII provides the further confirmation of this conclusion: “It [provision] does not aim at an amnesty for those having violated international humanitarian law”.³²²

States, where amnesty law has been adopted, regard it as a way to halt hostilities as well as promote reconciliation and stability.³²³ In some cases child soldiers` issue constituted the reason why amnesty law gained such a support.

³¹⁷ International Committee of the Red Cross, Advisory Service on International Humanitarian Law, “*Amnesties and International Humanitarian Law: Purpose and Scope*”, Legal Factsheet (2007), <https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope>.

³¹⁸ Mozambique, Laws No 14/87 and 15/87 (19 December 1987); South Africa, The Promotion of National Unity and Reconciliation Act of 1995; Sierra Leone, 7 Lomé Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front (Art IX), S/1999/777 (7 July 1999), accessed 6 December 2021 https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf; Liberia, Peace Agreement Between the Government of Liberia (GOL), The Liberians United for Reconciliation and Democracy (LURD), The Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana (18 August 2003), accessed 6 December 2021 <https://www.ucdp.uu.se/gpdatabase/peace/Lib%2020030818.pdf>.

³¹⁹ APII, Art. 6(5).

³²⁰ Yasmin Naqvi, “Amnesty for War Crimes: Defining the Limits of International Recognition”, *International Review of Red Cross* 85, 851 (2003): 604.

³²¹ Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997.

³²² Ibid.

³²³ Christine Bakker, “Prosecuting International Crimes against Children: The Legal Framework”, *Innocenti Working Paper* 13 (2010): 16.

To give an illustration of the amnesty law in action, the Uganda's Amnesty Act, 2000 can be noted.³²⁴ The main goal of the Amnesty Act, 2000 was to grant amnesty for those fighting in the rebellion groups, namely in the Lord's Resistance Army, against official Uganda's government since 1986.³²⁵ Setting certain requirements for person to be granted immunity, the Amnesty Act, 2000 promoted disarmament with the subsequent reintegration into Ugandan community.

One of the requirement preconditions to be met is the age threshold of 12 years old.³²⁶ The main reasoning for this factor inclusion was the established in Uganda minimum age of criminal responsibility. According to the Children Act, it should be the age of 12.³²⁷ Moreover, the length test and passing through reception centres were set as additional prerequisites to be granted amnesty.³²⁸ Leonie Steinl indicated this as an obligatory support provided for people, including child soldiers, who were affected the most by the participation in the hostilities.³²⁹ Contrary to this, victims and communities did not receive any assistance from the government, what undermined the fairness of the whole amnesty granting process.

Granting amnesty for children is regarded to be in a line with the common perception of child soldiers as victims.³³⁰ As Reis indicated, prosecution of children would be in violation with the criminal law goal of deterrence, and penalization must be applied to the adults responsible for children's recruitment. However, it would conflict with the general obligation undertaken by States to act in accord with international law and prosecute its violations by bearing responsibility.³³¹ The language of the Rome Statute preamble affirmed the duty of each State "to exercise its criminal jurisdiction over those responsible for international crimes."³³²

³²⁴ Uganda, The Amnesty Act (2000), accessed 6 December 2021 [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/\\$file/ugandan+amnesty+act+2000.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/$file/ugandan+amnesty+act+2000.pdf).

³²⁵ Uganda, The Amnesty Act (2000), Part II, section 3(1).

³²⁶ Uganda Coalition to Stop the Use of Child Soldiers, *Time to Implement! National and International Legal Instruments Related to the Recruitment and Use of Children by Armed Forces and Groups in Uganda*, 2007, p. 7, https://reliefweb.int/sites/reliefweb.int/files/resources/344AA6E2A8F362A1852573CC006BACAB-Full_Report.pdf.

³²⁷ Uganda, The Children Act (1 August 1997), Section 88, accessed 6 December 2021 [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/738fcd999d6976a8c125767e004c5fa6/\\$FILE/THE%20CHILDREN%20ACT.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/738fcd999d6976a8c125767e004c5fa6/$FILE/THE%20CHILDREN%20ACT.pdf).

³²⁸ Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes under International Law* (The Hague: Asser Press, 2017), 98-100.

³²⁹ Ibid, p. 100.

³³⁰ Reis 1997.

³³¹ Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2003).

³³² The Rome Statute, preamble.

