

CHILDREN AND TRANSITIONAL JUSTICE

*Truth-Telling, Accountability
and Reconciliation*

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CHAPTER 3

INTERNATIONAL CRIMINAL JUSTICE AND CHILD PROTECTION

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A child formerly associated with the Liberation Tigers of Tamil Eelam, held in a prison in Kandy, Sri Lanka.

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INTRODUCTION

The International Criminal Court (ICC) opened its first trial in January 2009 for war crimes against children. The prosecutor's decision to hold the Court's very first trial on charges pertaining to the recruitment and use of child soldiers highlights the growing significance of children in international criminal justice.² The trial against the Congolese rebel leader, Thomas Lubanga Dyilo, sends the resounding message that those responsible for crimes against children can be held responsible before international tribunals.

Previously, international and mixed criminal jurisdictions (referred to in this chapter as international courts)³ have not always

² This chapter uses the terms "child soldier" and "child associated with armed forces or armed groups" interchangeably. The use of these terms is not meant to confer any legitimacy on these appalling crimes. Graça Machel defines "child soldier" as "any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks." (Graça Machel, *The Impact of War on Children: A Review of Progress Since the 1996 United Nations Report on the Impact of Armed Conflict on Children* (London: Hurst & Co., 2001), at 7 [hereinafter Machel, *The Impact of War*].

³ International or mixed courts include the permanent International Criminal Court (its statute, known as the Rome Statute, was adopted in July 1998 by 120 states and entered into force on 1 July 2002, triggering the temporal jurisdiction of the ICC, which is competent for grave international crimes committed in the territory or by nationals of States parties or which may otherwise be referred to the ICC by the United Nations Security Council); the International Criminal Tribunals for the former Yugoslavia (established respectively by United Nations Security Council Resolutions 808 [1993] and 827 [1993]) and for Rwanda (created by United Nations Security Council Resolution 955 [1994]); the Special Court for Sierra Leone (set up by an agreement between the Government of Sierra Leone and the United Nations further to Security Council 1315 [2000]); the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (created jointly by the Government of Cambodia and the United Nations); the Special Panels of the Dili District Court (created in 2000 by the United Nations Transitional Administration in Timor-Leste); the War Crimes Chamber in the Court of Bosnia and Herzegovina (integrated into the domestic Bosnian legal system); the International Military Tribunal of Nuremberg (established by the London Charter of 8 August 1945); and the International Military Tribunal for the Far East (Tokyo Tribunal, established by the Charter of the International Military Tribunal for the Far East proclaimed on 19 January 1946). All these international courts have mandates to try individuals responsible for grave crimes; their competence usually encompasses the three most serious international crimes: genocide, crimes against humanity and war crimes.

brought to the fore crimes committed against children or highlighted the victimization of children. The first international tribunals – the Nuremberg and Tokyo international military tribunals – did not pay particular attention to crimes against children, mentioning them only as part of broader crimes against civilians during the Second World War.

Decades later, it was only with the adoption of the Convention on the Rights of the Child (CRC) in 1989⁴ and the seminal 1996 report by Graça Machel on the impact of armed conflict on children⁵ that the specific plight of children in the context of mass or systematic crimes began to capture international attention. The subsequent establishments of the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL) have triggered major developments regarding the sanctioning of crimes against children.

Children are among the victims of genocide, crimes against humanity and war crimes, and they are affected in many different ways, both physically and psychologically. This chapter aims to determine the extent to which international courts have focused on such international crimes committed against children and also sometimes by children. In so doing it concentrates on the legal framework, jurisprudence and practice of these courts.⁶

Specifically, this chapter assesses the contribution of international courts in trying those who recruit and use child soldiers, highlights the need to consider other crimes committed against children and reviews the exclusion of children from the scope of international prosecutions. It emphasizes that while international courts have contributed to the understanding of how

⁴ The Convention on the Rights of the Child (CRC) was adopted by United Nations General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

⁵ Graça Machel, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, A/51/306, 26 August 1996 [hereinafter Machel, *Promotion and Protection of the Rights of Children*].

⁶ The treatment of children by national criminal systems, even when such crimes are defined under international law, goes beyond the scope of this chapter.

children have been victimized, much more remains to be done. The current focus on the recruitment and use of children associated with armed forces or groups should not detract from accountability for other crimes against children or from other child victims. Time and again, children are victims of genocide, enslavement, rape, exploitation and other grave crimes falling within the mandate of international courts. While these courts cannot prosecute each of these crimes, they can and should contribute to identifying the systematic, widespread or endemic patterns of criminality affecting children, during wars and also in times of peace.

The chapter concludes by identifying areas needing improvement to better protect children, arguing notably that more thinking is required concerning the liability of children who have participated in the commission of crimes. It posits that children who have participated in international crimes should be considered first and foremost as victims, especially when the circumstances surrounding these crimes are inherently coercive, which in practice often seems to be the case.

CRIMINALIZING THE RECRUITMENT AND USE OF CHILDREN BY ARMED FORCES OR GROUPS

The SCSL is the first of the international or mixed tribunals to have focused on crimes committed against children, in particular against children associated with armed forces and groups. The use of children as soldiers during the country's civil war is well known and documented to the point of being one of the conflict's better-known characteristics.⁷ The leading role played by the SCSL (jointly established in 2002 by the Government of Sierra Leone and the United Nations) may have encouraged the ICC to consider crimes

⁷ This was acknowledged by the Sierra Leone Truth and Reconciliation Commission in its final report: "The Sierra Leonean conflict, perhaps more than any other conflict, was characterized by the brutal strategy, employed by most of the armed factions, of forcing children into combat. The Commission finds that, during the conflict, all the armed groups pursued a policy of deliberately targeting children." *Report of the Truth and Reconciliation Commission of Sierra Leone*, para. 465, at 6.

committed against children in its first cases. This section reviews these courts' contributions to criminalizing the recruitment and use of child soldiers.

Hundreds of thousands of girls and boys in countries throughout the world have been recruited and used as child soldiers. Those who survive usually suffer long-term consequences, having lost crucial years of socialization and education, and most of them endure long-lasting physical injuries and psychological trauma. Yet the explicit prohibition on the conscription or enlistment of children by armed forces or groups and children's participation in hostilities is relatively recent.⁸ Elaborating on the general protection afforded to children in the 1949 Geneva Conventions, the two Additional Protocols of 1977 set a minimum age of fifteen for the recruitment of children into armed forces or groups and for taking part in hostilities in the case of non-international armed conflicts⁹ and a minimum age of eighteen for international conflicts.¹⁰ This was partly reaffirmed in 1989 by the CRC; article 38 calls on states to ensure that children under fifteen are not recruited and do not take a direct part in hostilities.¹¹

⁸ The customary nature of the prohibitions on recruiting children into armed forces or armed groups and on allowing them to take part in hostilities appears generally accepted for both international and non-international armed conflicts, as recognized in the study of customary rules of international humanitarian law conducted by the International Committee of the Red Cross. See International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2006), rules 136 and 137.

⁹ See, for example, Article 4(3)(c) of Additional Protocol II provides that "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."

¹⁰ Article 77 of Additional Protocol I.

¹¹ Article 38 (2) of the CRC provides that "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities" and at article 38 (3) that "States Parties shall refrain from recruiting any person who has not attained the age of fifteen years 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, States parties shall endeavour to give priority to those who are oldest." Articles 38 and 39 of the CRC guarantee special protection in situations of armed conflict, calling on States parties to respect humanitarian law applicable to children and to promote

The Optional Protocol to the CRC on the involvement of children in armed conflict, adopted in 2000, prohibits the forced recruitment and use of children under eighteen in hostilities.¹² Under certain conditions, it allows States parties to voluntarily recruit persons above age fifteen into the national armed forces, but prohibits all recruitment below age eighteen by non-state armed groups.¹³ The Optional Protocol appeals to states to “take all feasible measures to ensure that persons who have not attained the age of fifteen do not take a direct part in hostilities.”¹⁴ An additional international instrument prohibiting the forced or compulsory recruitment of children under eighteen is the International Labour Organization’s Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182).¹⁵ Other international efforts to halt the recruitment and use of children include the 1997 Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed

recovery and reintegration of child victims. The CRC has no general derogation clause and applies in both times of peace and during armed conflict or emergency situations. As noted by Graça Machel, “It is important to note that the Convention on the Rights of the Child has no general derogation clause. In light of this, the Committee on the Rights of the Child has stressed that the most positive interpretation should always prevail to ensure the widest possible respect for children’s rights, particularly during war when they are most at risk. Although States in conflict may assert their prerogative to suspend some rights, derogation is only allowed legally under very specific and strict conditions.” Machel, *The Impact of War*, at 141-142.

¹² Articles 2, 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN Doc A/54/RES/263, 25 May 2000. The Optional Protocol entered into force in 2002.

¹³ This is specified in article 3(3) of the Optional Protocol and notably provides that the recruitment into national armed forces should be “genuinely voluntary” and “done with the informed consent of the person’s parents or legal guardians.”

¹⁴ Article 1 of the Optional Protocol.

¹⁵ Adopted in 1999.

