ZOOM IN

The Question:

Children in conflicts as victims and perpetrators? Reassessing the debate on child soldiers in light of the involvement of children with terrorist groups

Introduced by Giulio Bartolini and Marco Pertile

The issue of child soldiers and, in more general terms, of the involvement of children in conflicts has been the object of broad interest in the academic debate over time, especially from the perspective of international humanitarian law, human rights law, and international criminal law.[1] Suffice it to recall, of course, the fact that the first sentence of the International Criminal Court was imposed on Thomas Lubanga Dyilo for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the Democratic Republic of the Congo.[2] Along the same lines, one might recall the clamor caused by the case of Dominic Ongwen, one of the leaders of the Lord Resistance Army, who could go down in history as the first convicted person, again by the International Criminal Court, for a war crime he himself had previously been the victim of. The facts of the case reveal that ten-year-old Dominic Ongwen was abducted on his way to school by the Lord Resistance Army and later became one of the leaders of a group responsible, according to the Prosecutor, of an endless list of war crimes and crimes against humanity, including the enlistment and conscription of children.[3]

[1] As of 30 June 2019, a search in the Peace Palace Library catalogue with the key word 'child soldiers' provides 634 results.

[2] On 10 July 2012, Mr Lubanga Dyilo was sentenced by the Trial Chamber to 14 years of imprisonment. On 1 December 2014, the Appeals Chamber confirmed the verdict. See: *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, available at <www.icc-cpi.int/drc/lubanga/Pages/Home.aspx#19>.

[3] Dominic Ongwen, allegedly the former commander of the Sinia Brigade of the Lord Resistance Army, was charged with 70 counts of crimes against humanity and war crimes including (under the extended version of the charges): 'sexual and gender-based crimes

The legal and ethical interest for this topic undoubtedly derives from the paradox that the situation of children involved in conflicts can generate: due to their young age, they appear to our eyes as victims manipulated by adults, but their conducts in the conflict can certainly also fulfil the elements of the most heinous war crimes.[4] This dual status of children in conflicts intersects delicate questions that touch upon the protections deriving from international humanitarian law and human rights law and, ultimately, the role of international criminal law in providing retribution and re-habilitation to the perpetrators, in light of the wider interests of a given society.[5]

Recently, the scholarly debate on child soldiers, which seemed to a large extent exhausted, has found new reasons of interest in relation to the situation of children involved in asymmetric conflicts with armed groups qualified as 'terrorists'.[6] As is well known, the legal concept of 'terrorism' does not identify a personal status from the perspective of international humanitarian law and international criminal law. In other words, as a matter of principle, the prohibitions of international humanitarian law, which constitute the primary rules upon which the relevant war crimes are based, are oblivious to the legal qualification of the perpetrator as a 'terrorist'. Undoubtedly, however, recent practice shows that the attitude of States towards children involved in armed conflicts is strongly influenced by the qualification in terms of terrorism of the

committed from 2002 to 2005 in Sinia Brigade – forced marriage, rape, torture, sexual slavery, and enslavement – and the conscription and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005, in Sinia Brigade'. See: *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15 available at <www.icc-cpi.int/uganda/ongwen>. On the case, see: RLA Pangalangan, 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 American U Intl L Rev 605-635.

[4] Although, under art 26 of the ICC Statute: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime'.

[5] On 'the interplay between restorative and retributive post-conflict justice mechanisms, on the one hand, and juvenile rehabilitative justice mechanisms, on the other', see: N Quenivet, 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 European J Intl L 433–455.

[6] As revealed by the ongoing non-international armed conflicts above all in Syria and Iraq, but also in the African continent. See, for instance, M Bloom, 'Weaponizing the Weak: The Role of Children in Terrorist Groups' Washington & Lee Public L Studies, Research Paper Series, Accepted Paper Series No 2019-06 (14 January 2019).

groups of which they (or their parents) are a part. In this respect, aspects such as the criminalization of the conducts of children involved with terrorism within the national legal order; the obligations of the State of nationality with respect to their repatriation and reintegration in society; the exercise of jurisdiction by the territorial State for the crimes they might have committed; and the protection provided for by international criminal law when they are mistreated by members of terrorist groups are still relatively understudied. In particular, the issue of women and children deprived of their liberty because of their connection with terrorist groups raises complex questions with respect to international humanitarian law and human rights law. According to the International Committee of the Red Cross, as children enjoy general and special protection under international humanitarian law, in these contexts they 'are first and foremost victims and must be detained only as a last resort. It is of utmost importance to treat children with due consideration of their age and specific vulnerability'.[7] States are also encouraged to implement strategies for the repatriation and the reintegration of 'foreign fighters and their families into their countries of origin, including for prosecution purposes'.[8]

In this Zoom in, for the reasons outlined above, QIL has asked four scholars to address some of the legal issues emerging from the involvement of children with terrorist groups that are taking part in armed conflicts.

