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The International Criminal Law of Children on War Crimes

SUMMARY

Whilst the system of international criminal law is a relatively new branch of public international law, its foundations are comparatively based on ancient times. This system has mostly been applied to serious criminal violations committed by individuals, groups, organizations and states. It is the first system of public international law which deals with all of its violators as independent subjects of law. The international criminal law of children is that part of international criminal law which deals with the rights belonging to the children of the world and the obligations of individuals, organizations and states not only to fulfil and respect those rights but also to prevent their violation in national, regional or international relations. The rights of children should be regarded as peremptory parts of international criminal law and therefore inalienable because of their essential role in the protection of children from the unlawful and immoral acts of individuals acting behind the international legal personality of their states. Children are thus the protected subjects of international law, whether in times of peace or war. This is also confirmed in the judgments of the SCSL and the ICC. The word 'child' in the article is used without any prejudice as to the sex or the physical or mental capability of the child.

→ **KEYWORDS:** CHILDREN, RIGHTS, CRIME

¹ Distinguished Visiting professor, Director of Institute of International Criminal Law, Sweden. To my wife – a woman of substance – Kerstin Nordlöf – with a garden of followers of everlasting love.

STRESZCZENIE

Międzynarodowa odpowiedzialność karna za zbrodnie wojenne popełniane na dzieciach

Chociaż system międzynarodowego prawa karnego stanowi stosunkowo nową gałąź prawa międzynarodowego publicznego, jego fundamenty sięgają starożytności. Stосуje się go głównie w sytuacjach poważnych naruszeń prawa międzynarodowego publicznego, popełnionych przez poszczególne osoby, grupy, organizacje i państwa. Jest to pierwszy system prawny traktujący sprawców jego naruszeń jako niezależne podmioty prawa. Wchodzące w skład międzynarodowego prawa karnego międzynarodowe prawo karne dzieci stanowi tę jego część, która obliгуje osoby fizyczne, organizacje i państwa, nie tylko do realizacji i przestrzegania tych praw, ale także do podejmowania odpowiednich środków w celu zapobieżenia ich naruszeniu w porządku krajowym, regionalnym i międzynarodowym. Prawa dzieci powinny być traktowane jako bezwzględnie obowiązujące normy międzynarodowego prawa karnego z powodu ich zasadniczej roli, jaką odgrywają w aspekcie ochrony dzieci przed nielegalnymi i niemoralnymi czynami osób pozbawionych międzynarodowej prawnej osobowości. W ten sposób dzieci stanowią chroniony podmiot prawa międzynarodowego, zarówno w czasie pokoju, jak i czasie wojny. Fakt ten potwierdziły również wyroki STSL i MTK. Termin 'dziecko' w artykule jest stosowany niezależnie od płci albo fizycznej lub psychicznej zdolności dziecka.

→ **SŁOWA KLUCZOWE** – DZIECI, PRAWA, PRZESTĘPSTWO

What is International Criminal Law?

Whilst the system of international criminal law is a relatively new branch of public international law, its foundations are comparatively based on ancient time. This system has mostly been applied to serious criminal violations committed by individuals, groups, organizations and states.² It is the first system of public

² For an analysis of this law and its scope On international criminal law see Georg Schwarzenberger, 'The Problem of an International Criminal Law,' 3 *Current Legal Problems* (1950) 263; Edward M. Wise, 'Prolegomenon to the Principles of International Criminal Law,' 16 *New York University Law Review* (1970) 562; Farhad Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes* (2 vols. 1991); Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (2011); Farhad Malekian, *The Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach* (2 ed, 1995); M. Cherif Bassiouni (ed.), *International*

international law which deals with all of its violators as independent subjects of law. By contrast, within other branches of public international law, individuals, groups, or organizations did not constitute direct subjects of law up until the creation of a considerable number of international treaties. For instance, public international law did not recognize the individual as its direct subject but as its beneficiary subject. However, the situation of individuals and the recognition of their criminal responsibility in the international sphere altered their position and led to them being recognized as direct subjects of international human rights law and also responsible subjects of international criminal law. The system is thus the first and the foremost branch of public international law to attribute the concept of international criminal responsibility to all classes of offender, including states, organizations and individuals of all ranks.³ The system exclusively concerns criminal violations of the rules of international law, such as international human rights law, the international humanitarian law of armed conflicts, transnational criminal law, international criminal justice and – of particular relevance to this article – the protection of the rights of children from different forms of abuse and exploitation. These include slavery, pornography, international or transnational sexual exploitation and being conscripted as soldiers in wartime.

Although it is true that all the above subjects constitute a separate branch of international law, they are, at the same time,

Criminal Law (3 vols., 1999); Farhad Malekian, *International Criminal Responsibility*, in M. Cherif Bassiouni (ed.), *International Criminal Law*, (1999) 153; Michael Bacharach, 'The Protection and Rights of Victims under International Criminal Law,' 34(1) *The International Lawyer* (2000); M. Cherif Bassiouni, 'International Recognition of Victims' Rights,' in Bassiouni (ed.), *International Criminal Law*, vol. III, 635-701 (2008); Boas Gideon and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003); Yoram Dinstein, 'International Criminal Law,' 20 *Israel Law Review* 206 (1985); Robert A Friedlander, 'The Foundations of International Criminal Law: A Present-Day Inquiry,' 15 *Case Western Reserve Journal of International Law* 13 (1983); M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003).

³ The International Military Tribunal in Nuremberg attributed the concept of international criminal responsibility not only to individuals but also to organizations. Accordingly it recognized four criminal organizations. These were National Socialist German Workers Party known as Nazi Party, Gestapo (the official secret police of Nazi Germany), Waffen SS (known as the armed wing of the Nazi Party), and Sicherheitsdienst SD (the intelligence agency of the SS and the Nazi Party in Nazi Germany).

an integral part of the international criminal law system. In fact, the system cannot properly be treated without consideration of these branches and remain effective. For example, international criminal law emphasises the very significant function of international human rights law principles. This means that the system imposes upon states certain international obligations that must be followed by them for the maintenance of international peace, equality, justice, and humanitarian principles in the world. As such, international criminal law is a law which aims to secure and defend other systems of law from serious violations of their provisions.

International criminal law thus consists of a particular framework which focuses on the prevention or elimination of violations against individuals. For the purposes of our discussion, certain parts of this law may appropriately be characterised as the 'international criminal law of children', i.e. those parts aiming explicitly at the protection of the rights of children from the unlawful criminal actions of governments, organisations or individuals. In other words, the international criminal law of children may be defined as a body of law consisting of provisions, rules, principles or regulations of conventional or customary law which deal with the rights of persons who are under eighteen years of age. This is the age recognised as marking the passage from immaturity to adulthood.

What is the International Criminal Law of Children?