Furthermore, not prosecuting criminal offenders, in the present case – child soldiers, – would in turn encourage protraction of human rights` violation, especially rights of children in the first place. If child soldiers are presumed to escape punishment for the criminal actions due to their age, military commanders will perceive it as a “green light” in continuing recruiting children for even worse crimes.³³³

In this sense the notion of “amnesty” would be considered equivalent to “impunity”. In other words, not only children will be dismissed the sufficient support in acknowledgment of being perpetrators, but also victims of their offences will be rejected their right to an effective remedy.³³⁴

Justice should be administered over all kind of crimes, and war crimes committed by the child soldiers shall not be excluded. Nevertheless, the basic principles of juvenile justice should be adhered to either restorative, or prosecutive models. The most important regard to be paid to the rehabilitation and reintegration of children resulting from the concept of best interests of a child. Leaving children abandoned would only aggravate the problem of injustice for helpless victims and extend the whole phenomenon of child soldiers.

States have to fulfil obligations to guarantee and protect human rights.³³⁵ Otherwise this would jeopardize the basic principles of human rights in the framework of international law.

The widespread victimization of child soldiers denies their ability to act independently and with the whole understanding of their own actions. Whereas the option to perceive children also as perpetrators would fill the present gap regarding their criminal responsibility in the light of committed war crimes.

On top of everything the rights of child soldiers` victims shall be taken into consideration. By providing appropriate remedies, States restore their right to know the truth and ensure the reconciliation processes in the post-war communities.

The alternatives of restorative justice and prosecution should assist children in recognition of being responsible for atrocities. It is important to deliver justice in a manner consonant with basic principle of juvenile justice with unconditional prohibition of capital punishment and life sentence without possibility to release. Moreover, amnesty should be identified as an inadequate to the basic human right`s guarantees and general international law in regard to the serious nature of war crimes committed by child soldier.

³³³ Rose Grogan, “Child Soldiers, Prosecution”, IDEA in Nobert (2011), 36.

³³⁴ Bakker, *supra* note 323, 2.

³³⁵ Manisuli Ssenyonjo, “Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court”, *Journal of Conflict and Security Law* 10, 3 (2005): 429.

CONCLUSIONS

1. **“Child soldier” definition.** The main term articulated by international and regional agencies in regard to a child recruited in the military forces is “child associated with an armed force or armed group”, where the term covers all forms of children`s roles: cooks, porters, spies, messengers, sex wives, and fighters. Under the definition of “child soldier” there should be included children acted in the capacity of fighters of armed forces, armed groups, and terrorist organizations. It is necessary to emphasize that the term “child soldier” should be perceived as a term of art and not legalizing the use of children as combatants.
2. **Children recruitment standards.** In the international legal framework, there is no common approach regarding children recruitment in the State forces and non-State groups. Under international human rights law and international labour law there is a strict prohibition of children compulsory recruitment under the age of 18 for the military purposes. Conversely, according to the international humanitarian law State and non-State actors should cease from forced enrolment of children under the age of 15, while keeping voluntarily involvement from 15 to 18 years old.
3. **Age of criminal responsibility for children`s committed war crimes.** Modern international law does not designate definite minimum age of criminal responsibility. The only existing borderline of 12 years old is of a recommendatory nature and, accordingly, does not have universal approach. Meanwhile, the wording of international legal instruments does not proscribe the criminal accountability for child perpetrators. In consequence of the Rome Statute`s development process it was concluded that the question of children`s prosecution, including the issue of MACR designation, should be left for States. The margin of discretion given to the States provoked the range of different standpoints regarding the age threshold for war crimes` accountability at the national levels. This led to the potential liability of minor of 8 years old for international crime, which is contrary to the principle of best interests of a child.
4. **Child soldier as victim and perpetrator.** Different cultural and political contexts gave rise to the dual perception of child soldiers. Vague nature of child soldiers as victims of their recruiters and perpetrators of their communities` members deepens the legal loop of their criminal accountability resolution. In the international humanitarian law, there is no general prohibition of children`s prosecution for war crimes. On the contrary, from the wording of API, APII, and the Rome Statute it can be concluded that in fact children may be recognized as perpetrators and further be brought to the justice. The range of push and pull factors at socioeconomic and individual levels provides the evidence of children`s voluntarily decision to join armed forces or military groups. In turn, this contributes to the existence of *mens rea* element in the crimes` commitment of child

soldiers. The rejection of absolute “victimhood” approach in favour of dual status would solve the present legal impasse. The perception of children as perpetrators would expound the complication of their criminal responsibility issue.

5. **Juvenile justice principles.** In the course of juvenile justice, the primary role is dedicated to the principle of “best interests” of a child. According to the international human rights framework along with the humanitarian law approach, children should not be sentenced to the death, while life sentence imposition without possibility to be released is prohibited.

6. **Restorative justice, prosecution.** The prosecution process is considered to be traumatic for psychological health of a child, leading to social stigmatization. Restorative justice is presumed to be more sufficient and effective model for children to assist in acknowledgment of their own accountability for war crimes committed. Resulting in the assignment of active responsibility, restorative justice is considered to lead to more adequate and proportional “sanctions”. However, the coexistence of prosecution is regarded as a last resort option for those child soldiers objecting participation in the restorative justice process.

