

**Innocenti Working Paper**

**CHILDREN AND ACCOUNTABILITY  
FOR INTERNATIONAL CRIMES:  
THE CONTRIBUTION OF  
INTERNATIONAL CRIMINAL COURTS**

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The identification of topics and authors in this Working Paper Series was undertaken in the context of strategic partnerships with the Human Rights Program at Harvard Law School, and the International Center for Transitional Justice (ICTJ). The review of the Series was guided by a peer review oversight panel, chaired by Jaap Doek. A network of practitioners, academics, legal experts and child rights advocates participated in the peer review. The Series was initiated and overseen by Saudamini Siegrist, with the support of Ann Linnarsson.

An Expert Discussion on Children and Transitional Justice was convened by UNICEF Innocenti Research Centre (IRC) in June 2008 to provide comments to individual authors and to assess the range and coverage of the Series. A subsequent conference on Children and Transitional Justice was jointly convened by the Human Rights Program at Harvard Law School and IRC in April 2009 in Cambridge, MA USA.

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This series of Working Papers supports and complements the publication *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, edited by Sharanjeet Parmar et al., published by the Human Rights Program, Harvard Law School, Cambridge, MA, March 2010.

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- No. 17: Transitional Justice and Youth Formerly Associated with Armed Forces and Armed Groups. Theresa Betancourt and A'Nova Ettien, François-Xavier Bagnoud Center for Health and Human Rights.
- No. 20: Children and Accountability for International Crimes: The Contribution of International Criminal Courts. Cécile Aptel, ICTJ.

Other papers produced by the project have been published in *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (UNICEF and Harvard Law School, 2010), and are available on the UNICEF IRC website.

- Chapter 1: *Child Rights and Transitional Justice*. Saudamini Siegrist, UNICEF IRC.
- Chapter 2: Basic Assumptions of Transitional Justice and Children. Alison Smith, No Peace Without Justice.
- Chapter 3: International Criminal Justice and Child Protection. Cecile Aptel, ICTJ.
- Chapter 4: Children and the South African Truth and Reconciliation Commission. Piers Pigou, South African Archives.
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# CHILDREN AND ACCOUNTABILITY FOR INTERNATIONAL CRIMES: THE ROLE OF THE ICC AND OTHER INTERNATIONAL AND MIXED JURISDICTIONS

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**Summary:** This paper analyses the extent to which international and ‘mixed’ or ‘hybrid’ criminal courts, in particular the International Criminal Court (ICC), have focused on crimes against children and dealt with children as victims, witnesses and potential offenders.

While the earlier international courts -notably the International Military Tribunals of Nuremberg and Tokyo and the United Nations Tribunals for the former Yugoslavia and for Rwanda- referred mainly to crimes against children as part of other atrocities against civilians or against certain ethnic or religious groups, crimes against children are now receiving more focused attention. The paper underlines the major role played recently by international courts, notably the Special Court for Sierra Leone, followed by the ICC, in criminalizing as war crimes the conscription or enlistment of children and their use to participate actively in hostilities. The Special Court was the first to hand down convictions for these crimes. The first cases before the ICC also concern the unlawful recruitment of children or their use in hostilities, bringing these crimes to the fore.

The paper emphasizes that despite the significant contributions of international courts to the understanding of how children are being victimized, much more remains to be done to fully document the extent of extreme violence they suffer. The current focus on the recruitment and use of child soldiers should not detract from other child victims and from the need to pursue accountability for other international crimes against children. Time and again, children are killed, tortured, enslaved or raped and are victims of genocide, crimes against humanity and other international crimes falling within the mandate of international courts. Yet the extent to which international and mixed tribunals have recognized and litigated these crimes remains limited. While international courts cannot prosecute each of these crimes, they can and should contribute to identifying the systematic, widespread or endemic patterns of criminality affecting children, whether or not it takes place during conflicts.

Regarding children suspected of having participated in crimes, the paper establishes that none has been tried for international crimes by international courts. These courts have not prosecuted children because they are deemed not to be among those bearing the greatest responsibility for the worst crimes. International jurisdictions address the commission of crimes against rather than by children. This paper posits that children who have participated in international crimes should be considered primarily as victims, especially when the circumstances surrounding these crimes are inherently coercive. Yet some forms of acknowledgement, in a protective environment, may in certain circumstances be in the interest of these children and facilitate their rehabilitation and reintegration. Deconstructing the circumstances that led to children’s involvement in international crimes may enable them, their victims, their families and their communities to better understand the causes, nature and consequences of what happened and how, thus diminishing the stigma attached to the children concerned.

After presenting the relevant procedural provisions applicable before international courts, in particular the ICC, when interacting with child victims or witnesses, or with adults testifying about crimes they have experienced as children, the paper offers recommendations concerning specific areas where international practice could be improved.

The paper concludes that it is important for children to emerge as a recognized category of victims, because the process acknowledges and empowers them. It is essential to break away from an adult-centric understanding of international crimes and acknowledge that, in numerous contexts, victims and witnesses of international crimes are children, and as children, they have specific rights and specific needs.

**Keywords:** international criminal law, child rights, accountability, child-friendly procedures, child protection, juvenile justice

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# 1. INTRODUCTION

When grave international crimes – such as genocide, crimes against humanity or war crimes - are committed, children are among the victims, being affected in many different ways, physically and psychologically. Children are primarily victims of these crimes, yet, they also sometimes participate in their commission. Whether as victims, witnesses or alleged participants in the crimes, children interact with criminal justice systems, including with international and mixed criminal courts (‘international courts’) established to try international crimes in places such as the former Yugoslavia, Rwanda, Sierra Leone, East Timor, Cambodia, Darfur or Uganda.

This paper aims to determine the extent to which each international court<sup>1</sup> has focused on international crimes committed against children and also sometimes by children. It identifies emerging standards and practices concerning the interaction of children with international courts and the treatment of children by these courts. It explores the intersection between the fields of child rights and of international criminal law, considering exclusively international crimes, and the legal framework and practice of international courts; not the treatment of children by national criminal systems, even when core international crimes are concerned.<sup>2</sup>

Specifically, this paper assesses the contribution of international courts in trying those responsible for crimes against children (section 2), excluding children from international prosecutions (section 3), and adopting and implementing procedures respecting the rights and needs of children involved (section 4).

It emphasizes that while international courts have contributed to the understanding of how 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

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<sup>1</sup> 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 U.N. 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-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.

<sup>2</sup> This paper does not cover the treatment of children by national criminal systems, even when such crimes are defined under international law, as in the cases of children suspected of war crimes, for instance Omar Khadr, arrested in Afghanistan and detained by the United States of America, or children arrested in Sudan in association with the Justice and Equality Movement.

again, children are victims of genocide, enslavement, rape, exploitation and other international 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 armed conflict and also in other situations when violence occurs. More should also be done to include children, notably child-victims, so that their rights to participation and reparations are fulfilled. The paper posits that children who have participated in international crimes should be considered primarily as victims, especially when the circumstances surrounding these crimes are inherently coercive, which in practice often seems to be the case.

Recognizing that children may be adults by the time an international court is established or starts its work, this paper focuses on children but many of its findings and recommendations are also of importance for and applicable to young adults.<sup>3</sup>

## **2. ACCOUNTABILITY FOR INTERNATIONAL CRIMES AGAINST CHILDREN**

This section introduces the contribution of international courts in holding to account those responsible for international crimes committed against children. It starts by presenting the differences in the mandate and jurisdiction of different international courts, to demonstrate that the progressive inclusion of crimes against children has mirrored their progressive recognition and the increased attention given to them over time.

International and mixed criminal jurisdictions are a relatively recent phenomenon. The first international courts were established in the aftermath of World War II, under the form of two International Military Tribunals, based respectively in Nuremberg and Tokyo.<sup>4</sup> After a long period of inactivity in international criminal justice throughout the Cold War, the 1990s brought considerable progress, with the establishment of several new jurisdictions. In 1993 and 1994, the Security Council of the United Nations (UN) set up the ad hoc International Criminal Tribunals for the former Yugoslavia<sup>5</sup> and for Rwanda.<sup>6</sup> The success of these two jurisdictions paved the way for the creation in 1998 of the permanent and universal International Criminal Court (ICC).<sup>7</sup> In parallel, other efforts to fight impunity for serious international crimes led to the creation of so-called ‘hybrid’ or mixed courts, established by

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<sup>3</sup> Under the Convention on the Rights of the Child (which was adopted by UN General Assembly resolution 44/25 of 20 November 1989, and entered into force on 2 September 1990), children are defined as persons under 18 years of age. UNICEF defines ‘youth’ as those between the ages of 15 and 24 (see UNICEF fact sheet of 31 May 2008, available online: [http://www.unicef.org/media/files/Fast\\_facts\\_EN.doc](http://www.unicef.org/media/files/Fast_facts_EN.doc)).

<sup>4</sup> The International Military Tribunal of Nuremberg was established by the London Charter of 8 August 1945. The International Military Tribunal for the Far East (Tokyo Tribunal) was established by the Charter of the International Military Tribunal for the Far East proclaimed on 19 January 1946.

<sup>5</sup> United Nations Security Council Resolutions 808 (1993) and 827 (1993).

<sup>6</sup> United Nations Security Council Resolution 955 (1994).

<sup>7</sup> The Statute of the ICC (or Rome Statute) was signed in July 1998 by 120 states, and entered into force in 2002, triggering the temporal jurisdiction of the ICC, which is competent for grave international crimes committed in the territory or by States-party nationals, or which may otherwise be referred to the ICC by the UN Security Council.

agreements between the UN and the government of the State concerned, combining international and local judges, prosecutors and personnel. Mixed or ‘hybrid’ courts include the Special Panels in East Timor,<sup>8</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>9</sup> the Special Court for Sierra Leone,<sup>10</sup> and the War Crimes Chamber in the Court of Bosnia-Herzegovina.<sup>11</sup> All these international courts have mandates to try individuals responsible for international crimes; their competence often restricted to three of them: genocide, crimes against humanity and war crimes.<sup>12</sup>

The decision to establish an international court is marked by many complex dynamics, and diplomatic and political compromises significantly influence each court’s mandate: each one has a limited specific jurisdiction and can only prosecute crimes falling within this scope. The legal framework regulating the international courts’ procedure and operations include only very few provisions pertaining explicitly to crimes committed against children, or to the specific rights and needs of children. Arguably, this vacuum highlights the relative little attention given to children when these courts were established.

It is only with the seminal 1996 report by Graça Machel on the impact of armed conflict on children,<sup>13</sup> and following the adoption of the Convention on the Rights of the Child (CRC) in 1989,<sup>14</sup> that the specific plight of children in the context of mass or systematic crimes began to capture international attention. Before then, international crimes had been defined rather restrictively, influenced by the historical contexts of the crimes committed by the Nazis during the Second World War, and the struggles for independence in the 1960s. With a few exceptions, little attention was devoted to the plight of children: crimes against children were left to be addressed by national judicial systems. The establishments of the ICC and the Special Court for Sierra Leone (SCSL), a few years after the publication of the Machel report, have triggered major developments regarding the sanctioning of crimes against children.

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<sup>8</sup> The Special Panels of the Dili District Court were created in 2000 by the United Nations Transitional Administration in Timor Leste to try cases of "serious criminal offences", including murder, rape, and torture, which took place in Timor Leste in 1999.

<sup>9</sup> The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the Khmer Rouge regime) was created jointly by the Government of Cambodia and the UN.

<sup>10</sup> The Special Court for Sierra Leone was set up by an agreement between the Government of Sierra Leone and the United Nations to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, further to Security Council 1315 (2000) of 14 August 2000 which requested the Secretary-General “to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution...” (para. 1).

<sup>11</sup> The War Crimes Chamber is integrated into the domestic Bosnian legal system; its mandate extends to cases referred to it by the ICTY, but also over the most sensitive cases brought at a national or local level.

<sup>12</sup> Article 5(1) of the statute of the ICC stipulates that the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole. A notable exception is the Special Tribunal for Lebanon established in 2007 by the UN Security Council to try crimes defined under Lebanese law, including terrorism.

<sup>13</sup> 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*].

<sup>14</sup> 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.

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), although the two categories may overlap. This section analyzes the extent to which international and mixed tribunals have recognized and litigated each category of crimes.

