Children

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Repository Citation
Diane Marie Amann, Children (2016),
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CHILDREN

THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW
(William A. Schabas ed., 2016).

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Children withstand unique harms in periods of armed conflict and similar violence. Whether infants or juveniles, during such periods children often are among the most vulnerable persons. Children typically depend on their elders for sustenance, and so the loss of parents or other guardians, coupled with the destruction of homes, displacement from communities, and deprivation of basic necessities, education, or health care, affects them acutely. Some children do not survive war; others subsist along war’s waysides. Still others find themselves in armed groups, where they may be required to aid or participate in combat and, at times, to endure sexual or other physical assault. In recognition of such experiences, Raphael Lemkin, a foundational figure in the development of international criminal law, once wrote: ‘The permanent psychological injury and the arrest of normal development of the child victim is perhaps the most shocking and tragic result of genocide.’

Stories of such children have been told and retold, not only in recent memoirs like A Long Way Gone, an account of armed conflicts in 1990s West Africa, but also in much older ones like the world-famous diary of Anne Frank, a European teenager who lost her battle to hide from the Holocaust. Frank’s story reflected a myriad of children’s experiences during the Second World War. Nevertheless, early international criminal justice mechanisms paid scant attention to children’s wartime plight. Neither the 1945 Charter of the International Military Tribunal, which

This chapter is written solely in my personal capacity. My thanks to Stephany Sheriff for research assistance.


tried accused major war criminals in Germany, nor Control Council Law No. 10, upon which twelve subsequent Nuremberg trials were based, made any mention of children. The same was true of the 1946 Charter establishing the Tokyo Tribunal. Even the seminal instrument of post-war collective security, the Charter of the United Nations, was silent with respect to children. In stark contrast were institutions established at the turn of the twenty-first century. The statutes of both the Special Court for Sierra Leone and the International Criminal Court place emphasis on crimes against children, and both courts have convicted individuals charged with such crimes. The initial focus, on the recruitment and use of child soldiers, eventually shifted towards a more comprehensive approach. International Criminal Court Prosecutor Fatou Bensouda has explained 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.’

This chapter first will trace developments that gave rise to the current emphasis, and then will examine key judgments as well as the recent move to a broader strategy. It will conclude by discussing challenges to the prevention and punishment of international crimes against children.

Towards accountability for crimes against children

Despite their charters’ silence on the issue, the post-Second World War tribunals did not wholly ignore the effects of armed conflict on children. The first Nuremberg judgment contained a dozen such references. Most were brief mentions of children in the company of adults; for example, an Einsatzgruppe leader’s statement that his unit had ‘liquidated approximately 90,000 men, women and children.’ To the same effect were most of the five references to children in the Tokyo Tribunal’s 1948 judgment. Still, vulnerabilities attached to childhood were central to the Nuremberg judgment’s discussions of certain Nazi practices, such as abduction and forced adoption in order to boost the number of persons presumed to possess what one witness called ‘good blood of our type’, and forced abortion


4 (1948) 22 IMT 491.

if, in the words of another witness, 'the child's parentage would not meet the racial standards'. Finding that the Nazis routinely had killed captives too young to work in concentration camps, the International Military Tribunal quoted from an official's affidavit: 'Very frequently women would hide their children under their clothes, but of course when we found them we would send the children in to be exterminated.' Testimony at trial connected killings of children to the Nazis' ultimate goal: to eliminate an ethno-religious group.

That annihilative intent—precisely, the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'—was proscribed in a foremost instrument of modern international criminal law, the Convention on Genocide that the UN General Assembly approved in December 1948. The brainchild of Lemkin, this treaty aimed squarely at Second World War practices like forced adoption, and thus listed '[f]orcibly transferring children' of a protected group to another group as one of the five acts that might constitute genocide. The treaty reached criminality against future generations as well, forbidding the imposition of 'measures intended to prevent births' in a protected group.

