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PROSECUTING CHILD SOLDIERS: LEGAL CONSEQUENCES OF THE PARTICIPATION OF CHILDREN IN THE COLOMBIAN CONFLICT

Children have been widely used as pawns in the Colombian armed conflict. International conventions on children's rights view child soldiers solely as victimized and traumatized; criminalizing the use of children under the age of fifteen in active hostilities. This paper aims to approximate the reality of Colombian child soldiers, versus the approach taken in other jurisdictions, where child soldiers have been the prosecuted in situations of armed conflict. In making this approximation, we attempt to answer the question of whether it is lawful to prosecute former child soldiers in post-conflict Colombia.

Keywords: *Child soldiers, prosecution, Colombia, armed conflict, transitional justice.*

Original article

INTRODUCTION. The Colombian armed conflict has resulted in thousands of children and teenagers being recruited and victimized by illegal armed groups. These children, by virtue of their specific experience have been used in all capacities, from cooking staff to actual killing and committing other acts of violence. They have fought, guarded, gathered intelligence, provided medical assistance, performed domestic chores, helped to loot villages and took part in abducting and training other children (Carmona, Moreno, Tobón, 2011).

These children and teenagers receive the same military training in their guerilla forces as their adult counterparts. They learn to march, to lie down and crawl, to jog day and night with their kit, to throw grenades and to shoot. They are taught how to use AK-47s, assemble and fire homemade bombs, including land mines. Consequently, they reach adulthood with a skewed perception of reality from having lived in the jungle since early childhood.

The United Nations in its efforts to create a consistent policy towards children in conflict situations has mainly ascertained that children are victims, because of their age and forced nature of their association (Quénivet, 2017). However, they stop short of setting an age of criminal liability or prohibiting the prosecution of minors who are responsible for perpetrating war crimes.

The primary goal of this research paper is to examine existing international law governing criminal liability for child soldiers and compare it to the current legal framework in Colombia. In this regard, we will study the treatment of children responsible for war crimes under interna-

national and Colombian law, and approximate the reality of these child soldiers in Colombia versus the approach taken in other jurisdictions, where child soldiers have been the subject of prosecution in situations of armed conflict. In making this approximation, we attempt to answer the question of whether it is lawful to prosecute former child soldiers in post-conflict Colombia. The argument is then made that existing legal standards are not only enough, but that prosecuting children who have committed war crimes would prove beneficial for society if an alternative sentencing system were used.

PURPOSE AND OBJECTIVES OF THE RESEARCH. This paper aims to assess the relationship between international instruments, experiences, and the reality of children as active participants in the Colombian armed conflict and determine whether it is lawful to prosecute former child soldiers in post-conflict Colombia. The study finds that there is enough of a legal framework for prosecution with alternate sentencing, and although prosecuting children who have committed war crimes would prove beneficial for society there is not enough of a political will to prosecute those who, according to international and domestic legal standards, take on both the role of victim and perpetrator.

METHODOLOGY. A scoping historical review was conducted, analyzing the roots of the Colombian armed conflict, drawing from international experiences, focusing on the one African jurisdiction that attempted to prosecute minors engaged in hostilities. Socio-political approaches that emphasize the study of human rights and international humanitarian law instruments were extracted,

ending in a descriptive analysis, which was conducted to draft the conclusions of the paper.

RESULTS AND DISCUSSION

The Colombian armed conflict in a nutshell

Peter Waldmann (2007) mentions that Colombia has a culture of violence, defined as “all socio-cultural structures and symbols that are connected with, produced by, and perpetuate violence”. He argues that violent and illegal behaviors, and their subsequent amnesty agreements that are broken time and time again are such a part of Colombia’s cultural makeup that it cannot be removed. Violence and coercion are effective ways to restore rights that otherwise should be enforced and protected by the State. He identifies three types of indicators that point to a culture of violence: structural indicators arising from the nature of violence (frequency, intensity, etc.); mental indicators that suggest that there is a widespread propensity to violence; and a lack of taboos and prohibitive rules that would limit the use of violence. He points out to the Colombian government’s inability to keep the monopoly of the use of force as one of the main causes of the normalization of violence, among others.