Characterization

The international criminal law of children is that part of international criminal law which deals with the rights belonging to the children of the world and the obligations of individuals, organizations and states not only to fulfil and respect those rights but also to prevent their violation in national, regional or international relations.⁴ The rights of children should be regarded as peremptory parts of international criminal law and therefore inalienable

⁴ Farhad Malekian, Consolidating the International Criminal Law of Children, *Criminal Law Forum* (2014).

because of their powerful and essential role in the protection of children from the unlawful and immoral acts of individuals acting behind the international legal personality of their states. Children are thus a protected subject of international law, whether in times of peace⁵ or war.⁶ The word 'child' here is used without any prejudice as to the sex or to the physical or mental capability of the child.⁷ An *unkempt* form of international criminal law of children under national criminal law may be called juveniles justice which is essentially the development of the theory of the doctrine of *parens patriae* relating to the best interests of minors.⁸ This theory obliges the government to enact rules and provisions for the care, protection, custody, and maintenance of children under its jurisdiction.⁹ Therefore, the juveniles' justice is a field of national criminal law dealing with persons not old enough to be kept criminally responsible for the criminal conducts. The basic elements of the field of juveniles' justice are protection, non-application of punishment and rehabilitation. Some states have gone even further and protect children in different ways,¹⁰ although there is

⁵ Particularly see the Convention on the Rights of the Child.

⁶ See the 1949 Geneva Conventions relating to international humanitarian law of armed conflict.

⁷ Farhad Malekian and Kerstin Nordlöf, *International Legal Status of Children in the Encyclopaedia of Criminology & Criminal Justice*, (Jay S. Albanese, editor, Wiley-Blackwell, 5 volumes, 2014).

⁸ This theory was developed throughout the seventeenth century, <http://en.wikipedia.org/wiki/Parens_patriae> (access: 22.03. 2014). The theory has some roots in English Common law.

⁹ Here, a reference should also be made to Article 24 of the Charter of Fundamental Rights of the European Union concerning the protection of the Rights of the Child. The Charter was signed and proclaimed by the European Commission, the Council and the Parliament in December 2000. The article reads that: "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

¹⁰ See Kerstin Nordlöf, *Unga Lagöverträdare i Social, Straff- och Processrätt* (2005); Kerstin Nordlöf, *Straffprocessuella Tvångsmedel: Gripande, Anhållande och Häktning* (1987); Kerstin Nordlöf, *The Legal Philosophy of Protecting a Suspect Child*, *Journal of the XVII World Congress of the International*

not yet any integration of international legal system of children into their legislations. They have to work for this end in order to ensure the safety and welfare of children due to the provisions of international law of children.¹¹ This means that almost none of the legislations concerning juveniles' codes within different states fulfil the provisions of international or international criminal law of children.¹²

Jus Cogens

The body of international criminal law which protects the safety of children in different times is an integral part of the international law of *jus cogens*. This is an international legal system listing those norms of international law which cannot be modified by the will of one or several states. The philosophy behind the unchangeable character of certain norms protecting the rights of children is that these rights are so important and vital for the safety of children and humanity that they should not be modified, violated or reduced in any circumstances. They are, in other words, the minimum standard of justice for the safety and protection of the world's children.

The most significant source for the legal validity of the peremptory norms of international criminal law of children is to be found in one of the foundational international treaties, namely, the 1969 Vienna Convention. The convention emphasises that treaties conflicting with a peremptory norm of general international law are null and void. The Convention reads that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which

Association of Youth and Family Judges and Magistrates in Belfast, Northern Ireland, 27 August – 1 September 2006; Kerstin Nordlöf, *Straffrättens Processer för Unga Lagöverträdare* (1991).

¹¹ A clear example of this is the Swedish legislation which does not yet incorporate international law of children into its framework.

¹² See generally Farhad Malekian and Kerstin Nordlöf, *Confessing the International Rights of Children* (2012).

no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹³

Similarly, the international criminal law of children may be strengthened if the emergence of a new peremptory norm of general international law seems to be necessary for the protection of children and renders an existing law obsolete. This is also clearly stated by the Vienna Convention, which constitutes one of the most significant law-making treaties in the system of international law. The Convention states that

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.¹⁴

This means that the Convention aims to ensure that the provisions of preceding treaties which deal, in one way or another, with the rights of children do not hinder the development of the rights of children at the international level. This provision of the Vienna Convention may also be seen as recognising the increasing awareness of the relevant law of children and the importance of securing their social, juridical, economic and political positions at all times.¹⁵ The much-consolidated form of this theory is stated in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹⁶

The international criminal law of children is also strengthened by another article of the Vienna Convention which aims at the suppression of any obsolete act, decision, rule, or regulation in the provisions of any earlier treaty on the rights of children. Therefore, according to the Vienna Convention, the parties should take certain necessary measures concerning the consequences of

¹³ Article 53 of the Vienna Convention on the Law of Treaties.

¹⁴ Article 64 of the Vienna Convention on the Law of Treaties.

¹⁵ See the provisions of the 1989 Convention on the Rights of the Child and its Optional Protocols

¹⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

the invalidity of a treaty which conflicts with a peremptory norm of general international law. They should:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law.¹⁷

The parties should also take the following measures in recognition of the principle that a treaty which becomes void and terminates:

(a) releases the parties from any obligation further to perform the treaty;
(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.¹⁸

As is evident, the peremptory norms of general international law offer a strong framework for the protection of the rights of children. This includes even those rights which are expressed according to the circumstances of the time and should be superseded or strengthened on the basis of effective protection of the rights of children. That is why when we speak about the international criminal law of children we employ the system of peremptory norms of general international law which are not only unchangeable but are also requisite. This means that the domestic legal systems of states which do not coincide with the peremptory norms of international law protecting the rights of children have to be modified to this end.

Consolidated Parts

Among the most established parts of the international criminal law of children are international human rights law, international

¹⁷ Article 71 (1) of the Vienna Convention on the Law of Treaties.

¹⁸ Article 71 (2) of the Vienna Convention on the Law of Treaties.

humanitarian law, and international criminal justice. These three bodies of law make an effort to strengthen the legal status of children and prevent any conduct, action or decision which may prejudice the implementation of the legitimate rights of children. For example, some of the most widely-recognized rights of children are the following:

- The right to religious, cultural, language, race, ethnic, or any other similar matters;
- The right to integrity;
- The right to legal personality;
- The right to express his/her views;
- The right to be a party to an agreement;
- A right to be recognized as a child when a person is below eighteen years old;
- The right to be respected in all legal procedures;
- The rights to incontrovertible rights to protection;
- The rights to legal identity in criminal procedures;
- A right not to be recruited as a soldier when he is less than fifteen years old;
- The right not to be infanticide;
- The right that no crimes be committed against them;
- The right that transnational crimes be prevented against them;
- The right that international crimes be prevented against them;
- The right that not to be used as slave;
- The right not to be employed for heavy labour;
- The right not to be used in prisons for hard labour;
- The right to protection from unlawful sexual or pornographic exploitations;
- The right not to receive capital punishment;
- The right not to receive life imprisonment;
- The right regarding prohibition of corporal punishment in the juvenile justice system;
- The right not to be kept in adult's prisons or jails;
- The right not to be the object of armed attacks.

