

Protecting Children Rights under International Criminal Justice

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Abstract

Children are a central concern of international criminal justice. International crimes and other forms of violence and the abuse of children are disturbing daily realities in today's world. Children and young persons are increasingly being targeted for the purposes of murder, rape, abduction, mutilation, recruitment as child soldiers, trafficking, sexual exploitation and other abuses. Sierra Leone, the Democratic Republic of Congo, Rwanda, Colombia, and many others illustrate this. The participation of children in international criminal justice and other accountability mechanisms is now one of the major issues facing criminal justice today. In this sense, this paper presents a short overview on the issue of children and their participation in international criminal justice. The paper thus focuses on giving a definition of "child/children" according to international norms, which are the key principles of children's rights, their participation in the criminal justice system, the different international crimes committed by them or against them etc. Also, this paper briefly addresses the main contours of the normative framework regarding the criminal responsibility of children for their alleged participation in international crimes. It reviews international norms regarding children who may be accused of having participated in the commission of such crimes themselves (as child soldiers) and identifies their criminal responsibility for such acts. Finally, this paper acknowledges the obligations of states under international law to prosecute persons accused of genocide, war crimes, crimes against humanity, torture and enforced disappearances, specifically focusing on crimes against children.

Keywords: *Children, International crimes against children, Criminal responsibility; Child soldiers, International Criminal Court.*

Introduction

We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.”
Nelson Mandela

Children are among the principal victims of war. During the 20th century, children have figured prominently among the victims of systematic acts of violence. An estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict. At any one time over 300,000 child soldiers, some as young as eight, are exploited in armed conflicts in over 30 countries around the world.(UNICEF, Innocenti Research Centre, 2010, 12) They are targets of the worst possible violence and abuse; enslaved, murdered, raped, forcibly recruited as child soldiers and forced to participate in atrocities. They have also witnessed crimes committed against family members and friends. Yet the perpetrators of these crimes have rarely been held to account. Impunity for these crimes

adversely affects not only the individual child victim, but whole generations of children. Efforts over the last 60 years to put in place an international legal framework for safeguarding children's rights and ensuring their protection have been largely successful. The Convention¹ on the Rights of the Child (CRC), the most widely ratified human rights treaty in history explicitly outlines international obligations for the protection of children. In addition, States have committed themselves to protect children as part of their general undertakings to protect human rights and humanitarian principles laid down in various other international instruments. While there have been significant advances in the development of legal instruments for the realization of children's rights, much work needs to be done to ensure the implementation and enforcement of these obligations.

Definition of the 'child' and their principal rights

Children are protected by a vast body of human rights and humanitarian law. The key international legal instrument for the protection of children is the Convention on the Rights of the Child (CRC). The importance of the CRC is highlighted by the fact that it includes the whole spectrum of rights, civil and political, as well as economic, social and cultural rights, adapted to the specific needs of children. The fact that the CRC has received near-universal ratification, 195 ratifications to date, means that nearly all States have made a legal commitment to uphold its provisions. This, in itself is recognition of the importance that the international community attaches to the protection of children. The CRC has made great advances in this area of law, the key being its recognition that a child is not simply a passive recipient of protection, but a human being with specific rights and responsibilities, and the ability to exercise them in a manner consistent with the child's evolving capacities. The Convention on the Rights of the Child (CRC) defines a child as "*Every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier*".²

The CRC sets some strict obligations with respect to this age limit, such as a prohibition on the most severe punishments, capital punishment and life imprisonment without the possibility of release, being imposed on persons under the age of 18. The Convention on the Rights of the Child provides the most extensive articulation of the international standards relating to the protection of children's rights. Participatory rights reflect the very basis of the CRC, including the right to express their views on matters that affect their lives. (Stehn, Olasolo, Gibson, 2006, para. 219-238). Thus, according to the Convention on the Right of the Child as well as other international legal norms on the protections of children's rights, some of the most fundamental and essential rights for children are:

- Children shall benefit from all the human rights guarantees available to adults.

- In all actions concerning children, the best interests of the child shall be a primary consideration.

¹Adopted by General Assembly Resolution 44/25 of 20 November 1989 and entered into force by 2 September 1990.

²CRC, Article .

-States will respect each child's rights without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status and will take measures to ensure that all children are protected against all forms of discrimination.

-Every child has the right to express his or her views freely in all matters affecting him or her, including judicial and administrative proceedings, either directly or through an appropriate body or representative. These views shall be given due weight in accordance with the age and maturity of the child.

-Children in conflict with the law, including recidivists, have the right to be treated in ways that promote their rehabilitation and reintegration, and the child assuming a constructive role in society.

The International Criminal Court (ICC) and Children's Rights

The International Criminal Court (ICC) is the world's first international permanent court with jurisdiction to judge individuals for crimes of genocide, crimes against humanity, war crimes and aggression. The Rome Statute³ is a pioneering international treaty as it also provides for the participation of victims throughout the proceedings, not only as witnesses of the defense or the prosecution, but also as participants in judicial proceedings. (Schabas, 2010, 244).

Article 68(3) of the Rome Statute is the central provision related to victims' participation. It states: "(...) *where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (...)*". Moreover, pursuant to Article 68(1) of the Statute, "*the Court shall take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses having regard to all relevant factors, including age, gender (...) health, and the nature of the crime, in particular...where the crime involves sexual or gender violence or violence against children*". These provisions are innovative and an advance in international criminal law, which includes a restorative mandate, that enables the victims to express their views in international criminal trials. (SáCouto, Cleary, 2005, 392) Thus, participation in the ICC is a concrete step in the fulfillment of many obligations incorporated into the Convention on the Rights of the Child (CRC) and its Protocols.

As children are increasingly the victims of atrocities, whether targeted directly, harmed as a consequence of violent attacks against their parents, or coerced to act as combatants in hostilities, this Court provides an important new mechanism for implementing existing child protection standards. Children's rights incorporated into the Rome Statute include laws punishing crimes committed against children, recognition that separate procedures

³The Rome Statute of the ICC was adopted on 17 July 1998 and entered into force on 1 July 2002.

are necessary to establish the criminal responsibility of children, special measures protecting children as victims and witnesses during judicial proceedings, and requirements that judicial staff have expertise on children's issues. Children can participate in the Court only as victims or witnesses:

Children as victims to crimes under international law. Children can become victims of any of the criminal acts that fall within the jurisdiction of the ICC. The ICC, *ad hoc* Tribunals, national courts and other justice mechanisms should proactively investigate and take legal action against persons who commit crimes under international law against children. The definitions for genocide, crimes against humanity and war crimes also include a number of crimes specific to children or to which children are particularly vulnerable, such as: (UNICEF Innocenti Research Centre, 2010, 14):

Genocide

- Forcible transfer of children from one group to another;
- Measures intended to prevent birth.
- Crimes against humanity
- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization.

War crimes

- Intentional attacks on schools;
- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization;
- Using starvation as a method of warfare;
- Use of children under age 15 as child soldiers

Children as witnesses to crimes under international law. Children have been direct eyewitnesses to the most serious crimes under international law. They have seen their families and neighbors massacred, witnessed torture and abuse and seen their communities destroyed. Witnessing such crimes can leave children traumatized. Appropriate support and psychosocial care need to be provided to help them recover from what they have seen and experienced. (UNICEF Innocenti Research Centre, 2010, 14)

While children's experiences of war crimes, crimes against humanity and genocide are first and foremost as victims and witnesses, children are also sometimes recruited to be active parties to those crimes. Children, mostly from poor families, may be coerced into participating in crimes, either threatened, manipulated or drugged. Forcing children to commit atrocities during an armed conflict is itself a war crime, resulting in severe psychological harm, and is a violation of their rights. Child perpetrators are thus victims of criminal policies for which adults are primarily responsible. In Sierra Leone, children were abducted and made to terrorize the civilian population, including amputating the limbs of civilians. (Blattman, Annan, 2010, 896). In Rwanda, some children directly participated in killings during the genocide.

In addition to defining crimes concerning children, the Rome Statute of the ICC and

the Rules of Procedure and Evidence⁴ include special provisions for the protection of children during the investigation and prosecution of cases. For any child, the experience of giving testimony or being questioned by lawyers or investigators can be intimidating. In proceedings before the ICC, children may be asked to recall and mentally revisit horrors they have struggled to forget. There is a clear and imminent risk of re-traumatization unless child-friendly procedures are adopted and staff experienced with children and psychosocial supports are at hand. (D'Alessandra, 2014, 5). Therefore, the Rules of Procedure and Evidence provides that protective and security arrangements, counseling and other assistance to ensure the safety of witnesses and victims during investigations, trial and after the trial. These measures can include, for example, hearings *in camera*, sight-screens between the victim and the accused, pre-recorded testimonies, video conferencing or closed-circuit television, and the use of pseudonyms.

The guiding principles of the Convention on the Rights of the Child (CRC) apply with respect to children who come before judicial bodies. The following principles should therefore be reflected in procedures and measures of the ICC designed for child victims and witnesses:

- The best interest of the child should guide all policies and practices⁵;
- The child has a right to be heard⁶;
- Physical and psychological recovery of a child victim, and social reintegration, should be promoted⁷.

Child Soldiers

Children are widely affected by atrocities as victims and have been specifically targeted for some international crimes. Many children are the victims of armed conflicts, not only as civilians but also as soldiers. The recruitment of children for participation in an armed conflict is one of the most frequent and egregious violations targeting children. (Coalition to Stop the Use of Child Soldiers, Global Report on Child Soldiers, 2001, p.21). It is prohibited under several international conventions. Both the Special Court for Sierra Leone and the International Criminal Court have returned convictions for recruitment and use of children in combat. The Rome Statute for the International Criminal Court recognizes criminal responsibility for under-age recruitment, whether the Special Court for Sierra Leone established that such recruitment below the age of 15 years is also a crime under customary international law. Apparently, there is a consensus among states that these children should be considered primarily as victims, because they are often illegally recruited and they bear only limited, if any, responsibility if they commit such serious

⁴Note: The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. These are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002.

⁵Convention on the Rights of the Child, Article 3.

⁶Convention on the Rights of the Child, Article 12.

⁷Convention on the Rights of the Child, Article 39.

crimes. (Coalition to Stop the Use of Child Soldiers, 2001, 21).

In 2007, the Paris Principles declaration, whose aim is to combat the unlawful recruitment or use of children by armed forces or armed groups, (United Nations Children Fund, The Paris Principles: 2007, <http://www.unhcr.org/cgi-bin/exis/vtx/refworld/rwmain?docid=465198442>) took the stand that the term child soldier refers to “*any person below eighteen years of age who is or has been associated with an armed force or armed group*”. The generic language was meant not to limit the category of child soldiers to children who participate in combat, but also refers to porters, sex slaves, and others. Thus, child soldiers are any children under the age of 18 who are recruited by a state or non-state armed group and used as fighters, cooks, suicide bombers, human shields, messengers, spies, or for sexual purposes. (Gee, 2010, 5). Children who are poor, displaced from their families, have limited access to education, or live in a combat zone are more likely to be forcibly recruited. When children become soldiers, whether by their own volition or not, they are often mistreated by those that enlisted them. They are regularly attacked and drugged with the aim of inhibiting their ability to fully comprehend their actions when committing a crime.

In the last 13 years, the use of child soldiers has spread to almost every region of the world and every armed conflict. Though an exact number is impossible to define, thousands of child soldiers are illegally serving in armed conflict around the world. Given the growing number of children involved in armed conflicts, judicial norms have been established in order to protect them and limit their participation. Despite these efforts, existing legislation does not clearly limit the recognition of the guilt of child soldiers. The Declaration of the Rights of the Child of 1959 recognizes the lack of maturity and personal development of children globally. What is more, the international criminal age of responsibility has not been clearly defined, which leaves a margin for interpretation for countries and courts. Thus, courts operate in a gray area when carrying out their duties and determining who is guilty of international crimes.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits the compulsory recruitment of children under the age of 18 and their direct participation in hostilities. The Protocol, which entered into force on 12 February 2002, also requires States to increase the minimum age for voluntary recruitment and introduces strict safeguards for voluntary recruitment of children under the age of 18. All forms of recruitment and participation of children under the age of 18 are banned for non-State armed groups. The Protocol reflects an emerging international consensus that 18 years should be the minimum age for recruitment into armed forces and groups and for participation in hostilities.

Conclusions

The Convention on the Rights of the Child (CRC) remains a key reference for the promotion of children's rights and a source of inspiration for the administration of justice and the consolidation of international justice standards and mechanisms. The convention addresses critical areas of children's lives, education and health, family life, protection from abuse, violence and exploitation, and engagement in decision-making processes

within the family, the school system and community as a whole. The convention also addresses justice related questions. Under the CRC, States are obliged to protect children at all times, including during armed conflict. The principles of protection outlined in the CRC, together with other international instruments such as the Geneva Conventions and their Additional Protocols, make it clear that targeting children for genocide, war crimes or crimes against humanity is a serious violation of international law and cannot be tolerated. Children have not only been targeted as part of the civilian population, but have also been deliberately targeted specifically *because* they are children. Targeting children for extermination, torture, rape and use as sex slaves is increasingly being used by parties to a conflict as an effective means of subduing the civilian population as a whole. (United Nations Report, 2000, para. 2). For example, in the former Yugoslavia, elite snipers intentionally shot children in public places to intimidate the civilian population. In Sierra Leone, rebels amputated the arms and legs of civilians, including many children, as part of a deliberate strategy to spread terror. (UNICEF, *The state of the world's children*, 2002, 42) The adoption of the Rome Statute of the ICC on 17 July 1998 and thereafter its entry into force on 1 July 2002 shall be considered as a determination of each adopting state to bring to justice the perpetrators of genocide, crimes against humanity and war crimes end to end impunity for such crimes, including crimes against children. Furthermore, the United Nations Special Session on Children, through its document "*A world fit for children*" adopted in May 2002 by the General Assembly has explicitly called the accountability for crimes committed against children. Pursuant to that document, governments undertake to: "*Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, and war crimes, and exclude, where feasible, these crimes from amnesty provisions and amnesty legislation, and ensure that whenever post-conflict truth and justice-seeking mechanisms are established, serious abuses involving children are addressed and that appropriate child-sensitive procedures are provided*".(United Nations General Assembly Special Session on Children, 2002, para. 23)

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