## **2.1. Child-specific International Crimes**

There are three child-specific crimes defined under international law: the war crime of conscripting or enlisting children or using them to participate actively in hostilities, 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. While the jurisdiction of the International Military Tribunals of Nuremberg and Tokyo did not cover any of these child-specific crimes, the subsequent international courts have jurisdiction for a few serious international crimes targeting exclusively children. Such offences are more prominently highlighted in the statutes of the most recent of these courts, in particular the ICC and the SCSL.<sup>15</sup>

### ***2.1.1 Conscripting or enlisting children or using them to participate actively in hostilities***

Among the child-specific offences, those given the most attention are the conscription or enlistment of children by armed forces or groups, or their use in hostilities. Commonly known as the recruitment or use of child-soldiers,<sup>16</sup> these crimes affect hundreds of thousands of girls and boys throughout the world. Those who survive often suffer long-term consequences, having lost crucial years of socialization and education, and many 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.<sup>17</sup> Elaborating on the general protection afforded to children in the 1949 Geneva Conventions, the two Additional

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<sup>15</sup> In addition, the Statute of the SCSL refers to certain crimes defined under Sierra Leonean law and provides that the court is competent to prosecute individuals who abuse girls under 14 years of age, or for “abducting a girl for immoral purposes”. Article 5(a) of the statute of the SCSL refers to offences relating to the abuse of girls defined under the Sierra Leonean “Prevention of Cruelty to Children Act” of 1926.

<sup>16</sup> In this paper, the terms “child soldier” and “child associated with armed forces or armed groups” are used 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*.)

<sup>17</sup> 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.

Protocols of 1977 set a minimum age of 15 for the recruitment of children into armed forces or groups and for their direct participation in hostilities in the case of non-international armed conflicts<sup>18</sup> and a minimum age of 18 for international conflicts.<sup>19</sup> The CRC, adopted in 1989, called on states to ensure that children under 15 are not recruited and do not take a direct part in hostilities.<sup>20</sup>

In 2000, an Optional Protocol to the CRC was adopted on the involvement of children in armed conflict, prohibiting the forced recruitment and use of children under 18 in hostilities.<sup>21</sup> Under certain conditions it allows their voluntary recruitment into national armed forces, but not into armed groups.<sup>22</sup> 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.”<sup>23</sup> An additional international instrument prohibiting the forced or compulsory recruitment of children below age 18 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).<sup>24</sup> 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 Forces or Armed Groups; and the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.<sup>25</sup>

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<sup>18</sup>Article 4(3)(c) of Additional Protocol II provides that “[c]hildren 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.”

<sup>19</sup>Article 77 of Additional Protocol I.

<sup>20</sup>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 18 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 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.

<sup>21</sup>Articles 2, 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child, U.N. Doc A/54/RES/263, 25 May 2000. The Optional Protocol entered into force in 2002.

<sup>22</sup>This is specified in article 3(3) of the Optional Protocol and notably provides that the recruitment should be “genuinely voluntary” and “carried out with the informed consent of the person's parents or legal guardians.”

<sup>23</sup>Article 1 of the Optional Protocol.

<sup>24</sup>Adopted in 1999.

<sup>25</sup>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 18 (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.”

It was only in 1998, with the adoption of the Rome Statute of the ICC, that the recruitment and use of child soldiers was explicitly criminalized under an international instrument.<sup>26</sup> The recruitment and use in hostilities of persons younger than 15 was specifically deemed to be an international crime. Two provisions pertaining to war crimes in the statute of the ICC refer to this crime: article 8(2)(b)(xxvi) criminalizes “[c]onscripting 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 “[c]onscripting 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 enrolment and use of child soldiers was reiterated in article 4(c) of the statute of the SCSL, adopted in 2002.<sup>27</sup>

The SCSL is the first of the international courts to have focused on this crime,<sup>28</sup> charged individuals with the unlawful recruitment and use of children, and ultimately convicted them for it.<sup>29</sup> 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 15 had crystallized as a norm of customary international law by November 1996 and as such attracted individual criminal responsibility at least from that date,<sup>30</sup> as had been argued by UNICEF.<sup>31</sup> 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 15 years into armed forces or groups or using them to participate actively in hostilities.<sup>32</sup> Subsequently, Issa Hassan Sesay and Morris Kallon, of the

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<sup>26</sup> 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, e.g.*, the United States Child Soldiers Accountability Act of 2007, which makes it a crime to knowingly recruit or use soldiers under the age of 15 (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 15 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.

<sup>27</sup> Article 4(c) of the statute of the SCSL criminalizes “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”

<sup>28</sup> 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. 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*, paragraph 465, at p6.

<sup>29</sup> In 2003, the prosecutor of the SCSL declared that “[t]wo 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”.

<sup>30</sup> *Prosecutor v. Hinga Norman*, Decision of the SCSL Appeals Chamber, SCSL-2004-14-AR72(E), 31 May 2004, paragraphs 52-53.

<sup>31</sup> 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.

<sup>32</sup> Judgment, SCSL-04-14-T, 2 August 2007; Judgment, SCSL-04-16-T, 20 June 2007.

Revolutionary United Front, were found guilty of this crime.<sup>33</sup> The trial of former Liberian president Charles Taylor, ongoing before the SCSL, demonstrates the sustained attention this court has given to crimes victimizing child soldiers.<sup>34</sup>

The ICC has followed this trend and dramatically highlighted the growing significance given to crimes victimizing children through its very first trial, in the case of Thomas Lubanga Dyilo, launched exclusively on the basis of three counts of war crimes for enlisting and conscripting children under the age of 15 in the Democratic Republic of the Congo and using them to participate actively in hostilities.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

Beyond the Lubanga case, 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 enrolment or use of child soldiers include leaders of the Lord's Resistance Army – Joseph Kony, Vincent Otti and Okot

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<sup>33</sup> Judgment, SCSL-04-15-T, 25 February 2009.

<sup>34</sup> *Prosecutor v. Charles Taylor*, SCSL-03-01.

<sup>35</sup> *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](http://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.

<sup>36</sup> 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 Davis 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/ICTJDavisHayner\\_DRC\\_DifficultPeace\\_pa2009.pdf](http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner_DRC_DifficultPeace_pa2009.pdf)).

<sup>37</sup> *See* Davis and Hayner, “Difficult Peace, Limited Justice,” *ibid*, at 30-31. The *Report of the 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.)



Odhiambo – and of Congolese armed groups – Bosco Ntaganda,<sup>38</sup> Germain Katanga and Matthieu Ngudjolo Chui.<sup>39</sup>

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.

### ***The distinction between conscripting and 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.”<sup>40</sup> Nevertheless, in the view of another trial chamber of the SCSL, “the distinction between voluntary enlistment and conscription is somewhat contrived. Attributing voluntary 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.”<sup>41</sup>

Whether or not children join voluntarily or are forced to do so is ultimately irrelevant; those responsible for enlisting volunteer children under 15 as well as those forcibly conscripting them can be held criminally liable before international criminal jurisdictions.<sup>42</sup> This was

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<sup>38</sup> Ntaganda is co-accused with Lubanga. He has been charged with three counts of war crimes, including the enlistment and conscription of children under the age of 15 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](http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF).

<sup>39</sup> *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](http://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.

<sup>40</sup> *Prosecutor v. Brima, Kamara, Kanu* (AFRC case), Case No. SCSL-2004-16-T, Judgment, 20 June 2007, at 734-35.

<sup>41</sup> *Prosecutor v. Fofana and Kondewa* (CDF case), SCSL-04-14-T Trial Judgment, 2 August 2007, paragraph 192.

<sup>42</sup> Additional arguments in favour 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

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.”<sup>43</sup>

Additionally, the United Nations Special Representative of the Secretary-General for Children and Armed Conflict (SRSG) submitted to the ICC that “[i]n 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 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.”<sup>44</sup> The SRSG also indicated that “children under 15 years cannot reasonably give consent to their own abuse and exploitation”,<sup>45</sup> and that the concept of informed consent does not exist for children under 15 years of age because of “their extreme vulnerability to pressure and inability to understand the potential consequences of their actions”.<sup>46</sup>

### ***How many crimes?***

Is more than one crime subsumed under “conscripting or enlisting children or using them to participate actively in hostilities”?<sup>47</sup> 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

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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 “[t]he 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, paragraph 4557). The Optional Protocol, which stipulates that “[a]rmed 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).

<sup>43</sup> *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paragraph 247.

<sup>44</sup> *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 paragraph 14.

<sup>45</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-223-ENG, Official Court Transcripts, 7 January 2010, p.11.

<sup>46</sup> *Ibid.*, p. 23. The SRSG acknowledged that the ability to give consent by children between 16 and 18 is still being debated.

<sup>47</sup> *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).

conscripted or enlisted them, of putting their lives directly at risk of combat).”<sup>48</sup> The view that these are in fact three crimes rather than one seems endorsed by the SRSG, who indicated to the ICC “the invalidity of a child’s consent to any of the three crimes of child soldiering.”<sup>49</sup>

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.

### ***Participating actively in hostilities***

The definitions of the crime of using child soldiers require that the children “participate” in hostilities.<sup>50</sup> The language on this point has evolved; the phrase “participate actively in hostilities,” found in the Statute of the ICC, being broader and therefore more encompassing than the language “take a direct part in hostilities,” used in prior international legal instruments.<sup>51</sup> 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

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<sup>48</sup> This distinction was made by Judge Robertson in his separate opinion appended to the Appeals Chamber Judgment in the case of T, *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.

<sup>49</sup> *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 paragraph 10.

<sup>50</sup> 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 18 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.

<sup>51</sup> *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.

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 “[u]sing children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat” and that “[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”<sup>52</sup>

In written submissions to the ICC, the SRSB 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.”<sup>53</sup> 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 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.”<sup>54</sup>

Subsequently appearing as an expert witness before the ICC, the SRSB asked the ICC to protect all children, including girls, who have been abused during their association with armed groups after they have been recruited or enlisted regardless of whether or not they mostly engaged in direct combat functions during conflict.<sup>55</sup> She argued that: “when girl children are abducted or enlisted or enrolled, even as sexual slaves, that it be regarded as enlistment or conscription from the day they entered the camp, because they play -- they will play multiple roles in those camps. [...] it would just be impossible [to determine] on these days she is a combatant and on these days she is a domestic aid [...]”<sup>56</sup>

The SRSB 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.<sup>57</sup> 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.”<sup>58</sup>

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<sup>52</sup> *Prosecutor v. Brima, Kamara, Kanu* (AFRC Accused), Case No. SCSL-2004-16-T, 20 June 2007, at 736-37.

<sup>53</sup> *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 paragraph 20-21.

<sup>54</sup> *Ibid.*, at paragraph 22.

<sup>55</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-223-ENG, 7 January 2010, Official Court Transcripts, pp 15-16.

<sup>56</sup> *Ibid.*, p. 36.

<sup>57</sup> *Ibid.*, at paragraph 25.

<sup>58</sup> *Ibid.*, at paragraph 26.

This thorny 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 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 Lubanga: sexual slavery, inhumane treatment and cruel treatment (in addition to the existing charges for the recruitment and use of child soldiers).<sup>59</sup> Their request was ultimately denied.<sup>60</sup>

### ***2.1.2 Forcible transfer of children to another group***

Another child-specific crime is the forcible transfer of children from one national, ethnic, racial or religious group to another, which constitutes genocide if committed with the intent to destroy, in whole or in part, the group of origin of these children. This was originally defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and this provision has been reproduced verbatim in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and provides the only explicit reference to children in the statutes of these

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<sup>59</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, "Demande conjointe des Représentants Légalisés 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 "[i]f 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 Légalisés 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.

<sup>60</sup> 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.

two courts. This provision also falls within the competence of the ICC.<sup>61</sup> Beyond individual children, this crime targets the group to which they belong.<sup>62</sup>

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....”<sup>63</sup>

### **2.1.3 Attacks against buildings dedicated to education**

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.<sup>64</sup>

## **2.2. Crimes Victimizing Children among Other Victims**

Children are also victims of other more “generic” international crimes. The preamble of the statute of the ICC recalls that its drafters were “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>65</sup>

Children fall victims of genocide, crimes against humanity and war crimes as they are abducted, taken as hostages, detained, tortured, killed, trafficked or raped. As most international crimes are systematic, targeting either specific groups or an entire civilian population, children are affected alongside other victims. Yet, these crimes tend to disproportionately affect children in regard to their long-term consequences and traumatic impact.<sup>66</sup> Children are particularly vulnerable to violence because of its potential to harm their development.<sup>67</sup>

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<sup>61</sup> Article 6(e) of the Statute of the ICC.

