

EXPERT WORKSHOP SESSION: THE GLOBAL CHILD*

Rapporteurs:

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CHILDREN AS VULNERABLE PERSONS VERSUS CHILDREN AS ACTORS AND AGENTS

The session began with a discussion on the best way to approach the topic of children's rights. As noted previously in the Conference, children are often considered vulnerable parties despite the fact that some believe children should legally be recognized as actors and agents in control of their own fates. One expert cited field research they conducted in the Democratic Republic of Congo to show that children possess resiliency and have a strong desire to demonstrate their agency when pursuing accountability measures. Additionally, many children feel that the ability to name their perpetrators furthers accountability efforts.

Not only do children have a strong desire to participate in the accountability process, but they also desire better coordination among international actors. To child victims, no one issue is isolated. They want to see a more comprehensive reflection of their experiences that combines rehabilitation and accountability. Experts noted that there is a difference between exhausting every charge possible against a perpetrator and truly telling a child's story in way that encapsulates their experiences appropriately.

It is important to look beyond the United Nations' six grave violations against children during armed conflict and to truly address those and all other crimes causing children to suffer. For example, children often want to discuss what was taken from them, remembering personal items destroyed or stolen and the pain caused by displacement. Children sometimes focus more

* The University of Georgia School of Law hosted the Children and International Criminal Justice Conference on October 28, 2014. The Conference featured three expert breakout sessions that were closed to the public and held in accordance with Chatham House Rules. This Article summarizes the session titled The Global Child.

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on these violations instead of the psychological or physical crimes they experienced. Experts emphasized that the judicial process should reflect children's expectations as to how these experiences should be handled.

A theme throughout the conference was the extraordinary resilience and maturity exhibited by children from conflict areas. To better reflect those qualities when creating policy, experts suggested creating accountability systems focusing on the concept of children's agency instead of their vulnerability. Article 12 of the Convention on the Rights of the Child states that any child that is capable of forming a view has a right to express that view.¹ The weight given to the child's views may depend on the age and maturity of the child, but the existence of the right to express his or views is not based on the child's age or maturity.

Experts asserted that a child's views should be a part of every step in the accountability process, including the design and implementation processes of the judicial system and rehabilitation strategies. Experts emphasized that child diversity must be recognized throughout the accountability process. Some children want to participate, others do not, and the processes created should account for this diversity.

SEXUAL VIOLENCE

The panel of experts then shifted the discussion to sexual violence. Specifically, they discussed the similarities and differences between male and female sexual violence. One noted that males and females experience similar social, medical, and psychological consequences stemming from sexual assault. Another stressed the importance of not making any assumptions based on gender. By way of example, the expert noted that both the emotional impact on a child giving testimony and the stigma attached to the sexual abuse are similar for boys and girls, but the way boys describe sexual assault can vary from the descriptions given by girls. Specifically, the expert pointed out that boys might frame sexual assault in coded or different terms than those used by girls. Understanding the cultural context and the consequences boys may face for disclosing this type of information is key.

The panel then discussed the relationship between sexual violence and the definitions of masculinity in particular cultures. One expert voiced the

¹ Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.").

opinion that sexual assault could have long-term impacts on the ability of boys to attain masculinity as defined by their culture and their ability to view themselves as “men.”

This topic was followed by a brief discussion of victim interaction in the context of victim interviews, with one expert stating that it is important to focus on victim preferences rather than assuming victims will prefer interviewers of the same sex. The discussion of sexual violence closed with one expert stating that the stigma of sexual assault can be lessened for female victims if male victims come forward, because it can help them to realize that sexual violence is prevalent and that they are not alone.

HEALTH CONSIDERATIONS FOR CHILDREN IN CONFLICT AREAS

The panel next considered child health issues in conflict areas. The discussion began with an anecdote about a top Liberian medical professor. According to the expert, the professor had read a Harvard study on the mental health of residents of Liberia and Sierra Leone stating that 40% of the population of Liberia suffered from PTSD and 40% also suffered from depression. In describing this study to his first year medical students, the professor stated that 40% of the population of Liberia was “crazy.” The expert stated that the story illustrated the issue of stigma surrounding mental health issues in certain cultures. As a result, the expert stated that in certain cultures it is better to reframe the issue, excluding all mention of mental health. Instead, programs targeting mental health could be framed as “youth readiness programs,” described as preparing youth for occupational opportunities. Reframing the issue could serve to lessen the stigma of the programs and increase participation.

The discussion then shifted to sexual health. The first expert to speak on the issue stressed the importance of the “single story”—the idea that when listening to a speaker tell his or her story, it is important for the listener to step away from his or her own personal notions and really listen to the information as it is being presented. By way of example, this expert told the story of a focus group of women who were asked for their ideas on how to prevent sexual violence. While the questioners expected answers addressing relationships or the establishment of cultural support groups, the women answered that they actually needed was additional information on hygiene and how to take care of their bodies.

VIOLENCE WITHIN THE FAMILY

This same expert went on to discuss the role of the family in gender violence, first raising the question of what could be done if the person's caregiver was the one forcing them to engage in sexual behavior at a young age. This illustrated for the participants that most sexual violence happens in the home and that prosecution proceedings should account for this reality. Experts also stated that there is a need to consider the specific penalties available in particular jurisdictions. Specifically, in some jurisdictions, such as Liberia, penalties for sexual assault are very strict. Victims in these jurisdictions may be reluctant to accuse their attacker, because they do not want to subject a family member to a harsh penalty.

Another expert then took up the issues of confidentiality and protection concerns, stating that protections need to be put into place for victims. By way of example, the expert pointed out that in the United States the victim's name is withheld but that in certain cultures naming the perpetrator would essentially identify the victim. This expert closed the topic with a brief discussion of empirical evidence regarding sexual violence in conflict areas, noting that violence in the home is the largest factor negatively affecting school performance in Afghanistan.