As the onset of the Cold War stymied the enforcement of such prohibitions, States spoke more of protecting children from harm than of prosecuting harm once it occurred. The General Assembly endorsed the 1948 Universal Declaration of Human Rights, which proclaimed that '[m]otherhood and childhood are entitled to special care and assistance', and that '[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection', including free education 'at least in the elementary and fundamental stages'. In 1949, States adopted the Geneva Conventions for the protection of victims of war, the fourth of which contained multiple provisions intended to assure the identification, education, health, and well-being of infants and other children, during armed conflict and under occupation. The 1977 Additional Protocols to those universally ratified conventions reinforced this

6 (1948) 22 IMT 480. 7 Ibid., p. 503.
8 (1947) 4 IMT 337-338 (cross-examination of Ohlendorf).
9 Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287, articles 14, 17, 23, 24, 38(5), 50, 82, 89, 94, 132. This protective array compares favourably to a legal regulation issued during the United States Civil War: its sole reference to children recommended, yet did not require, notice of attack 'so that the non-combatants, and especially the women and children, may be removed before the bombardment commences.'
The contours of protection took shape with the adoption of the 1989 Convention on the Rights of the Child and the 1990 African Charter on the Rights and Welfare of the Child, each of which embraced as general principles recognition of the child's rights to life and to express views in matters affecting him or her, as well as guarantees of non-discrimination and action in a child's best interests.

These latter treaties also helped to restart efforts at prohibition; precisely, prohibition of the use or recruitment of children in armed service. Additional Protocol I provides that '[p]arties to the conflict shall take all feasible measures in order that children ... do not take a direct part in hostilities', and further specifies that such parties 'shall refrain from recruiting' children under fifteen 'into their armed forces', while Additional Protocol II states that 'children ... shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'. In the Children's Convention, meanwhile, States Parties similarly promise to 'take all feasible measures' so that young persons 'do not take a direct part in hostilities', and also to 'refrain from recruiting any person who has not attained the age of 15 years into their armed forces'. The African Children's Charter follows suit, with an important innovation: whereas previous treaties limited the recruitment-and-use ban to children who had not yet attained their fifteenth birthday, this regional child rights instrument extended that ban to everyone under eighteen. Subsequent treaties, such as the 1999 Convention on the Worst Forms of Child Labour and the 2000 Optional Protocol on the Involvement of Children in Armed Conflict, also opt for the eighteen-year-old threshold.

The promulgation of these overlapping and sometimes contradictory treaties coincided with a Cold War thaw and consequent revival of the international criminal justice project begun in the Nuremberg-Tokyo era. The new tribunals drew note for pioneering jurisprudence with regard to sexual and gender-based violence – crimes that their mid-twentieth

Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, article 19.

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century forebears had afforded a secondary priority. Like those forebears, however, the new tribunals did not dwell upon crimes against children. That changed after news dispatches and Graça Machel's 1996 UN report alerted public opinion to the prevalence of children - some younger than ten - in the ranks of national armies and rebel groups that then were waging wars across the globe.

The 1998 Rome Statute of the International Criminal Court and the 2002 Statute of the Special Court for Sierra Leone, therefore, both authorised war crimes prosecutions for the conscription, enlistment, and use of children in armed forces. Yet both statutes confined the courts' jurisdiction to the recruitment or use of children under fifteen, notwithstanding the higher age limit adopted in contemporaneous child rights treaties. In other respects, however, both statutes were products of a child rights vanguard, represented at the 1998 Rome Conference by UNICEF and an active children's caucus of non-governmental organisations, and by a similar coalition in the run-up to the adoption of the 2002 Special Court Statute. For example, abuse of girls and abduction of girls, proscribed under pre-existing Sierra Leonean law, were enumerated as crimes within the jurisdiction of the Special Court. An initial proposal to operate a Special Court juvenile chamber was set aside. Although that Court's statute did authorise the prosecution of children as young as fifteen, it mandated that anyone convicted of a crime committed when he or she was between

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fifteen and eighteen years old would be subject not to imprisonment but rather to rehabilitation and societal reintegration.\textsuperscript{14}

