

CRIMINAL RESPONSIBILITY OF RECRUITED MINORS AND FORMER CHILD SOLDIERS IN NATIONAL JURISDICTIONS



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INTRODUCTION

1. This paper is part of the research work by the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the *Ibero-American Institute of the Hague for Peace, Human Rights and International Justice (IIH)*, in cooperation with the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC). This memorandum seeks to answer the following two questions:

1. *¿In which national jurisdictions, and under which circumstances and criteria, can child soldiers under 15 be held criminally liable for crimes committed during the period of their recruitment? ¿What kinds of punishment are foreseen?*
2. *In national jurisdictions and in cases involving former child soldiers (or any equivalent circumstances where children were forced to commit crimes or subjected to any type of victimisation), ¿what role(s) do these elements play in their sentencing when convicted of crimes committed as adults?*

2. The ICC OPCV asked the Law Clinic to resolve the two aforementioned questions, and so the Clinic's team investigated multiple domestic jurisdictions and focused on three things: their current legislation regarding the minimum age of criminal responsibility, the prosecution of minors, and the existing case law resulting from this issue.

3. At the outset, and as a preliminary note, it must be highlighted that the Law Clinic's team did not find national jurisdictions that bestow special treatment - legal or procedural - to minors who perpetrate crimes after being recruited, or to adults who perpetrate crimes after being recruited as minors. The analyzed legislations prosecute minors through special legal provisions that take into account the age of the accused person but have no relation whatsoever to their status as a recruited child.

4. Accordingly, both questions will have a unified answer, given that the sources of information were the same. They will be addressed within the framework of a comparative analysis of various national jurisdictions, and, to this end, the legislation and jurisprudence of the following countries will be taken into account: the Republic of Colombia, the Republic of El Salvador, the Arab Republic of Egypt, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Republic of Hungary, the Republic of Kenya, the Republic of Peru, the Republic of Uganda, the Kingdom of Spain, the Republic of South Africa and the United States of America (Model Penal Code).

5. It is worth mentioning that three specific criteria were used when determining the specific jurisdictions to be analyzed : (a) the existence of an armed conflict that gave rise to the commission of mass crimes by minors - or by adults who were recruited as minors -; (b) the possibility to access official information in English or Spanish; and (c) the analysis of multiple



jurisdictions/countries located in different continents, thus enhancing the scope of this research and enriching it with legal and judicial diversity.

6. Thereupon, this memorandum is divided into two parts: **(I)** the first one, where the criminal responsibility of the forcefully recruited will be analyzed. This first part will be divided into two sections, *(A)* the first section, that will address ordinary justice systems, and *(B)* the second section that will focus on transitional justice systems; and **(II)** the second part with the overall conclusions.

I. CRIMINAL RESPONSIBILITY OF THE FORCEFULLY RECRUITED

7. According to the Child Rights International Network, only ten countries have placed the age of criminal responsibility above 15.² In other words, States usually assert their jurisdiction when punishing child soldiers who perpetrate crimes during the period of their recruitment. However, the penalties imposed are usually much lower than those applicable to people over the age of 18. This, since young offenders are generally protected by legal provisions and children's acts, which impose more favorable sentencing conditions for them. In extreme cases, some jurisdictions abandon the retributive justice system, in favour of the rehabilitative justice system, replacing sentences with temporary remands or "corrective measures". International Law has ratified this: the UN Convention on the Rights of the Child³ recognizes that when children commit criminal offences, their processing through the criminal justice system should be the last mechanism undertaken by the State.

8. The Law Clinic's team did not find national jurisdictions that bestow special treatment - legal or procedural - to child soldiers under 15 due to their forced recruitment status. Instead, child soldiers usually benefit from general provisions related to juvenile justice.

A. ORDINARY JUSTICE SYSTEMS.

a. Africa.

Kenya

9. Kenya has a particularly punitive approach towards juvenile justice; criminal responsibility starts at the age of eight years old. People between the ages of eight and twelve are presumed not to understand the consequences of their actions; however, if this presumption is disproved by the

² These countries are Luxembourg, Argentina, Cape Verde, Cuba, Equatorial Guinea, Guinea-Bissau, Mozambique, Portugal, Sao Tome and Principe, and Timor-Leste. Child Rights International Network, *Minimum ages of criminal responsibility around the world*, retrieved from: <https://archive.crin.org/en/home/ages.html>.

³ United Nations Convention on the Rights of the Child, article 40.



prosecuting authority, they are also criminally liable.⁴ Nevertheless, the penalties were restricted under general juvenile law to a lower level: the death penalty was prohibited, and specific provisions related to rehabilitation centers were established.⁵ Despite the fact that there was no available case law from Kenya's High Courts that responded directly to the issue in question, the Law Clinic's team analyzed a case that presented some important elements related to the present research: Criminal Case No. 239/2004,⁶ where an armed gang was captured and its members - including an underage gang member - were all punished.