Colombia’s history has been one intertwined with conflict since its very inception. Contemporary historians point to La Violencia, a bloody civil war triggered by the 1948 assassination of presidential candidate Jorge Eliécer Gaitán, as a turning point in the country’s domestic turmoil (Echeverri Uruburu, 2007). In the 1960s, the influence of the Cuban revolution further entrenched violence as a means to gain political influence and control the territory¹. This time period was marked by an open confrontation motivated by the heads of state that expressed their radical sectarianism under bipartisan violence, as well as by a repressive wave of agrarian, workers and popular movements and the formation of armed groups with different levels within political parties (Franco Castellanos, 2015). In 1957, the Frente Nacional was created with the goal of ending partisan violence and put an end to the confrontation between the two traditional parties, liberal and conservative, by means of a pact that gives them jointly half of the public positions in the three branches of power for 12 years (Echeverri Uruburu, 2007).

The Frente Nacional pact, raised to Constitutional mandate through a popular referendum, effectively eliminated all third parties from partic-

ipating in the political scene, especially after Congress, in 1959, allowed the institution of the “presidential alternation”, through which liberals and conservatives alternate in the presidency during the twelve years foreseen for the validity of the constitutional pact (Echeverri Uruburu, 2007). This “sharing of power” carried as a consequence, the exclusion of alternate political views, which was seen as an affront by some agricultural sectors, and began to group themselves in the mountains and jungles of Colombia, seeking refuge from the violence of the institutions, forming so-called “independent republics” like the Republic of Marquetalia, commanded by Pedro Antonio Marín, better known as “Manuel Marulanda”. It was here that the first bombing by the national army would take place in 1964, prompting the emergence of the “southern block”, or the first military unit of the future FARC-EP (Franco Castellanos, 2015).

Since then, the FARC and other armed groups regularly engaged in the recruitment and conscription of children. In a 2003 report, human rights watch pointed out that “The FARC-EP shows no leniency to children because of their age, assigning children the same duties as adults. Those who break minor disciplinary rules are sent off to dig trenches or latrines, clear forest, cut and carry firewood, or do kitchen duties. If they lose a weapon, they may be forced to enter combat without one until they are able to recover a replacement from the enemy. To deal with serious breaches, a “war council” is held. Combatants hear the charges and the defense. A death sentence may be passed by a show of hands. Children who desert are often shot, especially if they take their weapons with them. The same fate awaits suspected informers, infiltrators, or children who fall asleep on guard duty. The commander hand-picks a group to carry out the sentence. The child, hands tied by nylon cord, is taken beyond the camp’s perimeter and made to wait while the squad digs a grave”².

Just like the FARC, other armed groups like the ELN assigned children the same tasks and duties as their fellow adult guerrillas, without regard to international legal instruments that call for the protection of minors. Human Rights Watch estimated in 2003 that the number of child combatants exceeded 11,000³. The recruitment of children by the FARC continued until the signature of the peace agreements of 2016, and the ELN, still in active combat, continues to recruit

¹ “You’ll learn not to cry”. Child Combatants in Colombia // Reliefweb. URL: <https://reliefweb.int/report/colombia/youll-learn-not-cry-child-combatants-colombia> (accessed 18 June 2022).

² Ibid.

³ Ibid.

children despite violating multiple instruments of international law.

Children under international law

Before the discussion on prosecuting child soldiers can begin, there needs to be a real and set definition of what a child is under international law. This is quite a difficult task, as several international instruments make a distinction between minors over or under the age of fifteen for recruitment and conscription purposes.