As for the Rome Statute, concern for young people is manifest in the very preamble: 'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. The drafters declared they were establishing the International Criminal Court 'for the sake of present and future generations'. Article 36 of the Statute requires States Parties to 'take into account the need to include judges with legal expertise on ... violence against women or children', and article 42 further authorises the Prosecutor to 'appoint advisers with legal expertise on specific issues, including ... violence against children'. Additional provisions instruct Court officials to accommodate the needs of child victims and witnesses.\textsuperscript{15}

What is more, article 26 of the Rome Statute not only excludes from the Court's jurisdiction 'any person who was under 18 at the time of the alleged commission of a crime', even as other provisions confer jurisdiction over adults for a range of crimes against children. Apparently not content simply to list so-called generic offences like killing or pillaging, which affect adults as well as children,\textsuperscript{16} the drafters enumerated multiple child-specific crimes: genocide involving the forcible transfer of children; the crime against humanity of enslavement, defined with express reference to the trafficking of children; and, of course, the war crimes of conscription, enlistment, and use of children in armed groups. Also listed are numerous crimes that keenly affect children and future generations: prevention of births as genocide; sexual slavery, forced pregnancy, or enforced sterilisation as crimes against humanity or war crimes; and attacks on schools and hospitals as war crimes. Sexual slavery of children is expressly mentioned in the Elements of Crimes. Children similarly would suffer unique harm from the crime against humanity of persecution, if perpetrated by reason of the victim's age.

\textsuperscript{14} Diane Marie Amann, 'Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone', (2001) 29 \textit{Pepperdine Law Review} 167.

\textsuperscript{15} Rome Statute, articles 54(1)(b), 68(1), (2). See also article 84 (authorising posthumous revision of sentence on request of a convicted person's child).

Given these developments, it is little surprise that crimes against children figured prominently in the work of both the International Criminal Court and the Special Court for Sierra Leone. As discussed below, although decisions in the latter Court concentrated on child soldiering, over time the docket of the International Criminal Court grew to include additional charges involving child victims.

Special Court for Sierra Leone and crimes against children

Endemic during the 1990s civil war that wracked Sierra Leone were accounts of young people – sometimes, very young children – who toted AK-47s and committed atrocities. Typical was the 1999 report of a teenage veteran who boasted: ‘We attacked everybody. We feared nobody. We were very bold. Everybody is knowing our hot tempers.’ Stories of such children, and of persons of all ages victimised by their actions, stirred what has been called the ‘international legal imagination’, and so led to the legal developments just discussed. In the end, Special Court prosecutors chose not to exercise their statutory authority to charge persons as young as fifteen; nor did they allege crimes against girls pursuant to the incorporated Sierra Leonean law. Prosecutors did, however, pursue charges related to the recruitment and use of child soldiers.

The prohibition against child soldiering survived an early challenge in the Special Court. In Prosecutor v. Norman, a former Sierra Leonean government minister accused of recruiting or using children under fifteen in a pro-government militia asserted that such conduct was not criminal under customary international law. Over the dissent of one judge, a four-member Appeals Chamber held otherwise. Surveying the evolution of the prohibition contained in the Special Court’s statute, the majority

ruled, first, that an 'overwhelming majority of States' did not recruit such children and in fact had 'criminalised such behaviour' at the time in question, and second, that the government of Sierra Leone was on notice of this 'customary norm'. One commentator saw in this 2004 decision 'the beginning of a trend ... to take seriously the issue of crimes concerning children, and to prosecute those responsible for such violations, both to exact retribution from the offender, as well as to send a message of deterrence to others'.

Consequent efforts at prosecution nevertheless met with mixed results. The accused in *Norman* died before the Trial Chamber's verdict issued. In that verdict, one co-accused was acquitted of the child-soldiering count, and the child-soldiering conviction of the third co-accused was overturned on appeal. In contrast, in the two cases involving leaders of rebel groups, all but one accused was convicted at trial of recruiting or using child soldiers, and all five such convictions were sustained on appeal.