10. Regarding recidivism of former child soldiers, it is noteworthy that Kenyan law does not regulate general aggravating, nor mitigating circumstances in its Criminal Code. Rather, the only generally applicable rules to the sentencing process, are those present in the guidelines of the nation's judiciary,⁷ which do not determine forced recruitment as an aggravating, nor a mitigating circumstance. Nevertheless, Kenyan judges possess a broad margin of appreciation, endowing them with a wide range in which they can declare a mitigating or an aggravating circumstance, since these are explicitly enunciative.

South Africa

12. South Africa's Child Justice Act⁸ instituted a minimum age of ten years for criminal responsibility, and between the ages of 10 and 14, children presumptively lack a minimum degree of awareness - a necessary element of *mens rea*. These are general provisions related to juvenile criminal law, and there is no special system designed for forcibly recruited soldiers.

13. Regarding recidivism, and akin to the system in Kenya, the High Court of South Africa⁹ has declared that there's not a system of *numerus clausus* of aggravating or mitigating circumstances, since these are deliberated by the presiding officer in a case-by-case analysis.

14. Therefore, it would be a mistake to rule out forced recruitment as a mitigating or aggravating circumstance that can affect the final sentence. However, the Law Clinic's team did not find South African case law that addressed the issue in question.

Egypt

⁴ Kenya: Penal Code (2012), art. 14, pg. 6-21

⁵ Kenya: Children Act (2001), art. 190, pg. 91

⁶High Court of Kenya (Mombasa), Kazungu Kasiwa Mkunzo et al. vs. Republic, June 21 2006, Appeal ruling, No. 239/2004.

⁷ Judicial Branch of the Republic of Kenya, (2015), *Sentencing Policy Guidelines*, Retrieved from http://kenyalaw.org/ki/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf

⁸ Republic of South Africa: Child Justice Act 75 (2008), art. 7(1).

⁹ High Court of South Africa, S v Soni, 26 October 2018, Case No. CC 29/14P, ZAKZPHC 74, paragraphs 14-15.



15. In Egypt, there is a four-tiered approach towards underaged criminality¹⁰ depending on the minor's age at the time of the commission of the crime. Children between the ages of 7 and 12 are not subject to criminal punishment. Children between the ages of 12 and 15 are subjected to special juvenile justice provisions. Finally, minors over 15 are treated like adults.

16. The International Law Clinic did not find any legal provision, nor case law in Egypt that addressed the particular treatment given to adults who commit crimes after being initially recruited as minors into armed organizations (be they criminal¹¹, terrorist¹² or any other category).

A. The Americas

17. When discussing national legislations in the Americas, it is important to consider that the cornerstone of most American legal systems, underlined by the Jus Civile system, is the *nullum crimen sine legen* principle of criminal law. This principle entails that all factors of criminal responsibility must be set out in law. Thus, the International Law Clinic noted a general pattern regarding the questions posed by the OPCV: national legislations tend not to have any specific provisions regarding the responsibility of child soldiers.

El Salvador

18. Even though El Salvador¹³ has a criminal law addressed to children between the ages of 12 and 18¹⁴, it does not provide any special treatment for forcibly recruited soldiers. Salvadorian law only addresses child soldiers as victims and does not make any special consideration regarding the crimes they commit.

19. Hence, there was no Salvadorian case law found by the Law Clinic's team that referred to forcibly recruited children who commit crimes. Whereas, adults who commit crimes are not treated in a different way.¹⁵

Perú

20. Much like Egypt, the Peruvian Criminal Code¹⁶ has a tiered system when it comes to minors who commit crimes. Children under the age of 12 are subject to special measures of protection.¹⁷

¹⁰ Egypt: THE NATIONAL COUNCIL FOR CHILDHOOD AND MOTHERHOOD. LAW NO. 12 OF 1996 PROMULGATING THE CHILD LAW AMENDED BY LAW NO. 126 OF 2008.

¹¹ Egypt: Criminal Procedure Code - Law 58 (1937).

¹² Egypt: Terrorist Entities Law (Law 8, 2015)

¹³ El Salvador: Decree N° 1030 (1997), Criminal Code, art. 17.

¹⁴ El Salvador: Decree N° 863 (1994), Youth Criminal Code

¹⁵ El Salvador Supreme Court of Justice, Special Criminal Chamber (2019), Ruling 89-890-APE-2018.



Children between the ages of 14 and 18 are subject to special juvenile law, and will not be punished through general criminal law, but rather through the imposition of “socio-educative measures”.¹⁸ This “socio-educative measure” is usually the penalty of internment, consisting of 6 to 10 years (depending on the age of the person) for crimes such as terrorism.¹⁹

21. Peru has no legal provision related to mitigating or aggravating circumstances for individuals forcibly recruited as children and then tried as adults.²⁰ Additionally, the Law Clinic’s team did not find Peruvian case law that addressed the issue in question.

