
CHILD SOLDIERS AND GENDER-BASED CRIMES

Pranita Gupta, OP Jindal Global University

ABSTRACT

Gender-based violence has been a tactic of warfare, and there exist multi-faceted dimensions of violence experienced by the vulnerable sections of the society – women and children. This paper examines this intersectionality of gender and age in the context of child soldiers and gender-based crimes and analyses the historical evolution of international laws pertaining to these issues and contends that early frameworks failed to adequately acknowledge the distinct vulnerabilities faced by child soldiers, particularly in terms of gender-based violence. It highlights the disproportionate impact of gender-based crimes on girls, including sexual violence, forced marriage, and exploitation. Furthermore, it explores how boys, while often portrayed as perpetrators, are also subjected to various forms of violence and manipulation. The paper traces the progress made by the International Criminal Court (ICC) in addressing these concerns. It examines key legal instruments, such as the Rome Statute, that have contributed to the recognition and prosecution of gender-based crimes committed against child soldiers. By analysing significant cases and judgments, it demonstrates the ICC's growing commitment to investigating and punishing those responsible for such crimes.

Introduction

War and conflict have no exceptions. Men, women, veterans, and even children become emblems of extreme violence and armed conflict. UNICEF found over thousands of girls and boys being recruited as soldiers across the world. Many armed groups, “including many fighting in civil conflicts and both government and insurgent forces, fill their ranks with children, recruiting and even kidnapping and trafficking them.”¹ Recruiters mostly target the vulnerable section of children – facing poverty, security, social, and economic pressures. The functions of child soldiers vary greatly from that of adult soldiers’. While the latter might seldom find themselves to be a victim of offences carried out by their own country, child soldiers’ experiences of victimisation occur quite frequently.

Here, it is important to emphasize on the difference between jobs carried out by boy soldiers and girl soldiers. The position of girl soldiers is particularly complex. Girls are put into a multitude number of roles – they serve as porters, and cooks, and some are also sent as combatants with front-line duties, like boy soldiers. However, the girl soldiers are also particularly added to the extreme violence and suffering that child soldiers more generally confront and experience when they are recruited for forced marriage or other sexual objectives. Hence, other than participating in the war, they are often indulged in gender-based crimes.

Intersection of Gender and Child

Gender-based violence is often rooted in unequal power dynamics between genders, societal norms, and discrimination based on gender, leading to the marginalization, oppression, and subjugation of individuals based on their gender identity or gender roles. The International Criminal Court defines ‘gender-based crimes’ as crimes which are “committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.”² It can have severe and long-lasting consequences, including physical injuries, mental health issues, reproductive health problems, and social, economic, and educational disparities. They are

¹ Chang, C. (2019) *Female child soldiers: Forgotten in violence?*, *The Organization for World Peace*.

² Office of The Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, *International Criminal Court* (June 2014).

sexually enslaved, raped, used as ‘bush wives’ by their own fellow soldiers and commanders. According to a report on girl soldiers conducted by Susan McKay, during the civil war in Mozambique, girls had been treated as sexual property, and distributed as ‘rewards’ for other soldiers.”³ Similarly, such subjection of girls has been reported in many, many countries like Sierra Leone, Uganda, Cambodia, Democratic Republic of Congo, Rwanda, Sudan, Myanmar, Bosnia, East Timor and more where young girls are perceived as commodities, given to commanders as ‘wives’ and sexually harassed.

Gender-based Violence as Weapon of Warfare

Gender-based violence is not an activity which is indulged into by home soldiers but is also a weapon of warfare. “Between 2005 and 2020, parties to conflict raped, forcibly married, sexually exploited, and committed other grave forms of sexual violence against at least 14,200 children. This sexual violence disproportionately affects girls, who were 97 per cent of cases from 2016 to 2020.”⁴ Dominating a country is translated into raping their women. Such weaponization not only promotes gender inequality and gender-based violence, but also increases health risks for female troops, such as pregnancy and childbirth-related deaths, and psychological trauma. Both sexual and gender-based crimes “may be motivated by underlying inequalities, as well as a multiplicity of other factors, inter alia, religious, political, ethnic, national, and economic reasons,”⁵ and crimes like mutilation, torture, outrages upon personal dignity, and persecution may have a gender or sexual element too.

