

CHILD PROTECTION

Child soldiers and the International Criminal Court

RUTH HAMNETT looks into the campaign to prosecute child soldier recruiters

When they came to my village, they asked my older brother whether he was ready to join the militia. He was just 17 and he said no; they shot him in the head. Then they asked me if I was ready to sign, so what could I do - I didn't want to die.

(A former child soldier from the Democratic Republic of Congo, taken when he was 13.)¹

Introduction

The Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, has chosen to make child recruitment to armed forces the subject of the first prosecution in the ICC. This Brief asks whether the motivation for this decision is to raise international awareness of the issue of child recruitment, to reinforce the legitimacy of the ICC, or both. It goes on to consider the root of child participation in warfare and asks what the international community can do to prevent the problem of child recruitment to armed forces.

ICC prosecution of Thomas Lubanga Dyilo, alleged child recruiter

In April 2004, the Democratic Republic of Congo (DRC) referred the first case to the newly established ICC. The referral covered any crimes within the jurisdiction of the Court allegedly committed in the DRC after 1 July 2002, the date on which the Rome Statute entered into force.²

The ICC Prosecutor, Luis Moreno Ocampo, subsequently indicated his intention to investigate the situation of the DRC in respect of a variety of alleged crimes including the conscription of child soldiers, summary executions, mass murder, torture, rape and other forms of sexual violence.³

In February 2006, an arrest warrant was issued for Thomas Lubanga Dyilo, alleged founder and leader of the Union des Patriotes Congolais (UPC), for his involvement in the conflict in the Ituri region from 2002. Lubanga Dyilo was charged with 'conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities' in direct violation of Art 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.⁴

Significantly, Lubanga Dyilo was not charged with 'summary executions, mass murder, torture, rape and other forms of sexual violence and forced displacement' despite the fact that the Prosecutor has publicly stated that large-scale crimes committed in the DRC included many such atrocities.⁵ The Prosecutor has acknowledged publicly the importance of prosecuting gender crimes, stating that rape is one of the gravest crimes and that rape, as it was used in the

Democratic Republic of Congo, not only constituted sexual abuse but was, in addition, a weapon of war.⁶

The determination of who will be charged, and the crimes with which they will be charged, is a discretionary decision for the Prosecution. As a first prosecution, it is strategically important that the ICC focus on an issue of universal concern and the abhorrent nature of the use of child soldiers is an obvious choice. However, it is no more horrendous than gender crimes and it is unfortunate that the Prosecution chose not to pursue prosecution of these crimes when there appears to be so much evidence to support the commission of such crimes in the DRC.⁷

Whilst the likelihood of successful prosecution is an important consideration in the formative stages of the Court's existence, selective prosecution will not enhance the credibility of the ICC if the international community perceives that prosecutorial discretion is being exercised arbitrarily. Only commitment to the even-handed prosecution of all crimes prohibited by the Rome Statute will build the credibility of the Court and ensure its success.⁸

Underlying factors contributing to child recruitment

Poverty, a lack of educational opportunity, lack of economic opportunity and an increase in war and disease all contribute to the use of child soldiers.⁹ Many children are recruited by force, but others join armed groups out of desperation. Poor children whose communities have been destroyed by conflict, and who have been separated from their families, lack options and may conclude that joining an armed group is their best hope of survival.¹⁰

AIDS is another aggravating factor underlying the problem of child soldiers. In the next ten years AIDS threatens to kill tens of millions of people, destroying communities and creating an entire generation of orphans susceptible to recruitment as child soldiers.¹¹

To fight the grave problem of AIDS, the international community needs to devote far greater resources to it. It is officially estimated that between \$7 billion and \$10 billion each year is required to fight the global spread of the disease, primarily through funding prevention programs worldwide. Currently, however, the international community falls far short of this goal.¹²

Poverty contributes to the use of child soldiers. Many developing states continue to spend a much greater proportion of their national income on their militaries instead of focusing on the health and education of their people. These funds would be far better spent alleviating social and economic failings for the next generation. One way in which the international

REFERENCES

1. Voice of Young Soldiers, Coalition to Stop the Use of Child Soldiers <child-soldiers.org/childsoldiers/voices-of-young-soldiers> at 11 May 2008.
2. Women's Initiative for Gender Justice, Pre-Trial Chamber Submissions in the Situation in the Democratic Republic of Congo ICC-01/04-313 (10 November 2006) <icc-cpi.int/library/cases/ICC-01-04-313_English.pdf11> at 14 May 2008, 11.
3. Tom Malinowski, Washington Advocacy Director, *In Support of the 'The Child Soldiers Accountability Act of 2007': Hearing in the US House Judiciary Subcommittee*, Human Rights Watch, <hrw.org/english/docs/2008/04/08usint18473_txt.htm> at 11 May 2008.
4. On 29 January 2007, the Hague Pre-Trial Chamber I confirmed the charges against Thomas Lubanga Dyilo; International Criminal Court (Press Release, 29 January 2007) <icc-cpi.int/press/pressreleases/220.html> at 14 May 2008.
5. Women's Initiative for Gender Justice, above n 2, 14.
6. Joseph M Madubuike-Ekwe, 'The International Legal Standards Adopted to Stop Participation of Children in Armed Conflicts' (2005) 11 *Annual Survey of International and Comparative Law* 29, 31.
7. Women's Initiative for Gender Justice, above n 2, 14.
8. *Ibid* 16.
9. *Ibid*.
10. Tom Malinowski, above n 3.
11. Peter Singer, 'Talk is Cheap: Getting Serious about Preventing Child Soldiers' (2004) 37 *Cornell International Law Journal* 51, 564.
12. *Ibid*.



- 13. Ibid.
- 14. Ibid 565.
- 15. Joseph M Madubuikwe-Ekwe, above n 6, 31.
- 16. Singer, above n 11, 565.
- 17. Singer, above n 11, 581.

community could promote the better economic development of developing nations, and in turn help alleviate the conditions which invite conflict and the use of child soldiers, would be to make grants of aid to developing states conditional upon such a reallocation of funds.¹³

The proliferation of small arms is also an area for international concern. A surplus of arms since the end of the Cold War has meant that lightweight, automatic weapons are astonishingly cheap and easily accessible. It is estimated that there are as many as 500 million small weapons around the world.¹⁴ In Uganda, an AK-47 simple enough for a child to use can be bought for the same price as a chicken and, in Mozambique, for a bag of maize.¹⁵

There is general international agreement on the need to combat the proliferation of small weapons.¹⁶ However, the international community needs to put more resources, both financial and technical, towards supporting local initiatives aimed at controlling or reversing the proliferation of small arms. The international community should prioritise the destruction of surplus small arms and the improved management of stockpiles. Weapons collection programs must be established in post-conflict states and states where a high risk of conflict exists.¹⁷

Conclusion

It is too soon to say whether or not the prosecution of child recruiters will be a triumph for the ICC and the international community in the quest to end impunity of child recruiters. What is apparent, however, is that it is not through the prosecution of child recruiters alone that the international community will see a decrease in the number of child soldiers employed in modern warfare. For this reason, it is dangerous to view the prosecution of child recruiters as any more than an incremental step for the international community. Prosecution cannot resolve issues of poverty, surplus weapons and AIDS without more strategic efforts from the international community. However, it remains an important element of the campaign to raise awareness of the fundamental human rights abuses inherent in the use of child soldiers.

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