UNICEF Innocenti Research Centre

Expert Discussion on Transitional Justice and Children

10-12 November 2005

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Why an expert discussion on Transitional Justice and Children?

During armed conflict, children are systematically targeted for violence and abuse, including abduction, rape, forced marriage and recruitment as child soldiers, and are forced to take part in atrocities. There is a growing global consensus on the need for accountability mechanisms to address human rights violations committed during armed conflict, in particular crimes against children. Linked to this commitment is the urgent need to develop child-friendly procedures to protect children’s rights in the context of their involvement in transitional justice mechanisms.

The international focus on accountability, in particular, ending impunity for acts of genocide, crimes against humanity and war crimes, is evident in numerous efforts over the last decades, including the work of truth commissions, ad hoc tribunals, mixed tribunals and national courts. The adoption of the Rome Statute and the establishment of the International Criminal Court is a major achievement and challenge in addressing accountability and ending impunity, including for crimes against children. Civil society has contributed to the momentum, inspired in part by the work of Special Representatives and Rapporteurs of the UN Secretary-General, including the report by Graça Machel on the impact of armed conflict on children, which helped to initiate the global campaign to end the recruitment of child soldiers and to prosecute those who use children in hostilities.

In September 2002, UNICEF published, in cooperation with No Peace Without Justice, a book on International Criminal Justice and Children. The book is ‘a practical guide that summarises the legal protection framework for children in armed conflict, and provides an introduction to functions and statutes of justice and truth-seeking mechanisms, in particular as they relate to children’ and has already provided useful guidance for some of the first experiences with children in transitional justice mechanisms. In addition, the book was also intended to initiate and nurture a dialogue between child rights advocates and experts in international criminal law, and to inspire higher standards in the implementation of justice for children.

In recent years, a number of transitional justice mechanisms have been established, several of which have explicitly addressed child-related issues. Truth commissions in South Africa, Sierra Leone, Peru and Timor Leste as well as mixed tribunals such as the Special Court for Sierra Leone have dealt with crimes against children and involved children as victims and
witnesses. Likewise, traditional justice mechanisms, including the Gacaca process in Rwanda, have sought to address reconciliation and justice-seeking in post-conflict transition, also involving children. Current investigations underway by the ICC have already begun and might involve children as victims and witnesses. The focus on accountability for egregious crimes against children is expected to continue as an important component of its work. This creates both opportunities and challenges for legal experts and child rights advocates, working together to protect children from the atrocities of war.

In light of these recent efforts, there is an urgent need to review experience and to analyse emerging good practices and lessons learned on the protection of the rights of child victims and witnesses. On this basis, we can better inform ongoing and future efforts of legal experts and child protection advocates and agencies to achieve accountability. The key objective must be to ensure that children who have suffered the impact of egregious crimes are not exposed to further harm by their involvement in transitional justice mechanisms.

It is for this reason that the UNICEF Innocenti Research Centre, in collaboration with UNICEF New York and with support from the Canadian Human Securities Program, is bringing together international legal experts and child rights advocates in an expert discussion on Transitional Justice and Children.

### Objectives and expected outcome of the expert discussion

The overall objective of the expert discussion is to identify recommended methods and approaches for the involvement of children in transitional justice processes and mechanisms. This serves a dual purpose: to improve accountability for crimes against children; and to support and protect children who become involved as victims and witnesses.

Five panels will be convened to present and discuss key findings and best practices involving children in different forms of transitional justice processes: international and mixed tribunals, the ICC, truth commissions and other transitional justice processes, including national juvenile justice mechanisms. Following dialogue and analysis of that experience, three working groups will be set up to allow in-depth discussions and exchange between experts working in different transitional justice mechanisms, child protection agencies and NGOs: The involvement of children in international tribunals and the ICC; Truth commissions; and National post-conflict justice mechanisms. Each working group will be tasked with drafting key recommendations addressed to the respective transitional justice mechanism as well as to child protection agencies involved in the process.

The expected outcome of the discussion will be a document summarising the presented analyses of best practices and containing a set of core recommendations for transitional justice mechanisms as well as for child protection agencies and partners on their respective roles in supporting children involved in such processes.
Key issues and fields of discussion

1. Transitional Justice and Children: current trends and developments

Recent developments in international law have placed increasing importance on the prosecution of crimes against children, including a Security Council emphasis on the responsibility of States to end impunity and to bring perpetrators of crimes against children to justice.\(^2\) Among other child-specific crimes, the ICC has jurisdiction over the recruitment or use of child soldiers under 15 as a war crime, which is an important step towards the enforcement of international law prohibiting children’s participation in hostilities.\(^3\) The Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict prohibits the direct participation of anyone under 18 in hostilities and raises the minimum age for compulsory recruitment from 15 to 18 years.\(^4\) In June 2004, the Special Court for Sierra Leone ruled that the recruitment or use of children under 15 in hostilities is a war crime under customary international law, marking the first judicial ruling that recruitment of children under 15 for use in hostilities is a crime under international law.

Children have therefore become a focus of investigations and have become participants, as victims and witnesses, in post-conflict accountability processes. While children involved with fighting forces are seen primarily as victims, complex legal questions are being raised regarding the age of criminal responsibility for crimes under international law. The Statutes of the ICTY and ICTR make no reference to the age of the alleged perpetrator, therefore both tribunals could theoretically prosecute persons under the age of 18 at the time of alleged commission of the crime, although this has never occurred. While the Statute of the Special Court for Sierra Leone allows the prosecution of children above 15 at the time of the alleged commission of the crime, the Prosecutor made an early policy decision not to prosecute any person below the age of 18, since children would not meet the Statute’s personal jurisdiction requirement of “those who bear the greatest responsibility” for crimes within the Court’s jurisdiction. The fact that no international court or tribunal has indicted a child is arguably an indication that international or mixed tribunals are not considered to be an appropriate forum for holding children accountable for crimes they may have committed during a conflict. This policy is also reflected in the Rome Statute, which limits the jurisdiction of the ICC to persons over the age of 18.\(^5\)

While the above-mentioned institutions have a clear policy to consider children as victims of armed conflict, the question of accountability of children as alleged perpetrators is less clear before national courts and in traditional transitional justice mechanisms, such as the Gacaca Courts in Rwanda. This raises important legal questions as to the “outer boundaries” of the involvement of children, including questions related to definitions and the different roles children can have in various transitional justice mechanisms.

\(^2\) See e.g. Security Council resolution 1379 (2001).
\(^3\) ICJC p. 15.
\(^5\) ICJC p. 109.
Another issue is whether children born of wartime rape possess a rights claim due to being born of rape and would be entitled to reparations. Currently there is no legal precedent for such a claim; rather, it is the women survivors of rape who have a specific rights claim. While much has been achieved over the last few years to improve standards for international accountability, there have also emerged serious new challenges to the basic tenets of international law, including the rules enshrined in the Geneva Conventions. Recent debates in the international community over the rules of war, including basic definitions and protection against grave breaches, such as the use of cruel, inhuman or degrading treatment, have had an impact on the lives of children in numerous countries. These challenges only serve to underline the critical importance of the work that is underway.

Presentations:
- Implications of children’s involvement of children in transitional justice processes (Marieke Wierda, *International Centre for Transitional Justice*)
- Crimes against children under international law – current trends and developments (Alison Smith, *No Peace Without Justice*)

Some emerging issues and key questions for discussion:
- Which accountability mechanisms are the most appropriate for children’s involvement?
- What are the key differences for children between judicial and non-judicial mechanisms?
- What is the potential value of children’s testimony in an international tribunal? What challenges are introduced in hearing this evidence? Is testifying always in the best interests of the child?
- What are the legal challenges related to prosecuting crimes against children and the involvement of children in transitional justice mechanisms?
- Is there need for specific criminalisation of acts targeting children, in addition to existing crimes, such as underage recruitment and genocide?
- How should the establishment of a child witness’s age in a post-conflict setting be addressed?
- What are the legal and policy implications of pursuing ‘justice’ for children born as a result of rape during conflict?
- How best to achieve reconciliation? What is the role of accountability mechanisms in building a more stable and peaceful society?

2. Children’s involvement in the ICC and other international courts and tribunals

2.1 Experiences from the Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) has the mandate to prosecute “those who bear the greatest responsibility” for violations of international law and Sierra Leonean law during the conflict in Sierra Leone after November 1996. The court is located in the capital city of Freetown, where many wartime atrocities took place.
For the first time in an international tribunal, children have been actively involved as witnesses in the work of the SCSL. The Prosecutor has put special emphasis on crimes against children, including the first ever prosecution of the recruitment of children under 15 as a war crime. Children, and more specifically child ex-combatants, therefore form a very important but also particularly vulnerable group of witnesses. They can not only bring forward crucial evidence about the alleged recruitment of child soldiers but may also be able to provide important elements to prove command responsibility. The charge of ‘forced marriage’, for the first time introduced and accepted in the indictments of an international court, might further jurisprudence of gender crimes, as a crime against humanity that may involve girls as key witnesses.

The involvement of child witnesses at the SCSL called for the design of appropriate protective measures, child-friendly procedures and the establishment of a collaboration with child protection agencies. The Victims and Witnesses Section was mandated to organise the necessary protection and to ensure relevant support, counselling and appropriate assistance, including medical assistance, physical and psychological rehabilitation for witnesses. A relationship established between different Sections of the Court and child protection agencies (CPAs), including UNICEF, has helped to define the role of CPAs in identifying and supporting child witnesses.

The experience of different actors inside (OTP, WVS) and outside (UNICEF, CPAs, NGOs) the Court has established a new precedent and therefore provides a critical case study for this expert discussion. Lessons learned from this experience can also serve to inform the involvement of child victims and witnesses in the work of the ICC.

Presentations:
- Prosecuting crimes against children: Special Court for Sierra Leone. (Luc Côté, SCSL)
- Protecting and supporting children as victims/witnesses in the Special Court for Sierra Leone. (An Michels, Consultant, formerly SCSL)
- Role of CPAs in supporting children’s involvement in transitional justice mechanisms, in particular the SCSL (Keith Wright, UNICEF)

Some emerging issues and key questions for discussion:
- What challenges are encountered in investigating crimes against children?
- What is the value of child witnesses from the perspective of the prosecution? Are there other means of obtaining relevant evidence?
- How to deal with the tension between the best interest of the child, protection as a witness and the right to participation?
- What are recommended methods to protect and support child witnesses in the different phases of the work of an international tribunal (pre-trial, trial and post-trial)?

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7 Rules of Procedure and Evidence of the Special Court for Sierra Leone, (Rule 34, A).
- Is there a recommended minimum age of witnesses for participation in various mechanisms?
- What should be an appropriate approach of prosecution/defence/victims’ counsel towards the use of child witnesses, what protections are necessary? Issues of cross-examination?
- How could CPAs support the work of international courts and tribunals in pursuing crimes against children, including outreach, sharing of information and data and identification of and support for child witnesses?
- How to create most enabling framework for the relationship between transitional justice mechanisms and UN agencies, NGOs and CPAs? Which procedures are appropriate for facilitating the process and protecting the best interest of child victims and witnesses? How to ensure the operational capacity of UN agencies, NGOs and CPAs?
- How does the work of a tribunal affect reintegration programs for children and traditional reconciliation mechanisms?

2.2 Involvement of children in the International Criminal Court.

The International Criminal Court, which was established in July 2002, deals with ‘the most serious crimes of international concern’ namely genocide, crimes against humanity and war crimes. The ICC is founded on the principle of complementarity, namely that States have the primary responsibility to investigate and prosecute crimes under international law within their own systems. The ICC has jurisdiction only over persons above the age of 18 at the time of the alleged commission of the crime; therefore the involvement of children in the ICC is limited to the role of witness and/or victim.

There are a range of child-related provisions focusing on children within the Rome Statute, including crimes against children and children as witness or victim. Child-specific crimes are the first type of such child-related provisions, which by definition can only be committed against children. These include the crime of conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities and genocide, in particular the forcible transfer of children belonging to a national, ethnical, racial or religious group to another group, with the intention to destroy in whole or in part the first group. In addition, the Statute sets out crimes that are of specific relevance to children, including sexual violence as a tool of war, which can be prosecuted as war crimes, crimes against humanity or genocide, depending on the circumstances. Young girls are the most vulnerable targets for these crimes but boys are also targeted, although powerful social taboos often prevent any mention of boys as victims of sexual violence. Other war crimes directly affecting children include intentionally attacking schools and attacks on humanitarian staff and objects.

Another set of child-related provisions in the Rome Statute fall within the general measures for the support and protection of victims and witnesses, including the establishment of a

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8 Rome Statute, art. 8 (2) (b) (xxvi) and (e) (vii).
9 Rome Statute, art. 6, (e). In this context, ‘forcible’ is not limited to physical force but can also include the threat of force or coercion, such as that caused by fear of violence, psychological oppression or abuse of power.
11 IJC p. 77.
Victims and Witnesses Unit\textsuperscript{12} and Rules regulating protective measures.\textsuperscript{13} Aside from the general measures for support and protection applicable for all witnesses, some special measures are defined for child victims or witnesses, such as the possibility to conduct any part of the proceeding in camera or allow the presentations of evidence by electronic or other special means.\textsuperscript{14} In addition, a Children and Gender Unit has been established within the Office of the Prosecutor, to ensure appropriate measures to respect the interests of vulnerable witnesses during investigations, including victims of sexual violence and children.\textsuperscript{15}

The provisions of the Rome Statute on reparations for and participation of victims in proceedings before the ICC, unique in international criminal justice mechanisms,\textsuperscript{16} give victims\textsuperscript{17} the right to participate independently in the proceedings, the right to legal representation, the possibility to present observations, views or concerns where their personal interests are affected, and the possibility to request reparations for damage, loss or harm suffered as a result of a crime under the ICC jurisdiction. The Victims Participation and Reparations Section, under the Registry, is mandated to implement these provisions.

The above-mentioned provisions create unique opportunities and challenges for the involvement of children in the ICC, both on the level of child-participation, and on the level of compensation for child-victims, their families, schools and communities. With the recent unsealing of the indictments related to Northern Uganda and investigations ongoing in the DRC, two conflicts where children have been specifically targeted, the ICC has entered a new phase in which the implementation of appropriate measures to protect child witnesses will be crucial.

Presentations:

- Recommended strategies for children’s involvement in the ICC, from the perspective of:
  - the Office of the Prosecutor (Gloria Atiba-Davies, Vedrana Mladina-Damjanovic)
  - the Victims and Witnesses Unit (Simo Väätäinen)
  - the Victims Participation and Reparations Section (Didier Preira)

- Children’s rights as victims and witnesses in the Court proceedings of the ICC (Clementine Olivier, Redress)

\textsuperscript{12} Rome Statute, art. 43.6.
\textsuperscript{13} Rome Statute, art. 68.4.
\textsuperscript{14} Rules of Procedure and Evidence ICC, Art. 68.2.
\textsuperscript{15} Rome Statute, Art. 54 (b).
\textsuperscript{17} A victim can be a natural person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court, but can also be an institution or organization if it has sustained harm to property dedicated to religion, education etc. or to hospitals, historic monuments etc. RPE Rule 85.
Some emerging issues and key questions for discussion (see also questions under previous sub-chapter):
- How to ensure a focus on crimes against children in the prosecutorial strategy of the OTP of the ICC?
- How best to implement protection and support measures of children involved with the ICC? Steps undertaken so far by the ICC to implement the provisions for the support to child victims and witnesses
- Experiences so far in involving children during investigations? How to involve child victims in the ICC, whether giving testimony in court, or in camera testimony recorded in the child’s country of residence.
- How to ensure children’s involvement in the proceedings of the ICC in implementation of the provisions on victim participation?
- Experiences so far in collaboration between ICC, UNICEF and CPAs?
- How to deal with the need for reparations for child victims, through individual children, their families, their communities, etc.?

3. The involvement of children in Truth and Reconciliation Commissions

As non-judicial processes that investigate patterns of abuses of human rights or humanitarian law committed during conflict, Truth and Reconciliation Commissions can play a key role in addressing the past and re-establishing the rule of law in post-conflict situations. By providing a forum for victims, witnesses and perpetrators to tell their experiences and documenting the crimes of the war, TRC’s can be an important tool to build stability in societies where entire populations have been traumatized by war.

A victim-centred approach and the engagement with communities in the process of documentation make TRC’s a potentially effective and safe mechanism for children’s involvement. Whereas legal proceedings are likely to reach directly only a fraction of the perpetrators and victims of large-scale atrocities, truth-seeking mechanisms have the potential to involve many more persons in the process. A truth-seeking process can help children and young people understand what has happened to them during the war and thus can contribute to their understanding of right and wrong. Its recommendations can set the agenda for addressing the root causes of conflict, including the situation of children.

More than 30 TRC’s established in the last decades have involved children in a number of ways:
- Investigating crimes against children;
- Analysing the causes and consequences of wartime atrocities and formulating specific child-related recommendations to prevent future conflicts;
- Taking statements of children as witnesses to crimes committed against them, their families and communities;
- Involving children in hearings and facilitating their participation in gathering information;
- Reporting and disseminating the findings and recommendations of the TRC.

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The two Guatemalan Commissions, for example, have given attention to the documentation of crimes against children, including the targeting of children and the impacts of war on the development of children and adolescents in present and future generations. The Peruvian TRC has involved children and young people in the collection of information and evidence and the dissemination of its work. In the South African TRC, children under 18 were excluded from the formal process of testifying, but special hearings were convened for children and child-focused methods, such as drawings and games, were used to encourage children to tell their stories. The Sierra Leonean TRC placed a specific focus on crimes against children, including sexual violence against girls. Testimonies of children were heard in closed sessions and special public thematic hearings on children were organized. Child Protection Agencies were actively involved in the process of children’s statement-taking through a framework of cooperation between the TRC and CPAs and a child-friendly version of the TRC’s Report was written in close collaboration with children’s groups.

Some TRC’s also use punitive elements. In Timor Leste, for instance, the Commission for Reception, Truth and Reconciliation was established to complement the work of the Special Panels by addressing lesser crimes at the local levels. Immunity from prosecution was granted when the perpetrator has admitted guilt, and victims and community members have determined appropriate actions for restitution.

Presentations:
- Children’s involvement in the Commission for Reception, Truth and Reconciliation in East Timor (Jovito Rego de Jesus Araujo, CAVR)
- Truth and Reconciliation Commissions in Guatemala and Peru: the children’s perspective (Christine Bakker, EUI Florence)
- Children’s involvement in Sierra Leone TRC (Saudamini Siegrist, UNICEF)
- UNICEF’s experience in collaborating with the TRC in Sierra Leone (Keith Wright, UNICEF)

Some emerging issues and key questions for discussion:
- What are recommended methods to involve children in a TRC, ensuring the best level of child participation and the best possible protection?
- What are the challenges of statement taking of children? What is the potential impact of testifying on child witnesses? What are the challenges related to the protection of child witnesses in a TRC?
- How can the relationship between a TRC, NGOs and CPAs best contribute to the protection of children? Which procedures are suitable to help the process and to protect the best interest of child victims and witnesses?
- How can UNICEF and other organisations strengthen a government’s commitment to a TRC with a special focus on children and the implementation of its recommendations on children? How can the involvement of children in a TRC be stimulated in the different stages of design and implementation of the Commission?

20 ICJC p. 126-127.
What should be the relationship of the involvement of children in TRC and ongoing reintegration programmes, in particular for children with fighting forces, sometimes also using traditional healing ceremonies?

4. Involvement of children in other transitional justice mechanisms

The number of children involved in international courts and tribunals as well as in truth commissions will always be limited. It is to be expected that a far greater number of children will be part of other transitional mechanisms; it is possible that some children become involved with the national juvenile justice system, or with traditional accountability mechanisms. Increasingly, reintegration programmes, in particular for children with fighting forces, make use of traditional healing ceremonies.

4.1 Juvenile justice in post-conflict situations

According to the principle of complementarity in the Rome Statute, States have the primary responsibility to investigate and prosecute crimes under international law within their own systems. The challenge of supporting and protecting child witnesses is therefore addressed in the context of such proceedings before national courts. In addition, the question of accountability for children’s involvement in crimes during conflict is addressed, including the extent to which children bear criminal responsibility for these acts. While international tribunals will almost certainly not prosecute children, national courts and traditional mechanisms might address the responsibility of children as alleged perpetrators in armed conflict. The minimum age of criminal responsibility in national systems varies greatly and, in some countries, there is no minimum age established. Children could also become involved as witnesses in trials against perpetrators of war-time atrocities.

There are a number of challenges and risks for juvenile justice in post-conflict situations. National judicial systems may be destroyed or incapacitated during armed conflict. The rebuilding of a national justice system requires time and development of capacity at the local and national level and, in some cases, national courts may be subject to bias as a result of recent hostilities or face widespread corruption due to the collapse of government and State institutions. A breakdown of the judicial system has major repercussions on children who are alleged to have committed crimes under international law. In the absence of functioning court systems, children might remain in custody without trial for months or even years. In addition, pre-conflict juvenile justice issues are frequently aggravated by the conflict situation.

When deprived of their liberty, either awaiting trial or as a sentence, certain groups of children are at specific risk in juvenile justice systems in post-conflict situations, in particular former child soldiers. They may face greater risks for ill treatment, abuse, torture and extended periods of detention. They might suffer from discriminatory application of criminal procedures and penalties or be at risk of violence perpetrated by other detainees and detention personnel. There are also specific risks for girls and women, including sexual violence and abuse by detainees or detention centre personnel.

22 Strategic Approaches to Juvenile Justice in Post-Conflict Situations, UNICEF Innocenti Research Centre, (working draft) p. 9.
23 Ibid, p. 6.
Fundamental considerations are set out in international standards, which can be used as guidance for the reform of national courts and justice systems and the re-establishment of the rule of law in post-conflict transition. Diversion is the principle whereby child-offenders take responsibility for what they have done by directing them away from the judicial proceedings and towards non-judicial mechanisms as community support, both formal and informal, thereby avoiding the negative effects of implication in such proceedings.\(^{24}\) Restorative Justice is a form of mediation and conflict resolution which looks on offending principally in terms of the harm it causes to all concerned, the damage it does to relationships and the requirement that the needs of victims and the community have to be taken into account in addition to those of the offender.\(^{25}\) Alternatives to deprivation of liberty should also be considered, since deprivation of liberty should be used only as a last resort and for the shortest possible time.\(^{26}\) Since detention engenders a possible violation of other rights of children, all efforts should be made to reduce recourse to custodial sentences, to improve treatment and conditions in the facilities concerned and to provide training on international standards for judges and correctional personnel.\(^{27}\)

### 4.2. Traditional and other justice mechanisms

Traditional justice mechanisms are increasingly used in some countries as complementary or alternative processes to international or national systems. They tend to take place at the community level and often focus on providing reparations directly to the community that has suffered harm. For child victims and their families, it can be reassuring to see perpetrators brought to justice by the very same community that was targeted. In the case of dealing with child perpetrators, traditional justice mechanisms or healing mechanisms are likely to facilitate reintegration of the child into the community.

Within the context of rehabilitation of child ex-combatants and the reunification with their communities, traditional ceremonies are being used as a way to facilitate acceptance and reconciliation. The ceremonies are mostly designed specifically for a certain region or village and form a symbolic gesture that the child is forgiven and accepted back in the community.\(^{28}\) In Sierra Leone for instance, traditional cleansing rituals have been integrated in the activities of some of the CPAs and have been vital in restoring the social fabric and the harmonious reintegration of children in their communities.

Another example of an alternative justice mechanism, based on a traditional system of community-based conflict resolution and justice, are the Gacaca Courts in Rwanda, (re)established to deal with the overwhelmingly large numbers of persons in prison, several years after the genocide, waiting for their cases to be heard in court.

While traditional justice mechanisms might be a very useful alternative to bring justice and reconciliation in a post-conflict situation, they are not necessarily the most appropriate way to provide accountability for crimes under international law. No matter what type of mechanism is employed, the rights of the individuals involved, including witnesses, victims and


\(^{25}\) CRC, 40.1; Rule 5, 17.1.b of the UN Standard Minimum Rules for the Administration of Justice.

\(^{26}\) CRC, 37.b.

\(^{27}\) UNICEF’s Child Protection Approach in the sphere of Juvenile Justice, p. 6.

\(^{28}\) ICJC p. 135.
perpetrators, must be respected and international standards defining these rights must be followed. In addition, a proper assessment should precede the implementation of the traditional mechanism on whether the used methods are really culturally sensitive and appropriate in a certain community.

Presentations:
- Juvenile Justice in conflict and post-conflict situations (Daniel O’Donnell, UNICEF)
- Involvement of children in the Gacaca trials in Rwanda (Constance Morrill)
- Reform of juvenile Justice in DRC Congo (Trish Hiddleston, UNICEF)
- Juvenile Justice in LTTE controlled areas (Bo Viktor Nylund, UNICEF Sri Lanka)

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<th>Some Emerging issues and key questions for discussion:</th>
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<td>- How to deal with question of accountability of children as perpetrators before national courts? Under which conditions could prosecution be considered acceptable?</td>
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<td>- What are the most effective methods for ‘diverting children from punitive mechanisms’ in international law while achieving satisfactory accountability from the community perspective?</td>
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<td>- Under what conditions is the detention of children in periods of transition acceptable according to international standards?</td>
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<td>- How best to ensure the protection and support to child witnesses before national courts?</td>
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<td>- How best to achieve international standards for the reform of juvenile justice in post-conflict transition, examples?</td>
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<td>- What role can traditional healing mechanisms/reconciliation mechanisms play in addressing accountability of children and what processes of review and assessment are needed before traditional mechanisms are deemed appropriate?</td>
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<td>- How to ensure that any involvement of children in such mechanisms is in line with international child rights and juvenile justice standards? How can UNICEF and CPAs engage with such mechanisms towards this end?</td>
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References


- *Strategic Approaches to Juvenile Justice in Post-Conflict Situations*, UNICEF Innocenti Research Centre, (working draft) p.6, 9.


