Children and Transitional Justice

Truth-Telling, Accountability and Reconciliation

Edited by:
Sharanjeet Parmar
Mindy Jane Roseman
Saudamini Siegrist
Theo Sowa

Published by the Human Rights Program at Harvard Law School
This publication was jointly developed by the UNICEF Innocenti Research Centre (IRC) in Florence, Italy and the Human Rights Program, Harvard Law School, Massachusetts, United States of America. It is being distributed by Harvard University Press.

UNICEF IRC publications are contributions to a global debate on child rights issues and include a wide range of opinions. For that reason, the Centre may produce publications that do not necessarily reflect UNICEF policies or approaches on some topics. The views expressed are those of the authors and are being published in order to stimulate further dialogue on child rights.

All Rights Reserved

Cover photo: © UNICEF/NYHQ2006-2801/Bruno Brioni

ISBN: 978-0-9796395-4-8

Human Rights Program
Harvard Law School
1563 Massachusetts Avenue
Pound Hall 401
Cambridge, MA 02138
United States of America

617-495-9362
hrp@law.harvard.edu
http://www.law.harvard.edu/programs/hrp

Distributed by Harvard University Press
http://www.hup.harvard.edu

Printed by Signature Book Printing, http://www.sbpbooks.com
CHAPTER 1

CHILD RIGHTS AND TRANSITIONAL JUSTICE

Saudamini Siegrist

Children...have an extraordinary capacity to see into the heart of things and to expose sham and humbug for what they are.
– Archbishop Desmond Tutu, Chair of South African Truth and Reconciliation Commission

Participants in the national consultation with children on the draft TRC Bill.

---

1 Saudamini Siegrist is a child protection specialist at the UNICEF Innocenti Research Centre (IRC). She is the principal writer of the children's version of the 2004 report of the Sierra Leone Truth and Reconciliation Commission. The author would like to give special thanks to Marta Santos Pais, Yasmin Sooka, Bert Theuermann, Theo Sowa, Jennifer Klot, Ranjana Ghose, and the many colleagues and the children and young people who have inspired this chapter.
INTRODUCTION

Armed conflict and political violence expose children to the machinery of war. They become the victims of firearms, landmines, missiles and aerial bombardment. They witness the killing of family and friends. When their communities are attacked and forced to flee, children lose their homes and are deprived of food, health care and schooling. Girls and boys are also directly and systematically targeted for killing, torture, abduction, recruitment and sexual violence. They are targeted because they are young and within easy reach, precisely because of their vulnerability. Adolescents are often at greatest risk.

For all these reasons children are at the center of debates about the aftermath of war and the need for accountability to address systematic violations – war crimes, crimes against humanity and genocide. They have an important role, as family members and as citizens, in efforts to come to terms with grave human rights violations and to reconcile and achieve a measure of compensation or redress.

This chapter considers a number of the issues and debates in the fields of child rights and transitional justice, drawing primarily on international documents and responses to identify points of mutual concern and common ground. Transitional justice has only recently focused on child victims and witnesses and on the involvement of children in processes of accountability, truth-seeking and reconciliation. In 2002, at the time of the entry into force of the Statute of the International Criminal Court (ICC) and the publication of the study *International Criminal Justice and Children*, the relevance of children within international criminal

---


3 For the purposes of this chapter, references to “adolescents” include those aged ten to nineteen years, while “young people” are those aged ten to twenty-four years and “youth” are fifteen to twenty-four years old, as defined by the World Health Organization.

justice was questioned: “Why children? What do children have to do with international justice?” Today children are understood to be essential to the debate.

What Has Changed?

Grave violations of children’s rights have figured prominently in cases before the Special Court for Sierra Leone (SCSL) and, more recently, the ICC. The SCSL was the first international or hybrid court to prosecute and convict persons for the crime of recruiting and using children in armed conflict. It also established precedent in a decision criminalizing child recruitment prior to the adoption of the Rome Statute, on the basis of customary international law. Crimes against children have gained center stage in international investigations and prosecutions, and the focus on children has helped build consensus and draw public attention. In these ongoing efforts and debates, no issue has attracted more attention than the recruitment and use of children to become – themselves – instruments of war. Children are used to commit atrocities because they are malleable and easily intimidated. They have proved themselves to be obedient and as fearless as the commanders who have forced and coerced them to wage war. In some cases, children are also influenced by economic or political pressures, by family loyalties or independence struggles.


6 See, for example, Karen Emmons and Viktor Nylund, Adult Wars, Child Soldiers: Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region (Bangkok: UNICEF, 2002); Michael Wessells, Child Soldiers: From Violence to Protection (Cambridge: Harvard University Press, 2007); Alcinda Honwana, Child Soldiers in Africa (Philadelphia: Penn
The recruitment or use of children as soldiers is a war crime. It is one of six grave violations against children identified in Resolution 1612 (2005) of the United Nations Security Council, which established a mechanism for monitoring and reporting. The other violations are killing or maiming, rape and other forms of sexual violence, abduction, attacks on schools or hospitals and denial of humanitarian assistance. The purpose of the monitoring and reporting mechanism is to stop and prevent the brutal impacts of war on children, to better inform humanitarian response and to secure a basis for improved accountability for those violations.