In the first article ('Children Associated with Terrorist Groups in the Context of the Legal Framework for Child Soldiers'), Nina Jørgensen (University of Southampton) provides for an overview of the phenomenon of children who are recruited or born into terrorist groups, discussing how such cases fit within the legal framework related to the recruitment and use of child soldiers in armed conflicts. After describing the possible role played by children in terrorist groups, the author recalls the

[7] UN High-Level Conference of Heads of Counter-Terrorism Agencies of Member States, Statement by the International Committee of the Red Cross (ICRC) June 2018, available at <www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/S2-ICRC.pdf>.

[8] ibid. See also: C Paulssen, 'The Repatriation of Western Foreign Fighters and their Families' (28 June 2019) available at <www.ispionline.it/it/pubblicazione/ repatriation-western-foreign-fighters-and-their-families-23409>.

international legal framework and its applicability to the conducts of groups such as the Islamic State and Boko Haram. The article then discusses the status of children formerly associated with terrorist groups highlighting their dual role as victims and perpetrators, as well as the existing contradictions within the applicable rules.

The second article ('Toward an emerging legal framework on child soldiers and other children that are otherwise associated with armed groups under international law') by Yutaka Arai-Takahashi (University of Kent), explores how a legal and conceptual framework on child soldiers can be built on the loose coordination of different fields of international law, such as international humanitarian law, international human rights law, and international criminal law. It analyses how such a loose legal framework can address a number of novel (or hitherto side-lined) issues relating to child soldiers of the ISIS or other armed groups in the context of NIAC and other children who are associated with those groups. It is purported to be complementary to Nina Jørgensen's more detailed article. This paper concludes that a nascent legal framework based on the patchwork of different fields is barely sufficient to meet the challenge posed by those issues. It nonetheless argues that there remain some elements of incoherence in this framework, which can be explained by the residues of fragmentation between the three most relevant branches of international law (IHL; IHRL and international criminal law) or by different rationales underlying those legal branches. According to the author, such incongruence transpires when analyses turn to the criminal liability of the juvenile soldiers or other 'associated children' of the age range between fifteen and seventeen years. He finally argues that some conceptual dissonance is observable in relation to the way in which the ICC can develop the types of activities that should fall within the compass of the war crime of using children under the age of fifteen to participate in hostilities.

In the third article ('The Children of Foreign ISIS Fighters: Which Obligations upon the States of Nationality?'), Francesca Capone (Sant'Anna School of Advanced Studies) dwells upon the approaches adopted by different States to their nationals detained in Iraq or held in camps in the Northern part of Syria under the authority of the Syrian Democratic Forces. Her contribution explores how international law responds to the fate of foreign child soldiers and foreign child brides associated with terrorist groups, who are captured. The author sheds light on

whether they should be left to languish where they are (in Syria and Iraq) or be repatriated in their home countries. Analysing the international legal framework – with reference to the law of diplomatic and consular relations, international humanitarian law, international human rights law and international counter-terrorism law – she tries to determine if the States of origin of Foreign Terrorist Fighters (FTFs) have an obligation not only to repatriate their nationals, in particular children, but also to ensure their rehabilitation and reintegration. The question of repatriation arises not least for the purpose of prosecuting the crimes for which they are held responsible or protecting them from possible violations of their human rights at the hand of the detaining power. The article shows that there are significant differences in State practice. Whereas some States, e.g. the UK, have openly declared their intention to leave (and their family members) where they are to allow the countries affected by their crimes to exercise territorial jurisdiction, others, like Russia, Kazakhstan and Indonesia, have proactively sought the repatriation of women and children, the former for security reasons and the latter due to humanitarian concerns.

The fourth article ('Intra-Party Sexual Crimes against Child Soldiers as War Crimes in *Ntaganda*. "Tadic Moment" or unwarranted exercise of judicial activism?'), by Luca Poltronieri Rossetti (University of Trento), addresses the conundrum of member-on-member sexual crimes committed against child soldiers. The author discusses the potential legal characterization of the relevant conducts as war crimes despite the alleged lack of an underlying all-encompassing prohibition in conventional and customary international humanitarian law. He then reviews and critically analyses the recent case law of the International Criminal Court that has controversially affirmed that intra-party sexual offences (such as rape or sexual slavery) might per se amount to war crimes under the Rome Statute and thereby come under the Court's jurisdiction. The article briefly reviews the diverging approaches adopted by pre-trial, trial and appellate judges of the ICC assessing their persuasiveness in relation to the use of sources, the criminal policy objectives pursued and the potential normative consequences of these decisions on the relations between IHL and ICL. The detrimental consequences of this approach on the rights of the accused are then considered, in light of the principle of legality (*nulla poena sine lege*) and the prohibition of analogy enshrined in the Rome Statute. The author then discusses the problems emerging from

the application of this legal framework to the conducts committed against children involved with terrorist groups.

We do hope that these four articles will stimulate a debate on issues that are so relevant both from a legal and an ethical standpoint. As always, our *Zoom in* is open to further contributions on the topic and short comments on the published articles.