United States of America

22. The US Model Penal Code, generally similar to other criminal codes reviewed under this chapter, has no provisions related to the recruitment of child soldiers; however, this does not preclude State criminal statutes from establishing other provisions focused on underaged individuals who commit crimes, as it is very clear the Model Penal Code’s purview applies only to those under 16.²¹ The Model Penal Code does not determine any general mitigating or aggravating circumstances, nor are there any relevant circumstances present in the only crime whose circumstances are included in the Model Penal Code (murder).²²

23. It must be taken into account that, due to time constraints, no State legislations or USA case law were researched by the International Law Clinic.

B. Europe

24. Criminal codes in European jurisdictions include provisions for minors, but not for *recruited* minors. This confirms the pattern noticed by the Law Clinic’s team: forcibly recruited minors are only generally treated as juveniles in States that do not have legislation related to transitional justice.

25. No jurisprudence was researched by the Law Clinic’s team in relation to some European countries, due to time and language constraints. Hence, there is a possibility that judicial or doctrine interpretations of European criminal systems could justify special treatment to forcibly recruited individuals. However, it seems particularly unlikely to find legal provisions or case law

¹⁶ Republic of Peru: Legislative Decree N° 635 (1991), Criminal Code, art. 20.

¹⁷ Republic of Peru: Law N° 27337 (2000), Code of Children and Adolescents, art. 1.

¹⁸ Republic of Peru: Legislative Decree N° 1348 (2017), Code of Teenager Criminal Responsibility, art. 1.

¹⁹ Republic of Peru: Legislative Decree N°25475 (1992), On the punishment for crimes of terrorism and proceedings for investigation, instruction and judgement.

²⁰ Supra 16, articles 20 and 46.

²¹ United States of America: Model Penal Code (1971), Sections 4-10 and 210-4.

²² Ibid., section 210-4



that addresses the issue in question, especially considering that the analyzed states where no case law was researched have mostly civil law-based jurisdictions, hailing from a central European tradition of strong legality.

The United Kingdom

26. The division between different jurisdictions present in the United Kingdom makes it necessary to undertake an analysis in the nation's three constituent countries (England and Wales, Scotland, and Northern Ireland),²³ as different provisions (including general provisions of criminal law such as the age of criminal responsibility) vary depending on the country involved.²⁴

i. England and Wales

27. In England and Wales²⁵ children under the age of 10 cannot be criminally prosecuted. When they break the law, other types of sanctions can be applied to them, such as filing charges against their parents, or child safety orders to be followed by their guardians.²⁶ Children between the ages of 10 and 17 years can be prosecuted for crimes they commit²⁷ under special measures designed for them, such as being processed by specialized courts of minors, or to be sentenced by means of pedagogical and community service measures, or, in the most complex cases, to be sent to special security centers for young people, instead of prisons. No relevant case law was found by the Clinic's team that addressed the issue in question.

ii. Scotland

28. Scottish law,²⁸ has established that the age of criminal responsibility is 12 years old. The Criminal Justice and Licensing Act of 2010 indicates that minors may not be prosecuted for an offence.²⁹ Neither Scottish legislation, nor case law address the issue of children's participation

²³ "Juvenile Justice", United Nations Children's Fund, UNICEF, International Center for Child Development, Florence, Italy, with no edition or publication date, but its content refers to information up to 1997. The source indicates that in many cases, the ages may increase or decrease due to special circumstances, so the information indicated is indicative rather than definitive. Available at: <http://bcn.cl/1s8ge> (September 2015).

²⁴ United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2018), Sixth periodic report to be submitted by the United Kingdom of Great Britain and Northern Ireland in 2017 under article 19 of the Convention in accordance with Optional reporting procedure, CAT / C / GBR / 6, pg. 29 par. 25

²⁵ UK Government. Age of Criminal Responsibility. <https://www.gov.uk/age-of-criminal-responsibility>.

²⁶ UK Government. What happens if a child under 10 breaks the law?. <https://www.gov.uk/child-under-10-breaks-law>.

²⁷Supra 23.

²⁸ United Kingdom (2019): Age of Criminal Responsibility Act (Scotland).

²⁹ United Kingdom (2010): Criminal Justice and Licensing Act (Scotland)



in armed conflicts. The International Criminal Court Act of 2001,³⁰ the most relevant legal provision related to international crimes, does not make any reference to minors who might commit them.

29. Notwithstanding this, there is some case law that might shed light on trial judges' sentencing of minors. The High Court of Justiciary has stated that its primary consideration when sentencing minors must be the child's best interest. Thus, any conviction must aim to the reintegration and rehabilitation of the child in question, rather than the more punitive approach given to those who commit crimes as adults.³¹

30. The High Court of Scotland has determined that the convicted child's youth is a mitigating circumstance in several cases, including those where the prosecuted is an adult judged by crimes committed as a minor, as can be seen in the Paul William Greig vs. Her Majesty's Advocate³² case. In its ruling, the Chamber refers to the fact that the Chamber must consider that the acts were carried out when the convicted person was a minor. Therefore, the Chamber stressed that the penalty could not be established as if the convicted person was an adult.