Forces or Armed Groups; and the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.¹⁶

It was only in 1998, with the adoption of the Statute of the ICC, that the recruitment and use of child soldiers was explicitly criminalized under an international instrument.¹⁷ The recruitment and use in hostilities of persons younger than fifteen was specifically deemed to be an international crime, thanks to the sustained efforts of humanitarian organizations and child rights agencies, notably UNICEF, supported by like-minded organizations and states. Two provisions pertaining to war crimes in the statute of the ICC refer to this crime: article 8(2)(b)(xxvi) criminalizes “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” during international armed conflicts and article 8(2)(e)(vii) sanctions “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” in the course of armed conflicts not of an international character. The criminalization of the enrollment and

¹⁶ The Paris Commitments and Paris Principles, adopted in 2007, are not legally binding but were endorsed by seventy-six states, including a number of countries where children are or were associated with armed forces or groups. At the regional level, a particularly important development was the adoption of the African Charter on the Rights and Welfare of the Child, which entered into force in November 1999. It defines a child as anyone under the age of eighteen (article 2) and declares in article 22(2) that states “shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”

¹⁷ It is regrettable that the recruitment and use of child soldiers is not systematically criminalized under domestic laws. So far, only a few countries have adopted relevant national laws; *see, for example*, the United States Child Soldiers Accountability Act of 2007, which makes it a crime to knowingly recruit or use soldiers under the age of fifteen (Public Law 110-340, 3 October 2008). In Germany, the Code of Crimes against International Law concerns the recruitment or enlistment of children under the age of fifteen into armed forces or armed groups and their active participation in international or internal armed conflicts. A recent initiative of the International Committee of the Red Cross, which is developing guiding principles for the national implementation of these norms, is particularly useful in this context.

use of child soldiers was reiterated in article 4(c) of the statute of the SCSL, adopted in 2002.¹⁸

The SCSL was the first international or mixed tribunal to charge individuals with the unlawful recruitment and use of children and to ultimately convict them for it.¹⁹ Of particular significance is a 2004 ruling by the Appeals Chamber declaring that the prohibition on unlawful recruitment and use of children under the age of fifteen had crystallized as a norm of customary international law by November 1996 and as such attracted individual criminal responsibility at least from that date,²⁰ confirming the position taken by UNICEF.²¹ On this basis, the first convictions for recruiting and using child soldiers by an international tribunal were recorded in 2007 by the SCSL. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu, former leaders of the Armed Forces Revolutionary Council, were found guilty of enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.²² Subsequently, Issa Hassan Sesay and Morris Kallon, of the Revolutionary United Front (RUF), were found guilty of this crime.²³ The trial of former Liberian president Charles Taylor, ongoing before the SCSL,

¹⁸ Article 4(c) of the statute of the SCSL criminalizes “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in Hostilities.”

¹⁹ In 2003, the prosecutor of the SCSL declared that “two of the most egregious uses of children are sexual slavery and conscription of children into armed conflicts. Sierra Leone’s conflict was characterized by both, and we hope to establish a strong precedent that these abuses must end.” Press release, Special Court for Sierra Leone, “Honouring the Inaugural World Day against Child Labour.”

²⁰ *Prosecutor v. Hinga Norman*, Decision of the SCSL Appeals Chamber, SCSL-2004-14-AR72(E), 31 May 2004, paras. 52-53.

²¹ UNICEF, in the amicus curiae brief it submitted to the SCSL, indicated that prior to the adoption of the Rome Statute, criminalization of underage recruitment was established by customary international law. Amicus curiae brief of UNICEF, 21 January 2004.

²² Judgment, SCSL-04-14-T, 2 August 2007; Judgment, SCSL-04-16-T, 20 June 2007.

²³ Judgment, SCSL-04-15-T, 25 February 2009.

demonstrates the sustained attention this court has given to crimes victimizing child soldiers.²⁴

The fact that the first cases before the ICC also concern the unlawful recruitment of children or their use in hostilities demonstrates the importance given to these war crimes by international jurisdictions. The ICC's very first trial, in the case of Thomas Lubanga Dyilo, was launched exclusively on the basis of three counts of war crimes for enlisting and conscripting children under the age of fifteen in the Democratic Republic of the Congo and using them to participate actively in hostilities.²⁵ The decision to charge Lubanga only for recruiting and using child soldiers has been criticized as too limited because of the widespread allegations that he committed many other international crimes, including killings and sexual crimes.²⁶ Yet it has also been noted that this decision drew considerable attention to the issue of children associated with armed groups in the Democratic Republic of the Congo, not least from the very same groups that had recruited or used children, making it clear that this is an international crime and that those responsible can be held liable.²⁷

²⁴ *Prosecutor v. Charles Taylor*, SCSL-03-01.

²⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision on the Confirmation of Charges," 29 January 2007, at 153-157, available at www.icc-cpi.int/iccdocs/doc/doc571253.pdf. Thomas Lubanga Dyilo is accused of committing the following crimes from 1 July 2002 to 31 December 2003: enlisting or conscripting children into the FPLC (the military wing of the *Union des Patriotes Congolais*) and using these children to participate actively in hostilities.

²⁶ In a "Joint Letter to the Chief Prosecutor of the International Criminal Court" dated 31 July 2006, eight international human rights organizations (including Human Rights Watch) indicated that this "undercut the credibility of the ICC" as well as limited victims' participation. According to Laura Davis and Priscilla Hayner, citing a report from Agence France Presse of 10 December 2007 ("Droits de l'homme: Appels à la CPI pour Punir les Crimes Sexuels en RDC"), local rights groups and women's organizations were especially critical of the failure to include sexual crimes in the charges. They strongly urged the prosecutor of the ICC to broaden the scope of investigations and charges (see Laura David and Priscilla Hayner, "Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC" [International Center for Transitional Justice, March 2009], at 29-30, available at www.ictj.org/static/Africa/DRC/ICT/DavisHayner_DRC_DifficultPeace_pa2009.pdf [hereinafter Davis and Hayner, "Difficult Peace, Limited Justice"]).

²⁷ See Davis and Hayner, "Difficult Peace, Limited Justice," at 30-31. *The Report of the*

While it is still too early to assess the impact that this case may have as the trial is ongoing, the process is already raising important questions concerning the balance between the need to further accountability for crimes against children on the one hand, and the need to protect the children concerned on the other. The first witness who appeared for the prosecution in the case, a former child-soldier, initially recanted his testimony, certainly because he was intimidated and found it difficult to be in the presence of the accused, but also possibly because he could have incriminated himself through his testimony.²⁸

The ICC has thus far devoted considerable energy to investigating crimes related to the enlistment or use of child soldiers to participate actively in hostilities. So far, of the twelve individuals it has publicly indicted, seven have been charged with such crimes. In addition to Lubanga, those charged in relation to the enrollment or use of child soldiers include leaders of the Lord's Resistance Army – Joseph Kony, Vincent Otti and Okot Odhiambo – and of Congolese armed groups – Bosco Ntaganda,²⁹ Germain Katanga

Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo stated that “children have been hidden by the commanders and prevented from going to mixage sites to avoid their separation by child protection agents....Children are given various reasons for being hidden.... In some instances, commanders reportedly cited the capture and trial of Thomas Lubanga by the International Criminal Court as reasons for not taking them to the mixage centres. When children are brought along with the adults to the mixage centres they are often forced to declare an age above 18 years.” (S/2007/391, 28 June 2007, at 8.)

²⁸ The only provisions pertaining to the situation of self-incrimination in the Rules of Procedure and Evidence of the ICC are contained in Rule 74. For an analysis of these points and their links with the principle of complementarity underpinning the Statute of the ICC, see Cécile Aptel, “Children and Accountability for International Crimes: The role of the ICC and other international and mixed jurisdictions,” *Innocenti Working Paper* (Florence: UNICEF Innocenti Research Centre, forthcoming in 2010).

²⁹ Ntaganda is co-accused with Lubanga. He has been charged with three counts of war crimes, including the enlistment and conscription of children under age fifteen to actively participate in hostilities. *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06. See Warrant of Arrest issued on 22 August 2006, available at www.icc-cpi.int/iccdocs/doc/doc305330.PDF.

and Matthieu Ngudjolo Chui.³⁰

The jurisprudence developed by the SCSL and the ICC has clarified the constitutive elements of conscripting or enlisting children or using them to participate actively in hostilities. Three particularly problematic issues – whether a distinction should be drawn between conscription and enlistment, whether this crime should be treated as three different offenses and how to deal with the requirement that children “participate actively in hostilities” – are successively reviewed below.

Conscripting or Enlisting Children

Children can be recruited through abduction, coercion, manipulation, propaganda or conscription, or by exploiting their hope to escape impoverished circumstances. In some cases children believe they will be protected by armed groups. They also are sometimes motivated or convinced by others of the need to fight to defend their communities or redress inequalities, or in response to discrimination.

This led to the differentiation between conscription and enlistment, reflected in the statutes of the ICC and of the SCSL. A trial chamber of the SCSL defined conscription as encompassing “acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities.” It defined “enlistment” as “accepting and enrolling individuals when they volunteer to join an armed force or group.”³¹ Nevertheless, in the view of another trial chamber of the SCSL, “the distinction between voluntary enlistment and conscription is somewhat contrived. Attributing voluntary

³⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2009, at 113-115, available at www.icc-cpi.int/iccdocs/doc/doc571253.pdf. The age of the witnesses and victims is not specified in the decision. However, certain statements in the testimonies suggest that the crimes encompass girls and women.

³¹ *Prosecutor v. Brima, Kamara, Kanu* (AFRC case), Case No. SCSL-2004-16-T, Judgment, 20 June 2007, at 734-735.

enlistment in armed forces or groups to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is...of questionable merit.”³²

Whether or not children join voluntarily or are forced to do so is ultimately irrelevant; those responsible for enlisting volunteer children under fifteen as well as those forcibly conscripting them can be held criminally liable before some international criminal jurisdictions.³³ This was iterated by the ICC; after stating that conscripting and enlisting “are two forms of recruitment, ‘conscripting’ being forcible recruitment, while ‘enlisting’ pertains more to voluntary recruitment,” it concluded that “the child’s consent is not a valid defence.”³⁴

Additionally, the United Nations Special Representative of the Secretary-General for Children and Armed Conflict submitted to the ICC that “in most conditions of child recruitment even the most ‘voluntary’ of acts are taken in a desperate attempt to survive by children with a limited number of options. Children who ‘voluntarily’ join armed groups often come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict. Many ‘volunteer’ recruits soon become disillusioned, but are not able to leave due to

³² *Prosecutor v. Fofana and Kondewa* (CDF case), SCSL-04-14-T Trial Judgment, 2 August 2007, para. 192.

³³ Additional arguments in favor of criminalizing all forms of recruitment of child soldiers are found in both the Commentary on Article 4(3)(c) of Protocol Additional II to the Geneva Conventions and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The Commentary on Article 4(3)(c) refers to “the principle that children should not be recruited into the armed forces” and makes clear that this principle “also prohibits accepting voluntary enlistment.” (Sandoz, Swinarski and Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1986) at 1391-1393, para. 4557). The Optional Protocol, which stipulates that “armed groups...should not, under any circumstances, recruit...persons under the age of 18 years,” is generally understood as prohibiting recruitment under any circumstances, meaning cases of either conscription or enlistment (*see* article 4 of the Optional Protocol).

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber 1, 29 January 2007, para. 247.

fear of being killed. Many children who try to escape are executed in order to serve as an example to the other children. The line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict.”³⁵

How Many Crimes?