These efforts are part of a bigger picture. Children first came to the attention of the Security Council as a result of the study undertaken by Graça Machel on the impact of armed conflict on children, at the request of the Committee on the Rights of the Child and the United Nations Secretary-General. The study was submitted to the United Nations General Assembly in 1996 and provided the foundation for a coherent and comprehensive agenda on children and armed conflict, spurring action among governments, civil society and affected communities – as well as among children themselves. It examined the effectiveness of international standards

---

7 The Convention on the Rights of the Child (1989), the Geneva Conventions (1949) and the two Additional Protocols (1977) prohibit the recruitment or use of children below age fifteen. The Optional Protocol to the CRC on the involvement of children in armed conflict raises the bar to age eighteen for compulsory recruitment, forbids those under eighteen from participation in hostilities and outlaws all recruitment or use of children below eighteen by armed groups.

8 United Nations, S/RES/1612 (2005), New York. Initially the monitoring and reporting mechanism was implemented only in situations where the recruitment or use of children as soldiers was reported. In 2009, the Security Council adopted resolution 1882 on children and armed conflict, which expands the trigger for the monitoring and reporting mechanism to include the violations of sexual violence, killing and maiming.

9 The Machel Study helped build support for adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, spurred the Campaign to Stop the Use of Child Soldiers and inspired the Colombia Chil-
in protecting children threatened by armed conflict and established a place for children on the global peace and security agenda.

The Machel report and the campaign to end impunity for grave violations against children were, in turn, informed and driven by the momentum surrounding the Convention on the Rights of the Child (CRC), in force since 2 September 1990. It provides a universally agreed-upon set of standards and obligations guaranteed by governments to protect the rights of children. From its inception, the CRC commanded attention at national and international levels, achieving rapid and nearly universal ratification.\footnote{The Convention on the Rights of the Child has been ratified by all but two countries.}

As the Committee on the Rights of the Child noted in its 1992 thematic debate on children in armed conflict, the CRC includes no general derogation clause;\footnote{A derogation clause permits a state to suspend some rights in certain situations, particularly public emergencies.} the human rights of children should be safeguarded at all times, including during public emergencies and in times of armed conflict.\footnote{The Impact of War on Children, at 141-142. See also Ilene Cohen, “The Convention on the Rights of the Child: What it Means for Children and War,” International Journal of Refugee Law 3(1) 1991:100-111 (noting that certain rights with respect to deprivation of liberty, education or the cultural, linguistic and religious rights of indigenous minorities are more extensive in the CRC than in the Geneva Conventions and Protocols, whereas other international human rights instruments include provisions that remain in force in wartime and offer even greater protection).} The CRC promotes complementarity between international humanitarian law and human rights law, specifically with regard to children.\footnote{Convention on the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959), arts. 38, 39 [hereinafter CRC].} Article 38 calls on States parties to protect the rights of children in situations of armed conflict and to ensure “respect for rules of international humanitarian law.” Article 39 promotes post-conflict recovery and reintegration in an environment that fosters the “health, self-respect and dignity of the child.”
Child rights are an essential dimension of the international criminal justice framework. The importance of children to that agenda is therefore not a matter of public outcry or political expediency; it is the result of the steady development of legal standards that recognize the rights of children and require safeguarding their best interests. Relevant instruments under international law – in particular the CRC and the Optional Protocol to the CRC on the involvement of children in armed conflict – lay the groundwork for a rights-based approach to post-conflict recovery. This framework is founded on principles of accountability and rule of law, as well as universality, interdependence and indivisibility of human rights, and the four principles of the CRC: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child.14 These principles guide states in their commitment to respect and fulfill the rights of children and are critical in strengthening social and political responsibility in the transition from war to peace. Not only are child rights present and implicit in the transitional justice agenda, they are necessary for its success.

A CHILD RIGHTS-BASED APPROACH TO TRANSITIONAL JUSTICE

The CRC is the first legally binding instrument to recognize the full spectrum of rights – civil, political, economic, social and cultural. This makes it a normative framework for children and for society.

---

Transitional justice has focused primarily on violations of civil and political rights – killings, disappearances, torture, arbitrary arrest, detention and other threats to personal security. But armed conflict and political violence imperil all the rights of children. The CRC gives equal importance to children’s economic, social and cultural rights, including the right of every child to a standard of living adequate for her or his physical, mental, spiritual, moral and social development. While millions of children are victims of civil and political violations during armed conflict, the number of children exposed to displacement, hunger, disease and lack of education in war-affected countries is much greater.

In their analysis of the impacts of the armed conflict on children in Guatemala, Gibbons, Salazar and Sari found that the greatest number of children lost their lives due to economic, social and cultural rights violations during displacement and flight. Their deaths were caused by insufficient access to health care, nutrition, water and sanitation facilities, and adequate housing, as well as economic injustice and structural violence.

