

CHILDREN AND INTERNATIONAL CRIMES: VICTIM VS PERPETRATOR



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Abstract

This chapter analyses the issue of children in the context of international crimes, in which a child may be perceived as a victim or sometimes, unfortunately, a perpetrator. However, it is possible for a child to be simultaneously classified as both perpetrator and victim. Such a situation, from the perspective of law – including international law, ethics and morality – is extremely challenging to assess. Following an introduction outlining the problem, considerations related to the concept of the child are presented in the light of basic legal instruments in Poland, followed by those related to the concept of the child in the light of the basic instruments of international law. The next stage of the analysis covers international crimes from the perspectives of both Polish and international law. All of the above provides a basis for discussing the topic of children as victims and as perpetrators of crimes. These considerations are supported by an overview of court cases before the International Criminal Court (those of Thomas Lubanga Dyilo, Bosco Ntaganda, and Dominic Ongwen). Positive facts will also be presented. Arising from the research conducted, factors influencing the development of child soldiers will be proposed. The chapter concludes with a concise summary.

Keywords: children, international crimes, International Criminal Court, international criminal law, Poland

1. Introduction

Linking children's issues to the problem of crime is not easy as issues relating to children in a state's legal system are usually considered in terms of ensuring their full safety and effective protection from harm or damage. For any state and nation, children are the future and the guarantee of its continuation.

Children are always the epitome of vulnerability and pure goodness and are not normally predisposed to commit crimes, though there are exceptions. The situation is different when it comes to countries where armed conflicts are part of common existence. In these areas of permanent armed conflict – mainly in Africa – children are not necessarily conceived of as embodying the greatest good and the future. There, the hard rules of life place children in non-obvious situations characterised by non-obvious choices. The only law that applies then is the law of life and death (*ius vitae et necis*). The child is then unable – under these extreme conditions – to distinguish an action based on good from an action based on evil in order to save his or her life and the lives of his or her family and loved ones. Consequently, if a child chooses evil to survive, he or she may commit a crime. In countries torn by armed conflicts, law is replaced by force and aggression, and children are often idle tools.

In such a context we see the very complicated situation that arises when dealing with both children and international crimes.¹ This means that in the harsh realities of war, a child may not only be a victim, but also – completely beyond his or her control – a perpetrator of a crime. We, therefore, need to examine the workings of the very complex phenomenon of children's involvement in warfare, in which crime is often one of the daily activities. These two research elements – the child and international crimes – are linked in the title and form the core areas of analysis.

2. The concept of the child in the light of basic legal instruments in Poland

As indicated at the outset, the essential element that distinguishes a child from an adult is age. After all, the type of act committed by a child or an adult may be the same. Whether an act is a crime is determined by the relevant legal regulation. In Poland, based on Article 10 of the Criminal Code,² the minimum age of criminal responsibility is set at 13. From this age, individuals may be held criminally responsible for their acts. Therefore, children under the age of 13 cannot be held criminally responsible for a crime committed, whereas those between the ages of 13 and 17 can

1 See Graf, 2012, pp. 945–969; Amann, 2013, p. 411; Morss, 2004, pp. 213–225; Masło, 2019, pp. 15–26.

2 Act of 6 June 1997 - Criminal Code (Journal of Laws 1997 No. 88 item 553).

be held criminally responsible for their actions under special rules. This is a liability based on completely different principles than those applicable in standard situations where an adult commits a crime. Adults in Poland are liable on the general principle that a person is subject to criminal liability as soon as he or she commits an act prohibited by law after the age of 17.

Although Polish law makes a very precise distinction between an adult and a child in terms of a fixed age limit, there is no legal definition of a child,³ though a number of legal instruments attempt, to a greater or lesser extent, to define this concept. Moreover, there are also a number of legal concepts that are directly or indirectly linked to the concept of a child. In addition, the Polish legislation on this issue frequently refers to the standard of international law, where the notion of the child is recognised.

In the Polish legal system, one of the various legal instruments in which one can find an attempt to define a child is the Ombudsman for Children Act of 6 January 2000.⁴ Pursuant to Article 2 of this Act, a child is defined as every human being from conception to adulthood. On the other hand, the coming of age indicated in this definition is defined in separate regulations, which in Poland are mainly the provisions of the Civil Code.

In the Polish legal system, one may also encounter other notions referring to the concept of a child. One of these is the notion of a “minor”, which is included in the scope of the term “child”. The concept of a minor applies mainly in the area of civil law. The basic legal instrument for Poland’s civil law, already mentioned above in the form of the Civil Code,⁵ indicates that a minor is a person who has not yet reached the age of eighteen. In Poland, the concept of a minor is the opposite of the concept of an adult. Since, according to the Civil Code, an adult is a person over eighteen years of age, a minor is a person under eighteen years of age or who has not married.⁶ Therefore, the Polish Civil Code divides minors into persons who have not reached the age of 13 and persons who have reached the age of 13 but not the age of majority.

Another law, the Act on the support and rehabilitation of minors,⁷ uses the term “underage”.⁸ This Act forms the basis for adjudicating the scope of criminal responsibility specifically in relation to underage persons. The manner in which this law treats an underage person depends on his/her age and the type of proceedings. This means that underage persons are a) those who have reached the age of 10, are not of legal age, and against whom proceedings for demoralisation are being conducted; b) persons against whom criminal proceedings are being conducted for acts they committed after reaching the age of 13 but before reaching the age of 17; c) persons against whom proceedings are being conducted for the execution of educational,

3 Mathews and Collin-Vézina, 2019, pp. 131–148; Olszewski, 2011, pp. 205–216. See also Jarecka-Kowalczyk, 2022, pp. 179–191.