Is more than one crime subsumed under “conscripting or enlisting children or using them to participate actively in hostilities”?³⁶ A judge at the SCSL has expressed in a separate opinion that this crime “may be committed in three quite different ways: (a) by *conscripting* children (which implies compulsion, albeit in some cases through force of law); (b) by *enlisting* them (which merely means accepting and enrolling them when they volunteer), or (c) by *using* them to participate actively in hostilities (i.e., taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk of combat).”³⁷ The view that these are in fact three crimes rather than one seems to be endorsed by the Special Representative of the Secretary-General (SRSG), who indicated to the ICC “the invalidity of a child’s consent to any of the three crimes of child soldiering.”³⁸

³⁵ Amicus curiae brief of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, submitted to the ICC in application of Rule 103 of the Rules of Procedure and Evidence, pursuant to the Decision Inviting Observations from the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, of Trial Chamber I of the International Criminal Court, 18 February 2008, at para. 14.

³⁶ See Nina H. B. Jorgensen, “The Contribution of the Special Court for Sierra Leone,” paper presented at the 2009 Annual Conference of the International Bar Association (on file with the author).

³⁷ This distinction was made by Judge Robertson in his separate opinion appended to the Appeals Chamber Judgment in the case of *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, *Separate Opinion of Judge Robertson*, 31 May 2004.

³⁸ Amicus curiae brief of the United Nations Special Representative of the Secretary-

However, the jurisprudence of the SCSL, confirmed by the ICC and clearly approved by the SRSG as indicated above, is that the differences between conscription and enlistment are and should be eroded. On this basis, this author contends that though a clear disjunctive reading of “conscripting or enlisting children or using them to participate actively in hostilities” is correct, it would be better to consider that there are ultimately two crimes: one for recruiting child soldiers, irrespective of the modality, and one for having them participate in hostilities.

Participation of Children in Hostilities

A problem with the legal definition of the crime of using child soldiers is the insistence on the “participation” of the children in hostilities.³⁹ The language on this point has evolved; the phrase “participate actively in hostilities,” found in the Statute of the ICC, is deemed to be broader and therefore affording better protection than the language “take a direct part in hostilities,” used in prior

General on Children and Armed Conflict submitted to the ICC in application of Rule 103 of the Rules of Procedure and Evidence, pursuant to the Decision Inviting Observations from the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, of Trial Chamber I of the International Criminal Court, 18 February 2008, at para. 10.

³⁹ Although it is important to note that many states appear not to distinguish whether the participation in hostilities is active, or direct or indirect, and that the Paris Principles clarify that “children associated with armed forces or groups” do not only refer to those who are taking or have taken a direct part in hostilities. The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups define a child associated with an armed force or group as any person below the age of eighteen who is or has been recruited or used by an armed force or armed group in any capacity, including children, both boys and girls, used as fighters, cooks, porters, messengers or spies or for sexual purposes. The definition in the Paris Principles explicitly underlines that children associated with armed forces or groups are not those who are taking or have taken a direct part in hostilities. On this point, *see also* Sandrine Valentine, “Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict,” *New England International and Comparative Law Annual* 9 2003, at 109, who interestingly suggests that the concept of trafficking be used to capture a broader range of crimes committed against these children.

international legal instruments.⁴⁰ Nevertheless, the reference to “participation” remains problematic: while it clearly encompasses children engaged in activities such as scouting, spying and sabotaging, and also being used as decoys, couriers or at military checkpoints, does it also apply to children used in other functions, such as cooks, porters or servants, and those “recruited” for sexual exploitation? A negative response would be particularly damaging for girls, who may be unlawfully recruited more often than boys to perform these types of tasks or roles (which are often considered more menial) and who are also more systematically sexually assaulted and exploited.

The SCSL attempted to address this definitional issue by stating that “using children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat” and that “any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”⁴¹

In written submissions to the ICC, the SRSG warned against attempting to determine specific activities qualifying under the term “participate actively,” which would risk excluding a great number of child soldiers, particularly girls. She recommended that the ICC adopt a case-by-case approach, relying on the appreciation of “whether the child’s participation served an essential support function to the armed force or armed group during the period of conflict.”⁴² Crucially, she pointed out that children used in hostilities play multiple and changing roles, “being fighters one minute, a ‘wife’ or ‘sex slave’ the next, and domestic aides and food providers at another time. Children are forced to play multiple roles, asked to

⁴⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber 1, 29 January 2007, at 261.

⁴¹ *Prosecutor v. Brima, Kamara, Kanu* (AFRC Accused), Case No. SCSL-2004-16-T, 20 June 2007, at 736-737.

⁴² Amicus curiae brief of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict submitted to the ICC in application of Rule 103 of the Rules of Procedure and Evidence, pursuant to the Decision Inviting Observations from the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, of Trial Chamber I of the International Criminal Court, 18 February 2008, at paras. 20-21.

kill and defend, carry heavy burdens, spy on villages and transmit messages. They are asked to perform many other functions and their use differs from group to group.”⁴³

The SRSG also urged the ICC to “deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the ‘using’ crime” and underscored that during war, the use of girl children in particular includes sexual violence.⁴⁴ She further explained that girl combatants are often invisible: “Commanders prefer to ‘keep their women,’ who often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable.”⁴⁵

This problem highlights the difficulty of balancing the victims’ right to be protected, which often demands a progressive and more encompassing construction of the law, with the rights of the defendants and the principle of legality, a fundamental principle that calls for the law to be specific, clear and not to apply retroactively. In these circumstances, so as to criminalize the full extent of reprehensible conduct and render justice to all child victims while respecting the fundamental rights of the defendants, prosecutors and judges could make use of the entire legal arsenal at their disposal: they could charge and convict those responsible not only – or not necessarily – for the recruitment and use of child soldiers, but also for the other crimes committed against children, such as enslavement, torture, sexual slavery and rape, which are equally important.

This has been indirectly highlighted at the ICC in the Lubanga trial. During the opening statements on 26 January 2009, the ICC Chief Prosecutor emphasized that, once children are recruited, they enter an environment of abuse, sexual enslavement and violence. Later on, the legal representatives for some of the victims, predominantly children formerly associated with armed groups and their families, requested the addition of new legal charges against

⁴³ Ibid., at para. 22.

⁴⁴ Ibid., at para. 25.

⁴⁵ Ibid., at para. 26.

Lubanga: sexual slavery, inhumane treatment and cruel treatment (in addition to the existing charges for the recruitment and use of child soldiers).⁴⁶ Their request was ultimately denied.⁴⁷

The advances made in holding those responsible for recruiting and using child soldiers are remarkable, and the SCSL and the ICC should be commended for their laudable efforts in furthering the protection of children from these crimes. Yet it is imperative that the recent recognition of the war crimes of conscripting or enlisting children or using them to participate actively in hostilities does not obscure the importance and gravity of many other crimes committed against children, including against child soldiers themselves. Much more remains to be done to identify the scope of international crimes committed against children and hold accountable those responsible.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, “Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour,” 22 May 2009. Surprisingly, the prosecutor, in his response of 29 May 2009, limited himself to stating that “if the Chamber considers that it might be appropriate to [consider the possibility of modifying the legal characterization of the facts] it will give the participants notice and invite submissions. In that event, the Prosecution will provide its factual and legal response.” See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Prosecution’s Response to the Legal Representatives, “Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour,” 29 May 2009.

⁴⁷ On 14 July 2009, the Trial Chamber issued its “decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.” The Appeals Chamber reversed this decision, ruling that the Trial Chamber’s finding that the legal characterization of the facts may be subject to change was based on a flawed interpretation of Regulation 55. The Appeals Chamber did not rule on the question of whether the majority of the Chamber erred in determining that the legal characterization of the facts may be changed to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi) [sic], 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute because the Trial Chamber had not yet done a detailed review of the questions in this issue. See *Prosecutor v. Thomas Lubanga Dyilo*, Case ICC-01/04-01/06, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber 1 of 14 July 2009 entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” 8 December 2009.

BEYOND CHILD SOLDIERS: THE MANY OTHER CHILD VICTIMS OF INTERNATIONAL CRIMES

In reviewing the international crimes that victimize children and fall within the jurisdiction of international courts, it is useful to distinguish between child-specific crimes and crimes committed against children alongside other victims (in other words, “generic” international crimes victimizing children).⁴⁸ This section analyzes the extent to which international and mixed tribunals have recognized and litigated both categories of crimes, aiming at fostering accountability for the full scope of international crimes committed against children.

Child-Specific International Crimes

There are three child-specific core international crimes: the war crime of conscripting or enlisting children or using them to participate actively in hostilities (reviewed above); the crime of genocide for transferring children from one group to another; and the war crime of attacking schools and other buildings dedicated to education.⁴⁹

The forcible transfer of children from one national, ethnic, racial or religious group to another can constitute genocide if committed with the intent to destroy, in whole or in part, the group of origin of these children. This provision, which originated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, has been reproduced verbatim in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)

⁴⁸ Although the two categories may overlap, this distinction is relevant conceptually.

⁴⁹ In addition, the Statute of the SCSL, which refers not only to international crimes *per se* but also to certain crimes defined under Sierra Leonean law, provides that the court is competent to prosecute individuals who abused girls under fourteen years of age or for “abducting a girl for immoral purposes.” Article 5(a) of the statute of the SCSL refers to offenses relating to the abuse of girls defined under the Sierra Leonean Prevention of Cruelty to Children Act of 1926.

and the International Criminal Tribunal for Rwanda (ICTR) and provides the only explicit reference to children in the statutes of these two courts. This provision also falls within the competence of the ICC.⁵⁰ Beyond individual children, this crime targets the group to which they belong.⁵¹

While no international or mixed tribunal has litigated this crime, an indirect reference can be found in the judgment of the Nuremberg Tribunal, although it did not have competence over the crime of genocide. Heinrich Himmler is cited as having declared in October 1943: “What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us.”⁵²

Intentionally directing attacks against buildings dedicated to education (namely, schools), a crime that does not exclusively target children but primarily affects them, is an offense listed among the grave breaches defined under the 1949 Geneva Conventions. This provision has been reproduced in the statutes of the ICTY and the ICC, but so far it has not been litigated.⁵³

“Generic” International Crimes Victimizing Children

Children are also victims of other more “generic” international crimes. The preamble of the statute of the ICC recalls that its drafters were “mindful that during this century millions of children,

⁵⁰ Article 6(e) of the Statute of the ICC.

⁵¹ It is remarkable that while the crime of genocide is generally deemed to aim at the physical destruction of the targeted group, this crime – the forcible transfer of children from one group to another – while constitutive of genocide, is unique insofar as it does not result in the physical destruction of the group but rather its cultural elimination.