7. **Amnesty for child soldiers.** Under current international humanitarian and criminal law, the admissibility and prohibition of amnesty for child soldiers are not indicated. At the level of States amnesty is general used to provide conciliation inside of communities during post-war period. Granting amnesty for child soldiers is presumed to act as a protractive factor in the violation of human rights, namely children’s rights. In this matter amnesty would be equivalent to the “impunity”.

RECOMMENDATIONS

- The Commission on Crime Prevention and Criminal Justice together with the Committee on the Rights of the Child within the framework of the UN Economic and Social Council should revisit the minimum age of criminal responsibility and adopt the universal standard of mandatory nature. This will constitute the basis for the development of the minimum age of criminal responsibility for war crimes with due consideration in regard to the universal nature of crimes considered.
- Within the UN Economic and Social Council, the effective model of restorative justice for child soldiers should be developed. This model should include victim offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, reparative probation and community boards and panels. This will ensure the efficient reconciliation processes in the post-war communities along with providing sufficient assistance to child soldiers in acknowledgment and recognition of own responsibility for war crimes commission.
- Amnesty for child soldiers who committed war crimes should be perceived as inadmissible according to the general obligation of States to provide basic human rights and to exercise criminal jurisdiction over those accountable for international crimes. Consecutively, the restorative justice model and prosecution to be used in the light of child soldiers' responsibility determination.
- In international law, the list of mitigating factors applying to child soldiers during prosecution process to be developed. It should include the following elements as prerequisites to child soldiers' charges lessening in the prosecution procedure:
 1. age;
 2. cultural and economic environment in the States known for children recruitment;
 3. mental and psychological development;
 4. range of actions performed by child soldiers.

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ABSTRACT

According to the UN Secretary-General Annual Report on Children and Armed Conflict, in 2020 more than 8 thousand boys and girls have been drawn in the frontline fighting. Despite the numerous provisions of international law regarding the legitimizing of children`s usage by the State armed forces and organized groups, in the international law sphere there is no common approach among representatives of legal doctrine whether child soldiers should be prosecuted for their actions. This Master thesis focuses on the problem of responsibility of child soldiers for war crimes.

Consequently, this research comes to the conclusion that the issue of child soldiers` responsibility for war crimes hasn`t reached unified approach at the international legal level. Accordingly, appropriate legal mechanisms for child soldiers` accountability have to be established where certain mitigating factors would be taken into consideration while amnesty should be perceived as inadmissible

Keywords: Child Soldiers, War Crimes, Responsibility, Amnesty, Prosecution, Restorative Justice.

SUMMARY

THE PROBLEM OF RESPONSIBILITY OF CHILD SOLDIERS FOR WAR CRIMES

The objective of the present Master thesis is to analyse the issue of children soldiers' responsibility for committed war crimes with further identification of the applicable justice standards in a line of applicability of an amnesty.

The Master thesis consists of four chapters that are divided into subchapters. The first Chapter is dedicated to the analysis of the concept of a child soldier and of the main international legislation governing children's recruitment into State armed forces and non-State military groups. The study showed that main term articulated by international and regional agencies is "child associated with an armed force or armed group" which covers all forms of roles: from cooks, porters, to fighters and spies. Moreover, there is no common approach regarding children recruitment, therefore children from the age of 15 are capable to be voluntarily enrolled in the armed groups and forces.

In the second Chapter the main factors of children's involvement in the armed conflicts are defined, such as repressive conditions of a state, duration of an armed conflict, and level of the state economic development. The children's use in the State and non-State armed forces, groups and terrorist organizations was scrutinized. It was assessed that family, friends, surrounding peers along with the desire to revenge, to survive, to obtain self-fulfilment serves as motivating factors to be engaged in the armed groups and forces where the use of children continues to exist and does not lessen.

The third Chapter is devoted to the examination of the age of child's responsibility for war crimes in the international legal framework. Indeed, the analysis showed that there is no definite international minimum age of criminal responsibility. States are appointed the margin of discretion in determination of age threshold of war crimes' accountability at the national levels.

The fourth Chapter is dedicated to the analysis of dual status of child soldiers, admissibility of amnesty, and examination of prosecution and restorative justice model in assessment of children's accountability. The due attention was paid to the evaluation of the long-term consequences of granting amnesty, as well as relevance of providing justice at international and national levels. The number of applicable standards of proper evaluation of the child soldier's responsibility was elaborated, as age, cultural and economic environment in the States known for children recruitment, mental and psychological development, and range of actions performed by child soldiers.