

CHILDREN
AND THE INTERNATIONAL
CRIMINAL COURT

Analysis of the Rome Statute through
a Children's Rights Perspective

Cynthia CHAMBERLAIN



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Email: mail@intersentia.co.uk

Distribution for the UK:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7PP
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:

Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Children and the International Criminal Court
Cynthia Chamberlain

© 2015 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover design © Maricarmen Salazar
Artwork on cover © Harold Chamberlain, Soldadito valiente

ISBN 978-1-78068-295-2
D/2015/7849/51
NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

To my two wonderful sons, Sebastiaan and Samuel

FOREWORD

The history of the 20th century registers some of the bloodiest and cruel conflicts that cast a shadow over the history human beings.

Not forgetting national and international armed conflicts disputed in all continents, the mere memory of the two catastrophic World Wars, allowed the drafters of the Preamble of the Rome Statute to speak on behalf the millions of children, men and women “victims of unimaginable atrocities that deeply shock the conscience of humanity”.

These atrocities referred to in the aforesaid paragraph of the Statute’s Preamble, which were historically left unpunished, lead the international community to the adoption of a new legal system to put an end to their commission. It was this universal consciousness, as well as the imperative need to protect civilian victims, particularly children and women, from the devastating consequences of wars, which lead to the adoption of the Rome Statute in 1998.

With the creation of the International Criminal Court a new paradigm of international criminal justice came into force. It is a new paradigm of justice that includes a gender perspective, the rights of victims to actively participate in judicial proceedings, as well as a new perspective to the enforcement of human rights.

During its existence for more than a decade, the Prosecutors, Registrar and Judges of the International Criminal Court have barely been able to meet the expectations of the international community. They have also fallen short of meeting the expectations of victims in the cases investigated and prosecuted to date. Mistakes have been made, and difficulties and obstacles have been countless. But significant advances have been made which we cannot ignore.

Significant among these advances, has been the judicial acknowledgement of human rights of girls and children, victims of armed conflicts, to be protected from heinous crimes, such as the crime of enlisting, conscription and using children under the age of 15 years actively participate in hostilities. Children have been used and exploited in many different ways in all armed conflicts throughout history. However, it is only with the adoption of the Rome Statute that this war crime became crystallised in an international treaty as an international crime.

In this scenario and with this background is where this book by Dr Cynthia Chamberlain – which I am honoured to preface – acquires enormous transcendence.

It is with research such as that carried out by Dr Chamberlain in writing her remarkable thesis that the future jurisprudence of the International Criminal

Court will progress and advance the application and interpretation of the Rome Statute with a human rights perspective.

Children and the International Criminal Court is an extensive research into the violence that children, girls and boys, have suffered and are still suffering in all armed conflicts and attacks against civilians, although very often left invisible by enforcement mechanisms.

The author critically examines international instruments, including regional ones, and focuses her attention on the new system of the Rome Statute, from a human rights perspective and in light of the United Nations Convention on the Rights of the Child. She examines international criminal law and international human rights law equally, as two legal systems that should be interpreted in a harmonious and integrated manner.

To this end, Dr Chamberlain draws directly to our attention Article 21(3) of the Rome Statute, which sets the applicable law for all activities carried out by the International Criminal Court.

Dr Chamberlain presents a very detailed and creative analysis, with which this book undoubtedly enriches the literature and future academic sources for the analysis and application of the Rome Statute, particularly provisions such as Articles 68 and 75 of the Rome Statute and Rule 86 of the Rules of Procedure and Evidence, and its relationship with the Convention on the Rights of the Child.

As she states – and I agree with her statement – her research is based on the premise that the rights of children included in the Convention on the Rights of the Child are indivisible, interrelated and equal. The authorities that she cites, which derive from a broad range of international standards adopted by the United Nations and its specialised agencies, such as UNICEF, are clear and compelling.

Throughout the different chapters of the book the author examines the relationship between children's rights (the international crimes of which they are victims, their status as victims for participation purposes, as well as their right to reparations). The conclusions with which Dr Chamberlain closes each chapter provoke future academic discussions, and also offer the opportunity for the ICC to enrich the legal basis of its decisions, adjusting faithfully to internationally recognised human rights and the spirit of Rome Statute.

Because this is such a comprehensive research and since the conclusions referred to above are so timely, undoubtedly the final chapter "Conclusions and Recommendations" offers a series of insightful and original contributions that Dr Chamberlain proposes to the International Criminal Court for its future work, particularly as regards the impact of international criminal justice in the lives of child witnesses and victims international crimes under its jurisdiction.

Each and all of the sixteen final recommendations require comments that exceed the aim of this foreword. Their scope and content must be taken seriously by those in the ICC who are required to create a culture of children's rights in international justice, and also very prominently, by the States and international community called to construct a coherent strategy to protect children from

violence in all its manifestations, within and outside the context of armed conflicts.