4 Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws 2000 No. 6 item 69).

5 Act of 23 April 1964 - Civil Code (Journal of Laws 1964 No. 16 item 93).

6 Stawniak et al., 2017, p. 139.

7 Act of 9 June 2022 on the support and rehabilitation of minors (Journal of Laws 2022 item 1700).

8 Wielec, 2017, p. 1548.

therapeutic or correctional measures, but no longer than until they reach the age of 21. In addition, the Act defines a criminal act as conduct prohibited by law that constitutes an offence, a fiscal offence, or a misdemeanour. A criminal act is defined as conduct that matches the characteristics specified in the relevant legislation.⁹

A final concept that exists in the criminal law is that of a “juvenile”. This is defined in Article 115 § 10 of the Criminal Code as an offender who is under 21 years of age at the time of committing their criminal act and not yet 24 years of age at the time of adjudication in the first instance.

Based on the above, it is clear that several legal concepts are included in the term “child”. This is important from the point of view of incurring criminal liability for offences. While all these concepts referring to and concerning the term “child” provide for completely different – often less strict – rules of trial for these individuals when it comes to incurring criminal liability, adults (those over 17 years of age) are liable on general principles. This observation is important for the following analysis, as the introduction of these distinctions in relation to age, to the concepts associated with the child, and finally to the specific rules for incurring criminal responsibility is intended to show that a child cannot incur this responsibility to the same extent and based on the same principles as an adult. As adults play a key role in shaping children’s attitudes, it is unlikely that a child could commit a crime entirely independently.

3. The concept of the child in the light of the basic instruments of international law

The concept of the child in international law is fairly well formulated. The primary piece of legislation defining this concept is the 1989 Convention on the Rights of the Child.¹⁰ It is one of the most basic and most important pieces of international legislation containing a fairly detailed concept of the child. For many countries’ legislation, it provides a model for how to understand, describe and use – in legal terms – the concept of the child. For the purposes of this Convention, a “child” means any human being under the age of eighteen years, unless he or she attains the age of majority earlier in accordance with the law relating to the child. The definition of a child presented here implies two age ranges. The first is the generally indicated beginning of a child’s life and the second is the upper limit of coming of age.¹¹ While the question

9 Fic, 2019, pp. 96–108.

10 Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 (Journal of Laws 1991 No. 120 item 526); See: Schulz, 1997, pp. 163–182; Przyborska-Klimczak, 2019, pp. 211–235; Orzeszyna, 2019, pp. 267–273.

11 Korzyński, 2016, p. 15.

of reaching adulthood does not raise any objections, the question of the beginning of a child's life, that is, the lower limit, is no longer so obvious. Nonetheless, it is assumed in Poland that the Convention defines the upper age limit of the child while not referring to the beginning of the child's life. It is left to the individual states who are party to this Convention to determine for themselves from which moment a child becomes a human being.¹²

It is worth noting that the concept of the child is also known to other instruments of international law. It can be found, *inter alia*, in the provisions of the 1996 European Convention on the Exercise of the Rights of the Child,¹³ which applies to children under the age of 18. The purpose of this Convention is to benefit children by granting and promoting their rights, granting them procedural rights and facilitating the exercise of these rights by ensuring that children, either personally or through other persons or institutions, are informed of and entitled to participate in proceedings before a judicial authority that concern them.

Another piece of legislation is the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,¹⁴ which absolutely prohibits trafficking in children, child prostitution and child pornography, and calls for these offences to be punishable under national law with appropriate serious sanctions, taking into account the extremely serious nature of these offences.

A further example is the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹⁵ Here, the main object is to ensure the prompt return of children wrongfully abducted or retained and to ensure respect for the custody and visitation rights of children in countries that have signed this Convention.

4. International crimes – the Polish perspective

The second element of this analysis is the concept of international crimes.¹⁶ This is a very broad concept.

In this sense, these concepts are generally defined as a group of acts prohibited as crimes, that is, acts of the most serious kind, as defined by international laws.¹⁷

12 Żelichowski, 1997, p. 28.

13 European Convention on the Exercise of the Rights of the Child, drawn up in Strasbourg on 25 January 1996 (Journal of Laws 2000 No. 107 item 1128).

14 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000 (Journal of Laws 2007 No. 76 item 494).

15 Zombory, 2023, pp. 217–237.

16 Gacka, 2021b, pp. 159–194; See: Masło, 202, pp. 347–380.

17 Van der Wilt, 2013, pp. 43–77; Stewart, 2012, pp. 165–219; Bassiouni, 1996, pp. 63–74.

The situation is different in the legal regimes of individual states around the world. While the concept of international crime is not defined in national criminal law regimes (e.g. in Poland),¹⁸ some systems of national criminal law refer to crimes against humanity.

For example, the Polish Criminal Code contains, in the current Criminal Code, Chapter XVI under the title ‘Offences against Peace, Humanity and War Crimes’. At this point, it is worth pointing out for information that the Polish Criminal Code distinguishes between a general part, where the general principles of incurring criminal liability in Poland are presented (e.g. the concept of crime, the age of the perpetrator, circumstances excluding criminal liability, etc.) and a specific part, where a catalogue of individual crimes is provided. It is in this second part that the offences related to international crimes are found: offences such as the crime of initiating a war of aggression, genocide, organising and participating in an attack, using weapons of mass destruction, the manufacture and circulation of prohibited means, violation of the accepted rules or methods of warfare, or mistreatment of prisoners of war or civilians are defined there.