Mandate of International Criminal Law for Children

Protection of Children

Each branch of public international law has generally speaking a specific mandate that underlines the way in which it works and carries out its role in international public order. The same is true of the system of international criminal law. The system is authorized from its very inception to formulate certain rules that are necessary for the recognition, prevention, and eradication of international crimes against children.¹⁹ Furthermore, it is also one of the primary purposes of international criminal law to regulate proceedings for the prosecution and punishment of international criminals. This has to be in accordance with an appropriate criminal jurisdiction and more obviously a definite statute. Thus, the function of international criminal law is based on the chief element of the criminalization of acts that are deemed unacceptable by the international political and legal community as a whole and are eventually condemned. The scope of criminalization should therefore be considered as the most substantive function of international criminal law.

Yet this substantive part is also strengthened under the provisions of natural law which are integrated into human rights law. In other words, international criminal law strongly protects those primary natural rights of man that are inherited by all human beings and should not be taken from them for any reason, such as right to life, right to home, right to protection, political and social rights and also the right to reside in the land and territories

¹⁹ There are a large number of documents protecting the rights of children and creating the concept of ICLC. These are such as Geneva Declaration of the Rights of the Child (1924), Declaration of the Rights of the Child (1959), Convention on the Rights of the Child (1989), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), African Charter on the Rights and Welfare of the Child (1990), European Convention on the Exercise of Children's Rights (1996), Standard Minimum Rules for the Treatment of Prisoners (1955), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), United Nations Guidelines for the Prevention of Juvenile Delinquency (1990), United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

in which one has learned ones culture. Protection of these and many other rights are the primary purpose of international criminal law and it is upon this basis that the system of international criminal law was strengthened and settled after the outbreak of the Second World War. This not only aimed at the protection of individuals, but to a great extent, at the practical protection of children from unlawful acts of armed conflict.²⁰

Humanitarian Rules

Historically, however, the strengthening of the system of international criminal law has been straightforward and this is still one of the serious problems facing the law that has been ignored by many writers up until recently. The fact is that the system existed even during previous centuries, although not as a separate branch of the “law of nations,” but rather as an integral part of the body of law which was called “the law of war.” These laws regulated the rules of war between states with very few terms concerning children. Yet, these laws in their own terms were mostly created after an armed conflict by victorious states which had the authority to designate the rules and provisions of peace treaties. This was the case also after the First and the Second World Wars with the drafting of the law of war to apply to new areas, with new concepts of violations such as war crimes, crimes against humanity, aggression and genocide.

Nevertheless, it has to be stated here that the primary mandate of the international criminal law of children has been imposed by the rules of the international humanitarian law of armed conflict and therefore the enumeration of other international crimes into the system of international criminal law is mostly

²⁰ For example Article 38 of the 1989 United Convention on the Rights of the Child has proclaimed that “State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.” It has however permitted in certain situations when people who are over the age of 15 but under the age of 18 voluntarily take part in combat as soldiers. Nevertheless the provisions of Article 4 of the Optional Protocol to the Convention on the Rights of Children has stated that states parties “shall take all feasible measures to ensure that persons below the age of 18 do not take a direct part in hostilities and that they are not compulsorily recruited into their armed forces.” This means that there are basic differences between the provisions of the Convention and the Protocol.

conventional or promotional. This mandate put a particular weight on the rights of civilians and specifically the rights of children in wartime. This means that rules governing the prevention of certain criminal conducts during armed conflicts or the prohibition of certain acts against the population of occupied territories, in particular children or pregnant women, are not only a part of certain conventions of the eighteenth, nineteenth, and twentieth centuries, but are also a product of the long development of the customary international criminal law of armed conflict since the creation of the concept of states.

The charters, constitutions, or statutes of international criminal tribunals/courts are the descendants of these developments and all these together have helped in the strengthening of the system protecting the rights of children during an armed conflict. Examples are the International Military Tribunal for the Prosecution and Punishment of Major War Criminals in Nuremberg, 1945 to 1946; the International Military Tribunal in Tokyo, 1946 to 1948; the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) from 1991 to 2013; the International Criminal Tribunal for Rwanda (ICTR) begun in 1994, ending in 2014; the Mechanism for International Criminal Tribunals, tasked since 2010 with carrying out the works of the last two tribunals mentioned above after they cease operations; the Special Criminal Court for Sierra Leone (CCSL) since 2002; and also the Permanent International Criminal Court established at The Hague. The courts have defended, among other rights, the inalienable rights of children and necessity of their physical protection by the conflicting parties. In fact, one of the mandates of the courts is to prosecute and punish those who have committed serious criminal conduct constituting crimes against children.

These courts constitute the milestones for the rapid development of the system of international criminal law since 1919, and particularly 1945, and its consolidation in the twenty-first century. Some of the legacies of international criminal courts for international criminal law have been therefore to emphasise that rules of war should be respected by all conflicting parties and that violations of the rules of armed conflict constitute war crimes and, in certain situations, crimes against humanity. The ruling decisions of the courts also demonstrate the fact that regardless of

the degree and nature of a conflict between the conflicting parties, or occupying and occupied states or territories, the conflicting parties have certain duties and obligations regarding the maintenance of international rules governing the protection of children, serious violations of which may be recognized as war crimes, crimes against humanity or genocide. There may indeed be evidence which proves that all these three categories of crimes have been committed against children simultaneously.

Identifying International Crimes against Children

Hesitation

The function of international criminal law is to identify international criminal behaviour against men, women and children.²¹ This means that the law aims to recognize which acts do and do not constitute international crime. The elaboration of this function has been one of the important reasons for the slow evolution of the system and its recognition as law creating obligations for all states. This difficulty of identification has not necessarily been a result of the absence of international conventions but rather of the fact that states have been reluctant to identify their own acts or acts of their individuals as constituting international crimes against children. Therefore, political motivations have always played an important role in the identification of international crimes and the scope of their applicability.

Most states have, for example, avoided signing an international treaty which identifies which acts do or do not constitute aggression. For a long time the international legal community failed to adopt an acceptable international treaty which could clearly identify acts constituting aggression. This was because states did not want to be identified as aggressors because of their actions or occupation of the territories of other states or the unlawful

²¹ For the development of the principles of International Criminal Law of Children see Farhad Malekian and Kerstin Nordlöf, *The Sovereignty of Children in Law* (2012); Farhad Malekian and Kerstin Nordlöf, *Confessing the International Rights of Children* (2012); Farhad Malekian and Kerstin Nordlöf, *Prohibition of Sexual Exploitation of Children Constituting Obligations Erga Omnes* (2013); Farhad Malekian and Kerstin Nordlöf, *International Legal Status of Children in the Encyclopaedia of Criminology & Criminal Justice* (Jay S. Albanese, editor, 2014).

killing of civilians, including children. For this reason, most states preferred to focus on other aspirations at the expense of the recognition of the international crime of aggression, although the crime has been one of the oldest crimes identified in the system of international criminal law.²² The international policies of states, in particular those of the strongest states, caused all such proposals between 1919 to 1939 to be ineffective and these policies for the non-acceptance of a definition of aggression carried over even into the United Nations and from that organ into the drafting process of the International Criminal Court. Thus, political assessments have had a defining role in the identification, recognition and penalization of international crimes committed against men, women, and children.

It is due to the issue discussed above and many other practical reasons that the development of the system of international criminal law has been very slow and consequently criminals have succeeded in fleeing prosecution and punishment.²³ This is particularly tangible in the contemporary position of international criminal law. Almost all international crimes and all international criminal courts, including the permanent and *ad hoc* tribunals, have prosecuted and punished individuals of those states which are at an early stage of political development and which are in the process of trying to understand what democracy means and how it functions.