To conclude her work, Dr Chamberlain suggests the adoption of document that contains guidelines for ICC's work, both in the substantive and in the procedural areas. Based on existing principles of international law, and in perfect harmony with the principles and objectives of the Rome Statute, these proposed guidelines would be extremely useful for judges and court officials, but also for child victims and even for those who appear as accused persons before the Court. For example, the guidelines are extremely useful tool for the correct application of Rule 86 of the Rules of Procedure and Evidence, one of the most significant contributions in this new paradigm of international criminal justice, but which still has to find its true development in the jurisprudence of the Court and in domestic legislation of State Parties, in light of the principle of complementarity.

In the international and the internal order of States that aspire to make international human rights law and international criminal law the sources for societies that are fair and equal, contributions like Dr Chamberlain's are essential. Those of us who have devoted much of our life to human rights and international criminal justice, are greatly indebted to Dr Chamberlain for providing us with new elements to move forward.

Elizabeth Odio Benito
Former Judge
International Tribunal for the Former Yugoslavia
and the International Criminal Court

ACKNOWLEDGEMENTS

I would like to thank firstly my two brilliant supervisors during my PhD process in Leiden University, Professor Marielle Bruning and Professor Elies van Sliedregt. Thank you both for your dedication to this project and for making time in your tight agendas to meet with me, read my drafts and give me your needed and much appreciated guidance. Your enthusiasm motivated me to embark in this endeavour and has made the process of writing a PhD thesis a life-enriching experience. I consider myself privileged to have you both as my supervisors, combining the best of your expertise: children's rights and international criminal law. I could have not asked for a better team to guide me throughout this process.

My thanks for the respectable members of the PhD Committee in Leiden University, who reviewed my manuscript and provided me with valued comments that have without a doubt enriched this book.

Many thanks to my colleagues at the International Criminal Court, for their support throughout this process. I particularly thank my former supervisor and mentor, Judge Odio Benito, for her relentless support and her vision of an ICC that is fully compromised with human rights and with gender justice.

To conclude, I would like to thank those persons in my personal life that have also supported and encouraged me in this challenging process. Firstly my parents, who have sponsored my academic career to and who have always assured me that I could achieve this life-long dream. To my husband, for being a great partner and a fantastic dad to our sons. Thanks for your dedication to our family when my long working hours would not allow me to be there as a mom.

CONTENTS

<i>Foreword</i>	vii
<i>Acknowledgements</i>	xi
<i>List of Abbreviations</i>	xvii
Introduction	1
Chapter 1. Armed Conflict and Children	11
1. Children as Victims of Armed Conflict and Gross Violations of Human Rights.....	12
1.1. Violence against Children as a Method of War.....	12
1.2. Socioeconomic Impact of Armed Conflict on Children.....	15
1.3. Refugee and Internally Displaced Children.....	17
2. Children as Participants in Armed Conflict.....	18
3. Children as Key Players in Peace, Reconciliation and Justice Mechanisms.....	23
4. Conclusions.....	24
Chapter 2. Children and the ICC's Structure	27
1. The Establishment of the ICC.....	28
2. Organisation of the ICC.....	31
2.1. The Assembly of State Parties.....	31
2.2. Presidency and Chambers.....	32
2.3. The Registry.....	35
2.4. The Office of the Prosecutor.....	38
3. Child-Sensitive Reading of the Rome Statute and Other ICC Provisions.....	39
Chapter 3. Application of Children's Rights to the ICC's Legal Framework	41
1. Introduction to Article 21 of the Rome Statute.....	44
2. The CRC.....	52
3. Applicability of Other International Instruments.....	65
3.1. International Humanitarian Law Instruments.....	65

3.2.	Paris Principles	66
3.3.	United Nations Resolutions	71
4.	Regional Instruments and Case Law	75
4.1.	Brief Introduction to the Regional Human Rights Systems	75
4.2.	African Human Rights System	76
4.3.	Inter-American Human Rights System	78
4.3.1.	Definition of Child	80
4.3.2.	Special Protection of Children, particularly during Armed Conflict and in Situations of Gross Violations of Human Rights	80
4.3.3.	Recruitment of Children	83
4.3.4.	Procedural Rights of Children	84
4.3.5.	Children's Rights to Reparation	85
4.4.	European Human Rights System	88
4.5.	Case Law of the Special Court for Sierra Leone	93
5.	Conclusions	96