Thank you very much to UNICEF for organising this meeting. It is a great pleasure for me to be here in the company of such broad and deep expertise and experience on children and on transitional justice. This is a topic of increasing importance in today’s world, and the nature of the situation, the immense problems and the need for immediate solutions requires the collective effort of people such as those gathered in this room. For that reason, I will try to be brief, because one of the things that strikes me the most about this meeting is the great potential it has for tapping into this wealth of knowledge and having some real discussions on the issues. So I want to pose some ideas, some questions, and I look forward to the discussion we’ll have during this session and over the next couple of days.

In terms of trends and developments, there are three broad trends we can see over the past several years. First, it is becoming increasingly commonplace for children to be directly affected by warfare. Child recruitment and use in hostilities is on the rise. Cross-border recruitment and abduction is featuring more prominently. And crimes committed by fighting factions are increasingly being directed against children. This is being matched by increasing attention being paid by the international community to the problem, particularly by the Security Council, UN Agencies including UNICEF, NGOs and others. But, at the same time – and this is the third trend – there is a growing threat to some of the basic tenets of international humanitarian law, not just in terms of basic definitions of certain crimes, such as torture not to mention cruel, inhuman or degrading treatment, but in terms of a blatant disregard for the third Geneva Convention on Prisoners of War, the purpose of which is to protect any combatants captured during a conflict, including children.

Against this backdrop, the underlying question I wanted to pose at the start is this: what is our objective for transitional justice and, in particular, what is our objective for including children in a transitional justice agenda. This may seem like an obvious question, but it can help give us clarity about when a transitional justice mechanism is appropriate, what kind of mechanism or mechanisms are appropriate and to what extent it or they should address the situation of children. I was at a briefing on the Special Court for Sierra Leone that we organised with the court a couple of days ago at the European Parliament and the Sierra Leone Ambassador to Belgium explained why his President had asked for assistance to establish the court. Very simply, he said: “We need the rule of law to live in peace. To have the rule of law, we need justice and accountability.” This was something that had been overlooked in the various peace agreements concluded during the conflict in Sierra Leone and the Government later recognised that while a truth commission was an important component of accountability, in itself it was not enough to restore the rule of law or to ensure sustainable peace.

This, then, is the underlying objective: to live by the rule of law and to live in peace and the means by which we get there is through justice and accountability. This is in the best interests of society and, more importantly, in the best interests of the child. Everything we do should be measured against this broader objective and if it doesn’t help us achieve that objective, we
should reconsider whether we should do it. One thing that strikes me about children is that they are generally very adaptable. So the question is do we want them to adapt to a life of fear, ruled by the gun, where witnessing and committing crimes is nothing remarkable or do we want them to adapt to a life of peace, ruled by law, where witnessing and committing crimes calls for someone to account for their actions.

One of the most disturbing features of modern warfare, as I mentioned, is the recruitment or use of child soldiers and ensuring accountability for this directly contributes to the broader objective of peace and the rule of law, by avoiding placing children in the untenable position where they are forced either to kill or to be killed. The Special Court for Sierra Leone took an important step in the protection of children and in helping future generations to grow in peace when they held that the war crime of the recruitment of child soldiers, namely the conscription, enlistment or use to participate actively in hostilities of children under the age of 15, was a crime under customary international law since at least November 1996, the start date of the temporal jurisdiction of the Court.

This decision is a milestone in the protection of children through the development of international law, as it was the first time any court has made any decision on this issue. Its repercussions should spread beyond the borders of Sierra Leone, including through the precedent it can set for the ICC, and put everyone on notice that there will be legal consequences for anyone who recruits or uses child soldiers. But while the significance of the decision is clear, what is not necessarily clear is what happens next and how the questions that arise from that decision should be addressed.

According to the Elements of Crimes of the International Criminal Court, which were recognised as reflecting customary international law by the Special Court Appeals Chamber, those elements are that the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities and that such person or persons were under the age of 15 years. The decision, particularly the dissenting opinion, was murky in places regarding the standards or criteria to be used in determining whether the elements of the crime have been satisfied, which raises a number of questions: Is mere recruitment sufficient? Does the recruitment have to be forced, or is voluntary recruitment sufficient to satisfy the elements of the crime? What level of activity is required to meet the threshold of “active participation in hostilities”? The frontlines? Some other form of combat? Use as a courier? A porter? A cook? Forced labour? Forced marriage or sexual slavery? Are the considerations the same when you’re talking about someone who is 14, 16, 17, 18? Does it serve the best interests of the child, or does it further the objective of peace and the rule of law, to prevent a child from going to military school or enrolling in the cadets?

On many of these questions, the legal and policy issues are reasonably straightforward but the consequences of criminalising certain acts can be far-reaching and may not necessarily meet the policy objectives for which such acts have been criminalised. I would be very interested to hear what you think, what you consider to be the different factors at play and how the current international legal framework either meets, or fails to meet, the objective of peace and the rule of law and the protection of children.

The issue of child soldiers raises the question not only of accountability of those who recruit or use children, but also that of accountability for crimes allegedly committed by child soldiers. Because the illegality of the recruitment doesn’t extinguish any potential liability for
criminal acts committed by those illegally recruited any more than it extinguishes their status as a combatant. We all know very well that children are used to commit atrocities during a conflict and we have all heard harrowing stories about how efficient, how ruthless and how brutal children can be when forced into that position. The key here is that they are used: they are rarely, if ever, the “rational actors”, in the sense that they follow orders, they do not give them and they certainly do not devise them. But does it really serve the objective of peace and the rule of law if they are not required to account for what they have done? Or does that send a message to a whole generation that for some people, there is impunity?

International courts and tribunals do not, as a general rule, prosecute children: the ICTY and ICTR have never done it, although their Statutes are silent on the age of responsibility; the Special Court took an early policy choice not to do it, although its Statute expressly allows it for those aged over 15; and the ICC is statutorily barred from prosecuting anyone under the age of 18 at the time of the alleged commission of the crime. International courts and tribunals are also, as a policy decision, increasingly adopting the statutory direction of the Special Court to focus on those who bear the greatest responsibility for crimes committed during a conflict. That is, those decision makers, whether military or civilian, who were in a position to decide that warfare should be conducted in violation of the laws of war. Can this really include children? In any case, even if international courts or tribunals were legally or otherwise free to prosecute children, would they really be the appropriate venue to address any crimes allegedly committed by children? Would it serve the broader objective of peace and the rule of law and, if not, what could or should be done?

On the one hand, it does not seem right, from the legal or policy perspective, for a child who commits murder during peacetime to go through some judicial accountability process while a child who commits murder during an armed conflict does not. But on the other hand, do the circumstances of an armed conflict make the situation different? Do children have the capacity, legally speaking, to understand that there are circumstances during an armed conflict when it is wrong to kill, despite their status as a combatant and despite the fact that they are being ordered to kill and everyone around them is doing it? I believe that most children generally understand the difference between right and wrong, particularly when it comes to something as clear as murder, but during an armed conflict, these lines are deliberately blurred and even destroyed by those people who want to use wartime policies that include violations of the laws of war.

From the legal perspective, developments over the last 10 years make it highly improbable that any child will face an international court or tribunal for crimes allegedly committed during an armed conflict. From the policy perspective, we have to ask ourselves how to deal with this situation. And again, I would be very interested to hear your thoughts on this, whether an international arena would be appropriate in any circumstances and, if not, what the alternatives might be and how we can be sure that they also meet the objective of peace and the rule of law.

Finally, I wanted to spend a couple of minutes on the issue of children born from wartime rape, which was noted as an emerging issue in the background paper prepared for this meeting. As I mentioned, children are increasingly becoming direct victims of crimes under international law. Women are too: although rape has always been a feature of war, those who make the decisions on how to conduct warfare are increasingly targeting women as a means to demoralise societies and for other reasons. That these women are victims is quite clear, but one question that has been raised recently is whether children born of wartime rape should
also be considered to be victims and whether they should, for example, have a claim for reparations. From the legal perspective, it seems that these children may have a claim as a family member of the victim, namely the woman who was raped. A direct claim is much more difficult, because the child had not been born before the crime took place, so it is difficult to see how they could be considered to be a victim of that crime.

From the policy perspective, the question that must be asked is whether considering children born of wartime rape to be victims of that crime would further the objective of peace and the rule of law, as well as whether it would be in the best interests of the child. Would it help a child to be called a victim simply for being born? Is it useful for the circumstances surrounding their conception to be the element that defines their lives? Children born of rape during peacetime do not have a different legal status from children born in other circumstances, for obvious reasons, so why should it be different during wartime? And finally, what about privacy issues in relation to both the mother and the child.

I have to admit, I have only recently started thinking about this question. My initial response was that it is an interesting issue and worth thinking about to see if it could be useful to help children born in difficult circumstances. On further reflection, I began to see a range of problems, including those I have just outlined, and the more I think about it, the more problems I see.

I realise my presentation today may seem unusual, that I have raised more questions than I have attempted to answer and I have discussed a topic on which my thinking is still evolving. But, as I said at the beginning of my presentation, what I found refreshing about this meeting is its potential for us to discuss issues rather than positions and to push our thinking forward to find real solutions to real problems.

The issue of children and transitional justice is a vital area that is growing in importance every day. The issues that we will discuss over the next few days need careful consideration so that we can be sure that whatever we recommend, it advances the best interests of the child and the objective of peace and the rule of law. I have thrown a lot of questions at you for the reasons I have outlined and I very much look forward to hearing your thoughts and ideas on how we can frame the issues, how we can address them and how we can find solutions in a way to benefit future generations, the rule of law and, ultimately, peace.

Thank you.
Prosecuting Child Related Crimes at the Special Court for Sierra Leone: a mid term assessment.

Luc Côté*

When the President of Sierra Leone wrote a letter on 12 June 2000 requesting the UN Security Council to establish a Special Court that would deal with the violations of international humanitarian law committed during the dreadful civil war that plagued his country for more than a decade, he had no idea that he was opening a unique new chapter in the young history of international criminal tribunals, particularly as regards children. As for the ICTY and ICTR, the UN had to produce a Statute that would be crafted to the specificities of the Sierra Leone conflict, that would capture the horrors of a civil war where children played a very significant role, both as victims and perpetrators.29

Firstly as victims, children in Sierra Leone were specifically targeted by all armed groups.30 They were amputated, maimed and tortured. Many were killed or compelled to kill. “They were forced into slave labour, suffered rape, sexual slavery and other forms of sexual abuse. Girls between the ages of 10 and 14 were particularly targeted for abuse”.31 Stripped of their values and identity, children were turned into “war machines” by the same groups that had killed their parents in front of them. The same wave of violence that took the lives of their parents and siblings became part of their day-to-day lives, depriving them of their childhood, their dignity and their rights. From victims of violence at the beginning, they were now turning it against each other, being forced to wage a war they had nothing to do with, that they didn’t even understand. After being badly abused, they were now used “to perpetrate the most unspeakable violations including rape, torture and sexual abuse. In their role as perpetrators, children have been socialized into accepting violence as the norm. Perpetrating violence became a means of survival”.32

For many Sierra Leoneans, including the negotiators of the bi-lateral Treaty that would include the Statute of the Special Court, the criminal responsibility of children between 15 and 18 years of age was not as big an issue as it was for the United Nations.33 In his Report, the UN Secretary General “spoke of a ‘difficult moral dilemma’ in explaining the various options for dealing with international crimes committed by children, most of them former

* Chief of Prosecutions, Office of the Prosecutor, Special Court for Sierra Leone.
29 “Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible”. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000), par. 11 [hereinafter SG Report].
31 Id. par. 468.
32 Id. par. 469.
33 “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.” SG Report, par. 35.
34 “The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma.” SG Report, par. 32.
child soldiers and themselves victims of abduction, forced recruitment, sexual abuse, or other war crimes”.  

For the first time, International Criminal Law was confronted directly with the question of jurisdiction over juveniles, and the difficult reality of the Sierra Leone conflict would provide no escape from it.

The UN faced another difficult dilemma, albeit more of a legal nature. If on the one hand the majority of the crimes perpetrated against children fell in what is considered known territory of international criminal law, the crucial issue of child soldiers, war crimes related to the conscription, the enlistment and the use of children under the age of 15 to participate in hostilities, was in effect new territory for an International Criminal Tribunal, apart from the recent Statute of the International Criminal Court adopted in Rome in 1998 but not yet applied and tested. As stated by the UN Secretary General (hereinafter UNSG) in his Report, “while the prohibition on child recruitment has now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused”.

It is not our intention here to analyze in depth how these difficult issues were resolved by the Special Court for Sierra Leone (hereinafter SCSL), others have done it quite well and extensively. We would prefer to take this opportunity to look back modestly at the role of the prosecution with regard to children at the SCSL. As of November 2005, the prosecution has completed the presentation of its evidence in two cases, the CDF (Civil Defense Forces) and AFRC (Armed Forces Revolutionary United Council) trials involving 3 accused each, and will complete its last case against 3 RUF (Revolutionary United Front) leaders somewhere in mid 2006. We believe it is now possible, after more than 3 years into our mandate, to propose a mid-term assessment of the work done in prosecuting child related crimes, particularly with regards to the role of child witnesses in our cases.

As the adoption of the Statute posed a difficult challenge for the UN concerning the role played by children and the specific crimes committed against them, the same challenge faced the Prosecutor who had to decide who would be prosecuted, for which crimes, and what role children would play in the presentation of the evidence in court. Prosecutorial discretion would need to be carefully exercised to account for the important role played by children in the Sierra Leone conflict. Firstly, decisions had to be made about the prosecution of children themselves, as contemplated by the Statute after a delicate compromise was reached with the Sierra Leonans representatives. Then, in every indictment, the crimes committed against children would dictate the specific counts charging offenses related to child soldiers. Finally, to present evidence of the specific crimes against children, the interests and protection of the children would need to be balanced against the important evidentiary value of their testimonies with respect to each one of them.

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36 SG Report, par. 17.
I: Indicting children or not

Considering that the Statute of the SCSL provides personal jurisdiction over persons of 15 years of age and over, the ultimate decision to indict children or not would fall solely on the Prosecutor who has complete discretion on that matter as acknowledged by the UNSG in his report:

"It should also be stressed 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." 39

That being said, the exercise of prosecutorial discretion is never done in a vacuum, but rather within the limits imposed by the circumstances and ‘what seems just, right, equitable, and reasonable in those circumstances’. 40 Another important limit imposed on prosecutorial discretion by the Statute of the SCSL is stipulated in Article 1 which gives jurisdiction to prosecute only ‘persons who bear the greatest responsibility’. In itself the notion of greatest responsibility does not exclude children between 15 and 18 years of age and, as stipulated by the UNSG, “while it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of “Brigadier” was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.” 41

Taking all the circumstances into account, the Prosecutor did not hesitate to state publicly as he set foot for the first time in Sierra Leone in 2002 that there would be no prosecution of persons who committed their crimes while they were under the age of eighteen. Paraphrasing the UNSG, he declared in numerous outreach events all over the country that ‘although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims.’ 42 It was considered by most as a proper exercise of his discretion. By avoiding setting a delicate precedent in International Criminal Law, the Prosecutor’s decision did, in effect, solve the UNSG’s ‘difficult moral dilemma’. There would be no prosecution of children in front of the SCSL.

II: Indicting crimes related to child soldiers

The use of children as soldiers during the Sierra Leone civil war is well known and documented to the point of becoming one of its trademarks. It constitutes one of the primary findings of the Sierra Leone Truth and Reconciliation Commission Report in these terms:

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

38 Art. 7 of the Statute of SCSL, available on SCSL website at: http://www.sc-sl.org/.
39 SG Report, par. 38.
41 SG Report, par. 31.
42 SG Report, par. 7.
combat. The Commission finds that, during the conflict, all the armed groups pursued a policy of deliberately targeting children.\textsuperscript{43}

The Statute of the SCSL included in Article 4 (c) as a serious violation of international humanitarian law the specific crime of:

\textit{“Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostility.”}

Although that article was taken word for word from the Rome Statute of the ICC adopted in 1998, the indictment of every accused for that specific crime by the SCSL would provide the first opportunity for an international court to adjudicate on the existence of such a crime in international law. Since the accused were indicted for the crime of recruitment and use of child soldiers since 30 November 1996, the Prosecution had to prove that recruitment or use of child soldiers was in fact a crime under customary international law at least since that date. In what was qualified as a ‘milestone in the enforcement of the crime of child recruitment’\textsuperscript{44}, the decision of the Appeals Chamber of the SCSL of May 2004, relying notably on an \textit{amicus} brief from UNICEF, concluded that “child recruitment was criminalized...certainly by November 1996”.\textsuperscript{45}

With the existence of the crime confirmed, the Prosecution had now to move on and prove each element of the offense as charged in each indictment against the 9 accused in custody. Mainly, for our purposes, we had to prove that each accused knew or should have known that:

1. Children were conscripted or enlisted into their armed force or group or used to participate actively in hostilities.
2. Such children were under the age of 15 years

In the case of the RUF and AFRC, two of the armed groups involved in the conflict, we intend to prove that they routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters. The evidence would demonstrate that:

- a. Thousands of children were abducted from all over Sierra Leone;
- b. Thousands of children underwent military training at AFRC/RUF camps;
- c. Children were formed into Small Boys Units and Small Girls Units; and
- d. Armed Small Boys Units and Small Girls Units were used in combat.

In the case of the CDF, we intend to prove that CDF leaders initiated or enlisted children under the age of 15 years into armed forces or groups, and used them to participate actively in hostilities. The evidence would demonstrate that:

- a. CDF leaders recruited many child soldiers;
- b. Many children were initiated into the Kamajor Society with the specific purpose of using them as child soldiers;

\textsuperscript{43} TRC Report, par. 465, p. 66.
\textsuperscript{44} See Alison Smith, op. cit. note 9, p. 1141.
\textsuperscript{45} Prosecutor v. Samuel Hinga Norman, CaseNo. SCSL-2004-14-AR729E, Appeals Chamber, Special Court for Sierra Leone, Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31May 2004, p.27 available at: \url{http://www.sc-sl.org/CDF-decisions.html} (consulted 1 November 2005).
c. Children were divided into groups with a group leader;
d. Children were placed in frontline positions during battle and actively participated in hostilities.

The use of child soldiers by all armed groups involved in the Sierra Leone conflict was so common and widespread that it facilitated the investigative task of the prosecution to gather the evidence needed to prove it. Evidence of the use of child soldiers came from different sources: victims who suffered from the actions of the child soldiers, former members of the armed groups, witnesses from abroad who were present during the conflict, professionals involved in the demobilization and reintegration of child soldiers, reports of NGO or other agencies, public sources material, and finally the former child soldiers themselves. Each of these sources was relied upon by the Prosecutor during the investigations and witnesses were selected from these categories to give evidence in court, including some child witnesses.

III: Children as witnesses in front of the SCSL

As in any domestic criminal jurisdiction, given the option, an international prosecutor would not rely solely on children as their main witnesses to prove their case, even for crimes related to child soldiers. First of all, children are particularly vulnerable witnesses that require special measures and professional resources from the first contact during the investigation phase, through the trial process where they will give evidence and after their testimony is given. In the case of child soldiers who participated directly in some of the atrocities committed, these concerns are even greater and the danger of trauma and re-victimization is always present. Secondly, the Prosecutor has 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’46. In Sierra Leone, this assessment was done mainly by a specialized investigator with an attorney through an interpreter and cultural differences had to be taken into account. Most of the children interviewed were abducted by one of the armed groups at a young age, between 9 and 12, being deprived of education until the end of the conflict. Their level of development suffered greatly from being taken away from their family (which was killed in front of them on many occasions), then often forced to use drugs and commit horrendous crimes.

Nevertheless, the Prosecutor considered children to be competent and capable witnesses that could be very useful in providing essential evidence on numerous crimes committed during the conflict, including but not limited to offenses of recruitment and use of child soldiers. If every condition to ensure their protection and well-being were secured, children would play an important role in the trials in front of the SCSL.

The Investigative Phase

From the beginning of the investigation in late 2002 as required by the Statute47, the prosecutor’s office hired an investigator/magistrate specialized in juvenile justice. She was


47 Art. 15 (4) of the SCSL Statute 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
responsible for drafting, in consultation with NGOs and UNICEF, a document entitled: *Principles and Procedures for the Protection of Children in the Special Court for Sierra Leone*. Recognizing that any participation of children in the work of the SCSL shall be guided by the best interests of the child, the document had two clear objectives:

1. Adopting guiding principles that would secure the collaboration of numerous child protection agencies in the provision of psycho-social support to children in all stages of the Court;
2. Ensuring the support of those agencies in the process of identifying and supporting child witnesses during the investigations.

A clear and detailed protocol for identifying and interviewing potential child witnesses was adopted, providing for a vulnerability test to be passed before a selection was made by the prosecutor. The child was to be interviewed by our investigator in the presence of his parent or guardian. Confidentiality and security measures were also stipulated and provided.

Numerous potential child witnesses were then interviewed by the specialized investigator over a one year period. In March 2003 the first indictments were approved and accused from the three armed factions were arrested. All indictments included a count charging an offense related to recruitment and use of child soldiers. Around twenty children were selected as potential witnesses for all cases, nearly all of them being over 18 years of age by the time they would testify. But for the Prosecutor, considering their level of development as assessed previously and what they had gone through during the conflict, they would still be considered as child witnesses entitled to every special measure that they required.

**The Trial Phase**

Currently the SCSL is holding three trials of nine accused simultaneously. The three trials include all accused now in custody, in groups delineated by their association with the three main warring factions, the CDF, the RUF and the AFRC. In all trials, the Prosecution sought and was granted protective measures to protect the identity of the witnesses who were residing in Sierra Leone, which included all the child witnesses. Pseudonyms were then attributed to these witnesses and their statements were disclosed to the defense in a redacted form to protect their identity. The un-redacted statement and the identity of the witnesses would be given to the defense 3 to 6 weeks before the witness would be called to testify in order to respect the right of the accused to prepare their defense and cross-examination. Additional specific measures were granted by the court in relation to child witnesses authorizing the use of closed circuit television to avoid ‘the risk of re-traumatization and the possibility of stigmatization and rejection’. By having these decisions at the beginning of 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.”

48 In the case of the CDF, in view of specific threats against witnesses, the Court reduced the period for disclosing the identity of witnesses from 42 days to 21 days. In the RUF and AFRC cases, the delay remains 42 days.
49 See Prosecutor v. Norman, Kondewa and Fofana, Case No. SCSL-2004-04—14T, Trial Chamber 1, Special Court for Sierra Leone, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 08 June 2004, p. 16. Similar decisions were rendered in RUF and AFRC cases. available at: [http://www.sc-sl.org/CDF-decisions.html](http://www.sc-sl.org/CDF-decisions.html) (consulted 1 November 2005)
each trial covering all child witnesses as a vulnerable group, the Prosecutor avoided delays and multiple specific applications regarding each witness, having only to notify the court and the defense in advance that a ‘child witness’, falling into the specific category, would be called to testify on a certain date. In a few cases, the ‘child witnesses’ themselves refused to use the video-link, preferring to be present in the courtroom to deliver their testimony.

On July 14, 2005, the prosecution completed its case in the CDF trial after calling 75 witnesses, 5 of them being former child soldiers. It is important to note that only two of those ‘child witnesses’ were possibly under the age of 18 when they testified. Their exact age was impossible to confirm but they were at least 17 years old when they gave their testimony. The three others were probably between 18 to 21 years of age. Despite the fact that legally they were not child witnesses anymore, all of them were considered child witnesses by the court and given special protection as requested. All of them testified behind a screen hiding them from the public, though not from the accused, and were identified only by pseudonym during the whole procedure. In the case of the two 17-year-old witnesses, they were authorized to testify from another room via video-link to avoid direct confrontation with the accused.

The evidence provided by the ‘child witnesses’ in the CDF case was strong and compelling. They stood up firmly during cross-examination, even on two disturbing occasions where it was done by one of the accused who was representing himself. They talked about the killings of their family, what they suffered and endured when they were abducted, initiated and trained. They provided evidence not only on their direct involvement in the hostilities as child soldiers, but also on the chain of command implicating the three accused directly in a leadership role. They completed their testimonies with pride in their eyes, leaving us very impressed.

In the AFRC case, the prosecution called 59 witnesses, 5 of them being former child soldiers. No other witnesses will be called and the prosecution shall close its case by the end of November 2005. All child witnesses in that case were believed to be at least 18 years of age and 4 of them testified via closed circuit television. Their testimonies in chief were good but they encountered difficulties during cross-examination. Numerous contradictions surfaced when they were confronted with previous statements, some on important points of their testimonies. They were easily confused by the defense attorneys leaving us with some doubts as to how much probative value the court will assign to their testimonies. Evidence of the use of child soldiers from other sources, notably an expert witness who was involved in the demobilization of child soldiers, corroborated important parts of the children’s accounts of events and may well add more weight to their testimonies.

In the RUF trial, 48 witnesses have been called so far, including 2 former child soldiers who testified via closed circuit television. Another 50 witnesses will be called to complete our case somewhere in mid 2006, including 4 former child soldiers. It is too early at this point to evaluate the ‘child witnesses’ performance in court with only two of them called.