⁵² The Trial Of German Major War Criminals Judgment, 30 September - 1 October 1946, at 52.

⁵³ Article 8(2)(b)(ix) of the Statute of the ICC.

women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”⁵⁴

Children can be abducted, taken as hostages, detained, tortured, killed, trafficked or raped or be submitted to any of the other core international crimes. As most international crimes are systematic, targeting either specific groups or an entire civilian population, including their children, children are affected alongside other victims. Yet crimes disproportionately affect children in regard to their long-term consequences and traumatic impact.⁵⁵ Children are particularly vulnerable to violence because of its potential to harm their development.⁵⁶

Children are probably even more adversely affected than adults by rape and other sexual crimes, both physically and psychologically. Children disproportionately endure the consequences of the separation of a family; while both parents and children may suffer psychologically, children are likely to be more affected and also to be harmed by the loss of security and material support, including food, that adults usually provide. The use of starvation as a method of warfare, while not directed specifically at children, nonetheless disproportionately affects them because of their particular physical and developmental needs. Some children may be affected even more than others, younger children in particular. Gender is also an important factor: girls are often exposed to especially serious violations, and the consequences of the same

⁵⁴ Preamble of the Statute of the ICC.

⁵⁵ See Machel, *Promotion and Protection of the Rights of Children*, at 24, 32, 39-40.

⁵⁶ Angela Pirisi argues that for children “exposure to armed conflict can culminate in symptoms such as anxiety and fear, developmental delays, learning difficulties, sleep disturbances and nightmares, social withdrawal, violent and aggressive behaviour, severe depression and suicide.” See Angela Pirisi, “Healing the Minds of War-Exposed Children,” *The Journal of Addiction and Mental Health* 4(6) Nov/Dec 2001 at 9. See also S. Boney-McCoy and D. Finkelhor, “Psycho-Social Sequelae of Violent Victimization in a National Youth Sample,” *Journal of Consulting and Clinical Psychology* 63 1995:726-36. Some studies have evaluated the impact of excessive stress, although not necessarily in the context of war or mass crimes, on the development of children. See, for example, National Scientific Council on the Developing Child, “Excessive Stress Disrupts the Architecture of the Developing Brain,” Working Paper #3, 2005, available at www.developingchild.net.

crime committed against girls and boys may be more dire for girls.⁵⁷ Thus, even international crimes that are not necessarily child-specific may ultimately result in disproportionate suffering for children because the consequences of the crimes are more serious for them.

In addition, children are also sometimes specifically targeted because of their vulnerability, notably as a means to intimidate, harass or destroy their communities or groups. Children are indeed more vulnerable than adults to being victimized and therefore likely to be affected in greater proportion.⁵⁸ International law, including humanitarian law, recognizes that children's vulnerability entitles them to protection above and beyond the general protection afforded to them as part of the civilian population.⁵⁹ Given the

⁵⁷ See Report of the United Nations Secretary-General on Women, Peace and Security, 16 October 2002 (S/2002/1154) and World Vision International, "The Effects of Armed Conflict on Girls," World Vision Staff Working Paper No. 23, July 1996. The lack of access to education due to armed conflict, political violence, mass displacement or orphanhood appears to affect girls disproportionately, boys often being given priority over girls by their families and/or communities. See Jane Lowicki, "Political Violence and Education: Missing Out - Adolescents Affected by Armed Conflict Face Few Education Opportunities and Increased Protection Risks," *Current Issues in Comparative Education* 2(1) 2004:43-50.

⁵⁸ On this point, although not specifically applied to international crimes, see David Finkelhor and Jennifer Dzuiba-Leatherman, "Victimization of Children," *American Psychologist* 49(3) 1994:173-183.

⁵⁹ The Geneva Conventions, especially their common article 3 and the Fourth Convention and their Additional Protocols, are among the main sources affording legal protection to all civilians during armed conflict, including children. Additional Protocol I updates and develops rules protecting victims and participants in international armed conflicts. Two of its articles offer specific protection to children. Article 77 provides that "children shall be the object of special respect and shall be protected against any form of indecent assault" and that the parties to a conflict must provide children with "the care and aid they require, whether because of their age or for any other reason." Article 78 governs the evacuation of children to a foreign country, specifying that this should not take place except for compelling reasons and establishes some of the terms under which evacuations may occur. Article 4(3) of the Additional Protocol II recognizes the special protection that children require in times of internal armed conflict, stipulating that children must be provided with the care and aid they require, including education and family reunion. See International Committee of the Red Cross, "Legal Protection of Children in Armed Conflict Fact Sheet," 28 February 2003, available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jqus?opendocument.

specific legal obligation to protect children, their particular vulnerability and the disproportionate impact of crimes on them, crimes committed against children should really receive greater consideration. Yet, these crimes have not received systematic or even sustained attention from international courts.

While Nazi Germany and Imperial Japan victimized many children, crimes against children were not necessarily pursued systematically, although they were mentioned in the relevant judgments of the International Military Tribunals for Nuremberg and Tokyo (the first international criminal jurisdictions). The approach was more general, looking at civilians as a whole rather than at particularly vulnerable groups such as children or women.⁶⁰ The judgment rendered by the Nuremberg Tribunal repeatedly mentioned crimes committed against children as part of the war crimes and crimes against humanity targeting Jews.⁶¹ It underscored that, upon their arrival in extermination camps, children, especially young children, were systematically sent to the gas chambers to be killed because they were deemed incapable of working, illustrating the targeting of children because of their vulnerability.⁶² Yet it

⁶⁰ However, it is important to recognize that none of the aforementioned child-specific crimes were defined when the International Military Tribunals of Nuremberg and Tokyo were established and their competence determined.

⁶¹ The Trial of German Major War Criminals Judgment, 30 September-1 October 1946, *see, for example*, pp. 50-51.

⁶² *See, for example*, the Judgment of the Nuremberg International Military Tribunal, p. 63, referring to evidence given by Hoess, the Commandant of Auschwitz, describing the screening for extermination: "We had two SS doctors on duty at Auschwitz to examine the incoming transports of prisoners. The prisoners would be marched by one of the doctors who would make spot decisions as they walked by. Those who were fit for work were sent into the camp. Others were sent immediately to the extermination plants. Children of tender years were invariably exterminated since by reason of their youth they were unable to work. Still another improvement we made over Treblinka was that at Treblinka the victims almost always knew that they were to be exterminated and at Auschwitz we endeavoured to fool the victims into thinking that they were to go through a delousing process. Of course, frequently they realised our true intentions and we sometimes had riots and difficulties due to that fact. Very frequently women would hide their children under their clothes, but of course when we found them we would send the children in to be exterminated." Available at <http://avalon.law.yale.edu/imt/judwarcr.asp#general>.

appears that no specific charge in this regard was brought against any of the defendants, and no child was called to testify during the trial. Similarly, the Tokyo Tribunal merely referred to crimes committed against children by the Japanese.⁶³

Likewise, and despite the overwhelming evidence showing that children were frequently among the victims of the crimes committed in Rwanda and the former Yugoslavia, not a single case before the ICTR or the ICTY focused specifically on crimes committed against children. Nevertheless, several trials involved crimes committed against children as part of crimes committed against the civilian populations in general.

Interesting examples at the ICTY comprise the so-called Foca, Srebrenica and Plavsic cases. The Foca case led to convictions for crimes against humanity and war crimes with respect to the rape and sexual enslavement of four girls, including a twelve-year-old.⁶⁴ The Srebrenica judgment refers to the forced transfer of children, old people and women in Srebrenica in July 1995.⁶⁵ In the case against Biljana Plavsic, a psychotherapist testified before the ICTY

⁶³ See, for example, the references provided in chapter VIII of the Judgment of the International Military Tribunal for the Far East to the killings with machine guns of the inhabitants, including children, in Pingdingshan, Chienchinpao and Litsekou (now Pingdingshan, Jianjinbao and Lizegou) in the vicinity of Fushun (p. 1009) and to the crimes committed in Nanking, including the indiscriminate killing of “Chinese men, women and children.... At least 12,000 non-combatant Chinese men, women and children met their deaths in these indiscriminate killings during the first two or three days of the Japanese occupation of the city.” “There were many cases of rape.... Even girls of tender years and old women were raped in large numbers throughout the city.” (p. 1012). Available at www.ibiblio.org/hyper-war/PTO/IMTFE/IMTFE-8.html.

⁶⁴ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23; IT-96-23/1, 22 February 2001, which included charges against Kovac for crimes against humanity and war crimes with respect to the rape and sexual enslavement of a victim known under the pseudonym “A.B.” and three other girls. A.B., who was twelve years old, was among those abducted and repeatedly raped. She was later repeatedly sold as a sex slave before she finally disappeared. Kovac was convicted and sentenced to twenty years’ imprisonment.

⁶⁵ United Nations International Tribunal for the Former Yugoslavia, *Prosecutor v. Radislav Krstic*, Judgment, Case No. IT-98-33-T, 2 August, 2001, available at www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

that many of the child victims of the 1992 persecutions, which Plavsic acknowledged, suffered from depression or incontinence and had problems concentrating and studying, leading them to isolate themselves from others.⁶⁶

At the ICTR, among the cases referring to crimes victimizing children, the Akayesu judgment is particularly significant. In this first-ever international judgment on the crime of genocide, Akayesu was found to have publicly called for the extermination of all Tutsis, exhibiting a clear intent to target all – including children, newborns and even fetuses – in the commission of genocide.⁶⁷ The judgment noted that pregnant women, including those of Hutu origin, were killed on the grounds that the fetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda the child takes on the father's ethnic identity.⁶⁸ During the trial of Akayesu, evidence surfaced establishing that girls as young as twelve had been forced to parade naked and had been raped and killed.⁶⁹ However, despite the references to crimes against children in the jurisprudence of the ICTY and the ICTR, as noted by informed observers “there has not been any systematic or specific focus on

⁶⁶ *Prosecutor v. Biljana Plavsic*, Sentencing Judgment, Case No. IT-00-39&40/1, 27 February 2003, paragraph 49, referring to the testimony of Ms. Teufika Ibrahimfendic.

⁶⁷ International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 121, available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

⁶⁸ *Ibid.* The judgment indicates that “the accused expressed this opinion ... in the form of a Rwandese proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash.” (*Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena.*) In the context of the period in question, this proverb meant that if a Hutu woman married to a Tutsi man was impregnated by him, the fetus had to be destroyed so that the Tutsi child it would become should not survive. It should be noted in this regard that in Rwandese culture it was considered taboo to break the *gisabo*, which is a big calabash used as a churn. Yet, if a snake wraps itself round a *gisabo*, obviously one has no choice but to ignore this taboo in order to kill the snake.