31. Consistently, the Appeals Chamber in the Adam McCormick vs. Her Majesty's Advocate case - Appeal Against Sentence -, stated in paragraph 4, that: "*were the appellant to have been sentenced when he was still a child, any sentence for these crimes would have been significantly less than if the crimes had been committed by an adult. In sentencing a person who is a child, regard must be had to the best interests of that child as a primary consideration*³³." This circumstance is mainly presented by Lady Hale as she insists *that juveniles are generally less blameworthy and more worthy of forgiveness than adult offenders, although each case must depend on its own circumstances: there is a difference between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption.*³⁴

iii. Northern Ireland

32. Neither Northern Irish legislation nor case law analyzed by the Law Clinic's team have specific provisions related to children's participation in armed conflicts, be it the Troubles or any

³⁰ United Kingdom (2001): International Criminal Court Act (Scotland)

³¹ Appeal Court, High Court of the Judiciary, Scotland, Appeal Against Sentence By Adam McCormick Against Her Majesty's Advocate, 12 april 2016, [2016] HCJAC 50, Paragraph 4

³² Appeal Court, High Court of the Judiciary, Scotland, Paul William Greig v. Her Majesty's Advocate, 5 october 2012, [2012] HCJAC 127, Paragraph 7

³³ Appeal Court, High Court of the Judiciary, Scotland, Appeal Against Sentence By Adam McCormick Against Her Majesty's Advocate, 12 april 2016, [2016] HCJAC 50, Paragraph 4

³⁴ Appeal Court, High Court of the Judiciary, Scotland, APPEAL AGAINST SENTENCE by AARON THOMAS CAMPBELL against HER MAJESTY'S ADVOCATE, 10 september 2019, [2019] HCJAC 58, Paragraph 9



analogous situation. This takes us to general provisions of juvenile justice such as the Criminal Justice (Children) (Northern Ireland) Order of 1998, which regulates grave crimes committed by children. The Order determines that, when grave crimes are perpetrated, no life imprisonment sentence shall be passed onto the child. Instead, a court shall sentence them to be detained for the time the Minister of Justice considers appropriate. In any case, children can be punished for crimes even when the penalty is greater than 14 years.³⁵

33. Northern Irish law states that the purpose of juvenile justice is, “*encouraging children to recognise the effects of crime and to take responsibility for their actions*”, with special regard for the wellbeing of the child.³⁶ Nevertheless, Northern Ireland has a relatively punitive criminal system, as can be seen through the fact that children can be taken from juvenile facilities to prisons when they are 17.³⁷

34. Regarding mitigating and aggravating circumstances, the age of the offender is an important mitigating factor,³⁸ as is “*the capacity of understanding and responding in a socially appropriate manner*”.³⁹ Northern Ireland case law has ruled that psychological distress experienced as a child can also be considered a mitigating circumstance.⁴⁰ However, the direct act of recruitment into an armed group or an analogous criminal organization has not been addressed as a circumstance for sentencing.

Spain

35. Spain’s Criminal Code⁴¹ states that those under the age of 15 can only be sentenced to a maximum of 3 years’ imprisonment.⁴² Children recruited into armed organizations generally avoid punishment by criminal courts in the country. However, sentences with significant incarceration time have been granted.⁴³

³⁵ United Kingdom, (1998), The Criminal Justice (Children) (Northern Ireland) Order.

³⁶ United Kingdom (2002), Justice (Northern Ireland) Act.

³⁷ United Kingdom (2008); The Criminal Justice (Northern Ireland) Order.

³⁸ Crown Court in Northern Ireland, The Queen vs. Darren Larmour, *Decision on Tariff*, May 24th, 2005, Case No.: NICC 4, paragraphs 11, 17; Court of Appeals of Northern Ireland, The Queen vs. Trevor McCandless (and others), *Judgement*, January 9th 2004, Case No.: CARF4076, paragraphs 2-8, 13, 17.

³⁹ Crown Court in Northern Ireland, The Queen vs. A and B, *Judgement*, November 21st, 2008, Case No.: GIL7324, paragraphs 23-31.

⁴⁰ Court of Appeals of Northern Ireland, Attorney General’s Reference: Michael John Gilbert, *Appeals Judgement*, September 15th, 2006, Case Ref.: KERC5641, Paragraphs 10, 15.

⁴¹ Spain: Organic Law 10 (1995), Criminal Code, art. 19

⁴² Spain: Organic Law 5 (2000), Ruling norms for the criminal responsibility of minors.