Conclusion

Making a mid-term assessment of the prosecution of child related offenses in the SCSL while no cases are concluded yet calls for humility and reserve. After all, no one knows
what will be the final decision in each trial, the outcome of anticipated appeals in each case, the punishment for these specific crimes if the accused are found guilty and more importantly, what will be the longer term impact on the children themselves who participated in these proceedings. As of now with two prosecution cases completed, the active involvement of 12 ‘child witnesses’ in the trials has to be considered positive with regard to their contribution to the evidence gathering process in and outside the courtroom and their first reactions to it. No major incidents have been reported during the whole process, nor during the follow-up monitoring that is still ongoing.

A new crime

On the legal side, the greatest achievement of the SCSL in relation to child related offenses remains the Appeals Chamber decision that the recruitment of children into armed forces or their use to participate in hostilities crystallized as a crime under international customary law for which a person can be held individually criminally responsible by 1996. This decision, the first one on this issue, will have an impact on all domestic criminal jurisdictions around the world and is already sending a very clear message to every government and armed group that the phenomenon of child soldiers must come to an end. It is anticipated that the prosecution of child soldier related offenses will become known territory in the near future for every prosecutor, national or international.

The testimony of children: ‘The best interest of the child’ and ‘The best interest of the case’

Let me conclude this short essay by trying to answer the important question: Should we use children as witnesses in international criminal law proceedings? Interestingly, some of you would say that considering ‘the best interests of the child’, children should never be exposed to the risk of re-traumatization by testifying in court about horrible events that happened to them. Numerous prosecutors would also agree that in the ‘best interest of the case’, relying on the testimony of children to provide essential evidence at trial should be avoided. So why then did we decide to use child witnesses in our cases in front of the SCSL?

The choice of the prosecution to use children as witnesses in court to prove crimes related to the recruitment and use of child soldiers was not as easy as it seems. It was known early on that it was possible to build our case and prove it by relying on witnesses and sources other than the children. Expert evidence of individuals involved in the demobilization and demilitarization process of the child soldiers was available, reliable and compelling. Adult witnesses, victims and perpetrators also provided direct evidence of the use of child soldiers by all armed groups. Reports, open source material and outsider witnesses had all indicated that children in Sierra Leone were used during the hostilities. It was possible to make our case without the children.

Also, most prosecutors would admit that if they had the choice, they would not rely on children to support their cases if other witnesses are available. Numerous reasons would be given, some related to the simple fact that using child witnesses is an additional burden and risk in an already difficult case: the need for specially trained investigators and prosecutors, the need to take into consideration the interest of the child overall, the danger of re-traumatization of the child, the special protective measures to be taken, etc. Added to such a
list would be the specific difficulties of proving complex international crimes in front of a newly created international court, years after the crimes were committed, involving long delays that may have a negative impact on the child’s recollection of events. It is noted that the delays between the events and when the child testifies in court could have an adverse impact on the reliability of their testimony. As Stuart Beresford wrote recently in an article titled ‘Child Witnesses and the International Criminal Justice System’:

“Studies indicate that children experience a sharp decline in memory immediately after an event that becomes more gradual as time passes. Although an adult’s memory deteriorates in the same way, the deterioration of children’s memory is more profound”

Finally the situation of child soldiers itself called for prudence. Children would be asked to testify against their former commanders, sometimes in their presence. How would they react? Would they still be under their influence, their authority? Would they remain faithful to them? After their family was killed, their commanders were the only parental figure they had for numerous years. Another belief was that child witnesses are more easily ‘contaminated’ by others, especially other child soldiers. Special attention was paid to keeping them apart during the pre-trial phase. Most of these concerns raised by members of the prosecution teams were considered genuine and carefully assessed during interviews.

The decision to call children as witnesses was therefore not an easy one but it was the only one that made sense considering that we were going to prosecute for the first time a crime for which they were the only victims, all the victims, thousands of victims. The crime of recruiting children into armed forces or their use to participate in hostilities was all about them, just about them. Should they be deprived of an opportunity to talk about it, to explain what it did to them, what they feel about it? Isn’t that in their ‘best interests’? All of them were evaluated, had psycho-social support albeit limited, and were selected based on their level of development and their ability to give evidence in the unfamiliar surroundings of an international courtroom. They were clearly competent witnesses, being over 18 years of age by the time they would be called to testify. Indeed they were still vulnerable witnesses, the risk of re-traumatization, victimization or rejection was still present, but every measure to alleviate it was put in place. As a matter of evidence, the case would not depend solely on their testimony since other adult witnesses would also be called on the same issues. Therefore it was decided to have some of them give evidence in court related to their own account of what happened to them. It was believed that their testimonies would have a great impact in the cases.

Altogether 16 former child soldiers from Sierra Leone will be called out of 230 witnesses in total for the three cases. As of today, 12 of them have completed their testimony. Purely from a prosecution point of view, looking primarily at the evidentiary value of the completed testimonies of the ‘child witnesses’, the mixed feelings we had about using children that have gone through so many horrors during the war ended up with mixed results. If the experience had been very productive in the CDF case, it was disappointing in the AFRC case. But one shall not forget that if the ‘legal’ results were not completely as expected, every ‘child witness’ that gave evidence in front of the Special Court showed tremendous courage and deserves our full respect. The general indication was that they felt they were treated with

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51 Two were probably 17 years of age, although for one them, a dental examination suggested he was 23.
respect, that they were given a chance to tell their story to a group of adults that listened to them, something they had not seen for a long time. The experience with child witnesses in front of the Special Court for Sierra Leone has proven to us, international prosecutors, that sometimes ‘the best interests of the child’ coincides with ‘the best interest of the case’.

Freetown, Sierra Leone, 1 November 2005
Protecting and supporting children as witnesses: lessons learned from the Special Court for Sierra Leone.

An Michels

I A focus on children

Since the beginning of investigations, the Prosecutor of the Special Court for Sierra Leone (SCSL) has put a focus on crimes against children like the crime of recruitment, sexual violence, forced marriage and other crimes during the war in Sierra Leone. When in June 2004 the Appeals Chamber of the SCSL ruled that recruitment of children under age 15 is a war crime under customary international law, the road was open for the Prosecutor to bring forward evidence and seek to substantiate, beyond reasonable doubt, this count in the indictments against members of the CDF, RUF and AFRC.

After a conflict that left behind very little documentary evidence, both Prosecution and Defence have to rely almost exclusively on witness statements to establish their case. Statements were taken from children, mainly child ex-combatants, since they could not only bring forward crucial evidence about the alleged recruitment of child soldiers but may also be able to provide important elements to prove command responsibility. In addition, hearing the evidence from children would give them a voice in Court and would underline the emphasis on crimes against children.

Although numerous children were interviewed, only a very limited number of children, younger than 18, testified as witnesses for the OTP. However, the number of witnesses between the ages of 18 and 22 giving evidence about their experiences as children during the conflict, was significantly higher. Most of them were child ex-combatants, a few of them were girls who had been victim of sexual violence and/or forced marriage. A larger group of child witnesses was also prepared with the intention to call them as a witness but did not testify. The youngest child that testified for the OTP, was 16 or 17, the youngest child that was interviewed and later assessed by the psychologist in pre-trial stage (see below) was not older than 8 or 9. It was finally decided not to call this child as a witness. In the process of identifying measures for support and protection, the actual age of the witness is obviously an important parameter, however not a determinant factor. Witnesses a little older than 18 who had been child ex-combatants or had been victims of war-related sexual violence when they were children, were mostly considered as child witnesses. 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.

The author is a clinical psychologist and the former head of the Psycho-Social Team of the Witnesses and Victims Section of the Special Court for Sierra Leone.

Decision on preliminary motion based on lack of jurisdiction (child recruitment), Prosecutor against Sam Hinga Norman, Case No.SCSL-2004-14-AR72(E)), 31 May 2004.
However, child-specific protective measures in the courtroom, namely the use of closed circuit television, are in theory only provided to children under 18, although exceptions were made.

II Children as especially vulnerable witnesses

In proceedings of the SCSL where mostly oral evidence is presented within an adversarial setting, the burden on witnesses is significant. Moreover, unlike other tribunals, the SCSL sits in the country where the atrocities took place, a situation that creates additional difficulties for the protection of victims and witnesses.

Children form an especially vulnerable group of witnesses and hearing their evidence presents particular challenges. Depending on their developmental stage, they do not always fully understand all the nuances of the judicial procedures. Especially in a context where the mandate of the Special Court, namely prosecuting those ‘who bear the greatest responsibility’, was not always clear for the general public, participating in judicial procedures might be even more confusing for children.

Most of the child ex-combatants went through traumatic experiences that have a deep mental impact and can affect them until and throughout adulthood. Several of the children assessed by the psycho-social team of the Witnesses and Victims Section (see below) showed symptoms of behavioural disorders and affect-deregulation. They also suffered from intrusive thoughts and nightmares, and, in a few cases, they reported suicidal thoughts.

Like other groups of vulnerable witnesses, children run the risk to be retraumatised by their involvement in the judicial proceedings, particularly while testifying in Court. Recalling traumatic events in a stressful environment can cause an exacerbation of symptoms during and after testimony. It could also lead to more severe mental problems like depression in the months after the testimony.

In addition, most child ex-combatants carry a double burden: they were both victims and perpetrators and have to deal with the complex mental and moral consequences of that fact. The process of emotional attachment to parents and other relatives –crucial in the psychological development of a child- is often severely disturbed. During the war, rebel leaders sometimes became attachment figures for these children. In spite of the suffering and the abuse, they developed an ambiguous loyalty as ‘insiders’. These child witnesses can experience their testifying in Court against these leaders as a form of disloyalty towards primary attachment figures.53 Especially a public and direct confrontation can be very disruptive to children. Accordingly, during testimony stress levels might increase significantly.

Child ex-combatants themselves reported that stigmatisation as a ‘rebel’ by the community is often an obstacle to developing normal social contacts and to reintegrating into the society. Some of them fear rejection and threat by the community if it becomes public that they are testifying for the Special Court and/or if the content of their testimony becomes known. They are often worried that their newly re-established relationships with family and the community

and their education could be disrupted by this knowledge or as a result of being forced to leave for security reasons.

Girls, victims of sexual assault have to live with the physical and psychological consequences of extremely brutal and humiliating acts, often carried out in public. For many of these victims the idea of publicly testifying in Court is something very difficult and fearful. This feeling is worsened by the fact that in Sierra Leone, victims of sexual violence are still often stigmatised by the communities or even rejected by their families. In many cases the sexual violence was not known to the family.

Girls who were abducted by fighting forces were often forced to ‘marry’ one of their abductors. They reported stories of repeated and long-lasting sexual abuse. They suffer not only from the consequences of the sexual violence as such but also from the psychological impact of the relationship with commanders and the power they had over the girls, including over their fate and life. These so-called ‘bush wives’ find themselves in an ambiguous position of being a victim but often also being perceived as a ‘collaborator’ or even an (alleged) perpetrator. Testifying about these facts can be emotionally demanding but sometimes also liberating.

### III Support Strategies and Protective Measures put in place for child witnesses

Every witness before the SCSL goes through a long process of statement taking, identification and confirmation as a witness, preparation for trial and in some cases pre-trial protection if there is an indication of a threat against them. The Witnesses and Victims Section, under the Registry, is the main Section of the Court that deals with protection and support of witnesses and potential witnesses before, during and after trial. In the case of witnesses for the Office of the Prosecutor (OTP), the Section is assisted by the Witness Management Unit, part of the Investigations Division of the OTP, which organised mainly contacts with witnesses in the pre-trial stage.

**The role of the Witnesses and Victims Section**

The mandate of the Witnesses and Victims Section (WVS) is “to produce witnesses for the Court in the best physical and mental state possible and to ensure that they suffer no harm, loss or threat as a result of their testimony”. As stated in the Special Court’s Rules of Procedure and Evidence (RPE), the WVS has to provide witnesses and potential witnesses with adequate protective measures and security arrangements and develop short and long term plans for their protection and support.\(^{54}\) Apart from providing physical protection to witnesses, the WVS has also an obligation to take care of witnesses of the Court in a broader sense as “[i]t ensures that witnesses receive relevant support, counseling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children.”\(^{55}\) To accomplish this task, the RPE stipulate that “the Section shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.” The psychologist who fulfills this role works together with a team of Sierra Leonean counselors, medical and support staff. In addition to the direct protection and support provided to witnesses and victims another important role of the Section is that it can “also recommend to the Court the adoption of protection and security measures for them.” The Section in general and the psychologist in

\(^{54}\) Rule 34, A (ii), Rules of Procedure and Evidence, SCSL.

\(^{55}\) Rule 34, A and B.
particular can advice the Court and the Parties on victim-friendly and child-friendly procedures, especially on protective measures designed to prevent retraumatisation of vulnerable witnesses as a result of testifying in Court.

**Support strategies**

*In the Pre-trial phase:*

A first initiative to develop support and protection strategies for child witnesses was undertaken by the OTP, UNICEF, Child Protection Agencies and the Child Protection Advisor of UNAMSIL. The different actors agreed upon a set of ‘Principles and Procedures for the Protection of Children in the Special Court’. The document would assist investigators and included guiding principles for the involvement of children in the SCSL, procedures for the identification of child witnesses, vulnerability assessments and security measures. A monitoring committee consisting of representatives of the SCSL and of the Child Protection Network would oversee the implementation of the agreement. However, there was never a thorough follow-up of the implementation of the document, partly because of the rapid turnover of Specialised Investigators for child witnesses, seconded by their governments for only 6 months.

As soon as the Support Unit of the Witnesses and Victims Section was operational, a range of support strategies to implement its mandate were put in place. As part of the strategy, ‘Guidelines for Psycho-social Support of Witnesses’ were developed by the psychologist of the Section in collaboration with the OTP and the Office of the Principal Defender. The guidelines outlined the different steps of support and protection that would be provided in pre-trial, trial and post-trial phase, mainly focusing on vulnerable witnesses like child ex-combatants. The main guiding principles were the best interest of the child; minimizing the interruption of the child’s daily life and education; and the creation of a safe and protective environment for children before, during and after testimony in such a way that they would have a feeling of safety and control over the situation throughout the process. Also the creation of a relationship of trust with the support staff was emphasised to help children to go through the process in a balanced way.

From the pre-trial stage onwards -the phase of identification and confirmation of potential witnesses- a close collaboration between the WVS and the Investigations and Prosecutions Divisions of the OTP was developed. Through training and sensitisation, investigators and trial attorneys were made aware of the specific needs of vulnerable witnesses. This was followed by the introduction of ‘Psycho-Social Vulnerability Checklist’, filled in by investigators and lawyers during the confirmation process of earlier interviewed potential witnesses, in order to detect vulnerable witnesses early in the pre-trial stage and communicate information about these potential witnesses to the WVS.

*Psycho-Social Assessments* of all child witnesses and/or child ex-combatants were carried out by the psycho-social team of the WVS, followed by a feedback to the attorney who would prepare the witness for testimony, on how best to deal with the child in order to avoid re-victimisation. Since the psychologist was not a member of the OTP, any questioning or discussion related to evidence was avoided.

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56 Since the mandate of the WVS, under the Registry, regulates support and protection for all witnesses, the same support possibilities were provided to OTP and the Defence. However, in reality, during the first year of trial, covered by this paper, the OTP was presenting its case, therefore support that had to be provided to Defence was limited.
In case of some vulnerable witnesses, medical and psycho-social support was provided to the witnesses in pre-trial stage. In order to follow up vulnerable witnesses before their testimony, joint field visits were organised by the OTP and Sierra Leonean psycho-social assistants of the WVS.

**In the trial phase:**
In the trial phase witnesses were invited to Freetown to testify. In order to avoid disruption of daily life, school, skills training or work, children were brought in as close as possible to the estimated date of their testimony. An adult—a parent, caretaker, staff member of a CPA or a staff member of the WVS—travelled with the child. All vulnerable witnesses underwent a health check and received necessary medical care upon arrival in the capital; were prepared for testimony by the OTP and intensively followed by members of the psycho-social team of the WVS, with whom in most cases a basic relationship had been developed already during contacts in the pre-trial phase. Witnesses received a courtroom briefing by the WVS during which the procedures in Court were explained in detail.

During the testimony itself, a member of the psycho-social team was present in the waiting room with the child together with the accompanying support person. In one case, the psychologist was allowed to sit with the child in the room from which it was giving evidence through video-link. In case a vulnerable witness testified in the courtroom, a member of the psycho-social team of the WVS, and/or the psychologist would be present in Court.

**In the post-trial phase**
Immediately after testimony, every vulnerable witness received a post-trial debriefing from the psychologist, giving them the opportunity to ask questions, or ventilate opinions and emotions concerning the testimony. If needed, long term plans for support were made, including medical care and in very specific cases housing and educational support. Sometimes the child was anonymously referred to medical or counselling services for additional support but most of the support was provided by WVS, who had a doctor, nurses and psycho-social assistants among its staff. Every child or young adult was visited or contacted a few weeks/months after testimony by a Sierra Leonean staff member of the WVS to evaluate its situation in terms of support and protection, and to organise further support and protection if necessary.

**Protective measures for all witnesses**

In view of the particular context in which the Special Court for Sierra Leone operates, witnesses in general need a high level of protection. In the three ongoing cases the Court therefore decided, in response to a prosecution motion, on a series of protective measures for witnesses\(^57\). Based upon the conviction that anonymity and confidentiality are the most effective protection mechanisms, it was decided not to disclose the identity of witnesses to the public. Therefore witnesses testify by use of pseudonym and they are shielded from the public by a screen. Secondly, the full identity of the witnesses is only disclosed to the Defence 42 or 21 days – depending on the features of the case involved – before testimony.

Apart from these general protective measures, different levels of protection are provided before and after testifying, ranging from surveillance to relocation of witnesses, depending on the outcome of the risk assessment of individual witnesses. In addition to measures to protect witnesses from threat or physical harm, it was recognised by the Court that certain groups of witnesses, like children, need extra support and protective measures to prevent that their testimony will result in further psychological harm or suffering.

**Specific protective measures for child witnesses in the courtroom:**

*Closed circuit television*

In order to ensure privacy and anonymity, to minimise direct confrontation with the accused and to prevent disruptions in their social environment, the Special Court decided on child-specific protective measures in the courtroom. All children under 18 would testify through the use of closed circuit television. The child sits in a separate room in front of a camera and sees on a split screen himself/herself and the person in the courtroom who is asking questions to the child. Persons in the courtroom see the child on their monitor while the public can only hear the child’s voice. Although the procedures with a closed circuit television are identical to a hearing in open Court, it reduces the stress of the child in an important way and increases the comfort level. By only showing the person who is talking to the child the information input is filtered, the courtroom environment is less overwhelming and the child can more easily concentrate on the questions asked. A direct and open confrontation with the accused is avoided. It is as if there is a mental protective screen between the child witness and the persons present in the courtroom.

In a few cases the use of closed circuit television was allowed by the judges for witnesses of 18 years old. In one case, this was on the basis of an explicit request of the psychologist, for reasons based on the mental stage of a witness who just had turned 18.  

*Voice distortion*

Women and girls, victims of sexual assault or gender crimes were allowed testify with the use of voice distortion for the public. The use of voice distortion, in combination with the use of a protective screen ensures the non-disclosure of the identity of the victim to the public and, equally important, gives the women or girl the feeling of being protected and of having a sense of privacy. In a few cases the Court allowed a support person – a counsellor of the WVS with whom a relationship of trust was built up- to sit next to the witness in the witness box during testimony. In addition, the OTP, the WVS and the Translation Unit made efforts to ensure that, as much as possible, female staff would deal with victims of sexual violence. In a culture where talking about female sexuality in mixed company is very much a taboo, such measures help to a certain extent to reduce feelings of shame during preparation and testimony.

**IV Collaboration with UNICEF, NGOs and Child Protection Agencies**

As defined in the RPE, the WVS “shall cooperate, when appropriate, with non-governmental and intergovernmental organisations”\(^{59}\). From the beginning of its activities, the WVS has set


\(^{59}\) Rule 34, B of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
up collaboration with the UNICEF country office and the Child Protection Advisor of UNAMSIL; the psychologist participated in monthly meetings with UNICEF and the CPAs to brief them about general developments on the level of support of witnesses. Different NGOs were as well consulted to set up a support network for witnesses.

Different NGOs were very willing to assist in providing medical care, skill training and other support to potential child witnesses of the Court, but they preferred to keep the collaboration very low profile, since they did not want to be openly associated with the SCSL in order not to compromise their activities. Soon, it became clear that it was a challenge to establish cooperation with CPAs and NGOs without compromising the confidentiality of the process of identification of witnesses and the identity of potential witnesses. Therefore, a form of ad-hoc collaboration was set up with the Child Protection Officer of UNICEF, a few CPAs and NGOs. In specific cases, child witnesses were, anonymously, referred to NGOs and CPAs for different forms of support. With UNICEF, a helpful exchange of information concerning skill training, schooling and related issues developed.

In spite of difficulties in implementing a structural collaboration with CPAs, their assistance was of importance, especially in the post-trial phase. Several child witnesses, especially child ex-combatants were not living with family and lacked every social network. Often they had been in contact with a CPA during DDR, had been to school or benefited of skill training but often dropped out, for different reasons. Since the presence of a stable social environment is a crucial element to prevent retraumatisation by the judicial process, efforts were done by the WVS to re-establish the social network around the child witnesses. In several cases it was useful to re-establish the contact with the CPA, and/or education was organised. In one case a child witness could be reunified with its family.

V Impact of testimonies on children: a first evaluation

It is too early to make final assessment of the impact of testifying before the SCSL on child witnesses. However, it is possible to give a first but prudent indication of how children perceive their participation as witnesses.

So far children and adolescents did relatively well as witnesses. Thanks to intensive support and the availability of appropriate protective measures they managed to cope well with the stress of testifying. It is not surprising that the level of understanding of the judicial process is an important factor. Children or young adults who had a more limited understanding of the procedures and consequences of their testimony seemed to suffer more from stress. Understanding the need for cross-examination as part of a fair trial, for instance, is crucial in this respect. The more children felt that cross-examination was a personal attack and that they could be ‘punished’ because of their testimony, the more the feelings of shame and guilt were disturbing them after testimony.

Like many other vulnerable witnesses, child ex-combatants experienced difficulties during and/or after their testimony. They were sometimes emotionally overwhelmed during the proceedings, or felt inhibited when they had to talk about traumatic events that happened to them. Their capacity to visualise their testimony before it started -an important exercise to control stress- was often restricted. This limitation linked to their developmental stage could be partially overcome by using more child-friendly techniques to reduce stress and to imagine testifying, like repeated visits to the courtroom, role-plays and even drawings.

The child witnesses sometimes showed an increase of symptoms of post-traumatic stress the days after testimony: they reported often nightmares, sleeping difficulties, increased agitation
or flash-backs. The capacity of the child to express his/her emotions and difficulties to a person he or she could trust, in way adapted to its age, determined to a large extent the impact the symptoms had.

Finally, the long waiting periods in the waiting room and the long hours in the witness box were for a few children and young adults a heavy burden. Their attention span was sometimes limited and unfortunately there was little space to adapt the length of the hearings to the needs of the children. Sometimes children also did not understand why they had to continue to answer questions, even though they had the feeling that they had answered them already. More problematic than the testimony itself were in a few cases the implications of the protective measures put in place for the witness, before and after testimony. Relocating a child for security reasons, even temporarily, impacts in a major way on its life. It engenders as well a violation of different rights of the child, like the right to education. The same is true for (family) relocation of children, relatives of witnesses. Therefore, all efforts were done to avoid relocation for children. Intensive long term support was needed to minimise the impact in the very few cases where relocation was unavoidable.

On the other side, children who had the chance to give a statement to the SCSL or to testify were often very proud and enthusiastic over their involvement, although they were not allowed, for security reasons, to share these feelings with many people in their direct environment. They expressed a feeling of relief after their testimony, not only ‘because it was over’ but also because they had been given the chance to talk about their experiences and could speak for the many other children who had gone through the same suffering. Throughout the different steps of their involvement, potential child-witnesses showed in general a great sense of responsibility about the importance of their statements. They were very much aware of the impact their participation could have on the course of proceedings. It happened more than once that a child was upset or concerned over comments, made by relatives or others, or even in the courtroom, minimising their role because ‘they were only children’.

As much as it is necessary to emphasise the risks and vulnerabilities related to the involvement of children at the Special Court, it is therefore also important to recognise the role children play in the process of bringing justice to Sierra Leone by coming forward as witnesses.

The positive and the negative impact of testifying before the SCSL on children and young adults, as described here, shows the dilemma between ‘the need for protection’ and ‘the need for participation’. What is in the best interest of the child is not always that clear.

VI A few lessons learned and points for discussion

- **Establishing the age of child witnesses**: as described above, it was often very difficult in a post-conflict situation like Sierra Leone to establish the exact age of a child, especially in the case of child ex-combatants. This problem was somewhat avoided at the SCSL by focusing on the history and the needs of the child or adolescent, more than on its biological age. However, although also judges showed understanding for this argument on different occasions, it would be better if decisions concerning specific protective measures for children would also be formulated in a less strict way, without limiting it to a category of ‘children under 18’. Ideally, from a
support perspective, protective measures should be tailored to the needs of each individual witness.

- **Minimum age to testify before an international tribunal?** Although in domestic courts very young children are called as witnesses, experiences at the SCSL show that it is not advisable to put rather young children on the stand. Taken in consideration the specific context of a post-conflict situation, the level of trauma of many of the children, the specific characteristics of an international tribunals, the type of crimes it is dealing with and the fact that the necessary evidence could also be found through other sources, involving young children should be avoided. Also the fact that child ex-combatants are generally testifying about traumatic events that happened to them several years ago raises questions about the capacity of young children to testify. The youngest child assessed by the psychologist of the SCSL, was 8 or 9. It was quickly clear that the child did not meet basic criteria to be called as a witness in a safe way, due to way he was expressing himself, his minimal understanding of the process and other reasons linked to his family situation.