<sup>62</sup> 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.

<sup>63</sup> The Trial of German Major War Criminals Judgment, 30 September - 1 October 1946, at 52.

<sup>64</sup> Article 8(2)(b)(ix) of the Statute of the ICC.

<sup>65</sup> Preamble of the Statute of the ICC.

<sup>66</sup> See Machel, *Promotion and Protection of the Rights of Children*, p. 24, 32, 39-40.

<sup>67</sup> Angela Pirisi argues that for children “[e]xposure 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, e.g., National Scientific Council on the Developing Child “Excessive Stress Disrupts the Architecture of the Developing Brain”, Working Paper #3, 2005, available at: [www.developingchild.harvard.edu](http://www.developingchild.harvard.edu).

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.

Obviously, 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 crime committed against girls and boys may be more dire for girls.<sup>68</sup>

It is clear that 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 to being targeted alongside adults, children are 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.<sup>69</sup> 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.<sup>70</sup> Given the specific legal obligation to protect children, their particular vulnerability and the disproportionate impact of crimes on them, crimes committed against children should receive greater consideration. Yet, these crimes have not received systematic or even sustained attention from international courts.

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<sup>68</sup> See Report of the 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. For example, 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.

<sup>69</sup> 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.

<sup>70</sup> 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](http://www.icrc.org).

While Nazi Germany and Imperial Japan victimized many children, crimes against children were not 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> Yet it 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.<sup>74</sup>

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 International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court for the former Yugoslavia (ICTY) focused specifically on crimes committed against children. Nevertheless, several trials involved crimes committed against children as part of crimes committed against civilians in general.

Interesting examples at the ICTY comprise the so-called Foca, Srebrenica and Plavsic cases.<sup>75</sup> The Foca case led to convictions for crimes against humanity and war crimes with

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<sup>71</sup> 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.

<sup>72</sup> The Trial of German Major War Criminals Judgment, 30 September-1 October 1946, *see, e.g.*, pages 50-51.

<sup>73</sup> *See, e.g.*, the Judgment of the Nuremberg International Military Tribunal, page 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>.

<sup>74</sup> *See, e.g.*, 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 (page 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...." (page 1012). Available at [www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html](http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html).

<sup>75</sup> See David Tolbert, "Children and International Criminal Law: The Practice of the International Tribunal for the former Yugoslavia" in K. Arts and V. Popovski, eds., *International Criminal Accountability and the Rights of Children* (2006), hereinafter Arts and Popovski, *International Criminal Accountability*.



respect to the rape and sexual enslavement of four girls, including a twelve year-old.<sup>76</sup> The Srebrenica judgment refers to the forced transfer of children, old people and women in Srebrenica in July 1995.<sup>77</sup> In the case against Biljana Plavsic, a psychotherapist testified before the ICTY 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.<sup>78</sup>

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 foetuses – in the commission of genocide.<sup>79</sup> The judgment noted that pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda the child takes on the father’s ethnic identity.<sup>80</sup> 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.<sup>81</sup> 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 crimes committed against children in either Tribunal.”<sup>82</sup>

The Extraordinary Chambers in the Courts of Cambodia also seem 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.”<sup>83</sup> He recounted a

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<sup>76</sup> *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.

<sup>77</sup> 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](http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf).

<sup>78</sup> *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.

<sup>79</sup> International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paragraph 121, [www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf](http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf)

<sup>80</sup> *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 which 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.

<sup>81</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, paragraphs. 416, 421-424, 429-431 and 437.

<sup>82</sup> 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](http://www.npwj.org/No+Peace+Without+Justice/Newsroom/Publications).

<sup>83</sup> 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/](http://www.huffingtonpost.com/huff-wires/20090608/as-cambodia-genocide-trial/).

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.”<sup>84</sup> 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.

### 2.2.1 *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,<sup>85</sup> and several persons have been convicted for sexual slavery as a crime against humanity.<sup>86</sup> 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.<sup>87</sup> 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,<sup>88</sup> they are subsumed under the broader category of “civilians” in the confirmed charges.<sup>89</sup>

Noteworthy is the inclusion in the statute of the ICC of crimes also mentioned in Articles 19 and 34 of the CRC. They include: enslavement, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable

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<sup>84</sup> Ibid.

<sup>85</sup> 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.

<sup>86</sup> Article 2(g) of the statute of the SCSL. See Judgments for Issa Hassan Sesay, Morris Kallon and Augustine Gbao, SCSL-04-15-T.

<sup>87</sup> 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](http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107). Another example is that of 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=p39WF8TnM%3d&tabid=105](http://www.sc-sl.org/LinkClick.aspx?fileticket=p39WF8TnM%3d&tabid=105).

<sup>88</sup> “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](http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf).

<sup>89</sup> 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.”

gravity, all defined as crimes against humanity;<sup>90</sup> and rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence, constitutive of war crimes.<sup>91</sup> Of particular interest is the definition of enslavement as: “[...] the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.<sup>92</sup>

The SCSL has convicted individuals for acts of “forced marriage,” which constitutes 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 crimes against humanity.<sup>93</sup> Before the Appeals Chamber unequivocally held that the crime of forced marriage was not encompassed in the crime of sexual slavery,<sup>94</sup> 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 labour and enslavement.<sup>95</sup>

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.”<sup>96</sup>

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.<sup>97</sup> Yet the concept of forced marriage has generated an intense debate. This term and especially the related 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

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<sup>90</sup> Article 7(1)(g), 7(2)(c) and 8(2)(b) of the Statute of the ICC.

<sup>91</sup> Article 8(2)(xxii) of the Statute of the ICC.

<sup>92</sup> Article 7(2)(c) of the Statute of the ICC.

<sup>93</sup> Article 2(i) of the statute of the SCSL.

<sup>94</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, AFRC Appeals Judgment, 22 February 2008, paragraph 186.

<sup>95</sup> 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 non-sexual aspects into the crime of sexual slavery. *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, Judgment, AFRC Trial Judgment, 20 June 2007, paragraphs 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.*, paragraph 713.

<sup>96</sup> *Ibid.*, paragraph 202.

<sup>97</sup> 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/](http://www.phnompenhpost.com/index.php/component/option.com_myblog/Itemid,149/show.New-forced-marriage-complaints-before-ECCC.html/).

expectations, notably if children are born of the relationship, they are marked primarily by duress and coercion.<sup>98</sup>

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.<sup>99</sup> 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),<sup>100</sup> and against Ahmad Muhammad Harun and Ali Kushayb, charged with rape and outrage upon personal dignity involving girls in Darfur, Sudan.<sup>101</sup>

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 particular risk of stigma and rejection.<sup>102</sup> An estimated ten thousand babies were born in such circumstances in Rwanda<sup>103</sup> and at least another seventy-five hundred in eastern Democratic Republic of the Congo.<sup>104</sup>

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.<sup>105</sup> 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.”<sup>106</sup> These violations include neglect, infanticide, abandonment, violence

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<sup>98</sup> 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.

<sup>99</sup> 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](http://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](http://www.icc-cpi.int/iccdocs/doc/doc97189).

<sup>100</sup> *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](http://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.

<sup>101</sup> See Warrant of Arrest for Ahmad Muhammad Harun, available at [www.icc-cpi.int/iccdocs/doc/doc279858.pdf](http://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](http://www.icc-cpi.int/iccdocs/doc/doc279858.pdf).

<sup>102</sup> UNICEF-Pole Institute, “Children Born of Sexual Violence in Conflict Zones, DRC Country Study”, forthcoming.

<sup>103</sup> According to Patricia A. Weitsman, these crimes have been particularly common in Bosnia-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”).

<sup>104</sup> UNICEF-Pole Institute, “Children Born of Sexual Violence in Conflict Zones, DRC Country Study”, forthcoming.

<sup>105</sup> 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).

<sup>106</sup> *Ibid.*, at 578.

and discrimination. Although such violations are usually inflicted on children by their own communities or families, the birth of the children and their subsequent stigmatization were 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 prosecution for crimes committed against children.

### **3. 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 criminal conduct can contribute to their rehabilitation and reintegration into their families and communities. However a criminal process is often inappropriate for juvenile offenders, even in modified forms, rather children should be dealt with using restorative processes that promote diversion, mediation, truth-telling and reconciliation. 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 alleged perpetrators are are 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.<sup>107</sup>

#### **3.1. 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

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<sup>107</sup> 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,” (UNICEF, Innocenti Research Centre Working Paper Series on Children and Transitional Justice, 2010).

incapable of forming the requisite criminal intent).<sup>108</sup> 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.<sup>109</sup> Indeed, none of the relevant international conventions pertaining to humanitarian and human 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"),<sup>110</sup> the Paris Commitments and the Paris Principles<sup>111</sup> 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 programme of Nazi propaganda,<sup>112</sup> the Tribunal did not address crimes 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.<sup>113</sup> Similarly, no child was tried in the Tokyo

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<sup>108</sup> The age is determined at the time the alleged crime was committed.

<sup>109</sup> 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, p. 5 and A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2002), p. 2.

<sup>110</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, U.N. 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 "[i]n 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."

<sup>111</sup> 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.

<sup>112</sup> 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 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/tgmw/judgment/j-defendants-von-schirach.html](http://www.nizkor.org/hweb/imt/tgmw/judgment/j-defendants-von-schirach.html).

<sup>113</sup> See Volume 22 of the Trial Proceedings dated 29 August 1946, paragraphs 205-206, available at [avalon.law.yale.edu/imt/08-29-46.asp](http://avalon.law.yale.edu/imt/08-29-46.asp). The Stahlhelm was composed of the Scharnhorst, its youth organization

Tribunal. Also, notwithstanding the absence of provisions limiting their respective jurisdiction to persons 18 and older and despite evidence showing the involvement of children, the practice of the ICTY and the ICTR also has been not to investigate or prosecute children.<sup>114</sup>

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.”<sup>115</sup>

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 mixed 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;<sup>116</sup> the War Crimes Chamber in the Court of Bosnia-Herzegovina, for persons over fourteen;<sup>117</sup> and the SCSL, for persons over fifteen.<sup>118</sup> It is

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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 ages thirty-six to forty-five). In 1933, the Scharnhorst was transferred to the Hitler Jugend.

<sup>114</sup> It is estimated that some forty-five hundred children (below the age of 18) 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. See “Child Soldiers Global Report 2008, Rwanda,” available at [www.childsoldiersglobalreport.org/content/rwanda](http://www.childsoldiersglobalreport.org/content/rwanda); see also [www.unhcr.org/refworld/docid/49880632c.html](http://www.unhcr.org/refworld/docid/49880632c.html).

<sup>115</sup> Article 26 of the statute of the ICC.

<sup>116</sup> Section 45 of the TRCP. This should be done in accordance with UNTAET juvenile justice regulations for those ages twelve to sixteen.

<sup>117</sup> 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.

<sup>118</sup> Article 7(1) of the statute of the SCSL states that “[t]he 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 15 and 18. Article 7(2) provides that “[i]n 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), “[i]n 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 programme.

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 alleged offenses occurred, was initially prosecuted for crimes against humanity and ended up pleading guilty, but was finally convicted for manslaughter and not for an international crime.<sup>119</sup>

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 “[t]he possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma.”<sup>120</sup> He continued, “The Government of Sierra Leone and representatives of Sierra 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.”<sup>121</sup>

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 15 to 18. 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.”<sup>122</sup> In any case, the SCSL never exercised its jurisdiction over children; the first

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<sup>119</sup> 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](http://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 pre-trial 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 pre-trial detention for four months without a review of the detention order.

<sup>120</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, paragraph 32.

<sup>121</sup> Ibid. paragraph 35.

<sup>122</sup> 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”). The U.N. Special Representative suggested that certain precautions be put in place for these children, recommending notably the



prosecutor decided in 2002 that because children were not among those who bore 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.”<sup>123</sup>

Thus, the practice of all the international and mixed tribunals not to prosecute children for serious international crimes has been consistent. This 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 crimes defined under international law, so as to ensure that only persons older than 18 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 18; rather, it means that children fall outside the scope of the limited personal jurisdiction of the ICC.<sup>124</sup> This position is consonant with the fact that other international or mixed 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 not appropriate fora 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 all relevant international standards.

