CHILDREN, CONFLICT AND INTERNATIONAL PRACTICE: EXPLORING THE RIGHTS OF THE CHILD DURING ARMED CONFLICT WITH RESPECT TO HUMANITARIAN LAW AND TO HUMAN RIGHTS

Deca, sukob i međunarodna praksa: Istraživanje prava deteta tokom oružanih sukoba u pogledu humanitarnog prava i ljudskih prava

Mehari Fisseha
Independent Consultant for Migration and Refugee Protection, Ireland

"Safety and security don’t just happen; they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear."

Nelson Mandela

The relationship between humanitarian law and human rights has become at once more enigmatically ambiguous and more tightly bound during recent years. The ratification of the Optional Protocol on the involvement of children during armed conflicts (hereinafter “Protocol”) in February of 2002 is indicative of how inextricably linked international, humanitarian law and human rights have become within the first decade of the twenty-first century. More saliently, the Protocol is a manifestation of a collective vision for a future in which humanitarian law works synergistically with human rights on the world stage. Until then, however, human rights function as a

1 Kontakt autora: mehari17ie@yahoo.com. Autor izjavljuje da nema značajne materijalne ili finansijske interese koji se odnose na istraživanje opisano u ovom radu. Takođe, autor izjavljuje da je podneti članak njegov originalan rad i da nakon izdavanja ništa od sadržine neće predstavljati povredu autorskog prava. Rad primljen 19.08.2014. godine. Odobren za objavljivanje 27.10.2014. godine. The author declare that he has no relevant or material financial interests that relate to the research described in this paper. Also, the author declare that the submitted paper is his original work and that, upon publication, nothing contained in it will not constitute an infringement of any copyright. Paper received 19.08.2014. Approved 27.10.2014.
valuable bridge across the existing gaps in humanitarian law. While the Protocol can be more rightly construed as an instrument of human rights than an instrument of humanitarian law, it concurrently serves to fortify international law as well.

While humanitarian law has undoubtedly evolved considerably during the latter half of the twentieth century, abuses against human rights remain pervasive in 2010. In the text entitled *International Law Concerning Child Civilians*, Kuper asserts that “nowhere is the contrast between lofty ideals, as enshrined in various instruments of international law, and reality more stark than in relation to child civilians embroiled in situations of armed conflict.” [Kuper, 1997] During the 1990s, two million children have been killed, over four million disabled, twelve million left homeless, and over one million orphaned during armed conflicts. [Kuper, 1997] Additionally, UNICEF estimates that millions more are left irrevocably, psychologically traumatized by the conflict experience. [Kuper, 1997] Undoubtedly, the need to recognize children as a vulnerable group in dire need of protection was urgent at the dawn of the twenty-first century.

1. Instruments of Human Rights and Instruments of Humanitarian Law

Increasingly, UN member states are calling for human rights instruments to be applied in direct conjunction with humanitarian law, particularly during times of armed conflict or armed occupation. [Cerone, 2006, p.1447] Human rights instruments are generally concerned with the ways in which an existing state treats individuals within its domain and were not traditionally applied to a state’s conduct during a time of conflict. [Cerone, 2006, p.1448] Conversely, humanitarian law has been targeted at placing specific restrictions on the conduct of warfare with the lesser aim of softening the effects on a conflict’s victims. [Cerone, 2006, p.1449] While there are states that object to the application of human rights instruments during times of conflict, there have been legal precedents that favor the dual application of humanitarian law and human rights instruments during times of conflict.

The International Court of Justice stated in its 1996 Advisory Opinion on the Legality on the Threat or Use of Nuclear Weapons that the entity “observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” [Cerone, 2006, p.1449] The Court cited further that both the Inter-American Commission on Human Rights and the Human Rights Committee share its opinion, and clarified later that “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” [Cerone, 2006, p.1449] The Protocol is undoubtedly falls under the latter, combination jurisdiction.