Another interesting provision in the Polish Criminal Code – from the point of view of this analysis – and one that refers directly to international crimes is Article 124. This provision gives the very general ‘other violations of international law’ as constituting a crime. These ‘other violations of international law’ within the meaning of this provision constitute specific acts. This provision stipulates that whoever, in violation of international law, commits any of the following acts shall be punished by imprisonment for a term of 3 to 20 year: a) compels persons to serve in an enemy armed force or to participate in armed actions against their own country; b) inflicts corporal punishment; c) induces a person to engage in sexual activity – including sexual intercourse, submission to another sexual act, or performance of such an act – through violence, unlawful threat or deception; d) commits acts that violate personal dignity, particularly through humiliating and degrading treatment; e) unlawfully deprives a person of liberty; f) deprives a person of the right to an independent and impartial court or restricts their right of defence in criminal proceedings; and g) declares that the rights or claims of citizens of the opposing party are extinguished, suspended or inadmissible before the courts. The same punishment shall be imposed on anyone who, in violation of international law, a) delays the repatriation of prisoners of war or civilians; b) dislocates, resettles or deports civilians; c) conscripts or recruits into the armed forces persons under 18 years of age; or d) actually uses such persons in armed activities.

18 Grzebyk, 2022, p. 10.

5. International crimes – an international perspective

Turning to the field of international law, on the other hand – in the context of international crime or crimes under international law analysed here – it is worth pointing out that a basic catalogue of acts of warfare is generally known there, first adopted in 1907 in the Hague Conventions.¹⁹ However, the basis for comprehensive international liability for crimes under international law was defined later, in 1919 in the Treaty of Versailles.²⁰

Subsequently, the scope of this concept was broadened after the Second World War by, for example, the provisions of the Charter of the International Military Tribunal at Nuremberg.²¹ This refers to Article 6 of this Statute, which defined the types of crimes under international law. The first was ‘Crimes against Peace’, the crimes of planning, preparing, unleashing or waging a war of aggression. The second was war crimes, grave breaches of the laws and customs of war, especially if committed as part of an overall political plan and of a widespread nature. The third was crimes against humanity,²² committed against civilians, both before and during the war, for political, racial or religious motives.²³

Currently, however, the most important legal act defining the scope of crimes under international law is the Rome Statute of the International Criminal Court,²⁴ which not only defines the structure and types of international crimes, but also the rules of operation of this special international body set up to prosecute these types of crimes, which is precisely the said Court. Among other things, one can read in the preamble of this Statute that the States Parties to the Rome Statute decide that

to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

Currently, the International Criminal Court is complementary to national criminal justice systems.²⁵ The Court is a permanent institution, and it has the power to exercise jurisdiction over persons who have committed the most serious crimes of international concern listed in this Statute. The Court’s jurisdiction under the Statute of the International Criminal Court covers the following crimes: (a) the

19 Saeid, 2015, p. 37.

20 Niewiada, 2015, p. 103; See: Masło, 2023, pp. 45–49.

21 International Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws 1947 No. 63 item 367).

22 Masło, 2020, pp. 133–178.

23 Kanarek, 2011, pp. 455–456.

24 Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998 (Journal of Laws 2003 No. 78 item 708).

25 Kovacs, 2023, p. 135; Kovacs, 2018, p. 225; Kovács, 2017, pp. 343–360; Kovács, 2021, pp. 147–170.

crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

Crimes of genocide²⁶ means any of the following acts committed with the intent of destroying, in whole or in part, a national, ethnic, racial or religious group. This includes: the murder of members of the group; the infliction of serious bodily or mental harm on members of the group; the deliberate creation of conditions of life for the group calculated to cause its physical destruction in whole or in part; the use of measures intended to stop births within the group; and the forced transfer of children of members of the group to another group.

Crimes against humanity²⁷ means any of the following acts, committed as part of a widespread or systematic deliberate attack directed against a civilian population such as: murder or extermination; slavery; deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation and any other form of sexual violence of comparable gravity; persecution of any identifiable group or collectivity for political, racial, national, ethnic, cultural, religious, gender or other reasons generally considered unacceptable under international law; enforced disappearances of persons; the crime of apartheid; and other inhumane acts of a similar nature intentionally causing great suffering or serious harm to the person or to their mental or physical health.

War crimes²⁸ are criminal actions committed in pursuit of a plan or policy or when such crimes are committed on a large scale. For the purposes of the Statute, the term means serious violations of the Geneva Conventions of 12 August 1949, such as: wilful killing, torture or inhuman treatment, including biological experimentation, causing great suffering or grievous bodily or health harm; serious destruction of and damage to property, not justified by military necessity and carried out unlawfully and arbitrarily; forcing prisoners of war or other protected persons to serve in the armed forces of an enemy power; deliberately depriving prisoners of war or other protected persons of their right to a fair trial conducted in the normal course; unlawful deportation or resettlement or unlawful deprivation of liberty; hostage-taking; and other serious violations of the laws and customs of international law applicable to armed conflicts of an international character.

The crime of aggression²⁹ means the planning, preparation, initiation or execution, by a person in a position to exercise effective control over or direction of the political or military action of a state, of an act of aggression which, by its nature, gravity or scale, manifestly violates the Charter of the United Nations.