To this effect, The United Nations Human Rights Committee has stated that, although the right to special measures of protection belongs to every child because of his status as a minor, each state must indicate the age at which a child attains majority, under the light of the relevant social and cultural conditions. It cautions that the age must not be set unreasonably low. In contrast, the United Nations Convention on the Rights of the Child states that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier¹. The Rome Statute of the International Criminal Court takes a more pragmatic approach and establishes eighteen years of age as the minimum to join armed forces².

Before the International Convention on the Rights of the Child went into effect, several international instruments, such as the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948, and the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations in 1959, pointed out the need to seek a special protection of children to ensure proper development (Giovanna et al., 2016)

In reviewing the international treaties and conventions that distinguish children as special subjects during a conflict situation, the following instruments are found:

a. The Universal Declaration of Human Rights of 1948, which established in article 25, that mothers and children have the right to care and special protection³.

¹ Special Rapporteur on truth, justice and reparation // United Nations. URL: <https://www.ohchr.org/en/issues/truthjusticereparation/pages/index.aspx> (accessed 18 June 2022).

² Policy on Children. November 2016 // International Criminal Court. URL: https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF (accessed 18 June 2022).

³ Universal Declaration of Human Rights // United Nations. URL: <http://www.un.org/en/universal-declaration-human-rights/> (accessed 18 June 2022).

b. The Fourth Geneva Convention, of 1949, which, in article 23 states that “the parties in conflict have the obligation to allow passage to all shipments of indispensable supplies and clothing reserved for children”. Additionally, articles 50 and 94 establish that children have the right to receive education even in time of war⁴.

c. The International Covenant on Economic, Social and Cultural Rights of 1966, in article 10, recognizes that dependent children need special protection, and ordered States to adopt measures and assistance programs for children and adolescents, without any⁵.

d. Protocol I Additional to the Geneva Conventions, has an entire article dedicated to the protection of children in conflict situations. Article 77 points out that it is necessary to take “all possible measures” so that children under 15 do not participate directly in hostilities. When recruiting people between 15 and 18 years old, they will seek enlist the oldest in the first place⁶.

e. Protocol II Additional to the Geneva Conventions, once again, allows special protection for children in article 4, and establishes that “children under 15 years will not be recruited, and will not be allowed to participate directly or indirectly in armed conflicts⁷.”

f. The Rome Statute of the International Criminal Court acknowledges that children can be

⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 // International Committee of the Red Cross. URL: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4FBC9DEAB064E2B7C12563CD0051BB76> (accessed 18 June 2022).

⁵ International Covenant on Economic, Social, and Cultural Rights. 16 December 1966 // United Nations. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (accessed 18 June 2022).

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) // United Nations. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and> (accessed 18 June 2022).

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) // United Nations. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0> (accessed 18 June 2022).

actors in situations of armed conflict but pays special attention to crimes committed against or affecting children. It recognizes the recruitment of children under 15 as a war crime, and prohibits both “conscripting or enlisting children under the age of fifteen and ‘using them to participate actively in hostilities” (Schabas, 2002).

Colombia has adopted all the above in its internal legal system. In addition, Palou-Loverdos (2018) points out that the implementation of the Peace Agreements of November 24, 2016, with their multiple jurisdictional and non-jurisdictional provisions, reparatory measures, measures for the recognition of victims and truth-targeting measures regarding the abuses of the past, among others, are challenging for the Colombian people as well as for any future initiatives and policies of international cooperation. The agreements are very adamant in the protection of children and minors involved in the armed conflict. Focused on establishing truth and mechanisms of reparation, the aim of the agreements is the clarification and shared understanding of the conflict and, in particular, of its most unknown and hidden aspects, including its impact on children, young people and gender violence¹.

