

CHILD PROTECTION IN TIMES OF CONFLICT AND CHILDREN AND INTERNATIONAL CRIMINAL JUSTICE

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Being asked to provide an overview of the subject of Child Protection in Armed Conflict, and the relation of that protection to the treatment of children in international criminal justice, is, naturally enough, a daunting task, given the breadth of the subject. In this Article, as in my remarks, I will touch upon just a few areas that I hope can give an overview of UNICEF's engagement with the issue, and in particular, on the guidance that the wider child protection framework can offer to enhance the protection and rights of children involved with international criminal justice bodies.

In preparing for this Article, and the conference at which my remarks were presented, I was reminded again of the gap between the promises of protection that international and national law offer children, and the realities that millions of them face every day, in all corners of the globe, as a result of conflict. Additionally, I am reminded of the difficulties we often face in arriving at common understandings of what would seem—on their face—to be relatively simple and unambiguous terms, such as “protection” and “conflict.” At the beginning of my career, I went to live and work in Mexico, working with refugee families who had fled conflict in Central and South America. The challenges those families faced were my introduction to the complexities of defining what “protection” actually means for children in particular, especially in situations of armed conflict, and especially when that conflict is not of the kind that falls within the international legal and political definitions of war or conflict. In one way or another I've been working on these issues ever since. I raise these points because while my present work with UNICEF focuses mainly on the area of children's engagement with justice systems—predominantly national, but also international—I also still work on issues related to the protection of migrant children. Over twenty years since first grappling with these issues, the recent influx of children

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from Central America—specifically El Salvador, Guatemala and Honduras—into the U.S. and Mexico has again found child protection professionals engaged in the difficult task of defining common overall understandings of “conflict” and “protection.” Additionally, the recent increase in displaced children provides a specific focus for the ongoing debate in the child-rights community about what constitutes a child’s best interest, how we define those interests, and who decides it in any one moment.

Personal reflections aside, once I had agreed to speak at the conference on Children & International Criminal Justice, in the hope of narrowing down the scope of my presentation, I immediately consulted the UNICEF internal guidance on the issue of “Children and Armed Conflict.” As well as protecting children from the “Six Grave Violations” identified in United Nations Security Council Resolution 1612—killing and maiming of children; recruitment or use of children as soldiers; sexual violence against children; attacks against schools or hospitals; denial of humanitarian access for children, and the abduction of children—UNICEF also cites emotionally and psychologically painful events such as the violent death of a parent or close relative; separation from family; witnessing loved ones being killed or tortured; displacement from home and community; exposure to combat, shelling, and other life-threatening situations, even if no direct injury occurs; increased rates of arrest and detention, and generalized disruption of school routines and community life as urgent protection concerns regularly facing the millions of children living in conflict zones.

That’s quite a list. UNICEF’s global mandate for children specifically provides for a focus on protecting children from the immediate and long-term effects of armed conflict. UNICEF’s actions to protect children in armed conflict are as varied and far-reaching as the list of issues facing children in situations of armed conflict. They form part of UNICEF’s core commitment to children in humanitarian action. UNICEF’s objectives are to actively prevent children from being harmed, to monitor violations committed against them, and to develop programs to respond to instances where children are at risk of or have been subjected to violence, exploitation, or abuse.

It should be noted, also, that “regular” child protection concerns do not disappear in times of conflict. Some children will still come into contact with the law for minor offenses and anti-social behavior, or be subjected to violence and abuse in their homes and communities, or be deprived of parental care for reasons not directly associated with conflict. These child

protection concerns will also not end with the cessation of conflict, and so a key feature of UNICEF work in the area of child protection in all contexts—including humanitarian emergencies and armed conflict—is on supporting national child protection systems. Child protection systems seek to address the full spectrum of risk factors occurring in the lives of all children and their families. Along with partners, including governments, non-governmental organizations, civil society actors, and the private sector, UNICEF promotes strengthening all components of child protection systems—human resources, finances, laws, standards, governance, monitoring and services. Depending on the country context, child protection systems may cut across part of the social welfare, education, health, and security sectors.

UNICEF and its partners support the mapping and assessment of child protection systems, including in situations of armed conflict. This work helps build consensus among government and civil society on the goals and components of such systems, their strengths, weaknesses and priorities upon which to act. This then translates into improved laws, policies, regulations, standards, and services aimed at protecting all children. It also leads to the strengthening of these systems with the financial and human resources necessary to deliver results for children. For UNICEF, in practical terms, this child protection system approach is central to understanding the broad set of programmatic and advocacy interventions necessary to address the issues facing children in situations of armed conflict, and in ensuring that children in contact with international criminal law processes are adequately protected.

UNICEF has a very clear role in one of the major accountability mechanisms established to address violations against children in conflict. The 2005 Security Council Resolution 1612 established the monitoring and reporting mechanism (MRM). Country-based task forces co-led by UNICEF and the highest UN representative in a given country manage the MRM and provide timely and reliable information on the Six Grave Violations. The importance of the MRM cannot be understated, serving as it does to both document grave violations of children's rights and to act as the basis for the work of the MRM task force, through which UNICEF engages with government forces and non-state actors to develop action plans to end and prevent these violations from taking place, noting that governments hold ultimate responsibility for protecting children and ending impunity for grave violations against children.