- **Criteria to select child witnesses:** In the selection of witnesses, the relevance of the evidence the witness can bring forward is of primary importance to the parties. However, other criteria, mostly related to the psycho-social well-being of the witness, the potential security risk and risk for retraumatisation must also be taken into consideration. Although this was the case for most witnesses of the OTP, for child ex-combatants, victims of sexual violence and other especially vulnerable witnesses these criteria should be respected even in a stricter manner. Risks related to testimony should be kept to an absolute minimum. This however, is only possible by evaluating the risks and potential impact of testifying from the first contact between the witness and the Court. Therefore, involvement of psycho-social experts from the early stages of investigations onwards is absolutely necessary. Only in this way, enough information is available to balance ‘the best interest of the child’, ‘the need for protection’ and ‘the right to participation’.

- **Potential child witnesses vs. child witnesses:** In a discussion on the number of children that were involved in the SCSL, the total number of children should be taken in consideration. Although the number of children called to testify was very limited, the number of children interviewed, assessed, supported and even prepared for trial was not. This means that an important number of children were exposed to the judicial process, with all its risks, including several interviews about sometimes traumatic events.

- **General situation of child witnesses vs. the limited mandate of the SCSL to provide compensation:** Like many other vulnerable witnesses, the general condition of (potential) child ex-combatants in Sierra Leone is very poor. Access to basic healthcare, food, shelter, education was often extremely limited. Although the WVS has the mandate to provide basic health care and even educational support in exceptional cases, the Court has no mandate to provide any compensation for victims. This situation created often tension and frustration for witnesses. At the same time, full support (housing, food, health care) was provided during the time the children or adolescents were in Freetown awaiting their testimony, or were temporarily relocated for security reasons. This paradox caused sometimes dependency. In a few cases it was very difficult to stimulate adolescents or young adults to pick up their life after testimony and at give up ‘benefits’ that were related to their status of protected witnesses.

- **Involvement of ‘other actors’ in the support of child witnesses:** As described, preparations were made to involve Agencies like UNICEF, CPAs and NGOs in the
support of witnesses. Obstacles, mainly linked to confidentiality, made it almost impossible to fully implement the arrangements. The collaboration with CPAs and NGOs was therefore mainly established on an ad-hoc basis, or witnesses were referred anonymously to their services. Virtually all support was provided by the Court itself. The role NGOs and Agencies can play in the support of witnesses should be re-evaluated.

- **Space for child-friendly procedures in the courtroom**: Although important specific protective measures were put in place at the SCSL to facilitate the testimony of minors (closed circuit television), the general procedures -including lengthy processes of statement taking, preparation, awaiting testimony, examination in chief and cross-examination- remained unaltered for children. It would be in the interest of future child witnesses if newly established international justice mechanisms would be in the position to rethink procedures that involve children and adapt them more to their needs, like it is the case in more and more domestic courts, this in order to make international justice more child-friendly and the threshold for participation of children in these mechanisms lower.
With the start of the Truth and Reconciliation Commission (TRC) and Special Court for Sierra Leone the context for child protection considerably changed. During the conflict and the disarmament, demobilization and reintegration of the fighting forces the Child Protection Agencies (CPAs) had a clear role and way of working. The neutrality of the CPAs had become well established. The CPAs made it very clear that their role was to support all the children with no distinction as to from which fighting forces the child came, geographical location or tribe. In the process of demobilization and reintegration the CPAs were very precise about not being judgmental to the children or their actions. In the process of facilitating the family and community reunification the CPAs concentrated, without any judgment, on resolution of negative attitudes held by the family or community to the reintegrating children. A few CPAs guarded their neutrality so as to maintain communication with the fighting forces during the conflict to negotiate the release of children. Thus the role of the CPAs was non-political, non-judgmental and solely orientated to support the children in the best interest of the child.

The TRC and in particular the Special Court, brought processes that were inquisitive, insistent and judgmental. This was radically different to the approach of the CPAs. In addition, with the establishment of the TRC and Special Court at nearly the same time there were many questions as to the interrelationship between the two institutions. The answers to which, for many people, were not fully clear until the completion of the TRC.

The CPAs did not want to be associated with any institutions or process that may damage their relationship with the children. By being closely associated with the Special Court the CPAs considered that their neutrality would be compromised and the trust of the children in the CPA would be lost. Additionally, there was a real concern about security. Would the children be under threat when giving testimony to the TRC and most especially, would the children be in real danger if they were to give evidence to the Special Court? Equally, there was a real risk that the CPA staff could be threatened for having been involved in identifying possible child witnesses and facilitating the statement taking. There were particular concerns about those ex-combatants that were now over 18 years old who well-know the CPA staff and working habits of the CPA. These people would have sufficient knowledge to be mindful of the possible actions of the CPA and would know who and how to intimate or harm CPA staff.

The CPAs were also concerned that a child may give evidence against his/her better judgment because the child trusts the CPA and accepts the CPAs advice (to give evidence). Finally, the CPAs did not want to provide the Special Court with information about the children because the information that the child gave was obtained under very different circumstance and for different reasons from that of the Special Court.

It is important to note that in 2002 when the Special Court was starting there was a real concern about security. Demobilization had been completed only seven months before, the elections only three previously, and although state authority had returned throughout the country it was not robust enough to be able to guarantee personal security. There was no surety as to how the national security would
play out and there was considerable public opinion as to whether the Special Court would in fact worsen security and precipitate violence. No one had been indicted and there was huge speculation as to who would be in the Special Court’s targets. At the beginning it was not clear as to whether children could, or would, be indicted. The Special Court Chief Prosecutor was at pains to clarify on the issue of the children, although not everyone in the CPAs were convinced that people who were by then over 18 years old would not be indicted for acts undertaken when they were under 18.

Finally, none of the national CPAs had had previous experience in or the international CPAs any institutional memory, of working with or within a TRC or Special Court environment. There was no institutional policy direction within the individual CPAs or within the child protection sector as a whole.

The initial reaction was not to be involved with the Special Court. This sentiment was strongly held by a number of the international CPAs. For the national CPAs it was sometimes difficult to separate the personal views of the staff concerning the Special Court from that of the responsibility of the CPAs to support the processes to end impunity and the protection of children. All CPAs were unanimous in their desire to end impunity and promote reconciliation but were divided as to whether the Special Court and the TRC were the best methodologies so do so given Sierra Leone’s history and current situation. The UNICEF staff reflected the same range of attitudes and opinions. In addition the national staff were very reluctant to give evidence to the Special Court or make a personal or be involved in, any official submission to the TRC. Apart from the personal social aspects for the staff member, there was no clarity on the type of support the organizations would give the individual, even if the submission was an official submission.

**Establishing a Framework of Cooperation:**

An analysis of the process of how the CPAs developed a working framework with the Special Court is enlightened by a comparison of the process between the CPAs and the TRC and that with the Special Court. After much internal debate the position crystallized when it was clear that it was possible to have a distinction between working for the children and their protection and not working for the Special Court. Although this maintained neutrality and trust by the children and the Child Welfare Committees, it did constrain the CPAs’ ability to closely monitor and make formal comments on the Special Court procedures.

UNICEF and the CPAs established their position on the protection of children in the TRC from the conclusions of an international meeting held in Freetown in June 2001. The meeting identified the guiding principles, and suggested a relationship with the Special Court regarding the sharing of information between the TRC and the Special Court. However, what was not clear to anyone at the time was the process by which these principles would become considered and adopted by the TRC, which was yet to be operationalised. It was one year before the TRC was established. There was a blow to building confidence between the TRC and the CPAs when the request to present to the Commissioners the findings of the international meeting was denied by the TRC. There followed a long period of restructuring and reorganization by the TRC in which there was no opportunity for substantive collaboration. Soon after restructuring the TRC was almost immediately to embark on the statement taking and have it complete in four months. By then the collaboration sought by the TRC was at the functional level regarding statements from children rather than on policy and principles.

A “Framework for Cooperation between the Truth and Reconciliation Commission and the Child Protection Agencies” was developed in January 2003 which outlined the process and procedures for
taking statements from children. This included a method by which to assess the vulnerability of the child and conclude if the child would be likely to suffer any negative consequences from the statement-giving experience. The Framework established rather an elaborate system of working between the TRC and CPAs that included creating technical committees at the regional and district levels. The TRC would depend on the CPAs to identify children and make the vulnerability assessment. A description of the actual implementation of this Framework and the possible impact on children will follow later in this paper.

No opportunity was given, or assertively sought, to have a formal relationship between the management and policy making levels of the TRC and the CPAs. This was a function of a number of elements including the denial by the TRC for the CPAs to meet directly with the Commissioners in the early stages of the TRC; the uncertainty of what specific role should CPAs assume and level of such a relationship with the TRC; the real nature of the TRC after restructuring; and, the demand to complete the statement taking in a very short period with an even shorter preparatory period.

Although the establishment of a framework of cooperation between the CPAs and Special Court was taking place at about the same time as that with the TRC, the process was fundamentally different. First was a period of confidence-building. The Chief Prosecutor of the Special Court had a deliberate policy to reach out to the CPAs and a mutually respectful professional relationship between the CPAs and the Special Court developed. UNICEF and the UNAMSIL Child Protection Advisor established the role of go-between between the Special Court and CPAs, organizing and facilitating meetings, drafting position papers and negotiating points of concern from the CPAs with the Special Court. The discussions were initiated well in advance of identification and search for witnesses. The CPAs were able to have input at the senior policy level. Consequently, the resulting agreement was able to detail Guiding Principles for child protection in the Special Court/OTP that included the procedures for the identification of child witnesses, vulnerability assessment and security measures. The resulting Agreement (“Principles and Procedures for the Protection of Children in the Special Court”) also established a Joint Monitoring Committee composed of the Special Court and CPAs that would, on a monthly basis, oversee the implementation of the principles and procedures. This Agreement was kept secret so as to protect the CPA staff and not to damage the relationship between the CPAs and the children. Public reference to the Agreement is possible now because it is now clear that the Special Court does not engender distrust or high emotions in the general public, the children associated with the fighting forces or the commanders of the former fighting forces.

Up to this point the working relationship could be easily defined. However, the operation of any monitoring of the agreement was problematic. It brought the CPAs back to their basic fundamental concern not to be working for, or to be seen to be too clearly associated with, the Special Court. Similarly, the Special Court/OTP had its own rules and procedures to satisfy legal requirements and not least, the need to remain secretive.

These first meetings and the resulting Agreement was negotiated with the Office of the Prosecutor (OTP) and Registry (Witnesses and Victims Section - WVS). Discussions with the Office of the Principal Defender (further referred to as OPD) were initiated by UNICEF on the protection of child witnesses. The offer to undertake a similar process to establish principles and procedures to that used by OTP with the CPAs was not taken by the OPD. Currently there are on-going discussions on protection issues between UNICEF and the OPD.

With the approach of the trials UNICEF held meetings with the OTP and OTD and Witness Protection. All made full assurances that all the necessary court procedures would be used but did not stipulate exact procedures or give guarantees. OTP was more assuring than the OTD that they
would apply full protection measures and not challenge any child protection measures used by the Court. A requested meeting between the Judges, a representative of UNICEF and the Child Protection Advisor of UNAMSIL took place in May 2004. UNICEF and the UNAMSIL Child Protection Advisor advocated for In Camera hearings and voice alteration. However, the Court chose to use the video link whereby only the Judges and the lawyers could see the child but the public are in Court and could hear all the testimony. The first child witness did inadvertently reveal his name but this does not appear to have compromised his security.

On a parallel track, in early 2004 UNICEF was requested by the Special Court to make an amicus curiae brief regarding the Fourth defense preliminary motion based on lack of jurisdiction (child recruitment). Once again this raised the issue of maintaining some distance from and neutrality for UNICEF in-country. The UNICEF Country Office was very clear that, while wanting the Brief to be written, it did not want to be involved in the development of the Brief. Thus the Brief was written by UNICEF New York in collaboration with No Peace Without Justice and others. This was a good arrangement serving both to keep UNICEF actively engaged in the Special Court whilst maintaining some separation for the country office.

Implementation of the Agreement

It is not known as to how much the procedures outlined in the Agreement with the Special Court were consistently applied in the investigations undertaken by the Special Court. The investigators were a large team coming from a wide range of backgrounds and experience. The investigators were trained on the Principles and Procedures outlined in the Agreement. However, the action point to hold periodic reviews was not carried through. Thus there was no formal methodology by which the CPAs could observe and evaluate the investigations in operation or review the implementation of the procedures. Once again this was due to the two fundamental realities. Firstly, the daily internal working of the Special Court cannot be fully open to public scrutiny and secondly, the CPAs’ ambivalence about their association with the Special Court.

There is an argument that such monitoring by institutions other than the Special Court is not required. This responsibility can be left to the Special Court. In such a scenario, the CPAs would focus on the impact on children and on the reintegration process which would be an indicator, admittedly somewhat after the fact, on the effectiveness of and adherence to, the established procedures. In such a scenario input in the design stage of a Special Court would be a critical process in which the CPAs would be fully engaged. The initial design would include all the detailed child protection principles and procedures and the way in which the standards of adherence will be upheld by the Special Court.

On the other hand it was more straightforward to have an on-going working relationship with the Witnesses and Victims Section. This is mainly due to the nature of the work Unit which is more similar to that of the CPAs. Protection procedures were elaborately reviewed and there was cooperation in the protection of some child witnesses.

By contrast, the TRC was a more open process which could be monitored. The TRC was constrained by the lack of time for preparation, statement taking and monitoring of the statement taking process by senior staff. The statement taking had to be completed in four months. From the perspective of the TRC this left no time for relatively lengthy processes such as the vulnerability assessment. The statement-takers were made aware of the procedures but were not given precise instructions that they were to follow the procedures in all cases. There was no checking by supervisors as to the use of the vulnerability assessment.
It was found that the social workers who were to be present in the statement taking were not always available and not consistent in their follow-up with the children after the statement exercise. UNICEF did undertake an assessment of the statement taking in Makeni District which found that although the procedures were not adhered to, the process was child friendly. There were no reported cases in which the statements either led to threats or attacks on child statement-makers.

**Impact on Children:**

It does appear that no children have been unduly exposed to danger as a result of being involved with the Special Court. Neither has there been a negative impact on the social reintegration process of children formerly associated with the fighting forces. This is likely to be due to the procedures employed and to the fact that the actions and outcome of the Special Court is not a high concern for the children at this time and not a factor in their own priorities. For the majority of children, their priorities center around education and gainful employment. It is these two areas of life that they feel were denied them by the war. They are very anxious to regain those lost opportunities and are finding it a struggle to do so in their current situation.

**Considerations:**

a. **Child Protection Sector policy and institution-based policy**

There is a real need for the child protection sector to have a policy that will include the nature of a relationship with a TRC or Special Court-type body; giving evidence both as a CP Agency and as individual staff working for an agency; technical support from headquarters; gathering and providing information

b. **Technical Support from Headquarters**

It is very important for headquarters to play an active role in the process of working with a TRC or Special Court-type body. The experience of how the Amicus Brief was written was a good one. The Brief was written by UNICEF officers in New Your HQ in collaboration with No Peace Without Justice. It was a technical paper that the UNICEF Country Office could not have written. Additionally, by being written in New York it enabled to county Office to maintain some distance from a potentially contentious issue in the country that could have compromised UNICEF’s relationship with government and the general population.

c. **Child Protection Responsibility fully with the Special Court; more explicit procedures embedded at the design stage.**

There are two fundamental problems with a working relationship between the CPAs and the Special Court. Firstly, the CPAs feel that the relationship with the children would be severely compromised and that their staff will be put under more danger if they are seen to be working with the Special Court.

Secondly, the Special Court, by its very nature, operates within specific rules and has to be secretive and confidential. Thus, there is little opportunity for agencies outside of the Special Court to be able to be directly involved in, to influence, or to be able to monitor the activities that would affect the protection of children. Consequently, the CPAs could not be directly involved in the selection and
protection of child witnesses, except for a few specific cases. Additionally, the CPAs are not in a position to monitor and evaluate the activities of the investigators, both prosecution or defense; having to be content with assurances from OTP and OPD that all the agreed procedures were being operationalised. In the case of OPD the assurances were less affirmative because they could not speak for the actions of the individual defense lawyers that are independent of the Special Court.

However, such a role and relationship may not be necessary. It is entirely possible for the Special Court to assume full responsibility for child protection and seek structural ways that do not require an on-the-ground relationship with the CPAs. Such structural ways could include more explicit and detailed procedures included in the initial design of the Special Court and a child protection officer employed by the Special Court.

d Information and Analysis

It is abundantly clear that UNICEF and the CPAs did not have information that was immediately useful to the TRC or Special Court. The information the CPAs had collected with permission from the children was for a different purpose and thus not available to the Special Court. Additionally, the CPAs had not systematically or chronologically collected information on events during, and particular actors in, the conflict.

The TRC requested information on three areas, namely a formal submission with particular reference to “the impact of the war on Sierra Leone’s children”, details on significant events in the war that involved children that the TRC should research, the identification of children who, if willing, would be able to provide statements of some substance to the TRC.

UNICEF made both a formal written and a verbal submission. The latter submission was made as part of the special hearing on children. In the preparation of these submissions it became clear that UNICEF did not have first hand knowledge that was formally recorded. For example, UNICEF had not visited the sites of particular events and made a formal record of the findings. The organization had not systematically made a chronology of events that directly affected children such that it would have been able to make its own analysis of the pattern of events impacting on children, child rights violations and who were the main perpetrators and an assessment of numbers and pattern of numbers of children forced to become fighters. UNICEF did have access to a considerable amount of personal data on individual children that was collected as part of the personal assessment and family tracing for children who had been released or escaped from the fighting forces. This was confidential information and was used only in general terms to corroborate details provided from other sources. The CPAs had a similar experience.

The Special Court assumed that the CPAs could have provided information of particular events in the war to support the prosecution case and provide names of children who could be witnesses. Providing information in this particular way would have been much more acceptable to the CPAs in that it did support the process of prosecution for crimes against children and it could have been done in such as way that it did not compromise the role of the CPAs and their relationship with the children. However, the CPAs were constrained to do so because of the lack of systematically recorded information.

Substantial information and analysis would have been a significant assistance to the Special Court and enabled the investigation for the prosecution to move forward much faster and with a sharper focus. From a child protection perspective, this sharper focus would have limited the number of children who were approached for evidence and thus been in the best interests of the children.
The lack of systematized information collection over a long period of time is a significant weakness. It has far reaching implications. It not only limits the amount of information and analysis the CPAs could provide to the Special Court but constrained the advocacy and planning during the conflict and disarmament and demobilization period. Without detailed knowledge of the pattern of child recruitment and use by the groups that composed the fighting forces, the CPAs were not able to advice those that were negotiating with the fighting forces on who to approach and the number of children to request to be released. We will never know what percentage of children who were in the fighting forces were officially demobilized, who was missed and what is happening to them now.

The Security Council Resolution 1612 (2005) is a very good development in that it recognizes the need to monitor and report violations of the rights of children in situations of armed conflict with specific reference to the recruitment of use of children as soldiers. The Resolution has given its support to and mandated the UN, to undertake monitoring in what will often be politically very sensitive areas. The experience of providing information to the Special Court and submissions to the TRC and in negotiations for the release of children from fighting forces, shows that the monitoring should not be limited to the period of the conflict but should include the pre-conflict years when the pattern of use of children by individual and influential persons are being established. This information would be comprehensive enough to be considered intelligence of children in the fighting forces. This long term collection of intelligence enables a much more accurate analysis of the use and pattern of distribution of children in the armed groups that will guide the design of a DDR programme and that of a Special Court.

e. Relationship through other child protection actors

The Child Protection Advisors of an UN Mission and the regional states (in this case ECOWAS) child protection office could be the responsible office to oversee child protection issues within a Special Court

The Child Protection Advisors of the UN Mission could play a fulcrum role. Without a direct relationship with the children to be compromised or a field presence that would expose an officer to unacceptable risk, the Advisors could represent the concerns and present the technical advice of the CPAs. Thus said, to reach such a situation will require a closer and more collegiate working relationship between the Child Protection Advisors and the CPAs than has been the experience hitherto.

The office of Child Protection of ECOWAS has not been called upon to act on behalf of the CPAs. This was mainly due to the fact that the office was only developing at the time and did not have significant contact with child protection field activities. Nonetheless the relationship between the Special Court and ECOWAS could allow a natural technical relationship on child protection. To be effective in this role the ECOWAS Child Protection office will need to be strengthened and be involved in child protection in a country long before the start of a Special Court.

References:

A “Framework for Cooperation between the Truth and Reconciliation Commission and the Child Protection Agencies” UNICEF, CPAs, TRC, (2003); Freetown, Unpublished

“Principles and Procedures for the Protection of Children in the Special Court” UNICEF, CPAs, Special Court for Sierra Leone, (2003); Freetown, Unpublished
Fourth defense preliminary motion based on lack of jurisdiction (child recruitment); Amicus Curiae Brief of the United Nations Childrens Fund (2003); Special Court for Sierra Leone; Freetown

Children and the truth and Reconciliation Commission for Sierra Leone.; UNICEF, National Forum for Human rights, UNAMSIL/Human Rights, 2001; Freetown

Implementation of the Framework for Cooperation between the TRC and the CPAs in Bombali, Kenema and Bo Districts; UNICEF Sierra Leone, 2003; Unpublished


In Sierra Leone two complementary mechanisms were put into place to address accountability for wartime atrocities, the Special Court and the Truth and Reconciliation Commission.

The Special Court for Sierra Leone was established by an international agreement between Sierra Leone and the United Nations and has a mandate to prosecute those persons who bear the greatest responsibility for crimes committed during the conflict. The other mechanism – a non-judicial mechanism – is the Truth and Reconciliation Commission.

The Truth and Reconciliation Commission (TRC) for Sierra Leone originates from the Lomé Peace Agreement and was established by an Act of the Sierra Leone Parliament in February 2000. As with many other truth commissions, the key objectives of the Sierra Leonean TRC were to create an impartial record of human rights violations that occurred during the war, to provide a public forum for accountability, to initiate the process of healing and reconciliation for victims, witnesses, perpetrators and families, to help restore a sense of justice in the social and political order, and to make recommendations to the Government to prevent future conflicts.

The participation of children in the truth and reconciliation process was anticipated from the beginning of the Commission’s work. When the TRC was established, section 7(3) of the TRC Act called for the Commission to “implement special procedures to address the needs of such particular victims as children or those who have suffered sexual abuses as well as in working with child perpetrators of abuses or violations”. This was in recognition of the fact that children were deliberately, systematically and routinely targeted for the worst possible abuses during the 10-year civil war in Sierra Leone. As many as 10,000 children were abducted or forcibly recruited into armed forces and groups. Many were taken from their homes, drugged, threatened with death and forced to kill. Thousands were abducted for sexual slavery. Thousands of children were massacred, raped and mutilated. It was therefore essential that children become involved in the process of truth and reconciliation and justice-seeking.

The challenge was to develop child-friendly procedures to protect the rights of children participating. UNICEF, together with UNAMSIL and national and international NGOs and government counterparts, worked alongside the Commission to develop safeguards, including special hearings and closed sessions for children, a safe environment for interviews, protected identity of child witnesses, and staff trained in psychosocial support for children.

Child and adolescent participation: The bigger picture
The child-friendly TRC report did not happen as an isolated event. It is a part of the larger process of transition and reconciliation, rooted in what, at UNICEF, is the human rights-based approach to programming. This means building capacity for children’s involvement as active citizens and their contribution to the decision-making processes that affect their lives. It means involving children in all aspects of family, school and community life, including reconciliation and peace-building in post-conflict transition.
At the foundation of the human rights-based approach is the principle – enshrined in the Convention of the Rights of the Child (CRC) – to uphold at all times the best interests of the child. That is recognized as the cornerstone, guiding all efforts to pursue accountability for crimes against children. If the best interests of children are not served, then there can be no other reason. The best interests of the child must come first.

Then the debate begins as to what is in the best interests of children. Or, more to the point, under what conditions are the best interests of children served through their participation in transitional justice mechanism.

The heart of the human rights approach is participatory, creating the capacity and context for democratic citizenship. Participation – that is, children’s right to express their opinions in decisions and activities that affect their lives – is fundamental to the Convention and to the rights-based approach. And we find, again and again, that children want to play a role, they want to get involved and they are powerful motivators, community-builders, innovative thinkers, strategists and idealists. But child participation is not a “quick fix”. In order for children to become participants and partners in such a process they need support and guidance, and there must be long-term commitment to support young people’s efforts to achieve realistic and sustainable goals.

It is important to emphasize that the burden of responsibility for truth, reconciliation and peace-building must not, under any condition, be shifted onto the shoulders of children. To invite children’s participation in the processes of truth and justice-seeking is one thing, but it is another matter altogether to suggest that they can somehow solve the problems of society. It is essential that the principles – and the limits – of participation are well understood. This is always the case but, in conflict and post-conflict situations, it is even more crucial because children’s active participation in community development and peace-building may be at odds with their protection and serious risks may be involved. The challenge is how best to provide children and adolescents with opportunities, guidance and support – and protection – to participate in a meaningful way.

