

EXPERT WORKSHOP SESSION: CHILD WITNESSES: TESTIMONY, EVIDENCE, AND WITNESS PROTECTION*

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INTRODUCTION

During the Children and International Criminal Justice Conference at the University of Georgia School of Law on October 28, 2014, several international attendees met in a closed workshop session titled Child Witnesses: Testimony, Evidence, and Witness Protection. These experts in international law, crimes against children, and child welfare discussed issues facing the International Criminal Court (ICC) in protecting children while simultaneously pursuing justice.

During the breakout session, several experts referred to *Lubanga*, the first case involving child soldiers tried in the ICC by the Office of the Prosecutor (OTP).¹ Under the Rome Statute's definition of child (fifteen-years-old), some former soldiers who testified against the defendant were not children at the time of the trial, but they had been pulled into defendant Lubanga's army as children. The experts noted that the *Lubanga* judgment shows a sense of paternalism from the ICC judges, possibly based on the assumption a child cannot tell a truthful and coherent story. Though the *Lubanga* conviction for enlisting and conscripting children into armed conflict was a start toward justice for crimes against children, there was no conviction for the sex crimes committed against these children. As a result, a large class of victims was excluded from possible reparations.

* 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 Testimony, Evidence, and Witness Protection.

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¹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06, Judgment (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

ADDRESSING VULNERABILITIES IN CHILD WITNESSES

All members of the breakout session recognized that children are particularly vulnerable and that vulnerability requires special protections from the Court. Members noted that the Court should protect the safety, and physical and psychological wellbeing of child witnesses. One strategy generally agreed upon is to operate from a “do no harm” perspective, always considering the best interest of the child.

Child witnesses often need physical protection. In the United States this need may be met through child services or a welfare system. In the absence of a global child welfare system, one way children are protected internationally is in safe houses. For example, where state-provided services are lacking, children may immediately go to the care of a caretaking unit. This approach has been demonstrated in Sierra Leone. A challenge with placing child soldiers in caretaking units or other forms of safe house is ensuring that children from different warring factions are not mixed together, for they may begin fighting.

Article 68 of the Rome Statute obligates the ICC to protect the privacy of child witnesses.² Any former victim who cooperates with an investigation is guaranteed protection, which may require that information about the child remains confidential. Sometimes it may be necessary to take a child witness out of a community to protect him or her, though this may be difficult when a witness is removed from a community where he or she should be integrated.

A courtroom may be a particularly vulnerable place for a child witness. If a youth defends himself or herself without counsel, it may be even more difficult. In one instance, when a former child soldier was cross-examined by his former leader, he transformed from a strong young man to a child. One way the ICC has addressed this issue is to allow a shielding technique. During the proceeding, the child witness is shielded from the accused so the child does not have to see the defendant (though the defendant can see the child through the screen). Another method of protection is not requiring child witness testimony for certain types of crimes, like war crimes. Alternatively, *in camera* evidence, including video evidence, may be presented instead of direct testimony.

Another way to protect child witnesses is to change public perception. After a conflict, there has been an effort among some populations to hold child soldiers accountable for their actions. However, perceptions can be

² Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 90.

changed when there is a role for telling stories beyond the formal justice system. In one campaign to change public perception, a child soldier's testimony was recorded and played over the radio. His story generated empathy and understanding among the community, showing how voices of children in a non-judicial setting can have a profound, positive impact. Allowing child soldiers to tell their stories can help in the healing process for everyone affected by the underlying conflict.

RESPECTING CHILD WITNESS AUTONOMY WHILE WORKING TO PROTECT THE CHILD

The child's best interest was a recurring theme of the session. The ICC does in fact take steps to keep the child's best interest in mind. Even though children can come across as fragile, one expert pointed out that not every child is a "delicate flower," as some child witnesses are robust and willing to share their story. Child witnesses have an interest in testifying in order to tell their story in a cathartic manner. Their testimony is also critical to the trial process. One expert explained that child witnesses and victims often express a desire to assist the court. Consequently, it can be difficult to explain to a child that the testimony was not utilized, often due to reliability or age issues. There is tension between a child's desire to testify and the practicability of the child doing so. That tension may arise from both the potential harm to the child and an inability to utilize the testimony.

PROTECTING THE CHILD'S BEST INTEREST WHEN TESTIFYING

One expert suggested that people, including children, who have been through traumatic experiences generally want to talk, but that a courtroom may not be the best setting to do so. The participants agreed that child victims often want to testify and share their stories, and that the process of testifying may be helpful in the healing process. However, the child's testimony is not always necessary to resolve a case because other evidence can be used to corroborate a crime without questioning the reliability of a child's testimony. According to the session's experts, the decision of whether a child witness should testify is a "balancing act" that weighs a child's desire to share his or her story with the necessity of the child's testimony and whether that testimony could be safely presented in an admissible form.