26 Kress, 2006, pp. 461–502; Lemkin, 1947, pp. 145–151; Travis, 2012, pp. 30–55.

27 May, 2006, pp. 349–352; Sadat, 2013, pp. 334–377; Robinson, 1999, pp. 43–57.

28 Meron, 1998, pp. 462–468; Hagan et al., 2006, pp. 329–349; Frulli, 2001, pp. 329–350.

29 Koh et al., 2015, pp. 257–295; Scharf, 2012, p. 357; Clark, 2009, pp. 707–723.

6. Children as victims

There is no doubt that millions of children in areas of armed conflict are victims of unimaginable atrocities. As noted above, it was for this reason, among others, that, in recognition of the enormity of the situation, states at the Rome Conference committed themselves to establishing the International Criminal Court (hereinafter ICC) for the benefit of present and future generations. One of the ICC organs established was the Office of the Prosecutor of the International Criminal Court (Office of the Prosecutor). This body performs investigative and prosecutorial functions. Since 2003, the ICC Prosecutor's Office has been investigating a number of atrocious crimes against children in countries such as Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, the Faroe Islands, Mali, Burundi and Afghanistan. The office is also conducting preliminary investigations into such acts in Bolivia, Colombia, Guinea, the Philippines, Venezuela, Palestine and Nigeria.

In legal terms, the ICC Statute is not passive when it comes to children; an explicit commitment to address crimes against children can be found in many of the Statute's provisions and the word "child" is specifically mentioned on numerous occasions. The Statute's preamble mentions that there is full consciousness

(...) that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, recognizing that such grave crimes threaten the peace, security and well-being of the world.

The provisions of Article 6 of the Statute defines the crime of genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

In the provisions of Article 7 of the ICC Statute, enslavement, which is defined as the realisation of some or all of the powers associated with the right of ownership over a human being, is also treated as a crime against humanity and includes the use of such powers in the area of trafficking in human beings, particularly women and children.

Children are also affected by the provisions of Article 8 of the ICC Statute, where war crimes include, inter alia: a) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; b) conscripting or enlisting children under the age of fifteen years into

armed forces or groups or using them to participate actively in hostilities; c) crimes that disproportionately affect children, such as the deliberate targeting of buildings used for religious, educational, artistic, scientific or charitable purposes, historical monuments, and hospitals and places where the wounded and sick are gathered, provided they are not military targets.

The ICC Statute also, in the provisions of Article 36 relating to the qualification, nomination and election of judges of this Court, specifies that States Parties, in selecting judges, should take into account the need for ICC judges to have legal expertise in specialised areas, including but not limited to knowledge of violence against women and children.

Article 42 para. 9 of the ICC Statute relates to the functioning of the Office of the Prosecutor. In this context, the Prosecutor appoints advisors with legal expertise in specialised areas, including, *inter alia*, knowledge of sexual and gender-based violence and violence against children.

Similarly, the provisions of Article 54 regulate the duties and powers of the Prosecutor in pre-trial proceedings. It states that the ICC Prosecutor is obliged, *inter alia*, to take appropriate measures to ensure the effectiveness of pretrial proceedings in cases of crimes under the jurisdiction of the Court and, in the performance of his duties in this regard, to respect the interests and take into account the personal circumstances of victims and witnesses, including age, gender (sex) and health, and to take into account the nature of the crime, in particular where it involves sexual, gender (sex) or violence against children.

Another provision, Article 68 of the Statute, regulates the protection of victims and witnesses and the rules for their participation in ICC proceedings. Thus, in turn, the ICC shall take appropriate measures to ensure the safety, physical and mental well-being, dignity and privacy of victims and witnesses. In taking these measures, the Court takes into account all relevant circumstances, including age, gender (sex), health status, and the nature of the crime, especially, but not only, when it concerns sexual or gender (sex)-related violence or violence against children. Such measures apply in particular to victims of sexual violence or a child acting as a victim or witness.

In addition, it is important to note that children – especially, though of course not exclusively, during armed conflict – are vulnerable to sexual and gender-based crimes, which are prohibited by the ICC Statute. The Statute recognises children as persons with individual rights, as members of families and as members of multi-generational communities. This recognition corresponds to the international understanding embodied in the 1989 Convention on the Rights of the Child and many other international instruments, from which it follows that children are vulnerable and entitled to special care and protection and that their interests, rights and personal circumstances should be given due consideration.

7. Children as perpetrators of crimes

The concepts of victim and perpetrator of a crime seem to be easily distinguishable under normal operating conditions. However, it is not so easy in the case of children living in areas of permanent armed conflict. When hearing about war, our first thought is to protect children, as they are defenceless and dependent on the decisions of adults. On the other hand, it should be pointed out that – unfortunately – a child, due to a combination of different events, the influence of the situation created, the existence of various dependencies, meeting the wrong people or, finally, the influence of a psychological factor, can sometimes be not only a victim but also a perpetrator of crimes during warfare. He can also be both perpetrator and victim of a crime at the same time. And finally, he may also evolve to be only a perpetrator. For a defenceless child to become a victim and later a perpetrator of crimes is not a commonplace happening. Nevertheless, factors of war, the desire to live, and the need for a sense of security can bring about an extraordinary evolution whereby a child becomes first a victim and then possibly a criminal.

Such an unlikely evolution is particularly evident in countries on the African continent, the area most often gripped by the elements of war and destruction, making it possible for the victims of crime, in time, to become perpetrators. This observation particularly applies to children who have been forcibly drawn into warfare. These enlisted children then become elements of a war machine geared to aggression and the elimination of the enemy, whoever that enemy may be, and by every means possible – including the use of children in warfare. This terrible assumption unfortunately leads to a blurring of the distinction between good and evil.

Our tendency is to associate children with goodness, love, friendliness, the future and sincerity. Among other things, it was Pope John Paul II who pointed out in a speech at Castel Gandolfo that ‘The child is a source of hope. It tells the parents the purpose of their life, it represents the fruit of their love. It also makes it possible to think about the future’.³⁰ The child is, after all, good by nature, but as a *tabula rasa*, is influenced by the adults around it. These patterns that are passed on to children from adults during armed conflicts may not be positive. On the contrary, they may make these innocent children active and legitimate participants in armed conflicts. Then the distinction between perpetrator and victim in each case becomes quite blurred. Therefore, the responsibility attached to adults who, in the name of the interests of war – in this case – take advantage of a dramatic situation by leading children into armed conflict is very high.

In the world of war, the child is often a tool that can be used objectively for the cruellest actions. In a normal world, a child should be surrounded by goodness and love. In the world of war, there is a different hierarchy of values. There, traits such as anger, helplessness, desperation and pain are the standard. Children in war are

30 <https://p84.lublin.eu/2020/06/21/najwazniejsze-slowa-wypowiedziane-przez-papieza-jana-pawla-ii/> [accessed on: 29 January 2024].

children without school, without toys, without family, without joy. They are, in fact, little adults. They are children who have had to grow up quickly while holding a rifle in their hands, shooting, planning attacks, and getting killed.

Publicly available data shows that many cases involving children as perpetrators of crimes during warfare have been observed. This is mainly the case in the countries previously mentioned, where warfare is a daily occurrence, and in many cases violence and torture are used to compel children to fight. According to UN data, more than 300,000 children under the age of 18 in more than 30 countries are actively involved in armed conflict.³¹ For example, more than half of all soldiers in the civil war in Sierra Leone in 1999 were under the age of 18.³² From 1985 to the present, at least 12,000 children have been kidnapped by the Lord's Resistance Army in Northern Uganda. In Colombia, up to 30% of children are routinely recruited into guerrilla and paramilitary groups.³³

It is in this light that the concept of "child soldiers" has been coined, a term for which several different definitions exist. The concept of "child soldiers" was included in an international document created at the conference of the United Nations Children's Fund in Cape Town held from 27 to 30 April 1997. This conference, through a document entitled 'Cape Town Principles and Best Practises', addressed the prevention of the recruitment of children into the armed forces and the demobilisation and social reintegration of child soldiers in Africa. It defines the term "child soldier" as broadly covering any person under the age of eighteen who is a member of any regular or irregular armed force or armed group, in any capacity, including, inter alia, as cooks, baggage handlers, messengers or any other person accompanying such groups, but excluding only family members. The definition above also applies to girls recruited for sexual purposes and forced marriage. It is emphasised, however, that this definition is purely programmatic, lacking the force of law.³⁴

Another definition is found in a document called 'Child Soldiers Report' from the Coalition to Stop the Use of Child Soldiers. Here, a child soldier is considered to be

*a person under the age of eighteen who is a member of or has been conscripted into an armed force or armed group during an ongoing armed conflict or in peacetime. Child soldiers may perform tasks ranging from direct participation in combat to military activities such as reconnaissance, spying, sabotage, booby-trapping, messing, sentry or protection, training, drill and other types of combat preparation; they also perform functions such as transporting baggage, running a farm, sex slavery or performing forced labour.*³⁵

31 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024].

32 Shepler, 2005, pp. 197–211.

33 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024]; Hurtado et al., 2023, pp. 65–91.

34 Prucnal, 2012, p. 39.

35 Boratyńska, 2013, p. 43; <http://hdl.handle.net/11320/14047> [accessed on: 29 January 2024].

The prototypes for the legal treatment of the problem of the child in armed conflict, however, are the Protocols additional to the Geneva Convention of 1949. Among these we find the 1977 Protocols Additional for the Protection of Victims of International Armed Conflicts, where in Chapter II, entitled 'Actions for the Benefit of Women and Children', there are a number of guarantees concerning children. The provisions of Article 77 set out the protection of children.³⁶ According to these provisions, children should enjoy special respect and be protected from all forms of assault on their morals. The parties to the conflict will give them the care and assistance they need because of their age or for any other reason. The parties to the conflict will take all practicable steps to ensure that children under the age of 15 do not participate directly in hostilities; in particular, they will refrain from inducting them into their armed forces. If persons between 15 and 18 years of age are called up, the parties will endeavour to give preference to the older ones. If, in exceptional cases and contrary to the provisions indicated above, children under 15 years of age take direct part in hostilities and find themselves in the power of the opposing party, they will continue to enjoy the special protection granted, whether or not they are prisoners of war. In the event of detention, imprisonment or internment for reasons related to the armed conflict, children will be kept in accommodation separate from that occupied by adults, except where families are placed together. The death penalty for an offence related to the armed conflict shall not be enforced against persons who were under 18 years of age at the time of the offence.

The same is true of the content of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of Geneva of 8 June 1977. The provisions of Article 4 of this Protocol set out basic guarantees for the care and assistance the child needs. In particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited into the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; and (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Another legal regulation containing references to the concept of the child in armed conflict is the aforementioned Convention on the Rights of the Child, which, in Article 38, sets out situations and rules of conduct for children in war:

³⁶ Nowakowska-Małusecka, 2010, p. 130.

