

EXECUTIVE SUMMARY

Prosecuting International Crimes against Children and Questions of Criminal Responsibility: the International Legal Framework

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States in post-conflict situations are faced with the difficulty to balance judicial and non-judicial means intended to achieve accountability for crimes committed during the conflict and to contribute to national reconciliation. Adopted policies are based on the specific circumstances of each state. Nevertheless, due consideration should be given to the duties that are imposed on states by international law. In this paper, a short overview is provided of the obligations of states under international law to prosecute persons accused of genocide, war crimes, crimes against humanity, torture and enforced disappearances, specifically focusing on crimes against children. The paper also reviews the existing international norms regarding children who may be accused of having participated in the commission of such crimes themselves, for example as child soldiers, identifying some outstanding questions regarding their criminal responsibility for such acts.

MAIN FINDINGS

Children are widely affected by atrocities as victims and they have been specifically targeted for some international crimes. The recruitment of children for participation in an armed conflict is one of the most frequent and egregious violations targeting children. It is prohibited under several international conventions. The Special Court for Sierra Leone established that such recruitment below the age of fifteen years also is a crime under customary international law. The Rome Statute for the International Criminal Court (ICC) also recognizes under-age recruitment as a war crime. The fact that the very first cases before the ICC, *Lubanga* and *Katanga* cases, concern the recruitment of child soldiers or the use of children to actively participate in hostilities, underscores both the seriousness of these crimes and the international priority to try and punish their perpetrators.

Analysis of these recent developments, the evolving norms of international law and state practice shows that there is a duty of states to prosecute persons accused of having committed international crimes, including crimes against children, if these acts occurred within their own territory. The obligations to prosecute alleged authors of international crimes committed abroad, based on the principles of active or passive nationality or universal jurisdiction, vary from one crime to the other. At the same time, states often adopt amnesty laws which preclude prosecution for crimes committed during a conflict. This paper examines the permissibility of amnesties under international law, distinguishing between different types of amnesties used by states (e.g. 'self-amnesties' and amnesties as part of a peace agreement). It concludes that there is no firmly established rule of international law expressly prohibiting states to grant amnesties. However, according to a recent trend in national and international jurisprudence, amnesties for international crimes and serious human rights violations are increasingly being condemned. Moreover, a trend can be seen in amnesties adopted in the last ten

years, which increasingly exclude their application to genocide, war crimes and crimes against humanity.

The paper also examines whether under international law children may be prosecuted when they are accused to have participated in the commission of international crimes themselves. It concludes that, although to date no legally binding norm exists on this point, an international consensus is clearly evolving with regard to children accused of international crimes, in particular child soldiers. Children accused to have committed such crimes under the age of eighteen shall primarily be seen as victims and, in any case, may not be tried by an international criminal court or tribunal. Their case should be considered within their own state, where they should benefit either from an adequate juvenile justice system, or preferably from alternative accountability processes. Moreover, States do have a legally binding obligation under international law, as laid down in the CRC, to establish and apply juvenile justice systems to children accused of having infringed the penal law, and to seek alternatives to judicial proceedings. They also have an obligation to agree on a minimum age for criminal responsibility (MACR), which still varies significantly among States.

RECOMMENDATIONS

1) States should:

- Become parties to and ratify all international instruments on international crimes against children, including the OPAC and ensure that the definitions of international crimes against children as included in these international instruments are incorporated in their national penal law;
- Take measures to ensure that their national judicial system, their institutions and the capacities required to undertake investigations; to initiate prosecutions and to conduct trials of persons responsible for these crimes are sufficiently developed and effective;
- Ensure full cooperation with the ICC and other international courts or tribunals, when they undertake investigations and prosecutions of persons who may be accused of international crimes against children;
- Absolutely and unconditionally refrain from granting amnesties to persons who may be responsible for international crimes against children. Even where amnesties may be considered as part of a peace negotiation, international crimes, in particular genocide, war crimes and crimes against humanity, should always be explicitly excluded from the outset;
- Further develop the international standards on a minimum age of criminal responsibility taking account of the recommendations made by the Committee on the Rights of the Child;
- Undertake action to 'upgrade' the Paris Principles and the Paris Commitments to a United Nations level, such as UN guidelines or principles.

2) Child Protection Agencies should:

- Actively support the efforts of States to comply with the above mentioned recommendations, including through their field offices;

- Develop proposals on how to further improve international standards on a MACR and on an ‘upgrading’ of the Paris Commitments and Principles to UN guidelines or principles;
- Propose solutions for the accountability of adolescents who participated in war crimes at the age between 15 and 18 years, considering whether the current norms and recommendations adequately address the best interests of the child for this age group;
- Consider possibilities for cooperation or consultation among legal experts, interested CPAs and UN agencies regarding *amicus curiae* intervention before international courts and tribunals adjudicating international crimes against children, in order to ensure an adequate coverage of the legal issues at stake.

QUESTIONS FOR DISCUSSION:

- Should States grant *amnesties* to children who are accused to have participated in the commission of international crimes before reaching the age of eighteen, in particular when they were used to actively participate in the hostilities of an armed conflict? Some arguments against this proposition are outlined in par. 3.4 of the paper.
- How can a balance be found between the evolving responsibilities of the adolescent between 15 and 18 years, with the right to protection for all children under the age of 18? Are the standards of the CRC and other instruments related to juvenile justice really appropriate for regulating rights and responsibilities of child soldiers?
- How could an ‘upgrading’ of the Paris Commitments and Principles be achieved?