Chapter 4. Crimes under the Jurisdiction of the ICC and Children 99

1.	Who are the Victims of Crimes Committed against Children?	101
2.	International Crimes in which Children are a Material Element of the Crime	104
2.1.	Genocide by Forcibly Transferring Children of the Group to Another Group	104
2.1.1.	Brief Note on the Crime of Genocide in General	104
2.1.2.	The Act of Genocide of "Forcible Transfer of Children" ...	106
2.2.	Enlistment, Conscription and Use of Children under the Age of 15 to Participate Actively in the Hostilities	107
2.2.1.	Nature of the Crimes of Enlistment, Conscription and Use of Children to Participate Actively in the Hostilities	108
2.2.2.	Conscription and Enlistment and the Controversial Element of "Voluntariness"	109
2.2.2.1.	Consent as a Valid Defence	110
2.2.2.2.	Consent is not a Valid Defence but is Legally Relevant	111
2.2.2.3.	Consent is Impossible and Legally Irrelevant	114
2.2.3.	The Concept of Use of Children under the Age of 15 to Participate Actively in Hostilities	118
2.2.3.1.	Use as "Direct Participation"	118
2.2.3.2.	Use as Direct and Indirect Participation but Excluding Use for Other Purposes (Namely Domestic Work and Sexual Violence)	119

2.2.3.3. Use as “Associated with an Armed Group”	121
2.2.3.4. “Use” Dependent on the Risk to which the Child is Exposed	124
2.2.4. Age Determination	127
3. International Crimes in which Children are Disproportionately or More Seriously Affected	131
3.1. Sexual Violence	131
3.1.1. The Underlying Acts of Sexual Violence	134
3.1.2. Charges of Sexual Violence and Cumulative Charging and Duplicity of Charges	139
3.2. Intentional Attacks against Schools and Other Civilian Objects and Humanitarian Objects	142
4. Conclusions	143
 Chapter 5. Children’s Interaction with the ICC.	 145
1. Reaching out for Children	146
2. Participation of Child Victims at the ICC	155
2.1. Who is a Victim?	155
2.2. The Application Process	163
2.3. Legal Representation and Legal Aid	167
2.4. Modalities of Participation	172
2.4.1. Pre-Trial Stage: Investigation	173
2.4.2. Pre-Trial Stage: Confirmation of Charges	177
2.4.3. Trial Stage	178
2.4.4. Appeal Stage	180
3. Protection of Child Victims and Witnesses	181
3.1. Obligation to Protect and Support	181
3.2. Protective and Special Measures Available to Child Victims and Witnesses	184
3.3. Protection and Reliability of Child Witnesses	197
4. Reparations to Child Victims	198
4.1. Victim Beneficiary of Reparations	199
4.2. Types of Reparations and Harms	201
4.2.1. Restitution	201
4.2.2. Compensation	202
4.2.3. Rehabilitation	204
4.2.4. Other Types of Reparation	205
4.3. Principles on Reparations	206
4.4. Reparations Proceedings	209
5. Conclusions	213

Chapter 6. Conclusions and Recommendations	215
1. Creating a Culture of Children’s Rights in International Justice	216
2. Recognising that Children’s Rights are Not Optional	218
3. Adapting ICC Proceedings to Article 12 of the CRC	219
4. Preserving the Evidence of Child Witnesses	221
5. Protecting Children against Exploitation	225
6. Including the Plight of Children in All ICC Cases	226
7. Reaching Out for Children	227
8. Guaranteeing Active Participation of Child Victims	228
9. Providing Meaningful, Adequate and Fair Reparations for Child Victims, their Families and Communities	230
10. Involving States in an ICC Children’s Rights Strategy	231
11. Concluding Remarks	231
<i>Guidelines on Children and the International Criminal Court</i>	233
<i>Bibliography</i>	239
<i>Table of Cases</i>	249
<i>Table of International Instruments and Resolutions</i>	261
<i>Index</i>	267
<i>About the Author</i>	273

LIST OF ABBREVIATIONS

ACtHPR	African Court on Human and Peoples' Rights
AFRC	Armed Forces for Revolutionary Council
ASP	Assembly of State Parties
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CICC	Coalition for an International Criminal Court
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECECR	European Convention on the Exercise of Children's Rights
ECOSOC	United Nation's Economic and Social Council
ECtHR	European Court of Human Rights
GCU	Gender and Children Unit
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IDP	internally displaced persons
ILO	International Labour Organisation
JCCD	Jurisdiction, Complementarity and Cooperation Division
NGOs	non-governmental organisations
OAU	Organisation of African Unity
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PrepCom	Preparatory Commission
PIDS	Public Information and Documentation Section
RoC	Regulations of the Court
RoR	Regulations of the Registry
RPE	Rules of Procedure and Evidence
RTFV	Regulations of the Trust Fund for Victims
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone

TFV	Trust Fund for Victims
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission on Refugees
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit