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Diane Marie Amann

*University of Georgia School of Law*, [amann@uga.edu](mailto:amann@uga.edu)

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# “Protecting Children”: A Welcome Addition to Efforts to Redress Wartime Harms

by [Diane Marie Amann](#) - November 6, 2018

[This essay is the second in an online mini forum that Just Security is hosting on the new book, [Protecting Children in Armed Conflict](#). Other participants in the mini forum include by [Prime Minister Gordon Brown](#), [Shaheed Fatima QC](#), Sarah Knuckey, Alex Moorehead, and Alex Whiting.]

Many laws prohibit the subjection of children to wartime harms like killing, sexual and gender-based crimes, kidnapping, conscription, and deprivation of basic necessities. But as I learned while conducting research to aid preparation of the [Policy on Children that the International Criminal Court Office of the Prosecutor published in 2016](#), these laws – not to mention related commentary and jurisprudence – are scattered, in international instruments and national codes and in civil as well as criminal law discourse, across a disparate array of subfields and institutions. What is more, the intense interest of the last several decades in child-soldiering has resulted in insufficient study of legal regulations regarding many other aspects of children’s experiences during conflict. The need for a detailed reference has long been apparent.

[Protecting Children in Armed Conflict](#), a 600-page volume just released by Hart Publishing, fills this void. The volume arises out of the 2017 Inquiry on Protecting Children in Armed Conflict that was spearheaded by [Gordon Brown](#), former British Prime Minister and current UN Special Envoy for Global Education. For more than a year, the Inquiry’s team of researchers, led by London barrister [Shaheed Fatima](#) QC, compiled and analyzed treaties and other international documents, as well as state practice and academic and other commentaries. External experts were consulted throughout the process (I was one of these, serving on the Inquiry’s Advisory Panel). The resulting comprehensive synthesis marks a vital starting point for anyone interested in child protection amid armed conflict and similar instances of extreme violence.

The book is structured around what the [UN Security Council terms the “Six Grave Violations against Children in Armed Conflict”](#):

- killing and maiming;
- recruitment or use as soldiers;
- sexual violence;
- abductions;
- attacks against schools or hospitals; and
- denial of humanitarian access.

*Protecting Children* traces whether and how these violations are regulated within three legal frameworks, international criminal law, international humanitarian law, and international

human rights law. (The book's exposure of gaps in protection, notwithstanding these overlapping frameworks, is especially significant.) Thus examined are regimes based on widely ratified treaties, including, but not limited to, the four [Geneva Conventions](#) of 1949, the 1989 [Convention on the Rights of the Child](#), and the 1998 [Rome Statute of the International Criminal Court](#).

With respect to each of the Six Grave Violations, *Protecting Children* endeavors to identify a common baseline of legal protection, rather than an aspirational ceiling. This seems likely to frustrate a reader who would have preferred a *lex ferenda* rather than a *lex lata* approach. But there is value in pinpointing minimum legal baselines given the relative dearth of comprehensive scholarship. Moreover, the minimalist approach may offer greater promise for the book's policy recommendation.

Indeed, that policy recommendation is sure to garner special attention. Having demonstrated the limits of existing means to redress breaches of laws meant to protect children, the book proposes a novel solution: promulgation of a "single instrument," perhaps in the form of a new optional protocol to the Convention on the Rights of the Child. In this instrument, states would agree on two key innovations:

- codifying the baselines that *Protecting Children* has posited; and
- empowering the [Committee on the Rights of the Child](#), which monitors compliance with this treaty regime, to entertain communications alleging breaches of the newly codified legal rules.

This two-part proposal likewise will stir concerns among some readers. First, there is the risk that codification will freeze protection, at a less-than-desired level. I share that concern, and yet I feel compelled to recognize that the current global climate of retreat from international obligations poses a counterpoint: codification even of a baseline could serve as a beachhead against new attacks on existing legal protections. Second, there is the risk that an expanded portfolio would overwhelm the Committee on the Rights of the Child, a body of eighteen independent experts who meet periodically. Responsible reforms thus must accompany any such expansion. At the least, safeguards must be put in place to assure the selection of committee members with expertise in this particular field, as well as the provision of resources adequate to the new task they would be given. If these concerns were dispelled, the proposal could prove to be a welcome complement to other means by which perpetrators of wartime violence against children may be called to account.

One of those other means, of course, is prosecution by the [International Criminal Court](#). As is well known, the ICC's first trial ended in 2014 with the conviction and sentencing of a Congolese militia leader for the war crimes of conscripting, enlisting, and using children in armed conflict. By then, Prosecutor [Fatou Bensouda](#) already had launched the effort to draft a comprehensive policy for her Office, explaining, in a keynote address at the University of Georgia School of Law, that "in addition to focusing on 'children who are forced to carry arms,' we must also [address the issue of children who are affected by arms](#)." A draft policy, prepared by an Office working group, underwent several civil society consultations before

the final version was [issued](#), in Arabic, English, French, Spanish, and Swahili, on the first day of the ICC Assembly of States Parties meeting in November 2016.

The ICC OTP *Policy on Children* naturally relies first and foremost on the ICC's Rome Statute. Paragraph 3 states:

“The Statute recognises children as persons with individual rights, as members of families and as constituents of multi-generational communities. This recognition corresponds with international understandings, set forth in the 1989 Convention on the Rights of the Child (“CRC”) and many other international instruments ...”

To that purpose, the *Policy* spells out how the OTP will proceed:

“[T]he Office will adopt a [child-sensitive approach](#) in all aspects of its work involving children. This approach appreciates the child as an individual person and recognises that, in a given context, a child may be vulnerable, capable, or both. ... This approach is based on respect for children’s rights and is guided by the general principles of the 1989 Convention on the Rights of the Child: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one’s views and have them considered.” [para. 22]

The child-sensitive approach applies to all phases of OTP operations, including treatment of witnesses. The approach extends as well, of course, to investigation, charging, and prosecution. The *Policy* observes:

“Almost all crimes within the jurisdiction of the Court affect children. Certain provisions in the Statute make explicit reference to children. There are also crimes directed specifically against children or those that disproportionately affect them....” [para. 38]

Several crimes against and affecting children then are discussed in detail: war crimes of conscription, enlistment, and use in armed groups; forcible transfer and prevention of births as acts of genocide; trafficking as a form of the crime against humanity of enslavement; war crimes of attacking buildings dedicated to education and health care; persecution; sexual and gender-based crimes; and torture and related crimes.

These crimes, as footnote 48 of the ICC OTP *Policy* indicates, resonate with the Six Grave Violations recognized by the UN Security Council – the same Six Grave Violations around which the Inquiry report just published as *Protecting Children in Conflict* is structured. This fact underscores the complementary potential of these and other initiatives. Together, they may advance two essential goals: first, to articulate norms prohibiting wartime harms against children; and second, to secure redress for any such harms that occur.

*Diane Marie Amann has served since 2012 as International Criminal Court Prosecutor Fatou Bensouda’s Special Adviser on Children in and affected by Armed Conflict. Amann’s service has included assisting in the preparation of the International Criminal Court Office of the*

*Prosecutor Policy on Children discussed in this post. This essay is prepared in her personal capacity.*