It is this second aspect of the MRM mechanism—the work of the task force in developing action plans—which is especially reflective of the

approach of UNICEF towards children in armed conflict, in which supporting mechanisms to ensure accountability for violations is just one aspect of a broad set of programmatic and advocacy interventions aimed at the protection of children and the prevention of child rights violations, including those that fall outside of the six grave violations. As well as prevention, UNICEF is focused on providing response and services for those whose rights have been violated and, more widely, support and services for children who have been made vulnerable by conflict and conflict-associated displacement—as well as supporting the creation of child friendly justice systems to help children in seeking eventual redress for violations.

The focus of this Article, however, is not to examine this entire gamut of protection issues that can arise during conflict situations, but to unpack the issues specifically related to children and international criminal justice, which relate more, in reality, to the issues of accountability and redress for violations committed against children in times of armed conflict. But it is important to always to keep in mind the multitude of wider protection concerns, and protection responses, that frame this specific area. It is that wider protection framework—which is at the heart of the work and mandate of UNICEF—grounded in the Convention on the Rights of the Child, and its related protocols—that I would argue provide a clear direction when considering some of the questions that were raised for discussion in the conference on Children and International Criminal Law and, in particular, that can provide guidance on two areas that I will examine in greater detail below; definition of the age of the child in International criminal law, particularly in the Rome Statute and the Rules of Evidence of the International Criminal Court, and the special procedures and protections that should be afforded to child victims and witnesses appearing before international criminal justice bodies.

I. THE DEFINITION OF “CHILD” IN INTERNATIONAL CRIMINAL LAW AND BY THE INTERNATIONAL CRIMINAL COURT

There is international consensus that a child is any person under the age of eighteen, as defined by the Convention on the Rights of the Child. In principle this means that all justice systems—national and international—need to provide special proceedings and measures for children below eighteen. These need to ensure that all persons and institutions working for the justice system respect, protect and fulfil the special rights of persons under the age of eighteen who come in contact with the law.

The CRC is mindful that childhood is a concept that varies across the globe. Hence the age definition of eighteen is not absolute. Article 1 of the Convention reads

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.¹

It is a key feature of that Article that the overall definition is qualified by the words “unless under the law applicable to the child, majority is attained earlier.”² This clause, whilst aiming to reflect varying concepts of childhood in different cultural and legal contexts around the world, is problematic, especially in light of tendencies in some countries to lower the age of criminal responsibility as part of a law and order approach towards adolescents. Because of this, the importance—and reach—of that qualification cannot be underestimated. But I would argue that the broader definition of a child as a human being below the age of eighteen in Article 1 of the CRC is effectively a peremptory norm, interpreted as it is with clear qualifications allowing for “adult” treatment of children within specific areas of law.

In UNICEF, we find ourselves working with justice systems in which children as young as ten can be prosecuted in adult courts. In such cases we strongly argue to take into account the standard set by the CRC for all people under eighteen, even if national jurisdictions allow for a lower age of criminal responsibility.

Article 3 of the Convention on the Rights of the Child requires States to ensure that persons under the age of eighteen are subject of special protection;

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³

¹ Convention on Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 2.

² *Id.*

³ *Id.* art. 3.

This is especially relevant for the justice system and is enforced by the ban of the death penalty for all persons under the age of eighteen—no matter what the legal age of criminal responsibility in a country is. Article 37 clearly states that

Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.⁴

In the same vein, the Committee on the Rights of the Child, the body of eighteen independent experts that monitors implementation of the Convention on the Rights of the Child and of two Optional Protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution, and child pornography, has issued many recommendations to States with a lower age of criminal responsibility than eighteen to fully uphold the protection standards of the CRC for all persons under eighteen. In its General Comment no. 10 on juvenile justice systems, the Committee reiterates that “both special procedural rules and rules for diversion and special measures—should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offense, have not yet reached the age of 18 years.”⁵

The Rome Statute, and the Courts Rules of Procedure and Evidence, with their many provisions related to the special treatment of children, reflect a similar understanding, even if they do not contain a specific attempt to define the term “child.” For example, the Court has exempted children below the age of eighteen from prosecution under its jurisdiction, through Article 26 of the Rome Statute. In Article 2(b)(xxvi), the Statute identifies the conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a crime within the court’s jurisdiction, following the age limit for enlistment into armed combat established in Article 40 of the Convention on the Rights of the Child. In the Rules of Procedure and Evidence, the court makes multiple references to the special needs of children, and includes provisions to allow for special procedures—such as in camera or ex parte hearings, and the use of recorded testimony, following the recommendations of General

⁴ *Id.* art. 37.

⁵ COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 10 ¶ 36 (2007), available at <http://www2.ohchr.org/English/bodies/crc/docs/CRC.C.GC.10.pdf>.