The Special Court's final trial resulted in the conviction of former Liberian President Charles Taylor on eleven counts, including a charge of aiding and abetting the rebel groups' recruitment or use of boys and girls under fifteen. In 2013 that judgment, plus another imposing a sentence of fifty years in prison, withstood the accused's appellate challenge.

The 349-page appeals judgment detailed findings not only of systematic harms that children suffered in armed groups, but also of sexual and gender-based violence against victims described as 'women and girls', without further age differentiation.

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26 Ibid., paras. 260–73.
By the time the Special Court’s Appeals Chamber issued its judgment in *Taylor*, the International Criminal Court already had concluded two trials involving child-soldiering charges, against three defendants. Another person accused of crimes involving children was in custody following his surrender to the court, and a handful of others so charged remained at large.

The first International Criminal Court trial, *Prosecutor v. Lubanga*, pertained exclusively to allegations that the accused, a former leader of a Congolese rebel group, was responsible as an indirect co-perpetrator for the war crimes of ‘conscripting or enlisting children under the age of 15 years ... or using them to participate actively in hostilities’. This singular focus signalled ‘[t]hat children come first, at the top of our contemporary priorities when dealing with the victims of armed conflict’, one commentator wrote.\(^\text{27}\) The focus on children drew sustained criticism, however, from victims’ groups and other non-governmental organisations usually supportive of the Office of the Prosecutor; they complained in particular that despite available evidence, sexual and gender-based crimes had not been charged.\(^\text{28}\) The Trial Chamber would echo such criticism in its post-trial judgments.

Compounding these difficulties, the reliance on child victims in *Lubanga* soon gave rise to problems of proof. The very first witness began his testimony by recanting a prior statement that he had been abducted and forced to serve as a child soldier in the defendant’s militia. Trial was put on hold for a week, and eventually the witness testified in accordance with the prior statement. In its verdict, however, the Trial Chamber rejected as unreliable not just his testimony but that of all witnesses

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who said they had been child soldiers. Yet it credited the testimony of two experts and of a UN official who had worked with child combatants demobilised after the Congolese conflict. Pivotal was the Trial Chamber's viewing of a video in which the defendant rallied troops while surrounded by bodyguards who, in the eyes of the judges, were 'recruits who were clearly under the age of 15'. In a trilogy of 2012 decisions, therefore, the Trial Chamber: convicted the defendant of conscription, enlistment, and use in a non-international armed conflict; imposed a concurrent fourteen-year sentence; and outlined a framework for the award of reparations to victims of the crimes of conviction.

Late in 2014, a majority of the five-member Appeals Chamber sustained the conviction and sentence in *Lubanga*. In so doing, it issued a number of important rulings with respect to child-soldiering crimes. First, it rejected the defence challenge to the manner by which child victims had been determined to meet the Rome Statute's age threshold. The Appeals Chamber ruled that 'it suffices that it is established that the victim is within a certain *age range*, namely *under* the age of 15 years', and further held that in the absence of precise records, age is a factual finding to be determined case-by-case. It also accepted the testimony about children's ages that the judgment below credited, as well as the trial judges' finding that the rally video depicted child soldiers under fifteen. Second, the Appeals Chamber clarified the relationship between 'conscripting' and 'enlisting' children. The defence in *Lubanga* had argued that the Trial Chamber erred as a matter of law when it wrote that conscription, or forcible recruitment, and enlistment, or voluntary enrolment, 'are dealt with together'. The Appeals Chamber stressed that the two crimes

29 *Prosecutor v. Lubanga* (ICC-01/04-01/06), Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 792.

30 *Prosecutor v. Lubanga* (ICC-01/04-01/06 A 5), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014; *Prosecutor v. Lubanga* (ICC-01/04-01/06 A 4 A 6), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the 'Decision on Sentence Pursuant to Article 76 of the Statute', 1 December 2014. Judge Anita Ušacka would have reversed the conviction on grounds of insufficient evidence, while Judge Sang-Hyun Song objected to the majority's treatment of child-soldiering crimes.

31 *Prosecutor v. Lubanga* (ICC-01/04-01/06 A 5), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014, para. 198 (emphasis in the original).

32 Ibid., paras. 207–62.

33 Ibid., para. 268.
are distinct because only conscription entails an element of compulsion, and it next found in the trial record sufficient evidence of such compulsion. A related defence argument, that conviction for conscription depended upon proof of lack of consent by the child, was dismissed; 'the elements of these crimes', the Chamber explained, 'focus on the conduct of the perpetrator'.

Finally, the Appeals Chamber weighed in on how to interpret 'using ... to participate actively in hostilities', a statutory phrase with which other judges in the International Criminal Court and in the Special Court for Sierra Leone already had grappled. In *Lubanga*, the Trial Chamber majority had ruled that the phrase encompassed not only front-line combat, but also situations when 'support provided by the child to the combatants exposed him or her to a real danger as a potential target'. The lone dissenter preferred a much broader interpretation. Arguing that the phrase encompassed not only supportive roles within a zone of danger, but also 'the sexual violence and other ill-treatment suffered by girls and boys', without regard to location, she wrote: 'The use of young girls' and boys' bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused'. On appeal, the defence characterised even the majority's middle-path interpretation as too broad. It endeavoured to equate 'using ... to participate actively in hostilities' with 'direct participation', an international humanitarian law concept that defines who is protected, and who may be targeted for killing, in times of armed conflict. The Appeals Chamber rejected this claim of interchangeability. But it also rejected the Trial Chamber majority's construction, in favour of its own 'plain interpretation of the relevant provisions in their context'; in brief, the Appeals Chamber held that the crime of using children depends on proof of a 'link between the activity

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34 Ibid., para. 302.
36 *Prosecutor v. Lubanga* (ICC-01/04-01-06), Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, paras. 16, 21 (punctuation as in original).
37 *Prosecutor v. Lubanga* (ICC-01/04-01/06 A 5), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014, paras. 315-20 (citing, *inter alia*, Additional Protocol I, article 51(3), which extends protections to civilians 'unless and for such time as they take a direct part in hostilities').
for which the child is used and the combat in which the armed force or group of the perpetrator is engaged'.

Reluctant to delineate proscribed and permitted uses 'in view of the complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world', the Appeals Chamber in Lubanga called for case-by-case analysis. It drew guidance from International Committee of the Red Cross commentaries, which included within the meaning of use 'military operations such as gathering information, transmitting orders, transporting ammunitions and foodstuffs, or acts of sabotage', as well as 'gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc'.

Also consulted was a draft Rome Statute report, which included 'military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints', and excluded 'activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation'. Sexual violence and other conduct of concern to the dissenter in the Lubanga trial judgment clearly fell outside the bounds of this construction. Within the posited meaning of use, however, was conduct for which the Trial Chamber had ruled the defendant responsible: 'the deployment of children under the age of fifteen years as soldiers and their participation in combat, as well as their use as military guards and bodyguards', as the Appeals Chamber described it. Accordingly, the International Criminal Court's first trial concluded with affirmance of the judgment of conviction for crimes of child soldiering.

Acquittals in child-soldiering cases

The International Criminal Court's second trial took a turn very different from the proceedings in Lubanga. At issue was an attack that a rival rebel group had launched on a single day in Bogoro, a Congolese village said to harbour members of the militia over which the defendant in Lubanga once presided. Two leaders of that rival group stood trial in Prosecutor

38 Ibid., paras. 333, 335; see also para. 324.
39 Ibid., para. 335. 40 Ibid., para. 334.
41 Ibid.
42 Ibid., para. 340; see also paras. 341-433.
v. Katanga and Ngudjolo, for multiple crimes against civilians, including the use of ‘children under 15 years for multiple purposes and to participate actively ... prior to, during, and following the attack’. The cases were severed after trial concluded in 2012, yet in the end, both defendants were acquitted of the child-soldiering offence.

Before detailing its reasons for acquitting the defendant in Ngudjolo on all counts, the Trial Chamber, in a judgment subsequently upheld on appeal, emphasised its adherence to the Rome Statute provision that presumes innocence unless and until an accused is proved guilty ‘au-delà de tout doute raisonnable’—literally, ‘beyond every reasonable doubt’.

It then ruled that essential facts had not been proved. As in Lubanga, judges found fault with persons who had testified that they were militia members. Concluding after extended analysis that three such prosecution witnesses were ‘imprecise’ and ‘contradictory’, the Chamber rejected their testimony in its entirety. Unlike in Lubanga, in Ngudjolo the same fate befell videos introduced into evidence, all of which post-dated the attack. The Trial Chamber did find that the presence of child combatants was ‘un phénomène généralisé’, or ‘a widespread phenomenon’, during the period in question, and further that ‘children under 15 years, some carrying blades, ... were present’ at the attack itself. Nevertheless, with respect to allegations that the accused had ordered military training for underage children or used them as bodyguards or for other purposes, the Chamber wrote in its 2012 judgment of acquittal that the credited evidence failed to establish the requisite nexus between the accused and child soldiers.

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43 Prosecutor v. Ngudjolo (ICC-01/04-02/12), Jugement Rendu en Application de l'article 74 du Statut, 18 December 2012, para. 504 (brackets around ellipsis and internal quotations omitted); Prosecutor v. Katanga (ICC-01/04-01/07), Jugement Rendu en Application de l'article 74 du Statut, 7 March 2014, para. 1025.


46 Ibid., paras. 444, 463, 480, 500. 47 Ibid., para. 516.

48 Ibid.
The defendant in *Katanga* likewise was acquitted of child soldiering, even though he was convicted on other counts in a judgment issued early in 2014. Considerable evidence had revealed ‘a significant phenomenon of the utilisation of child soldiers, aged seven to seventeen years, integrated into the ranks of different armed groups then active’, the same Trial Chamber which had passed judgment in *Ngudjolo* wrote in *Katanga*. During the attack on Bogoro out of which the case arose, ‘children armed with guns, machetes, lances or arrows, fought alongside combatants’, the Chamber continued; moreover, the evidence established that some of those children were younger than fifteen. Yet no conviction issued. Doubts about some witnesses’ reliability, coupled with uncertainty about specific child soldiers’ ages, compelled the conclusion that the defendant on trial had not been proved responsible for the prohibited use of underage children.

A more comprehensive policy on children

While these prosecutions for the recruitment and use of child soldiers were unfolding, the Court’s second Prosecutor, Fatou Bensouda, assumed office. The transition marked a change in strategy. The decision to charge only child-soldiering offences in *Lubanga* had provoked objections from judges, victims, and commentators alike, and proceedings before and during trial had laid bare investigative and evidentiary challenges. Commentary also took note of the complex nature of child soldiering. Although many children were victims kidnapped into armed groups and forced to wield weapons, other children chose to do so, even though the law declined to give weight to their offers of consent; moreover, child combatants who committed international crimes victimised others, persons also deserving of redress. Increasingly, expansive interpretations of the statutory phrase ‘using ... to participate actively in hostilities’ were said also to expand the scope of children who might become legitimate

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49 *Prosecutor v. Katanga* (ICC-01/04-01/07), Jugement Rendu en Application de l’article 74 du Statut, 7 March 2014, para. 1052; see also paras. 1053–9.
50 Ibid., paras. 1060, 1065; see also paras. 1061–4.
51 Ibid., paras. 1066–88. The trial judgment became final after the withdrawal of cross-appeals; the defendant is serving a twelve-year sentence on the counts for which he was convicted.
targets of warfare. Perhaps in tacit recognition of considerations like these, shortly before taking office in mid 2012 Bensouda made a statement she would often repeat: 'Our focus should shift from “children with arms” to “children who are affected by the arms” in the context of the crime of enlisting and conscripting child soldiers'. The Office of the Prosecutor subsequently identified ‘particular attention to ... crimes against children’ as one of its six strategic goals, and began preparing a Policy Paper on Children, a process that included consultations with experts in academia and civil society.