Prosecution of child soldiers

International Human Rights Law, as well as International Humanitarian Law call for the protection of children in situations or armed conflict regardless of how they entered this situation. In the specific context of armed conflicts, N. Quéniwet (2017) points out that “Article 39 of the Universal Declaration of the Rights of the Child declares that states must ‘take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... armed conflict’. The article refers to child ‘victims’ of armed conflict for it aims to protect children who have suffered violence and exploitation. There is no reference to the fact that such children might have been members of armed forces or groups and actively involved in the commission of crimes. Article 6(3) of the Optional Protocol refers to children unlawfully recruited or used in hostilities, and it requires states to accord such children ‘appropriate assistance for their physical and psychological recovery and their social reintegration’. States are also encouraged to cooperate with a view to rehabilitating such individuals”. There is no acknowledgment that children could have

been perpetrators, nor any directive to prosecute children.

International criminal law, in its narrow scope does not present any further guidance regarding the prosecution of children. Article 26 of the Rome Statute prevents the court from prosecuting anyone under the age of 18, that is, it establishes that the court will have no jurisdiction over any person under the age of 18 at the time of the commission of the crime (Schabas, 2002). It does not assert an age of criminal responsibility or a minimum age for criminal prosecution and it leaves this task to each individual State. In Colombia, the age for criminal responsibility has been set at 14, with a special juvenile jurisdiction to investigate and sentence youths who have committed crimes, but nobody older than eighteen has ever been imprisoned as a result of the armed conflict.

Historically, international criminal courts have not tried children. Nuremberg did not address crimes committed by Nazi Youth, and neither did Tokyo with underage soldiers. Following the trend, both International Tribunals for Rwanda and the Former Yugoslavia chose to focus on crimes committed by adults despite large evidence of crimes committed by children (Aptel, 2010). Despite not prosecuting children directly, international criminal law has stayed away from denying criminal responsibility to those who committed war crimes under the age of 18.

Power relationships resulting from infra human war conditions usually precede the recruitment and conscription of children. In Northern Uganda, the Lord’s Resistance Army, or LRA, has fought a civil war against the Ugandan government since 1988. The LRA was notorious for abducting young adolescents; three times as many fourteen-year-olds were abducted than nine-year-olds or twenty-three-year-olds; a fourteen-year-old had a 5 percent average chance of abduction – twice the risk faced by those of age nine or twenty-three. These young soldiers were then initiated into the ranks, usually by killing a close friend or family member, with the purpose of desensitizing them to the violence and binding them to the group, creating a feeling of loyalty (Beber, Blattman, 2013). After this initial treatment, children may react by doing a process of splitting or dissociation, by cutting themselves off from their past identity and construct a new identity more appropriate to their new situation and doing things that are appropriate in that world, such as killing (Aptel, 2010).

The case of Dominic Ongwen, currently before the International Criminal Court, presents a challenge, due to the defendant’s recruitment by

¹ Special Rapporteur on truth, justice and reparation // United Nations. URL: <https://www.ohchr.org/en/issues/truthjusticereparation/pages/index.aspx> (accessed 18 June 2022).

the LRA as a child soldier and climbing the ranks of the organization for over two decades. In 2005, the ICC issued arrest warrants for Vincent Otti, Joseph Kony, Dominic Ongwen and two other senior LRA members. In January 2015, Ongwen was arrested and transferred to the ICC. The trial began on 6 December 2016. To date, The Prosecution has completed its presentation of evidence, and the Legal Representatives of Victims also called witnesses to appear before the Chamber. The Defense started the presentation of its evidence on 1 October 2018¹.

According to a report by Child Soldiers International, Ongwen is charged with 70 counts of crimes against humanity and war crimes committed in northern Uganda between 1 July 2002 and 31 December 2005 (Child Soldiers International | A former child soldier at the ICC, 2018). These crimes were committed during Ongwen's adulthood and include murder, rape, torture, sexual slavery and enslavement, as well as conscription and use of children under the age of 15 to participate actively in hostilities. The fact that he was recruited into the LRA as a youth may be used to plead leniency for the defendant, and it will pose some interesting legal and ethical dilemmas for the International Criminal Court. After all, how much weight should the trauma of forced enlistment before the most horrible atrocities known to humans? Can an international criminal be excused because his vision of the world got skewed by war?