Consequently, the international courts which have been established by the United Nations after the end of the lengthy Cold War between the two super power states have aimed solely at the prosecution and punishment of individuals of militarily weak states. The concept of international crimes, such as crimes against humanity, war crimes and genocide that have been recognized in the constitutions of the United Nations Tribunals have entirely been used against nations which are politically very weak and underdeveloped. In other words, individuals of powerful nations have not been brought to justice and have avoided prosecution and punishment.

²² See Gerhard Kermp, *Individual Criminal Liability for the Crime of Aggression* (2010).

²³ Another great difficulty has been the very dark and challenging atmosphere around the cold war or between the two super power states and their allies. The United States and the Union of Soviet Socialist Republic have been very critical for the recognition of certain conducts as criminal violations.

The international criminal courts or tribunals base their constitutions on the identification of several categories of crimes recognized by the system of international criminal law. These are crimes against humanity, war crimes, genocide and also, to be recognised in the very near future, the crime of aggression. The first three identifications of international crimes are almost always the ones applied to those who have committed serious criminal conduct against children under international criminal law.

War Crimes against Children

The term “war crimes” constitutes one of the most readily-identified terms in the system of public international law. These crimes have been recognized within most civilizations in the world but with different criteria and to different degrees. War crimes imply acts that are not permitted to be carried out during an armed conflict against enemies or occupied lands. They should be avoided by the conflicting parties and are regarded as violations of the law of armed conflict. These are acts such as attacks against civilians; killing of the elderly, women and children; attacks against schools and hospitals; using weapons of mass destruction: using of weapons that cause unnecessary suffering; destruction of civilian installations; torture of civilians; and devastation of food supplies or other resources necessary for civilians. Although war crimes against children have been particularly prohibited and have been recognized as against the principles of morality and the philosophy of justice, war crimes have been committed repeatedly against children from the dawn of civilization up until today.

Customs Preventing War Crimes against Children

Some of the most important regulations concerning the prohibition of certain acts during armed conflicts and recognizing them as war crimes can be examined within the rules of war under the 1907 Convention IV, Respecting the Laws and Customs of War on Land. According to this instrument, any attack or bombardment for whatever purpose on dwellings, villages, towns or

any building which is undefended was prohibited. The treaty also prevented the commission of other acts in wartime.²⁴ The provisions in the Convention recognized certain responsibilities for the states which were engaged in hostilities, such as avoiding attacks on the life of non-combatants and the property of municipalities, and causing damage to the institutions of religion, charity and education, works of art and historic monuments.²⁵ States were in fact obliged not to violate an occupied state's social services or commit acts against their population. The 1907 "Convention integrated natural law and customary law into international conventional law and it was a step towards the creation of international humanitarian law."²⁶

The Convention should be regarded as one of the clear modifications of the system of international law towards the creation of certain rules that are necessary for the protection of civilians from the threat of war, the danger of developed weapons, fear of being killed, the risk of destruction of residential dwellings by enemies, while also protecting children from unlawful methods of military occupation and calling gradually for the application of the humanitarian law of armed conflict for the recognition of the international criminal responsibility of offenders. Although the Convention aimed at the prohibition of certain acts during armed conflict, its provisions regarding the protection of children were not specified in a separate article. The Convention collectively safeguarded all individuals which meant children practically received the same protection as adults and therefore received no extraordinary protection because of their age. This was one of the serious problems of the Convention regarding the protection of children as it ignored their particularly vulnerable position in armed conflict.

The evolution of the rules of armed conflict in these earlier instruments, including the 1907 Convention, and then the outbreak of the First World War brought the necessity of the protection of civilians including children into the global spotlight for the first time. Many civilians were killed because of the disregarding and violation of the rules of occupation. A clear example is the occupation

²⁴ Article 25.

²⁵ Articles 46, 50 and 56.

²⁶ Malekian, *International Criminal Law*, Vol. I, p. 105.

of the Armenian region under the authority of the Turkish government and the genocide of the population of the area, including children, committed by the shameful Turkish military forces in contravention of the earliest forms of the international humanitarian law of armed conflict which had been strengthened in 1907.²⁷ The killing proved that the international legal community needed powerful rules for the prohibition of certain acts, behaviours or conduct during an armed conflict and practically preventing such acts against children. Therefore, the question was taken into serious consideration during the Preliminary Peace Conference in Paris in 1919. The Peace Conference established a Commission in order to investigate which acts should or should not be recognized as violations of the rules of war and therefore be categorized as war crimes.

The Commission came to the conclusion that there were many acts that should be recognized as war crimes. It listed thirty two acts the commission of which would lead to the attribution of criminal responsibility to the violating party. Thus, parties during conflicts and parties who had occupied other territories by the use of armed force were under obligations not to commit certain acts which were also represented in the customary rules of armed conflict. However, one of the serious problems of this list of acts was its failure to mention explicitly the importance of the protection of the rights of children in armed conflict.²⁸

Ignoring the Murder of Children

Despite the fact that many international conventions and reports created by the League of Nations agreed on the prevention of certain acts during armed conflicts, the outbreak of the Second World War proved that the law concerning the international humanitarian law of armed conflict was not strong enough and states were not prepared to prevent the commission of war crimes. During the war the armed forces of Germany were

²⁷ Farhad Malekian, *Armenian Genocide and the Questions of Responsibility of the Turkish Government* (House of Commons Conference on the Armenia Genocide, Nor Serount Publications, 2007), p. 31-39.

²⁸ The United Nations War Crimes Commission., *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), p. 34-35. For no. 33 see The United Nations War Crimes Commission, p. 478.

responsible for the killing of a large number of unarmed civilians, mainly Jews. Many children were murdered or caused intentional suffering by German forces in the territories of occupied Europe. The Nazi regime was convinced that the Jewish people had to be eradicated from the whole of Europe – a fanatical and irrational ideal which could not be carried out without the mass killing and systematic occupation of Jewish properties by German military power.

The international response to these atrocities led to the establishment of an international military tribunal by the victorious powers. This was known as the International Military Tribunal for the Prosecution and Punishment of Major War Criminals. For the first time in history, the Charter of the Tribunal used the term “war crimes” to describe the way in which humanitarian law have been violated. The Charter states that war crimes are

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.²⁹

The definition, as the above extract demonstrates, recognizes as war crimes acts which were already recognized as serious violations of the law of armed conflict after the First World War by the League of Nations Commission. The definition was also based in its particulars on the concept of the violation of the law of armed conflict under customary international law. The words used in the definition were merely illustrative and were not therefore conclusive. The Tribunal could therefore refer to other acts as constituting war crimes and entailing the international criminal responsibility of the perpetrators.