Statement-taking and hearings
A key activity involving children in the Truth and Reconciliation Commission was statement-taking at the community level. Child participants were interviewed by a statement taker, with the support of a child protection worker, to ensure that children were not adversely affected and that proper follow up would take place. Most children who were interviewed by the TRC were identified through the child protection and reintegration programme. This also helped to ensure their involvement was safe and that follow up occurred. There were nearly 200 children participants across the 13 districts. Children therefore played a significant role in the overall process.

Many children also participated in the thematic hearings on children, which took place on 16 and 17 June, 2003, coinciding with the “Day of the African Child”. The purpose of the hearings was to raise awareness and give visibility to children’s issues, and to recommend actions for improving the situation of young people in post-war Sierra Leone. Children’s recorded testimonies were shown at the hearings, without revealing the children’s identity. Based on the children’s statements, specific recommendations were made for each district.
Other children, representing the inputs from youth clubs, appeared in person before the hearings. Clips from these more general statements were broadcast live on radio UNAMSIL and on television. The children presented their recommendations for a more peaceful future in Sierra Leone. Children also exhibited drawings and performed dramas about their wartime experiences.

Child-friendly Truth and Reconciliation Commission report for Sierra Leone

A further involvement of children in the TRC process was the preparation of a child-friendly version of the final report of the Truth and Reconciliation Commission. The child-friendly version is a much shorter and simpler version of the full report.

The preparation of a child-friendly TRC report was first discussed when experts and children met in Freetown, in June 2001, to plan how children would take part in the Truth and Reconciliation Commission. The submission to the Truth and Reconciliation Commission by the Children’s Forum Network made a similar recommendation, calling for a child-friendly version of the report that children could read and understand, “as a measure to prevent recurrence of what happened.”

The preparation of the child-friendly report was undertaken by the Truth and Reconciliation Commission, together with UNICEF, UNAMSIL – and with children themselves. The child-friendly text is based on the official report, and on information in the TRC database, including statements by children, and testimony given by children in closed hearings and public hearings, including presentations during the thematic hearings on children conducted on the occasion of the ‘Day of the African Child’. Formal submissions to the Commission by child protection agencies and others, in particular the submission prepared by the Children’s Forum Network, proved a valuable source of information. Children’s voices are included in all these resources.

Participation in the drafting of the report came from three national children’s networks – the Children’s Forum Network, the Voice of Children Radio, and the Children’s National Assembly. Over 100 children participated, with a team of 15 closely involved, meeting with the writer on a daily basis. Discussions of the child-friendly report, led by children, were also aired on the Voice of Children Radio, in Freetown. During the first-ever Children’s National Assembly, held in Freetown in December 2003, meetings were convened to discuss the child-friendly report, which brought children together from all districts around the country. Excerpts from the discussions on the child-friendly report that took place at the Children’s National Assembly were broadcast on national television and radio. The children were eager to play a role and give shape to a report that would bring about positive action, for and by children.

The child-friendly Truth and Reconciliation Commission report is thus a culmination of children’s involvement and perspectives throughout the process, from initial preparation, to background research, to the preparation of the final report. The Children’s Forum Network continued to assist with input into the design process, working in close collaboration with the Truth and Reconciliation Commission, and with UNICEF and UNAMSIL. In addition, the last chapter of the child-friendly version is a menu of activities, created by children, to outline their role in disseminating the findings and recommendations of the Truth and Reconciliation Commission.
Questions for clarification and discussion

Was children’s participation in the Sierra Leone TRC ‘genuine’? Did the Commission’s work accurately reflect children’s own views?

This raises the question of what exactly is meant by ‘genuine’ adolescent participation. The ‘ladder of participation’, popularized by Roger Hart, has become a benchmark for determining the extent to which, in a given situation, young people are able to exercise decision-making power and exert their own influence over the means and the end of their labour. This ranges from manipulation and tokenism on the bottom rung, to full-fledged youth-designed and implemented programmatic responses on the top.

The role of children as participants in the Truth and Reconciliation Commission in Sierra Leone was, to a great extent, determined by the official nature of the Commission’s work. From the point of view of ‘human rights-based participatory programming’ the children and young people of Sierra Leone did not set the boundaries on their participation in the Commission. Their role was, in fact, pre-determined. For this reason, some NGOs in Freetown were reluctant to involve children in the process. It was not ‘genuine’ participation, per se. However, children were able to play an effective and even an essential role in the process. In fact, the participation of adolescents in conflict and post-conflict situations has been successful within a wide range of conditions and contexts.

What protections were in place and how effectively were they implemented?

To protect children’s involvement in the TRC, UNICEF, together with other UN agencies and the Child Protection Network (CPN) – national and international non-governmental organizations (NGOs) and government counterparts – developed special ‘child-friendly’ procedures, including special hearings for children, closed sessions, a safe environment for interviews, protected identity of child witnesses, and staff trained in psychosocial support for children. The TRC and child protection agencies (CPAs) agreed formally through the Framework for Cooperation to work together on these measures and procedures, in line with their respective mandates and roles (see Framework for Cooperation Between the Truth and Reconciliation Commission and Child Protection Agencies, annex).

As stated in the Framework for Cooperation, the TRC policy was to treat all children coming before the Commission as witnesses. CPAs agreed to assist TRC statement takers in overall guidance and advice on involving children: i) identifying child statement givers; ii) facilitating access to child statement givers; iii) providing psycho-social support for child statement givers.

Eight principles for protection were included in the Framework for Cooperation:

i) The participation of children in the TRC process shall be guided by the best interest of the child. The children will be treated with dignity and respect.

ii) Any participation of children shall be voluntary on the basis of informed consent by subject child and guardian.

iii) The safety and security of all child statement givers is paramount. Statements can only be obtained in places considered safe and friendly to the child.

iv) Children must be in an appropriate psychosocial state to give statements. The taking of statements from children must ensure the protection of their physical, spiritual and psychological well-being.

v) The confidentiality and anonymity of the child shall be guaranteed at all stages of the work of the TRC. All statements given by children shall be confidential; no
sharing of information obtained by the TRC with any outside body, including the Special Court.

vi) In principle, statements shall be obtained on a one on one basis, with only the statement taker and the child present, except when the child wishes the presence of a social worker and/or guardian. Girls shall be interviewed by female TRC statement takers only.

vii) Psycho-social and other appropriate support services shall be available for child statement givers.

viii) All statement takers & Designated social workers shall receive further training on taking statements from children.

A vulnerability assessment and safety checklist were developed as part of the Framework for Cooperation, to help determine whether a child would be secure and confident enough to proceed with the TRC process (see annex). To help identify possible child participants, two questions were deemed essential, whether the child was able to give a statement and whether the child would be willing to give a statement.

In fact the procedures agreed to in the Framework for Cooperation were not closely adhered to and many inconsistencies occurred in the process of statement-taking. However, the Framework was groundbreaking in establishing norms for the involvement of children in the process and the experience and lessons learned have created valuable precedent.

What specific challenges were encountered?

- Initial confusion between the TRC and the Special Court: In the beginning, children who had taken part in the child protection and reintegration programme were contacted and asked to give statements. Many were reluctant. There was confusion regarding the relationship between the TRC and the Special Court and former child combatants, and their parents, were afraid that statements given to the TRC would be shared with the Special Court and they would then be called to testify and perhaps even face prosecution. The confusion between the TRC and the Special Court underlined the need for greater community outreach early on by both institutions, in order to specifically clarify children’s role. When the prosecutor for the Special Court clarified that no children would be prosecuted, children were encouraged to come forward, and parents to give permission.

- Girls had specific vulnerabilities: Girls were reluctant to participate in the TRC process, in particular those who had been sexually exploited. They were fearful and did not want their story told to others.

- Collaboration between CPAs and the TRC at the district level: The collaboration between the TRC and child protection agencies varied from district to district and the TRC often took statements from children directly without the support of child protection agencies.

- Children’s unfulfilled expectations: In some cases children had an understanding of the purpose of the TRC and why their statement was important. In other cases children were not well informed. Some children thought that the TRC could provide financial support and send them to school. This demonstrated the importance of working closely with children so that they would be well informed and prepared, in advance.

- Initial concern over potential negative impacts for children: Concerns were raised over the possible negative impacts on children of remembering the horrors of the war. Negative impacts, such as retraumatization, have not been observed. Instead, it seems that children’s participation in the TRC has helped them come to terms with their
experiences. An evaluation is needed to further assess the impact and improve child protection measures.

What were key lessons learned through children’s participation in the TRC process?

- More attention should be given to the collaboration and coordination with child protection organizations from the very beginning of the process.
- Timely sensitization and awareness-raising campaigns at the community level – aimed at both adults and at children and formulated according to the needs of the community – are critical to explain the purpose and to promote the participation of children.
- Children’s participation in the truth and reconciliation process is entirely voluntary and they should be under no pressure to participate. In addition, they reserve the right to withdraw their participation at any time. This needs to be explained so that it is well understood by children and their parents or guardians.
- Statements from children should be taken by staff with a background in human rights and child protection. This was not always possible but child-friendly procedures should be used in all cases when interviewing children and parents, guardians or social workers were also present when requested by the child.
- Special procedures are needed so that the involvement of children in truth and justice-seeking mechanisms is confidential. These procedures include, for example, conducting interviews in a child-friendly environment and organizing closed hearings for children.
- Girls should be interviewed by female staff, unless male staff is requested, and measures taken to ensure gender sensitivity.
- It is essential that statement-takers, Commissioners and TRC staff speak and understand the language of the child.
- Psychosocial support for children should be provided throughout all stages of the process: prior to and during the statement-taking, as well as after the hearings.
- Traditional ceremonies and forgiveness rituals can help support the work of the TRC but these practises should be in accordance with international child rights standards, for example, by protecting the identity of the child and ensuring that all participation is entirely voluntary.
- Children can continue to play an important role after the conclusion of the TRC by helping to raise awareness about the TRC in their schools and communities and lobbying for implementation of the TRC recommendations.
- An evaluation is needed to assess the overall impact of children’s involvement in the TRC in the community, as well as the impact on children themselves.

How were children involved in the public presentation of the report?

On 5 October, 2004, both the official report and the child-friendly report of the Sierra Leone Truth and Reconciliation Commission were presented in Freetown to President Kabbah. Children from the national Children’s Forum Network, a national child-led organization, participated and prepared the following statement:

We, the children of Sierra Leone, were the most vulnerable group during the decade-long civil war. We want to be the first priority on the Government’s agenda… We want to see the needs of children addressed in a pragmatic way. … including improved access to education, health care and nutrition, and the elimination of child labour and sexual exploitation. … we want recreational spaces.”
In their presentation, the Children’s Forum Network also recommended that children be given a stronger voice in the democratic decision-making process and they asked that the Children Act should be adopted by Parliament, giving national weight to the rights of children outlined in the Convention on the Rights of the Child. They asked for special attention for children most affected by the war, especially girls who did not benefit from the demobilization programme. And they requested that the child-friendly version of the TRC report be incorporated into the school curriculum.

On 28 October report, 2004, the child-friendly Truth and Reconciliation report for Sierra Leone was presented by the Government of Sierra Leone to a joint session of the General Assembly, the Security Council and the ECOSOC at UN Headquarters, in New York. The session was co-chaired by the three Presidents of the three organs of the UN, as a symbol of the entire UN's involvement in peace making and peace building. Children did not take part in the event as there was not enough time to arrange for the travel of child participants in the TRC process from Freetown to New York. The Executive Director of UNICEF attended the event stating that, “There is a sense that this report brings a positive message to the international community on the role of children in post-conflict reconciliation and peace-building. In the past the involvement of children and the focus on children within the SC Peace and Security Agenda has been in the context of the terrible impact of war on children. This event will also highlight children’s vision for a better and more peaceful future.”

_To what extent did children’s participation in the TRC for Sierra Leone actually contribute to reconciliation?_

Reconciliation and the return to civilian life is a long process. A truth commission is part of the process. For the children of Sierra Leone it means reuniting with families, returning to school and finding a place in the community. Families and communities must also find ways to forgive and rebuild, and to look towards the future.

One of the boys who participated in the closed hearings later told his social worker that the TRC “helped him talk”. He said that after spending eight years of his life in the war, he wanted to do something good. A young girl who delivered a statement during the hearings said she felt it was important to let people know what had been done to her. She felt better knowing that people cared about her and her story. Both children are currently taking part in a vocational training programme and looking towards the future.

From the children’s point of view, education and vocational training is essential for regaining a sense of normalcy and hope for the future. In the statements given to the TRC children, again and again, identified return to school as their number one priority.

Reconciliation in Sierra Leone is ongoing. It continues in schools and villages and in children’s lives. There is no doubt that the Child Welfare Committees, organized at the village level, have been instrumental in helping to achieve reconciliation at the community – grass roots – level. But the TRC process has played an important role in the process, at the national level and at the community level.

Reconciliation also means accountability. By gathering testimony and creating an accurate record that acknowledges the crimes committed, the TRC gives survivors a public forum to voice the wrongs they have suffered and the causes of the conflict. At the same time, it provides a basis for social and political reform to prevent further abuse. By gathering testimony and creating an accurate record that acknowledges the crimes committed, the TRC
gives survivors a public forum to voice the wrongs they have suffered. At the same time, it provides a basis for social and political reform to prevent further abuse. Children’s participation – and children’s voice – in this process demonstrates how children can become active partners, helping to break the cycle of violence and to re-establish confidence in the rule of law.
ANNEX

Recommended by TRC/CPA National Committee 27/01/03

FRAMEWORK FOR COOPERATION BETWEEN THE TRUTH AND RECONCILIATION COMMISSION AND CHILD PROTECTION AGENCIES (Focus: statement taking)

I. Introduction

The TRC Act, adopted by Parliament in 2000, recognises the particular impact of the Sierra Leonean conflict on children and calls on the Truth and Reconciliation Commission (TRC) to give special attention to the experiences of children within the armed conflict. According to Section 6 (2) (b) of the TRC Act, the Commission shall “work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual violence and to the experiences of women and children within the armed conflict. To this end, the TRC can and has adopted special procedures to address the needs of children who come in contact with the TRC (S 7 (4) TRC Act).

The key task of the TRC in relation to children is to create an impartial and official historical record of what happened to children during the armed conflict in Sierra Leone and to make recommendations for improving the situation of children in the future. The TRC also aims at building upon existing mechanisms for promoting the reintegration and reconciliation of children, particularly the work of Child Protection Agencies (CPAs).

Based on its mandate given in the TRC Act, the TRC has decided that it will make every effort to involve children in all aspects of its work in a manner that is guided by the best interest of the child and ensures the well-being and dignity of the child. This shall be done in close co-operation of the TRC with Child Protection Agencies (CPAs). The following measures will be undertaken by the TRC in order to give a voice to children in its work:

- Statement taking from children;
- Special hearings for children (closed sessions);
- Public special hearings on children;
- Formal submissions by CPAs on their work and experiences of children during the conflict, and their recommendations for law and other reforms relating to children;
- Research and investigations into the experiences of children during the conflict;
- Special section in the final report of the TRC on children with focused recommendations.

The TRC and Child Protection Agencies (CPAs) agree to cooperate on all these measures, in line with their respective mandates and roles. The current framework concentrates on cooperation between the TRC and CPAs during the process of statement taking by TRC statement takers, which will end on 31 March 2003. It shall apply to all children who come in contact with the TRC, irrespective of whether they are currently in the care of CPAs. Other aspects of the co-operation, in particular the role of CPAs in special hearings for and on children, will be addressed in the near future.
II. General consideration for statement taking with children

Some 70 statement takers of the TRC have been deployed throughout the country to take statements from individuals – victims, witnesses, perpetrators, regarding their experiences during the conflict. These statement takers are organized at district level with District Co-ordinators leading the team of statement takers in each district. In addition, four Regional Co-ordinators have been appointed. The process of statement taking will end on 31 March 2003.

The TRC will treat all children coming before the Commission as witnesses. Concerning child statement givers, the TRC Act instructs the TRC to strive for representativity, as well as geographical balance. Representativity includes the diversity of experiences of children, the range of violations suffered, roles played by children and the political or other groups to which they belonged or were affiliated. Special attention shall be given to the experiences of girls during the conflict. There is no specific number of statements that must be obtained from children. Quality of statements – and treatment of children – is more important than the quantity of statements from children. Furthermore, the TRC will seek statements from young adults about their experiences as children during the conflict.

The TRC and CPAs agree to collaborate in statement taking involving children and to put a framework in place for the identification of child statement givers and for the protection of their safety and psycho-social well-being. CPAs will assist the TRC statement takers in:

- Overall guidance and advice on involving children in TRC statement taking in the respective districts;
- Identifying child statement givers;
- Facilitating access of TRC statement takers to the child statement givers;
- Preparation of and psycho-social support to child statement givers.

In order to fulfil these tasks, CPAs will have one social worker in every district especially designated to support the TRC statement taking with children (‘Designated Social Worker’). With the help of the Designated Social Worker, CPAs in every district will identify children in their care who might be suitable to give a statement to the TRC, establish, through direct contacts, whether these children are able (vulnerability assessment) and willing (informed consent by child and guardian) to do so and provide this information to the TRC statement takers. The CPAs will be available for psycho-social support immediately before, during and after the statement taking and will undertake follow-up visits. The TRC will rely primarily on CPAs concerning the identification of child statement givers. Statements from children not referred by CPAs will only be taken if the situation so requires. The TRC statement takers will regularly report back to CPAs about the follow-up needs of children and also refer children in need of particular support to CPAs. It is envisaged that CPAs, with the help of ‘Designated Social Workers’, will be able to provide for planning purposes, although exact numbers are hard to estimate, the TRC with 20 names of children in their care per district and month (i.e. 40 per district) and to provide follow-up support (at least two visits) to them and to some 10 additional child statement givers per district and month (i.e. Grand Total 60 per district). UNICEF and its implementing partners will work out the details concerning the arrangements and deployment of Designated Social Workers. In addition, special arrangements will be sought to interview children who are in specialised child protection programmes (e.g. emergency and alternative Care). This shall be done with the above measures where appropriate child supports are available.

This co-operation between the TRC and CPAs and the work of the TRC with children in general, shall be guided by the following principles:

1. The participation of children in the TRC process shall be guided by the best interest of the child. The children will be treated with dignity and respect.
2. Any participation of children shall be voluntary on the basis of informed consent by subject child and guardian.

3. The safety and security of all child statement givers is paramount. Statements can only be obtained in places considered safe and friendly to the child.

4. Children must be in an appropriate psychosocial state to give statements. The taking of statements from children must ensure the protection of their physical, spiritual and psychological well-being.

5. The confidentiality and anonymity of the child shall be guaranteed at all stages of the work of the TRC. All statements given by children shall be confidential; no sharing of information obtained by the TRC with any outside body, including the Special Court.

6. In principle, statements shall be obtained on a one on one basis, with only the statement taker and the child present, except when the child wishes the presence of a social worker and/or guardian. Girls shall be interviewed by female TRC statement takers only.

7. Psycho-social and other appropriate support services shall be available for child statement givers.

8. All statement takers & Designated social workers shall receive further training on taking statements from children.

III. Detailed procedures for statement taking with children

1. The TRC and CPAs exchange demographic and contact information about their respective staff and partners at regional and district level. The TRC will share with the CPAs the names and contact details of their Regional and District Coordinators. The CP Network will provide the TRC with the names and contact details of CP agencies (in particular Designated Social Workers for TRC statement taking), MSWGCA officials and Child Protection/Welfare Committees (CP/WC) at regional and district level.

2. The TRC and CPAs establish contacts at regional and district level. As a first step, TRC Regional and District Coordinators will be invited to brief the respective Child Protection/Welfare Committee on the work of the TRC, and in particular on the statement taking process. In such meetings, this framework of co-operation between the TRC and CPAs shall be presented and discussed.

3. The TRC and CPAs set up Technical Committees at the regional and district levels. At the regional level, this will comprise the Regional Coordinator for the Commission and three representatives of CPAs. At the district level, this would include the District Coordinator for the Commission and three representatives of CPAs, including the MSWGCA SDO, CPA Manager, and Designated Social Worker. One of these representatives will serve as CPAs focal point (with substitute) for every region and district.

4. The Technical Committees will:
   - Hold regular meetings at the regional and district levels in order to exchange information and to organize and review the practical work of the TRC in relation to children.
Facilitate the holding of further training of statement takers on taking statements from children. This training shall be carried out on a regional basis with the participation of CPAs and should take place on 8 February 2003.

Be involved in the regular reviews of the statement taking process.

Report regularly to the national Technical Committee of the TRC and the Child Protection Network and to the regional/district Child Protection/Welfare Committees.

5. The District Technical Committees shall:
   - Organise and prepare the work of the TRC statement takers with children in the districts and the support provided by CPAs.
   - The TRC shall present its preliminary deployment plan.
   - CPAs shall brief on the overall experiences of children in the district, their work and the distribution of children in their care throughout the district.
   - CPAs will provide information concerning children they consider suitable to give statements to the TRC based on visits of these children.
   - The TRC and the CPAs will regularly exchange information on and adapt their deployment plans in order to ensure that a CP social worker (primarily the Designated Social Worker) is available for psycho-social support before, during and after the taking of a statement from a child.

6. CPAs will:
   - Identify children who might be suitable to give a statement to the TRC, based on the general criteria set out in the TRC Act (see chapter II above) and an overall vulnerability assessment. Detailed criteria for the vulnerability assessment (Annex A) and safety check list (Annex B) will be operationalised at district level.
   - Contact the child prior to sharing his/her name with the TRC in order to explain the TRC statement taking process to the child and guardian and to establish whether the child is able (vulnerability assessment, Annex A and safety check list Annex B) and prepared (informed consent) to speak to a TRC statement taker. If possible this should be done as part of a regular follow-up visit.
   - Share the child's vulnerability assessment and safety check list (if no psychological and physical well-being concerns are indicated) with the TRC District Co-ordinator and advises on the most appropriate way of taking the statement, which ensures the physical and psychological well-being of the child in cases where there is informed consent by the child and guardian. This shall include information on where to take the statement (can it be done in the community, or should it be done in an outside location for safety concerns) and whether the child wishes a social worker or guardian to be present during the statement taking.

7. The statement taking shall take place in a safe and child-friendly environment. The TRC statement taker and Designated social worker must work out a safety plan in relation to the child statement giver. A CP social worker shall be available before, during and after the interview in order to provide psycho-social support. In principle, statements shall be obtained on a one on one basis, with only the TRC statement taker and the child present. Girls shall be interviewed by female statement takers only. If the child so wishes a social worker, or guardian shall be present during the interview to provide support (without participating in the interview). In such cases, the social worker has to sign a declaration of confidentiality presented to him/her by the statement taker.
8. The TRC will rely primarily on CPAs concerning the identification of child statement givers. Statements from children not referred by CPAs will only be taken if the situation so requires (e.g. statement taker comes across abducted child). In such situations, it is up to the statement taker to refer the said child to the Designated Social Worker who will undertake a vulnerability & safety plan assessment (Annexes A & B) and to establish the informed consent.

9. The CPAs will undertake at least two follow-up visits with child statement givers, the first visit will be within 7 days of the child's statement and second visit will be 14 days later.

10. If TRC statement takers identify in the course of the statement taking children in need of special protection or particularly vulnerable, e.g. children still in abduction and/or in servitude, the TRC shall notify the CPA, and arrange with the CPA the appropriate methods of support, including securing their release.

11. The TRC and CPAs shall make arrangements to keep child statement givers informed about the progress of the work of the TRC.
**Vulnerability assessment:**

- To be completed by the Designated CPA Social Worker prior to referring the child to the TRC Statement Taker.
- If any boxes are checked, do not proceed with TRC referral.

### Child

1. Name .................................................................
2. Age .................................................. □ 12 years and under
3. Child living with parent .......................................................... □ No
4. Child living with extended family ..........................................................
5. Date of reunification .......................................................... □ Less than 6 months
6. Last visit follow up visit of CPA ..........................................................
7. Child’s participation in community life ..........................................................
   (sports, traditional activities, ...)
8. Is the child attending or completed school?
   - Name of school: ..........................................................
   - Level: ..........................................................
9. Is the Child attending or completed skills training?
   - Name of the organization organizing skills training: ..........................................................
   - Name of the skill he/she is trained in: ..........................................................
   □ Child not attending school or skills training
10. Is the Child facing specific problems at school or in skills training?
   (poor attendance, always late...)

### Progress in school / Does the Child find it difficult to learn?

- SW to assess the child’s education/skills training situation
  - Child has significant adjustment issues in school skills training
- Was the Child exposed to stress at home or in neighborhood?
  (always alone, bad nickname, bullied by others)
  □ Physically abused
  □ Sexually abused
  □ Neglect

### Community

12. Community has a good understanding of TRC.
   - What type of message the community has received about TRC? ..........................................................
   - Information meetings were held? ..........................................................
   - When information/sensitization were held? ..........................................................
   - If possible name or function of the person/organization who made information/sensitization? ..........................................................

### Safety check list:

- To be completed by the Designated CPA Social Worker.