The identification of human rights, undoubtedly, has been integral to framing the current incarnation of humanitarian law as has been the role played by armed conflict in challenging those rights. [Martinez, 2008, p.550] A common perception has been that while humanitarian law was more directly applicable to armed conflict situations than were instruments of human rights, human rights instruments exist to provide an additional layer of protection to civilians involved in these conflicts. [Moir, 2002, p.133] International, humanitarian law began to be codified long before human rights came to the forefront of international discourse, however. In essence, while the paths
between human rights instruments and humanitarian law have begun to cross, those paths have been traditionally distinct from one another, with the path of humanitarian law being considerably longer. [Moir, 2002, p.133] In her text entitled *The Law of Internal Armed Conflict*, Moir writes that “their separate development does not mean that the two regimes could not now have merged into one body of law, but it does demonstrate that human rights and humanitarian law have traditionally been seen as distinct, an approach which the weight of modern opinion still tends to support.” [Moir, 2002, p.133] The precise places at which the paths between human rights instruments and humanitarian law diverge from one another are two-fold; primarily, laws are binding equally for governments and insurgents alike while human rights obligations bind governments only. By extension, insurgents during a conflict are not bound by human rights obligations.

The single, greatest fault line in human rights instruments, and one not had by humanitarian law, is that these instruments are not unwaveringly binding. The clauses that allow for derogation from provisions under certain conditions allow states to make exceptions during times of public emergency. [Moir, 2002, p.137] However, if human rights are concurrently applicable with humanitarian law, which is unfailingly mandatory, during times of armed conflicts as stipulated by the International Court of Justice, than human rights instruments serve to rightfully supplement the existing gaps in humanitarian law. Instruments of human rights serve as what Moir calls an “interpretative device” during times of conflict, clarifying the myriad of protections given civilians by the law and, most saliently, impose needed constraints on insurgents not provided by the law. [Moir, 2002, p.138]

**2. The Protocol**

Offenses against children during times of armed conflict violate both humanitarian law and human rights. Children are human beings, and therefore entitled to all of the rights afforded individuals by instruments of human rights. In some instances when humanitarian law unfortunately falls short of offering children needed protections, human rights instruments become crucial in providing a safeguard for children; this is particularly true when an conflict does not exist at the level to which the Protocol would apply. [Kuper, 1997, p.21]

The Protocol exists in Article 38 of the Convention on the Rights of the Child; the legislation charges governments to undertake any and all possible measures to ensure that children under the age of fifteen do not take part in an armed conflict. [Provest, 2002, p.32-35] Additionally, the Protocol stipulates that fifteen should be the minimum age for a child to be either recruited into an army or enlist into an army. States are charged to prohibit independent groups from recruiting or otherwise enlisting anyone under the age of eighteen. The Protocol is, of course, optional, and while it exists alongside several instruments of humanitarian law, it is not as binding for states as humanitarian law would be.

Undoubtedly, the Protocol is a salient step forward in protecting the human rights of children, but it is not yet a genuine instrument of humanitarian law, if it ever will be. The distinct paths taken by humanitarian law and human rights may well render human rights instruments as eventually more binding than the current incarnation of humanitarian law. In his article entitled “Does International Human Rights Law Make a Difference,” Cassell eloquently cites that “as one strand in the rope that pulls rights forward, the value of international human rights law depends mainly on its interaction...
with the other strands. The central strand in the rope is the global growth in human rights consciousness.” [Cassel, 2001, p.121] The existence of a human right, by its nature, demands that it be recognized as fundamentally, irrefutably applicable to all human beings, regardless of age. [Cassel, 2001, p.121]

The generality of human rights law, however, may well be an insurmountable barrier to its universal application. Human rights are presumably, innately attached to individuals themselves while humanitarian law is more irregularly applied under only very specific conditions. [Cassel, 2001, p.121] While the complexity of the difference between human rights and humanitarian law goes far beyond universal versus non-universal, or peacetime versus wartime for that matter, it remains that human rights violations persist more perversely than violations of humanitarian law; and yet, the universality of human rights does not render them ambiguous or too difficult to understand.

The root of human rights violations may well exist in their lack of specificity. Under humanitarian law, protections for individuals are granted not because of those individuals are human but because they belong to a specific group. [Provest, 2002, p.34] By extension, the Protocol may be more successful than other instruments of human rights in that it narrows down who, precisely, is afforded those protections, if only by age.

3. Bridging the Gap between Rights and Law

The Kurdish conflict has birthed a range of human rights violations, including several, gross examples of the heartbreaking role played by children in times of conflict. Between 1987 and 1988, over fifteen years before the Protocol was ratified, the chemical weapon attacks on Iraqi Kurds were construed as an “internal disturbance” and thus humanitarian law did not apply. [Kuper, 1997, p.171] However, human rights violations were rampant and children were both directly involved in warfare as well as victims of the insurgency. In this instance, human rights protections were direly needed in order to afford security to a vulnerable population left unprotected by humanitarian law. The later Kurdish uprisings that detrimentally affected the same region during the aftermath of the first Gulf War were perceived as a separate uprising from the war itself; thus children were afforded only limited protections under humanitarian law. In both instances, humanitarian law was not sufficiently applicable to serve the affected populations.