⁴³ National Audience of Spain, Penal Chamber, fOURTHSection (2018), Ruling 973/2018, Num 20180411



36. There are no particular aggravating or mitigating circumstances present in the Spanish Criminal Code related to individuals recruited as children who later commit crimes as adults.⁴⁴ Indeed, Spanish legislation has not given a differential treatment to those who, having been recruited when underaged, commit crimes after turning eighteen.⁴⁵ Instead, general aggravating and mitigating circumstances can apply, such as: the age of the convicted person, or grave alteration of personal situations.⁴⁶

Hungary

37. According to the Hungarian Criminal Code, the minimum age for criminal responsibility is 14. Additionally, children between the ages of 12 and 14 who commit harsh crimes, or those whom the State proves knew of their actions⁴⁷ can also incur in criminal responsibility.

38. Regarding the possibility of forced recruitment being treated as a mitigating or aggravating circumstance, the Hungarian Criminal Code defines the specific causes for limiting or eliminating criminal responsibility in its Section 15.⁴⁸ There are no general aggravating circumstances, only specific ones related to crimes, none of which are related to recruitment as a child. However, the general principles of sentencing in section 80 of the Hungarian Criminal Code determine that the judgement must be imposed based on “*its objective, ensuring that the punishment is appropriate for the material gravity of the criminal offence, the degree of guilt, the degree of danger the perpetrator poses to society, and other mitigating and aggravating circumstances*”, which opens the door to the application of circumstance under some of the very general provisions of sentencing.⁴⁹

Germany

39. German criminal law is more lenient towards minors, with an age of criminal responsibility set at 14 by the German Criminal Code.⁵⁰ Besides the minimum age, German law determines a further condition for criminal liability: “*if, at the time of the act, [the person who commits the crime] has reached a level of moral and intellectual maturity sufficient to enable them to understand the wrongfulness of the act and to conduct themselves in accordance with such*

⁴⁴ Supra 38, article 22

⁴⁵ National Audience of Spain, Penal Chamber, Third Section (2018), Ruling 3462/2018, Num 201809028

⁴⁶ Supra 41

⁴⁷ Hungary: Criminal Code (2012), Section 16

⁴⁸ Ibid., section 15. The causes are they are infancy, mental disorder, coercion or threat, error, justifiable defense, necessity and permission by law

⁴⁹ Ibid, section 80

⁵⁰ Germany: Criminal Code (1998), Section 19



understanding".⁵¹ Once again, German criminal law does not establish a specific approach towards forcibly recruited individuals.

40. The German Criminal Code has no direct reference to being a victim of forced recruitment as a mitigating or aggravating circumstance when trying crimes later committed. The closest thing to this, would be the "special personal characteristics",⁵² or reduced understanding of the criminal act.⁵³

41. In summary, no ordinary jurisdiction analyzed has notions that directly address forced recruitment of minors into armed groups. This entails that the answer to both questions posed by the Office of Public Counsel for Victims is that there is no special treatment for forcibly recruited individuals. Child soldiers are responsible under general provisions of juvenile criminal law; their recruitment would not result in the application of aggravating or mitigating circumstances.

2. TRANSITIONAL JUSTICE SYSTEMS

A. Colombia

42. In the context of transitional justice systems, laws related to the particular treatment of demobilized soldiers bestow judges with a greater margin of action when deciding what to do with former child soldiers. This is exemplified clearly in the Republic of Colombia, since the special legal provisions related to the peace process have addressed the issue of child soldiers who commit crimes: amnesty is not granted to those who commit international crimes in light of Article 28 of the Law of Amnesty.⁵⁴ It must be noted that the Law of Amnesty tasks a special section of the SJP (Special Jurisdiction for Peace) named "the Chamber for the Definition of Judicial Situations". This chamber decides whether charges will be pressed against minors who committed international crimes during the conflict.

43. The Constitutional Court's rulings related to this law establish that this is a particular faculty that Congress decided to grant upon the Special Jurisdiction for Peace, by which they can determine what treatment to be given to individuals recruited as children. Even if the Special Chamber does decide to press charges against them, the Constitutional Court makes it clear that the ruling Chamber must take into account "*the principles that guide the function of the penalty in the system of juvenile criminal responsibility, and the restorative and prospective focus of the sanctions of the Special Jurisdiction for Peace*".⁵⁵

⁵¹ Germany: Youth Courts Act (1972), Section 3

⁵² Ibid., section 28

⁵³ Ibid., section 21

⁵⁴ Colombia: Law 1820 of 2016, Article 28

⁵⁵ Constitutional Court of Colombia, Ruling C-008/18, March 1 2018, Number RPZ-001.



44. Over the two hundred cases overseen by the Chamber for the Definition of Judicial Situations, only five of them dealt with minors being recruited. In all five cases, the Chamber dismissed the plea of former child soldiers, and denied them the possibility to be exempt from criminal responsibility under Article 28 of the Law 1820 of 2016.⁵⁶

45. The Law of Justice and Peace⁵⁷ dealt with special provisions of transitional justice regarding Colombian paramilitary United Self-Defenses, and is more general when talking about minors: it only refers to the handing over of recruited minors, and not to the actions that they may have committed.