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creation of a “juvenile justice panel” overseen by a judge with juvenile justice expertise and the supervision of the implementation of sentences.

<sup>123</sup> 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 U.N. 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, paragraph 38.

<sup>124</sup> 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.

These standards, establishing minimum guarantees that should be granted to juvenile offenders, are notably found in the CRC,<sup>125</sup> the Beijing Rules, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,<sup>126</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency (also referred to as the Riyadh Guidelines)<sup>127</sup> and the Guidelines for Action on Children in the Criminal Justice System.<sup>128</sup>

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 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.

### **3.2. 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.<sup>129</sup> 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.”<sup>130</sup> 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.<sup>131</sup> Interestingly, he also contended that social norms, which demand the

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<sup>125</sup> 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.

<sup>126</sup> Adopted in 1990, these Rules aim to safeguard fundamental rights and establish measures for the reintegration of young people who have been deprived of their liberty.

<sup>127</sup> Adopted in 1990, these guidelines provide for the prevention and protection of juvenile delinquency.

<sup>128</sup> Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

<sup>129</sup> On this point, see Matthew Happold, “The Age of Criminal Responsibility for International Crimes under International Law,” in Arts and Popovski, *International Criminal Accountability* and Matthew Happold, “Child Soldiers: Victims or Perpetrators?”, *University of La Verne Law Review* 29(56) 2008.

<sup>130</sup> 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*, p. 121. Crane was a prosecutor at the SCSL.

<sup>131</sup> 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

obedience of children to adults, have to be taken into account in any consideration of intent.<sup>132</sup>

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.”<sup>133</sup> This raises the question as to whether some child soldiers suffer from pathology similar to the so-called Stockholm syndrome, the tendency of kidnap victims to associate themselves with their kidnappers after some period of time. Ultimately, these children grow up in the ambit and according to the image of their oppressors.<sup>134</sup>

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.<sup>135</sup> Child soldiers or children who are 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.

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Child Soldiers: Contributions from Psychology,” in Arts and Popovski, *International Criminal Accountability*, pp. 97-98.

<sup>132</sup> It is through interaction with parents, teachers and other significant adults that young 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.

<sup>133</sup> 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/BNSStory/International/home?cid=al\\_gam\\_mostview, hereinafter Nolen and Baines, "The Making of a Monster."](http://www.theglobeandmail.com/servlet/story/RTGAM.20081024.wongwen1024/BNSStory/International/home?cid=al_gam_mostview, hereinafter Nolen and Baines, ) Wessells is a professor of psychology at Columbia University and an expert in child protection who has worked extensively in northern Uganda.

<sup>134</sup> The ICC may in the future look at this specific situation in the case of Dominic Ongwen, one of the five leaders of the Lord's Resistance Army indicted for three counts of crimes against humanity and four of war crimes, including "murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements" encompassing the abduction of children to serve as fighters, porters and sex slaves. Ongwen has hinted that, if he were ever brought before the ICC, he may raise as a defence the fact that he was himself abducted when he was 10 years old, used as a child soldier, exposed to violence, and probably psychologically intimidated. This could be approached possibly as a plea of non-responsibility tantamount to insanity based on a variation of the Stockholm syndrome, or – and more likely – as a factor to be taken into account in sentencing.

<sup>135</sup> See, e.g., 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.

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."<sup>136</sup> Children abducted and forced to combat 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 arrest and legal action.<sup>137</sup>

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 acknowledgement 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.<sup>138</sup> 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.

These processes usually prioritize acknowledgement 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 international 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 agency and resilience. 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.

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<sup>136</sup> Nolen and Baines, "The Making of a Monster."

<sup>137</sup> See Peter Eichstaedt, *First Kill Your Family: Child Soldiers of Uganda and the Lord's Resistance Army* (Chicago: Lawrence Hill Books, 2009).

<sup>138</sup> See Draft Key Principles on Children and Transitional Justice.

#### 4. INTERNATIONAL CRIMINAL PROCEDURE AND THE PROTECTION OF CHILDREN

Only a few children have so far appeared as witnesses before international courts. This is because (1) few trials have concerned crimes against children, (2) child victims may be adults by the time they appear in court, due to the length of time usually elapsing between the commission of crimes and a trial,<sup>139</sup> and (3) international criminal prosecutors, like their national counterparts, may be reluctant to rely on the testimony of children. (This reluctance extends to adults testifying about events they witnessed as children, as demonstrated at the Extraordinary Chambers in the Court of Cambodia.<sup>140</sup>) Yet children may possess the best and

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<sup>139</sup> Because of lengthy procedures and possible delays (for instance to arrest the accused), considerable time elapses between the time of the commission of the crime and the time of the investigation by an international court, and then again between the time of investigation, when a witness is first interviewed by an investigator, and the time this witness is called to testify at trial. Children may thus be adults by the time they appear in court but may remain affected by the negative experience suffered by them as children, which may have affected their development and rendered them particularly vulnerable despite their real age. The practice of international and mixed courts in terms of the protection afforded to witnesses older than 18 testifying about crimes they witnessed as children differs across courts. At the SCSL, such witnesses were mostly considered as child witnesses. According to An Michels: “this was a deliberate policy decision, partly based on the fact that in many cases it was difficult to establish the exact age of witnesses; partly also because child ex-combatants, who often spent several years with the fighting forces during a crucial time in their development, might show a significant difference between their mental age and their biological age. For instance, these children or adolescents will easily give the impression of ‘being an adult’ on a behavioural level, while their emotional development is sometimes heavily disturbed.” (An Michels, Protecting and supporting children as witnesses: lessons learned from the Special Court for Sierra Leone, Paper available in the Annex to the Outcome Document of the Nov 2005 Meeting on Transitional Justice and Children, page 2). By contrast, before the War Crime Chamber of the Court of Bosnia-Herzegovina, there have been several instances in which persons who had been children at the time they witnessed the crime, sometimes as young as 5 years old, testified many years later, as adults. Yet, their testimonies were made in public, with apparently no particular protective measures being taken. These include the testimony of Mirveta Pervan, who was 5 years old in 1992 and 21 when she testified in 2008 in two cases: *Prosecutor vs. Bundalo et al.* (<http://www.bim.ba/en/117/10/10573>), and *Prosecutor vs. Savic and Mucibabic* trial (<http://www.bim.ba/en/136/10/13852/>).

<sup>140</sup> This has recently been the case of Norng Chan Phal, who was detained at S21 as a child. It is unclear at this stage whether Norng Chan Phal will testify before the ECCC, and if so whether the usual protection measures applying for witnesses living in Cambodia, namely to be given a pseudonym until a threat assessment is made or until they come and testify, will be given or whether any additional protection measure will be put in place. Prosecutors apprehend that children may poorly recall or recount the events, may change their mind as to whether or not they want to participate, may be ill-equipped to sustain cross-examination if it applies. Some have also argued that time seems to undermine the reliability of child-witness testimony, because children apparently experience a sharp decline in memory immediately after an event: L. Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001), at 23-24 cited in Beresford, Stuart. “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” *Journal of International Criminal Justice*, 2005; 3: 721-748 at page 737. Beresford indicates that, although an adult’s memory deteriorates in the same way, the deterioration of children’s memory is more profound. Depending on their age and own individual development, young children may not have a sufficiently developed understanding of concepts such as ‘truth’ and ‘lies’, which form the basis of criminal justice. It depends on the individual cognitive, emotional, social and moral development of each child, and also on the specific socio-cultural framework. Moral development refers to the capacity to distinguish between right and wrong. The level of moral development of a child is an important factor to understand the meaning and the impact of a justice process, the value of a testimony and the importance of telling the truth. Of course, each child is unique and has her or his own individual development, influenced by factors like social environment, education, culture. Also, in a new environment, especially one drastically different caused by the eruption of an armed conflict, the disappearance of a parent, or abduction, may lead a child to regress. Young children may face difficulty in distinguishing between reality and fantasy, especially when recounting traumatic events. The capacity of a child to make a true statement needs to be assessed carefully and individually. (See Poole, Debra A., and Michael E. Lamb. *Investigative Interviews of Children: A Guide for Helping Professionals*. Washington, DC: American Psychological Association, 1998). The general reluctance of

sometimes only evidence available on certain crimes, notably those committed against themselves or other children. Testifying in highly visible trials is a significant means by which children can be given a voice and realize their right to participate in hearings concerning them.<sup>141</sup> This section reviews how child witnesses have been treated by international courts, focusing on the SCSL and the ICC, and introduces a few selected proposals to improve the quality of such interaction.<sup>142</sup>

Children may be easily intimidated by lawyers, judges, courtrooms and criminal procedure, and this is certainly heightened in the case of international trials. Testifying before international courts involves travelling, often across international borders, which in turn causes disruptions such as separation from family and absence from school. Investigators, lawyers and judges interacting with children may not speak the child's language and may therefore use interpreters. Even more disturbing for children, those testifying are often confronted in the courtroom with persons who caused terrible suffering in their lives, and the children are asked to revisit those experiences. Child witnesses are asked to recall and describe in detail traumatic events that they may have painstakingly attempted to forget. They do not always understand that what they have experienced is wrong and may have been convinced otherwise by the perpetrator.<sup>143</sup> While the experience of telling one's story may produce a sense of relief for some individuals, it can also be traumatizing or exacerbate existing trauma. Disclosing painful experiences can make children feel ashamed and guilty, and can have long-term negative impacts.<sup>144</sup>

It is therefore crucial for international courts to adopt child-friendly procedures. These ensure that the rights of the children are respected; their needs are considered; the stress, trauma or possible harm associated with testifying is minimized; and children understand the process and can fully contribute to it. These procedures should conform to all relevant international

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prosecutors to call children enables to better understand the "Model Guidelines for the Effective Prosecution of Crimes Against Children" developed by the International Association of Prosecutors (Best Practice Series No. 2, 1999). These guidelines provide notably that prosecutors have an obligation to "ensure that the testimony is reliable and of good quality by assessing the ability of the child to give evidence and appreciating the relevant language skills and conceptual ability of the child". "Children should be considered as capable of credibly reporting events and of being credible witnesses; prosecutors must consider the protection of the child, including the risk of further trauma and victimization; prosecutors should make an early assessment of the ability of the child to give evidence and form an appreciation of the child's developmental level. This may involve meeting the child and reviewing videotaped and other evidence; and prosecuting cases involving repressed memory requires particular caution in determining whether to proceed. This may include consultation with expert witnesses or specialists to assist in making this determination. In most cases involving crimes against children the victim's testimony is vital and prosecutors should develop techniques which lessen the child's trauma and ensure that the testimony is reliable and of good quality by: assessing the ability of the child to give evidence; appreciating the relevant language skills and conceptual ability of the child; being informed about cultural differences and the impact they may have on the testimony of the child; and determining whether an interpreter is necessary."

<sup>141</sup> Article 12 of the CRC. Art. 12 (2) says "... the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

<sup>142</sup> These proposals are recapitulated in the last section, entitled 'Recommendations', of this paper.

<sup>143</sup> WHO. *Guidelines for medico-legal care for victims of sexual violence*, p. 74-96.

<sup>144</sup> Schuman, J., Bala, N., Lee, K. (1999). *Developmentally Appropriate Questions for Child Witnesses*. 25 Queen's L.J., p. 253 ; and Poole, Debra A., and Michael E. Lamb. *Investigative Interviews of Children: A Guide for Helping Professionals*. Washington, DC: American Psychological Association, 1998.

standards,<sup>145</sup> and the overarching guiding principles defined by the CRC, including the best interests of the child;<sup>146</sup> the rights to life, survival and development<sup>147</sup> non-discrimination;<sup>148</sup> and the right to participation.<sup>149</sup>

International criminal procedure has developed incrementally, being refined as more international or mixed courts have been established. It is therefore unsurprising that the Statute of the ICC provides the most elaborate procedural framework of all international courts concerning the protection and support for witnesses, in particular children. A fundamental principle is that: “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender [...], and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.<sup>150</sup> Also, the ICC “shall take into account the needs of all victims and witnesses [...] in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence.”<sup>151</sup>

At the ICC, as in all other contemporary international or mixed courts, a specific Victims and Witnesses Unit, functionally under the Court’s registrar, is responsible for protective measures and security arrangements, counselling, and other appropriate assistance for witnesses and victims appearing before the Court and others who are at risk on account of testimony given by the witnesses.<sup>152</sup>

### **Protection during Investigations**

The investigative phase is crucial in terms of both physical and psychological protection of victims and vulnerable witnesses. Initial contacts and interactions carry the greater risk for the physical security and mental well-being of the children concerned. Great caution ought therefore to be exercised by international investigators and prosecutors at this stage, notably when they go through ‘intermediaries’ – individuals or organizations – to identify potential witnesses, including children. Not only is there a risk for the investigation to be manipulated by such intermediaries, but there are potential security risks for vulnerable witnesses identified and approached in this way, as well as for the intermediaries themselves. Collaborating only with trustworthy, impartial, professional, reliable and reputable organizations, including child protection agencies, and developing a network upon which to rely to approach and protect victims and witnesses, especially vulnerable ones, takes time and a deep understanding of the situation on the ground. This poses challenges to foreign

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<sup>145</sup> In particular the UN Guidelines for Action on Children in the Criminal Justice System, the UN Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice.