The decision as to which measures will be in a child's best interest is "fabulously indeterminate." One expert suggested deferring to child

protection professionals for guidance in deciding whether or not a child should testify. Additionally, a duty exists in most jurisdictions to defer to specialists in concert with discussions involving the child's parents or legal guardians. One participant explained that dealing with traumatic stress is like working with an electrically charged wire—getting too close can result in a shock. One approach in psychological treatment is to slowly get closer and closer to the pain, “insulating the wire,” and ultimately giving meaning to the narrative for the child soldier or other victim. This slower clinical process is less traumatic than one in which a child witness would testify before being proofed, as is required by the ICC.

If the OTP determines that testifying is too painful for a child, the OTP may choose to not prosecute the case, or it may rely on other testimony such as the video evidence that was relied on in *Lubanga*. Contemporaneous video evidence was relied upon in *Lubanga* to prove systematic abuse of children used as child soldiers, a violation of international law. Due to the reliability questions child testimony raises, certain types of crimes, such as war crimes, do not require child witness testimony. But, if the child witness is deemed a vital link in proving a crime, the judge must consult the Convention on the Rights of the Child to arrange testimony. For example, child witness testimony has proved useful in corroborating facts concerning a military commander's chain of command.

THE CHILD'S BEST INTEREST AND COMMUNITY REINTEGRATION

Reconciling the policy of community reintegration with a child's best interest in testifying was another balancing act discussed by the session participants. While a child may want to testify, the testimony could result in the child's removal from his or her community. One panelist suggested that if you are taking a child's best interest into account, displacing the child from his or her community in order to testify may not be the best decision, even if the child insists on testifying.

When deciding if a child is to testify in the ICC, it is useful to look at the child's community and where the child will return after the trial process. Consultation with community members must be confidential so that the child's and the OTP's interests in the case are protected. One expert suggested that a community member could help determine the child's best interest by researching the community and relevant ethnic relationships. The experts recommended that the same point person should be used throughout the trial, so that the same person could help form a strong trusting

relationship between the child and his or her community and eventually provide post-trial support.

THE OFFICE OF THE PROSECUTOR'S APPROACH

The OTP has developed resources to aid in the determination of whether a child will testify. The Victim and Witnesses Unit, outlined in the Rome Statute, provides psychologists who can interact with witnesses and provide support before, during, and after the interview process. At the conclusion of the interview process, an expert will assess whether testifying is in the child's best interest. The expert determines whether the child can testify and whether the potential testimony should be postponed. OTP investigators rely on the expert's determination. If an interview is postponed, it will not be scheduled again until there is another assessment.

While the ICC has some techniques in place to work with potential child witnesses, the experts suggested that civil society could step in to set new norms for assessing and preparing child witnesses who may choose to testify.

SPECIAL CONSIDERATIONS AND CONCERNS

In the context of prosecuting war criminals for exploiting child soldiers, the OTP faces evidentiary difficulties when child soldiers take the stand as witnesses. Some of these difficulties include confirming that the soldiers were children, the credibility of child-soldier witnesses, and procedural barriers. Perhaps due to these difficulties, the ICC has shifted their reliance from child-soldier witness testimony to alternative evidence of abuse by relying on contemporaneous video evidence of widespread, systematic violations.

Since cases take years to reach the ICC, child soldiers are often indistinguishable from adults by the time they testify. In war-torn regions where medical documentation or birth certificates are difficult to recover or non-existent, the ICC relies on experts to demonstrate the age of witnesses by potentially unreliable tests such as wrist or bone development, which some believe have a one-year margin of error. In the past, the ICC relied on video footage of contemporaneous, behavioral observations such as whether the participants engaged in childlike activities (e.g., playing with pebbles on the ground). However, a recent evidentiary focus on general, systemic abuse of child-soldier recruitment has reduced the burden of showing specific instances of child soldier abuse via testimony of child soldiers.

Unlike some domestic courts, where child witness testimony is relied on to prove isolated (often clandestine) child-related crimes (e.g., abuse, neglect), the ICC has taken an unconventional approach to establish violations of widespread child-related war crimes (e.g., child soldiers). In two projects within Syria, social media and video evidence have been instrumental in identifying and documenting violators, the number of instances of violations, the number of persons affected, and the persons funding the crimes. While these forms of evidence also present problems, such as authenticity and chain of custody, the ICC has shifted reliance to these overt, contemporaneous forms of evidence to demonstrate violations of international child-soldier laws.

This shift does not devalue or recognize a defect in the testimony of child witnesses. Forensic psychologists have demonstrated that the testimony of children is no less reliable than that of adults. If questions are properly formed, children can provide competent, consistent testimony. The reliability of child testimony is demonstrated by the acceptance of testimony from cognitively or emotionally disabled children in some U.S. courts. While there is a perception that disabled children may be susceptible to being “fed” a spurious story, some child testimony advocates argue that a disabled child’s testimony may be even more reliable because children with an impairment are less able to maintain a lie. Unfortunately, child-soldier witnesses called upon by the ICC often come from places with no documentation of childhood disabilities.

The shift from child testimony to alternative forms of evidence acknowledges the difficulty of procuring reliable witnesses who were child soldiers, rather than the credibility of child testimony itself. The unpleasant reality in war-torn regions, where children suffer and experience war crimes, is that these areas lack records of children. Records that could identify age, cognitive impairment, or any number of qualifiers are destroyed, non-existent, or lost. Without such evidentiary documentation, war criminals can more readily rebut the *scienter* or *actus reus* of recruiting child soldiers. One expert suggested this explains why the ICC has shifted its attention to irrefutable, contemporaneous video evidence of systematic abuse by violators.

The OTP’s emphasis on video evidence is related to the extensive procedural mechanisms designed to protect child witnesses. Ensuring witness reliability and protecting the interest of the child are recurring challenges for ICC prosecutors. Generally, the OTP cannot prepare witnesses. The OTP has initial meetings with potential witnesses, but, per policy, it does no more than verify the reliability of the witnesses. First, there is a fear that preparing witnesses will lead to coaching and rehearsing

stories that undermine the objectiveness of the OTP's case. Second, when child-soldier witnesses are called, the lack of preparation can often be unfair to the witnesses because the volatile nature of judicial processes (e.g., cross examination) can re-victimize the witnesses by subjecting them again to the hands of their alleged abusers. Finally, witnesses re-exposed to their abusers often do not hear about the results of the case for years, which can delay the healing process for victims.

POST-TRIAL

The child witness's post-trial experience is essential to that child's perception of the legal system and his or her role in the overall prosecutorial process. To date, the OTP has not focused much on the involvement of the child in the sentencing process. There are several ways a child could meaningfully participate in sentencing. Some examples include: asking the child to write a letter or draw a picture describing what happened to them, having an expert who interviewed the child provide evidence of their credibility, or creating a video of the child discussing how their experience impacted them.

The OTP has considered the child's post-trial involvement. How the child perceives his or her role in the legal process colors his or her view of the legal system as a whole. There is concern that the child may be unable to distinguish between the various actors in the court, causing the child to feel used and left out of the process. Attempts to help a child understand his or her role are further frustrated by the length of time between the occurrence of events, the trial, and sentencing. Sometimes the trial will not begin until five years after the events, and sentencing could occur two or three years after that. Through this long process it is important to help children understand both how the trial relates to what happened to them individually, and the broader connections between the legal process, the child, and the child's community.

The role of the child becomes more complicated when the child's testimony is found to be unreliable and cannot be used. Regardless of the testimony's legal usefulness, the OTP should thank the child for participating in the trial and update child witnesses after the trial. When the child's testimony cannot be used, it is important to tell him or her that the testimony was significant and that his or her participation helped in the search for justice, even if the testimony was not used. If a child witness is expecting reparations for his or her participation in the trial, it will be necessary to explain that the child will not collect reparations. This process will help the

child understand his or her role in the judicial process and the child's experience at the trial.

An important area of focus in dealing with child witnesses post-trial is managing expectations about reparations. For many witnesses from civil law nations, such as those involved in the trial in the Democratic Republic of the Congo, reparations were expected for those witnesses who participated in the legal process. As the ICC cannot guarantee reparations at the end of the trial, it is important for the OTP to help clarify and manage expectations of witnesses with regard to reparations. Because the ICC has no involvement with reparations, they have previously paid them little concern. Civil society, including non-governmental organizations (NGOs), can help manage expectations and provide education in this area.

SOLUTIONS

In many ways civil society and NGOs could help shape the way the ICC utilizes child witnesses, particularly in the field of education. Private organizations can help educate witnesses about issues such as reparations, as discussed above. As there are limits to what the OTP can successfully and reasonably undertake, civil education in these areas can help define the impact and consequences of a prosecution on local communities. The OTP must balance helping the most victims as possible with the effectiveness of prosecution; private organizations can focus solely on helping the child victims. Civil society can also serve an important parallel role of educating judges on community impact and particularized issues dealing with child witnesses.

Private organizations can write policy papers on topics like sensitization to the way children tell stories at various ages. These can serve to educate judges about a variety of child-related issues. This process is more appropriately left to NGOs, UNICEF, and other partners in order to avoid any appearance of improper *ex parte* communications and diplomatic issues that would arise if left for the OTP to discuss with judges.

While the Rome Statute sets out criterion as to the amount of experience required for judges on the ICC, additional training, particularly in the area of child-witness credibility, should be done regularly. Private organizations can provide this training in a way that will help judges identify issues of child-witness credibility in an effective way. This would prevent issues that arise when judges from different countries are accustomed to treating child witnesses in a nation-specific manner, and provide for a more uniform treatment of these witnesses.

CONCLUSION

Preparing child victims to testify as witnesses in the course of prosecuting alleged perpetrators is a complex and vital task. True protection requires a multi-faceted approach that addresses a child's physical, psychological, and social vulnerabilities. While children should be protected by the international criminal justice system, they may choose to play an important role in the trial of their former oppressors. Special concern for child witnesses is necessary, but this concern should not overshadow a child's right to testify or otherwise participate in the trial process. A child's rights do not cease upon the completion of a trial. The child's best interest and role within the judicial process is also important during the period following trial. Civil society may be most effective in assisting the ICC as it determines how to best care for a child victim and benefit from a child witness.