Human rights, humanitarian law, and perceptions of children have all evolved considerably throughout the twentieth century. There are cultural differences between the ways in which children are construed in the proverbial eyes of the law and internationally recognizing that children are human beings deserving of the same rights as adults may be more urgently necessary in some states over others. However, the Protocol marks an invaluable step forward in ensuring that the youngest citizens of the world are universally perceived as having their own rights.

The Protocol is however more of an instrument of human rights than humanitarian law, despite its specific application to armed conflicts, and is thus not universally mandatory. In short, while the legislation urges governments to take a
particular stance in protecting the rights of children, it does not bind them to unwaveringly uphold it. By extension, while human rights instruments such as the Protocol are a crucial way in which to bridge the gap between law and rights, they depend precariously on the willingness of a state to recognize the universal applicability of those rights.

Persuading states to adopt international human rights instruments may be the greatest charge for contemporary bodies of international law during the twenty-first century. [Slye, 2001, p.59-70] The act of persuasion is rooted in the legitimacy and the validity of human rights within all nation-states. [Goodman, 2004, p.621] More precariously, the act is rooted in democracy. In their article entitled “Democracy and International Human Rights Law,” authors McGinnis and Somin write that “ultimately, democracy is itself an institution dependent on legal norms. Precisely because human rights are best developed through democratic systems, international norms that facilitate democracy have a claim to be enforced domestically.” [McGinnis et al., 2009, p.1739] While democratic systems more readily birth human rights legislation than other forms of government, the apparent link between democracy and human rights has rendered universal recognition of human rights as problematic within nations that are culturally adverse to Western democracy.

The enforcing of human rights instruments is barricaded by perceptions of the legislation’s very nature. Asserting that human rights are universal is a broad contention indeed, and one that hinders the widespread adherence to legislation. However, the Protocol may be more successful than other instruments of human rights in that it does specifically apply to a narrow population in much the same way that humanitarian law applies to a specific group of people.

5. Conclusion

Children are human beings, but they are also a naturally vulnerable population in need of specialized protections. The Protocol marks the dawn of a new era in international recognition of human rights that long been undermined due to the generalized nature of human rights instruments; this new era may well be permeated by a total dissolution of traditional, human rights law and concurrent birth of more specialized protections. [Orford, 2003, p.190] Human rights instruments have the potential to not only bridge the gaping holes left by humanitarian law but to trump humanitarian law altogether in the not-too-distant future.

While the nature of human rights instruments at presents renders their enforcement more difficult than humanitarian law, this is something that can and will be remedied as jurisdictions are homogenized and international enforcement bodies are afforded more power. [Pasqualucci, 2005, p.1] At present, the perceptions of human rights instruments as being concurrently instruments of democracy and capitalism is hindering their enforcement. However, difficult is it for any government to deny that children are deserving of basic, human rights; thus the Protocol is a timely means of uniting human rights with domestic law.

Humanitarian law is mandatory, but human rights instruments are inextricably bound to state compliance. Ironic is it that humanitarian law would be at once more binding and yet less strict in terms of affording those involved in an armed conflict rights. However, the existence of human rights instruments is then a fortunate safety net. Particularly when humanitarian law does not apply because the conflict is not construed.
as international, human rights instruments such as the Protocol can serve to protect the youngest population of global citizens.

Unfortunate is it that even the Protocol could be construed as a sort of instrument of Western, legislative imperialism. [Hathaway, 2002, p.1935-1999] However, human rights instruments will undoubtedly, increasingly be linked to precisely the universality for which they were intended; in order for this to happen, however, human rights instruments may well need to follow the Protocol and relinquish some of the general verbiage for more specific avenues of protection. Alternatively, human rights instruments may be increasingly accepted precisely as they are. Author Doswald-Beck writes in his article entitled “Implementation of International Humanitarian Law in Future Wars” that “any attempt to look into the future is fraught with difficulty and the likelihood that much of it will be wrong…. In so doing one may assume that human nature will not change, although the organization of society and of international relations could well do so.” [Doswald, 1999, p.24-30] In accepting that human nature is immutable but society is dynamic, the diverging paths of humanitarian law and human rights instruments can be easily predicted to come together irrevocably in the future; until then, the paths are likely to intermittently cross, birthing invaluable legislation such as the Protocol.

References


* * * * *