⁶⁹ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, paras. 416, 421-424, 429-431 and 437.

crimes committed against children in either Tribunal.⁷⁰

The Extraordinary Chambers in the Courts of Cambodia also seems to follow this trend. Kaing Guek Eav (alias Duch), the accused, who acknowledged his responsibility for crimes committed when he commanded the notorious Khmer Rouge's S-21 prison, declared: "I am criminally responsible for killing babies, young children and teenagers."⁷¹ He recounted a Khmer Rouge policy on killing detained babies and young children, sometimes by holding their legs and smashing their heads against trees, so that "they would not seek revenge later in life."⁷² Tragically, it is not known how many young children were killed at S-21; while photographers kept meticulous records of adult prisoners, babies and children were not routinely photographed, highlighting the relatively lesser importance given to children.

Sexual Crimes and Crimes Targeting Girls

Some of the most recent international courts also seem to pay greater attention to generic crimes such as sexual crimes and violence that, although not exclusively committed against children, affect them particularly or disproportionately. Charges for crimes committed against girls and women have been included in most of the indictments issued by the SCSL,⁷³ and several persons have been convicted for sexual slavery as a crime against humanity.⁷⁴

⁷⁰ No Peace Without Justice and UNICEF, "Justice for Children Through Other Mechanisms," *International Criminal Justice and Children*, September 2002, at 112-113, available at www.npwj.org/No+Peace+Without+Justice/Newsroom/Publications/ICJ+and+Children.

⁷¹ See Sopheng Cheang, "Khmer Rouge Torturer Recounts Baby Killing Policy," 8 June 2009, available at www.huffingtonpost.com/huff-wires/20090608/as-cambodia-genocide-trial/.

⁷² *Ibid.*

⁷³ See Indictments for Issa Hassan Sesay, Morris Kallon and Augustine Gbao, 2004-15-PT, 2 August 2006; Alex Tamba Brimba, Brima Bazzy Kamara, Santigie and Borbor Kanu, 2004-16-PT, 18 February 2005; Charles Ghankay Taylor, SCSL, 2003-01-I, 7 March 2003; Johnny Paul Koroma, SCSL, 2003-03-I, 7 March 2003.

⁷⁴ Article 2(g) of the statute of the SCSL. See Judgments for Issa Hassan Sesay, Morris Kallon and Augustine Gbao, SCSL-04-15-T.

Importantly, the SCSL has charged individuals with crimes in which children – or sometimes more specifically girls – are mentioned as a distinct victim group in the detailed charge.⁷⁵ It is unclear whether the ICC will follow this significant trend, but it seems to have already missed important opportunities to do so. One such example is found in the Decision on Confirmation of Charges for Germain Katanga and Mathieu Ngudjolo Chui; while the evidence specifically showed that children were among those attacked and killed,⁷⁶ they are subsumed under the broader category of “civilians” in the confirmed charges.⁷⁷

The SCSL has also convicted individuals for acts of “forced marriage,” which constitute a crime against humanity. This crime primarily affects girls and young women. Although not explicitly included in its statute, forced marriage was deemed to be covered under the residual category of “other inhumane acts” constituting

⁷⁵ One such example is Charles Taylor, who was charged with rape, sexual slavery and/or outrages upon personal dignity. This charge reads, inter alia, “the ACCUSED, committed widespread acts of sexual violence against civilian women and girls.” *Prosecutor v. Taylor*, SCSL-03-01-PT, Prosecution’s Second Amended Indictment, 29 May 2007, at 4-5, available at www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107. Another example is Issa Hassan Sesay, Morris Kallon and Augustine Gbao, who were charged with violence to life, health and physical or mental well-being of persons, in particular mutilation and in addition or in the alternative, other inhumane acts: “Members of the AFRC/RUF mutilated an unknown number of civilian men, women and children in various areas of Freetown, and the Western Area, including Kissy, Wellington and Calaba Town. The mutilations included cutting off limbs.” *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, Corrected, Amended and Consolidated Indictment, 2 August 2006, at 16, available at www.sc-sl.org/LinkClick.aspx?fileticket=ppr39WF8TnM%3d&tabid=105.

⁷⁶ “The evidence presented by the Prosecution is sufficient to establish substantial grounds to believe that the attack was directed against civilians not taking direct part in the hostilities, including women and small children, who were killed inside their houses with gunshots or machetes.” *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, at 92, available at www.icc-cpi.int/iccdocs/doc/doc571253.pdf.

⁷⁷ Ibid. “In conclusion, the Chamber finds that there are substantial grounds to believe that the war crime of attacking civilians, as defined in article 8(2)(b)(i) of the Statute was committed by FNI/FRPI members during the 24 February 2003 attack against the civilian population of the village of Bogoro.”

crimes against humanity.⁷⁸ Before the Appeals Chamber unequivocally held that the crime of forced marriage was not encompassed in the crime of sexual slavery,⁷⁹ a Trial Chamber had dismissed the charge on this basis, finding that the crime of forced marriage did not exist independently of sexual slavery, rape, imprisonment, forced labor and enslavement.⁸⁰

In overturning the ruling of the Trial Chamber, the Appeals Chamber elaborated that the taking of so-called “bush wives” involved the imposition of the status of marriage and a conjugal association by force or threat of force, including but not limited to non-consensual sex in exchange for support and protection. It noted that “society’s disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal... incurring individual criminal responsibility in international law.”⁸¹

It is interesting to note that this jurisprudential development seems to have caught the attention of the Civil Parties at the Extraordinary Chambers in the Courts of Cambodia, who requested a supplementary investigation into allegations of forced marriage by the accused Duch.⁸² Yet the concept of forced marriage has generated an intense debate. This term and especially the related

⁷⁸ Article 2(i) of the statute of the SCSL.

⁷⁹ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, AFRC Appeals Judgment, 22 February 2008, para. 186.

⁸⁰ Judge Doherty dissenting, the majority of the Trial Chamber held that sexual slavery and other forms of sexual violence violated the rule against duplicity and confused sexual and nonsexual aspects into the crime of sexual slavery. *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, AFRC Trial Judgment, 20 June 2007, paras. 696-722, 2116-2123. The majority ruling of the Trial Chamber found “no lacuna in the law which would necessitate a separate crime of ‘forced marriage.’” *Ibid.*, para. 713.

⁸¹ *Ibid.*, para. 202.

⁸² The argument is that forced marriage fits within “other inhumane acts” under article 5 of the ECCC Law. See www.phnompenhpost.com/index.php/component/option,com_myblog/Itemid,149/show,New-forced-marriage-complaints-before-ECCC.html/.

term “bush wives” have been criticized for not accurately reflecting the criminal nature of these relationships. While some of these relationships may last for complex social and psychological reasons or as a result of social or individual pressure and expectations, notably if children are born of the relationship, they are marked primarily by duress and coercion.⁸³

Charges for sexual offenses, including sexual enslavement, have been included in several indictments issued so far by the ICC, notably against Joseph Kony, who was indicted for the crimes against humanity of sexual enslavement and rape, and the war crimes of rape and inducing rape.⁸⁴ Similar charges are also levied against Germain Katanga and Mathieu Ngudjolo Chui, charged with sexual slavery and rape (both war crimes and crimes against humanity) of female victims of all ages (including girls),⁸⁵ and against Ahmad Muhammad Harun and Ali Kushayb, charged with rape and outrage upon personal dignity involving girls in Darfur, Sudan.⁸⁶

In many contexts, victims, often girls and young women, who have suffered from rape and sexual slavery are also victims of forced pregnancy, unwillingly bearing children as a direct result of these crimes. While most of the victims of sexual crimes experience psychological trauma and difficulties in social reintegration, girls and women who have children born of sexual violence face a

⁸³ See, notably, Augustine S. J. Park, “‘Other Inhumane Acts’: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone,” *Social and Legal Studies*, 15(3) 2006:315-337.

⁸⁴ See Warrant of Arrest for Joseph Kony, issued on 8 July 2005 as amended on 27 September 2005, doc ICC-02/04-01/05-53, at 13-19, available at www2.icc-cpi.int/iccdocs/doc/doc97185.PDF. Warrant of Arrest for Vincent Otti, 8 July 2005, doc ICC-02/04-01/05-54, at 12-20, available at www.icc-cpi.int/iccdocs/doc/doc97189.pdf.

⁸⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2009, at 113-115, available at www.icc-cpi.int/iccdocs/doc/doc571253.pdf. The age of the witnesses and victims is not specified in the decision. However, certain statements in the testimonies suggest that the crimes encompass girls and women.

⁸⁶ See Warrant of Arrest for Ahmad Muhammad Harun, available at www.icc-cpi.int/iccdocs/doc/doc279858.PDF and Warrant of Arrest for Ali Muhammad Ali Adb-Al-Rahman (“Ali Kushayb”), available at www.icc-cpi.int/iccdocs/doc/doc279858.pdf.

particular risk of stigma and rejection.⁸⁷ The number of such children is not insignificant – an estimated ten thousand babies were born in such circumstances in Rwanda⁸⁸ and at least another seventy-five hundred in eastern Democratic Republic of the Congo.⁸⁹

These children suffer from dreadful social stigma and, in patriarchal communities, they are assumed to bear the – often despised – ethnic or religious identity of their fathers.⁹⁰ As noted by Patricia Weitsman, “Because their identities are inextricably linked to their fathers and because of the circumstances of their conception, they become subject to gross violations of their human rights.”⁹¹ These violations are not benign; they include neglect, infanticide, abandonment, violence and discrimination. Although such violations are usually inflicted on children by their own communities or families, stigmatizing the child was a foreseeable and intended result of the rape or forced pregnancy. The situation illustrates yet another area in which international prosecutors could further the scope of criminalization for crimes committed against children.

⁸⁷ UNICEF and Pole Institute, “Children Born of Sexual Violence in Conflict Zones, DRC Country Study,” draft internal document.

⁸⁸ According to Patricia A. Weitsman, these crimes have been particularly common in Bosnia and Herzegovina and Rwanda. (“The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda,” *Human Rights Quarterly* 30 2008:561-578, hereinafter Weitsman, “The Politics of Identity and Sexual Violence.”)

⁸⁹ Children Born of Sexual Violence in Conflict Zones, DRC Country Study.

⁹⁰ In the former Yugoslavia, children born of rape are sometimes called “a generation of children of hate” or sometimes “children of shame”; in Rwanda, “children of bad memories,” “children of hate,” “unwanted children”; in Darfur, “*janjaweed*,” reflecting the amalgamation of their identity with their fathers (Weitsman, “The Politics of Identity and Sexual Violence,” at 567).

⁹¹ *Ibid.*, at 578.

Agenda for Investigating and Prosecuting Crimes against Children

While sexual crimes are particularly important, many other grave crimes affecting children have lifelong consequences. It is clear that many serious international crimes committed against both children and adults are not prosecuted, and it is important to recognize that international courts cannot prosecute them all. But it is also clear that these courts can and should more thoroughly record, investigate and prosecute the systematic and endemic patterns of criminality affecting children. More systematic investigation of the extent to which children are victimized by serious international crimes would clarify the scope of the crimes committed against them and show that children are often targeted in different ways, through both child-specific and other crimes.

Different prosecutorial approaches could be adopted to this end. For instance, crimes committed against children can be charged and tried separately or jointly with crimes against non-child victims. Whether the trials should be joint or separate depends on the nature of the facts and offenses and also on prosecutorial policies; the availability of evidence; institutional capacity and constraints; and the possible symbolic function of judicial trials in a given context, among others. Nonetheless, five important parameters should guide any decisions and should be concomitantly respected.

First, prosecuting the full extent of the crimes suffered by children is essential; no grave, massive or systematic crimes committed against children should go unaddressed. Effective investigation and prosecution strategies should single out and explicitly charge all forms of children's victimization through both categories of crimes, namely child-specific and generic international crimes. Whenever child-specific crimes are committed, they should be charged as such.

Second, investigating, prosecuting and trying those responsible for child-specific crimes should not serve as a "fig leaf" for not trying all the other generic, grave international crimes committed against children; all crimes affecting children should be viewed with equal seriousness.

Third, when generic crimes are committed against children, it is conceptually and morally unacceptable to consider the targeting of children merely as an “aggravating factor,” discussed only or predominantly at the sentencing stage. Instead, instances of grave crimes committed against children should be charged and fully exposed through the presentation of evidence during the trial, thus publicly showing the gravity of these crimes and the criminal responsibility of those who commit them.

Fourth, international and mixed courts should thoroughly prosecute the systemic patterns of criminality affecting children during armed conflicts but also in other situations, including in times of peace. This includes enslavement of children and/or widespread forced labor, constituting a crime against humanity.

Fifth, and last but not least, it must be recognized that children’s participation is essential to enable the exposition of the whole range of crimes committed against them and to further accountability for these crimes. To enable this participation requires adopting and implementing child-friendly procedures in line with article 12(2) of the CRC, which stipulates that children have a right to be heard in any judicial and administrative proceedings affecting them. Child-friendly procedures notably ensure that child rights are respected; that the needs of children are considered; that the stress, trauma or possible harm associated with testifying is minimized; and that children understand the process and can fully contribute to it. These procedures should respect the overarching guiding principles defined by the CRC, including non-discrimination;⁹² the best interests of the child;⁹³ the rights to life, survival and development;⁹⁴

⁹² Article 2 of the CRC.

⁹³ Article 3 of the CRC.

⁹⁴ Article 6 of the CRC.

and the right to participation,⁹⁵ with informed and voluntary consent.⁹⁶

EXCLUDING CHILDREN FROM INTERNATIONAL PROSECUTIONS

Wars and situations of gross human rights abuses or widespread political instability disrupt the lives of children to such an extent that they may provide the context leading some children – notably child soldiers and children involved in violent youth militia – to become involved in the commission of grave crimes. Situations such as the genocide in Rwanda in 1994 and the long conflict in Sierra Leone throughout the 1990s constitute chaotic and bewildering environments. As a result, many norms and values are discarded, and some children are coerced to participate in crimes or are sometimes encouraged to do so by their families, communities, friends or teachers. When a sense of normality returns, there may be insistent demands to bring to justice those responsible for such crimes, including children.

For children, free and willing acknowledgment of their criminal conduct can contribute to their rehabilitation and reintegration into their families and communities. However, the criminal process is not appropriate for juvenile offenders, even in modified forms. Rather, children should be dealt with using restorative processes that promote diversion, mediation, truth-telling, reconciliation or

⁹⁵ Article 12 of the CRC.

⁹⁶ On the basis of these principles, the legal framework applicable to each of the international courts provides for the use of specific procedures when interacting with children, although usually in a limited manner, and not in as many details as most national legislations on juvenile justice. For more analysis on the issue of the procedure applicable to children before international and hybrid criminal tribunals, see An Michels, “Psychosocial Support for Children: Protecting the rights of child victims and witnesses in transitional justice processes,” *Innocenti Working Paper* (Florence: UNICEF Innocenti Research Centre, forthcoming in 2010) and Cécile Aptel, “Children and Accountability for International Crimes: The Role of the ICC and Other International and Mixed Jurisdictions,” *Innocenti Working Paper* (Florence: UNICEF Innocenti Research Centre, forthcoming in 2010).

other such processes. International criminal jurisdictions have not prosecuted children, considering that children are not among those who bear the greatest responsibility in these crimes. They have thus provided strong arguments to those advocating for more restorative alternatives to criminal justice when dealing with children in conflict with the law, even for the gravest crimes such as international crimes.

Whether anyone is tried at the domestic level depends on many factors, including possible national laws granting amnesties or pardons and the age of the individual concerned. Amnesties may be adopted, although consensus is growing that amnesties should not be allowed for the gravest international crimes because they contravene certain international legal obligations.⁹⁷

When Is a Child Too Young to be Tried?

Answering the question of when a child is too young to be tried requires addressing the particularly complex and contentious issue of defining an age of criminal responsibility (the age below which children are not held criminally accountable because they are deemed to be incapable of forming the requisite criminal intent).⁹⁸ This is inherently linked with the understanding of who is a child, legally but also culturally, according to the sociocultural context and also sometimes to the child's gender. State legislation determines the age of criminal responsibility, and consequently it varies widely from one country to another.⁹⁹ Indeed, none of the relevant international conventions pertaining to humanitarian and human

⁹⁷ On the permissibility of amnesties as they pertain notably to children, see Christine Bakker, "Prosecuting International Crimes against Children and Questions of Criminal Responsibility: The International Legal Framework," Innocenti Working Paper No. 2009-# (Florence: UNICEF Innocenti Research Centre, forthcoming).

⁹⁸ The age is determined at the time the alleged crime was committed.

⁹⁹ In some national jurisdictions, children are deemed to be *doli incapax*, unable to entertain criminal intent. See, notably, No Peace Without Justice and UNICEF, "International Criminal Justice and Children," 2002, at 5, and A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2002), at 2.

rights law establish a minimum age of criminal responsibility, and the CRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”),¹⁰⁰ the Paris Commitments and the Paris Principles¹⁰¹ provide only ambiguous guidance.

The situation is clearer in terms of international justice: on the basis of combined international criminal law and practice, children have not been and should not be tried for serious international crimes by international criminal courts.

The International Military Tribunals of Nuremberg and Tokyo established this trend. In Nuremberg, beyond the finding of individual responsibility of Von Schirach, an adult, notably for his use of the Hitler Jugend organization to educate German youth “in the spirit of National Socialism” and subjecting them to an intensive program of Nazi propaganda,¹⁰² the Tribunal did not address crimes

¹⁰⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, United Nations General Assembly Resolution 40/33, 29 November 1985. These rules enumerate basic procedural safeguards, such as the right to counsel, which must be guaranteed. Rule 4.1 of the Beijing Rules merely indicates that “in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”

¹⁰¹ The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups and the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, the outcome of a Paris conference convened in February 2007, have been endorsed by more than 80 countries. Paragraph 11 of the Paris Commitments requires ensuring “that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators.” Importantly, this formulation is more protective than the wording found in paragraph 3.6 of the Paris Principles: “Children who are accused of crimes under international law ... should be considered primarily as victims of offences against international law; not only as perpetrators” as it omits the critical reference to *alleged* perpetrators.

¹⁰² Baldur von Schirach, who was the “Leader of Youth” and controlled all Nazi youth organizations including the Hitler Jugend, was indicted for promoting the accession to power of the Nazi conspirators, the consolidation of their control over Germany, the psychological and educational preparations for war and the militarization of Nazi-dominated organizations. Interestingly, thanks to the efforts of von Schirach, Hitler signed

committed by Nazi youth in general and by some of their organizations in particular. Such organizations were not listed among those bearing a major responsibility for the crimes. At one point, the prosecution even recommended excluding certain sections of the Stahlhelm youth organizations from among the general membership of criminal organizations reviewed by the Tribunal.¹⁰³ Similarly, no child was tried in the Tokyo Tribunal. Also, notwithstanding the absence of provisions limiting their respective jurisdiction to persons eighteen and older and despite evidence showing the involvement of children, the practices of the ICTY and the ICTR also have been not to investigate or prosecute children.¹⁰⁴

The establishment of the ICC in 1998 translated this practice into substantive international criminal law. The ICC cannot prosecute children; its statute states that “the Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime.”¹⁰⁵

a decree on 1 December 1936 that incorporated all German youth within the Hitler Jugend. This ensured that by the time formal conscription was introduced in 1940, 97 per cent of those eligible were already members. *See* judgment available at www.nizkor.org/hweb/imt/tgmwc/judgment/j-defendants-von-schirach.html.

¹⁰³ *See* Volume 22 of the Trial Proceedings dated 29 August 1946, paras. 205-206, available at avalon.law.yale.edu/imt/08-29-46.asp. The Stahlhelm was composed of the Scharnhorst, its youth organization for boys under fourteen; the Wehrstahlhelm, which included the Jungstahlhelm (boys ages fourteen to twenty-four); the Stahlhelm sports formations (men aged twenty-four to thirty-five); and the Kernstahlhelm (men aged thirty-six to forty-five). In 1933, the Scharnhorst was transferred to the Hitler Jugend.

