

EXPERT WORKSHOP SESSION: REGULATORY FRAMEWORK*

Rapporteurs:

*Ashley Ferrelli,** Eric Heath,*** Eulen Jang,**** and Cory Takeuchi******

INTRODUCTION

On October 28, 2014, in a closed session during the Children and International Criminal Justice Conference at the University of Georgia School of Law, several experts discussed the implementation of various regulatory mechanisms that may be utilized by the International Criminal Court (ICC) when prosecuting crimes against children. The discussion largely concerned the application of international criminal law in four areas: (1) determinations of competency regarding children in armed conflict; (2) crimes preventing access to education; (3) crimes relating to human trafficking; and (4) crimes preventing access to healthcare. The experts also focused their discussion around what roles the ICC and the Office of the Prosecutor (OTP) should play in developing international criminal law. Additionally, the ICC's effectiveness as a deterrent against the most serious crimes of concern to the international community also merited discussion from the experts. Each topic is discussed separately below.

CHILDREN IN ARMED CONFLICT: COMPETENCY DETERMINATIONS

The ICC has applied international law to the prosecution of crimes relating to children in armed conflict. For example, Thomas Lubanga was convicted of the war crime of conscripting and enlisting child soldiers under the age of fifteen.¹ However, complexities inherent in the prosecution of individuals charged with recruiting child soldiers highlight several challenges facing the ICC. For example, child soldiers are perhaps

* 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 Regulatory Framework.

** J.D., University of Georgia, 2016; B.A., University of South Florida, 2011.

*** L.L.M., University of Edinburgh, 2016; J.D., University of Georgia, 2015; B.A., Lipscomb University, *summa cum laude*, 2012.

**** J.D., University of Georgia, 2015; B.MUS., University of Georgia, *cum laude*, 2012.

***** J.D., University of Georgia, 2016; A.B., University of Georgia, *cum laude*, 2009.

¹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶ 1358 (Mar. 14, 2012).

appropriately regarded as both victims of war crimes—i.e., those involuntarily recruited and abducted into military service—and as active participants accused of murder and various other offenses, such as sexual assault. The OTP currently considers any individual above the age of eighteen an adult eligible for prosecution. However, multiple panel experts expressed the need to consider a broader array of criteria to determine a defendant's competency to stand trial as an adult. Other experts argued that practical realities of prosecuting crimes related to child soldiering require the application of bright-line rules. As a result, discussion was largely focused on the nature of the criteria used to determine competency, the potential use of prior recruitment as a mitigating factor in sentencing, and the use of prosecutorial discretion to broaden the scope of international criminal law in this context.

Criteria

As mentioned above, both the ICC and the OTP are generally inclined to consider individuals above the age of eighteen as adults eligible for prosecution, though there are inherent difficulties that accompany the use of this bright-line rule. First, in the absence of state-certified records, there is no accurate scientific or medical method for determining a person's age. Some organizations have attempted to use a "cross-checking" method where both the individual and members of the community are interviewed in an attempt to make age determinations. Unfortunately, this method can be thwarted: once the party recruiting child soldiers is aware an investigation is in progress, it is easy to hide—or kill—any person who might speak contrary to their wishes.

Second, this arguably arbitrary line does not take into account many individuals that may be both victims and perpetrators of war crimes. For example, a twenty-year-old soldier guilty of enlisting children under the age of fifteen may himself also have been conscripted at such an age. In such a situation, some argue that child development must be taken into account as these individuals may have missed key developmental milestones essential to the adult maturation process. Rather than utilize these bright-line rules, panel experts suggest establishing international guidelines that incorporate criteria from relevant literature and experts on child-development to determine competency.

Age as a Mitigating Factor

Utilizing guidelines informed by sociological research regarding stages of child development may ultimately be a fruitless endeavor. Such an inquiry may be too directed toward utilizing a case-by-case analysis of a given individual's capability to possess the requisite *mens rea* for the alleged crime. Further, childhood is often a culturally defined concept; many cultures utilize differing definitions or simply do not recognize "childhood" as a stage of development at all. Such factors may render the use of guidelines unsustainable at the international level.

Moreover, any recognition of kidnapping or prior recruitment as a defense cannot overlook the gravity of the crimes a defendant allegedly perpetrated as an adult. Regardless of questions of development and competency, those who perpetrate these crimes seem to be aware of the criminal element implicit in their actions. Why else would child recruiters go to such lengths to hide individuals that could potentially incriminate them? Use of a bright-line rule establishing a minimum age of culpability seems to combat the potential for a vacuum of accountability. Considering these factors, such criteria are arguably best utilized at the sentencing stage. Rather than inoculating a defendant from prosecution, recruitment as a child and its effects on an individual's level of maturity and development can be used as a mitigating factor when sentencing a convicted perpetrator.

Prosecutorial Discretion

ICC prosecutions ostensibly serve two key functions: justice and deterrence. The ICC's previous prosecutions and investigations arguably have substantial deterrence value with respect to child soldiering; labeling a child-recruiter as a war criminal and disseminating this information both domestically and internationally has had far-reaching effects. However, urging the ICC to pursue further prosecutions of child-recruiters may result in diminishing returns. The ICC has limited resources, and therefore only realistically possesses the means to prosecute the most reprehensible and visibly culpable criminal actors. In this context, the ICC's pursuit of "big fish" on the international level provides a model that domestic courts may utilize in pursuing justice for "smaller fish," such as child-recruiters in lower levels of a given command structure.

The ICC's time may be better spent pursuing the activities of individuals committing crimes against children in other contexts. Courts do not typically view adulthood in terms of competency and developmental maturity.

Moreover, judges are often reticent to expand or develop the law in such a sweeping and arguably fundamental manner. While it is acknowledged that the duty of any prosecutor is to push the court to further expand the law, prosecutorial discretion must be exercised to gain convictions where they are more readily attainable. Viewed in this context, discussion of international norms and guidelines is perhaps better left to the domestic courts or the United Nations General Assembly.

CRIMES AGAINST ACCESS TO EDUCATION

Attacks against schools and educational facilities are generally acknowledged as matters of grave concern to the international community. Such attacks not only hinder a child's rightful access to education, but also increase the risk of abduction and recruitment into child soldiering and sexual slavery. However, the Rome Statute of the International Criminal Court paints criminal attacks directed against educational facilities with a broad brush and exempts attacks directed against educational facilities utilized for "military objectives."² This wrinkle complicates any attempt to further develop attacks against education as a legal concept, as any militarily occupied facility may be considered a legitimate target and therefore legally susceptible to attack. Further complicating the issue is the manner in which such potential crimes occur. Attacks against educational facilities are often conducted in conjunction with other crimes. The experts agreed that the ICC must develop and establish criteria for the prosecution of such crimes, raise awareness on the topic, and exercise prosecutorial discretion to enhance the development of international criminal law in this area.

Criteria

Article 8 of the Rome Statute defines a "war crime" in a variety of contexts. Article 8(b) articulates several specific activities that are considered "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law," and includes acts that are "intentionally direct[ed] against buildings dedicated to religion, *education* . . . provided they are *not military objectives*."³ While the ICC has recently decided to open an investigation into an attack on an educational facility, international criminal law relating to

² Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

³ *Id.* art. 8(b)(ix) (emphasis added).

attacks against education and educational facilities is largely undeveloped. As a result, criteria must be developed to pursue the prosecution of these crimes at the international level. Specifically, such criteria must focus on the exception for educational facilities used for military objectives. Other criteria must be developed to distinguish when schools may be treated as either legitimate or illegitimate military targets.

