THE RESPONSIBILITY OF CHILD SOLDIERS FOR WAR CRIMES

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Annotation. According to the UN Secretary-General's Annual Report on Children and Armed Conflict, in 2020 more than 8,000 boys and girls were drawn into frontline fighting. Children's involvement in State and non-State armed forces, armed groups, and terroristic groups arises out of range of factors at the socio-economic and individual levels. The vague nature of child soldiers as both victims of their recruiters and perpetrators of actions against their communities deepens the legal loop of the resolution of their criminal accountability.

Consequently, this analysis comes to the conclusion that the abandonment of a 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 the issue of their criminal responsibility. Accordingly, an effective model of restorative justice for child soldiers has 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.

Introduction

Armed conflicts constitute a consistent feature of the modern world. Irrespective of their their type – international or non-international armed conflict – they affect all members of the population, including the most vulnerable: children. According to the UN Secretary-General's Annual Report on Children and Armed Conflict, in 2020 more than 8,000 boys and girls were drawn into frontline fighting.[1]

The list of roles of children within State military personnel or non-State actors' troops is endless. However, the main part of this article is dedicated to their active participation in warfare.

While part of State armed forces or organized armed groups, children not only function as "supporters", but take a direct part in hostilities: torturing and killing members of their native communities, using explosive devices to maim the enemies of their commanders, and acting as suicide bombers.

As prescribed in Art. 8 of the Rome Statute of the International Criminal Court, the enlistment or conscription of children under the age of 15 years in armed forces or groups, and using them directly in hostilities, are war crimes.[2] However, children can themselves be the executors of atrocities. In the Lord's Resistance Army in Northern Uganda, for example, children are abducted and forced to kill and maim civilians, burn civilian objects, and kidnap other children.[3]

Despite the numerous provisions of international law regarding the legitimacy of the use of children by State armed forces and organized groups, in international law there is no common approach among representatives of legal doctrine as to whether child soldiers[4] should be prose-

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

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

3 "Stolen Children: Abduction and Recruitment in Northern Uganda", Human Rights Watch, 28 March 2003, https://www.hrw.org/report/2003/03/28/stolen-children/abduction-and-recruitment-northern-uganda.

4 It is necessary to highlight that the term "child soldier" should be interpreted as illustrative instead of its usage in a direct sense, where 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.

cuted for their actions.

The majority of scholars believe that, due to the immaturity of children and their low level of psychological development, they should be treated as victims of human rights violations, not as perpetrators.[5] Moreover, States are considered to be responsible for rehabilitation, reintegration, and resocialization programmes for child soldiers to be demobilized from armed forces and groups.

Meanwhile, some authors suggest that children may be prosecuted for their actions due to the gravity of the crimes they commit.[6] Nonetheless, a number of mitigating factors should be taken into consideration as, ultimately, child soldiers are still children.

The Rome Statute of the International Criminal Court prescribes that its jurisdiction does not cover any person under 18 years of age at the moment of crime commitment.[7] The Special Court for Sierra Leone has jurisdiction over a person of 15 years of age.[8] In the international legal community, there is no common approach to the question of whether child soldiers should be prosecuted for the atrocities that they have perpetrated.

The question of child soldiers' dualism is the leading issue in answering the matter of whether these children should be accountable for the commission of war crimes. The oxymoron of their role as both victim and perpetrator has not yet reached a conclusion in international legal and scholarly circles. Therefore, this issue should be analysed more thoroughly in order to resolve the question of whether child soldiers should bear responsibility for crimes committed.

1. Factors of child involvement in armed forces

Children's involvement in State and non-State armed forces, armed groups, and terroristic groups arises out of range of factors. Commonly, these are interdependent and follow from each other. For the purposes of this research the factors concerned are divided into two groups contingent

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

6 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.

7 "The Rome Statute of the International Criminal Court", *op. cit*., Art. 26.

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

upon the level where they take place, with no distinction in their hierarchy: socioeconomic and individual.

1.1. Socioeconomic level

At the level determined by the social and economic development of the State, the following factors can be identified which constitute the basis of children's use in armed forces and groups: repressive conditions of the State, duration of armed conflict, and level of the State's economic development.[9]

1.1.1. Repressive conditions of the State

The period of Statehood formation and changes to political forces and the political system is characterized by a decrease in respect for legal norms at both the national and international level. As a result, the weakening of control over the military makes it easier for children to be used within their ranks.[10]

Militants exhausting reserves of potential adult recruits consider children's plenitude as an opportunity to fill their armies.[11] Through increasing the size of the army at the expense of children, commanders ensure a lasting impact on society. Moreover, in a repressive State there is no way for children to confront recruitment, in comparison to in democratic societies.