International Criminal Court judges, meanwhile, agreed to enlarge the scope of proceedings in one case involving offences against children. To be precise, in 2012 judges approved a request from the Prosecutor to supplement the initial arrest warrant for a fugitive Congolese rebel leader who had been accused solely of child-soldiering crimes in 2006, at the same time as his alleged ally, the defendant in Lubanga. Bosco Ntaganda surrendered in 2013 to face charges that he was responsible not only for the prohibited conscription, enlistment, and use of children, but also for a range of generic crimes, and for the war crimes of rape and sexual slavery perpetrated by his troops against children under fifteen in the same militia. Before a Pre-Trial Chamber, he contended that ‘the crimes of rape and sexual slavery against these persons are not foreseen by the Statute, as international humanitarian law does not protect persons taking part in hostilities from crimes committed by other persons


54 Office of the Prosecutor, Strategic Plan June 2012–2015, 11 October 2013, para. 3.

55 Prosecutor v. Ntaganda (ICC-01/04-02/06), Decision on the Prosecutor’s Application under Article 58, 12 July 2012.

56 Prosecutor v. Ntaganda (ICC-01/04-02/06), Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, paras. 36, 74.
taking part in hostilities on the same side of the armed conflict.'\textsuperscript{57} The Chamber disagreed. It noted that common article 3 of the 1949 Geneva Conventions protects ‘[p]ersons taking no active part in the hostilities’, while Additional Protocol II protects ‘persons who do not take a direct part or who have ceased to take part in hostilities’, and forbids in particular ‘rape, enforced prostitution and any form of indecent assault against persons.’\textsuperscript{58} The Pre-Trial Chamber then proceeded to consider whether the child soldiers in question ‘were taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery.’\textsuperscript{59} That framing virtually compelled a negative reply. As stated by the Pre-Trial Chamber:

\begin{quote}
[T]hose subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature, including rape, as defined in the relevant Elements of Crimes. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.\textsuperscript{60}
\end{quote}

The conclusion jibed with that of the Special Court for Sierra Leone trial verdict in \textit{Taylor}, as the Pre-Trial Chamber recognised.\textsuperscript{61} But in the earlier case the indictment had not specified sexual abuse against child soldiers; rather, the Special Court’s reasoning arose out of the facts as adduced at trial, as proof of more generic charges. The confirmation of these rape and sexual slavery charges in \textit{Ntaganda} thus was a milestone. Combined with the confirmation of additional, generic charges, it suggested a new receptivity to including, within the narrative of International Criminal Court proceedings, the full range of children’s experiences amid armed conflict and analogous violence.\textsuperscript{62}

\textsuperscript{57} Ibid., para. 76 (parenthetical acronym omitted).
\textsuperscript{58} Ibid., para. 77. \textsuperscript{59} Ibid.
\textsuperscript{60} Ibid., para. 79. \textsuperscript{61} Ibid., para. 79, n. 318.
\textsuperscript{62} The reference to ‘analogous violence’ is intended to encompass situations yielding to crimes that occur outside of armed conflict yet lie within the International Criminal Court’s jurisdiction; for example, genocide, which may be committed in times of peace and war alike, and crimes against humanity, committed in the course of widespread or systematic attacks against civilian populations.
Challenges to prevention and punishment

It must be noted that the new charges laid in Ntaganda constituted an exercise of prosecutorial restraint, perhaps influenced by the actual evidence to be proffered at the trial. For the Pre-Trial Chamber’s reasoning, though applied in that case to children under fifteen, invited extension in future cases to older children; indeed, to all persons in militias who have been subjected to abuses prohibited by international humanitarian law. Over time, moreover, the logic of the Ntaganda confirmation decision may prove a bit too neat. Accurately referring to ‘the Pre-Trial Chamber’s construction of a binary in which a child soldier is either subjected to sexual violence or taking direct part in hostilities’, one commentator probed the boundaries of that binary: ‘Is the victim only subject to sexual slavery in the moment when he or she is forced to engage in a sexual act, or for so long as the perpetrator exercises rights of ownership? And does the sexual slavery stop if the victim is made to take part in hostilities, only to resume at some future point in time?’