<sup>146</sup> Article 3 of the CRC.

<sup>147</sup> Article 6 of the CRC.

<sup>148</sup> Article 2 of the CRC.

<sup>149</sup> Article 12 of the CRC.

<sup>150</sup> Article 68(1) of the statute of the ICC.

<sup>151</sup> Rule 86 of the Rules of Procedure and Evidence of the ICC.

<sup>152</sup> At the ICC, this Unit was established pursuant to Article 43(6) of the Statute of the ICC.

investigators with a limited understanding of the country in which they operate. Yet it is key in ensuring the protection, privacy and well-being of vulnerable witnesses and victims.

Institutionally, the investigative phase is challenging for international courts. While the protection of victims and witnesses falls formally within the ambit of the Victims and Witnesses Unit, a part of the registry, those on the ground are investigators, who functionally are part of the office of the prosecutor. Coordination between the different organs of the courts is therefore crucial in providing support to victims and potential witnesses early in the process, as soon as investigations start.

The practice of the SCSL in this regard provides a good example. In addition to the Victims and Witnesses Unit in the registry, a witness management unit was established as part of the investigation team in the office of the prosecutor.<sup>153</sup> Early in 2003, before any trials on the merits had started, a document titled *Principles and Procedures for the Protection of Children in the Special Court for Sierra Leone* was jointly developed by the SCSL, child protection agencies (in particular UNICEF) and the Government.<sup>154</sup> Recognizing that the children's participation should be guided by the best interests of the child, the document set guiding principles in the collaboration between the SCSL and child protection agencies<sup>155</sup> and a protocol for identifying and interviewing potential child witnesses.<sup>156</sup>

The Statute of the ICC stipulates that during investigations the prosecutor should “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender [...] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”.<sup>157</sup> Yet, the procedure remains unclear, leading Beresford to recommend that: “the prosecutor should issue guidelines to all members of his staff to ensure that children are treated in a caring and sensitive manner throughout the investigation and prosecution process (taking into account age and level of maturity) and to guarantee that they are effectively protected.”<sup>158</sup> The ICC in general and the office of the prosecutor in particular do not have publicly available guidelines pertaining to their interaction with children, and it is unclear whether they have internal binding guidelines to regulate their interactions with children during investigations.

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<sup>153</sup> This unit, composed largely of Sierra Leoneans with a police background, played a crucial role in centralizing the information regarding children and protecting them before they are formally identified as potential witnesses, at which time they become the responsibility of the registry.

<sup>154</sup> The Government was represented by the Ministry of Social Welfare, Gender, and Children's Affairs. UNAMSIL, the UN peace-keeping mission in Sierra Leone was also actively involved in this exercise.

<sup>155</sup> This collaboration has been critical to ensure the identification of child-witnesses and their support during the investigations, as well as the adequate provision of psycho-social support to these children.

<sup>156</sup> This detailed protocol provides for a vulnerability test to be passed before a child-witness is selected by the prosecutor, providing notably that the child is to be interviewed in the presence of a parent or guardian, and stipulating confidentiality and security measures.

<sup>157</sup> Article 54(1)(a) of the statute of the ICC.

<sup>158</sup> Beresford, Stuart. “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” *Journal of International Criminal Justice*, 2005; 3: 721-748 at page 737.



Following the practice established by the SCSL, the ICC would do well to regulate a few specific areas of concern, including the above-mentioned identification and selection of child witnesses and the use of intermediaries in this process, assessments of the ability of children to give evidence and systematic use of child-friendly interview techniques.

As was done at the SCSL, the ability of each child to give evidence should be assessed in detail by specialists before a child is interviewed, notably to minimize the risk of re-traumatization.<sup>159</sup> These individual assessments can determine if the interview or appearance in court is in the best interests of the child, and also whether special protective measures are required to facilitate the interview or testimony.

Child-friendly interviewing techniques should be used to minimize the hardship for children. Investigators and lawyers should be trained in asking children developmentally appropriate questions.<sup>160</sup> The basic principle is that children should be allowed to express themselves as freely as possible. The SCSL employed investigators familiar with such techniques, including the use of testimonial aids such as drawings.<sup>161</sup> Importantly, the child's own wishes should be sought and considered when determining the gender of the investigators interviewing a child.<sup>162</sup>

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<sup>159</sup> At the SCSL, child-witnesses as well as any witness who was a child when witnessing the crimes were systematically evaluated by a psychologist before testifying. On child protection at the SCSL, see A. Michels, 'As if it was happening again: supporting especially vulnerable witnesses, in particular women and children, at the Special Court for Sierra Leone', chapter 10, *International Criminal Accountability and the Rights of Children*, pp. 133-145. See also *Best-Practice Recommendations for the Protection and Support of Witnesses*, Special Court for Sierra Leone, 2008, p. 36.

<sup>160</sup> To protect a child and also elicit the best possible answers, asking suitable questions to which a child can answer accurately requires an understanding of the evolving capacities of each child, in terms of each individual's linguistic, cognitive and emotional abilities. An accurate understanding and assessment of the child's cognitive development is particularly important to elicit from her or him evidence that can be used in court. Indeed, this development refers to the acquisition of the ability to perceive and store information, to form abstract concepts and to reason about various ideas. It determines how well a child function as an eyewitness in court, because the court usually requires accurate observations, the precise recollection of past events, using concepts such as time, numbers, sequencing, size and distance, handle abstractions and make inferences. A child who is not yet equipped to answer questions using these concepts may become confused and sustain particularly poorly cross-examination. Children, especially young children, may be unable to indicate the time when something happened or to put events in a chronological order. Evidently, it is therefore particularly difficult for younger children to provide explanations about their own thinking or emotional processes and about the motives of other people, while these elements are intrinsically part of a testimony. See Schuman, J., Bala, N., Lee, K. (1999). *Developmentally Appropriate Questions for Child Witnesses*. 25 Queen's L.J., p. 257.

<sup>161</sup> Testimonial aids refer in this context to gadgets or devices used to enable questioning, for example drawings, dolls toys or other objects. This approach allows alternative ways of communication and expression. For young children who have not yet achieved the capacity to verbalize their emotions in a nuanced way, recourse to these techniques can help them tell their story. When prompted to draw, children who have been affected often depict images of crimes; the ensuing discussion enables the investigator to elicit a narrative of the events, integrating an art, drama or play approach. This approach allows alternative ways of communication and expression. (Michels, A., 'Psychosocial Support for Children: Protecting the rights of child victims and witnesses in transitional justice processes', UNICEF Innocenti Research Centre, Florence, 2010.

<sup>162</sup> A child should not automatically be interviewed by a person of the same gender, but should rather be given a choice to be interviewed by a man or a woman. This author's experience is that, in practice, girls often prefer being interviewed by a woman, but may also sometimes prefer that one man be present as they feel then more protected, cultural factors of course impacting considerably on such decisions.

Another good practice established by the SCSL has been the recruitment of a child-rights expert with a good knowledge of the situation of children in Sierra Leone to advise the chief prosecutor.<sup>163</sup> At the ICC, despite the requirement for the prosecutor to appoint “advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”,<sup>164</sup> no advisor on violence against children has so far been appointed. It is unclear whether the office of the prosecutor at the ICC includes among its personnel any adviser with expertise on child rights or more generally professionals specialized or even experienced in dealing with children in criminal investigations or prosecutorial settings.<sup>165</sup> Furthermore, in light of the diversity of countries where the ICC operates, each investigative team should include not only professionals with the right background and experience in child protection but also some with specific knowledge of the situation facing children in the country where the investigation is carried out. Such persons can guide the investigators and prosecutors in establishing contacts with experienced and reputable child protection agencies, gain their support in identifying child victims and possible witnesses, and develop country-specific child-friendly procedures.

#### 4.1 Protection in Court

Once the trial has started, the judges themselves are probably the most important single factor to ensure the protection and well-being of children. It is therefore reassuring that the Statute of the ICC provides that “[J]udges with legal expertise on specific issues, including, but not limited to, violence against women or children” should be designated.<sup>166</sup>

When there is demonstrated good cause, international courts generally allow vulnerable witnesses, including children, to give evidence in alternative ways, such as via closed-circuit television. At the ICC, certain protective measures may apply quasi-systematically for child witnesses. These include providing support persons to assist children through the judicial proceedings<sup>167</sup> and holding closed sessions. Indeed, article 68(2) of the Statute indicates that, to protect vulnerable witnesses, hearings may be held *in camera* or evidence presented by electronic or other special means, and “such measures shall be implemented in the case of [...] a child who is a victim or a witness, unless otherwise ordered by the Court”.<sup>168</sup>

The ICC may also order the name of a witness to be expunged from its public records or that a person be referred to by a pseudonym. It may authorize the use of voice and image

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<sup>163</sup> This conformed with the Statute of the SCSL which stipulates that: “... Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.”

<sup>164</sup> Article 42(9) of the Statute of the ICC.

<sup>165</sup> Beresford recommends that: “Specialized training should be provided to persons handling cases involving children and consideration should be given to the establishment of a specialized unit to deal with cases involving crimes against children.” Beresford, Stuart, “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” *Journal of International Criminal Justice*, 2005; 3: 721-748 at p. 737.

<sup>166</sup> Article 36(8)(b) of the statute of the ICC.

<sup>167</sup> Rule 17(3) of the Rules of Procedure and Evidence of the ICC.

<sup>168</sup> Article 68(2) of the Statute of the ICC.

distortion technology and the giving of testimony through video conferencing or closed-circuit television.<sup>169</sup> To limit the impact of questioning, particularly of cross-examination, the judges should control the manner of questioning to avoid any harassment or intimidation, especially with respect to victims of sexual violence.<sup>170</sup> In the specific case of a child testifying in the trial of one of their parents, the child shall not be required to make any incriminating statement against the accused.<sup>171</sup>

Despite all these remarkable advances in the Statute of the ICC, its practice during trial has not been without problems. Three areas of possible improvements are reviewed here: one pertains to the ‘prepping’ of vulnerable witnesses, another to cross-examination by an accused representing oneself, and the last to the experience of the ICC in the first testimony by a witness who had been a child victim.

### **Prepping the witness**

The procedure of ‘proofing’ or ‘prepping’ or preparing witnesses shortly before their testimony in court – which is practised at the SCSL, ICTY and ICTR but not at the ICC – appears to reassure vulnerable witnesses.<sup>172</sup> It enables them to better identify with the party calling them, and thereby to feel less isolated in the courtroom when undergoing cross-examination. Conversely, in the current situation at the ICC, vulnerable witnesses including children unfortunately only briefly meet the lawyers who will be questioning them, so they are interrogated by strangers, often in a language the children do not understand. If there are concerns about the possible effects of ‘prepping’ on the probative value of the evidence, this procedure can of course be restricted and regulated. It does not mean that witnesses, and children in particular, should be ‘coached’ into giving specific answers, but rather that they should be adequately prepared for their court experience.<sup>173</sup> This includes an explanation of the procedure to be followed in terms that children can easily understand. It also includes an informal meeting with the judges and the lawyers for the prosecution and the defence who will question the child or be present during the testimony. Matters unrelated to the case can then be casually discussed. Such preparation builds the confidence of children to testify, and as such may contribute to minimizing the risk of re-traumatization.

### **Cross-examination in a case of self representation**

Defendants who elect to represent themselves may directly question and confront a witness in the course of cross-examination. Because this can be very distressing to a child, it has been

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<sup>169</sup> Rule 87(3) of the Rules of the ICC.