War also has serious impacts on children who survive the violence, leaving many to grow up in poverty, suffering from malnutrition and lack of access to education and health care. During post-conflict reconstruction, a child rights focus should inform the rebuilding of health care, education and other social protection systems, as well as the reform of institutions, including the justice and security sectors. The educational curriculum is

---

15 Elizabeth Gibbons, Christian Salazar and Guenay Sari, Between War and Peace: Young People on the Wings of the Phoenix (Goettingen: Lamuv, 2003).

16 Johan Galtung, “Cultural Violence,” Journal of Peace Research 27(3) 1990:291-305. Galtung defines cultural violence as any aspect of a culture that can be used to legitimize violence in its direct or structural form. The term “structural violence” describes social structures and systems that cause individuals and populations to suffer harm, including extreme poverty and oppression. The violence is described as structural because it is embedded in the social, political and economic organization of our world. See also Johan Galtung, “Violence, Peace and Peace Research,” Journal of Peace Research 6(3) 1969:167-191; and Parmar, Sharanjeet “Realizing Economic Justice for Children: The Role of Transitional Justice in Post-Conflict Societies,” Chapter 10 of this volume.

17 In 2008, UNICEF introduced a new child protection strategy outlining two main,
particularly important as an expression of society’s priorities and values. Linking educational and curriculum reform to transitional justice has the potential to strengthen the protective environment and to establish a broader understanding of human rights principles. In transitional contexts a human rights-based curriculum can promote social inclusion and active citizenship.

The destruction of social protections during armed conflict often has a devastating impact on the lives of girls and women. Both girls and boys are affected, but girls are more likely to be targeted for sexual violence and exploitation. Crisis and conflict also cause social upheaval and can result in a radical shift in social norms, altering the gendered roles and identities of girls and women, as well as of men and boys. This can increase exposure to risk, including within families, in public spaces such as schools and health facilities, or when harvesting crops or gathering firewood. During armed conflict and political violence, there is often a marked increase in domestic violence and abuse by family complementarity approaches: strengthening national protection systems and supporting social change. Child protection systems include laws, policies, regulations and services needed across all sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection-related risks. The strategy is available at www.unicef.org/protection/files/CP_Strategy_English.pdf.

18 See Karin Landgren, “The Protective Environment: Development Support for Child Protection,” Human Rights Quarterly 27(1) 2005:214–248. The eight elements identified as strengthening the protective environment for children include government commitment and capacity; legislation and enforcement; culture and customs; open discussion; children’s life skills and participation; capacity of families and communities; essential services; and monitoring, reporting and oversight.


members. At the same time the destruction of social protections can lead girls and women to assume greater responsibilities and take on challenges in order to survive. After the conflict, social norms and conventions may be reinstated, creating both tensions and opportunities.

When transitional justice processes are initiated, it is important to consider and document the diverse roles and experiences of girls and women and the often underreported acts of sexual violence committed against boys and men. In some cases, children are reluctant to speak out because they fear for their safety or because of social stigma. This is most likely in situations where there has been systematic or widespread rape and other sexual violence. It is important that procedures are in place to protect and enable the involvement of girls and young women in justice- and truth-seeking, redress and reparation, and community reconciliation.

The focus on women’s rights and gender equality should encompass prevention and response to sexual violence, including health care, psychosocial support and assistance to children born to survivors, but should not be limited to those violations. The experiences of girls and women, both during and after conflict, are diverse. As caregivers, activists, survivors, educators and in professional capacities, young women contribute to national recovery and peace-building. A rights-based approach is needed so that girls and women can fully participate in rebuilding their lives and societies.

---


This includes procedures to protect and enable their involvement in justice- and truth-seeking, redress and reparation, and reconciliation.\textsuperscript{25}

The investigation of the full range of violations that girls and boys suffer during armed conflict and political violence not only leads to a better understanding of root causes and overall impacts but can help inform recommendations and reforms for recovery.

\section*{CHILD PARTICIPATION: LOCAL CONTEXTS, GLOBAL STANDARDS}

One of the challenges – or dilemmas – encountered when addressing child rights within a transitional justice framework is the need to adapt justice, accountability and truth-seeking mechanisms in local contexts, while at the same time upholding international human rights standards. If accountability is to be meaningful to the communities and children most affected by violations, it must take into account the cultural values of the victims. If international standards are imposed without consultation and consensus, they may be seen as biased or intended to serve the political interests of powerful states, which can provoke a backlash. For example, questions have arisen as to how the ICC chooses when and where to pursue prosecutions.\textsuperscript{26} Crimes targeting children have high visibility, leaving children caught in the middle of those controversies.\textsuperscript{27}

\footnotesize
\begin{itemize}
  \item \textsuperscript{25} Ruth Rubio-Marín, ed., \textit{What Happened to the Women?} (New York: Social Science Research Council, 2006).
  \item \textsuperscript{27} The high visibility of international crimes against children is demonstrated by the decision of the ICC to open its first trial, in January 2009, against the Congolese rebel
\end{itemize}
A current debate that is also caught in the crux between global and local norms has to do with recent terminology that describes specific sexual and gender based crimes committed by armed groups against girls as “forced marriage.” In February 2009, the Special Court for Sierra Leone prosecuted three Revolutionary United Front (RUF) commanders for this crime.\(^{28}\) It was the first prosecution of forced marriage and established a legal precedent for the use of the term as a crime against humanity under international law, distinct from other forms of sexual violence, as a result of the length of the association and its domestic nature. Based on the jurisprudence of the SCSL, civil society groups and transitional justice specialists working on accountability for crimes committed by the Lord’s Resistance Army (LRA) in northern Uganda have adopted that terminology to describe abduction, forced labor, forced participation in hostilities, systemic and long-term rape, enforced pregnancy and forced domestic duties, based on the jurisprudence of the SCSL. The stated intention of the SCSL was to underline the systematic abuse of girls and young women by armed groups as a grave violation and to hold commanders who are responsible for these crimes accountable.\(^{29}\)

However, the use of the term forced marriage to describe such grave violations of international law has been contested by some lawyers and human rights advocates, who are concerned that it may be misread as a euphemism, resulting in a tendency to normalize or even trivialize the horror that these victims experience. It may also wrongly suggest an element of consent or complicity on the part of the victim. The use of the terminology to describe abduction, rape and forced labor in countries affected by war, when it has not been used to describe those crimes elsewhere, adds to the contentious-

---

\(^{28}\) *Prosecutor v Brima, Kamara and Kanu* (AFRC Case, Case No. SCSL-2004-16-A), Special Court for Sierra Leone, Appeals Chamber Judgment of 22 February 2008, paras. 181-203.

\(^{29}\) Office of the Prosecutor, Special Court for Sierra Leone, Press Release, 8 March 2005, available at www.sc-sl.org/LinkClick.aspx?fileticket=T5eUb5Sxaso%3d&tabid=196.
ness of the debate. Not only is the term forced marriage situated and confined in the context of the power structure that informs conventional marriage, but it is additionally loaded because it imposes a diminished status on those who have been targeted for their gender and survived the brutal violence of repeated rape and forced labor. The use of the term forced marriage can be perceived as placing these girls and young women in a category that labels them as false or forced wives, rather than empowering the survivors and emphasizing the delivery of justice to the girls and young women targeted for horrific crimes perpetrated during armed conflict. While the terminology was intended to prevent impunity and deliver justice to the survivors, its implications are a matter of ongoing debate.

Another important question that has generated debate and come to the attention of practitioners and legal experts, as well as academics, is what transitional justice processes may be most appropriate for children’s involvement in diverse cultural contexts. Over the last decade children’s participation in truth commissions has been promoted in part because such commissions can provide a nonjudicial and nonpunitive approach to accountability. When truth commissions are in compliance with international human rights standards, they may create opportunities for children to express their views, building capacity for active citizenship and democratic processes. Truth commissions may also be linked to community reconciliation and education activities. But truth commissions are political processes; if they are not objective and human rights-based, they can lead to risks and manipulation of children, or to disillusionment.

Children may also become involved in local or traditional accountability and reconciliation processes. The Machel Study 10-Year Strategic Review highlights the participation of children in traditional healing practices that succeeded in enabling reintegration while also providing protection and psychosocial

---

30 Children and Truth Commissions.
support. However, traditional practices reflect the status quo, and in some post-conflict environments they may reinforce social inequalities, discrimination or gender bias. The tendency to make generalizations concerning traditional practices can be misleading. In fact, traditional practices cover a wide range of diverse activities. Children’s involvement in traditional practices should not be romanticized; rather, the potential of such practices should be further explored in specific situations to assess under what conditions children’s participation serves their best interests.

The involvement of child witnesses in courtroom proceedings is another area that has received considerable attention, provoking debate among child rights advocates and legal experts. Protection policies and procedures for child witnesses in international courts and tribunals were first established by a framework of cooperation between the Special Court of Sierra Leone and the country’s child protection agencies (CPAs). The resulting agreement (*Principles and Procedures for the Protection of Children in the Special Court*) created a joint monitoring committee composed of the Special Court and CPAs, which reviewed the implementation of the principles and procedures on a monthly basis. This agreement later informed the development of protection policies and procedures for child witnesses at the ICC. While the impact of testimony by individual child witnesses may be quite significant in international courts and tribunals, as has been the case in the SCSL

---

31 *Machel Study 10-Year Strategic Review*, 73.


34 Donald Robertshaw and Keith Wright, “The Role of Child Protection Agencies in Supporting Children’s Involvement in Transitional Justice Mechanisms, in Particular the Special Court for Sierra Leone” (paper presented at the UNICEF IRC meeting on Children and Truth Commissions, November 2005), 4-5.
and in ongoing trials at the ICC, the possibility for grassroots engagement of children in those processes is extremely limited.

Children’s involvement in transitional justice processes fulfills their right to be heard in judicial and administrative proceedings affecting them (article 12 of the CRC). At a conference on children and transitional justice attended by legal experts and child rights advocates in April 2009, the issue was raised that truth commissions have limited time and resources in which to carry out their work and that the involvement of children, as a special interest group, would be subject to those limitations. In response, a number of child protection specialists intervened, which sparked a discussion leading to a consensus on the legal obligation to involve children in transitional justice processes and to give their views due weight in decisions that affect them, as articulated in article 12 of the CRC. The legal obligation is binding. Children and young people comprise more than half of the affected population in many post-conflict situations, and they are frequently among those most targeted. Participatory processes that include children are therefore needed to achieve the aims of truth- and justice-seeking, in particular to promote reconciliation and recovery at the community level. Children’s participation in transitional justice processes is critical; the question is how to determine children’s appropriate role in diverse situations and how to ensure that their rights are protected and their best interests safeguarded throughout their involvement.

Children’s participation in truth- and justice-seeking and reconciliation processes is twofold. One, children are victims and witnesses, and sometimes, perpetrators of crimes. They have an important and distinct role in providing an account of their experiences. Children and adolescents have successfully contributed statements and testimony to international and truth commissions.36


In all cases where children engage as witnesses, protection procedures and legal safeguards must be in place to protect their rights before, during and after their testimony. Two, children are family members and citizens of their communities, and are therefore key actors in accountability and reconciliation processes. With guidance and support, children can help to inform and energize efforts toward reconciliation and recovery. This does not mean that the burden of justice- and truth-seeking should be shifted to the shoulders of children. But they should be given a place and a voice in transitional justice processes.

Children's recovery from grave human rights violations does not begin or end with transitional justice. Entire lives may be spent in the effort to reconcile, to recover. Yet there is reason to invest in the processes of transitional justice and to enable and protect children who want to bear witness to harms they have suffered or, in some cases, have perpetrated.

The investment in transitional justice is no less than “society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” This quotation from the United Nations definition lays bare both the ambition and the idealism of the transitional justice agenda. The ambition too often overreaches and leaves the victims empty-handed, without redress. During a 2008 workshop on children and transitional justice convened by UNICEF and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal, a number of child participants expressed their opposition to the establishment of a truth and reconciliation commission, as called for in the 2006 Peace Agreement. They did not trust a commission established and supported by political actors to deliver the truth, and they did not want the truth to become a label for political purposes. Instead they proposed a more creative

approach to reconciliation activities, including public discussions, debate, drama, music and art.\textsuperscript{38} The energy and idealism of children and young people can help transform transitional justice processes, but those processes must be willing and able to listen to children and to allow their voices to be heard.

The objective of transitional justice, as articulated in the United Nations Secretary-General’s report, cited above, is to enable societies that have been torn apart by atrocity to recover their humanity and to empower individuals – victims, witnesses and perpetrators – to recount their experiences and agree on a measure of justice to inform their future. Ultimately, transitional justice seeks to end recurring violations and establish a secure and just peace. In a submission to the Sierra Leone Truth and Reconciliation Commission (TRC), the child-led Children’s Forum Network called for a child-friendly version of the commission’s report so that children could read and understand their own history. They wanted to make sure that children would not forget the sufferings of the war, “as a measure to prevent recurrence of what happened.”\textsuperscript{39}

But how effective are the processes and mechanisms of transitional justice – judicial prosecutions, truth-telling and truth commissions, traditional practices, reparations and institutional reforms – in fulfilling the expectations of survivors to achieve accountability and reconciliation? What do accountability and reconciliation mean to children who have suffered the impacts and trauma of war, lost family and friends, and in some cases participated in violence and lost confidence in themselves, their leaders and in society as a whole? The rebuilding of a child’s world is not the work of transitional justice. That can only be achieved with the help of families, communities and children themselves. But transitional justice can open doors, allowing children’s ideas and viewpoints to be heard and to influence the process and outcomes.

\textsuperscript{38} Author’s observations during the workshop.

BEST INTERESTS OF THE CHILD

The principle of the best interests of the child is one of the most cited and significant principles underpinning the Convention on the Rights of the Child. Article 3(1) states “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Its meaning in different national, local and cultural contexts is open to discussion and debate, and applications of the ‘best interests’ principle are wide ranging.40 In transitional justice contexts, the application of this principle is relatively new.

An examination of the decisions taken by the TRCs in Sierra Leone and South Africa regarding child testimony and statement-taking demonstrates how the assessment of the best interests principle can lead to different outcomes. In his analysis of children’s role in the South African TRC, Pigou notes that “a debate arose during preparation of the special hearings on children and youth as to whether or not children under the age of eighteen should appear and testify.”41 At the time there was no precedent for children’s participation in a process that was considered both risky and politicized. In particular, the possibility of re-traumatizing children was an area of concern. International advice was elicited and, following consultations with UNICEF and more than thirty South African non-governmental organizations,42 a decision was made to exclude children from statement-taking and from the hearings. The argument was that exposure to the public and political glare of the


41 See Piers Pigou, “Children and the South African Truth and Reconciliation,” Chapter 4 of this volume.

42 Ibid.
hearings would not be in children’s best interests. That decision, made in 1996, was based on and informed by experience and professional expertise. It was, as Pigou states, the conventional wisdom of the day. One year earlier, in 1995, South Africa had become a party to the CRC.

Five years later, in 2001, the Sierra Leone TRC used the same argument – the best interests of the child – to arrive at a different conclusion. The technical meeting of the Sierra Leone TRC, in Freetown in June 2001,\(^{43}\) determined that because “children are among the primary victims of the civil war in Sierra Leone, their involvement in the TRC is essential.”\(^{44}\) With the best interests principle at the heart of the process, it was decided that children’s main form of participation in the TRC should be in confidential statement taking.\(^{45}\) The basis for the decision is further elaborated in chapter 10 of the technical report, ‘Children’s Views on the TRC and Children – Report from the Children’s Working Group,’ where the best interests principle is cited: “The fundamental objectives of the work of the TRC concerning child participation should be the promotion of the ‘best interests of the child’, with priority treatment

\(^{43}\) The technical meeting convened by UNICEF, the National Forum for Human Rights and the UN Mission in Sierra Leone (UNAMSIL), Human Rights Section, 4-6 June 2001, Freetown, Sierra Leone, brought together national and international child rights and protection experts and child participants.


to be provided to children’s issues and measures to be taken for their protection.”

The decision of the Sierra Leone TRC to include children’s statements and testimony in the process established precedent that helped inform the Liberia TRC policy, in 2006, to systematically include children in statement-taking and in regional hearings throughout the country. The evolution of thinking and decision-making with regard to children’s best interests in transitional contexts means that the principle is not fixed or rigid, but should be adapted and informed by children’s views and experiences, as well as by local factors and lessons learned.

CHILDREN’S EVOLVING CAPACITIES

While the best interests of children is a widely quoted principle at the core of the CRC, the principle of children’s evolving capacities, though often debated, remains less quoted or understood. Article 5 of the Convention states that direction and guidance, provided by parents or others with responsibility for the child, must take into account the capacities of the child to exercise rights on his or her own behalf. Twenty years after the adoption of the CRC, the articulation of this principle is still in flux, recognizing that children require varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts.

Children’s evolving capacities are intrinsic to their growing ability to take on responsibility and agency, both developmentally


48 Lansdown, at ix.
and legally. As Lansdown has surmised, “This concept provides the basis for an appropriate respect for children’s agency without exposing them prematurely to the full responsibilities normally associated with adulthood.” But the implications of the principle of evolving capacities present a dilemma with regard to children’s involvement in transitional justice processes. If children’s agency and their right to participate in decisions affecting them are promoted, what criteria will be used to set boundaries to prevent exposure to risk beyond their years?

As noted by Smith, the lack of protection for child witnesses in the courtroom can put them at risk; in the first trial of the ICC, it resulted in a child witness recanting his testimony. This high-profile lapse of protection led to immediate steps by the ICC to better protect child witnesses, including hiring a full-time child psychologist to advise on all aspects of children’s participation throughout the trial. However, it also calls into question the capacity of children to participate as witnesses in such trials. Some members of the Network for Young People Affected by War are currently debating the issue. According to Kon Kelei, one of the founders, now aged twenty-six, children should not be put on the witness stand to testify in international trials unless protection measures are in place and, even then, only as a last resort: “Truth and justice, what are they? And for whom are they meant? Young war victims were once forced to commit the most horrible atrocities, all the architecture of adults. And today we ask them to tell in detail how they were forced by the defendant to kill their parents or relatives, rape their sisters or mothers. In the case of girls, asked to tell in detail how they were continually raped by warlords and forced to go and fight. The courts and legal scholars should and

---

49 Ibid.

50 Ibid.

51 See Alison Smith, “Basic Assumptions of Transitional Justice and Children,” Chapter 2 of this volume.
need to recognize that the traumas with which the [former] child soldiers lived, and are still living, are too heavy.”52

Many legal experts have advocated in favor of children’s testimony in courtroom trials, with proper and appropriate protection, taking into consideration each child’s maturity and evolving capacities.53 The protection procedures for child witnesses include, for example, shielding them from the defendant, who may be a perpetrator or former commander, as well as protecting the child’s privacy at all levels of the proceedings. At the same time, it is important to ensure that fair trial procedures are not put at risk.

A dilemma related to evolving capacities that has provoked even more debate is children’s criminal responsibility when they are accused of committing crimes under international law. While it is understood that appropriate measures of accountability are in children’s best interests, what is actually appropriate is a matter of controversy. According to international child rights and juvenile justice standards, alternatives to judicial proceedings should be applied wherever appropriate.54 To date, only one child has been tried for crimes under international law.55

Children’s responsibility for crimes committed during armed conflict is complicated by the fact that children have been used by armed forces and groups to carry out egregious crimes and have, in some cases, become underage commanders within armed groups. An often-cited instance is the case of Dominic Ongwen, one of the five commanders of the Lord’s Resistance Army indicted by the ICC.

---

52 Kon Kelei, e-mail to the author, 11 December 2009.


for crimes committed in northern Uganda. The case has been researched by Baines, who argues that because Dominic Ongwen was abducted at age nine or ten and forced into the ranks of the LRA, he is both victim and perpetrator. She uses the term “complex political perpetrator” to describe “youth who occupy extremely marginal spaces in settings of chronic crisis, and who use violence as an expression of political agency.” Baines argues that the criminal responsibility of Dominic Ongwen should take into consideration the failure of society to protect him from becoming a victim and then a perpetrator of war crimes.