The friction inherent in such questions is salutary: it may spark an analysis of text and purpose that synthesises legal sources – not only the Geneva Conventions and other humanitarian law, but also the Children’s Convention and other child rights and human rights law – in order to arrive at a deeper explication of the extent to which international law protects persons against abuse within armed groups.

This is but one jurisprudential challenge to the development of an effective structure for the prevention and punishment of international crimes against children. As the Appeals Chamber in Lubanga observed, even though its decision confirmed the core of criminalised conduct, it remains for future rulings to affirm the full contours of the prohibition against conscripting or enlisting children under the age of fifteen years into armed forces or groups, or using them to participate actively in hostilities. Furthermore, the acquittals of some commanders charged with child-soldiering crimes point to a need for continued fine-tuning of the

64 Prosecutor v. Lubanga (ICC-01/04-01/06 A 5), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014, para. 335.
modes by which accused superiors are to be held criminally responsible for conduct committed by their subordinates.

Issues of evidence gathering and reliability loomed large in numerous cases involving children. Such cases frequently will require the presentation of witnesses who were children when alleged events occurred. To the extent that such testimony can be corroborated, by the testimony of adults and witnesses or by physical evidence, the rights both of child witnesses and adult accused will be better served. Posing a particular evidentiary hurdle is an element unique to the Rome Statute's child-soldiering crimes; specifically, that the affected children must not have reached their fifteenth birthday. Absent birth certificates or other vital records—documents often scarce in times of war—this is an especially difficult fact to prove. The use of rough markers, such as whether a boy's voice has changed, or whether a girl's breasts have developed, may have the effect of depriving some children of due protection—for example, children who have reached puberty early and thus are wrongly assumed to be fifteen or older. Considering that the two treaties raising the age threshold to eighteen enjoy more Member States than the Rome Statute, an amendment on this point may merit examination.

The International Criminal Court and related tribunals typically are set up to pursue only those persons believed to bear grave responsibility. In order to enhance prevention and punishment, international criminal justice mechanisms thus must endeavour to work with national legal systems, with the United Nations and kindred international and regional entities, and with civil society, not to mention with children themselves.65 Also in order would be support for international instruments aimed at ending war or minimising the effects of conflict; to name a few, the treaties outlawing landmines, cluster munitions, and arms trafficking, as well as the 2010 Kampala Amendments that would make the crime of aggression punishable before the International Criminal Court. This complementary approach does not mean that all lesser offenders—let alone all child offenders—eventually must face criminal charges in some forum. To the contrary, children once associated with armed groups, not to mention

65 General Comment No. 12, UN Doc. CRC/C/GC/12; Virginie Ladisch, 'Children and Youth Participation in Transitional Justice Processes', (2013) 6 Journal of the History of Childhood and Youth 505.
other persons victimised by armed groups, may benefit far more from non-criminal means of rehabilitation, reintegration, and reconciliation.66

Finally, there is a need for a richer understanding of the manifold ways that armed conflict and similar violence affect children. When the evidence merits, child-specific crimes must be prosecuted to the fullest extent – not only the oft-charged child-soldiering crimes, but also offences like child trafficking, whenever they amount to crimes against humanity. Crimes that acutely affect children, such as sexual slavery or attacks on education, also must be pursued. When appropriate, allegations of generic crimes like killing and pillage ought to emphasise the impact on children.67 In short, international criminal justice mechanisms must persist in giving priority to crimes against children, who, after all, embody the future of global society.

FURTHER READING


66 For an analysis of such options, see, e.g., Mark A. Drumbl, Reimagining Child Soldiers in International Law and Policy, Oxford University Press, 2012, at pp. 168–208.

67 A trend in this direction may be discerned not only from developments at the International Criminal Court and the Special Court for Sierra Leone, but also from the many mentions of children in the second trial judgment of the tribunal established to adjudicate crimes during the Khmer Rouge regime; Prosecutor v. Nuon and Khieu (002/19-09-2007/ECCC/TC), Judgment, 7 August 2014.