Moreover, the stigma attached to sexual harassment does not help in their rehabilitation and reintegration. Their own groups and societies frequently reject them and occasionally vilify them. The question of society aiding rehabilitation of child soldiers and acknowledging gender-based violence comes after the question of whether law adequately addresses hostilities of child soldiers as well as gender-based violence, and without the benefit of support for reintegration into society, girls are at risk of falling into poverty, unable to access education and skills training, or suffering further stigma, exploitation, and abuse.

³ Altunjan, T. (2021) *The International Criminal Court and Sexual Violence: Between aspirations and reality: German Law Journal, Cambridge Core.*

⁴ UNICEF. (2022, January 31). *Gender-based violence in emergencies.*

⁵ Office of The Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, *International Criminal Court* (June 2014).

Evolution of the Legal Perspective

Both international humanitarian law and international criminal law regulate the use of child soldiers; however, neither of these laws expressly address the involvement of girl soldiers in the aforementioned actions. This lacuna in the legal framework, reflects that, as Charlesworth and Chinkin put it, “the concerns of women and girls have been obscured by and within the international legal order.”⁶ Addressing gender-based crimes is particularly complicated because of the political power held by the alleged perpetrators, often through state or institutional machinery. For example, “Robert Jackson, the chief prosecutor of the Nuremberg trials, chose not to prosecute the Nazi officials for sexual and gender-based violence, despite possessing evidence for the same. Japanese leaders who were prosecuted by the Tokyo Tribunal were never made accountable for the ‘comfort women’ phenomenon by which over 80,000-100,000 women from China, Korea, the Philippines, and other Asian countries that they colonised, were forced systematically into sexual slavery to “serve” the Japanese army officials.”⁷ As mentioned before, the Rome Statute addresses sexual violence and gender-based crime. There are provisions for protection of child soldiers as well. However, does it take care of the intersection between crimes against child soldiers and gender-based crimes? Moreover, is the legal framework provided for gender-based crimes enough?

As there has been an increase in such gender-based violence reports, addressing the said concern has become inevitable, and attempts have been made to address the violence within the legal framework. Emphasizing on the legal framework, there still, hadn't been much prioritisation towards sexual violence and gender-based crimes by the International Criminal Court (ICC), the failure of Mbarushimana (2010) and Lubanga (2012) cases being a demonstration. Rome Statute, which established the ICC, had taken a timid and hesitant approach towards addressing controversial issues of gender-based violence. However, there have been several progressive developments with respect to this issue. Recommendations for "expanding the list of sexual and gender-based offences" were taken into consideration as a result of the Women's Caucus for Gender Justice in the ICC. Such slow recognition of gender-based crimes itself reflects patriarchy entrenched in international law, which regarded sexual

⁶ Altunjan, T. (2021) *The International Criminal Court and Sexual Violence: Between aspirations and reality: German Law Journal, Cambridge Core.*

⁷ *Where Does International Criminal Law Stand When It Comes to Sexual and Gender-Based Violence?* (n.d.). The Wire.

violence (that primarily targets women) as a lesser crime and an ‘inevitable’ by-product of conflicts.

As a result, the ICC Statute has progressed in enlisting a wide range of gender-based offences including rape, slavery, enforced prostitution as specific crimes against humanity and war crimes. With respect to child-based violence, international law has rightly prohibited the use of children in warfare by virtue of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) in the Rome Statute of ICC. The Statute criminalises ‘enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities. The issue here is that the term ‘participate actively in hostilities’ does not specify what particular activities can be termed as hostile and could include a multitude of activities, which is completely left for the interpretation of the Courts. While gender-based violence like rape, enforced prostitution, enforced marriage, and slavery of girl soldiers should be included in ‘hostile activities’, interpretation of the Courts has more frequently than not, avoided taking into consideration such activities and hence, adjudicated otherwise.

Thomas Lubanga Case Study

The 2012 case against Thomas Lubanga is one such example. The lawsuit involved allegations of child troops and conscription. The acknowledgment with respect to gender-based violence among child soldiers was so low, that although having obtained evidence of sexual violence, the prosecution did not deem such acts “to be of a sufficiently systemic nature to meet the crimes against humanity threshold, and therefore suspended the investigations on the matter.”⁸ Furthermore, even after emergence of more evidence, the prosecution failed to request an amendment to the charges at a later date. Regardless of the behaviour of the prosecution, which was heavily criticized, The main question was whether Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute's concept of ‘the use of children under 15 years of age to participate actively in hostilities’ qualified as war crimes.