The suppression of human rights abets children to voluntarily enlist in armed forces or armed groups to fight for situation enhancement.[12] Furthermore, juveniles may be eager to participate in politics to promote better standards of life but may end up on the frontline, as was the case in the Mozambique Liberation Front and the Mozambique National Resistance movements.[13]

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9 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.

10 *Ibid*, 345.

11 Timothy Webster, "Babes with Arms: International Law and Child Soldiers", *George Washington International Law Review* 227 (39) (2007): 233–234, https://scholarlycommons.law.case.edu/faculty_publications/556/.

12 Høiskar, *supra note,* 9: 345.

13 Angela McIntyre, Rights, Root Causes and Recruitment: The youth factor in Africa's

1.1.2. Duration of armed conflict

This situation occurs in a protracted state of war that is depleting national resources and undermining moral standards and principles. In such a chaotic situation of economic crisis, the depletion of human capital and labour occurs, and children lose faith in justice and hope for the future.[14] Growing up and socializing in the context of a conflict "with no peace or stability in living memory"[15] causes children to become accustomed to cruelty.

As indicated by Webster,[16] the repercussions of low-intensity hostilities include family splits, when children lose the support provided by parents. Instead of panhandling on the streets, they choose to join militia as a source of supervision.

After years of enduring conflicts, armed groups become part of communities' everyday lives. Acting as dispute settlers, they gain support from the local population, obtaining the ability to control their actions. The presence of non-State organisations turns into a legitimate course. Therefore, children perceive fighters as role models in "understanding and responding to their chaotic environment".[17] However, not all cases of the occurrence of armed groups are characterised by voluntary enrolment.

1.1.3. Level of the State's economic development

Decreases in a State's economy lead to a decline in families' ability to survive. Household poverty is commonly indicated as the most prominent factor among children who become members of armed forces and non-State armed groups.[18] According to most studies, the majority of child soldiers come from poor families. The absence of basic needs and poverty-related complications such as a lack of food make joining armed groups a favourable option. In these groups, these children can be supplied with

armed conflicts", *African Security Review* 12, 2 (2003): 94.

14 Høiskar, *supra note*, 9: 346.

15 McIntyre, *supra note*, 13: 94.

16 Webster, *supra note*, 11: 233.

17 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.

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

everything they need, including shelter, protection, and the possibility to endure tough times.

Unemployment level constitutes another aspect in the decision to voluntarily enlist in the military.[19] The policies of armed organisations often aim at assuring children and their families that if minors or youths join their units, they will receive payment enough to make a living,[20] status among their peers, and the "*national pride*"[21] of their communities. During the Columbian conflict, "Children [were] lured into the AUC [Autodefensas Unidas de Columbia][…] by salaries ranging between 900,000 and 1,200,000 Colombian pesos […] reportedly paid every 3 months, with bonuses for special missions".[22] There was evidence of a promise on the behalf of Boko Haram members to pay a "salary" in the amount of $600–$800 per month, with a one-time payment of around $3,000 upon entering the organisation.[23]

1.2. Individual level

The family may be identified as one of the factors which acts as both a push and pull cause at the same time. Already-associated family members may motivate and further facilitate the involvement of their minors.[24] Children can be sent to military organizations and terroristic groups as part of arrangements and requests from these groups via the so-called "*one-recruit-per-family*" policy.[25] The same degree of influence on chil-

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19 *Ibid*, 45.

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

21 Clayton A. Hartjen and S. Priyadarsini, *The Global Victimization of Children: Problems and Solutions* (New York: Springer Science+Business Media, LLC, 2012), 113.

22 "Colombia's War on Children", Watch List on Children and Armed Conflict, 2004, 26, https://resourcecentre.savethechildren.net/pdf/2384.pdf/.

23 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 23 March 2022 https://www.bbc.com/news/av/world-africa-27107375.

24 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.