46. The general provisions of Colombian law are vaguer when discussing juvenile justice. The Colombian Criminal Code⁵⁸ punishes through various means⁵⁹ the use of children for the purpose of committing a crime. The increasing number of children and adolescents belonging to gangs and urban cartels, have led Colombia to specifically criminalize this type of behavior.⁶⁰

47. Regarding forced recruitment, the Constitutional Court⁶¹ established that it is not relevant whether the recruited minor acted willingly or not, since, in the Court's opinion, when analyzing all cases, there is not a complete awareness of the consequences that derive from enlisting - especially considering the social, cultural and educational background in which recruitment usually occurs. Thus, there is an incapacity of autonomous decision on the part of minors, that precludes full consent. Also, Law 1448 of 2011 provides that children forcibly recruited who disengage themselves from the armed group while they are under 18 years old, will be recognized as victims. Nevertheless, this regulation does not specifically refer to the criminal liability that could be attributed to them.^{62,63}

48. In light of the above mentioned, to this date there is no legal provision, nor case law that establishes a detailed position towards forced recruitment as grounds for exemption or mitigation

⁵⁶ Special Jurisdiction for Peace (2020), *General Archive of the Chamber for Definition of Judicial Situations*.

⁵⁷ Colombia: Law 975 of 2005, Article 10(3)

⁵⁸ Law 599 of 2000. Penal Code. Recovered from: http://www.secretariassenado.gov.co/senado/basedoc/ley_0599_2000_pr006.html#188.

⁵⁹ Including a specific criminal type: "Use of the Underage in the Commission of Crimes"; present in Article 188D of the Criminal Code

⁶⁰ According to the report of the Secretary General of the United Nations presented before the United Nations Security Council in 2002, cited in Sentence SP15870-2016 with File 44931 MP Luis Antonio Hernández Barbosa, the main estimates indicated that for that time the figure of minors serving in the ranks of illegal armed groups operating in the national territory ranged from 11,000 to 14,000.

⁶¹ Constitutional Court of Colombia, Ruling C-240/09, April 1, 2009, Number D-7411

⁶² Colombia: Law 1448 (2011), Law of Victims, art. 3

⁶³ González Ortiz, J, Carrasquilla Baza, D. (2017). Niños, niñas y adolescentes ¿víctimas o victimarios del conflicto armado en Colombia? *Justicia Juris*, 13 (1), 56 - 62



of criminal responsibility. Colombian criminal law states that the grounds for exemption from criminal responsibility are exhaustive and contained in Article 32 of Law 599 of 2000. In other words, Colombian judges cannot arbitrarily declare a particular circumstance as an exemption from criminal responsibility, unless it is encompassed within Article 32, with the closest grounds for exemption being forced coercion, hardly an analogous case.⁶⁴

B. Uganda

49. Uganda's age of minimum criminal responsibility is 12, as established by the Penal Code Act.⁶⁵ However, under the Children Act of 2001,⁶⁶ the penalties for minors who commit crimes cannot be greater than three years, the death penalty is proscribed,⁶⁷ and the penalties are not considered as a punishment, but rather remands or orders.⁶⁸ This is compounded by the fact that the Amnesty Act⁶⁹ - last extended in 2017,⁷⁰ despite wide-ranging opposition due to its general provisions⁷¹ of the Republic of Uganda has established wide-ranging provisions for those who laid down their arms.⁷² Cases related to the LRA are generally referred to the traditional Acholi *mato oput* method of community justice,^{73,74} which leads to application of amnesty to all minors.

50. However, it must be taken into account that application of the Amnesty Act is dependent on the Amnesty Commission and, in the cases of grave crimes, on the Attorney General of Uganda. This has occasionally led to an arbitrary application of the Act. In 2003, the Attorney General of Uganda prosecuted two underage former child soldiers, even though they were eligible for amnesty. This investigation sparked international uproar and was eventually rescinded.⁷⁵

51. A particularly contentious moment in the Ugandan judiciary refers to the case of Thomas Kwoyelo. The Kwoyelo Case has been upheld as Uganda's first ever human-rights judicial case, as well as the first (and to this date, only) substantive process to be held by the High Court of Uganda's International Crimes Division.⁷⁶ Kwoyelo was a member of the Lord's Resistance

⁶⁴ Supra 57, article 32-8

⁶⁵ Uganda: Penal Code Act (1950)

⁶⁶ Uganda: Children's Act (1997), art. 88, pg. 66.

⁶⁷ Uganda: Children's (Amendment) Act (2016), art. 19, pg. 42.

⁶⁸ *Ibid.*, article 91(5).

⁶⁹ Uganda: Amnesty Act (2000), art. 2

⁷⁰ Uganda: Amnesty Act (Extension of Expiry Period) Instrument (2017)

⁷¹ Uganda Law Reform Commission (2016), "Development of a model law on Amnesty for Uganda"

⁷² Lebig, A. (2005), "Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection", *Northwestern Journal of International Human Rights*, Vol.3, No. 1

⁷³ Acirokop, P. (2010), Addressing the Potential and Limits of the "Mato Oput" Process as a Basis for Accountability, Justice and Reconciliation for Children in Northern Uganda, Innocenti Research Centre, UNICEF.

⁷⁴ Odongo O, G. (2004) "Child justice law reform developments in Africa and international standards on the rights of the child." Article 40. Vol. 6(2), pp. 8-12

⁷⁵ Human Rights Watch (2003), "Uganda: Stop Treason Charges Against Child Abductees"

⁷⁶ Refugee Law Project (2011), 'Witness to the trial: Monitoring the Kwoyelo trial'



Army (LRA), allegedly forcibly recruited while underaged.⁷⁷ He rose through the ranks of the LRA, reaching a fairly high level of command, until he was captured by the Ugandan military in the Democratic Republic of the Congo. Once captured, Kwoyelo requested amnesty under the provisions of the Amnesty Act, but the request was rejected by the Attorney-General.⁷⁸ A contentious judicial dispute in the Constitutional Court of Uganda initially led to this being recognized as an act of discrimination. However, the decision was eventually overruled.⁷⁹ No other judicial decisions issued by the International Crimes Division of the High Court of Uganda has dealt with child soldiers or with individuals recruited as children,⁸⁰ even though most LRA soldiers were recruited as children.⁸¹

52. The wide unpopularity of the LRA in Acholiland, and the great social stigma placed upon those who were abducted by it as children, means that the incapacity of reintegration into society is a relatively widespread phenomenon.⁸² Ugandan experts cite that nearly 70% of all those imprisoned in Gulu are former child soldiers⁸³ (although other studies find no differences in aggressive behavior between former child soldiers and other Acholi)⁸⁴. However, and surprisingly, the issue has been addressed very few times in the Ugandan high courts. The only relevant case found by the Law Clinic's team is the case of Alfred Onen Kamdulu and others.⁸⁵ Kamdulu had been forcibly recruited as a child by the LRA, but after being captured by the Ugandan military, was granted amnesty. A year after his pardon, however, Kamdulu joined a

⁷⁷ The age at which Kwoyelo was recruited is disputed; however, the ICD has determined he was recruited at 17.

⁷⁸ Constitutional Court of Uganda, Thomas Kwoyelo alias Latoni v. Uganda, *Judgement*, September 22nd 2011, Case No.: UGCC10

⁷⁹ African Commission on Human and People's Rights, Kwoyelo v. Uganda, *Communication No.431/12*, October 17th 2018, Doc. No.: ACHPR 129

⁸⁰ The ten other decisions by the ICD are: High Court of Uganda (Kampala), International Crimes Division, (2016), Uganda v. Hussein Hassan Agade & 12 others, session document 0001, 2016, UGHICID1, High Court of Uganda (Kampala), International Crimes Division, (2017), Uganda v. Kamoga Siraje & 13 others, session document 004, 2015, UGHICID1, High Court of Uganda (Kampala), International Crimes Division, (2020), Uganda v. Ahmad Ssebuwufu, session document HCT-00-ICD-CM-0021-2019, UGHICID1, High Court of Uganda (Gulu), International Crimes Division, (2019), Uganda v. Musijjo Asuman, session document HCT-00-ICD-CM-0019-2018, UGHICID1, High Court of Uganda (Kampala), International Crimes Division, (2018), Uganda v. Kalule, document of miscellaneous application 001, 2018, UGHICID1, High Court of Uganda (Kololo), International Crimes Division, (2014), Uganda v. Umutoni, judgement, UGHICID1, High Court of Uganda (Kampala), International Crimes Division, (2012), Attorney General v. Gabula, Judgement, UGHICID1

⁸¹ Tim Allen, Jackline Atingo, Dorothy Atim, James Ocitti, Charlotte Brown, Costanza Torre, Cristin A Fergus, Melissa Parker, What Happened to Children Who Returned from the Lord's Resistance Army in Uganda?, *Journal of Refugee Studies*, , fez116

⁸² Haer, R., Böhmelt, T. (2016), "Child soldiers as time bombs? Adolescents' participation in rebel groups and the recurrence of armed conflict", *European Journal of International Relations*, Vol 22(2), pp. 408-436

⁸³ Akello, G., Richters, A., Reis, R. (2006), "Reintegration of former child soldiers in northern Uganda: coming to terms with children's agency and accountability", *Intervention 2006*, Vol. 4, num. 3, pgs. 229-243