The definition had several problems. One serious problem of the definition was that it focused exclusively on the criminal acts of the German state and ignored the serious criminal violations by the Allied Powers. A second problem of the definition is that it did not say anything directly about the immoral and unlawful killing of innocent Jewish children who had no idea of what was

²⁹ Article 6 (b).

neither occurring nor any awareness of the forces evolving within the social relations of human beings against their existence. As a whole, the idea of war crimes, their prevention and punishment was based on the methods of proceedings and procedures and not specifically on the shocking violations of the natural or legal rights of children. That is why the Tribunal in Nuremberg did not tackle the question of the mass killing of children separately from the massive and systematic killing of the Jews.³⁰

Protection of Children in Territories under Military Occupation

Since the provisions of the Charter of the International Criminal Tribunal in Nuremberg were temporary and had only been drafted to evaluate the violations of the law of armed conflict during the Second World War, other necessary rules needed to be drafted and be codified. Furthermore, the international humanitarian law of armed conflict created thus far was far from application and the legislation of international criminal law needed precise conventions that could be referred to in times of armed conflict. Moreover, in the creation of the provisions of the earlier international conventions, in particular the Charter of the Nuremberg Tribunal, the victorious states had taken a dominant role

³⁰ The crimes which were committed against (mostly Jewish) children in Europe disfigured the image of justice and humanity in the world. Accordingly: "The Germans and their collaborators killed as many as 1.5 million children, including over a million Jewish children and tens of thousands of Romani (Gypsy) children, German children with physical and mental disabilities living in institutions, Polish children, and children residing in the occupied Soviet Union. The chances for survival for Jewish and some non-Jewish adolescents (13-18 years old) were greater, as they could be deployed at forced labour." <www.ushmm.org/wlc/en/article.php?ModuleId=10005142>. Simultaneously, children who could be hidden with the help of individuals, entities or states were transferred to the new state or Israel. The following description is illustrative of this fact: "After the surrender of Nazi Germany, ending World War II, refugees and displaced persons searched throughout Europe for missing children. Thousands of orphaned children were in displaced persons camps. Many surviving Jewish children fled eastern Europe as part of the mass exodus (Brihah) to the western zones of occupied Germany, en route to the Yishuv (the Jewish settlement in Palestine). Through Youth Aliyah (Youth Immigration), thousands migrated to the Yishuv, and then to the state of Israel after its establishment in 1948." <www.ushmm.org/wlc/en/article.php?ModuleId=10005142>.

and right of decision and therefore most states had not participated in the drafting of those earlier instruments.

It was on the basis of these and many other reasons that the world moved toward the adoption of new conventions protecting civilians from indiscriminate acts of war by occupying powers. Therefore, the 1949 Geneva Conventions were drafted, signed and ratified by states in order to create a legal body responsible for the international humanitarian law of armed conflict. The Conventions formulated the customary international provisions into conventional international law and simultaneously formulated many new rules to be applied in times of armed conflict. The Geneva Conventions are 1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949,³¹ 2) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 3) the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, and 4) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.³²

The provisions of the four Geneva Conventions apply to times of armed conflict, whether of an international or non-international character. The conflicting parties in an armed conflict are under the responsibility to carry out the provisions of the conventions and bound not to breach these provisions. Violations of the rules of the Conventions are not therefore permitted for any state.³³ This is for four essential reasons: firstly, the parties to the Conventions are bound by the principle of *pacta sunt servanda*; secondly, the provisions of the Conventions constitute an integral

³¹ This convention has been developed since 1864, 1906, 1929, and finally 1949. Therefore, the Convention is one of the significant instruments of international criminal law protecting individual during an armed conflict.

³² *Id.*, p. 122-141.

³³ However, it must be stated that the provisions of these Protocols have not been respected and have often been violated by different states in national or international armed conflicts. A clear example of this is "The Gaza massacre or the grave violations of the international humanitarian law in Gaza was a three week long horrific attack on the civilization of the Gaza Strip. The war was waged by the Israeli armed forces against the population of the Gaza Strip at the end of 2008 and the beginning of 2009. At least 1550 civilians were killed, one third of whom were very young children. Only a few Israeli people were killed by the Hamas militants." Farhad Malekian, Judging International Criminal Justice in the Occupied Territories, *International Criminal Law Review* 12 (2012) 827-869, 841.

part of international customary law; thirdly, the Conventions are a central pillar within the international humanitarian law of armed conflict; fourthly, the provisions of the Conventions are a significant part of the international law of *jus cogens*. This means that they constitute peremptory *regulations* and, consequently, compulsory humanitarian obligations upon all states regardless of their ratification of the Conventions.

The content of all four conventions require that states should protect civilians and children in all possible circumstances and that they do not commit war crimes. These crimes include murder, extermination, killing of children, minors or infants, violence to life, mutilation, humiliation, torture and cruel or degrading treatment.³⁴

Additional Protocols Safeguarding Children

Whilst the provisions of the four Geneva Conventions were formulated to outline the existence of principles respect for which is important in times of armed conflict, some of the states parties were not satisfied with their provisions and pressed for the adoption of more detailed provisions for the prevention of certain acts that should not be allowed to occur during an armed conflict. Consequently, states parties to the Geneva Conventions drafted and adopted two additional protocols to the four Geneva Conventions. These are the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977 and the Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977. These Protocols include a considerable number of provisions governing armed conflicts that were not properly examined within the provisions of the four 1949 Geneva Conventions.

Condemning the Murder of Children

In a broad sense many questions of the protection of children and the safeguarding of their position from various attacks arise

³⁴ *Id.*

in the context of armed conflict. It is for this reason that most relevant international conventions have focused on the protection of civilians, in particular minors, women and the elderly. Although the four Geneva Conventions and the two Protocols adopted certain provisions regarding the protection of women, men and children, these were not seen by the legislators as sufficient to protect the position of children. The two Protocols therefore focused on the rights of children in a separate chapter. They make it clear that the conflicting parties have conventional duties to protect children in all possible situations and avoid any act which may danger their security. Chapter II of Protocol I relating to measures protecting women and children declares that:

Art 77. Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them 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 the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of *eighteen years* at the time the offence was committed.

That is why almost all crimes committed against children at the international level are bound by the provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.³⁵ States are obliged to follow the

³⁵ Article 1.

provisions of the conventions and prevent any actions which prejudice the protected rights of children. The purpose of the Statutory convention is also to underline that those who commit criminal acts against children cannot escape from criminal responsibility by invoking any statute of limitations. It must nevertheless be asserted that the provisions of Article 77 of the Additional Protocol are not as strong as they could be for the protection of the rights of children. This is based on the fact that the article uses the term “all feasible measures” which is subject to very profound differences in interpretation varying from state to state.

Evacuation of Children

The contracting parties to the Geneva Conventions and Protocols have also taken into serious consideration and have recognised the situation of children who should be evacuated because of the conditions of war, armed attacks or the absence of certain necessary requirements for their health or social care. Protocol I has formulated certain provisions regarding the evacuation of children from war zones but attaches certain conditions. It provides that:

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.³⁶

As is evident, according to the provisions of Protocol I no evacuation can be carried out without the primary consent of

³⁶ Art 78. Evacuation of children.

a rightful guardian of the child. This means for the evacuation of each child a legitimate form of consent should be expressed by the parents or any other person who is responsible for the care or the safety of the child in question. With all these safeguards the provisions above aim at preventing abuse or decisions against the interests of the child and calls simultaneously on the responsibility of the occupying state not to resort to unlawful decisions which may harm the present or the future position of the child.