Raising Awareness

As noted above, state military forces are often installed in and around educational facilities under the mandate of “protecting schools and education.” However, this provides cover for those accused of attacking the facility to justify the attack based on its use as a military facility. Use of this narrative complicates public perception of these crimes. Therefore, efforts must be made to raise international awareness of these attacks. One suggested method emphasizes the use of well-crafted narratives throughout the prosecution of an undeniably guilty and well-known individual. Much in the same way that Lubanga’s prosecution exposed and raised general awareness of crimes associated with child soldiering, prosecution of an undeniably guilty person or persons accused of destroying a school could employ narratives exposing the multitude of crimes associated with an attack against education, even if the attack is not an independent ground for conviction.

Prosecutorial Discretion

Because international criminal law relating to crimes against education is sparse, the ICC is limited in its ability to effectively develop law within this area. Approaching the topic in terms of disparate impact theory—such as establishing a pattern or practice of failure to respect education in general—is likely to fall on deaf ears. As mentioned above, courts are unlikely to be eager to develop the law in this manner. Rather, the ICC and OTP should focus their efforts on those instances where rock-solid evidence exists that an individual or individuals directly attacked educational facilities. Such a method could not only pave the way for broader convictions in the future, but also provide a model for domestic courts to utilize in the future prosecution of such crimes. Moreover, a clear conviction of an individual responsible for a direct attack against a school or educational facility would reaffirm the legal concept within the framework of international humanitarian law and reinforce the efforts of the Office of the Special

Rapporteur for Children in Armed Conflict's goal of stigmatizing grave violations.

HUMAN TRAFFICKING

The discussion also focused on human trafficking, another grave violation of human rights. Article 7(1) of the Rome Statute defines enslavement as a crime against humanity. Article 7(2)(c) defines enslavement as, "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."⁴ Prosecutable human trafficking occurs "when committed as part of a widespread or systematic attack directed against any civilian population."⁵ While the Rome Statute designates human trafficking as a "crime against humanity," and the statutory emphasis placed on women and children imply preference in prosecution, many obstacles exist to the successful prosecution of this crime.

Criteria

Unfortunately for the sake of the ICC's jurisdiction, most human trafficking incidents are not systematic. It has proven difficult to find a case where trafficking meets the legal definition of the Rome Statute. However, multiple experts suggested that if the trafficking involves children, it may be less difficult to prosecute as a broader coercion element would not have to be proven. To prosecute successfully, the ICC needs to evaluate the act, means, and purpose, and look specifically towards whether or not the perpetrator used these child victims for exploitation.

Prosecutorial Discretion

When prosecuting a human trafficking case, the elements of a typical trafficking case can be used. The systematic element would still need to be present, though, and not just in small numbers. As with access to education, the strongest cases for prosecution should be chosen—the so-called "big fish." The OTP should be searching for persons who are specifically trafficking children for the purposes of sex and forced slavery to support a war effort.

⁴ *Id.* art. 7(2).

⁵ *Id.* art. 7(1).

CRIMES AGAINST HEALTHCARE

Another major concern for the ICC and the international community are attacks on hospitals and healthcare. Multiple experts on the panel expressed concern over recent examples of women and children in Syria being denied access to healthcare. The discussion group generally agreed that there was a pressing need to broadly stigmatize the lack of respect for healthcare. However, differing opinions were offered as to what would be a sufficiently severe punishment for stigmatization to be an effective deterrent.

Criteria

Article 8 of the Rome Statute condemns physical attacks on hospitals and, by extension, healthcare. Article 8(2)(b)(ix) states that intentionally directing attacks against buildings dedicated as hospitals and places where the sick and wounded are collected is a serious violation of the laws and customs applicable to international armed conflict and law.⁶ However, indictments for impeding healthcare may prove to be more difficult than indictments for intentionally targeting hospitals.