There was a disagreement between the judges on whether the aforementioned terms should specify the activities and actually be defined in the judgment, to which the majority opined that given the various roles of child soldiers, the determination as to what can be constituted as ‘active participation’ can be made on a case-to-case basis. Judge Odio-Benito disagreed with

⁸ *Lubanga Decision Roundtable: The participation of children in hostilities (2012) Opinio Juris.*

this ‘case-to-case’ decision, arguing in her dissenting opinion that it “potentially risks leading to divergent assessments of the respective harms suffered by different children, in particular by the girls victims of sexual violence.”⁹ Judge Odio-Benito, on the failure of the prosecution of Lubanga for the commitment of sexual offences, retorted:

*“[...] By failing to deliberately include within the legal concept of “use to participate actively in the hostilities” the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. [...]”*¹⁰(para. 16)

According to her, it is the duty of the ICC to include sexual violence within the definition of ‘active participation in hostilities’, conveying that sexual violence is an intrinsic part of criminal conduct. Therefore, in this case, the intersections between the gender-based crimes and sexual violence and crime of using child soldiers were not taken into consideration by the prosecution itself, and the judges declined to decide with respect to whether sexual abuse of girl child soldier would amount to ‘active participation’ under the Rome Statute or not.

The case of Jean Pierre-Bemba Gombo (Bemba) is another recent example. Bemba was a senior military commander in the Central African Republic, and ICC had held him guilty of crimes against humanity, war crimes, as well as sexual violence committed by official under his control in years 2002-2003. However, in the year 2018, the appeals chamber reversed the conviction; although it was acknowledged that there was rampant sexual violence present in the situation, there was not enough evidence to link Bemba with the same. He was acquitted of all sexual and gender-based related crimes, creating a major setback for gender-based crimes in the ICC.

Similarly, the case of Germain Katanga failed to deal with gender-based crimes adequately. He was charged with orchestrating an attack on the village of Bogoro in 2003. The ICC’s trial chamber “convicted him as an accessory to murder, pillaging and destruction of property as war crimes and crimes against humanity. However, it unanimously acquitted him of being an accessory to rape, sexual slavery, and the use of child soldiers.”¹¹ Irrespective of credible testimonies of three women victims of sexual slavery and rape and acknowledgement of sexual slavery taking place, the trial chamber “declined to hold Katanga responsible for the crimes

⁹ *Lubanga Decision Roundtable: The participation of children in hostilities* (2012) *Opinio Juris*.

¹⁰ *Lubanga Decision Roundtable: The participation of children in hostilities* (2012) *Opinio Juris*.

¹¹ *Where Does International Criminal Law Stand When It Comes to Sexual and Gender-Based Violence?* (n.d.). The Wire.

as it did not find convincing evidence to conclude that such crimes formed part of the common purpose of the attack. While he was convicted of other crimes (such as murder, attacking a civilian population, destruction of property and pillaging), it appeared that the trial chamber required a higher standard of evidence to prove the deliberate intention of Katanga to commit sexual and gender-based crimes as compared to such other ICC crimes.”¹² The requirement of higher standards of evidence in case of gender-based crimes is a result of the ambiguous phrase of ‘active participation’ in the Rome Statute, and ICC’s failure to take into consideration such crimes in the same.

The definition of active participation does not fully capture the complexity of gender-based crime and sexual violence. For sake of clarification and adequate justice, sexual violence should be explicitly included in the ICC’s definition of active participation to ensure that perpetrators of such crimes are held accountable. This is particularly relevant in cases where sexual violence is used as a weapon of war or as a tactic of genocide or crimes against humanity.

Bosco Ntaganda Case Study

The ICC has made significant progress in dealing with sexual violence in its recent practice; since “at the pre-trial level, sixteen out of twenty-six cases brought before the ICC as of 2018 included charges of sexual violence, indicating that such crimes are no longer side-lined in the investigative stage.”¹³ When it comes to judicial approach towards gender violence has been progressive, as is seen in the case against Bosco Ntaganda. Bosco Ntaganda, better known by his stage name "Terminator," is a former rebel who was born in Rwanda and has been active in a number of armed conflicts in both Rwanda and the Democratic Republic of the Congo, was “involved in numerous armed conflicts in both Rwanda and the Democratic Republic of Congo.”¹⁴ In July, judges at the ICC concluded that fighters had executed horrific killings of people at Ntaganda's direction. According to Judge Fremr:

“Men, women, and children and babies were found in the field. Some bodies were found naked, some had hands tied up, some had their heads crushed. Several bodies were disembowelled or

¹² Ibid.