Minimizing the Risk of Harm to Children

Protocol I additional to the Geneva Conventions on the humanitarian law of armed conflict puts a heavy weight on the position of children who are, for one reason or another, the subject of evacuation because of armed conflict. The parties to the Protocol have therefore accepted clearly defined responsibilities for the protection of the identity of children and providing of assured facilities for their return to their country of origin. Thus, authorities who are engaged in the evacuation and receiving of children have duties not only to safeguard children's physical health but also to record all information concerning their identities. The Protocol clearly concerns the question of the protection of children not only by an occupying power, but also, by all other states who are engaged with the wider consequences of armed conflicts.

Protocol I clarifies that:

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

- (a) surname(s) of the child;
- (b) the child's first name(s);

- (c) the child's sex;
- (d) the place and date of birth (or, if that date is not known, the approximate age);
- (e) the father's full name;
- (f) the mother's full name and her maiden name;
- (g) the child's next-of-kin;
- (h) the child's nationality;
- (i) the child's native language, and any other languages he speaks;
- (j) the address of the child's family;
- (k) any identification number for the child;
- (l) the child's state of health;
- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.³⁷

The list above outlines with no room for doubt the importance of the child's right to a childhood and his/her need for an effective protection of personal identity. This means that the relevant authorities of the contracting parties are under a recognized responsibility to record and safeguard the identity of each child and avoid any action or decision which may prejudice the legal status of the child. The intention of the legislator is therefore two-fold: firstly, it is to protect the position of the child with the rules of international criminal law; and secondly, it is to emphasise the responsibility of the relevant authorities who are engaged in armed conflict.

Humane and Fundamental Guarantees for Children

The Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 1977 is another international

³⁷ Art 78. Evacuation of children.

instrument dealing with the questions of the protection of children as set out in Protocol I.³⁸ The difference between the first and the second protocol is the scope of their applicability and not their legal validity. Protocol II encloses three significant humanitarian principles: principle one concerns the necessity of fundamental guarantees protecting those who do not take a direct part in armed activities;³⁹ principle two deals with those persons whose liberty has been restricted during a time of armed conflict;⁴⁰ principle three concerns the respect of generally recognized principles for penal prosecutions such as the principle of innocence until proven guilty, the right to a defence, conviction on the basis of individual responsibility and the application of the law in force at the time a crime was committed and not the retroactive application of a law.⁴¹

Some of the most significant provisions of the Protocol dealing directly with the rights of children are entered into the provisions of Article 4 relating to humane treatment and fundamental guarantees for children. The provisions of the article clearly protect the moral, cultural, and legal statuses of children who may be the victims of non-international armed conflict. The article reads that:

- ...
3. Children shall be provided with the care and aid they require, and 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 in the armed forces or groups nor allowed to take part in hostilities;

³⁸ The Protocol was opened for signature in Berne, on 12 December 1977 and came into force on 7 December 1978. U.N. Doc. A/32/144 Annex II; International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949*, Geneva, Geneva, 1977, p. 89-101; 16 ILM (1977), p. 1442.

³⁹ See Article 4.

⁴⁰ See Article 5.

⁴¹ See Article 6.

- (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.

The Protocol condemns the participation of children in armed conflicts. Specifically, it underlines that children who have not attained fifteen years of age should not in any circumstances be forced to take part in armed hostilities. Article 4 of Protocol II has therefore aimed to create legal protections for children below the age of fifteen who are, for one reason or another, forced to participate in armed conflict. In this case, “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 subparagraph (c) and are captured.”⁴²

The purpose of the above provisions is to emphasise two important principles regarding the protection of children. The first principle specifies the age limit of fifteen years below which participation in armed conflict is not permitted, while the aspiration of the second principle is to bring to the attention of conflicting parties that the participation of a child in an armed conflict who has not reached fifteen years of age should not be interpreted as removal of his/her protection. The Protocol has therefore underlined that the “death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.”⁴³

It may be asserted that the provisions of Protocol II governing children are partly based on the customary interpretation of the rules of armed conflict during hostilities. The provisions are also the development of the rules of conventional international law, such as the four Geneva Conventions, which were not clearly elaborated at the time of their formulation and created ambiguity, controversy and a broad gap within the scope of their applicability

⁴² Article 4 (3,d).

⁴³ Article 6 (4) concerning penal prosecutions.

at the international level. The Protocols came into existence to fill this gap.

War Crimes against Children and the International Criminal Courts

Practically, the definition of war crimes in international criminal law has been, to a great extent, developed within the statutes and judgements of international criminal tribunals or courts. The first definition of war crimes was drafted into the provisions of the Charter of the Nuremberg Tribunal.⁴⁴ The establishment of the Tribunal was met with many sharp criticisms by a considerable number of states and international lawyers. The criticisms were based essentially on the fact that the Tribunal itself and its law were both retroactive and did not therefore have any basis in the system of international law. Criticisms were also made concerning its non-impartiality.

Regardless of the many criticisms of the Charter of the Tribunal, it is true that its laws concerning war crimes were not only based on conventional approaches to the law but also on principles of customary international law. It is in this regard that the definition of war crimes had long been rooted in international law. However it is true that the Nuremberg Tribunal did not separately deal with the questions of crimes committed against children and therefore children were, like other categories of persons, recognized as an indistinguishable part of the general civilian population. No particular priority was given to children because of their age.⁴⁵

Despite the occurrence of many wars between many states, particularly the war waged by the United States in Vietnam and the occupation of its territories, no need for the codification of a new concept of war crimes was seen by the great powers as necessary for the world. In other words, the definition, application and interpretation of such crimes were legally monopolized. Consequently, it was only in 1993 that the first definition of war

⁴⁴ On Nuremberg Tribunal see generally Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 Harv.L.R. 1059 (1942-3); Hans Kelsen, *Will the Judgement of the Nuremberg Trial Constitute a Precedent in International Law*, 1 INT'L L.Q. 153 (1947).

⁴⁵ Article 6 (b).

crimes, under the term “violations of the laws or customs of war,” was drafted by the United Nations Security Council into the Statute of the ICTY.⁴⁶ The Statute relates to two significant questions of international criminal law concerning war crimes. These are the law and customs of war and grave breaches of the relevant law in the territories of the occupied state by the criminal acts of the occupying state.⁴⁷

The Statute of the ICTY also clarifies which acts constitute grave breaches of the law of armed conflict and therefore entail the attribution of criminal responsibility to individuals of the occupying state. According to it, the Tribunal has the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions.⁴⁸

The International Criminal Tribunal for Rwanda (ICTR) has similar provisions to the ICTY regarding the prohibition of war crimes and grave breaches of the international humanitarian law of armed conflict. The Statute of the ICTR makes it clear that Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II constitute war crimes.⁴⁹

Under certain conditions which are mentioned in the Statute, it is possible that the international humanitarian law of armed conflict may be judged to have been violated by the conflicting parties in the occupied territories. The law makes it clear that the occupying power has a great responsibility not to violate the obligations of international criminal law.