(i) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(ii) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(iii) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

An interesting document in the context analysed here is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in New York on 25 May 2000. According to Article 3 of this Protocol, States Parties to this Protocol, shall raise the minimum age limit for the voluntary entry of persons into their national armed forces from the limit set by – as indicated above – Article 38(3) of the Convention on the Rights of the Child, taking into account the principles contained in that Article and recognising that, under the Convention, persons under the age of 18 are entitled to special protection. It further indicates that each State Party shall, at the time of ratification of or accession to this Protocol, make a binding declaration specifying the minimum permissible age for voluntary enlistment in its national armed forces, together with a description of the safeguards adopted to ensure that such recruitment is not carried out by force or coercion. In addition, States Parties permitting voluntary enlistment in their national armed forces of persons under the age of 18 shall maintain safeguards to ensure, at a minimum, that: a) such enlistment is genuinely voluntary; b) such recruitment is done with the informed consent of the person's parents or legal guardians; c) such persons are fully informed of the duties involved in such military service; and d) such persons provide reliable proof of age prior to acceptance into national military service.

In the next document, the 1990 African Charter on the Rights and Welfare of the Child, the provisions of Article 22, entitled 'Armed Conflicts', mentions that the States Parties to the present Charter undertake to respect and ensure respect for the norms of international humanitarian law applicable in armed conflicts involving the child. States Parties to the present Charter shall take all necessary measures to ensure that no child takes direct part in hostilities and, in particular, shall refrain from recruiting any child. States Parties to the present Charter, in accordance with their obligations under international humanitarian law, shall protect civilians in armed conflicts and shall take all possible measures to ensure the protection and care of children affected by armed conflicts.

8. Case studies – a general overview

8.1. Thomas Lubanga Dyilo

One of the most important cases relating to the issue of child soldiers before the ICC was that concerning the situation in the Democratic Republic of Congo. The accused before the ICC was Thomas Lubanga Dyilo, former president of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), first arrested in March 2006. The subject matter of the case concerned a number of offences of enlisting and conscripting children under the age of 15 and using them to participate in hostilities. In 2012, the ICC handed down a verdict of guilty and he was sentenced on 10 July 2012 to a total of 14 years' imprisonment, confirmed by the second instance of the ICC (Appeals Chamber) on 1 December 2014. Following further review proceedings, Lubanga was transferred to a penitentiary unit in the Democratic Republic of Congo on 19 December 2015 to serve the remainder of his prison sentence. He was released on 15 March 2020 after serving 14 years of imprisonment. By contrast, the proceedings for victim reparations began on 7 August 2012.³⁷ There is no doubt that the verdict in the Lubanga case – one of the first to address the issue of child soldiers – was a landmark decision, highlighting the need for urgent and concrete action to curb the problem. The final outcome of the case sent a clear message around the world that the use of child soldiers is totally unacceptable and perpetrators must be held accountable.

8.2. Bosco Ntaganda

Another historically important proceeding before the ICC on the issue of child soldiers was the case against Bosco Ntaganda,³⁸ Congolese deputy chief of staff and commander of the *FPLC*. He was charged with 13 counts of war crimes and five counts of crimes against humanity committed between 2002 and 2003 in the Ituri district of the Democratic Republic of Congo. The charges included the most serious crimes, such as murder, rape, sexual slavery, recruitment of child soldiers, persecution, forcible deportation, looting and carrying out attacks directly targeting civilians. On 8 July 2019, the ICC's Sixth Arbitral Chamber found Bosco Ntaganda guilty beyond reasonable doubt of 18 war crimes and crimes against humanity committed in Ituri, Democratic Republic of Congo, between 2002 and 2003 and he was sentenced on 7 November 2019 to a total sentence of 30 years' imprisonment. On 30 March 2021, the ICC Appeals Chamber upheld the conviction of the case. These two decisions are now final.³⁹ This case marks the first time in the history of international criminal law,

37 <https://www.icc-cpi.int/drc/lubanga> [accessed on: 29 January 2024].

38 Gacka, 2021a, p. 218.

39 <https://www.icc-cpi.int/drc/ntaganda> [accessed on: 29 January 2024].

and indeed international humanitarian law, that ICC judges have handed down a conviction for sexual violence committed by perpetrators against members of their own armed group and the 30-year sentence is one of the harshest sentences handed down since the ICC began operating. It should be noted that Ntaganda has consistently maintained his innocence, arguing that he is a ‘revolutionary, not a criminal’.⁴⁰ The conviction opened the way for some 2,123 of his victims to seek compensation for the harm they suffered as a result of Ntaganda’s criminal actions.

8.3. Dominic Ongwen

The most notorious case before the ICC concerning child soldiers as victims and perpetrators of international crimes was the case against Domenic Ongwen.⁴¹ The proceedings in this case are an exemplary instance of the impact of devastating factors on human life, as a result of which a person becomes a ruthless criminal. These proceedings before the ICC – and indeed Ongwen’s life story – demonstrate how easily, in the context of the realities of war, the status of victim can transform over time, first into that of victim-perpetrator and then directly to cruel perpetrator. It is widely reported that the origins of Ongwen’s criminal activities in Uganda began when he was kidnapped and recruited by the Lord’s Resistance Army (LRA), a group active in Uganda since the 1980s. By contrast, as part of the ICC proceedings, Ongwen’s case goes back only as far as 2005, when arrest warrants were issued for LRA leaders. However, only one of them – Ongwen – ended up before the Court. This trial took place in 2015. Among the charges of war crimes and crimes against humanity brought against Ongwen were those acts that directly related to his personal involvement in the unlawful recruitment of child soldiers into the ranks of the LRA, meaning that Ongwen committed the same acts that he himself was once a victim of. The ICC at first instance (Trial Chamber IX) found Ongwen guilty of a total of 61 crimes, including crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005. These crimes included attacks on civilians, murder, attempted murder, torture, enslavement, insult to personal dignity, violation of personal dignity, looting, destruction of property, forced marriage, rape, sexual slavery, enslavement, forced pregnancy, and the crime of conscripting children under the age of 15 and making them participate actively in hostilities and many other atrocities.