WHO IS A CHILD?

The panel then discussed a fixed definition of "child" in the context of the International Criminal Court. The group agreed that there is an international consensus that eighteen-years-old is the age threshold for the definition of a child. Despite this general consensus, it is not clear that there is a uniform definition for "children" under the Rome Statute.² Rather, the panel noted that the statute takes a somewhat dichotomous approach concerning the age threshold for the term "children." Article 26 concerns the ICC's exclusion of jurisdiction over persons *under eighteen* at the time of an alleged commission of a crime.³ Yet, Article 8 states that the conscription or enlistment of "children *under fifteen years* into the national armed forces" is considered a war crime.⁴ These two Articles are the only instances in the

² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

³ *Id.* art. 26 (emphasis added).

⁴ *Id.* art. 8(s)(b)(xxvi) (emphasis added); *see also id.* art. 8(2)(c)(vii) (providing the same definition in the case of an armed conflict not of an international character).

Statute where the term “child” is used in conjunction with an age limit. The fact that these two age limits differ leaves the definition of child within the ICC open to interpretation. According to one expert, the ICC’s upcoming policy paper provides an opportunity for the ICC to clear up this ambiguity.

One expert posited that this ambiguity may stem from the difficulty in obtaining uniform agreement from states on what constitutes the appropriate age threshold, and certain states have been quite protective of their national or legal tradition of what constitutes a child. This tradition is ingrained in states’ cultures, and these states are not particularly receptive to the implementation of a uniform age limit by the Court. Another expert noted that past interactions with states on this issue indicated that the best approach for the ICC is to be very candid about the Court’s stance on the age limit, while being sure to account for and acknowledge the sovereign choice of the state.

Even if the ICC provides clarity on the meaning of child, the panel noted that there is another hurdle the ICC will need to surmount: age verification. Individuals who come before the ICC are not always easily identifiable as a child or an adult. Many of these individuals do not have personal documents such as an identification card or a birth certificate to verify age. An assortment of alternative age verification measures have been tested, but none have been completely successful. Medical procedures have been found to have a wide margin of error, while heavier reliance has been placed on in-person interviews. The ICC’s current practice is to err on the side of caution and consider individuals of uncertain ages children, unless the ICC can prove otherwise.

A concern that arose during the panel’s discussion of a uniform age limit was how to handle children who themselves commit crimes. There was an emphasis on the need for an international determination of an age below which there should be no criminal prosecution. While the Court has made it clear that its jurisdiction does not extend to individuals falling below the age of eighteen, many states do criminally prosecute children. Another perspective on this issue focused on the reality that some children will inevitably act criminally and that the particular jurisdiction’s judicial system may be the best option for dealing with these situations. An example of a less viable alternative to a justice system was the use of detention centers for children who commit crimes. Another suggestion for a means to handle child crime was to conduct cleansing rituals. The core idea being that such a ritual would recognize that a child had harmed the community in some way, but was being forgiven and provided with an opportunity for reformation.

CONSENT

The panel concluded the session with a lively discussion on how the ICC should approach child participation in the judicial process. Currently, before allowing a child to participate, the ICC requires a responsible party, such as a parent, to give informed consent. Alternative options might be available. Since the guiding principal of consent is the "best interest of the child,"⁵ the source of the consent remains an open question. The experts suggested three alternative sources for obtaining consent for a child to participate in the judicial process: a parent, a director at a care center, and a guardian ad litem.

First, while parents are the most obvious source of consent for child participation, obtaining parental consent can be problematic. One expert expressed concern that parents may not necessarily represent the "best interest of the child," because some parents may be self-interested, especially in domestic violence cases. Parents also may not understand the legal process which can be detrimental to the child. Another expert noted that the definition of a parent is not consistent across cultures and suggested that the ICC definition should reflect those differences. For example, in some countries the idea of a "parent" transcends the traditional understanding of a mother and father. Instead, children are seen as a "child of the community," where many people might be understood as a parent beyond the traditional roles. This expert suggested defining a parent through broad concepts, which can be tailored to culturally specific contexts.

Second, certain individuals completely unrelated to a child might be qualified to give informed consent, such as a director at a care center. One expert suggested these individuals may be just as qualified to give consent as a biological parent. Since parents may be hard to locate, the ICC should consider obtaining consent from individuals close to the child when parents are absent.

Third, one expert suggested the appointment of a guardian ad litem for children, though this option was unpopular among other experts on the panel. Whether a guardian ad litem is necessary could be determined by either the age of the child or through an individualistic approach based upon the maturity of the child. The appointment of a guardian ad litem would allow a third party to make decisions in the "best interest of the child."

Finally, one expert suggested that perhaps the best way to deal with consent is by finding alternative ways to incorporate older children into the

⁵ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

judicial process, which would not require consent. Who can give consent in “the best interest of the child” remained an open question among panel members.

CONCLUSION

In sum, the expert panel focused its discussion on topics relevant to determining and enforcing the global rights of children. In discussion relating to a child’s role in the accountability process, experts focused on the notion that a child’s expectations and experiences should be an integral consideration. The panel’s discussion of sexual violence centered on the differences between the ways boys and girls experience and describe sexual violence. The discussion of health concerns focused on the importance of understanding individual health concerns within the broader frame of cultural expectations. The panel then discussed the complexities of dealing with crimes committed against children by family members. Next, the panel spent significant time debating how the ICC should define who is and is not a child. If a definition can be agreed upon, problems such as age verification and how to deal with children who themselves commit crimes will still be of concern. Finally, the panelists turned to the topic of who can give a child consent to participate in a judicial proceeding noting the problems with parental consent and the controversy of allowing guardian ad litem consent.