<sup>170</sup> Rule 88(5) of the Rules of the ICC.

<sup>171</sup> Rule 75(1) of the Rules of the ICC.

<sup>172</sup> As way of an example, at the SCSL, children like all other witnesses, are ‘prepped’ shortly before they appear in courts: they are individually ‘prepared’ for their testimony. They meet the attorney(s) who called them to testify and who will interrogate them in court, visit the court room. At this occasion, they can also go through the prior statements given by the witness, enabling the attorney to evaluate the capacity of the child to testify. A psychologist is present during the ‘prepping’ and independently evaluates the child reaction to the questions, and can request that the prepping be halted if the child is not reacting well.

<sup>173</sup> On this point see Beresford, Stuart. “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” *Journal of International Criminal Justice*, 2005; 3: 721-748 at p. 742.

suggested that defendants who represent themselves in person should be prohibited from cross-examining child witnesses in person if the judges are satisfied that the quality of their evidence would be diminished by such a cross-examination.<sup>174</sup> In such cases, the accused should be given an opportunity to arrange legal representation; but if none is arranged, the judges should consider appointing a lawyer to conduct the cross-examination.<sup>175</sup>

### **Lessons to be learnt from the very first testimony**

The first witness to testify before the ICC regarding crimes he suffered as a child revealed many weaknesses in the Court's practice. This witness, the first called by the prosecution in the Lubanga trial, and therefore the very first witness ever to appear before the ICC, was called to testify as a former 'child soldier'. Formerly associated with the armed group allegedly led by Lubanga, the witness was apparently just over 18 when called to testify before the ICC on 28 January 2009. Once in the courtroom, he appeared concerned and frightened, and he recanted his testimony. The trial chamber deemed the witness unfit to continue and suspended the proceedings. The witness appeared again about two weeks later, on 10 February 2009, after a determination by the ICC that he was fit to testify and subject to specific protective measures. By decision of the trial chamber, fewer persons were present in the courtroom and public gallery, the witness was allowed to testify without any prompting or interruptions by the prosecution or the defence, and, most critically, the witness was shielded from the direct view of the accused.<sup>176</sup>

This incident offers two important lessons.

One lesson is procedural. It is clear that the measures to protect this witness were initially insufficient. Children, persons testifying about crimes they have experienced as children and other vulnerable witnesses should be duly informed of the aims, objectives and limitations of the trial process and should be provided with culturally appropriate psychosocial support.<sup>177</sup> Since the appearance of the first witness in the Lubanga case, the ICC has taken steps to prevent future such problems, including reviewing its court procedures for vulnerable witnesses. Shortly after this incident, the Victims and Witnesses Unit hired a psychologist experienced in working with child victims of international crimes, who can assess children's capacities for testifying and the risks they face prior to court appearance.

Yet the powers of the psychologist are relatively limited; she can recommend consideration of special protective measures, but the final decision rests with the judges. This highlights again the fact that the judges are the single most important factor of protection for vulnerable witnesses.

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<sup>174</sup> Beresford makes this recommendation based on L. Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001), at 123, cited in Beresford, Stuart. "Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?" *Journal of International Criminal Justice*, 2005; 3: 721-748 at pp. 746-47.

<sup>175</sup> Ibid.

<sup>176</sup> <http://www.lubangatrial.org>

<sup>177</sup> This should ideally include the possibility to testify in the presence of a person of the child's choice and, if warranted, with the assistance of a psychologist or of another experienced professional.

In addition, efforts should be made to minimize disruptions to the child's life and well-being. In addition to the security and psychological risks witnesses face in testifying before the ICC, they also must disrupt their lives with long intercontinental trips.<sup>178</sup> For those most vulnerable, including children, the ICC can allow testimony by means of distance video conferencing or closed-circuit television. Its Statute also allows it to hold trials closer to the location where the crimes were committed and where most witnesses live. In any case, when witnesses travel to The Hague to testify, the Victims and Witness Unit should take all measures to provide them with an environment as close as possible to the ones they are accustomed to.<sup>179</sup>

The other lesson to be learned from the first testimony before the ICC concerns the risk of self-incrimination, discussed in the next section.

## 4.2 Children and the Risk of Self-incrimination

Some of the former child soldiers called to testify against those who recruited or used them may themselves have committed crimes and may therefore risk incriminating themselves in the course of their testimony. While children usually have nothing to fear from international courts, they may nonetheless fall within the competence of national criminal systems ultimately facing trial there.<sup>180</sup> The risks associated with self-incriminating evidence have never been problematic at the SCSL when child-soldiers testified<sup>181</sup> because of the specific amnesty that applied to such crimes in Sierra Leone.<sup>182</sup> But the situation at the ICC is dramatically different. Unlike previous international courts, it is based on the principle of complementarity rather than primacy,<sup>183</sup> and it therefore cannot actually guarantee witnesses who incriminate themselves in the course of their testimonies that they will not be prosecuted before domestic courts.

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<sup>178</sup> An example would be that of children from Eastern DRC, who most probably never travelled much, or took a plane, are asked to travel to The Netherlands, and find themselves upon arrival in a much colder and totally foreign environment, where they do not understand the languages spoken by most people around them. It is very unlikely that these children truly comprehend what such travel entails and means when they agree to testify.

<sup>179</sup> The practice of the SCSL in this regard is excellent. The safe-house that it operates in The Hague for witnesses testifying in the trial of Charles Taylor has been designed and is operated so as to resemble the usual living conditions in Sierra Leone, including the food that is provided. Sierra Leoneans have been employed as support personnel, cooks, security officers, and even as drivers, so that they provide familiarity and comfort to victims and witnesses, and limit the need to use interpreters.

<sup>180</sup> See section 3 of this paper.

<sup>181</sup> By March 2009, nine children (under the age of 18) had testified before the SCSL, all called by the prosecution, all of them boys and former child-soldiers. Most of them testified in open court, in view of the defendant(s), but with their identity and image protected from the public, their voice usually being distorted. They testified as other witnesses do, answering the questions put to them by the judges and by the parties, including in cross-examination. Only two of these children testified outside the courtroom, from another room in the Court's premises, connected to the courtroom by a closed-circuit television. Before testifying, each of the children undertook to tell the truth, swearing either on the Bible or the Koran, as is the practice before the SCSL. Interview with Saleem Vahidy, Chief of the Registry's Witnesses and Victims Section.

<sup>182</sup> This amnesty arises from the relevant provisions of the Lome Agreement that have been incorporated into Sierra Leonean law.

<sup>183</sup> The principle of complementarity means that the ICC can only prosecute when national criminal systems are unable or unwilling to do so.

This is true despite the provisions of Rule 74 of the ICC Rules of Procedure and Evidence (entitled “Self-incrimination by a witness”) which implicitly recognizes the possibility of circumstances in which the protections granted to a witness who may self-incriminate are insufficient.<sup>184</sup> Indeed, it seems that the protection the ICC can offer is limited to either not requiring that the witness answer questions or ensuring that the identity of the witness and the content of her testimony remain confidential.<sup>185</sup> These measures suffer from obvious weaknesses. Even in the unlikely case of a binding agreement between the ICC and a State specifying that no witness could subsequently be charged for crimes for which the witness self-incriminated, this would be insufficient to fully protect the witness, for two reasons. First, while the country would abdicate its authority to pursue criminal justice, this would appear inconsistent with the principle of complementarity and may also contradict other international legal obligations on the State, notably those providing for an obligation to prosecute or extradite those responsible for certain categories of international crimes. Second, this agreement would only be binding on the State concerned, and the witness may possibly be tried before other domestic courts.

Ultimately, the only assurance the ICC could give to such witnesses would be a pledge to try them before the ICC itself, rather than letting them be tried before domestic courts. Yet while this ‘remedy’ has been available to previous international courts, for the ICC this may not work due to the principle of complementarity. Even more fundamentally, as far as children are concerned, it would be impossible because of the limits of the ICC jurisdiction to those over 18.<sup>186</sup>

In these circumstances, it is crucial for the ICC at least to ensure that children are fully informed and warned and understand the possible consequences of their participation. It is equally critical for the ICC to ensure that children participate voluntarily, giving full meaning to the principle of ‘informed consent’.<sup>187</sup> In any case, children should always testify anonymously and with their identity protected.<sup>188</sup>

It is particularly problematic that witnesses at risk of incriminating themselves are only provided with an opportunity to obtain legal advice if an issue of self-incrimination arises in the course of the proceedings and if the witness so requests.<sup>189</sup> In the case of children at risk of self-incrimination, legal advice should be systematically proposed to ensure their rights are protected and also preserved for the future. Ideally, children should therefore always benefit from the assistance of a lawyer when interacting with international courts, and in particular with the ICC, as early as possible in the process.

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<sup>184</sup> Rule 74(4) of the ICC Rules of Procedure and Evidence.

<sup>185</sup> Rule 74(5) of the ICC Rules of Procedure and Evidence.

<sup>186</sup> See section 3 of this paper.

<sup>187</sup> Among many other relevant rules contained in the ICC Rules of Procedure and Evidence, Rule 190, entitled “Instruction on self-incrimination accompanying request for witness” is of particular significance in this regard.

<sup>188</sup> Article 40(2)(b) of the CRC and Rule 8 of the Beijing Rules.

<sup>189</sup> Rule 74(10) of the ICC Rules of Procedure and Evidence.

### 4.3 The Paramount Importance of Protecting Witnesses

All these challenges highlight the very serious limits to the protection that international courts can provide to witnesses and victims. These are primarily associated with the structures of international courts and the international dimension of their work. First and foremost, lacking their own police force and operating internationally, international courts rely on others, often States, to identify, approach and ultimately protect witnesses.<sup>190</sup> This carries many risks for these witnesses, especially for their continued protection when the international court closes down or disengages.<sup>191</sup> Second, these courts usually operate in the context of ongoing conflicts and usually target powerful leaders, heightening the challenges associated with witness protection. Third, international and local media and the public follow these procedures closely, increasing the risks that witnesses will be recognized despite protection measures.

Notwithstanding these constraints, the protection of witnesses remains and should remain paramount. In practice, the inability to protect witnesses may well take priority over the drive to fight impunity itself, as demonstrated in the case of the ICC investigations concerning crimes committed in Darfur.<sup>192</sup> It is indeed crucial to initiate as early as necessary the protection of witnesses or potential witnesses, particularly children, at least as soon as a child has been in contact with investigators. This protection should continue as long as necessary, usually well beyond the closing of a case. It is crucial for children to be and feel safe and secure; fear of retaliation can harm and inhibit them, especially when they live in a volatile or conflict-affected situation with the fear that those responsible for the crimes or their allies will hurt them or their family or community.

### 4.4 Child-friendly Outreach and Material

Successful investigations for international crimes begin with sustained communication efforts. Victims and witnesses, including children, and their communities should be informed so they understand the international court's mandate, procedures and objectives. Outreach is critical to inform victims and witnesses, build their trust and secure their cooperation.<sup>193</sup> Child-friendly materials and events should be designed and used, especially when the investigations concern crimes committed against children.<sup>194</sup> Detailed child-friendly

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<sup>190</sup> The SCSL in this regard may once again provide an example of good practice as it has standing arrangements with Sierra Leone police to monitor the welfare of former witnesses.

<sup>191</sup> Some of these challenges are not even yet fully understood, as none of the contemporary international courts has yet closed its doors. This will unfold in the near future, as most of these courts are due to complete their work within the coming years. How will the protection of witnesses be guaranteed afterwards? These issues are also relevant for the ICC. While it is a permanent court, it cannot be expected to remain involved over time in the same countries and will have to progressively 'disengage' from them.

<sup>192</sup> The ICC Prosecutor has apparently merely relied on the testimony of witnesses available in Chad in these investigations, because of the early concerns for the safety and protection of witnesses in Sudan. See Cecile Aptel, "Justice empowered or justice hampered: The International Criminal Court in Darfur", *African Security Review*, vol. 15, No 1, 2006.

<sup>193</sup> Obviously, outreach is easier for mixed courts located in situ than it is for international courts located abroad.