In considering the criminal responsibility of children below the age of eighteen, the civil conflicts of Sierra Leone and Liberia are particularly relevant. In Sierra Leone, from 1998 to 2002, nearly seven thousand children were formally demobilized from fighting forces. Many of them had been drugged, threatened and forced to commit atrocities. Despite evidence that children participated in hostilities and had, in some instances, commanded younger children, the Special Court of Sierra Leone adopted a policy not to pursue prosecution of anyone who was under age eighteen at the time the offense was committed. The policy was based on a decision by the chief prosecutor that “no child could bear the greatest responsibility for the crimes that have taken place.” The Sierra Leone TRC, operating at the same time as the Special Court, included among its guiding principles a decision to treat all children equally as victims and witnesses of the war, including children associated

---


57 Witness to Truth, Report of the Sierra Leone Truth and Reconciliation Commission, Volume Three B, Chapter 4, “Children and the Armed Conflict in Sierra Leone”, para 9, 235. The number of children recruited by fighting forces during the conflict in Sierra Leone is confirmed to be more than 6,774, according to the National Committee for Demobilisation, Disarmament and Reintegration in its submission to the TRC, 4 August 2003, at 3.

with fighting forces. This was based on the recognition that all children were victims of a conflict that brutally abused and exploited them.

In Liberia more than ten thousand children were demobilized in the formal disarmament, demobilization and reintegration (DDR) program (2003-2007), and more than nine-thousand, six hundred reunited with their families. Children formed an integral part of the fighting forces in Liberia, including the Small Boys Units formed by Charles Taylor in the national army. As in Sierra Leone, the DDR process in Liberia gave priority to rehabilitation and reintegrating boys and girls associated with the fighting forces. This included programs for family tracing and reunification, access to health care, including psychosocial care, education, vocational skills training, apprenticeships and business development services. The Liberian TRC (2005-2009), unlike the Sierra Leone TRC (2002-2004), was mandated to recommend “prosecutions in particular cases as the TRC deems appropriate.” This created concern among some children in Liberia who feared that the TRC would call for the prosecution of children. From the outset, the TRC maintained that it would not hold children criminally responsible for grave violations committed during the armed conflict. Instead the adults who recruited and armed children would be held responsible. This position was reaffirmed in the final report of the TRC, which discussed children’s role in the wartime violations, noting that, “Thousands of children and youth were forced to take drugs as a

---


60 Coalition to Stop the Use of Child Soldiers, Global Report 2008, available at www.child-soldiers.org/home


62 E-mail communication with UNICEF Country Office, 31 December 2009 (on file with the author).

means to control and teach them to kill, maim and rape without [conscience]; making them virtual killing machines.”64 However, with regard to children’s criminal responsibility for those acts, the TRC recommended that “all children be excluded from any form of criminal prosecution” and further noted that amnesty for children would not apply, as it would imply criminal responsibility for international crimes.65

The question concerning evolving capacities and the agency and responsibility of children alleged to have participated in violations is complicated by the fact that some criminal activity of gangs in politically or economically unstable situations resembles the use of children by fighting forces in armed conflict.66 While there is emerging consensus that children should not be prosecuted for grave violations by international courts, accountability – including judicial prosecution – at national levels is less clear. According to the Key Principles for Children and Transitional Justice:67

Accountability measures for alleged child perpetrators should be in the best interests of the child and should be conducted in a manner that takes into account their age at the time of the alleged commission of the crime, promotes their sense of dignity and worth, and supports their reintegration and potential to assume a constructive role in society. In determining which process of accountability is in the best interest of the child, alternatives to judicial proceedings should be considered wherever appropriate.


65 Ibid, at 256. See also Children and Truth Commissions.


67 See Key Principles for Children and Transitional Justice, Annex of this volume.
The question is complicated by the fact that the jurisdiction for national courts depends on the minimum age of criminal responsibility determined by individual states. Aptel notes that, “a particularly complex and contentious issue pertaining to juvenile justice is the determination of the age of criminal responsibility.”68 She explains that the situation of children’s responsibility is clearer in international than in national jurisdictions. There is a growing consensus that children should not be held criminally responsible under an international jurisdiction.69 However, Aptel notes that “the exclusion of children [from international and hybrid criminal jurisdictions], which underlines that international or mixed courts are not appropriate fora to prosecute them, does not preclude other competent national courts from trying them.”70 While there is no last word on the issue, there is emerging agreement that children associated with armed forces or armed groups who may have been involved in the commission of crimes under international law shall be considered primarily as victims.71 In addition, the Paris Principles on Children Associated with Armed Forces or Groups reaffirm that children recruited or used in hostilities should be considered primarily as victims and recommend that, where appropriate, accountability for children should be pursued through alternatives to judicial proceedings.72

The discussion of children’s evolving capacities needs to acknowledge that, in situations of conflict and instability, children’s political sensibilities are likely to be heightened, leading them to


69 See Key Principles for Children and Transitional Justice, Annex of this volume.


71 See “Key Principles for Children and Transitional Justice,” Annex 1 of this volume.

72 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.
become responsible beyond their years. During armed conflict and political violence, children may be exposed to both short-term and long-term physical, mental and emotional harm. They may also find ways to survive in the face of extreme hardship. Following the genocide in Rwanda an estimated one-hundred-thousand children were orphaned and living in child-headed households. This may be a sign of their resilience or an effort to cope or may simply indicate that they have prematurely taken on adult responsibilities, depending on the specific factors and conditions that individual children face. The principle of evolving capacities cannot be applied indiscriminately; it must be considered from the perspective of a child's own experience and life skills.