1. Selection of Child (Social Worker and Statement Taker)
# If any boxes are checked, do not proceed with TRC referral.

- Passed vulnerability test □ No

2 Preparation for the interview (Social Worker)

- Social Worker reviews TRC process with Child and Guardian □ No
- Consent Given by Child and Guardian □ No
- Checking of referral possibility to another person in case of safety needs (Chief, Elder, Teacher,...) □ No
- Active Child Welfare Committee should be in the community □ No
- Private and confidential place is available for the interview □ No
- Community child support services identified (SDW, local/international NGOs,...) □ No

3 Interview (Statement Taker + Social Worker)

# If any boxes are checked, do not proceed with TRC interview.

- Further information on TRC by Statement Taker □ No
- Consent of Child and Guardian □ No
- Child informed about the possibility to request presence of Guardian or Social Worker present during interview □ No
- Obtain a safe, confidential place □ No
- Interview by Statement Taker □ No
- Child, Guardian, Statement Taker and Social Worker review safety plan and follow up measures □ No
- Social Worker should debrief the child immediately after interview □ No

4 Follow up (Social Worker)

- First follow up visit after 7 days □ No
- Second follow up visit after 14 days □ No
- Use of referral supports if necessary □ No
Truth and Reconciliation Commissions in Guatemala and Peru: 
The Children’s Perspective

Christine Bakker

Introduction

In recent years, Truth and Reconciliation Commissions (TRC’s) have presented their reports on the internal armed conflicts in Guatemala (1999) and Peru (2003). In both countries, hundreds of thousands of people were killed, disappeared, tortured or sexually abused. Many children, adolescents and youth were among the victims.

The children and youth of today, -as well as the next generations-, will have the task to achieve national reconciliation in their country. It would therefore seem logical that they also take part in the work of the TRC’s, which stand at the beginning of this process. Moreover, today’s children need to be prepared for their task of shaping a new culture of non-violence, mutual respect, justice, democracy, observance of human rights and peace. Therefore, peace education is one of the focal points in the recommendations of both TRC’s.

This paper aims to present and comment on the participation of children in the work of the two TRC’s (paragraph 3) and to discuss the implementation of the child-related recommendations so far (paragraph 4). Before that, the background of the conflicts giving rise to the TRC’s will be addressed (paragraph 1), and the general features of these Commissions, including their mandate, their cooperation with national and international actors, the link with judicial accountability mechanisms, and their reception by the people and the government. Finally, some conclusions will be drawn from the experiences in Guatemala and Peru, with a view to the discussion on ‘lessons learned’ and suggestions for future TRC’s.

1. Background of the Conflicts Giving Rise to the Truth and Reconciliation Commissions

1.1. Guatemala

Guatemala was affected by an armed conflict from 1962 until 1996. The confrontation between government forces and supporters of the leftist movement Unidad Revolucionaria Nacional Guatemalteca (URNG) started with protests against the military government led by President Miguel Ydigoras Fuentes. The country had been ruled by military dictatorships since the US backed overthrow of the democratically elected government of President Arbenz Guzman in 1954.60

The government forces adopted an extremely violent counterinsurgency strategy, razing villages and killing tens of thousands of civilians, especially in the early 1980’s. The estimated number of people who were killed or disappeared during the civil war is around 200.000, most of them belonging to the population groups of Indian origin, in particular the Mayan people. Thus the initially politically motivated confrontation turned into a government campaign of violence directed towards ethnic groups which. According to the Guatemalan

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60 This occurred after land reforms introduced in 1952 affected important US economic interests embodied in the United Fruit Company.
TRC, the Comision de Esclarecimiento Historico (CEH), this violence even amounted to genocide.

The underlying causes of the armed conflict were both of an internal and of an external nature. At the national level, an anti-democratic political tradition evolved after the country’s independence in 1821, with the creation of an authoritarian State which excluded the majority of the population, was racist in its precepts and served to protect the economic interests of the privileged minority. The weakness of the State’s institutions and legal norms legitimising the suppression of civil and political rights led to a culture of social injustice, in which protests only led to further repression. At the international level, the cold war and the anti-communist policies of the United States also contributed to the polarization within Guatemala. US military assistance was directed towards reinforcing the national intelligence apparatus and for training in counterinsurgency techniques. On the other hand, Cuba provided political, logistic and training support to the Guatemalan insurgents.

The CEH has confirmed that a large number of children, adolescents and youth, especially from the Mayan population, were among the victims of arbitrary execution, forced disappearance, torture, rape and other violations of their fundamental rights. Also many children were orphaned and abandoned. Children, adolescents and youth alike often witnessed the violent death of their parents and other family members. Through these traumatic experiences many of them lost the possibility of living a normal childhood or adolescence within the norms of their culture.

1.2. Peru
In Peru two decades of massive human rights violations began, paradoxically, with the return of democratic rule after being governed by several military junta’s since the 1930’s. In 1980, the Maoist oriented Partido Communista del Peru- Sentiero Luminoso (PCP-SL or Shining Path) initiated an armed struggle against the Peruvian State, striving for a fundamentalist communist state model. This resulted in an internal armed conflict between supporters of this party and the armed forces for more than a decade, of which the number of fatal victims is estimated at more than 69.000. As from 1984, another revolutionary movement, the Movimiento Revolucionario Túpac Amaru (MRTA) joined the armed campaign against the government, but on a much smaller scale.

Unlike in Guatemala, where the atrocities were generally committed by state agents against the population, in Peru the serious human rights violations -such as the forced disappearance of persons, torture and arbitrary executions- were committed by both sides in the conflict. The Shining Path initiated the violence by killing local authorities in the remote rural areas, taking effective control in the communities, violently coercing the population to support its new rule, and provoking a violent reaction from the State and the Military. With the capture in 1992 of Abimael Guzman, leader of the PCP-SL, the direct confrontations lessened. However, international crimes continued to be committed under the rule of the elected President Alberto...

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62 This number is estimated at 69.280; ‘Hatun Willakuy, Versión abreviada del informe final de la Comisión de la Verdad y Reconciliación’, February 2004, p. 17, footnote 1.

63 According to the report of the Truth and Reconciliation Commission, 54 % of the reported victims (deaths or disappearances) of the internal armed conflict can be attributed to the PCP-SL; 1.5 % to the MRTA; 37 % to State agents (armed forces and police), paramilitary groups and ‘comités de autodefensa’ and the remaining 7.5% to others (report Hatun Willakuy, op. cit., pp. 18, 19).
Fujimori, who led a repressive regime between 1990 and 2000. In September 2001, the Comisión de la Verdad y Reconciliación (CVR) was established.

According to the CVR, decades of military rule had laid the foundations for discrimination and centralization in Peruvian society. The main factors explaining the emergence of the armed conflict are the divisions between the poor and the rich; between Lima and the provinces; between the three main climate zones (coast, forest and mountains); and between ethnic population groups (Creoles, Mestizos and Indians). The richer Creole population in the capital and its surroundings had adopted a discriminatory attitude towards the poorer remaining population groups, especially in the rural areas.

The CVR concluded that the armed conflict had a particularly devastating effect for children, adolescents and youth. As in Guatemala, also in Peru many children were killed or witnessed the violent torture and death of their parents and other family members; were left orphaned and abandoned; and lost any possibility of living a normal childhood within the norms of their culture. A large number of adolescents and youth were also cruelly killed, others were left traumatized and forced to take care of younger brothers and sisters after they lost their parents. Many girls have to live with the psychological scars of sexual abuse. The testimonies given to the CVR show that the fear, grief and hatred they experienced often left serious scars and led to violent attitudes towards others and later to their own children as well. A specific factor compared to the situation in Guatemala, was the recruitment of thousands of youth by the revolutionary movements, who were then forced to use violence against the unsupportive people in their own communities. If they refused, they were tortured and killed themselves.

2. General Features of the Truth and Reconciliation Commissions

2.1. Guatemala

The establishment of the CEH was decided in 1994 by virtue of the Oslo Agreement, one of the first agreements concluded between the State and the URNG as a result of the peace negotiations. These negotiations were actively promoted and supported by the United Nations, and came to a final conclusion in December 1996.

The mandate of the CEH was to conduct a full and detailed investigation into the human rights violations and acts of violence committed during the armed conflict. The CEH was requested to submit a report to the Parties and to the UN Secretary General, present the results of its investigation and make recommendations. These recommendations had the purpose of keeping alive the memory of the victims, promoting a culture of mutual respect and

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64 Mr. Fujimori fled to Japan after being accused of large scale fraud with public funds. After his impeachment by Congress, the Judiciary opened investigations against him and others in two cases of severe human rights violations, in addition to several other investigations into charges of corruption. Although Peru has requested Mr. Fujimori’s extradition, Japan refuses to do so on the ground that he also possesses the Japanese nationality.

65 This division in the Peruvian society was exacerbated by the massive migration from rural areas to the capital. Moreover, a ‘power vacuum’ arose in the rural zones after the dismantling of the local state organs set up as part of the agricultural reform in the 1960’s. It is in these zones that the PCP-SL established its first power-base.

66 See above, note 5, at p. 438 (par. 32).


observance of human rights and strengthening the democratic process. The Commission was also expected to pronounce itself on possible forms of reparation for the injuries suffered. An important limitation to the Commission’s mandate was the proposition that the report could not attribute responsibility to any individual. This prohibition effectively barred any link between the CEH and judicial accountability mechanisms.

Moreover, it was one of the major reasons why the Catholic Church decided to establish its own truth commission. It held that the official report of the CEH would, according to all probability, be so timid that it could not make any meaningful contribution to laying the groundwork of a new and better Guatemala. The report of the Church’s investigations, Guatemala: Nunca Mas, was presented in April 1998 by Bishop Juan Gerardi, who was murdered two days later. His assassination is widely believed to be related to the interests of the Military, since the report explicitly identified several army commanders who were said to be involved in the atrocities. Thereafter, the follow-up activities of the Church’s truth commission virtually came to an end.

The CEH report indeed does not mention any names of alleged perpetrators of the atrocities found. Agreement was reached on a clear division of functions in which penal prosecution was left to the exclusive competence of the Judiciary. To the relief of the CEH, the Law on National Reconciliation, adopted a few days before the conclusion of the final Peace Agreement of 1996, indeed formally provided that the amnesty decreed by it did not apply to genocide, torture, forcible disappearance and other international crimes. Nevertheless, the preserved possibility of national prosecution and conviction of those responsible for the atrocities has not led to any substantial progress in the field of judicial accountability in practice.

Although the United Nations and many States expressed their full support to the CEH, obtaining financial resources proved extremely difficult, also from the side of the Guatemalan government. Moreover, the CEH was barred from access to governmental archives. The lack of assistance was even greater on the side of the Military and the secret services. Before drafting its recommendations, the CEH consulted a large number of local organizations of civil society, and discussed their proposals at a gathering in May 1998. Also during its investigations, the CEH cooperated with national human rights organizations who organized workshops and other information activities.

During the two years of its work, the Commission was well received and became an integral part of the political life of the nation. The presentation of the report at a massive celebration attended by thousands of people, in February 1999, was a glorious moment for the nation. However, the euphoria of that day did not lead to a permanent force which could determine the future course of national policies. The official reaction was and still is generally negative

71 See above, note 6.
72 On the other hand, in a case filed by Nobel Peace Prize winner Rigoberta Minchu, the Spanish highest court has recently opened the possibility of prosecution before Spanish courts of Guatemalans accused of international crimes committed during the armed conflict, based on universal jurisdiction, even if no Spanish citizens were involved (Decision of 4 October 2005).
73 The government of President Arzu did not assume responsibility for the human rights violations. The government also declined to establish a follow-up mechanism, This situation has not substantially changed since

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and civil society has not been strong enough to insist on compliance with the recommendations.\textsuperscript{74}

2.2. \textit{Peru}

Soon after the election of Alejandro Toledo in September 2001 the \textit{Comisión de la Verdad y Reconciliación (CVR)} was created. Its tasks were to provide clarifications on the historic and sociological factors which enabled the armed conflict; on the facts and on the corresponding responsibilities both on the side of the State agents and on that of the revolutionary movements. Contrary to the CEH in Guatemala, the Peruvian CVR was explicitly requested to identify individuals who were involved in the human rights violations, with a view to their criminal prosecution. The Commission was also charged to propose initiatives for restoring peace and for achieving reconciliation among all Peruvians. In August 2003 the Commission presented a comprehensive report of some 20,000 pages, presenting an extremely well documented analysis of the armed conflict in all its aspects, as well as a series of relatively detailed recommendations.

Whereas in Guatemala the CEH was created as part of the internationally supported Peace Agreements, the CVR in Peru was especially the result of a coordinated effort at the national level. Several Peruvian NGOs have contributed to paving the way at the political level, creating public support, and effectively supporting the investigations.\textsuperscript{75} The CVR also received support from public institutions, including the \textit{Defensoría del Pueblo} (Ombudsman) and the Ministries of Defence, Internal Affairs and Police, and Education. The public television and radio stations and the national press ensured regular and broad dissemination of information about the Commission’s activities.

At the international level, the CVR benefited from financial, political and in some cases operational support from many States and international organizations, in particular the Red Cross, The European Union and the United Nations. At the UN level, support was provided by the High Commissioner for Human Rights and especially by UNDP. However, an official involvement of the UN such as in the Guatemalan case was absent in Peru.

Another difference with the Guatemalan CEH concerns the role of the Truth and Reconciliation Commission in the pursuit of judicial accountability. Contrary to the prohibition to do so in Guatemala, the Peruvian CVR explicitly recommended the prosecution and trial of the authors of international crimes committed in 47 identified cases. These cases have indeed been taken up by the Public Prosecutor and in some of the major cases the court proceedings have been launched. Therefore, the CVR has directly contributed to facilitating the criminal prosecution of those responsible for the atrocities.\textsuperscript{76}

1999, despite the positive attitude adopted by the government of President Portillo (2000-2004). The newly elected government in 2004 did not make any commitments with respect to the CEH report.

\textsuperscript{74} Tomuschat, see above, note 9, p. 254-255.

\textsuperscript{75} A prominent role was played by the \textit{Coordinadora Nacional de Derechos Humanos}, an umbrella organization of NGOs promoting human rights and democracy. The CVR also concluded cooperation agreements with a series of organizations which are active in fields ranging from legal issues (such as the \textit{Comisión Andina de Juristas}) to the promotion of mental health, or anthropological research.

\textsuperscript{76} The judicial proceedings were not hampered by the laws adopted under President Fujimori in 1995, which granted amnesty to military, police and civil personnel who were accused of human rights violations during the armed conflict between 1980 and 1995. In fact, these so-called ‘self-amnesty laws’ have been left unapplied since a decision from the Inter-American Court of Human Rights of 14 March 2001, declaring them to violate the American Convention on Human Rights.
It is difficult to assess the effects of the CVR on Peruvian society, also because its report was only published two years ago. However, the general feeling is that the CVR report has indeed been adopted as a guide for the government’s priorities and policies in the areas for which it has made recommendations. Nevertheless, insufficient resources as well as political and economic instability do not favor the post-CVR process.

3. Involvement of Children and Youth in the TRC process

3.1. Guatemala
There has been no direct involvement of children or youth in the work of the Guatemalan CEH, other than the participation of local NGOs which are promoting the interests and rights of children and youth in the above mentioned consultation process.

3.2. Peru
On the other hand, in Peru young people have been actively and successfully involved in the work of the Comision de la Verdad y Reconciliacion (CVR). A Voluntary Program, Promotores de la Verdad (PROVER), was set up by the TRC in January 2002 with a view to support its work and spread it among the population. Some 1400 volunteers participated in this program, the large majority being young people from the age of 17, mostly students aged between 20 and 25. They were children in the period when the atrocities occurred. The main objective of PROVER was to disseminate the work of the CVR through cultural, educational and communication activities. At the request of the CVR, the volunteers also contributed to the collection of information and evidence of cases falling within its mandate.

The volunteers were mainly sought through the universities and local organizations which are active in the field of human rights protection or related areas. The response from the academic institutions was extremely positive: volunteers from all national universities throughout Peru participated in the program, as well as from private universities in Lima. A particularly active role was played by the Catholic University of Lima (PUCP), whose rector, Salamon Lerner, was also the President of the CVR.

The main activities undertaken through PROVER were:

- The organization of social and cultural activities throughout the country with a view to promoting the participation of people in the process of the CVR;
- Training of the volunteers in order to prepare them for their tasks within PROVER;
- Dissemination of information throughout the country about the CVR process, its objectives, activities, and its progress; about the Campaign for the Disappeared, and (at a later stage) about the CVR report and recommendations;
- Providing support to people who suffered from and/or witnessed the violence, and document the testimonies.

Through these activities, the young volunteers directly participated in the process of truth seeking and helped broaden the awareness among the Peruvian people of the CVR’s efforts. They generally supported the work of the professionals assigned to the regional offices of the CVR, thereby increasing the number of people reached. In areas where no regional CVR

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77 The Decree creating the CVR and determining its tasks also specified that mechanisms must be set up to involve the population in the work of the CVR, Decreto Supremo No. 065-2001-PCM.
78 Other participants included professionals from training institutions, Human Rights organizations and local leaders.
offices existed, the PROVER volunteers directly cooperated with local organizations to carry out the program’s activities.

An evaluation of PROVER\textsuperscript{79} concluded that the objectives of the program have for the most part been achieved. The volunteers generally valued their work and were satisfied with their support to the CVR. Most of them said to have gained a lot from their experience with PROVER, both for their personal development and in terms of professional experience. According to the evaluation, for many of these young people human rights now form part of their life agenda.\textsuperscript{80}

However, several participants complained that the activities and rules had been decided by the CVR before they joined the process, so that there was hardly any scope for suggestions or initiatives from the volunteers themselves. The lack of information about the role of the volunteers has led to difficulties –sometimes amounting to discrimination or mistreatment–, with the professionals working for the field offices of the CVR.\textsuperscript{81}

Despite these flaws, on the whole the program was considered a successful and essential contribution to the work of the CVR in Peru during its operating period, which ended in July 2003.

Several initiatives were taken to pursue the involvement of young volunteers in the post-CVR phase as well. In Lima, the Grupo PROVER was set up in 2004 by former participants in the voluntary program, aiming at the further distribution of the CVR report and at broadening awareness of the political violence and its consequences. It organizes interactive information workshops for university students and some informative activities at secondary schools and in parishes. Follow-up activities by these young people are hampered by the logistical difficulties in getting volunteers organized and activities coordinated across the country. Another problem is time-constraints, since the young volunteers are mostly students and often have a job as well. Several other groups and NGOs are directing post-CVR activities to youth too.\textsuperscript{82}

PROVER was the only ‘institutionalized’ channel through which young people in Peru were able to participate directly in the work of the CVR. There has been no involvement of children under the age of 17 in this process. It may therefore be concluded that the Peruvian experience with the involvement of young people in the CVR process has been positive in terms of mobilizing and training a substantial number of youngsters, particularly students, who played a key role in the operational work of the Commission. It is regrettable that the volunteers were neither involved in the conception of their own activities, nor in the formulation of the CVR’s recommendations. It seems that their participation was especially sought to fill the gap in the CVR’s human resources. Had the volunteers been given more responsibility and possibilities

\textsuperscript{79} Comision de la Verdad y Reconciliacion, Informe de Evaluacion e Impacto del Programa de Voluntariado, by Federica Braun, Lima, July 2003, p. 8.
\textsuperscript{80} Idem, at p. 56.
\textsuperscript{81} Idem, at p. 55.
\textsuperscript{82} For example, the Instituto Bartolome de las Casas has launched projects for volunteers strengthening social responsibility based on the CVR report and has implemented a ‘Memory Workshop’ with various groups of young people; the Movimento San Marquino por la Verdad has also organized discussions at the Universidad Nacional Mayor de San Marcos, despite a somewhat hostile attitude in that university towards the CVR process; and the Movimiento Ciudadano Para Que No Se Repita has recently implemented a program dedicated to youth and has mobilized many young people for the commemoration of the second anniversary of the presentation of the CVR report.
to influence the process, their feeling to have contributed something useful to their country would have been even stronger.

4. Recommendations of the Truth and Reconciliation Commissions Relating to Children and their Implementation

4.1. Guatemala

4.1.1. Recommendations Concerning Children

The Guatemalan CEH formulated two sets of recommendations which are specifically aimed at children and youth. These recommendations concern, on the one hand, children who disappeared, or were illegally adopted or separated from their families; and on the other hand, the need for peace education.

The CEH recommended the Government to urgently promote activities aiming at the search for disappeared and illegally adopted children including at least the following measures:

- The creation of a National Commission for the Search of Disappeared Children, with the task to search for these children and document their disappearance;
- The promulgation of legislation allowing the release of information by the courts and other state organs on children who were adopted during the armed conflict;
- A massive information campaign in Spanish and in all indigenous languages about the activities and measures put in place for the search of children;
- The adoption of legislative measures allowing for the revision of adoptions carried out without the knowledge or against the will of the natural parents.\(^8\)\(^3\)

The CEH recommendations on *peace education* are included among the Measures to Promote a Culture of Mutual Respect and of Observance of Human Rights.\(^8\)\(^4\)\)

The CEH considers that national harmony and reconciliation require a strong effort of cultural transformation, which can only be promoted through an active policy of peace education. In concrete terms, the CEH recommended that the curriculums for primary, secondary and university education must be adapted to include teaching on the causes, the course and the consequences of the armed conflict, as well as on the content of the Peace Agreements.

The Commission also held that the State should co-finance an education campaign to be developed and carried out by the national human rights organizations, on a culture of mutual respect and peace, aimed at the various political and social sectors. Finally, the CEH advised the government, through the educational reform foreseen in the Peace Agreements, to encourage tolerance and respect and to promote self-knowledge and knowledge of the other to help overcome the dividing lines resulting from the ideological, political and cultural polarization.\(^8\)\(^5\)

4.1.2. Implementation

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\(^8\)\(^3\) According to the CEH, such a revision always has to take account of the opinion of the adopted person and in such a way that cordial relations are promoted between the natural and the adopting parents, in order to avoid later traumas for the adopted person.

\(^8\)\(^4\) See note 2, Chapter 5, par. IV, at p. 68 and 69.

\(^8\)\(^5\) The Commission asked for the technical support from the Organization of American States (OAS) through its *Programa Cultura de Dialogo: Desarrollo y Recursos para la Construccion de la Paz*, and from UNESCO, through its *Programa de Cultura de Paz*. 
The successive governments in Guatemala have not given any priority to the implementation of the CEH recommendations in general. This is also true for the recommendations concerning disappeared children, which for their most part have not been taken up by the government.

The picture is slightly more positive for the recommendations on peace education, where some first steps have been taken towards the adoption of education policies geared towards peace education. The Ministry of Education, together with UNESCO-Italy in the context of its *Proyecto de Cultura de Paz*, recently organized a national forum on civic training entitled *Educar para la Democracia* with a view to discuss the progress made with the educational reform for the period 2004-2008 and to reflect on the relations between democracy, citizenship and education. The Ministry of Education stressed that the education reform incorporates the input from various national and international organizations and institutions in order to make it a coherent national project. However, a comprehensive peace curriculum for primary and secondary schools and for universities, as recommended by the CEH, has not been developed so far.

On the other hand, several innovative education projects have been launched in recent years and are still being implemented in Guatemala, mostly at the initiative of NGOs and/or with the support from international organizations or foreign aid funds. UNICEF-Guatemala is involved in some of these activities as well. The main projects which explicitly address the issues raised in the CEH recommendations on peace education are:

- **The Promoting the Right to Education, Respect within and between Cultures, and the Exercise of Citizenship in a Multicultural society in the Process of Peace Building and Democratic Transition Project**, supported by UNICEF-Guatemala, aims to develop and consolidate educational policies and innovative pedagogical models in several fields, including peace and democracy education. Its participants are children and youth who live in precarious situations in rural and urban areas, particularly indigenous girls. The project supports the implementation of education reform at primary schools, and the education reform itself in middle and secondary education.

- **Child Rights and Education for Peace**, a project led by the *Coordinadora Interinstitucional de Promocion por los Derechos de la Ninez* (CIPRODENI), with the objective ‘to contribute to the transformation and empowerment of citizens to be reflected in specific actions at school and in the community towards the construction of a culture of peace, democracy and respect for the exercise of children’s human rights’. Activities included training of teachers, parents and children on human rights, peaceful conflict resolution, and citizen participation; the formation of school boards active in the fields of children’s rights, a culture of peace and upbringing matters. 86

- **A Different Guatemala, Political Advocacy and Historical Memory.**

  The main goal of this project led by the Catholic Church and supported by UNICEF, is to train youth from parochial groups and education centers to develop their ability to participate in, and influence the social reality in order to construct democracy and education for a culture of peace. The training events prioritized recreation and the

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86 In 2003, 400 teachers were trained in 15 municipalities, who made the commitment to train 10 other teachers each; 350 parents and school board members and 350 boys and girls from school governments participated in training sessions. In 2004, 320 teachers were trained in 16 municipalities, also committing themselves to replicate their experience with ten others each.
recovery of joy as the means to leave violence and hopelessness behind, calling on spirituality as the basis of pardon for things past, and focusing on self-knowledge in order to tackle life-situations. It should be noted that only boys and young men benefited from this project.  

- **REMHI: Devolution to Children and Youth of the Historical Memory Report.**  
  This project was developed by the archbishop’s Office of Human rights of Guatemala (ODHAG) and aimed to make known to Guatemalan children and youth the historical memory of the country based on the Church’s report ‘Guatemala: Never Again’ and the CEH report. The teaching documents were discussed in workshops with educators, teachers and students and were printed with the financial support of Norway. Discussions with the Ministry of Education are underway since early 2004 to obtain permission for its implementation.

- **National Workshop Educating for Peace.**  
  This workshop was first organized in September 2002 by the European Union (PROASE), UNICEF and USAID, and was attended by government representatives from the Ministry of Education, NGOs, human rights organizations and representatives from civil society. Similar workshops were held in 2003 and 2004. The meetings aimed 'to promote the exchange of experiences and reflection around an education for peace, the individual’s dignity, democracy, human and children’s rights, allowing for participatory construction of a new model of peace and democracy within the framework of equity and respect for human rights.'

This overview shows that NGOs and the Catholic Church, with the support from international organizations and donors, have been quite active in developing and implementing education activities directed towards the objective of education for peace and democracy. The Ministry of Education has been involved in some of these activities, and several initiatives aim to support the government’s educational reform process.