Disputes concerning what do and do not constitute unjust and therefore grave breaches of armed conflict are, however, frequent. The proceedings and records of international criminal courts display the fact that many disputes are irrational and it is only when a conflict flares up constituting a danger to peace or some other political crisis that it leads to an international reaction. In other words, an occupying power which hides the truth

⁴⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

⁴⁷ Article 3.

⁴⁸ Article 2.

⁴⁹ Article 4.

concerning the commission of war crimes and serious violations of the law of armed conflict may nevertheless later face serious difficulties in the procedures of international criminal courts and jurisdiction. This happened in the case of those individuals who were brought before the ICTY or the ICTR. Individuals who had violated the law of armed conflict faced similar problems in the proceedings of the Special Court of Sierra Leone (SCSL). Almost all those who were brought to the above courts were prosecuted and received terms of imprisonment according to the gravity of their criminal decisions or conduct. The SCSL in particular has dealt with questions of violations of international criminal law against children.

However, it is true that all international crimes against children are not prosecuted or punished. Clear examples are crimes committed against Iraqi children during the Gulf War beginning in 1991.⁵⁰ These crimes were war crimes, crimes against humanity and aggression committed by the United States and the United Kingdom governments.⁵¹ None of the responsible authorities of the relevant governments were brought before any national or international criminal court.⁵² Similar conclusion can be reached about the serious criminal actions which have long been committed against the Palestinian's children by the government of Israel.⁵³ Official Reports of the United Nations denote to this fact. Although, violations against Palestinian's children are seriously condemned by the international legal and political community, responsible individuals have never been brought before any national or international criminal court.⁵⁴ More seriously, the serious

⁵⁰ See Farhad Malekian, *Condemning the Use of Force in the Gulf Crisis* (1993); see also <<http://www.countercurrents.org/azzawi010310.htm>>, (access: 02.02.2014); see also World Tribunal on Iraq: Final Declaration of the Jury of Conscience, <<http://www.indymedia.org.uk/en/regions/world/2005/08/320190.html>> (access: 02.02. 2014).

⁵¹ <http://www.brussellstribunal.org/article_view.asp?id=925#.Uu7NS_vY-EYg> (access: 02.02.2014).

⁵² <http://www.gicj.org/index.php?option=com_content&task=view&id=282&Itemid=4> (access: 03.02.2014).

⁵³ Farhad Malekian, *Judging International Criminal Justice in the Occupied Territories*, *International Criminal Law Review* (2012), p. 827-869.

⁵⁴ Human Rights in Palestine and Other Occupied Arab Territories, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48,

violations of international criminal law of children are occurring continuously.⁵⁵

War Crimes against Children in the Statute of the ICC

Many important regulations governing what constitutes a war crime and what constitutes a breach of international humanitarian law of armed conflict can be found in the Statute of the International Criminal Court (ICC). By contrast with other international criminal courts which have *ad hoc* characters, the ICC is a permanent Court. This means that the function of the ICC is not restricted for a limited time period and its Statute should be respected at all times. The Statute recognizes several international crimes, including war crimes. The definition of war crimes in the Statute is strictly speaking much broader than the definitions of war crimes in the statutes of other earlier international criminal courts. It could be said that the definition used by the ICC is a combination of several international factors including the effect of customary international law.

The Statute's definition explicitly calls upon the responsibilities of states in armed conflict and occupying states to respect the international humanitarian law of armed conflict and to avoid unnecessary suffering. The definition also strictly prohibits conflicting parties from committing certain criminal acts against *children*. Although the statutes of other international criminal courts have dealt with the questions of serious crimes committed against civilians or children, this is the first time that the statute of an international criminal court has formulated explicit regulations concerning the prohibition of certain acts against children. The statute has, for example, criminalized the use of children as soldiers. Article 8 of the Statute reads that "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" in international or non-international armed conflict constitutes a war crime.

15 September 2009, para.32. The report was prepared by Richard Goldstone, a distinguished international lawyer and judge.

⁵⁵ *Id.*

The long list enumerating war crimes in Article 8 of the Statute of the ICC demonstrates the inherent requirements of international humanitarian law of armed conflict for the conflicting parties not to engage in activities that violate the system of international criminal law of children. The intention of the legislators is here to emphasise that pleas of defence or self-defence by contracting parties do not by themselves create permission to violate the principle of proportionality or the principle of duties of the occupying states towards the population of the occupied country.

The legislator's aim is also to create a distinction between what we call an act of war and what is called criminal conduct in its strict definition. The contrast between the legitimate conduct of armed conflict and the list of prohibited acts deriving from the imperatives of conventional and customary international criminal law makes the task of international organs such as the General Assembly, the Security Council and the international criminal courts apparently much more straightforward. The list is also intended to emphasise that the international humanitarian law emanating from the Geneva Conventions or their Protocols cannot present the development of the system of international criminal law regarding certain new emerging weapons technologies. Thus, the Statute of the ICC with its long list of provisions applicable to international crimes tries to guarantee the fact that the question of possible uncertainty surrounding the conduct of conflicting parties will not freeze the provisions of international criminal law governing the protection of justice, of victims and the prosecution of those responsible for international crimes committed against children.

Criminal Responsibility for the Recruitment of Children

One of the most significant functions of the system of international criminal law of children is to bring the perpetrators of international crimes against children under international criminal jurisdiction and to attribute criminal responsibility to the perpetrators.⁵⁶ In particular, the system has been decisively important

⁵⁶ See Alison Smith, Child Recruitment and the Special Court for Sierra Leone, 2 *Journal of International Criminal Justice* 1141-1153 (2004).

concerning the attribution of criminal responsibility to those who have recruited children in armed conflict. This has been demonstrated particularly effectively by the concept of criminal responsibility which has been developed within the Statute of the Special Court for Sierra Leone.⁵⁷

This concept contains some of the most prominent rules for the protection of children and punishment of those who deploy children as soldiers during armed conflict.⁵⁸ The Statute recognises the recruitment of child soldiers as a serious crime under the structure of the international humanitarian law of armed conflict.⁵⁹ According to Article 4 (c) “Conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities” constitutes a violation of international humanitarian law.⁶⁰

There were several crucial reasons for the formulation of Article 4 (c) of the Statute.⁶¹ However, the most fundamental motivation behind the article was the fact that during the civil war in Sierra Leone children were influenced or kidnapped and forced to take part in the armed conflicts.⁶² This military strategy was

⁵⁷ The Statute was formulated in response to the Civil War in Sierra Leone which began on March 23, 1991 and finished on January 18, 2002.

⁵⁸ Most shockingly, the recruitment of children as soldiers was a strategy adopted from the very beginning of the war. See *ibid.*

⁵⁹ Consult *ibid.*

⁶⁰ Article 4 (c). For the examination of the views of the Special Court consult *id.*

⁶¹ See <www.crin.org/law/Instrument.asp?InstID=1263 - 21k> (access: 20.01.2014).

⁶² According to the Prosecutor of the Special Court for Sierra Leone, the politician Samuel Hinga Norman had criminal responsibility for the use of children under the age of 15. He stressed “The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.” Moreover, a considerable number of other international instruments establish the prohibition of child recruitment such as the ICC Statute, which represents the codification of the rules of customary international law. The *Tadic* case is another example proving the existence of customary rules for the prohibition of child recruitment. According to the prosecutor, the president of the Security Council has also declared the condemnation of child recruitment in the body of the international humanitarian law of armed conflicts on 29 June 1998. The concept of the prohibition of child recruitment has in fact entered into the

not only against the Convention on the Rights of the Child, but was also against various international conventions protecting the rights of children in peace and wartime.⁶³ An examination of different cases brought before the Special Court demonstrates the widespread abuse of children less than fifteen years of age.