⁸⁴ Annan, J., Blattman, C., Mazurana, D., Carlson, K. (2011), "Civil War, Reintegration, and Gender in Northern Uganda", *Journal of Conflict Resolution*

⁸⁵ High Court of Uganda, Col.Onen Kamdulu, Alfred Ayella v. Uganda, *Judgement*, May 22nd 2008, Case No. AA 243/2007



criminal organization, carrying out several acts of armed robbery against people in Gulu. After being captured, Kamdulu was sentenced to 9 years in prison (armed robbery, under the Penal Code Uganda, has a penalty of up to 10 years or death).⁸⁶

53. Particularly relevant to the questions posed by the OPCV is the fact that all former child soldiers in the case (Alfred Onen Kamdulu as well as Patrick Ayella) were explicitly treated as first offenders. This clearly points out the fact that their previous tenure as child soldiers is not held either in favor, nor against them - in the Ugandan judiciary's view, this essentially, does not exist. Formerly recruited individuals who are granted amnesty and "reintegrated" into Ugandan society, and that later commit crimes, are treated as any other Ugandan defendant; their previous victimization takes no role in their sentencing process.

C. The Philippines

54. The general responsibility of children is set out in section 10 of the Philippine Criminal Code,⁸⁷ with a particularly punitive approach towards minors: those over the age of 13 can be sentenced for particularly grave crimes and can be tried as adults, without a special provision for forcibly recruited individuals. However, the Philippines does have a particular provision regarding Children in Armed Conflict (CIAC), specifically the Republic Act 11188.⁸⁸ Article 28 of this Act terminated all criminal proceedings against children recruited in the conflict (especially in regard to individuals recruited by the Moro Islamic Liberation Front - MILF) and referred them to the Local Social Welfare and Development Office (LSWEDO), which determines the measures of reintegration and rehabilitation of CIAC.

55. This radical reinterpretation of juvenile justice for CIAC enacted the end of juvenile prosecution in the context of insurgency inside the country, and especially the end of the conflict between the Philippine Army and the Moro Islamic Liberation Front (MILF). It must be noted that Article 28 was provisional, entailing that amnesty towards all underaged individuals is not a constant element of the Philippine legal system. Thus, the changes of the Philippine criminal justice system are deep and result in a less punitive approach towards forcibly recruited individuals.

56. Finally, the Philippine Criminal Code does not establish general aggravating circumstances, as can be seen in section 19 of the Criminal Code. All aggravating circumstances are directly related to the act in question, and not to the particular circumstances of the convicted person.⁸⁹

⁸⁶ Supra 61, article 286

⁸⁷ Republic of the Philippines: Criminal Code (2014), Section 10

⁸⁸ Republic of the Philippines: Republic Act 11188, An Act Providing for the Special Protection of Children in Situations of Armed Conflict and Providing Penalties for Violations Thereof, article 28.

⁸⁹ Supra 82, section 19: aggravating circumstances are the brutality of the crime, taking advantage of the victim, or flagrant disregard for situations of the victims, or any analogous circumstances.



Meanwhile, mitigating circumstances are based on mental disabilities, or voluntary surrender to certain judicial authorities, as stated in paragraph 2 of section 19.⁹⁰

CONCLUSION

57. Based on the above, the International Law Clinic's team cannot establish, *prima facie*, the existence of any legal provision, nor case law that addresses directly the issue in question. It is possible to conclude that, in ordinary justice systems, there is a lack of legal provisions related to child soldiers. Furthermore, it is possible to observe that no special treatment is provided (in either positive or case law) for adults who commit crimes after being forcibly recruited as children.

58. Instead, in most domestic jurisdictions without transitional justice systems, the only different factor for child soldiers - or those in an analogue situation - is the applicability of general juvenile criminal systems. None of the analyzed ordinary justice systems refer to forced recruitment as a particular circumstance to be considered for exemption or mitigation of criminal liability. Hence, generally, the only factor that sets forcibly recruited children apart from adult participants in criminal acts is their age; these children may be treated more favorably than other criminals, but only due to their age.

59. On the other hand, States with transitional justice systems handle minors through general amnesty laws. While no particular reference to child soldiers can be found in Ugandan amnesty laws, Colombia and the Philippines amnesty laws specifically consider forcibly recruited individuals as victims. Nevertheless, as seen above, the consequences derived from this are different in Colombia and The Philippines.

60. In sum, child soldiers under 15 can be held criminally liable for their actions in most jurisdictions. When they are not, the immunity granted to child soldiers is not due to their status of child soldiers, but rather due to general provisions of amnesty designed for all insurgent soldiers. Colombia and The Philippines are the main exceptions to this general rule. Furthermore, no jurisdiction analyzed by the International Law Clinic provides special treatment for former child soldiers who commit crimes as adults.

⁹⁰ Ibid: attenuating circumstances are “lesser criminal perversity”, mental disability, diminished exercise or freedom, physical or mental defect that restricts his action, or analogous circumstances.



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