The Special Court for Sierra Leone, set up in 2002 "to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991–2002) civil war"², established the mandate to investigate and prosecute children over 15 responsible for war crimes. The United Nations Special Representative felt that it was appropriate in order to ensure that crimes committed by soldiers recruited over the age of 15 would not remain in impunity (Aptel, 2010). In reality, the prosecutors decided that because children were not ultimately responsible for the crimes, they would focus on the biggest perpetrators, especially those who forced children to commit crimes.

The southeastern island of East Timor has history of civil war similar to Colombia's. After the 1975 invasion of Indonesian forces, natives took

to the jungles to preserve their Portuguese identity, resulting in the creation of the Fretilin, and its armed wing, Falintil³. On the other side, several East Timorese paramilitary units operated alongside regular Indonesian army units. These groups, such as the Partahanan Sipil Hansip were trained in military tactics and strategy by the Indonesian army. Like these, several units, sprouted in defense of either the East Timorese side or the Indonesian invaders.

Initially, these militias and paramilitary groups did not use underage soldiers, due to the ease of finding and recruiting enough adults to meet their quotas. However, as the conflict aged, and able-bodied men over the age of 18 were harder to find, large groups of children and youths were recruited. A 2000 report by UNICEF describes it: "According to pro-autonomy political leaders as well, there were large numbers of youth conscripted into the militia in the western districts of East Timor. This was fueled by a belief that if they could win the majority of the votes from these districts, then the pro-autonomy side could request a partition of the western part of country for themselves in the advent of a pro-independence victory. Therefore, there was a massive recruitment drive in the region and many youths who were under-18 were forced to join the militia to ensure that the pro-autonomy side won by whatever means".⁴

After the end of the hostilities, the Special Panel for Serious Crimes in East Timor was established by the United Nations, acting as the transitional authority between the end of the Indonesian occupation in 1999 and the independence of East Timor in 2002. This panel, acting under relevant national laws, set the age of prosecution to twelve years old⁵. For the most part, the panel chose not to prosecute minors, with the exception of one, referred as "X" in all proceedings, who was fourteen at the time the alleged offenses occurred. "X" was charged with genocide, war crimes, crimes against humanity, murder, sexual offences and torture. He pleaded guilty but was finally convicted for manslaughter and not for an international crime. This highly unusual case is the only one where an international court of a mixed nature convicted a minor⁶.

¹ Ongwen Case. The Prosecutor v. Dominic Ongwen (ICC-02/04-01/15) // International Criminal Court. Available at: <https://www.icc-cpi.int/uganda/ongwen> (accessed 18 June 2022).

² Special Court for Sierra Leone. URL: <http://www.rscsl.org/> (accessed 18 June 2022).

³ The State of the World's Children 2000 // UNICEF. URL: www.unicef.org/media/84776/file/SOWC-2000.pdf (accessed 18 June 2022).

⁴ Ibid.

⁵ International Bar Association. URL: <https://www.ibanet.org/> (accessed 18 June 2022).

⁶ Special Panel for Serious Crimes (Date 2/12/2002, Case No. 04/2002) // WORLDCOURTS.

Child soldiers in Colombia

The current Colombian Penal Code removed the old presumption that a child was unimpeachable or not subject to criminal liability, instead, it gives the Juvenile Courts jurisdiction over crimes committed by minors. Article 33 of the Penal Code reads: "... it is unimpeachable who at the time of executing the typical and unlawful conduct did not have the capacity to understand or determine its illegality due to psychological immaturity, mental disorder, sociocultural diversity or similar states. Those who give previous notice of their mental illness are not unimpeachable. Minors under eighteen (18) years of age shall be subject to the Juvenile Criminal Responsibility System ...".¹ Note how the penal code does not shy away from attributing criminal responsibility to those under 18, but instead gives jurisdiction to a special court with restorative purposes. When sued under the pretense that it violated the constitutional rights of children by making them subject of criminal investigation and prosecution, the Constitutional Court ruled that contrary to this argument, an education-based system of special criminal responsibility specially designed for minors does not violate their constitutional rights; to the contrary, it protects them (Arboleda, Baquero, Domínguez, 2010).