The Charles Taylor Case is one of the most notorious cases to have come before the jurisdiction of international criminal courts in which the system of international criminal law of children has been applied to prove the criminal responsibility of a head of state for crimes against children. Among the crimes committed against children during the conflict were rape, abduction, subjection to sexual slavery, conscription of minors and forced labour. According to witnesses, militias allegedly authorised by Charles Taylor abducted and terrorized children in various ways. They trained children in “Small Girls Units” and “Small Boys Units” and sent them to villages and cities in order to kill and mutilate people, sometimes even their own families.⁶⁴ Taylor was finally convicted by SCSL in 2012 for 50 years imprisonment.

Another case similar to the character of the above case is the final judgment of the ICC concerning the charges against Thomas Lubanga Dyilo who was accused of committing several serious international crimes, in particular child requirement.⁶⁵ The case concerns the alleged crimes committed in the Democratic Republic of the Congo.⁶⁶ There are allegations that Lubanga was the former President of a political group, namely, Union des Patriotes Congolais (UPC), since its establishment in September

declaration on the Prevention of Children into Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa which clearly states that “those responsible for illegally recruiting children should be brought to justice.” [Cape Town Principles and Best Practices on the Recruitment of Children in to the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Symposium of the NGO working on the Convention of the Rights of the Child and UNICEF, 30 April 1997, para 4.]

⁶³ Consult [http://www.sc-sl.org/Documents/CDF/SCSL-04-14-AR72\(E\)-131-7398.pdf](http://www.sc-sl.org/Documents/CDF/SCSL-04-14-AR72(E)-131-7398.pdf) (access: 01.02.2014).

⁶⁴ *Sexual Violence in the Sierra Leone Conflict*, 15 Human Rights Watch (Africa Division)-1(A) (Jan. 2003), at 6-8, 28-63, 76-7, [http://www.hrw.org/reports/2003/sierral eone/](http://www.hrw.org/reports/2003/sierral%20eone/) (access: 03.02.2014).

⁶⁵ For the full case see Farhad Malekian, *Jurisprudence of International Criminal Justice* (2014), p. 461-465.

⁶⁶ *Thomas Lubanga Dyilo*, (ICC-01/04-01/06), Warrant of Arrest, 10 February 2006.

2000.⁶⁷ Lubanga was, alongside other leaders of the conflicting party, arrested by Congolese authorities and imprisoned in Kinshasa. He was then later arrested by the ICC in 2006.⁶⁸

The Prosecution alleged that Lubanga recruited children under the age of fifteen years. Therefore, there were several charges against Lubanga. He was charged with criminal responsibility as a co-perpetrator, jointly with other active members of two different groups. He forced children into many forms of military training. After the training, he compelled them to participate in different military activities. The children were also used for the protection of military officers from any act against them.⁶⁹ Similarly, according to the Pre-Trial Chamber in 2007, there was enough evidence to establish substantial grounds to prove that Lubanga was responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen.⁷⁰ It is relevant to present the charges demanded by the Pre-Trial Chamber against Lubanga:

Charges arising in the context of “Non-international armed conflict:”

- Count 1: CONSCRIPTING CHILDREN INTO ARMED GROUPS, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.
- Count 2: ENLISTING CHILDREN INTO ARMED GROUPS, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.
- Count 3: USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

Charges arising in the context of “International armed conflict:”

- Count 4: CONSCRIPTING CHILDREN INTO NATIONAL ARMED FORCES, a WAR CRIME, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.
- Count 5: ENLISTING CHILDREN INTO NATIONAL ARMED FORCES, a WAR CRIME, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.

⁶⁷ Malekian, *Jurisprudence*, p. 461.

⁶⁸ *Id.*

⁶⁹ *Id.*, p. 462.

⁷⁰ <<http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf>>.

Count 6: USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a WAR CRIME, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.

After many prolong investigations and hearings, the Chamber concluded in 2012 that

the prosecution has proved beyond reasonable doubt that ... Lubangav...vis guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.⁷¹

Lubanga was finally sentenced to 14 years imprisonment by the ICC. This is the first case of the ICC which came to the end and in which the body of international criminal law of children has been focused in the Court. On the whole, the system of international criminal law is even directed to establish transnational measures against the impunity of international crimes.⁷²

Conclusion

Owing to limits of space this has of necessity been a brief study and much more attention needs to be devoted to the international criminal law of children.⁷³ The article has dealt solely with those aspects of war crimes most relevant to the discussion. Obviously, the international criminal law of children has not been developed to apply only to war crimes but also concerns crimes against humanity, genocide, sexual exploitation, slavery and pornography. This system of law has long been consolidated in

⁷¹ *Id.*

⁷² Albin Eser., Transnational Measures against the Impunity of International Crimes, JICJ (2012), p. 621-634.

⁷³ See also Arts, Karin; Popovski, Vesselin (eds.), International Criminal Accountability and the Rights of Children (2006); Grover, Sonja C., Prosecuting International Crimes and Human Rights Abuses Committed Against Children – Leading International Court Cases (2010); Comparative Youth Justice – Critical Issues (2009); Bergsmo, Morten (ed.), Thematic Prosecution of International Sex Crimes (2012).

the system of international public law and it constitutes, without doubt, a significant part of the international legal system. The purpose of the international criminal law of children has been first and foremost to protect and support the position of children whether in times of war or peace. As a result, a framework has been created in which numerous laws, regulations, rules and principles are collected which specify what is and is not permitted to be carried out against the legal personality of children.

Among the most significant values of the system of international criminal law of children is the principle that the legal characterization of the law is not only preventive and prohibitive but is also punitive. This is based on the fact that the international criminal justice system ensures that the violators of the law are brought before the international *ad hoc* or permanent tribunals for prosecution and punishment. That is why one of the most important tasks of the international criminal tribunals has been to bring the perpetrators of international crimes against children under their jurisdictions.

Regardless of what has been said about the international criminal law of children, the implementation of the law is still a very difficult question among the international legal community based on the fact that, for different reasons, states do in fact continue to violate the rights of children. Rights belonging to children are still a question of legality and not reality. The reason is that the protection of children under international criminal law has not yet become a universal policy. Most states in the world have its own tactics for the use of children in military armed conflicts. Another strong reason is that the permanent members of the Security Council of the United Nations have quite different policies in their own national military systems. Although the permanent members have defended the position of children in various situations, they have also been responsible directly or indirectly for the widespread killing of children during armed conflicts. For example, they have not taken any action against the murder of Palestinian children, or children in Iraq and Afghanistan. Nevertheless, the international criminal law of children does enjoy the principle of universality which means that all those who commit crimes against children, wherever they are arrested, have to be prosecuted and punished or must be submitted to the jurisdiction of the permanent International Criminal Court for appropriate prosecution and punishment.

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