¹⁰⁴ It is estimated that some forty-five hundred children (below the age of eighteen) were detained in Rwanda in relation to events pertaining to the genocide, post 1994. Most were apparently released after the president of Rwanda ordered that all “genocide minors” be freed in January 2003. In 2003, eleven hundred detainees who had been children in 1994 were released; a further nineteen hundred were released in 2005 and seventy-eight more in 2007, according to the Coalition to Stop the Use of Child Soldiers. It is unclear whether any individuals below the age of eighteen in 1994 remained in detention in Rwanda. *See* “Child Soldiers Global Report 2008, Rwanda,” available at www.childsoldiersglobalreport.org/content/rwanda; *see also* www.unhcr.org/refworld/docid/49880632c.html.

¹⁰⁵ Article 26 of the Statute of the ICC.

The mixed courts are in a slightly different position because their statutes and mandates result from negotiations with the pertinent country and may accommodate the relevant national laws or national susceptibilities pertaining to the age of criminal liability. Thus, under certain conditions, some of the hybrid courts are competent to try children for crimes falling within their mandates. This is the case for the Special Panels for Serious Crimes in East Timor, competent for persons over twelve;¹⁰⁶ the War Crimes Chamber in the Court of Bosnia and Herzegovina, for persons over fourteen;¹⁰⁷ and the SCSL, for persons over fifteen.¹⁰⁸ It is

¹⁰⁶ Section 45 of the TRCP. This should be done in accordance with the United Nations Transitional Administration in East Timor juvenile justice regulations for those aged twelve to sixteen.

¹⁰⁷ Article 8 of the criminal code of Bosnia and Herzegovina provides that a child who had not reached fourteen years of age at the time of perpetrating a criminal offense should not be held criminally accountable. Juvenile justice is regulated pursuant to chapter X (Rules Relating to Educational Recommendations, Educational Measures and Punishing Juveniles) of the Criminal Code of Bosnia and Herzegovina. The Criminal Procedural Code of Bosnia and Herzegovina contains provisions (chapter XXVI, article 340) that apply to proceedings conducted against persons who were minors at the time they committed a criminal offense and who had not reached the age of twenty-one at the time proceedings were instituted or when those persons were tried.

¹⁰⁸ Article 7(1) of the statute of the SCSL states that “the Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.” Further, the statute includes specific guarantees applicable to the prosecution by the SCSL of children aged between fifteen and eighteen. Article 7(2) provides that “in the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.” Pursuant to article 15(5), “in the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation program is not placed at risk, and that where appropriate, resort should be had to alternative truth and reconciliation mechanisms to the extent of their availability.” Article 17(2) offers guidance in the instance of a conviction against a child, stating that he or she should not go to prison, but should instead be placed in a rehabilitation program.

particularly significant that those mixed courts with jurisdiction over children have decided not to invoke it, with the exception of a sole – and anomalous – case tried by the Special Panels for Serious Crimes in East Timor. In that case, the accused, who was fourteen at the time the crimes occurred, was initially prosecuted for crimes against humanity and ended up pleading guilty; he was finally convicted not of a serious international crime but for manslaughter.¹⁰⁹

In the process of establishing the SCSL and defining its jurisdiction, opposing views emerged. Some insisted on accountability, including for the crimes committed by juveniles; others, including child rights organizations, opposed the criminal prosecution of children. In his report on the establishment of the Court, the United Nations Secretary-General recognized that “the possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma.”¹¹⁰ He continued, “The Government of Sierra Leone and representatives of Sierra

¹⁰⁹ This case, highly unusual and ultimately not about a grave international crime, demonstrates nonetheless that when the prosecution of minors is allowed, it must strictly comply with the relevant international standards and the requirement of juvenile justice. On the basis of a detailed report prepared by the Judicial System Monitoring Programme (*The Case of X: A Child Prosecuted for Crimes Against Humanity*, Dili, Timor-Leste, January 2005, available at www.jsmp.minihub.org/Reports/jsmpreports/The%20Case%20of%20X/case_of_x_final_e.pdf), it appears that X was granted specific guarantees commensurate with his/her age: the proceedings were conducted in a small room, the judges were not wearing their robes, and they ensured that X was able to follow and understand the proceedings against him/her. X was also told that whenever he/she felt tired the hearing would be interrupted to give him/her time to rest. X was accompanied by the grandfather during the hearing, and the hearing was closed to the public. In order to protect the accused's identity, the court also ordered the name of the accused to be substituted by the letter X in all court documents. The proceedings were adapted to the accused's young age to allow him/her to have an understanding of the proceedings. Nevertheless, it also appears that several procedural irregularities plagued this case, notably in terms of questioning by the police and pretrial detention. X was interrogated at the police station without the presence of a legal representative or a relative; he/she was held for a period of over seventy-two hours without being taken before a judge; and he/she was held in pretrial detention for four months without a review of the detention order.

¹¹⁰ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 32.

Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability.”¹¹¹

Ultimately, a compromise was found, granting the SCSL the mandate to investigate and prosecute children over 15. Unexpectedly, the United Nations Special Representative for Children and Armed Conflict at the time had commented positively on the possibility for the SCSL to prosecute children aged fifteen to eighteen. He believed that this would ensure that “a lacuna would not exist whereby children could be recruited at fifteen but could not be prosecuted for the crimes they committed between the age of 15 and 18 years...allowing such a lacuna would set a dangerous precedent and encourage the recruitment and use of children in this age bracket.”¹¹² In any case, the SCSL never exercised its jurisdiction over children; the first prosecutor decided in 2002 that because children were not among those bearing the greatest responsibility for the crimes committed in Sierra Leone, he would exercise his discretion not to indict children who allegedly participated in the crimes, instead seeking to prosecute those “who forced thousands of children to commit unspeakable crimes.”¹¹³

¹¹¹ Ibid. para. 35.

¹¹² See Ilene Cohn, “The Protection of Children and the Quest for Truth and Justice in Sierra Leone,” *Journal of International Affairs* 55(1) 2001 (hereinafter, Cohn, “The Protection of Children”).

¹¹³ Special Court for Sierra Leone, Press Release, 2 November 2002. This use of the discretionary power of the prosecutors to direct his efforts toward others deemed more responsible had been foreseen by the United Nations Secretary-General who had declared that “ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.” Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 38.

Thus, the practice of all the international and mixed tribunals not to prosecute children for serious international crimes has been very consistent. It has been encapsulated in the statute of the ICC, which explicitly excludes children from its mandate.

Could this international practice inspire national legislators to increase the age of criminal responsibility for grave crimes defined under international law, so as to ensure that only persons older than eighteen are tried? This could only be the case if the statute of the ICC were to fix an actual age of criminal responsibility defined internationally instead of merely asserting that this Court “shall have *no jurisdiction* over any person who was under the age of eighteen at the time of the alleged commission of a crime” (emphasis added). The exclusion of children from the jurisdiction of international courts does not mean that the age of criminal responsibility is fixed at eighteen; rather, it means that children fall outside the scope of the limited personal jurisdiction of the ICC.¹¹⁴ This position is consonant with the fact that other international or hybrid jurisdictions, some established after the drafting of the ICC, were given competence to try children, as stated above.

That such jurisdictions did not exercise this part of their mandate is to be attributed to prosecutorial strategies. In accordance with their limited mandates and resources, international criminal prosecutors concentrate on those bearing the greatest responsibility, commonly seen as those who planned or orchestrated widespread criminal activity. In so doing, they have not pursued the offenses committed by children, who do not usually occupy positions of authority and responsibility. Yet the exclusion of children, which underlines that international or mixed courts are

¹¹⁴ See Per Saland, “International Criminal Law Principles,” in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999), at 200-202. Ilene Cohn (“The Protection of Children”) argues that the reasons for this exclusion included the lack of consensus on a minimum age for criminal responsibility; the avoidance of possible conflict with national regulations regarding the age of criminal responsibility; the challenge of assessing maturity, which may vary by country and may require appropriate expertise; and the difficulties of securing special resources needed for juvenile detention and implementation of sentences in light of the limitation on resources of the ICC.

not appropriate forums to prosecute them, does not preclude other competent national courts from trying them.

Whether children are ultimately tried by domestic criminal systems depends on the applicable national legal framework, which should comply with the relevant international standards. These standards, establishing minimum guarantees that should be granted to juvenile offenders, are notably found in the CRC,¹¹⁵ the Beijing Rules, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,¹¹⁶ the United Nations Guidelines for the Prevention of Juvenile Delinquency (also referred to as “The Riyadh Guidelines”)¹¹⁷ and the Guidelines for Action on Children in the Criminal Justice System.¹¹⁸ Contexts of massive or systematic perpetration of international crimes and the participation of children in these crimes pose many extremely difficult legal, policy and moral questions. In considering their options and the best possible solutions, those responsible for defining the national legal and policy frameworks should balance the international legal obligations pertaining to the “duty to prosecute” specific crimes

¹¹⁵ Articles 37 and 40 of the CRC focus on the rights of juvenile offenders and the guarantees they should be afforded. These guarantees encompass those usually granted in criminal proceedings, as recognized notably in the International Covenant on Civil and Political Rights (such as the presumption of innocence; the right to be informed of charges promptly and directly; the right to trial without delay; the right to a fair trial and to appeal; the right to an interpreter; and the right to privacy) and also specific procedures pertaining to juvenile offenders. Article 40 states that “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.” Other relevant provisions include the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, also called the Havana Rules.

¹¹⁶ Adopted in 1990, these rules aim to safeguard fundamental rights and establish measures for the re-integration of young people who have been deprived of their liberty.

¹¹⁷ Adopted in 1990, these guidelines provide for the prevention and protection of juvenile delinquency.

¹¹⁸ Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

defined under international law with what is in the best interests of the children concerned, in light of their evolving capacities and the specific circumstances and in keeping with the guiding legal principles of the body of child rights.

Alternatives to Criminal Justice

Considering the appropriateness of criminal justice mechanisms to deal with children who have participated in international crimes, some argue that there should be a presumption that children are incapable of forming the requisite criminal intent required for complex international crimes.¹¹⁹ David Crane, the first prosecutor of the SCSL (who decided not to pursue children), later wrote that “children under fifteen per se are legally not capable of committing a crime against humanity and are not indictable for their acts at the international level.”¹²⁰ W. McCarney, looking specifically at child soldiers, argued that based on both their age and the trauma generated by their experience, such children cannot distinguish between right and wrong.¹²¹ Interestingly, he also contended that social norms, which demand the obedience of children to adults, have to be taken into account in any consideration of intent.¹²²

¹¹⁹ On this point, see Matthew Happold, “The Age of Criminal Responsibility for International Crimes under International Law,” in K. Arts and V. Popovski, eds., *International Criminal Accountability and the Rights of Children* (2006), hereinafter Arts and Popovski, *International Criminal Accountability* and Matthew Happold, “Child Soldiers: Victims or Perpetrators?,” *University of La Verne Law Review* 29(56) 2008.