25 This practice is highly used by Taliban, LTTE, as well as in Kachin Independence

dren's decisions to join military groups may be carried by their friends and peers. The impact of peers is indicated as the main cause of affiliation with the Islamic State by 75% of European members.[26] In addition, the Islamic State uses close friends as tools to translate the idea of taking up arms against parental authority. The factor of revenge plays a signification role in the range of motivations to join armed groups. The deaths of parents or friends may be accompanied by wishes to retaliate. In a study conducted by Wheeler, child soldiers of South Sudan designated vengeance as a main impetus for fighting.[27]

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 of whether former child soldiers should bear criminal responsibility for war crimes.

2. The post-war prosecution of former child soldiers

2.1. The dual concept of a child soldier

There is a widespread opinion among international institutions that children should be perceived, in the first place, as victims.[28] The general

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.

26 Scott Atran, "The Role of Youth in Countering Violent Extremism and Promoting Peace", Address to the UN Security Council, 23 April 2015, accessed 25 March 2022, https://apo.org.au/sites/default/files/resource-files/2015-04/apo-nid57229.pdf.

27 "South Sudan: Government Armed Forces Reiterate Commitment Not to Enlist Children", Office of the Special Representative of the Secretary-General for Children and Armed Conflict, accessed 25 March 2022 https://childrenandarmedconflict.un.org/2019/03/south-sudan-government-armed-forces-reiterate-commitment-not-to-enlist-children/.

28 Jean Chrysostome and K. Kiyala, *Child Soldiers and Restorative Justice* (Cham: Springer, 2019), 164; U.N. Security Council, *Report of the Secretary-General on children and armed conflict in Nigeria*, S/2017/304 (10 April 2017), 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, *Re-*

prohibition of their compulsory recruitment under the age of 18 by State armed forces and non-State armed groups correspondingly sets the concept of *de-facto* victimization.[29]

"Victimization" embraces the scope of violence faced by children while being in armed forces and groups. This could include sexual assault, the loss of close ones or hometown, physical injuries, or psychological harm caused by the surrounding military environment. Continuing on from the definition of a "child" 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 this Convention, therefore labelling children as victims of the actions considered.[30]

The illustration of child soldiers through the image of "*faultless passive victims*" was delivered by Michel Drumbl.[31] Drumbl depicts them as powerless, weak, very young children who have been targeted and manipulated by higher commanders in order to perform duties "*of war*".[32] Contrastingly, the stories of child soldiers in Columbia and ISIL demonstrate that this is not the case overall.[33] Provided that social obedience and coercion constitute a significant part of the general pull factors of children's involvement in armed forces and groups, then voluntarily joining is de-

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port 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*".

29 "Convention on the Rights of the Child", Art. 38(1); "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000", Art. 2, 4; "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. 77 (2); "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", Art. 4(3)(c); "Worst Forms of Child Labour Convention (No. 182), 1 June 1999, International Labour Organization", Art. 3(a).

30 As is Stated in 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*"*; Hartjen and Priyadarsini, *supra note,* 21: 1-6.

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

32 Kiyala, *supra note*, 28: 118.

33 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.

picted as a case in past and ongoing conflicts.[34]

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

In the works of Chein Reis[35] and Cecile Aptel,[36] the rejection of children's accountability was aligned with the conception of accountability being put on those who hold positions of authority while planning and orchestrating violent activities, i.e., *the command responsibility doctrine*. The command responsibility doctrine provides that a military commander, or a superior acting in this position in a rebel group or a terrorist organization, shall be criminally responsible in respect to the crimes committed by minor soldiers, where direct or personal participation is not required.[37]

This doctrine was further corroborated by the approach of international criminal jurisdiction. According to this, children are excluded as not bearing the greatest liability for crimes committed.[38] Authors such as Reis[39] and Aptel[40] have indicated that the whole extent of responsibility should be put on the recruiters of children, firstly, for committing a war crime in itself by enlisting minors, turning them into "victims", and, secondly, for controlling the commission of atrocities under their supervision.

A 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.[41] However, from the perspective of international law on human rights, "children [are not considered] to be innocent per se".[42]

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34 McIntyre, *supra note*, 13; Høiskar, *supra note,* 9.

35 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).

36 Aptel, *supra note,* 5.

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

38 Aptel, *op. cit.,* 5.

39 *Ibid*.

40 *Ibid*.

41 Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law* 38 (2007): 342.

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

Despite the aim of the international community to purify child soldiers through the emphasis on their victimized image, the fact of their implication in the execution of criminal acts should not be made incidental. As stated by Drumbl, according to the *circumscribed actor model*, a person "can do, [has] the ability not to do, and the ability to do otherwise that what he/she actually has done".[43] Children should be considered "as actors in their own capacity"[44] without being fully devoid of agency, as was further indicated by Honwana.[45]

A significant role is played by the communities that have suffered from the activities of child soldiers. Overall indignation to the phenomenon of child recruitment into armed forces and paramilitary groups is reinforced by the public requirement for children to be recognized as accountable for their own actions, as was the case in Rwanda, the Democratic Republic of Congo, and Sierra Leone.[46]

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 suffering of the victim does not alter depending on the age of the alleged perpetrator.[47] Therefore, the limitation of justice to adults would only erase the right of victims to know the truth, and to receive justice and corresponding reparations.[48]

In international humanitarian law, there is no general prohibition against the prosecution of children for war crimes. Moreover, it can be concluded that, in fact, it is permitted. 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".[49] That provision

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43 Drumbl, *supra note,* 31: 215.

44 Kiyala, *supra note,* 28: 158.

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

46 Joyce Hackel, "When Kids Commit Genocide", *Christian Science Monitor*, December 5, https://www.csmonitor.com/1995/1205/05062.html; Kiyala, *supra note:* 28; Tim Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).

47 Kiyala, *supra note,* 28: 157.

48 *Ibid*, 93.

49 "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", http://www.oas.org/dil/introductory_course_on_international_humanitarian_2007_

is further duplicated in Art. 6, para. 4 of AP II,[50] thereby not distinguishing the nature of, on the one hand, legal protection granted to minors, and, on the other hand, responsibility incurred by them. A similar reassertion is found in Art. 26 of the Rome Statute. Besides limiting its jurisdiction to people above 18 years old, it does not prescribe full forbiddance for the prosecution of minors by the agencies 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".[51] Under the term "*the most serious crimes*", the following range of war crimes should be understood: grave breaches of the 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 the 1949 Geneva Conventions during armed conflict of a non-international character.[52]

In relation to children who are members of terroristic organisations, their offences do not fall from the scope of responsibility. As is prescribed by the Additional Protocols I and II of the Geneva Convention (API and APII), acts of terrorism with the spreading of fear and panic among the civilian population are prohibited.[53]

This selection of crimes was exercised in regard to the following aspects: the norm should be one of an international customary law nature, and should lead to individual criminal responsibility.[54]

In light of the individual criminal responsibility principle, child soldiers' correspondence cannot be denied. According to Art. 25[8] of the

ihl_instruments.pdf, Art. 77(5).

50 "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", http://www.oas.org/dil/introductory_course_on_international_humanitarian_2007_ihl_instruments.pdf, Art. 6(4).

51 "The Rome Statute of the International Criminal Court", *supra note*, 2: preamble.

52 "The Rome Statute of the International Criminal Court", *supra note*, 2: Art. 8[2].

53 "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", *supra note*, 49: Art. 51(2); "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", *supra note,* 50: Art. 4(2)(d), Art. 13(2).

54 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.

Rome Statute, a person should be found guilty and bear responsibility if they commit a crime which is recognised as such under the jurisdiction of the International Criminal Court.[55] Although children fall out of the International Criminal Court's personal jurisdiction, the provisions of the Special Court for Sierra Leone set the same range and extent of individual criminal responsibility within its own jurisdiction.[56]

Art. 33 of the Rome Statute may be perceived as a key clause which could contribute to the "victimization" of children. Pursuant to it, a person can be relieved of criminal responsibility if they commit a crime under the order of the Government or a superior, where either it was their legal duty or the order was not evidently unlawful for the person.[57] It is worth noting that, compared to the provisions of the Rome Statute, the Statute of the Special Court for Sierra Leone does not number the required factors to be established in acquiring whether a person under command still bears responsibility. On the contrary, the abovementioned component may be considered as a mitigating factor but not as a way to amnesty.[58]

Knowledge of an activity's unlawfulness ties in strongly with *mens rea* – the necessary element of war crimes' *corpus delicti*. In accordance with the wording of the Rome Statute – which enshrines the traditional common law *mens rea*: "guilty mind" – a person shall have the intent to commit a crime along with the knowledge of further consequences.[59] However, the application of *mens rea* to children is believed to be irreconcilable. Due to their low level of phycological and mental development, it is difficult for children to differentiate between right and wrong, or to resist a superior's order.[60]

Meanwhile, after joining the military, children obtain a "military mentality" through the cycle of constant violence.[61] Moreover, children acquainted to violence perceive it as a tool in reaching personal goals with a clear understanding of what the nearest consequences would be.[62]

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55 "The Rome Statute of the International Criminal Court", *supra note*, 2: Art. 25[8](3)(a).

56 "Statute of the Special Court for Sierra Leone", *supra note*, 8: Art. 6 (1).

57 "The Rome Statute of the International Criminal Court", *op. cit*., Art. 33 (1).

58 "Statute of the Special Court for Sierra Leone", *supra note,* 8: Art. 6 (4).

59 "The Rome Statute of the International Criminal Court", *supra note*, 2: Art. 30 (1), (2).

60 Nobert, *supra note,* 6: 38.

61 *Ibid.*, 33.

62 Higgs, *supra note,* 33: 233.

The abandonment of a 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 the issue of their criminal responsibility. Regarding children in a separate, victimized way would ensure that some of their victims remain unseen.

2.2. Accountability of child soldiers

The accountability of crime perpetrators remains crucial for the protection of human rights. Victims' suffering should not remain ignored. The restoration of truth and dignity lies at the very core of safeguarding basic human rights.

Child soldiers, within the framework of "everyday" military life, execute massacres, commit torture, set landmines, and act as suicide bombers. This set of commitments are classified among war crimes due to their seriousness and their nature as violative of customary law.[63] The preamble of the Rome Statue embeds the due obligation to provide appropriate punishment for such crimes.[64] Consequently, 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 conducted under the auspices of the best interests of the child, the need for prosecution must be determined as conforming to the needs and interests of the child.[65]

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

2.2.1. Justice at the 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 their international nature it is

63 "The Rome Statute of the International Criminal Court", *op. cit*., Art.8[2.]

64 *Ibid*.

65 Quénivet, *supra note,* 42: 441.

more rational to solve war crimes on the international judicial platform.[66] The universal character of these atrocities concerns the international community itself. Subsequently, all States should provide the same approach towards perpetrators of crimes considered, acting "*as agents of the international community*".[67]

Furthermore, considering territorial jurisdiction, Happold presumed that dependence on the place of a crime's prosecution would be inequitable, as regarding the universality of the crime.[68] Finally, as a result of the absence of an 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.[69]

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

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

The lack of a universal minimum age of criminal responsibility provides States with full discretion in deciding over child soldiers' liability.[70] However, the freedom of decision-making should be limited. Despite the advantages of providing justice at the national level, children should not receive different approaches in regard to their accountability. A universally recognized minimum age of criminal responsibility for war crimes should be developed, which should facilitate national courts to comply with the principle of non-discrimination enshrined in the provisions of

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66 Matthew Happold, "Child Soldiers: Victims or Perpetrators", *University of La Verne Law Review* 29 (2008): 73.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*.

70 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.

the Convention on the Rights of the Child.[71]

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 to the consideration of States.[72] Similarly, the principle of primacy jurisdiction plays an 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, while it should not be left to the full autonomy of States.

2.2.2. The restorative justice model and prosecution

A criminal trial can be hurtful for minor offenders. As was noted by Grossman, the process of prosecution may deepen an already traumatized child's psychological health, and may make reintegration more difficulty due to social stigmatization in the case of public trials.[73]

The prevalence and widespread accentuation of alternatives to prosecution justice confirm the pervasiveness of the mentioned approach. In Art. 40, para. 3, subpar. b, the Convention on the Rights of the Child promotes the establishment of, "whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings",[74] whereas in the Paris Principle the obligatory nature of this clause can be grasped from the wording of principle 8.9.0.[75]

Currently there is increased attention and recognition of the restorative accountability method in the frame of juvenile justice.[76] Drumbl notes that "criminal trials are ill-fitting [in regard to child soldiers]".[77] Their initialisation lacks the appropriate features to ensure that children are

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71 "Convention on the Rights of the Child adopted 20 November 1989 by General Assembly resolution 44/25", https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child, Art. 2.

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

73 Grossman, *supra note,* 41: 351.

74 "Convention on the Rights of the Child adopted 20 November 1989 by General Assembly resolution 44/25", *op. cit.,* Art. 40(3)(b).

75 The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, United Nations Children's Fund, 8.9.0.: "*Alternatives to judicial proceedings should be sought for children at the national level*".

76 Kiyala, *supra note,* 28: 184.

77 Drumbl, *supra note,* 31.

brought to justice and that the rights of victims are met at the same time.

Restorative justice is seen as a tool to bring victim and offender under one roof, where victims are able to be involved in the process of determining the essence of a crime and its gravity and defining a way to restore the harm caused. Resulting in the assignment of active responsibility, restorative justice is considered to have real means which could assist children in the acknowledgment of their responsibility.[78]

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

The main types of restorative programmes are identified by the UN Office on Drugs and Crime as follows: victim offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, reparative probation, and community boards and panels.[79] The exercising of justice in the broader context, where the crime is regarded as part of a larger conflict, is of considerable importance in the case of child soldiers. All scopes of background can be taken into account in justifying the hostilities of offenders. That in turn can affect 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 through the prosecution process only under circumstances when children object to their participation in restorative justice.[80] The rejection of recognising one's own responsibility erodes the very nature of justice. For this reason, prosecution should serve as a last resort for child soldiers, with the adherence to certain universal principles of juvenile justice: no imposition of capital punishment, and the prohibition of life sentencing without the possibility for release towards minors who were

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78 "Tutorial: Intro to Restorative Justice", *Centre For Justice & Reconciliation*, accessed 25 March 2022 http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/#sthash.VCkw6UK6.dpbs.

79 UN Office on Drugs and Crime (UNODC), *A Handbook of restorative justice programmes* (New York: Criminal justice handbook series, 2006), 14–15, accessed 25 March 2022 https://www.un.org/ruleoflaw/files/Handbook%20on%20Restorative%20Justice%20Programmes.pdf.

80 Quénivet, *supra note,* 42: 455.

under the age of 18 at the time of crime commission.[81]

2.2.3. Mitigating circumstances for child soldiers

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

The age of a child convicted of a war crime should be the first thing to be 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 them. To this end, the age of 15 should be considered as the threshold being the most widespread age in international instruments in relation to the prohibition of the recruitment of children in armed forces and groups.[82] From the further language of OPAC, it can be presumed that voluntarily enrolment is allowed – not specifying the age from which it is possible, however. Consequently, children then are able to esteem the choices to be made, with corresponding consequences.

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

As was already mentioned, the cultural background and political and economic situations of States play a key role in the recruitment and en-

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81 "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", *supra note,* 49: Art. 77(5); "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", *supra note,* 50: Art. 6(4).

82 "Convention on the Rights of the Child adopted 20 November 1989 by General Assembly resolution 44/25", *supra note*, 71: Art. 38; "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", *supra note,* 49: Art. 77(2); "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", *supra note,* 50: Art. 4(3)(c).

rolment of children into armed forces and rebel groups. This may identify the scope of *mens rea* evidence, along with distinguishing the level of comprehension of a crime's consequences. Provided that the child does not fulfil the requirements of *mens rea*, this should not stand for prosecution exclusion, rather reducing the sanctions to be imposed.

Within the determination of the level of *mens rea*, the state of mind should also be evaluated. The common practice of drugging children calls into question the state in which they perpetrated crimes. Art. 31, para. 1, subpar. b of the Rome Statue could be taken as a basis for such a mitigating factor, where a state of intoxication can serve as a ground for excluding criminal responsibility.[83]

The final but no less important factor to be observed is the function performed by the child soldier. Not all activities in which children participate should be prosecuted. Moreover, as 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".[84] Only actions that fall under the definition of war crimes should be punished.

2.3. Admissibility of amnesty for children accused of the commission of war crimes

Amnesty composes the mechanism of prosecution impediment. At the present time, there is no official legal definition of amnesty. According to the International Committee of the Red Cross (ICRC), amnesty is defined as "an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group or class of persons and/or certain offences is prospectively or retroactively barred, and any penalties cancelled."[85]

Amnesty is commonly used by States to implement national recon-

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83 "The Rome Statute of the International Criminal Court", *supra note*, 2: Art. 31(1)(b).

84 "Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993", https://www.un.org/ruleoflaw/files/PRINCI~5.PDF, 8.7.

85 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.

ciliation after a long-term period of armed conflict.[86] The mere nature of amnesty is still debatable among scholars, whereas at the international level the approach is more precise.