Comment no. 10 and of the United Nations Guidelines on Justice in matters involving child victims and witnesses of crime, which are themselves grounded in the general provisions of Articles 37–40 of the Convention on the Rights of the Child.

Hence, I would recommend that the policy paper being developed by the Office of the Prosecutor contains a clear and definitive statement from the International Criminal Court that it defines children as persons below the age of eighteen. This statement would reflect the steps the court has already taken in the Rome Statute and its rules of procedure and evidence to ensure that, in line with the Convention on the Rights of the Child and other international standards for all persons under the age of eighteen, children receive special treatment when appearing before the court as victims and witnesses. Such a statement would be a powerful normative commitment to enhance protection of the rights of the child.

Of course, even when consensus exists on the definition of a child as a person below the age of eighteen, identifying just who is a child is something that can be challenging, especially in situations of armed conflict. The usual means of verifying such a claim—civil registration records, birth certificates etc.—will generally not be available. So age assessment procedures need to be established in order to help identify children. This is an area where guidance and examples can be taken from within the wider protection framework I have highlighted above, for instance in immigration procedures, national justice systems and refugee settings.

II. SPECIAL PROCEDURES AND PROTECTIONS THAT SHOULD BE AFFORDED CHILD VICTIMS AND WITNESSES

There are clear guidelines from a range of international instruments that indicate the special procedural protections that should be made available to children engaging with criminal justice systems—whether as defendants, witnesses, or victims.

These protections are first alluded to in the Convention on the Rights of the Child, in articles 37–40, and then elaborated in greater detail in the “soft law” of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules).

Taking this guidance further, the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime—and the accompanying UNICEF/ONODC guidelines on their implementation, which

include a child friendly version—provide concrete measures and safeguards to ensure that children engaging with criminal justice systems are protected and supported throughout the investigation and trial process.

As an illustration of how these standards and principles can be effectively translated into practical measures to protect and support children appearing before bodies adjudicating alleged violations of international criminal law, In this context, the ground-breaking work undertaken by the Special Court in Sierra Leone provides excellent guidance for addressing the specific issues of the vulnerability, protection, and support of child victims and witnesses appearing before court.

The Special Court for Sierra Leone has produced specific guidance on the protection and treatment of child witnesses and victims of war crimes and crimes against humanity. These guidelines offer step-by-step protocols and guidance for investigators, prosecutors, and related court officials for all stages of the child's involvement with the court. UNICEF recommends these guidelines as an excellent point of departure for the International Criminal Court and the prosecutor's office in developing its own policy paper on the treatment of child victims and witnesses, whilst recognizing the many special protection measures and principles for children that are already embodied within the ICC. However, the protections that could be offered to children appearing before the ICC could be developed and elaborated further to strengthen a fair and responsible treatment of child victims and witnesses by the court, in particular by increasing the use of local child protection resources and actors in the manner of the Special Court for Sierra Leone .

In particular, the following procedures adopted by the Special Court for Sierra Leone for the identification of child witnesses and their involvement in the investigations of the Court provide excellent guidance on implementing the "best interests" principle in determining if and how a child should come in contact with the Special Court. In Sierra Leone, Child protection agencies (CPA) work hand in hand with staff of the Special Court to ensure that the protection and best interests of children remain the paramount consideration at all stages of investigation and trial.

In Sierra Leone, CPA staff undertake a general review of their case files with the aim of selecting a few cases that meet the requirements of the Special Court. The Special Court will provide guidance on the type of information sought. CPA managers and a child's social worker will assess each child and apply carefully drawn vulnerability criteria to ensure that a child is emotionally and intellectually prepared for possible appearance before the court, and only when they are confident that a child meets these

criteria will his or her file be shared, in a manner that guarantees confidentiality, to the court, which will then identify cases of interest.

The CPA then contacts children identified and discusses with the child and her or his guardian the role of the Special Court and the implications of becoming a witness, and finds out whether they would be prepared for the child to become involved with the Special Court. A consent form is to be signed by the child and guardian.

If the court decides to proceed, the rules then elaborate a detailed roadmap of how interviewing, security monitoring, support, and follow-up should be conducted, all subject to review by court officials and child protection specialists. At all stages, the welfare and safety of the child take precedence over other considerations, and both prosecution and CPA staff have the authority to recommend the child's participation end at any stage, if they believe this to be in the child's best interests.

This approach highlights the importance of placing children's engagement with bodies adjudicating alleged violations of international criminal law within a wider protection framework, and of close collaboration at all stages between legal professionals and child protection professionals. It is also reflective of an approach that embodies the protections and safeguards recommended in the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. It is this close collaboration between the justice sector and child protection and social welfare that UNICEF supports in all the countries where it undertakes programmatic work on justice for children—around 115 in 2013. As both UNICEF and the International Criminal Court continue in their work, it is our hope that ongoing collaboration and exchange of experiences and best practice can help us jointly ensure that children are better protected, and that redress and accountability mechanisms continue to develop their capacity to serve both accountability and the needs of children.