PROTECTION AND PARTICIPATION IN SITUATIONS OF CONFLICT AND POLITICAL INSTABILITY

The principle of indivisibility of rights is at the core of the human rights-based approach. This means that children’s rights to protection and to participation must be equally respected. The relationship between children’s right to protection and their right to participation during conflict has been described as a “thin red line.” In situations where adolescents are politicized by family ties or by national struggles for independence, or are faced with injustice, they may become involved in protests or other political movements. This can put their safety and their lives at risk. Likewise in transitional justice contexts, children’s participation in


75 See “Adolescent Programming in Conflict and Post-Conflict Situations,” at 4-5.
justice and truth-seeking activities may expose them to serious and unanticipated consequences.

During the antiapartheid movement in South Africa, Pigou notes, the experience of children and youth “caught up in the vortex of repression and resistance.” This included involvement in “more radical and confrontational actions…Young people often played a front-line role in protest and defensive actions. They also were active in ensuring compliance with boycotts and other political directives.” He further notes that, “Such activities made children and young people a primary target of the apartheid government and its security forces in their efforts to maintain white minority rule.”76

In Colombia, following the 1996 visit by Graça Machel, children supported by UNICEF and over twenty local and national organizations convened a conference calling for an end to the conflict. This led to the establishment of the Children’s Peace Movement.77 While the movement was viewed as a success and led to a national referendum calling for the end of the conflict, it put the child leaders at risk. Some were relocated outside the country because of threats against them.

Politically environments can compel young people to take action, and their aspirations for truth and justice can have repercussions. In Nepal, children participated in protests against the government during civil conflict in 2006, and many children were reportedly beaten, detained and tortured.78 In the Occupied Palestinian Territory children have been targeted for being in the street during an imposed curfew.79 Clearly children’s participation

76 Piers Pigou, “Children and the South African Truth and Reconciliation,” Chapter 4 of this volume.

77 See “Adolescent Programming in Conflict and Post-Conflict Situations,” at 28; see also Sara Cameron, Out of War: True Stories from the Children’s Movement for Peace in Colombia (New York: Scholastic Press, 2001).


cannot be promoted if it exposes them to violence, and yet the suppression of political awareness and activity is not a solution. Blocking or thwarting children’s social consciences can lead to destructive behavior and increase risks in the long run.80

The participation of children in transitional justice processes is not an isolated event. What is needed is a comprehensive effort to build children’s protective environments through their active participation in home, school and community life. The participation of children in transitional justice should strengthen their protection, and protection should enable their genuine and safe participation. When children’s participation and protection are mutually supportive, they can reinforce each other.81 This can help break the cycle of violence and prevent future conflict and instability.82 Children’s participation in transitional justice processes also must be voluntary and, when relevant, with the informed consent of their parent or guardian. It should be inclusive of children’s families and communities so they are not at odds with their own social contexts and cultures.83

In transitional contexts, enabling children’s participation in justice, truth-seeking and reconciliation processes will require an investment in human and financial resources, and sufficient time to engage children in ways that are meaningful to them. In the long run the investment is cost-effective because it builds awareness, ownership and sustainability among children and their families and communities.


82 Children and Truth Commissions.

CONCLUSIONS

Involving children and young people, as well as their families and communities, in building a more protective environment is fundamental to the human rights-based approach. Engagement with communities affected by violence and armed conflict informs action in diverse situations. The Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, notes that the human rights-based approach is fundamental in times of peace and war: “In all instances, the participation of children and adolescents in home, school and community life can promote conflict resolution, tolerance and democratic principles. The human rights approach in reconciliation, in education and economic reform, and in transitional justice processes, can lay a foundation for a more stable future, contributing to nation-building and providing the opportunities that children and young people so desperately need.”

In the aftermath of war, when institutions and infrastructure are damaged or destroyed, when families are scattered and children have survived atrocities or witnessed the killing of family and friends, personal recovery and the rebuilding of society are lifelong endeavors. Yet the survivors – especially children – are impatient. Their lives cannot be put on hold. The very definition of transitional justice creates untold expectations. And these expectations, if not stated in real terms and real time, with attainable objectives, can further frustrate children and undermine their hopes.

Transitional justice cannot be imposed from the outside or left to the international community. It is at national and local levels that transition must take place. And if the transition is to be effective, and peace and reconstruction are to be lasting, children need to be involved. As members of their communities they have an important and unique contribution.

84 From the statement of the Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, delivered to the 11th Annual EU-NGO Forum on Human Rights, dedicated to “Violence against Children,” Stockholm, Sweden, 6-7 July 2009.
Children are best situated to know their needs and can help inform their own protection from violence. They cannot act alone but need the immediate and long-term support and guidance of their families, peers and mentors to help create a better and more peaceful place to live.