Law 1098 of 2006, the Infancy and Adolescence Code, was issued to set "substantive and procedural norms for the integral protection of children and adolescents, guarantee the exercise of their rights and freedoms enshrined in the international instruments of Human Rights, in the Political Constitution and in the laws, as well as their restoration"². In this context, the child is seen as a subject of criminal prosecution, albeit such prosecution is undertaken by a different system whose goal it is to restore the child's rights through pedagogic sentencing. This type of prosecution has been seen as ineffective by many because of the lack of institutional support to meet the code's guarantees, and the lack of an educational quality to the sanctions imposed on adolescents, that while framed in legality, send a wrong message to the teenager: that regardless of the behavior committed and the damage inflicted with the crime, all these youths receive is a scold-

ing and a 'do not do it again. In addition, the monitoring of minors is deficient, and the accompaniment and assistance to the minor's family are few or nil (Ruiz, 2018).

The Infancy and Adolescence Code, although imperfect in many ways, leaves no room for interpretation regarding criminal responsibility of minors, establishing in article 169 "The punishable conducts carried out by people over fourteen (14) years of age and who have not reached the age of eighteen (18), give rise to criminal and civil liability, in accordance with the norms enshrined in this law"³. It is clear that the legislature foresaw the need to impose criminal liability to children over the age of 14, even if the penalties to punish such criminal behavior occurs within a rehabilitative model of juvenile justice.

The legal framework in Colombia influences the decision over whether to prosecute children. Once criminal liability is established, the key question must be asked whether the Colombian government feels obliged to deal with child soldiers via rehabilitation programs as part of a disarmament, demobilization and reintegration process.

According to Human Rights Watch, internal FARC-EP regulations stipulated fifteen as the minimum age for recruitment, in line with the norms of international humanitarian law. In spite of this, more than two-thirds of the former FARC-EP combatants interviewed by Human Rights Watch joined the group when they were age fourteen or younger⁴.

The same report found that children were also being used by paramilitary forces to kill and capture guerrillas. In some cases, paramilitaries paid these children a salary, which made joining an attractive proposition, in the face of extreme poverty and violence. Two-thirds of the former AUC members Human Rights Watch interviewed were younger than fifteen when they joined the group. The youngest two said that they joined when they were seven and eight⁵.

Regardless of whether the guerillas or paramilitaries had recruited them, a lot of these young people identified with the feeling of freedom and adulthood given to them by the bearing of arms. Child combatants were ordered to perform the same arduous physical training as their adult counterparts, and in some cases enjoyed the respect

URL: http://www.worldcourts.com/spsc/eng/decisions/2002.12.02_Prosecutor_v_X.htm (accessed 18 June 2022).

¹ Congreso de la república de Colombia, 2002. https://www.oas.org/dil/esp/codigo_penal_colombia.pdf (accessed 18 June 2022). Translated from Spanish to English by author.

² Ibid.

³ Ibid.

⁴ "You'll learn not to cry". Child Combatants in Colombia // Reliefweb. URL: <https://reliefweb.int/report/colombia/youll-learn-not-cry-child-combatants-colombia> (accessed 18 June 2022).

⁵ Ibid.

given by their superiors. Similarly, children were sometimes punished by summary execution for the crimes of falling asleep during guard, surrender or loss of a weapon; being a police or army infiltrator or informer; using a weapon against a fellow combatant; firing rounds in populated areas; robbery, extortion, or violence against the civilian population; repeated drug or alcohol abuse; and rape¹.