It seems that the lack of a prompt and coordinated response from the government to the CEH recommendations has stimulated organizations of civil society and the Church to come into action. Although the results cannot be said to have a broad and country-wide scope so far, they certainly have a positive impact in the communities and departments where they have been or are being implemented.

### 4.2. Peru

#### 4.2.1. Recommendations Concerning Children

The main recommendations of the Peruvian TRC which specifically relate to children are those in the field of education. The CVR has underlined the need for an educational reform towards a system in which the promotion of democratic values is a central feature. In particular, the CVR recommended to:

- Put emphasis on educational policies aiming to transform the school into a place where the humanity of the pupils is respected and where a contribution is made to the integral development of their personality;

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87 In 2003 and 2004, 227 boys, adolescents and young men were directly trained and 2510 benefited through replication activities.
• Set up a study program which stimulates knowledge and is oriented towards the well-being of the pupils, with a view to achieve an all-round education and to avoid the inclination towards violence;
• Promote an education in respect for ethnic and cultural differences, and adapt the school in all its aspects to the ethnic-linguistic, cultural and geographic diversity of the country;
• Strengthen participation and democratization mechanisms at school;
• Prohibit and sanction the use of any form of physical punishment or humiliating practice as a form of discipline.

The Commission also recommended developing a special education program for schools in rural areas, especially for those parts of the country most affected by the violence.

According to the CVR such a program should:

• Give urgent attention to the most vulnerable groups, starting with the youngest children in the areas of greatest need;
• Promote an alphabetization program giving priority to adolescent girls and women;
• Reorient the contents, methods and coverage of the education towards the capacities required for entering the labor market;
• Improve the physical structure of rural schools; provide sufficient incentives for teachers to go and work in those areas, and promote an active support to rural schools from the State agencies responsible for education and health management.

The CVR also developed a set of education materials; methodological guides for teachers and guidelines for those training the teachers.

4.2.2. Implementation: the Recordando-nos Project

The training materials developed by the CVR have been used as an input to a pilot project named Recordando-nos, which was conceived as part of the implementation process of the CVR recommendations on education. This project is a joint effort of the education faculty of the Universidad Catolica del Peru (PUCP) and the Instituto de Defensa Legal (IDL), a non-governmental organization promoting democracy and human rights.\footnote{Together with other NGOs, IDL also played an active part in the process leading up to the creation of the CVR; supported its central place on the national agenda, and regularly consulted with members of the Commission on the content of its work.}

The initiative is financially supported by the Peruvian Ministry of Education, the Fondo Santa Maria, Save the Children UK, and UNICEF-Peru.

In the framework of the Recordando-nos project,\footnote{Proyecto Recordando-nos, Convenio Instituto de Defensa Legal y Facultad de Educacion de la Universidad Catolica del Peru.} education materials and teaching guidelines have been developed involving young professionals from the education faculty of the PUCP, for primary and secondary schools.\footnote{Primary and secondary school teachers were not directly involved in the conception of these materials. They will however be able to suggest adaptations during a testing period and its evaluation.} This curriculum is centered on the themes identity and values, based on the CVR report. The main findings and conclusions of this latter report are integrated into the materials, adapted for each age group. It also incorporates the priorities of the Ministry of Education, namely Human Rights and citizenship in the proposed teaching methods.
The training materials are currently being disseminated and the proposed methods will be tested in 11 regions of the country.\(^{91}\) To this end, the project’s strategy envisages the training by IDL of 28 professionals at the education faculties of the local universities, who will then ensure the training of teachers in the schools participating in the project. They will be given all the conceptual and methodological elements necessary to adequately prepare the school teachers for using the education materials. The pilot project aims to reach 22,000 students at primary and secondary schools; 550 teachers and 50 schools. The use of the materials in practice will serve to adapt them, taking account of the experiences and comments from students, teachers and the University facilitators.

The Ministry of Education has committed itself to adopt these materials as part of its official education program once their validation process is concluded. The initial testing and validation process should be finalized in February 2006, so that the adapted materials can be distributed throughout the country and be used as from the beginning of the new school year.

The chances of success for the Recordando-nos project are high, thanks to the commitment of the Ministry of Education and to its strategy to actively involve universities in the different regions, thereby broadening the project’s base and spreading it to a large number of students and teachers. It is, however, surprising that the pilot project has given priority to students in urban areas, and to those who were not directly affected by the political violence. According to a representative of IDL, limited resources obliged the project designers to focus, in this first phase, on either the urban or the rural schools. Because of their different backgrounds and experiences, it was not possible to develop materials which could be used in both sectors alike. Nevertheless, the question arises why the project did not follow the priorities formulated in the CVR’s recommendations, which explicitly call for urgent attention for the rural areas, which were most directly affected by the violence. It can be assumed that the development of a curriculum for rural schools will be undertaken in a next phase of the project, provided that the financial and government support persists in the coming years.

5. Conclusions

The experiences with the Truth and Reconciliation Commissions in Guatemala and Peru have been quite different. Perhaps the most crucial difference is the degree of government commitment to take on the heavy and long term task to achieve some form of national reconciliation, now that the truth has been clarified.

This commitment seems to be quite strong in the case of Peru, where the report of the CVR has become a crucial factor in society and an inevitable guide for government policies in those fields for which the commission has made recommendations. Even though progress is not extremely rapid - the report has only been published two years ago-, the government has expressed its firm commitment to work along the lines proposed by the CVR and there a positive signs indicating that this is not a hollow promise..

On the other hand, in Guatemala, the report of the CEH has not become an integral part of the government policies. Despite the massive popular support for the Commission during its work and for its report when it was presented, the successive governments did not adopt the recommendations as a political priority at all. Therefore, six years after the hardly any action has been taken to put the Commission’s proposals into practice.

\(^{91}\) Lima, Pasco, Trujillo, Lambayeque, Cusco, Arequipa, Ayacucho, San Martin, Huanuco, Iquitos and Cajamarca.
An important factor explaining the differing degree of State ownership of the post-TRC process is the political environment in which the Truth and Reconciliation Commissions were created. Whereas the Peruvian Commission was set up by the newly elected government itself after the departure of President Fujimori—under whose government many of the atrocities were committed—the Guatemalan CEH was established as part of the UN brokered Peace Agreements, and were thus part of a ‘compromise’ between the parties in the armed conflict.

These different approaches to the TRC’s and their reports are also reflected in the implementation of the recommendations which specifically concern children. Both Commissions had formulated detailed proposals for the development of a peace curriculum to be integrated into the national education programs, adapted to the specific linguistic needs and background in different parts of the country. Both Commissions emphasized the need for a comprehensive education aiming at a change of mentality; eradicating racism; non-violent resolution of conflicts; and at promoting human rights, democratic values and peace. The Guatemalan CEH also made specific recommendations concerning the search for disappeared and illegally adopted children.

The picture of the implementation of these proposals is mixed. In Peru, the general commitment to the CVR process can also be seen in the field of education. The Ministry of Education has agreed to a pilot project testing a peace curriculum developed by a national NGO (IDL) and a university (PUCP) with the support of some external donors. If the teaching materials prove to be adequate, they will be integrated into the national education program and implemented throughout the country. Although it is only a start, the government is showing an interest to move ahead.

In Guatemala, on the other hand, no significant action has been taken to implement the child-related recommendations of the CEH. However, NGOs and the Catholic Church have stepped in to fill this void with several initiatives in the field of peace education. Although these projects, some of which are supported by Unicef and other multilateral or bilateral donor organizations, do not have a nation-wide scope, they have quite a broad reach and respond to some of the needs identified by the CEH.

The experiences in Guatemala and Peru also differed with regard to the involvement of children or youth in the work of the Truth and Reconciliation Commissions. In Guatemala, no efforts seem to have been made to make children or young people actively participate in the process. However, in Peru a positive experience was made with a broad volunteer program, Promotores de la Verdad (PROVER), through which young people directly contributed to the work of the Commission. After receiving some specific training themselves, the young volunteers organized information gatherings about the CVR, helped with the administrative side of the information gathering and sometimes independently carried out investigations and receiving testimonies, especially in remote rural areas. The youth who took part in PROVER highly valued their experience, which introduced them into the deep problems which the country faces and the challenges lying ahead. Despite a generally positive evaluation of the program, a major shortcoming was the lack of involvement of the young participants in the conception and planning of their contribution. Moreover, the volunteers were not involved in the formulation of the CVR recommendations.

Bilateral and multilateral donors are already contributing to the key activities promoting the implementation of the TRC recommendations in both countries. Their continued financial and
technical support to these projects, especially in the area of education, is of the utmost importance.

It is quite early to assess the effects of the TRC’s in general, and on children and young people in particular. The path towards true reconciliation and a peaceful democratic future is long and requires a sustained long term effort, both from the government and from civil society. A central role must be played by children and young people, who have to take on the process and pursue it also in the future. Despite the many difficulties highlighted in this paper, at least the first steps have been taken on this path, which was laid out by the Truth and Reconciliation Commissions.

Points for Discussion

1. How can government commitment to TRC’s and to implementation of their recommendations be strengthened, especially in situations where leaders of the former conflict still occupy key positions?92
   - More active involvement by the international community (States/multilateral organizations)
   - Requiring a firm commitment by the government through a law on the implementation of the TRC’s recommendations

2. Volunteer programs such as the Peruvian PROVER, directly involving young people in the operational work of the TRC, should be recommended to future TRC’s. Which improvements should be made?
   - Active participation of the volunteers in the planning phase and on the recommendations of the TRC
   - Involvement of other youth besides university students

3. How can TRC’s contribute to the development of peace curricula and to building local ownership of adequate peace education integrated in official education programs?
   - Include specific guidelines for peace curricula in their recommendations
   - Recommend a follow-up mechanism with the active participation of the Ministry of Education and specialized local NGOs
   - Recommend the government to make use of peace curricula conceived by international organizations (eg the OAS, UNESCO, UNICEF) and by other countries, as references

4. Even though each country has its specific needs and background, certain aspects of peace education are of a general value. How can experiences with peace curricula be better shared?
   - A role for multilateral organizations (UNESCO, UNICEF)
   - Creation of online-database reassembling training materials, including concrete exercises for different age groups and guidelines for teachers

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92 Such as in Guatemala, where Mr. Rios Montt, former dictator during the civil war, is still president of Congress.
5. The approach of ‘multiplying’ training for teachers, such as put into practice in the Peruvian *Recordando-nos* project and in some Guatemalan experiences has been successful so far. Which practices should be recommended for future (post) TRC processes?

- The creation of focal points within the regions through local universities in order to strengthen commitment and provide for a continuous follow-up
- Training professionals at these universities, who will then train teachers from local schools, who subsequently transmit the knowledge to their immediate colleagues.
Part I

Background

The International Criminal Court derives its mandate from the Rome Statute. Gender and Children Unit at the Office of the Prosecutor (referred to as OTP) has been established in order to assist the Prosecutor in fulfilling his obligation to meet special needs of the victims/witnesses as foreseen in the Article 54 (b).

Statutory Provisions

The Statute and Rules include procedures to protect the rights of children in their interaction with the court. These provisions are designed to encourage the involvement of that vulnerable group:
Art. 36 (8) (b)
Art. 42 (9)
Art. 43 (6)
Art. 54 (1) (b)
Art. 68 (1) (2)
Art. 68 (3)

Art 26 Exclusion of jurisdiction over persons under eighteen

The ICC does not have jurisdiction over persons who were under eighteen years of age at the time of commission of the offence. Children are therefore free from the threat or fear of prosecution.

Part II

Mechanisms to Encourage Children Involvement

Children as victims and witnesses

The ICC can be an effective mechanism for implementing existing child protection laws and standards and creating a deterrent effect on” warmongers”. 
During Investigation

Investigation Division being currently fully operational and proactive part of the OTP, had to establish and implement particular child-friendly measures in order to meet special needs of child victims/witnesses who are being interviewed. Whereas all Divisions of the Office of the Prosecutor are involved in creating overall legal policies on children’s involvement in Court’s procedures, Investigation Division guided by Gender and Children Unit developed very practical child-friendly measures that are easily applicable in respective interview situations in the field:

The OTP has adopted the following investigative strategies:

- Focused investigation
- Minimize the number of witnesses
- Avoid using children as witnesses, except in cases where evidence cannot be obtained from an alternative source.

1. Prior to the interview

   - Guidelines for investigators

   In order to support the investigators in developing special skills to conduct interviews in a safe and child-friendly manner, Gender and Children Unit has developed practical guidelines on interviewing children for the investigators. Theses guidelines are touching on essential psycho-social characteristics of children’s developmental stages as well as recommending concrete strategies in order to mitigate stress and result in child victims/witnesses feeling comfortable during the interview. Respective cultural and gender dimensions are also being emphasized as important factors for preparing and conducting an interview. Except for having to adapt approaches and methods to each respective cultural and social context, the investigators have to maintain some universal standards that are applicable throughout all the situations they are confronted with. Guidelines have also been reviewed and edited by internal (VWU) as well as external experts, such as UNICEF and Save the Children.

   - Child-friendly introduction of the Court

   Investigators are also using child-friendly ways to introduce the Court to children. Gender and Children Unit has also advised them on this issue by drafting a template child-friendly introduction that can be tailor made accordingly.

   - Psycho-social pre-interview assessment of child’s well-being

   Prior to the interview, well-being of every child victim/witness is being assessed by Associate Victims Expert (Psychologist) from Gender and Children Unit in order to determine whether it is possible to proceed with the interview or not, depending on the condition of respective child.
In cases where child’s condition is very fragile and/or severe consequences for his/her well-being could be severely impaired by the interview procedure, the interview has to be cancelled or postponed.

- **Parental consent and security assessment**

Prior to the interview, security situation of respective child victim/witness has to be assessed and in most of the cases parents/guardians are already included in the process, since the level of children’s awareness about security issues is limited. Except for the child’s own consent to be interviewed, parental/legal guardian’s consent is required in order to be able to proceed with the interview.

2. **During the interview**

- **Assistance of Associate Victims Expert**

Associate Victims Expert (Psychologist) is present throughout the interview to make sure that the child is at ease and to intervene when necessary. Also when it comes to specific questions connected to rather sensitive issues as well as to using alternative interviewing techniques (e.g. drawings), the psychologist is assisting in the process.

- **Accompanying person (part of pre-interview assessment, but implemented during the interview)**

Children are also entitled to accompanying person of their choice to support them during the interview. The choice ranges from parents, siblings, other family members, friends to social workers or other care givers they are close to.

- **Preference in gender of investigators/interpreters (part of pre-interview assessment, but implemented during the interview)**

Except for being encouraged to express their wishes regarding accompanying person, children are also asked to give their preference when it comes to the gender of the investigators and of the interpreters. In this way, besides feeling more comfortable during the interview procedure, children also are actively and equally participating in making decisions about themselves and the way they want to be treated.

- **Child-friendly interview setting and procedure**

Bearing in mind that the conditions in the field are rather limited, the investigators are always trying to set up the interview room in a child-friendly way by arranging everything to look less formal and therefore more comfortable, offering drawing material, snacks, water/juices, toys etc. Special attention is paid to the frequency of taking breaks (more often) and to the whole duration of the interview (as short as possible). Language and communication in general is always adapted to respective developmental level.
3. Pre-trial and During Trial

Meeting special needs of child witnesses at the Trial stage is a shared responsibility between OTP and VWU.

In order to minimize retraumatization and stressfulness, the Court can undertake the following steps:

Prior to the Trial:

- Child witness familiarized with the interior of court
- Child witness shown films of court proceedings and the functions of actors in court explained

Alternatives to testifying in person in the courtroom (Article 68 (2); Article 69 (2)):

- Evidence by video link
- Evidence given in camera
- Screening witness from the accused
- Visually recorded evidence as evidence in chief

In the courtroom

Currently there are no ongoing trials in the ICC. However, the following recommendations will be put forward by GCU for consideration to be applied within the mandate of the Court:

- Make judicial process accessible and accommodating to children
- Dismantle some long standing legal customs and practices
- Minimal use of legal jargon
- Non use of judges and attorneys robes
- Investigators, prosecutors, judicial officials and judges must adapt laws, regulations and practices to meet the needs of children
- Child friendly interview/court rooms where the child will have the opportunity of giving a more coherent account of what he or she knows in a relaxed atmosphere.
- Change in approach and treatment of a child’s evidence by the justice system.
- Development of child friendly systems and procedures which take into account the rights, interests and special needs of child victims/witnesses.
- Develop international mechanisms and standards to deal with child victims/witnesses without causing further traumatization.
- Development of instruments dealing with justice for victims and witnesses especially children.

Part III

Legal and practical procedural difficulties

(A) Competence

Minimum age requirement- There is no minimum age requirement for potential child witnesses in the Statute.
Therefore the Court will have to make a determination in each individual case taking the following relevant points into consideration:

- The distinction between age and child’s actual developmental level
- The child’s ability to understand importance of telling the truth
- The capacity to recollect events and to communicate
- The possibility to be easily influenced

(B) Compellability

Rule 65 of the Rules of Procedure and Evidence provides that a witness who appears before the Court is compellable by the Court to provide testimony unless provided for in the Statute and the Rules. The best interest of a child is a paramount in making any decision about that child’s involvement in criminal proceedings.

Should a child be forced to participate in criminal proceedings? During the investigation phase, statement is only obtained from a potential witness, after the issue of voluntariness has been fully explained to and understood by him or her in the presence of parents or guardians and that child agrees to make a statement. The child is then informed that he/she can at anytime withdraw their consent.

(C) Credibility

The general assumption that children are less reliable witnesses than adults has not been supported by research. On the contrary, research into children’s memory, shows that their cognitive and recall skills have been grossly undervalued and that the gap in the reliability between children’s testimony and that of adult’s is false.

How should a child’s evidence be evaluated?
What weight should be attached to it?

To answer the above questions, several issues should be considered:

- In recounting an event, a child should not be expected to be as articulate as an adult because their narration, especially when they are the victims, is usually disjointed and unstructured.
- Flexibility is desirable when children are involved.
- Suggestibility, immaturity, influence and pressure should not be inferred.
- The art of asking questions and answering them should not have the same technical perfection, as in the case of adults.
- Prejudices that a child’s power of observation, memory and recall, are less reliable than that of an adult could lead to incorrect evaluation of their testimony.
Part IV

(A) Protection

Article 68 obligation

1. Security instructions

After the interview is finalized, very clear security instructions are given to child victims/witnesses in presence of their parents/guardians/care givers. In reality, children are not entirely able to understand the consequences of their acts. Therefore it is essential that the child him-/herself understands the purpose and procedures in place and to repeat in their own words the instructions given, so that the investigators are sure that it has been correctly understood.

2. Follow-up contacts

The living conditions, security situation and well-being in general of every victim/witness that has been interviewed is being checked on a regular basis either directly or through intermediaries.

(C) Provision of assistance to witnesses

In cases where special assistance and support of child victims/witnesses is required (e.g. medical, psychos-social care), investigators inform Gender and Children Unit and after case assessment is made, respective referrals are being forwarded to VWU Support Officer for further procedure.

(D) Participation and reparations

Child victims/witnesses and their parents/guardians are informed about their rights to participation and reparations in a child-friendly and understandable way and respective referrals are being forwarded to the VPRS on regular basis.

Conclusion

Children need to be treated with compassion and professionalism by the judicial system from the first time of contact, throughout the court process (pre-trial, trial and appeal), and follow up mechanisms should be established to ensure that they do not suffer retraumatization.

Crimes committed against children must be taken seriously and appropriate action should be taken to ensure justice for the victim.

Children also have a right to justice and they should not be treated as bystanders; they have a right to be heard.
At present, the involvement of children in international criminal proceedings is minimal compared to the number of children who are victims of crimes under the jurisdiction of international courts/tribunals.
I. The Victims and Witnesses Unit

Article 43, paragraph 6, of the Rome Statute provides that the Registrar shall establish the Victims and Witnesses Unit ("the VWU"). Within the Registry’s organisational structure, the Registrar has placed the VWU under the authority of the Division of Court Services ("DCS"), reporting directly to the Head of DCS.

A. Mission statement of the Victims and Witnesses Unit

The VWU facilitates the interaction of victims and witnesses with the Court. The VWU provides support, protection and other appropriate assistance to witnesses, victims who appear before the Court and others at risk at all stages of proceedings. The VWU ensures respect for their dignity and guards them against further harm. In addition, the VWU will provide advice, training and other assistance to the organs of the Court in matters falling under the mandate of the VWU.

The VWU adheres to the highest level of confidentiality and impartiality in all matters relating to victims, witnesses and the work of the Court. The VWU strives to be at the forefront of best international practice in all its operations, both within the Court and in the field.

B. VWU services

The parties and the participants to the proceedings may refer victims and witnesses for the services of the VWU. The VWU provides services in the form of support, protection, logistical and operational assistance.

The purpose of the support services is to assist and support witnesses, victims appearing before the Court, and others at risk on account of testimony in the best possible way, through all the phases of their interaction with the Court. Particular attention is given to vulnerable groups, such as victims of sexual or gender violence, children, the elderly and persons with disabilities. Where these vulnerable groups are concerned, the VWU provides tailor-made services following a careful needs assessment and based on their individual circumstances. The VWU support staff work in close cooperation with the Office of the Prosecutor’s Children and Gender Unit.

The support services encompass, amongst others: psycho-social support; aid in daily life (for example, accommodation, food, clothing and transportation); access to medical treatment; counseling; the provision of allowances; and an activity programme while at the seat of the Court.
The protection services are designed to minimize the risk associated with cooperating with the Court. This is achieved by training in and promoting “Good Practices” when in contact with victims and witnesses, establishing Initial and Secondary Response Systems to address immediate protection requirements in the areas of operation, and by creating a Witness Protection Programme.

The operational services provided by the VWU facilitate all aspects of travel of victims, witnesses and others to the seat of the hearings.

The VWU has made available to the Court additional training concerning children and aims to promote an approach that takes into account the particular needs of children within the procedures of the Court.

II. Mandate of the VWU with regard to children

In the Rome Statute (“the Statute”), the Rules of Procedure and Evidence (“the Rules”), and the Regulations of the Court (“the Regulations”), a number of provisions allow for the special needs of vulnerable victims and witnesses, including children.

As a general principle, the Court and the VWU are required to take into account the needs of children, in accordance with Rule 86.

Furthermore, the VWU must give due regard to the particular needs of children, according to Rule 17.3, and is required, under Rule 19, to have expertise in dealing with children.

The Regulations allow for the VWU to draw any matter to the attention of a Chamber, in accordance with Regulation 41, where protective or special measures are concerned under Rules 87 and 88.

A. General framework of procedures for the protection and support of children

Based on the Statute, the Rules, and on the good practices of other international and national courts, the VWU, in line with the policies of the Registry, is developing procedures and practices for dealing with children.

An important element of this is to ensure that the experiences of and the lessons learned by the other international tribunals are incorporated into the procedures and practices of the VWU and the Court.

One of the guiding principles of the VWU services is that the best interests of children are taken into account whenever the child interacts with the VWU and the Court. However, those interests may sometimes conflict with the interests of justice, and it needs to be noted that the VWU has no role when the parties select their witnesses.
B. Some considerations relating to procedures respecting children

In the course of developing procedures and policies in dealing with children, the VWU has taken into consideration the experiences of and lessons learned by the Special Court for Sierra Leone and UNICEF.

The VWU considers the following points to be the most relevant for the work of the VWU and the Court:

- A child has the right to justice and to be treated with respect and dignity;
- Act in the best interests of the children. Subject to their ages, developmental levels and individual needs, child-witnesses require special measures of protection and support throughout the proceedings;
- Ensure that the informed consent of the child’s parents, legal guardian or person who, within the child’s particular culture, is responsible for the child’s needs has been given prior to making any arrangements, such as arranging travel to the seat of the Court;
- Provide accurate and understandable information to children about all aspects of their involvement with the Court. Use language and terminology that they can understand. Avoid using legal terms;
- At all stages, the child should be able to understand what is going on and what is being asked of him/her;
- Promote the use of venues suitable for children, both in the field and at the seat of the Court. Consider the use of video-link technology;
- Encourage others, such as Judges, the prosecution and Defence counsel to develop an approach that is suitable for or takes into account the specific needs of children;
- Recommend to all Court staff that they should inform and encourage children to ask for a break when they need it. Staff should also monitor whether a child is still capable of participating;
- Advise all Court staff that, where children are involved, the number of staff and the number of meetings, interviews and court sessions should be limited to the absolute minimum necessary;
- Recommend to the Court that children not be put in the same room as the accused, especially if the matter involves sexual slavery (unless a child specifically asks for this, and then only after the child has been prepared thoroughly for the eventual emotional consequences of such a confrontation);
- Give special attention to the needs of children during the entire course of their interaction with the VWU.
C. VWU’s procedures and practices for the protection and support of child-witnesses

Each time a child is referred to the VWU, the Unit will conduct a special needs assessment, in consultation with the OTP or the Defence. Where necessary, the VWU may independently develop this assessment further.