¹³ Altunjan, T. (2021) *The International Criminal Court and Sexual Violence: Between aspirations and reality: German Law Journal, Cambridge Core.*

¹⁴ *Bosco Ntaganda sentenced to 30 years for crimes in DR Congo* (2019) *BBC News.*

otherwise mutilated."¹⁵

On 30th March 2021, the Appeals Chamber of the ICC delivered the judgment upholding the decision of the Trial Chamber which had found Bosco Ntaganda guilty of aforementioned 19 accounts of war crimes and crimes against humanity committed in Democratic Republic of Congo. He was sentenced to a total of thirty years of imprisonment – the longest term ever given by the ICC. The defence in this case had argued that because international humanitarian law is not intended to shield combatants from crimes committed by other combatants in their own group, the legality principle precluded these sexual assaults from being labelled as war crimes, and therefore, according to Article 8 of the Rome Statute, crimes committed against members of the same armed group, in this case the female troops, are not considered war crimes.

Hence, the Pre-Trial Chambers had to determine and adjudicate on two issues – 1) whether crimes committed against the members of the same armed group be counted as a war crime under International Humanitarian Law, and as a result of which 2) sexual violence towards child soldiers will be constituted as a war crime under Article 8 of the Rome Statute. The Pre-Trial Chambers dismissed the Defence's arguments, holding that "child soldiers were protected under International Humanitarian Law when the sexual violence took place, with the result that the acts of sexual violence constituted war crimes under Article 8 (2) (e)(vi) of the Rome Statute. Whether the girls assumed the role of combatants in the same armed group as the perpetrator was irrelevant to the Pre-Chamber's determination."¹⁶ This finding by the Pre-Trial Chambers constitutes an important jurisprudential development.

The Appeals Chamber's approach in the Ntaganda case, which included rape, forced prostitution, forced pregnancy, forced sterilisation, sexual slavery, and any other form of sexual violence and gender-based persecution, established a precedent for several cases to follow and allowed for the prosecution of intra-party sexual violence as war crimes. Two noteworthy, recent cases being the Ongwen case and the Al Hassan case. Dominic Ongwen, a former commander of the Lord's Resistance Army (LRA), was found guilty for the first time in the Ongwen case of a war crime and a crime against humanity including forced pregnancy. The charges against Ongwen mostly focused on the attacks on refugee camps between 2005-09,

¹⁵ Ibid.

¹⁶ Altunjan, T. (2021) *The International Criminal Court and Sexual Violence: Between aspirations and reality: German Law Journal, Cambridge Core.*

one of the worst being in 2009. In December 2009, the LRA conducted a four-day raid on camps in the Democratic Republic of the Congo, which resulted in the deaths of 350 civilians and the kidnapping of 250 more, including at least 80 children. According to reports, the LRA often thrashed these children, threatened to have them executed if they refused to be a commander's 'wife', and repeatedly raped the young ladies.

Conclusion

The Ongwen conviction is a renewed hope for the possibility of justice for victims of gender-based crimes and sexual violence; however, it would be premature to assume that “this is a new positive trend in ICC’s convictions for sexual and gender-based violence, and not a one-off exception from the otherwise poor track record of the ICC. The significant aspect that perhaps facilitated his conviction was that he was a direct perpetrator of those crimes.”¹⁷ It can be deduced that in its yearly years, failures of the ICC with respect to gender-based crimes and sexual violence can be attributed to investigations that are ineffective and gender-blind, as well as to a lack of comprehension of the effects of sexual assault faced by victims in conflict zones and the continuance of the same. The ICC has made efforts to address sexual violence, including the establishment of a specific office called the Office of the Prosecutor (OTP) to investigate and prosecute such crimes. However, there have been criticisms and concerns about the scope and effectiveness of the ICC's inclusion of sexual violence in its investigations and prosecutions. It needs a high degree of gender sensitivity, constant effort, and prioritisation in order to address adequately gendered harms suffered by victims, given its intersectionality and growing complexities.

¹⁷ *Where Does International Criminal Law Stand When It Comes to Sexual and Gender-Based Violence?* (n.d.). The Wire.