

# Denying juveniles' agency role: truly in their best interest?

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How is it possible that thus far the agency role of juveniles in international law appears to be diminished and underestimated, even though they constitute a large number of the world's population? Yet, instead of being treated as responsible agents who deserve to be involved in decision-making processes concerning international law issues, juveniles are being victimized and paternalized. This is well shown in the Preamble of the Convention on the Rights of the Child (CRC) from 1989 which states that "[children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection](#)". This notion is also reflected in the perception of juveniles' role in international criminal law, particularly with regard to child soldiers.

It has to be noted, that in international law the definition of "juveniles" or "youth" is yet to be determined (for further information see "[Rejuvenating international law](#)"). Nonetheless, with regard to the following international criminal law reflection I will apply the term "juveniles" to persons until the age of eighteen.

## The victimized view on child soldiering

The fact that juveniles play a central role in armed conflicts around the world has been widely acknowledged. Due to their particular susceptibility to child soldiering, which is defined and prohibited as a [war crime under Art 8 \(2\) \(b\) \(xxvi\) and Art 8 \(2\) \(e\) \(vii\) of the Rome Statute](#) (RS) and several other prohibitions on child soldiering in international law, children can be victims of a multitude of injustices such as compulsory recruitment and involvement into armed forces or groups. Hence, child soldiers are widely recognized as having been coerced and/or drugged and therefore are – ultimately considered – traumatized victims of armed conflicts; it is this vein that generates their need for special protection.

Whereas this perception is to a large extent correct, the exclusive victimization remains one-sided. It is especially dominant in the West and does not cover the phenomenon of child soldiering comprehensively inasmuch as it disregards the dichotomy of the phenomenon and – more generally – of the agency of juveniles in hostilities. Children do not only participate in hostilities in various ways but are additionally motivated by several different factors and seek different aims. For example, children committing egregious crimes and even occupying positions of command, as in the case of the massacre of Barlonyo in north-western Uganda in February 2004 where child soldiers were members of the armed group, the so-called Lord's Resistance Army, are not isolated incidents. Though, it is not only their participation in hostilities in Africa that has been detected. Child soldiers are [participants of armed conflicts throughout the world](#). In fact, the number of child terrorists joining the terrorist group of the Islamic State of the Iraq and Syria (ISIS)

has actually increased in the past few years. Yet, whereas the former are deemed to lack full moral culpability and capacity and are therefore mostly considered as victims, the view on the latter is less lenient. Quite to the contrary, child terrorists tend to be excluded from such a beneficial presumption, are held fully responsible and are ultimately sentenced harshly. In a nutshell, it is to be noted that different images of child soldiers reflect the complexity of this phenomenon.

Additionally, there is a tension between the general goal of the international community to end impunity of war criminals and the special protection children need to be warranted. Nevertheless, the victim narrative tends to prevail. Even though the underlying rationale of the victim approach is clearly to protect children participating in hostilities by calling their recruiters to account for their acts, it is necessary to scrutinize whether the victim narrative of child soldiers and the exclusion of the agency role of the child soldiers in itself have certain shortcomings.

### **“Agency” concept of child soldiers on the international level**

Recently, the emphasis on the agency role of child soldiers – and juveniles in general – has received more attention in international law. Nonetheless, the responsibility of child soldiers has not been a completely new concept. During the establishment of the Special Court for Sierra Leone (SCSL) in 2002, the Secretary General Kofi Annan at the time himself [stated](#) that the prosecution of child soldiers should not be generally excluded, bearing in mind the crucial role they played in the commission of atrocities and human rights violations and, no less importantly, the victims’ claim for justice. Unsurprisingly, his proposition has been widely rejected both by the [Prosecutor of the Special Court](#) and by scholars, international organizations and NGOs. The Rome Statute of the International Criminal Court (ICC), which entered into force also in 2002, states in Article 26 that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime. Therefore, both the SCSL and the ICC seemingly precluded the agency role of child participants of hostilities on the international level. Moreover, thus far, no international tribunal has ever tried a person below the age of eighteen. With the increasing number of prosecutions against alleged recruiters of child soldiers and the first judgment of the ICC against [Thomas Lubanga](#), who was convicted for the war crime of conscripting and enlisting child soldiers, the actual role of the child soldiers themselves has been overshadowed, if not totally erased.

### **Benefits of responsibility?**

It is not only the victims’ claim for justice that justifies some thoughts on the responsibility of children as participants at the international level, but the juveniles’ status as well. What happens to those who have actively participated in hostilities and have committed the most egregious crimes of humankind? Are they to be totally excluded from criminal prosecution and has the prevailing victim narrative on the international level also penetrated the national level? Will they go unpunished even at the national level? A rapid review of the criminal justice systems in different countries throughout the world proves the contrary. The minimum age of criminal responsibility in domestic systems of different countries varies greatly from eight to eighteen years – this being only the [current legal framework in Europe](#). Therefore,

the mere fact that individuals who have not attained the age of eighteen are not held criminally responsible on the international level does not exempt them from prosecution altogether. Even though international law has not directly addressed the issue of whether juveniles should be held criminally responsible, *de lege lata* a prosecution of juveniles committing core crimes is still and has always been possible.

This highlights the major problem regarding the responsibility of child soldiers – the lack of a universal minimum age of responsibility. In fact, setting a universal minimum age of criminal responsibility could diminish the arbitrariness in prosecuting, sentencing and enforcing legal mechanisms against juvenile offenders depending on their state of nationality and on the territory where the crimes allegedly were committed. One might assume that Article 26 RS determines the minimum age of criminal responsibility to eighteen years, however, this provision is merely procedural and does not entail any substantive decision on a minimum age of responsibility. The procedural solution instead indicates the compromising character of Article 26 RS as the governments drafting the statute were unable to reach an agreement. Customary international law cannot provide a certain proposition to such a minimum age either. Hence, a rule on the minimum age of criminal responsibility is still absent on the international level and notwithstanding the emergence of alternative approaches to a criminal prosecution – such as a restorative justice approach or transitional justice approach – the question of a universal minimum age of criminal responsibility remains.

The actual recognition of the accountability of juveniles has certain additional effects. First, by granting victims the full right to justice, including reparations and apologies, the reintegration, rehabilitation and reconciliation of the juvenile perpetrators within their community may be encouraged. Another side-effect of acknowledging the actively “destructing” role of juveniles for several societies could be that the role of juveniles becomes equally active in rebuilding and reconstructing their society. Additionally, this could lead to a greater recognition of their political role. The denial of full accountability to juveniles paternalizes and incapacitates juveniles on different levels, not limited to the criminal stage.

### **Prosecution reconcilable with the best interest of the child?**

The severity of criminal law due to its nature is a central barrier to a criminal approach as the adequate exposure of child soldiers’ participation in hostilities. Is it still possible to consider a prosecution as being in the “best interest of the child” – that set by the CRC as its major principle? Whereas prosecution as such objectively can never be reckoned to be in the best interest of the accused, a deeper look into the consequences of the lack of an international rule has shown that the denial of juveniles’ active participation in hostilities is not in the best interest of the child either.

Therefore, the international community should reconsider its concept and perception of juvenile offenders at the international level in order to respond adequately to this phenomenon, notably considering the increasing number of former ISIS juvenile returnees and the danger of severe punishment they may face at the domestic level.

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