¹²⁰ David Crane, “Strike Terror No More: Prosecuting the Use of Children in Times of Conflict: The West African Extreme,” in Arts and Popovski, *International Criminal Accountability*, at 121. Crane was a prosecutor at the SCSL.

¹²¹ W. McCarney, “Child Soldiers: Criminals or Victims? Should Child Soldiers Be Prosecuted for Crimes Against Humanity?,” Paper presented to the Child and War Conference (Sion, Switzerland: International Institute for the Rights of the Child, 2001), cited by Angela Veale, “The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology,” in Arts and Popovski, *International Criminal Accountability*, at 97-98.

¹²² It is through interaction with parents, teachers and other significant adults that young

A key characteristic of serious international crimes is that they are generally committed in contexts marked notably by coercion, manipulation and the use of propaganda, to which children are particularly vulnerable. As Michael Wessells pointed out, “Children do a number of things when they are subjected to [such circumstances], but the most frequent is a process of splitting or dissociation: They literally cut themselves off from their past identity and construct a new identity more appropriate to their new situation – and they do things that are appropriate in that world, such as killing.”¹²³ This raises the question as to whether some child soldiers ultimately suffer from the so-called Stockholm syndrome, the tendency of kidnap victims to associate themselves with their kidnappers after some period of time.

In these circumstances, the appropriateness of criminal justice for children who have participated in the commission of crimes defined under international law seems diminished, especially when it is difficult if not impossible to precisely determine the individual responsibility of each child. These circumstances encompass situations in which children are acting under duress because they have been abducted or have lost their families and have nowhere to go or are under the influence of drugs forcibly administered, as has been seen in different contexts.¹²⁴ Child soldiers or children who are

children learn to make rudimentary moral judgments and start to understand the need to respect certain values, norms and conventions. Obviously, these circumstances may be totally confusing in the cases of children who have been ordered or forced to commit atrocities. The moral development of younger children is influenced by rewards and punishments. As children grow older, it seems that their moral development is largely influenced by peer groups, which again can be assumed to be very detrimentally affected by circumstances such as child soldiering.

¹²³ Michael Wessells, cited in Stephanie Nolen and Erin Baines, “The Making of a Monster,” *The Globe and Mail*, 25 October 2008, available at www.theglobeandmail.com/servlet/story/RTGAM.20081024.wongwen1024/BNStory/International/home?cid=al_gam_mostview, hereinafter Nolen and Baines, “The Making of a Monster.” Wessells is a professor of psychology at Columbia University and an expert in child protection who has worked extensively in northern Uganda,

¹²⁴ See, for example, the circumstances in which children were recruited by the Khmer Rouge regime in Cambodia and used to commit atrocities: Meng-Try Ea and Sorya Sim, “Victims and Perpetrators? Testimony of Young Khmer Rouge Comrades,” Documentation Series No. 1, Documentation Center of Cambodia, 2001.

part of violent youth militia are frequently coerced into committing grave crimes. Some circumstances, such as having been recruited as a child soldier, could be implied, in and of themselves, to be coercive.

In Uganda, for instance, the Lord's Resistance Army has used dehumanizing tactics to terrify the children they abduct and force them into submission. As noted in a newspaper article, "The price of disobedience was clear: they were forced to kill children who attempted escape by beating them with a log or branch while the others stood and watched. Sometimes, after such a killing, the young trainees were forced to taste the dead child's blood."¹²⁵ Children abducted and forced to serve as soldiers are usually ordered to forget their past lives and are taught, through fear, indoctrination and threats (such as of retaliation against one's family), that escape is impossible. In addition, children who have committed atrocities fear, and often are told, that their families and communities will not accept them back or that they may face the police and legal action.¹²⁶

Given the serious questions about the appropriateness of criminal justice for children who have participated in the commission of serious crimes, are there suitable alternatives? This author contends that a free and willing acknowledgment of the crimes committed and a full explanation of the circumstances is often in the best interests of the children concerned. Such a process can maximize the opportunities for rehabilitation and reintegration into their families and communities, as long as these take place in a protective environment.¹²⁷ On this basis, it is contended that children who have participated in the commission of serious crimes should preferably not go through a criminal process but rather undergo more restorative processes including mediation, truth commissions or other alternative reconciliation mechanisms, insofar as these processes fully respect children's rights.

¹²⁵ Nolen and Baines, "The Making of a Monster."

¹²⁶ See Peter Eichstaedt, *First Kill Your Family: Child Soldiers of Uganda and the Lord's Resistance Army* (Chicago: Lawrence Hill Books, 2009).

¹²⁷ See Annex, Key Principles for Children and Transitional Justice.

These processes usually prioritize acknowledgment and reconciliation over litigation and punishment, which makes them particularly suited to children. When handled sensitively, they offer the potential for children to acknowledge their responsibility and express contrition, regret or remorse, and also to explain their own victimization and wish to be reintegrated into their families and communities. Of course, such processes are not a panacea; any truth-telling mechanism may be detrimental to reintegrating individual children by highlighting the full extent of their crimes. Yet deconstructing the circumstances that led to the involvement of children in grave crimes may enable them, their victims, their families and their communities to better understand the causes, nature and consequences of the conflict, what happened and how, thus diminishing the stigma attached to the children concerned. These processes also have the benefit of ascertaining children's resilience and agency. They establish that children bear rights as well as obligations, and that ultimately, consistent with their age and development, they are individuals responsible for their acts, able to actively participate in mechanisms and decisions affecting their lives.

CONCLUSIONS

International justice has undoubtedly contributed to the increasing recognition of the harm that violence and conflicts cause for children and to the extent of their victimization from mass, systematic crimes. Two international courts have played a particular role in this respect. Sierra Leone's Special Court has been a pioneer, ensuring that the recruitment and use of child soldiers is recognized as an international crime and that those responsible are held accountable. The International Criminal Court has continued this trend, bringing to the world's attention the plight of children associated with armed forces and groups by focusing on their unlawful recruitment and use in its first and highly publicized trial.

These significant contributions should not be understated, and the courts are to be congratulated for their efforts to assert the responsibilities of those who have recruited and exploited child

soldiers. Yet much more is needed to better protect children, notably those who may have participated in the commission of crimes, as well as all those involved as victims of crimes or as witnesses before international courts.

International and mixed courts, which concentrate on those bearing the greatest responsibility for the worst crimes, address the commission of crimes against rather than by children. Children should not be among those held accountable internationally. Even if they have participated in crimes defined under international law, children should be considered primarily as victims, especially when circumstances are inherently coercive, which is typically the case, especially during armed conflict and for child soldiers.

Yet more thinking is required concerning the liability of children who have participated in the commission of crimes. While children are always primarily victims of international crimes, it is clear that some are also involved in the perpetration of such crimes, whether as child soldiers or in other circumstances. Many questions remain as to what really is in the best interests of these children and whether some forms of acknowledgment and contrition, in protective nonjudicial forums, might be beneficial. Perhaps such processes could facilitate their rehabilitation and reintegration into their families and communities.

This chapter demonstrates that, in addition to holding responsible those who recruit and use child soldiers, much more remains to be done by international criminal justice to foster the protection of children. The focus of international jurisdictions, in particular the ICC, on the crime of unlawfully recruiting or using children to actively participate in hostilities should not be to the detriment of attention on other international crimes victimizing children, committed during conflicts and also during peacetime.

The monitoring and reporting mechanism established through United Nations Security Council resolution 1612, which enables systematic collection of information on six specific categories of grave violations against children, forms the basis for improved response and accountability. The resolution leads to a periodic “naming and shaming” exercise in which situations are brought to the attention of the Security Council and may include sanctions

against the countries or non-state actors who abuse children in the context of armed conflict. The six violations are killing or maiming; recruitment or use of child soldiers; rape and other forms of sexual violence; abduction; attacks against schools or hospitals; and denial of humanitarian access.¹²⁸ This list is limited and does not include many crimes defined under international law that victimize many children across the world. At first, only the recruitment or use of child soldiers was a “trigger” to initiate the implementation of the monitoring and reporting mechanism, but this was extended in 2009 by United Nations Security Council resolution 1882 to patterns of killing or maiming of children and/or rape and other sexual violence against children. Yet the application of resolution 1612 is limited to countries on the agenda of the Security Council.

While many – if not most – of the grave crimes committed against children are perpetrated in the course of armed conflicts, more consideration should be devoted to international crimes committed against them in other contexts. These should include targeting of children as part of a genocide campaign and the widespread enslavement of children, which constitutes a crime against humanity. These crimes are not yet receiving sufficient attention, although the appointment in 2009 of the first Special Representative of the United Nations Secretary General on Violence against Children is a cause for hope.¹²⁹ But reporting crimes and raising awareness, while crucial, do not amount to accountability.

International criminal jurisdictions cannot prosecute each crime within their respective mandates, but to the extent possible they should meticulously identify the systematic, widespread or endemic patterns of criminality affecting children. This important role was highlighted by three separate resolutions of the United

¹²⁸ United Nations Security Council resolution 1612 (S/RES/1612 [(2005)] of 26 July 2005. Importantly, that resolution also enabled the establishment of a permanent Security Council working group, the consolidation of the office of the Special Representative of the United Nations Secretary-General for Children and Armed Conflict.

¹²⁹ This appointment is in line with the recommendation included in the 2006 Secretary-General’s Study on Violence against Children. The Secretary-General appointed Marta Santos Pais, a long-time child rights advocate and an outstanding practitioner.

Nations General Assembly that recognized the role of the ICC in ending impunity for perpetrators of crimes against children.¹³⁰ It is important that international criminal jurisprudence continue to expand to include the whole range of crimes committed against children – boys and girls, child-specific and generic, sexual and nonsexual, whether or not perpetrated during armed conflict.

Children, in general, and girls in particular, are only slowly emerging as previously invisible categories of victims. The extent to which children in general and girls in particular are victimized by crimes defined under international law and the negative impact that these crimes have on them have not yet been fully documented. All crimes against children should be documented and penalized, and international courts have a critical role to play in that process. It is essential to break away from an “adult-centric” understanding of international crimes and acknowledge that, in numerous contexts, the victims and witnesses of grave crimes are children.

¹³⁰ Resolutions 54/149, 57/190 and 60/231 of the United Nations General Assembly.