Child soldiering and recruitment were addressed in the 2016 Colombian Peace Agreements. Specifically, they addressed the treatment of FARC minors in the post-conflict peace agenda: “Minors who left the FARC-EP camps since the start of the peace talks, as well as those that leave at the end of the process of the abandonment of arms, will be subject to measures of special attention and protection that they will be discussed in the National Council of Reincorporation in the framework of the Commission for Follow-up, Promotion and Verification of the Implementation of the Final Agreement (CSIVI) and that will include the guiding principles that will be applicable to minors and the guidelines for design of the Special Program in accordance with the provisions of Joint Communiqué No. 70 of May 15, 2016 to guarantee the restitution of their rights with a differential approach, prioritizing their access to health and education. These children will have all the rights, benefits and protections established for the victims of the conflict, as well as those rights resulting from their reincorporation process as contemplated in this Final Agreement. Family reunification in their native communities will be prioritized, always considering the best interests of the child”².

The Peace agreements of 2016 emerge as a paramount of restorative justice, inasmuch as they focus on restitution and establishing the truth over punishing those responsible for the crimes committed. “The main purpose of sanctions will be to satisfy victim’s rights and consolidate peace. They must aim to restore and repair the damage caused, always in relation to the degree of recognition of truth and responsibility that is made before the judicial component of the SIVJRNR through individual or collective statements”³. However, the agreements are very clear

in establishing that crimes against humanity, genocide, serious war crimes, deprivation of liberty, torture, extrajudicial executions, enforced disappearance, rape and other forms of sexual violence, child abduction, forced displacement, and the recruitment of minors will not be subject to amnesty or pardon, in accordance with the provisions of the Rome Statute⁴.

None of the above provisions of the peace agreements addresses former guerrilla members who were recruited as children but are now of adult age, nor does it refer to prosecution of children who are responsible for crimes against humanity within the context of the Colombian conflict. This despite the knowledge that child soldiers have been responsible for committing some of the most brutal crimes of rape, mutilation and mass killing of civilians. After making the previous annotations, it is relevant to raise the following questions: Will punishable behaviors committed by children and adolescents go unpunished? Will children and adolescents over 15 years of age receive different judicial treatment than those under 15 years who have committed the same crimes while they were recruited by illegal armed groups? Moreover, if the courts decided to investigate, prosecute and convict a person under the age of 18 for crimes committed by them in their double capacity as victim and victimizer in the Colombian armed conflict, would they would be deviating from the legal domestic and international order?

If we acknowledge that it could be helpful to make a distinction between child soldiers who were used primarily for noncombatant positions and those who participated in hostilities, we could begin to draw the line between those minors who were mostly victims and deserving of protection, and those who acted as victimizers and should face some sort of punishment for violating international humanitarian law. After all, the Colombian Penal code establishes that minors over the age of fourteen can be subject to criminal prosecution, albeit under a different jurisdiction with pedagogic sentencing.

CONCLUSIONS. The case for prosecuting child soldiers seems obvious from the perspective of combatant who encounters such an enemy in action. A sixteen or seventeen-year-old who has received military training is just as capable of setting a land mine or attack a group of civilians. Under such circumstances, it would and should be acceptable to use whatever means are necessary to stop such an attack, regardless of the age of the person representing the threat. Of course, it is

¹ Ibid.

² Acuerdo Final Para La Terminación Del Conflicto y la Construcción de una paz estable y duradera, 2016. URL. <https://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx> (accessed 18 June 2022). Translated from Spanish to English by author.

³ Ibid.

⁴ Ibid.

always preferable to capture the enemy rather than shoot or kill.

Much has been written about the war crime of recruiting children to participate in war. Most of these writings point at the brutality of capturing a young, impressionable mind and bending it to the warlord's will. Children who are recruited as soldiers are victims first and foremost, and should be subjected to the protections established by international law. However, when those same children are committing the atrocities, whether it is killing, kidnapping or recruiting other children, there should be an alternative method of prosecution and sentencing designed to ascertain remorse and determine the next steps in this person's life. This will act not only as a buffer between the former child soldier as they reintegrate into society, but it will give them the opportunity to come to terms with their past behavior

and restore the damage caused. As N. Quenivet (2017) quotes: "The aim is educational, making them understand that what they have done is wrong and that such behavior cannot be tolerated, thereby ensuring that in the future they will not follow a criminal path on the basis that such behavior is tolerated".