In international instruments governing humanitarian issues, there is no indication of either permissibility or forbiddance of amnesty. Neither the 1949 Geneva Conventions nor API contain provisions exist on the matter of precluding a person's accountability. The only clause to be considered in this matter is Art. 6, para. 5, of APII, which prescribes granting "the broadest possible amnesty to persons who have participated in the armed conflict".[87] Despite the fact that this provision was widely used by States to support the validity of amnesties,[88] 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 the mere fact of participating in atrocities.[89] The drafting history of APII provides the further confirmation of this conclusion: "It [the provision] does not aim at an amnesty for those having violated international humanitarian law".[90]

States where amnesty law has been adopted regard it as a way to halt hostilities as well as promote reconciliation and stability.[91] In some cases, the issue of child soldiers constitutes the reason why amnesty law gains such support.

To give an illustration of amnesty law in action, Uganda's Amnesty

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86 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 25 March 2022https://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 25 March 2022 https://www.ucdp.uu.se/gpdatabase/peace/Lib%2020030818.pdf.

87 "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", *supra note*, 50: Art. 6(5).

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

89 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.

90 *Ibid*.

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

Act, 2000, can be observed.[92] The main goal of the Amnesty Act was to grant amnesty for those fighting in rebellion groups, namely in the Lord's Resistance Army, against official Uganda's government since 1986.[93] Setting certain requirements for a person to be granted immunity, the Amnesty Act promoted disarmament with subsequent reintegration into the Ugandan community.

One of the preconditions to be met was an age threshold of 12 years old.[94] The main reasoning for the inclusion of this factor was the minimum age of criminal responsibility established in Uganda. According to the Children Act, this should be the age of 12.[95] Moreover, the length test and passing through reception centres were set as additional prerequisites to be granted amnesty.[96] Leoni Steinl indicated this as an obligatory support provided for people, including child soldiers, who were affected the most by participation in hostilities.[97] Contrary to this, victims and communities did not receive any assistance from the government, undermining the fairness of the entire amnesty granting process.

Granting amnesty for children is regarded as being in-line with the common perception of child soldiers as victims.[98] As Reis indicated, the prosecution of children would be in violation of the goal of deterrence in criminal law, and penalization must be applied to the adults responsible for the recruitment of children.

However, this would conflict with the general obligation undertak-

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92 Uganda, The Amnesty Act (2000), accessed 25 March 2022 https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/$file/ugandan+amnesty+act+2000.pdf.

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

94 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.

95 Uganda, The Children Act (1 August 1997), Section 88, accessed 25 March 2022 https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/738fcd999d6976a8c125767e004c5fa6/$FILE/THE%20CHILDREN%20ACT.pdf.

96 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.

97 *Ibid*, 100.

98 Reis, *supra note,* 35.

en by States to act in accordance with international law and prosecute violations by bearing responsibility.[99] The language of the Rome Statute preamble affirmed the duty of each State "to exercise its criminal jurisdiction over those responsible for international crimes".[100] Furthermore, not prosecuting criminal offenders in the case of child solders would in turn encourage the protraction of human rights violations, especially the rights of children in the first place. If child soldiers are presumed to escape punishment for criminal actions due to their age, military commanders will perceive this as a "green light" to continue to recruit children for even more severe crimes.[101]

In this sense, the notion of "amnesty" would be considered equivalent to "impunity". In other words, not only would children be denied sufficient support in the acknowledgment of them being perpetrators, but victims of their offences would also be rejected their right to an effective remedy.[102]

Conclusions

The range of aspects which lay beneath the motivation for the enlistment of children in armed groups or armed forces are varied and derive from different levels of a child's life. The minor may be driven by their personal wish to survive, may earn money for their family or to provide their own life, or may become a part of something more than simply being.

Different cultural backgrounds and political contexts induce the divergent views of local societies on former child soldiers. This has led to the ambiguous perception of children by numerous scholars as victims of their perpetrators, and, in turn, as perpetrators against others, which indicates the growing awareness of the need for resolution of this issue.

In international humanitarian law, there is no general prohibition of the prosecution of children for war crimes. On the contrary, from the wording of API, APII, and the Rome Statue, it can be concluded that children may in fact be recognized as perpetrators and, further, may be brought to justice.

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

100 "The Rome Statute of the International Criminal Court", *supra note*, 2: preamble.

101 Rose Grogan, "Child Soldiers, Prosecution", IDEA in Nobert, *supra note,* 6: 36.

102 Bakker, *supra note,* 91: 2.

The crimes committed by child soldiers shall not be left disregarded. Appropriate justice would bear, firstly, an educative character. Quénivet accentuated the need for understanding by children of the blameworthy nature of their actions.[103] Moreover, society, in the form of international and national justice, should point out the realistic images of child soldiers being perpetrators.[104] 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 *mens rea* evidence.[105]

Child soldiers should be recognised as accountable for the war crimes enlisted in the Rome Statute. The prosecution of child soldiers would have deterrent effects on the further recruitment of child soldiers.[106] While perceiving them as fully escaped from responsibility, enlistment into State armed forces, non-State rebel groups, and terrorist organizations can never be terminated.

Justice should be administered over all kind of crimes, and war crimes committed by child soldiers shall not be excluded. The most important regard is to be paid to the rehabilitation and reintegration of children resulting from the concept of the best interests of the child. Leaving children abandoned would only aggravate the problem of injustice for helpless victims and extend the phenomenon of child soldiers.

States have to fulfil obligations to guarantee and protect human rights.[107] Otherwise, this jeopardizes 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 entire understanding of their own actions. Conversely, the option to also perceive children as perpetrators would fill the present gap regarding their criminal responsibility in the light of committed war crimes.

Above all, the rights of the victims of child soldiers should be taken

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103 Quénivet, *supra note,* 42: 451.

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

105 "Convention on the Rights of the Child adopted 20 November 1989 by General Assembly resolution 44/25", *supra note*, 71: Art. 3.

106 Quénivet, *op. cit.,* 42: 451.

107 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.

into consideration. By providing appropriate remedies, States restore victims' right to know the truth and ensure the reconciliation processes in post-war communities.

The alternatives of restorative justice and prosecution should assist children in the recognition of responsibility for atrocities. The prosecution prosses is considered to be traumatic for the psychological health of a child, leading to social stigmatization; while restorative justice is presumed to be a more sufficient and effective model for children to assist in the acknowledgment of their own accountability for war crimes committed. However, the coexistence of prosecution is regarded as a last resort option for those child soldiers objecting to participation in the restorative justice process. It is important to deliver justice in a manner consonant with the basic principle of juvenile justice, with the unconditional prohibition of capital punishment and life sentences without the possibility of release.

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 generally used to provide reconciliation within communities during a 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 should be identified as inadequate regarding guarantees of basic human rights and general international law in regard to the serious nature of war crimes committed by child soldiers.

Recommendations

Within the UN Economic and Social Council, an 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 efficient reconciliation processes in post-war communities, along with providing sufficient assistance to child soldiers in the acknowledgment and recognition of their own responsibility for the commission of war crimes.

Amnesty for child soldiers who have 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 should be used in light of the determination of the responsibility of child soldiers.

In international law, the list of mitigating factors applying to child soldiers during the prosecution process should be developed. This should include the following elements as prerequisites to charges against child soldiers, lessening them within the prosecution procedure:

1. age;
2. cultural and economic environment in the States known for child soldier recruitment;
3. mental and phycological development;
4. range of actions performed by child soldiers.

VAIKŲ KARIŲ ATSAKOMYBĖ UŽ KARO NUSIKALTIMUS

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Anotacija. Remiantis Jungtinių Tautų Generalinio sekretoriaus metine vaikų ir ginkluotų konfliktų ataskaita, 2020 metais į fronto kovą buvo įtraukta daugiau nei 8 tūkstančiai berniukų ir mergaičių. Vaikų dalyvavimas valstybinėse ir nevalstybinėse ginkluotosiose pajėgose, ginkluotose grupėse ir teroristinėse grupėse susiję su įvairiais socialinio, ekonominio ir individualaus lygmens aspektais. Atlikus analizę prieita prie išvados, kad atsisakius gryno „aukos" požiūrio ir suteikus dvigubą statusą dabartinė teisinė kolizija išsispręstų. Be to, vaikų kaip smurtautojų suvokimas leistų suprasti jų baudžiamosios atsakomybės klausimo sudėtingumą. Atitinkamai turi būti sukurtas veiksmingas vaikų karių atkuriamojo teisingumo modelis, kuriame būtų atsižvelgta į tam tikrus lengvinančius veiksnius, o amnestija būtų suvokiama kaip nepriimtina.

Reikšminiai žodžiai: vaikai kariai, karo nusikaltimai, atsakomybė, amnestija, baudžiamasis persekiojimas*, atkuriamasis teisingumas.*