On 6 May 2021, Trial Chamber IX sentenced Ongwen to 25 years in prison. This verdict and sentence was affirmed by the Appeals Chamber on 15 December 2022. On 18 December 2023, Ongwen was transferred to Norway to serve his prison sentence⁴² and the proceedings against him are now considered complete and the

40 <https://www.dw.com/pl/haga-bosco-ntaganda-terminator-skazany-na-30-lat/a-51158374> [accessed on: 29 January 2024].

41 Gacka, 2020, pp. 78–100.

42 <https://www.icc-cpi.int/uganda/ongwen> [accessed on: 29 January 2024].

sentences imposed final. Approximately 4,095 victims participated in the proceedings.⁴³ However, only the partial stage concerning the award of compensation to Ongwen's victims is currently ongoing.

For additional detail, in its February 2021 judgment, the Court found Ongwen guilty of the majority of the charges against him (62 out of 70 charges). He was found guilty beyond reasonable doubt of crimes described as war crimes and crimes against humanity committed in Uganda between 1 July 2002 and 31 December 2005. The crimes for which he was criminally responsible are, in particular: *first*, attacks on civilians as such, killings, attempted killings, torture, enslavement, insults to personal dignity; *second*, attacks on civilians as such, killings, attempted killings, torture, enslavement, insults to personal dignity, looting, destruction of property and persecution; committed in the context of four specific attacks on internally displaced persons camps; *third*, sexual and gender crimes, namely forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy and violations of personal dignity, committed against seven women (whose names and individual stories are detailed in the sentence) who were abducted and placed in his household; *fourth*, a number of further sexual and gender-based offences committed by him against girls and women in the Sinia brigade, namely forced marriage, torture, rape, sexual slavery and enslavement; *fifth*, the offence of conscripting children under the age of 15 into the Sinia brigade and using them to actively participate in hostilities. warfare. It is also important to note that the so-called argument from original victimisation, i.e. the fact that Ongwen was in fact a victim and not a perpetrator, was not accepted by the Court. The Court also did not find that there were other circumstances excluding criminal responsibility in this case (such as mental illness).

9. Child soldiers - positive facts

Although the issue of child soldiers arouses negative emotions, it is worth mentioning that in the history of armed conflicts around the world one can find extremely positive assessments of this phenomenon. One of them originates from the history of the Second World War and concerns the legendary participation of children in Poland's Warsaw Uprising.⁴⁴

Of course, the analysis indicated below cannot be compared to the current involvement of child soldiers in current armed conflicts, especially on the African continent. In these conflicts, children are used deliberately as an instrument of crime. The scale and circumstances prevailing during the Second World War were completely different, as were the reasons for the participation of children in the fighting.

⁴³ Gacka, 2021a, p. 217.

⁴⁴ <https://www.1944.pl/> [accessed on: 29 January 2024].

The fact that the involvement of children during the Warsaw Uprising gained enormous fame and was seen as an honourable action is worthy of note.⁴⁵ Sources indicate that between 900,000 and 1,100,000 people lived in occupied Warsaw in August 1944. By the end of October, some 180,000 of them had died at the hands of the Germans. Among the 45,000 insurgents were 2,912 eighteen-year-olds, 5,840 children aged between ten and seventeen, and others even younger.⁴⁶ The historical literature contains many vivid accounts of that terrible time, according to which

*(...) The poorest were the small children, intimidated, so often very hungry and not understanding why such terrible things were happening around them. I felt so sorry for these children... With older children it was often different. Many took a direct part in the war effort in the Warsaw Uprising. As messengers they carried weapons, reports, orders and the press with enthusiasm. Often these children were unaware of the danger and were therefore often prone to bravado.*⁴⁷

However, it is necessary to emphasise that the children who participated in the Warsaw Uprising were not soldiers in the same sense as those children fighting in armed conflicts on the African continent. The children during the Warsaw Uprising were not forced into warfare and did not take up arms but performed auxiliary functions. The Scout Field Mail was legendary for passing on and delivering important information, for example, letters and parcels to the various insurgent posts. These children did not murder or display violent behaviour. They were not manipulated by the military, nor were they specially trained to do so, nor were they forcibly conscripted into the ranks of professional soldiers. On many occasions, risking their lives, out of a pure need to fight for their homeland, invaded by brutal Germans, they provided assistance to fighting soldiers, often risking their lives, as even for a child capture by the Germans while carrying a parcel or letter was tantamount to a death sentence.⁴⁸ In Poland, the issue of children fighting in the Warsaw Uprising has the dimensions of a legend and is an example of exceptional self-sacrifice for the fatherland.