The legal system in Colombia acknowledges the capacity of a minor to form criminal intent. In a war where thousands of children were recruited either forcefully or voluntarily, there is a need to ascertain the truth about who is responsible for the most particularly heinous crimes and apply restorative and educational justice. Prosecution of combatant children is not just lawful but necessary to achieve a stable and lasting peace, within the framework of international law and the 2016 peace agreements.

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СУДЕБНОЕ ПРЕСЛЕДОВАНИЕ ДЕТЕЙ-СОЛДАТ: ПРАВОВЫЕ ПОСЛЕДСТВИЯ УЧАСТИЯ ДЕТЕЙ В КОНФЛИКТЕ В КОЛУМБИИ

Детей широко использовали в качестве пешек в вооруженном конфликте в Колумбии. Международные конвенции по правам ребенка рассматривают детей-солдат исключительно как пострадавших и травмированных, криминализируя использование детей в возрасте до пятнадцати лет в активных боевых действиях. Целью этой статьи является приблизить реальность колумбийских детей-солдат к подходу, принятому в других юрисдикциях, где детей-солдат привлекают к ответственности в ситуациях вооруженного конфликта. Делая такое приближение, мы пытаемся ответить на вопрос, законно ли судебное преследование бывших детей-солдат в постконфликтной Колумбии.

Ключевые слова: *дети-солдаты, судебное преследование, Колумбия, вооруженный конфликт, правосудие переходного периода.*

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СУДОВЕ ПЕРЕСЛІДУВАННЯ ДІТЕЙ-СОЛДАТ: ПРАВОВІ НАСЛІДКИ УЧАСТІ ДІТЕЙ У КОНФЛІКТІ В КОЛУМБІЇ

Дітей широко використовували як пішаків у збройному конфлікті в Колумбії, що загострило гуманітарну кризу, яка виникла після підписання мирних угод з Революційними збройними силами Колумбії (FARC-EP). Збройні групи вербували, призивали та навчали дітей, кількість яких в один момент перевищила 11 000 осіб. Механізми конвенцій міжнародного права, розроблені для регулювання жорстокості збройних конфліктів, а саме Женевських конвенцій та Римського статуту, розглядають дітей-солдат лише як потерпілих і травмованих, водночас криміналізуючи призов, вербування та використання дітей віком до п'ятнадцяти років, які брали активну участь у бойових діях. У цьому контексті діти є суб'єктами захисту згідно з міжнародним правом, хоча закон не встановлює вік кримінальної відповідальності, якщо судове переслідування життєздатне. Ця стаття має на меті наблизити реальність колумбійських дітей-солдат до підходу, прийнятого в інших юрисдикціях, де діти-солдати були об'єктом судового переслідування в ситуаціях збройного конфлікту. Застосовуючи таке наближення, ми намагаємося відповісти на питання, чи законно переслідувати колишніх дітей-солдат у постконфліктній Колумбії. Це соціально-політичне дослідження, в якому, аналізуючи корені збройного конфлікту в Колумбії, спираючись на міжнародний досвід і зосереджуючись на одній африканській юрисдикції, яка намагається переслідувати неповнолітніх, які брали участь у бойових діях, було проведено масштабний історичний огляд. Ми дійшли висновку, що хоча в Колумбії існує кримінально-правова база для переслідування дітей, які беруть участь у збройних діях, однак немає політичної волі залучати неповнолітніх до системи відновного правосуддя.

Ключові слова: *діти-солдати, судове переслідування, Колумбія, збройний конфлікт; правосуддя перехідного періоду.*

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