Condemnations on a Broader Scale

While some experts believe that any attack on healthcare should be condemned, whether it be denial of healthcare access or the political use of hospitals, others believe that the OTP should be looking for and prosecuting their strongest case. It was suggested that the “pile of rubble” test, where a school is physically demolished or attacked, should be the deciding factor for the OTP’s decision to prosecute. On the opposite end of the spectrum, other experts believed that the OTP should take a stronger stance against attacks on healthcare and that something less overt—such as intimidation of healthcare professionals and patients, hospital occupation, and blocking humanitarian aid—should be prosecuted alongside more heinous crimes. These experts stated that it is necessary to punish those involved in these less overt attacks on healthcare for the purpose of broadly stigmatizing and condemning attacks on healthcare and healthcare facilities. There was a lack of consensus on how these more isolated acts could be prosecuted, however, as ICC judges have not aggressively interpreted the law.

⁶ *Id.* art. 8(2)(b)(ix).

Prosecutorial Discretion

As mentioned above, the ICC's judges have been conservative with their interpretation of the law. The judges tend to apply the law without seeking to expand its reach. Trying to push for something more progressive has proven to be difficult. However, the ICC's conservatism in its formative stages may be necessary in order to allow for the development of its structure and administration. The ICC judges may become more open to what some might call judicial activism in the future as the institution becomes more developed and established. While this may be frustrating for those who want to see the ICC advance farther in its condemnation of many aspects of different crimes, it is important that the OTP continues to win its cases. Successful prosecution and convictions will serve to increase the stigmatization of the most serious crimes of concern to the international community and enhance corresponding dialogue around the world.

THE ICC AS A DETERRENT

As reiterated above, the two main tenants of the ICC are accountability and deterrence. For the latter, the ICC is able to utilize the title of "war criminal" as a valuable deterrent mechanism. While there are limits to deterrence in criminal law, the experts' discussion focused on maximizing the effect of deterrence by focusing the ICC's prosecutorial strategy on realistic, high-profile, and achievable cases.

Maximizing Deterrence

The use of "war criminal" as a label has value and can be used as a deterrent if cases are successfully prosecuted. The risk of a criminal indictment and conviction is a powerful deterrent. One expert favorably cited the International Criminal Tribunal for the former Yugoslavia for conducting investigations and prosecutions of sexual violence and rape even though it was not written into the applicable statutes and argued that the ICC should create new law for effective deterrence in a similar fashion. Others argued, however, that the ICC should consider handling cases in a manner similar to Canada's Supreme Court by utilizing a more compromising and less precarious approach to achieve the desired results. Like the Canadian Supreme Court, the ICC should be working through the designed system that is already in place to obtain convictions instead of attempting to push aggressive prosecutions. In this view, the ICC is part of a system. When a

case is successfully prosecuted, it creates a universe of partners. Many perpetrators will be uncomfortable with their crimes or crimes similar to theirs being placed in the spotlight. If would-be war criminals see a network being established as the result of successful prosecutions, the goal of effective deterrence can realistically be achieved.

CONCLUSION

The ICC was not intended to cover every possible crime against humanity. The Rome Statute created a system, not a court. The purpose of the OTP is to find and prosecute the most responsible parties to set an example for the international community going forward. The rest of the ICC system depends on the national systems and domestic courts filling in the prosecutorial gaps that remain. The ICC intends for the complementary national systems to try and convict low to mid-level perpetrators. Here, domestic enforcement arms, NGOs, and civil society are vital for the purpose of assisting these national systems in the prosecution of lower level—but equally important—cases.

In addition to the domestic courts functioning within the system, it is also the responsibility of the OTP to push the ICC judges towards more convictions and apportioning appropriate punishments. While not always effective, there have been instances where the OTP was successful in changing the structure of the courts. For example, in the ongoing ICC investigation in Kenya there is no formal power for the ICC to compel witnesses to appear. But the OTP pushed the judges to compel nine witnesses, arguing that it was unfair that the domestic courts had the power to compel but the ICC did not. This line of argument was successful and four witnesses have since testified.

The ICC will not and was not intended to be the only forum for punishing international crime. It is more important that the ICC brings these convictions to light, thus providing the courage and guidance for national and domestic courts to prosecute the remaining perpetrators. If the ICC system and national systems function together as intended, there will ultimately be a reduction in crimes of international concern.