<sup>194</sup> The SCSL, and more recently the ECCC and the ICTR, have conducted outreach events specifically targeting children. In Sierra Leone, the SCSL has regularly conducted outreach events in schools. In Cambodia, the ECCC reported holding an outreach event at Bak Touk high school in Phnom Penh on 1 March 2010 where over

explanations are particularly important when conducting forensic examinations.<sup>195</sup> These can facilitate the task of investigators in earning the trust and cooperation of the child-witnesses. The children's version of the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2007) provides advice and guidance to children called as witnesses, notably before international and mixed criminal courts. This document should encourage international courts to produce child-friendly documents and explain their mandates and procedures, as well as the extent and limits of the protection they can provide.

#### 4.5 Participation of Victims in the Proceedings

While none of the earlier international or mixed courts provided an opportunity for victims, including children, to be legally represented in proceedings concerning them, the legal frameworks of the ICC and the Extraordinary Chambers in the Courts of Cambodia (ECCC) do provide for their participation and also for reparations.<sup>196</sup> But because the ECCC has only tried a single case and the first trial before the ICC is ongoing, these institutions have limited experience in the representation of victims and the award of reparations.

The Statute of the ICC stipulates that: “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered [...]. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”<sup>197</sup> The Rules of Procedure and Evidence of the ICC further elaborate on the scope and modalities of victims' representation<sup>198</sup> and of the award of reparations.<sup>199</sup> While these Rules define victims as those: “[...] who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”<sup>200</sup>, in the Lubanga case, the judges of the ICC have limited the right of participation in the proceedings to the ‘direct victims’, namely to those alleging harm or personal interests “linked with the charges confirmed against the accused”.<sup>201</sup> Because the charges in this specific case concern the recruitment and use of child soldiers, the victims entitled to participate include former child soldiers. In its decision of 9 April 2009, the Court said that: “Criminalising the conscription, enlistment and use of children actively to participate in hostilities affords children with additional safeguards,

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7,000 students and teachers were briefed by ECCC officials. The ICTR has also recently launched an outreach programme targeting children and youth.

<sup>195</sup> On the specific requirements of forensic interviews conducted with children, see Cronch, L., Viljoen, J., Hansen, D. (2006). *Forensic interviewing in child sexual abuse cases: Current techniques and future directions*. *Aggression and Violent Behaviour* 11, 195 – 207; and Lamb, M., Orbach, Y., Hershkowitz, I., Esplin, P., Horowitz, D. (2007). *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol*. *Child Abuse Negl.* 31(11-12): 1201-1231.

<sup>196</sup> The issues pertaining to reparations for victims are reviewed below.

<sup>197</sup> Article 68(3) of the Statute of the ICC.

<sup>198</sup> See *inter alia* Rules 89-95 of the Rules of Procedure and Evidence of the ICC.

<sup>199</sup> Rule 97(1) of the Rules of Procedure and Evidence indicates that the ICC: “Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

<sup>200</sup> Rule 85 of the Rules of Procedure and Evidence of the ICC.

<sup>201</sup> Appeals Chamber, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008” (11 July 2008), ICC-01/04-01/06-1432, available at [www.icc-cpi.int/iccdocs/doc/doc529076.pdf](http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf), para. 2.



recognizing their vulnerability, and the Statute has in those circumstances made them ‘direct victims’ for these purposes.”<sup>202</sup>

The modalities of participation of the victims, directly or through their legal representatives, have been contentious matters, both before the ICC and the ECCC.<sup>203</sup> Meaningful legal representation can only take place if free legal assistance is available to victims, especially the more vulnerable and those without financial means. Also, due to the magnitude of the offences alleged in trials for serious international crimes and the number of victims involved, individual victims may have different or divergent views and interests, leading to uncoordinated positions and even possible conflicts of interest. Victims or groups of victims often insist on having their own experiences heard in court and reflected in the findings, as demonstrated so far at the ECCC. The fact that some of the victims participating in the proceedings may also be called as witnesses is problematic, especially in the case of children who were formerly associated with armed groups or forces and who may incriminate other children represented as victims in the proceedings.

All these issues are surfacing now and will deserve further in-depth analysis as the work of the courts progresses.

#### **4.6 Reparations for Child Victims**

Conceptually, the goal of reparations is to empower victims and ensure that they recover or preserve their dignity.<sup>204</sup> In relation to children, article 39 of the CRC requires States to take

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<sup>202</sup> Redacted version of "Decision on 'indirect victims'" ICC-01/04-01/06, 9 April 2009, p. 20.

<sup>203</sup> See notably Redress, "Victims, Perpetrators or Heroes? Child Soldiers Before the International Criminal Court," September 2006.

<sup>204</sup> See Reparations in Theory and Practice, <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>. *Black's Law Dictionary* defines reparation as a "[c]ompensation for an injury or wrong, especially for wartime damages or breach of an international obligation", and compensation as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another and must therefore make the other whole." Reparations programmes attempt to provide repair, through a range of measures, for specific types of violation as well as for different classes of victims. Reparations refer to the direct provision of benefits to victims of certain human rights violations. Under international law, the term has a broader meaning and can take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence. In practice, the content or form of reparations will depend on a number of factors, including the scale of violations that occurred. See Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff, Oxford University Press, Oxford, 2006. *The Handbook of Reparations* also includes a detailed analysis of reparations programmes, including a taxonomy of reparation and a review of goals, objectives and policies, providing normative guidance for future practice. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (2005). Under these Principles, States are obliged to "[...] provide effective remedies to victims, including reparation [...]" This Resolution goes on to stipulate that as defined by law and as appropriate to the gravity of the situation, victims should be provided with full and effective reparations, which include: restitution (e.g., restoration of liberty and return of property), compensation, rehabilitation (e.g., medical and psychological care, legal and social services), satisfaction (e.g., measures to end violations, public apology, judicial sanctions) and guarantees of non-repetition (e.g., promoting mechanisms for preventing and monitoring social conflicts, strengthening the judiciary). Victims include those who have suffered direct harm [...] as well as the immediate family or dependents of the direct victim [...]" General Assembly Resolution: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (2005). These rights are also recognised for all victims by Article 8 of the

steps to promote the recovery and reintegration of a child victim and provides that such recovery and reintegration shall take place in an environment that fosters the child's health, self-respect and dignity.

As noted above, only two international courts can directly award reparations to victims: the ICC and the ECCC. Reparations are narrowly defined in the statutes of these courts, in terms of their nature – for instance, material or symbolic – scope, beneficiaries and creditors.<sup>205</sup>

The Statute of the ICC envisages that it: “[...] shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.[...]”<sup>206</sup> In this context, the ICC may request States to seize the proceeds, property and assets of convicted persons, with a view to forfeiture and ultimate restitution, and States are required to give effect to such forfeiture orders.<sup>207</sup> Reparation may also be made through the Trust Fund established under the Rome Statute.<sup>208</sup> This ‘Trust Fund for Victims’ is for the benefit of victims of crimes within the jurisdiction of the Court, and of their families.<sup>209</sup>

In contrast to most court-ordered reparations, which focus on individual benefits, the ECCC has a mandate to award “collective and moral” reparations.<sup>210</sup> While their form remains unclear, the ECCC has the potential to set interesting precedents for other international courts.

While it is too early to assess the track record of the ICC and the ECCC in terms of reparations, a few points pertaining to the possible awards of reparations to children by these jurisdictions can be made.

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Universal Declaration of Human Rights, which establishes the right to ‘effective remedy’, providing that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”; the International Covenant on Civil and Political Rights, notably its Article 2, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by the UN General Assembly in 1985), and by several regional human rights conventions, including the American Convention on Human Rights (Article 25) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13). Both provide for a right of remedy for victims of violations of these conventions. When children are concerned, these rights are also specifically enshrined in the CRC, which defines the right to participation – or ‘right to be heard’ (article 12), and also directly refers to a right to a remedy (article 39).

<sup>205</sup> See Marieke Wierda and Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, International Centre for Transitional Justice, available at <http://www.ictj.org/static/TJApproaches/Prosecutions/RepICCTrustFund.eng.pdf>

<sup>206</sup> Article 75(2) of the Statute of the ICC. The possibility, in the case of a victim who is a child, that an application to participate be made by a person acting on behalf of a child is explicitly envisaged. On reparations before the ICC, see notably C. Ferstman, ‘The Reparation Regime of the International Criminal Court: Practical Considerations’, 15 *Leiden Journal of International Law* (2002).

<sup>207</sup> Statute of the ICC, articles 75(4), 93(1)(k), and 109.

<sup>208</sup> The Trust-Fund is established pursuant to Article 79 of the Statute of the ICC. Article 75(2) of the Statute of the ICC envisages that: “[...] Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund [...]”.

<sup>209</sup> Article 79 of the Statute of the ICC.

<sup>210</sup> Rule 23(1)(b) of the Internal Rules and Regulations of the ECCC.

First, child victims too often lack the information, resources or access to legal counsel and the courts to be in a position to have their views heard and to assert their rights to claim the reparations they are owed.

Second, the more severe the crime the more difficult it is to repair the victims. How can any entity ‘compensate’ a child victim of genocide whose parents and siblings have been killed in front of her eyes, or who is dying of AIDS as a consequence of being gang raped? In this context, the need for reparation is all the more pressing, especially for victims in need of assistance, such as medical services and treatment to recover from the crimes they have suffered. Adequate reparations should be child-friendly and gender-specific and should examine and consider gendered experiences and consequences of crimes. Ultimately, reparations for these crimes, which aim to ‘repair the irreparable’, represent one of the most ambitious challenges for international courts, especially as, in situations of widespread or systematic abuse, such as those in which international crimes are usually committed, the number of victims eligible to receive reparation is daunting.<sup>211</sup>

Third, in criminal judicial settings the notion of reparation is conceptually tied to the individual responsibility of the defendants and is the materialization of a recognition or determination of responsibility. The insistence on individual responsibility and often individual reparations has led many to conclude that criminal courts are not the best mechanism for victims to obtain redress and repair, notably because they do not grant equal access to all victims. This is particularly problematic in contexts involving a large number of victims. Reparations by international courts should therefore draw on best practices developed in administrative or State-run reparations programmes.<sup>212</sup>

## 5 CONCLUSIONS

International courts have undoubtedly contributed to the increasing recognition of the harm that violence and conflicts cause for children and the extent of their victimization from mass, systematic crimes. Two international courts have played a particular role in this respect. The SCSL 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 ICC has continued this trend, bringing to the world’s attention the plight of children associated with armed groups by focusing on their unlawful recruitment and use in its very first and highly publicized trial.

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<sup>211</sup> Jean-Baptiste Jeangne Vilmer, *Reparer l’irreparable. Les reparations aux victimes devant la Cour penale internationale*, Presses Universitaires de France 2009.

<sup>212</sup> See Reparations in Theory and Practice, <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>. In the context of transitional justice, the broader understanding of reparations is inherently linked to States and to their responsibility. Reparations are then deemed to serve as a vehicle for acknowledging past violations and state responsibility for harms as well as a public commitment to respond to their enduring impact. In this way, they aim to restore victim confidence in the State and build a level of civic trust needed for the effective functioning of a democratic society.

But this development is recent. Many interrelated probable causes explain why earlier international courts did not pay particular attention to the plight of children. These include the conspicuous absence of child-specific provisions in their legal framework, reference to the rights of children and to the protection they should receive, and statutory requirements for staff with expertise in child rights. Other factors are the low priority given to recruitment of such staff and reluctance to rely on the testimonies of children, as well as related concerns regarding the possible impact on fair trial guarantees. But among the probable causes are also external factors: the general lack of visibility of and interest in these crimes at the time and the resulting absence of attention given to these crimes in UN reports such as the ones that led to the creation of the ICTY and ICTR.<sup>213</sup>

These external factors highlight the importance of the early recognition and international acknowledgement of crimes committed against children. *Such acknowledgements are now more systematic with the monitoring and reporting mechanism initially established through UN Security Council resolution 1612 and completed in 2009 by UN Security Council resolution 1882, enabling the regular collection of information on six specific categories of grave violations against children.*<sup>214</sup> The resolution leads to a periodic ‘naming and shaming’ exercise that brings situations 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.<sup>215</sup> In addition, guidelines could be developed to ensure that any international investigation or commission of enquiry pays particular attention to crimes committed against children and systematically includes these crimes in ‘mapping’ serious international crimes.

This historical context makes it all the more remarkable that international courts have recently devoted sustained efforts to the prosecution of some crimes against children. It shows that it is possible to rely on the testimonies of children and young adults victimized during their childhood to secure conviction, without infringing the rights of the defendants. These significant contributions should not be understated, and the courts and their prosecutors are to be congratulated for their efforts to hold responsible those who have recruited and exploited child soldiers. Yet more is needed to 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.