It is also worth mentioning that in Poland, in Warsaw's Old Town, there is a famous monument – the monument to the Little Insurgent – which symbolises the sacrifice of the children involved in the Warsaw Uprising.⁴⁹ However, there is no doubt that the assessment of children's involvement in the war effort during the

45 <https://kultura.gazetaprawna.pl/artykuly/1424469,powstanie-warszawskie-1944-dzieci.html> [accessed on: 29 January 2024].

46 <https://ciekawostkihistoryczne.pl/2021/05/22/mali-zolnierze-ile-dzieci-walczylo-w-powstaniu-warszawskim/> [accessed on: 29 January 2024].

47 Davies, 2004, p. 395.

48 <https://ipn.gov.pl/pl/aktualnosci/41192,Powstanie-Warszawskie-boj-o-wolna-Polske.html> [accessed on: 29 January 2024].

49 <https://www.polska-zbrojna.pl/home/www/85?t=Pamieci-najmlodszych-powstancow> [accessed on: 29 January 2024].

Warsaw Uprising in Poland is unequivocally positive. The participation of young insurgents is an expression of supreme sacrifice, heroism and patriotic attitude.

10. Factors influencing the development of child soldiers

Currently, the participation of children in armed conflicts – on the African continent, and elsewhere – as child soldiers is not due to a voluntary decision by the child. By nature, children are oriented towards wellbeing and learning about the world. It is through learning about the world, through the existing conditions of the child's life, through the influence of educational factors and methods, that the child becomes a defined individual with a full set of values to help them make certain decisions. Therefore, before becoming a soldier, the child must be subjected to factors that will cause them to adopt an attitude that permits the creation of a child soldier.⁵⁰

The first such factor is the emotional state of children. There is no doubt that children, due to their emotional and physical immaturity, are easy targets for manipulation because they are too young to resist or understand what is really going on around them.

The second factor is poverty. It is not insignificant that the phenomenon of child soldiers occurs in extremely poor countries. Children are most likely to become child soldiers if they are poor, separated from their families, displaced from their homes, living in a war zone or have limited access to education.

The third factor is the survival factor, which can be described as the will to survive. Many children join armed groups because of economic or social pressure, or because they believe that the group will provide them with food or security.

The fourth factor is violence. Many children are forced to join the ranks of child soldier military units. Under the influence of violence, they are subjected to military training, to the regime of military life, and – through violence – their absolute obedience to those in charge of the group is shaped.

The fifth factor is the lack of education. Education in poor countries, especially war-torn ones, is very difficult. The lack of schools and educational resources does not make it easier. Friendship are often established in schools and their absence eliminates this type of relationship. Therefore, the lack of education, the lack of friendly relationships and the lack of opportunities to grow up with friends causes children to choose the army where they can be among their peers.

The sixth factor is technological progress, which is normally a positive factor. However, in this case, technological progress relates to the handling and use of weapons. Nowadays, anyone – even children or others not very familiar with weapons – can handle them very easily. The next step is to convince the child how easy it is to use the weapon.

50 Dudenhoefer, 2016, pp. 45–53.

11. Summary

In summary, it is unfortunately the case that a connection between children and international crimes is possible. Undoubtedly – given the irreparable damage caused to children during such conflicts – the international community must redouble its efforts to prevent crimes against children. There must also be an active and effective system to combat them.

Some positive signs can already be seen. One good example of this cooperation is the adoption on 25 May 2000 by the United Nations General Assembly of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁵¹ This document has been ratified by 159 countries around the world. Since 2002, the day commemorating the Protocol's entry into force, 12 February, has been celebrated as the International Day of Child Soldiers to remind the world of this problem.

Another good example is the formation in June of the Coalition to Stop the Use of Child Soldiers, established by six international, non-governmental human rights organisations, including Amnesty International and Human Rights Watch.⁵² Over time, regional and national human rights institutions have become involved in its development.

A worldwide legal regulation explicitly prohibiting the recruitment of children into the army and the participation of children in armed conflicts as soldiers is also a very important demand. The age should absolutely be set at the age of majority, that is, 18. Anything under the age of 18 should be prohibited. This ensures that people are properly aware of the decision they are making. Any involvement by a person under the age of eighteen is unreliable and dangerous.

However, the most important issue here is the effectiveness of the bodies applying the law,⁵³ including of course the ICC. Despite clear and overwhelming evidence of multiple crimes, the Ongwen case mentioned here lasted 8 years, and issues related to reparations still remain to be finalised. There seems to have been the Special Court for Sierra Leone in the past, which was probably more effective than the current ICC in that it also dealt with the issue of the involvement of child soldiers in armed conflict.⁵⁴ It concerned the organisation of Charles Taylor, who was convicted by Court of genocide, cruelty to civilians, the practice of slavery, and the forced recruitment of children into the army. There is an overwhelming need to ensure efficient cooperation and to speed up and simplify the ICC's procedures so that a simple and clear message is transmitted to and received by all that the accused state and the citizens of that state, those guilty of such terrible crimes against

51 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in New York on 25 May 2000 (Journal of Laws 2007 No. 91 item 608).

52 <https://www.unic.un.org.pl/rozbrojenie/dzieci-zolnierze.php> [accessed on: 29 January 2024].

53 As an aside, mention may also be made of cybercrime, which manifests its own peculiarities. See Karski and Oręziak, 2021, pp. 55–69; Oręziak, 2020, pp. 187–196; Oręziak, 2019.

54 Kovacs, 2023, p. 121.

children, have been convicted. In addition, there is a need for general education and a broadening of public awareness about situations involving the ruthless abuse of children in armed conflicts as child soldiers.

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