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<sup>213</sup> The creation of the ICTY was recommended in the Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) S/25274, annex I (1993), often referred to as the ‘Bassiouni’ Report, and the creation of the ICTR was proposed in the Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), UNSC, UN Doc. S/1994/1125 (1994) Annex.

<sup>214</sup> 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. Obviously 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 by resolution 1882 to patterns of killing or maiming of children and/or rape and other sexual violence against children.

<sup>215</sup> 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 U.N. Secretary-General for Children and Armed Conflict.

This paper demonstrates that, beyond child-soldiers, attention should also be given to other international crimes victimizing children, committed during conflicts and also during peacetime.

While it must be recognized that *international courts can only prosecute a few of the many serious international crimes committed against both children and adults*, it is important that these courts record, investigate and prosecute as thoroughly as possible 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.

Many international crimes committed against children are perpetrated in the course of armed conflicts, but more consideration should also 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 of a Special Representative of the Secretary-General on violence against children may signal growing awareness of the importance of the victimization of children throughout the world.<sup>216</sup> But reporting crimes and raising awareness, while crucial, do not amount to accountability.

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 token to make up for failing to try all the other generic international crimes committed against children; all crimes affecting children should be viewed with equal seriousness.

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<sup>216</sup> This appointment is in line with the recommendation included in the 2006 Secretary-General's Study on Violence against Children. The Secretary-General appointed in 2009 Marta Santos Pais, a long-time child rights advocate and an outstanding practitioner.

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 international 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 investigate systemic patterns of criminality affecting children during armed conflicts but also in other situations, including in times of peace and prosecute those responsible. This includes enslavement of children and/or widespread forced labour, 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.

The ICC’s important role in ending impunity for perpetrators of crimes against children has been recognized and highlighted in three separate resolutions of the United Nations General Assembly.<sup>217</sup> *This largely reflects the increased recognition by the United Nations of the gravity of these crimes,*<sup>218</sup> *leading world leaders to pledge to end impunity for the crimes committed against children,*<sup>219</sup> notably in the Paris Commitments.<sup>220</sup> International tribunals, alongside national criminal courts, can play a critical role in ending the cycle of impunity. This is crucial, because the lack of accountability for crimes against children leaves children vulnerable to further violation and abuse. Conversely, criminal investigations and trials raise public awareness of the crimes targeting children and can contribute to breaking the cycle of violence.

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<sup>217</sup> Resolutions 54/149, 57/190 and 60/231 of the UN General Assembly.

<sup>218</sup> See for instance UN Security Council Resolution 1379 S/RES/1379 (2001), urging States to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against children. In the Report of the Secretary-General: Children and Armed Conflict 7 September 2001 (A/56/342 - S/2001/852), the Secretary-General expressed his commitment to combating impunity for egregious abuse of children’s rights in the context of armed conflict.

<sup>219</sup> In May 2002, during the UN General Assembly’s Special Session on Children, on the occasion of the adoption of the Plan of Action incorporated in ‘A World Fit for Children’, world leaders pledged to: ‘[p]ut an end to impunity, prosecute those responsible for genocide, crimes against humanity, and war crimes and exclude, where feasible, these crimes from amnesty provisions and amnesty legislation, and ensure that whenever post-conflict truth and justice-seeking mechanism are established, serious abuses involving children are addressed and that appropriate child-sensitive procedures are provided.’, para. 23

<sup>220</sup> Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, 6 February 2007 para. 6: ‘To fight against impunity, and to effectively investigate and prosecute those persons who have unlawfully recruited children into armed forces or groups, or used them to participate actively in hostilities, bearing in mind that peace or other agreements aiming to bring about an end to hostilities should not include amnesty provisions for perpetrators of crimes under international law, including those committed against children.’

International courts are a means to address the crimes experienced by children, which should simultaneously improve accountability and adequately protect the children involved in this process, recognizing that one objective must not preclude the other. Ideally children's participation should strengthen and enhance their protection, and protective measures should enable participation. The lack of accountability for crimes against children leaves the latter vulnerable to further violation and abuse, whereas criminal prosecutions, especially international ones, raise public awareness and contribute to breaking the cycle of violence. Accountability in post-conflict situations can fulfil a number of important functions. It contributes to the process of healing and helps children understand that they are not to blame for what has happened.<sup>221</sup>

In this regard, another area deserving further attention concerns the children who have participated in the commission of international crimes. *While children are 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.* Children should not be among those held accountable by international courts; these courts concentrate on those bearing the greatest responsibility for the worst crimes, and should therefore pursue accountability for crimes against rather than by children. *But many questions remain as to what really is in the best interests of these children and whether some form of acknowledgement and contrition, in protective non-judicial fora, might be beneficial. Perhaps such processes could facilitate children's recovery and reintegration into their families and communities.*

Children, girls in particular, are only slowly emerging as visible victims, and they are being empowered in the process. The extent to which children 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 international crimes are children.

## **6 RECOMMENDATIONS**

The preceding review forms the basis of the following set of recommendations, aiming to improve the practice of international courts in their interaction with children and young adults. These recommendations have a dual objective: to ensure that these courts better foster accountability for international crimes committed against children and that they better protect the rights of the children involved.

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<sup>221</sup> No Peace Without Justice and UNICEF, "Justice for Children Through Other Mechanisms", *International Criminal Justice and Children*, September 2002, at 13, available at [www.npwj.org/No+Peace+Without+Justice/Newsroom/Publications](http://www.npwj.org/No+Peace+Without+Justice/Newsroom/Publications).

Five overarching principles that inform these recommendations must be respected at all times by international courts as by any other judicial mechanisms: First, the right of children to participate in decisions affecting their lives, which includes the right to seek justice, must be recognized and upheld. Second, the best interests of the child should guide the justice process. Third, the safety and security of all children is paramount, and their confidentiality and protection must be guaranteed at all times. Fourth, children must be treated with dignity and respect. Fifth, a gender-sensitive approach should be taken, ensuring that the rights of both girls and boys are protected and that their specific needs are addressed.

Recognizing the differences between the respective mandate, resources and contexts of operations of each international or mixed court, these recommendations are primarily relevant for the ICC, but they are formulated to be applicable for all and to guide possible future international tribunals.<sup>222</sup> In light of the organizational structure prevailing in each court and the specific mandate and responsibilities of each organ, some of the recommendations are addressed specifically to the judges, prosecutors and registrars.

## **6.1 For Judges of International or Mixed Courts**

### ***6.1.1 Permit the best possible preparation of the testimonies of children.***

Notwithstanding the possible impact on the probative value of the evidence, adequately preparing child witnesses or persons testifying about crimes they have experienced as children shortly before their testimony in court builds their understanding of the procedure and their confidence to testify. It enables them to feel less isolated in the courtroom when undergoing cross-examination and reassures them, thus reducing the risk of re-traumatization. This preparation would ideally include a visit to the courtroom, an explanation of the procedures to be followed in terms that children can easily understand, and informal meetings with those who will be in the courtroom, including judges and lawyers for the prosecution and defence who will question the witness.

### ***6.1.2. Enable child victims to exercise their rights, through free legal assistance if needed***

Taking into consideration the specific circumstances and needs of child victims, it is often necessary to provide adequate and free legal representation to enable their participation in the proceedings and preserve their rights to a remedy, including reparations when applicable.

## **6.2 For Prosecutors of International or Mixed Courts**

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<sup>222</sup> This is not only because the ICC is permanent but also because several cases in its current caseload pertain to crimes committed against children.



### ***6.2.1 Systematically consider all international crimes targeting children, both child-specific crimes and other generic crimes, whether or not they are committed in the course of an armed conflict***

International courts should systematically consider the best interests of children when designing and conducting their investigations and prosecutions' strategies and policies, and they should review cases of systematic patterns of crimes committed against children. Investigators and prosecutors should include both child-specific crimes and other generic crimes affecting children in their strategies and in the 'mapping' of international crimes. Those who have unlawfully recruited, enlisted or actively used children in hostilities should be held responsible not only for such crimes but also for any other crimes inflicted on these children. If applicable they should also be held responsible for having ordered or incited children to commit offences. This will enable deconstruction of the complex realities of these situations and enable children and their communities to understand how those children may have been coerced or manipulated into being involved in the commission of crimes, which in turn will facilitate the reintegration of these children or young adults into their communities. Other non-child-specific crimes committed against children, such as enslavement, forced labour, murder, torture and rape, should also be prioritized so as to cast a light on the plight of children, which might help to deter such crimes. All systematic patterns of international crimes affecting children, including those committed outside conflicts, should be considered for investigations.

### ***6.2.2 Establish a specialized unit to support the investigation and prosecution of cases involving children***

A specialized unit should be established to support the investigation and prosecution of cases involving children, from the start of an investigation to the completion of a case in appeals. Such a section would provide a thorough understanding of the rights and needs of the children involved, including gender-specific considerations and professionalism in approach. To prevent children's issues from being sidelined as a result of the specialized section, the later should be mandated and empowered to mainstream children issues throughout the prosecutor's office, notably through office-wide trainings. This section would facilitate identification of the main challenges encountered in the investigation and prosecution of crimes committed against children, while aiming to learn from past mistakes and record and ensure the systematic implementation of good practices, included those developed by national juvenile justice systems. The specialized children's unit should include experts with a solid understanding of child rights and international criminal law, experienced juvenile justice professionals and child psychologists to address the specific requirements and vulnerabilities of children.

## **6.3 For Registrars of International and Mixed Courts**

### ***6.3.1 Conduct child-focused outreach efforts***

Child-focused and child-friendly outreach efforts should be undertaken as early and as frequently as possible to inform children of their rights and obligations when interacting with international courts. These events should ensure that children who interact with these courts, including those who may have been involved in the commission of crimes, understand the courts' mandate and procedures and the extent and limits of the protection and possible immunity they can provide. To this end, child-friendly documents should be prepared, distributed widely as part of outreach efforts and used when dealing with a child.

International courts should consider children as an integral part of their audience, preparing child-friendly versions of important or particularly relevant judgments or decisions whenever possible. In situations where many children are illiterate or have not received formal education, such versions may be in non-text forms such as cartoons or audio or video recordings.

### ***6.3.2 Develop and implement public guidelines and policies pertaining to interactions with children***

In consultation with all relevant stakeholders, including child rights organizations, develop and implement public guidelines and policies pertaining to the interaction with children and establish policies that guarantee the effective protection of children and their physical, spiritual and psychological well-being. Subsequently, context-specific child-friendly procedures should be elaborated for each country or region, taking into account the socio-cultural specifics and the particular needs of children in each context.

## **6.4 For all Actors in International and Mixed Courts**

### ***6.4.1 Maintain very regular contacts with all children involved***

Children who are interacting or have interacted with international courts, and their parents or guardians when applicable, should be kept regularly informed of the progress made in the cases concerning them. This should include the timing of each stage of the proceedings, even after they have testified; for instance, children who testified should be individually informed of the delivery of judgments and of the verdict. This information should also provide the opportunity to discuss with the children any concerns they may have, notably in case of acquittal for those who have testified against an accused. This should extend to those children who have been initially contacted but who will not be or have not been called as witnesses in court. Contacts should not only be regular but also sustained, if possible through the same person, to reassure the children concerned.

### ***6.4.2 Offer a familiar environment***

Efforts should be made to minimize disruption to the life and well-being of children called to testify. Whenever possible, trials should be held as close as possible to their

home to minimize the demands on child witnesses and increase the visibility of the proceedings. Alternatively, children should testify by distance video conferencing or closed-circuit television. If child witnesses have to appear in persons far away from their homes, all measures should be taken to provide them with as familiar an environment as possible.

#### ***6.4.3 Protect and preserve the rights of children over the long term, including before national court systems***

Children who may have been involved in the commission of a crime or otherwise associated with any suspects may fall within the competence of national criminal systems and ultimately face trial there. Therefore, children should always testify anonymously and have their identity protected. They should be fully informed and warned and understand the possible consequences of their participation, including any risks of self-incrimination.

When interacting with international or mixed courts, children should be assisted by criminal lawyers, ideally from their own national jurisdiction, to ensure that their rights will be preserved and protected over the long-term, including before national criminal courts. This legal assistance should be systematically offered without cost for those children who cannot afford it.