The needs assessment focuses on the following issues:

a. Cultural Context
   Focuses on developing an accurate understanding of the child’s place or role in his/her culture or society. It is equally important to understand who is responsible for the child, especially as it may impact the determination of an accompanying person. An understanding of this cultural context will form the foundation for all the other elements of the needs assessment and the services that will be provided.

b. Protection Assessment
   The VWU may conduct a specific risk assessment.

c. Psycho-social Assessment
   Focuses on whether the child is at risk of re-traumatisation or will suffer additional psychological damage as a result of testifying. The child’s family situation and his/her wider socio-economic environment are also scrutinized. The aim is to identify all risks in an early stage in order to minimize them.

d. Accompanying Person
   VWU foresees that all child-witnesses will be accompanied by a support person, subject to the agreement of the child’s parents, legal guardian or person who, within the child’s particular culture, is responsible for the child’s needs. The assessment will determine the most suitable person to accompany the child (an individual family member, case manager of a rehabilitation centre, staff member of a local NGO, a Support Assistant, or other individual).

e. Expectation Management
   Determines whether the child’s expectations of the trial are realistic. If not, the child will receive additional information and support.

f. Video-link Technology
   The assessment determines if video-link testimony should be recommended in a particular case, based on the psycho-social and protection needs of the child. It is possible that testimony via video-link will be less stressful and more conducive to the psycho-social well-being and safety of a child-witness than traveling to the seat of the Court.

Based on the needs assessment, the VWU will provide tailor-made services of support and protection. This also includes selecting appropriate support staff on the basis of their expertise, gender and/or personality. Additionally, the VWU may make recommendations to the Court relating to the particular child, based on the assessment.
The VWU staff will familiarize the child-witness with the courtroom setting prior to the child giving testimony.

While the VWU Support Unit will provide round-the-clock psycho-social and practical services to all victims and witnesses at the seat of the Court, special attention will be given to children and their accompanying persons.

The VWU will conduct post-trial follow-up for child-witnesses. The method and frequency of the contact will be determined in the needs assessment. This follow-up may be carried out in cooperation with NGOs.

**D. Cooperation with third parties**

The VWU acknowledges that a vast amount of experience and expertise exists outside the Court, which would be very useful for the VWU and the Court in developing its own practices and procedures. The VWU endeavors to act in accordance with the best international practice and actively seeks to cooperate with IGOs, NGOs and other agencies in this field.

**III. Issues of importance**

In the following areas the VWU would benefit from the expertise of organizations working with children:

- Practical advice and training on language, venues and approaches that are suitable for or take into account the specific needs of children;
- Lessons learned by other international tribunals or courts in dealing with children both during the proceedings and during their overall interaction with the Court;
- Problems encountered by other Victims and Witnesses Units and issues to consider when providing services to children.
ANNEX

Relevant Provisions
of the Rome Statute, the Rules of Procedure and Evidence
and the Regulations of the Court

Rome Statute

Art. 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Art. 43
The Registry

(…)

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Art. 68
Protection of the victims and witnesses and their participation in the proceedings

1. The 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 as defined in article 7, paragraph 3, 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. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court,
Rules of Procedure and Evidence

Rule 16
Responsibilities of the Registrar relating to victims and witnesses

2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

(a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;

(b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.
(iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;

Rule 18
Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

(b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;

(e) Where appropriate, cooperate with intergovernmental and non-governmental organizations.

Rule 67
Live testimony by means of audio or video-link technology

1. A witness may be allowed to give viva voce (oral) testimony before a Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.
**Rule 86**  
*General principle relating to victims*

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

**Rule 87**  
*Protective measures*

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

(...)

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.
Rule 88
Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

(…)

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Regulations of the Court

Regulation 41
Victims and Witnesses Unit

The Victims and Witnesses Unit may, pursuant to article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.
Victims Participation and Reparations Section Discussion Paper

RECOMMENDED STRATEGIES FOR CHILDREN'S INVOLVEMENT IN THE PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT

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4 November, 2005

I. The Victims Participation and Reparations Section

Rules 89 and 94 of the Rules of Procedure and Evidence of the International Criminal Court provide that the Registry of the Court must facilitate the participation and request for reparations by victims of crimes falling within the jurisdiction of the Court. Under Regulation 86 of the Regulations of the Court, the Victims Participation and Reparations Section ("VPRS") is charged with this responsibility. The VPRS is located in the Registry, within the Division of Victims and Counsel.

A. The challenge posed by child victim participants before the ICC

One of the most important ways in which the International Criminal Court develops the law and practice of international justice is in the unprecedented access it affords to victims. The VPRS, tasked with facilitating this access, faces a number of serious challenges in trying to implement its mandate, in particular with respect to child victims.

Accordingly, while the title of this paper is "Recommended Strategies" and the Court is in a position to share certain methodologies it is currently undertaking to facilitate the participation of children before the ICC, we are still very much in the developmental phase of this process. In sharing certain of our strategies with you, we also view this conference as an occasion to receive your valuable feedback as to how we can progress our work in a manner which takes into account the best interests of children. The ICC Registry is actively working to institute strategies that will allow child victims to participate in Court proceedings in a positive and meaningful way, while mitigating security risks or retraumatisation, and preserving the well-being and best interests of the child.

The ability of victims to participate independently in proceedings and to request reparations before the ICC is novel: such access has never before been incorporated into the mandate of an international court or tribunal, where the role of victims has been limited to being called as witnesses or as passive observers.

Moreover, there is almost no almost experience within other international criminal tribunals such as the ICTY or ICTR with respect to children being represented before the court. Perhaps the institution with the greatest experience dealing with the participation of children who have been victimized is the Truth and Reconciliation Commission for Sierra Leone, although we recognise the differences between any
II. Legal framework governing participation of victims in ICC proceedings and reparation

The ICC does not have a separate scheme orchestrating the participation of children before Court proceedings. A single procedure is established for all victims, while the Rome Statue and Rules of Procedure and Evidence emphasise the importance of taking special measures designed to protect the interests of all vulnerable victims, including children.

Under the Court’s Rules of Procedure and Evidence, a person will be considered to be a victim by the Court if she or he suffers harm as a result of the commission of a crime falling within the ICC’s jurisdiction (Rule 85). This may still seem a broad definition, considering the fact that the situations referred to the ICC to date involve atrocities which have been committed on such a massive scale. By way of example, the situation of the Congo referred to the Court covers the entire country, which is eighty times the size of Belgium. It will be up to the Judges, sitting in Chambers in specific cases, to decide whether an applicant fulfils the definition in Rule 85.

The Statute and the Rules specify that victims will be entitled to present their views, observations or concerns at certain specific stages of proceedings (such as the confirmation of charges hearing), and at any other stages considered appropriate by the Chamber, where their personal interests are affected, so long as this is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (Article 68.3). For this purpose, they are entitled to legal representation.

Where victims apply to participate in proceedings before the Court, the relevant Chamber will decide whether it is appropriate for him or her to participate at a particular stage, and the manner of that participation: for instance, whether the legal representative of the victim will be permitted to make opening or closing statements, present oral or written submissions or question a witness (Rule 89).

The right of victims to request reparations derives from Article 75 of the Rome Statute. According to this Article, the Court shall establish principles relating to reparations, including restitution, compensation and rehabilitation. The Court may proceed to make determinations regarding the scope and extent of any damage, loss or injury, and may make an order for reparations directly against a convicted person.

The Rules of Procedure and Evidence and the Regulations of the Court establish specific procedures for victims to apply for participation or reparations. Under Rules 89 and 94, requests to participate or for reparations must be made individually in writing to the Registrar; the Registry is charged with developing and disseminating standard application forms for this purpose. The Registrar then transmits the application to the relevant Chamber, as well as a copy of any participation application to the Office of the Prosecutor and the Defence; a Chamber may rule that an application for participation not be sent to the Prosecutor or Defence for reasons of security or the well-being of an applicant. The Chamber specifies, as the case may be,
the proceedings and manner in which participation is considered appropriate or the form of a reparations award. It is worth noting, however, that the Court may decide to deal with reparations on its own initiative.

According to Rule 91, the legal representative of a victim is entitled to attend and participate in the proceedings in accordance with the terms of the ruling of a Chamber. Under Rule 92, the Registry has a series of obligations to notify individuals once they are recognised as victims by the Court about various aspects related to the continuing proceedings, including the date of hearings and the date of delivery of the decision. In some circumstances, the Registry may take more extensive measures to give wider publicity to the proceedings.

The Registry’s role in relation to victim participation and reparation is neutral: its task is to facilitate the access of victims to the Court and to ensure that they are properly informed in order that they can decide to exercise those rights if they wish to do so. This is unlike the situation where victims appear as witnesses before the Court, where they are called to testify by the Prosecutor or the Defence. When they apply to participate or request reparations they do so on their own behalf and on their own initiative.

It is worth emphasising that the Registry, as the entire Court, is bound by Article 68 of the Statute, which states that the Court “shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so the Court shall have regard to all relevant factors, including age. . . .”

The Registry is accordingly tasked with taking necessary measures to ensure that children are able to participate in Court proceedings in an environment that caters to their special needs and vulnerabilities.

### III. Methods and strategies for enabling child victims to exercise their rights before the ICC

Underpinning all of the Registry's activities related to victims is the mandate of Article 68 of the Rome Statute, which requires that the needs of vulnerable victims, including children, are taken into account throughout the judicial process. This focus on the needs of children has manifested itself in Registry procedures and materials, including the Standard Application Form for Participation. The Form includes questions related to whether the applicant is a child and, if so, information on the person responsible for that child.

This philosophy derived from Article 68 has also strongly influenced the manner in which the Registry identifies, contacts and works with victims in the field.

The Registry recognised from an early stage the need to rely on international agencies and local actors, particularly those organisations and institutions which have an expertise in dealing with vulnerable victims and a presence on the ground, to provide advice and assistance both to the Court and to victims themselves. This is essential given the scope and complexity of the situations before the Court, the fact that the
Court is based far away and has only limited staff and resources. Even as the staffs of the ICC’s field offices grow, there will need to be a substantial involvement of local actors and international agencies with a presence on the ground, including those that already know and have the trust and confidence of victims, legal experts and others, in order for victims to effectively exercise their rights before the ICC.

In light of this reality, the Registry works to establish networks of potential “intermediaries”, who may inform and assist victims in relation to their possible role before the Court. In doing so, a number of criteria are taken into account. These criteria include, among others, the following:

- An organisation’s or institution’s location and area of operation
- Its mission and mandate
- Its level of knowledge and credibility
- Its capacity to undertake activities to assist victims
- Its experiences in dealing with specific vulnerable groups, in particular children and victims of gender-based violence

The Registry has already identified certain organisations in the DRC, Uganda and Sudan that have specific expertise working with vulnerable groups, including children, though we are always looking to widen our contacts.

We have also conducted training sessions of various kinds with local groups on the participation of victims in ICC proceedings and reparation. These sessions, many of which have occurred in the DRC and Uganda, have included lawyers, NGOs, local authorities and legal aid providers. We have taken advantage of these opportunities to listen to the guidance of these local actors as to how children should be approached and treated in different contexts. This input has informed the development of our policies and strategies in relation to children.

Recognizing that the cultural, social and legal context relating to children may differ in each place, and that ensuring the full rights of children represents particular challenges, the Registry plans to further develop our understanding of local context, tradition and custom and develop more child focused strategies. For instance, we would like to ensure that in future training, we invite speakers with relevant expertise to help to train other local groups on how to work with children in facilitating victim participation and reparation before the ICC.

A. Legal representation of child victims

It is evident that in the vast majority of cases before the ICC, victims will be represented before the Court by legal representatives. This means that child victims may not need to come to the seat of the Court in The Hague, which would raise concerns regarding security and retraumatisation.

Nevertheless, representing a child presents challenges, and since the Registry may play a role in appointing a legal representative or representatives for a victim or a group of victims, we will be looking for counsel with experience in working with children as part of our strategy for protecting the interests of children before the Court.
We will also consider including this element in training courses for lawyers that the Registry is involved in.

B. Some considerations relating to child victims before the Court

The following are some of the specific questions that we have identified as arising in relation to the potential participation of child victims in ICC proceedings and their interest in reparation. The Registry believes that it can greatly benefit from the input of the experts assembled here, in order to assist in improving and developing policies and procedures with respect to children. The participants in this meeting may also identify further questions that require consideration.

Legal Issues:

1. What specific measures can the Court take to ensure that children actually do wish to participate or request reparations even where there is a grant of authority by a parent or guardian?

2. What mechanisms can be put in place to mitigate the risk that a child is represented in a manner that does not conform to an original grant of authority regarding that representation?

3. To what degree can and should the Court take into account local or traditional practices for the grant of authority from an adult regarding the consent of a child?

4. What basic steps should be taken by the Court to protect the best interests and well-being of child participants before the Court? What additional protective or special measures (such as those envisaged in Rules 87 and 88 of the Rules of Procedure and Evidence) might appropriately be ordered by the Court, particularly in relation to children who have already been traumatized to a greater degree?

5. Should the Court ever be in a position to make a recommendation that a child applicant not participate in ICC proceedings, given the potential for retraumatisation or other interests of the child?

6. In what manner should children be represented in their participation before the Court?

7. Does common legal representation pose any specific issues with respect to the representation of children?

Questions Relating to Reparation:

1. What is the best way to determine the specific needs of children in order for the Court to make appropriate orders relating to reparations?
2. What is the best way for the Court to seek information on traditional forms of reparations or relevant local customs in specific countries or communities, particularly those that are relevant to children?

3. What specific evidentiary or other legal issues might arise in relation to children in the context of reparations awards?

**Practical Issues:**

1. What measures should the Court take to enable the active participation of child victims?

2. How should children (or their parents/guardians) be approached regarding the children’s possible interest in participation before the Court or requesting reparations?

3. In this respect, should children or their parents/guardians be the first point of contact for the Court in providing information about the possibility of children participating before the Court or requesting reparations?

4. To what extent do local norms and practices determine appropriate methods for approaching children in different communities?

5. Are there particular forms of support that could be provided by the Court that children may need when participating in ICC proceedings?
Perpetrators Only: the “Role” of Accused Youth in Rwanda’s “Modern” Gacaca

EXCERPTED AND UPDATED FROM A REPORT PUBLISHED AT WWW.TRINSTITUTE.ORG/OJPCR

Constance Morrill

BRIEF BACKGROUND TO THE RWANDAN CRISIS: 1990-1994

It is now widely understood that the 1994 Rwandan genocide was preceded by a series of events that created an ideal environment for anti-Tutsi sentiment to rapidly develop into genocidal violence. The first of these events was the 1 October 1990 invasion of Rwanda by the largely Tutsi Rwandan Patriotic Front (RPF), launched from neighboring Uganda. While there is no dispute that the genocide was organized by political extremists in the Habyarimana government, it is important to remember that the civil war instigated by the RPF invasion with approximately 6,000 highly trained troops constituted a credible threat to the Rwandan state, which had a smaller and poorly equipped national army at the time (Forces Armées Rwandaises or FAR).

The second major event, which further validated the credibility of this threat, came from across the border in Burundi: the assassination of Burundi’s first democratically elected president, Melchior Ndadaye, a Hutu, by Tutsi soldiers on 21 October 1993. As Rwanda scholar Alison Des Forges writes, “[t]he movement known as Hutu Power (...), the coalition that would make the genocide possible, was built upon the corpse of Ndadaye.” Members of political parties opposed to the Rwandan Patriotic Front (the CDR, MRND, as well as breakaway factions within the MDR and PL) in Rwanda perceived this event as “irrefutable proof” that Tutsi intended to achieve domination of the region, and would not hesitate to use force. These credible threats to State security were later exploited by extremists through the use of anti-Tutsi propaganda aimed at instilling fear in ordinary Hutu citizens that they would be killed and their property taken by Tutsi, if they did not kill first.

However, the fact that the RPF deliberately and arbitrarily killed tens of thousands of Hutu civilians between April and August 1994, and thousands more after this time, is not widely recognized. According to UNHCR, the RPF was responsible for the perpetration of “clearly systematic murders and persecution of the Hutu population in certain parts of the country,” and that “the great majority of these killings had apparently not been motivated by any suspicion whatsoever of personal participation by victims [of RPF killings] in the...
massacres of Tutsi in April 1994." Evidence of gross human rights violations perpetrated by the RPF since it invaded Rwanda on 1 October 1990, while abundant, continues to be actively suppressed and denied, both legally and politically. While maintaining that “reconciliation” is a primary goal, and one that the gacaca courts aim to achieve, the government has actively obstructed the revelation of a more complete social truth that is indispensable to Rwanda’s continued recovery and long-term national reconciliation.

DIFFERENCES BETWEEN TRADITIONAL AND MODERN GACACA

“Ukuri, Ubatabera, Ubwiyunge Ukuri kurakiza.” (Truth, Justice, Reconciliation. The truth will set you free.)

--Text appearing on one of the many full-color billboards in Rwanda, advertising the Inkiko-Gacaca

A Hutu woman, who stood to testify about property that was stolen and destroyed in 1994, was told that she could not claim for those items, because “they were not taken as part of the genocide.” Even more serious in its impact than this case was the impression that Inkiko-Gacaca could not even record the names of Hutus who had died within the cellule.


Following the promulgation of the first Gacaca Law in January 2001, the pre-trial pilot phase of the “Inkiko-gacaca” was launched in a public ceremony on 18 June 2002, and the number of pilot cells was expanded on 25 November 2002. However, due to numerous difficulties encountered in implementation, the law was substantially revised in June 2004. One of the most significant revisions was the reduction of the original four categories of crime into three. Category I (relatively unchanged from 2001) pertains to planners and organizers of the genocide, those who killed with “zeal,” cases involving rape or sexual torture, and those who desecrated dead bodies. Category I cases are to be tried in Rwanda’s regular courts, not the gacaca, although gacaca judges do have the power to place the accused into Category I (those who were minors at the time of their alleged crimes can be placed in Category I).

Category II now pertains to intentional murder, attempted murder, manslaughter, and assault cases, and Category III concerns property offenses only. After a period of suspension, the gacaca courts (still in pre-trial phase) were re-launched on January 15, 2005 and the first “real” trials began in the pilot jurisdictions on March 10, 2005. Gacaca trials are expected to be underway nationwide by January 2006.

The modern gacaca differs from the original in several important ways. First, the primary objective of the traditional gacaca was “not to determine guilt nor to apply state law in a coherent and consistent manner (as one expects from state courts of law) but to restore

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99 The June 2002 launch of the pilot gacaca system was followed by approximately 21 weeks of preliminary administrative activities (pilot phase), per the Gacaca Law of 2001. This pilot phase was carried out in 80 cellules, within selected sectors in each of the country’s 12 provinces.

100 In late September 2005, the Rwandan government proposed several radical amendments to the 2004 Gacaca Law, one of which involves creating a “National Gacaca” which would hear Category I cases. Four NGOs, including Avocats Sans Frontières and Penal Reform International, voiced their concern over these proposed changes in a memo to the National Service of Gacaca Jurisdictions dated October 17, 2005 (copy on file with author). These NGOs noted that none of the amendments called for the elimination of the death penalty for adult Category I offenders.
harmony and social order in a given society, and to re-include the person who was the source of the disorder."\(^\text{101}\) Indeed, the objectives of the modern \textit{gacaca} depart from the traditional in that guilt will be determined and state law (the \textit{Gacaca} Law) will be applied. While the traditional \textit{gacaca} dealt mainly with civil conflicts arising from disputes over land, marital problems, and damage to property and livestock, it could also settle minor criminal offenses such as petty theft. In such cases, settlements usually required that the injured party be compensated by the wrongdoer and his family. More serious crimes, like the theft of cows and assassination were normally handled by the king (\textit{mwami}).\(^\text{102}\)

Second, as the modern \textit{gacaca} system is designed to interface efficiently with the existing administrative system, it is highly-structured and organized to reflect and include the participation of the country’s four administrative levels of government (from smallest to largest): cell, sector, district and province. It is thus an example of “state-imposed informalism”\(^\text{103}\) that bears little resemblance to the spontaneous community-controlled traditional \textit{gacaca}.

Third, the modern \textit{gacaca} judges, or \textit{inyangamugayo} (“those who detest opprobrium”), are generally younger than the \textit{inyangamugayo} of the traditional \textit{gacaca}, who were the “wise elders” of their communities, elected to this post (as opposed to acquiring it by virtue of old age or wisdom in decision-making), and nearly a third women. These modern judges are also vested with the authority to classify the accused according to the three categories set out in the \textit{Gacaca} Law (discussed below), to determine criminal guilt (intent)\(^\text{104}\) or innocence, and to award prison sentences (as opposed to the non-penal sanctions used in the traditional \textit{gacaca}) to defendants without proper legal representation. All of these decision-making powers have been heavily criticized by human rights organizations, due to the lack of legal training and poor education of many judges.\(^\text{105}\) Finally, instead of existing as a purely community-based operation, the \textit{Inkiko-gacaca} will be monitored by the National Service of \textit{Gacaca} Jurisdictions and the Prosecutor General of the Republic will supervise “the organs of the Public Prosecution” during the proceedings. The Public Prosecutor, in turn, is responsible for verifying that confessions conform to the “required conditions” (i.e. that they contain a guilty plea, a “repentance” and an apology) and for preparing written minutes containing the results of case investigations (carried out by the Officer of the Judicial Police), which are then forwarded to the relevant cell-level \textit{gacaca} court.\(^\text{106}\) In cases of rape or other “sex-related crimes,” the Public Prosecutor withholds the file from the cell-level \textit{gacaca} court, as all proceedings for such crimes are to take place \textit{in camera}.


\(^{103}\) Term employed by panelist at the African Studies Association Annual Meeting, Washington, D.C., 17 Nov. 2005

\(^{104}\) While the crime of genocide is unique in that it contains the element of \textit{dolus specialis} (special intent), requiring that the crime be committed with the intent 'to destroy in whole or in part, a national, ethnic, racial or religious group as such,' the legal definition of genocide is not made explicit in the \textit{Gacaca} Law, as it is in the ICTR statute (Cf. Article 2.2, ICTR Statute). However, Article 34 of the \textit{Gacaca} Law defines the term “victim” as someone who was hunted, harmed or whose property was destroyed “because of his or her ethnic background or opinion against the genocide ideology.”

\(^{105}\) Literacy, for example, is not a prerequisite. For a complete list of the requirements for judges (“persons of integrity”), see Article 14, \textit{Gacaca} Law of 19 June 2004.

\(^{106}\) See Articles 48 and 59, \textit{Gacaca} Law of 19 June 2004. A Rwanda-based \textit{gacaca} researcher noted that, “The prosecutors’ case files threaten to usurp independent fact-finding by poorly educated and poorly trained \textit{gacaca} judges, especially if those files already categorize the accused. It may be difficult for \textit{gacaca} judges to afford a presumption of innocence to detainees in the face of case files prepared by state prosecutors.” (Personal communication, November 2005. On file with the author.)
According to the National Service of Gacaca Jurisdictions, 63,447 persons were placed on the lists of the accused during the pre-trial phase in the pilot gacaca cells by mid-2005.¹⁰⁷

**INTRODUCTION: SITUATION OF YOUTH DETAINNEES**

The number of youth imprisoned in the aftermath of the genocide has varied widely both by date and according to source. At the end of October 1996, barely two months after Rwanda passed legislation authorizing detention of genocide suspects notwithstanding any irregularity in their files,¹⁰⁸ the Special Rapporteur from the U.N. Commission on Human Rights reported the number of child prisoners at 1,353.¹⁰⁹ At the end of 1999, a United Nations report (ECOSOC) by Special Rapporteur Michel Moussalli put the number of “children” detained at 4,454, and noted that they were “subjected to the same vagaries as adult detainees.”¹¹⁰ This same report indicated that 450 of these children were under the age of 14 and continued to be detained, even after having been “formally cleared of any involvement in the genocide.” Also in 1999, the ICRC reported that approximately 570 children who were under the age of 14 at the time of their arrest were incarcerated on genocide-related charges, although that figure had dropped by early 2001.¹¹¹

In the summer of 2001, seven years after the genocide, statistics provided by the Rwandan Ministry of the Interior indicated that nationwide, there were 4,222 incarcerated minors (those between 14 and 18 in 1994) accused of genocide.¹¹² In the summer of 2002, the ICRC was aware of 2,911 minors accused of genocide, allegedly between the ages of 14 and 18 in 1994. The majority of those still in detention (and 100% of all detainees interviewed by the author between 2001 and 2005) are now in their mid to late twenties, and some have been in detention and without files for over 10 years. Only in rare instances have any of these minors had legal representation, and they have been detained in conditions that have severely compromised not only their physical health, but their potential for intellectual growth, and their potential for successful reintegration into society.¹¹³

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¹⁰⁷ Information is from a 10 July 2005 presentation by the National Service on the status of the gacaca jurisdictions. 56,763 suspects were listed by state prosecutors for all pilot cells together. However, if the majority of suspects from the prosecutor’s lists now appear on the gacaca lists, then it would seem clear that state prosecutors wield considerable influence over the pre-trial fact-finding process. It is not clear which of these suspects were named by state prosecutors and confessed prisoners, and which were named during the gacaca proceedings. (Id., note 106, supra).


¹⁰⁹ Degni-Ségui, René, Special Rapporteur of the Commission on Human Rights (20 January 1997), at 37. It is not clear whether this figure includes minors in prison only, or in both prison and communal lock-ups (“cachots”).


¹¹² MININTER figures are from May 2001. According to ICRC statistics from March 2001, women represented 3.2% of all genocide suspects (3,442 of a total of 108,215). Women suspects who are minors may be included in the figure provided by MININTER.

¹¹³ Researcher (the author) spoke only with youth detainees who appeared to be in relatively good physical and mental health, but who spoke of problems inside the prison, such as sexual abuse of minors by adult prisoners, and inadequate nutrition and medical care.
THE PRESIDENTIAL COMMUNIQUÉ OF 1 JANUARY 2003 AND THE INGANDO SYSTEM

In a Presidential Communiqué broadcast via national radio on 1 January 2003, President Kagame outlined the government’s plans to release 30-40,000 genocide detainees on a provisional basis—including all minors who were between 14 and 18 during the genocide, the elderly, the seriously ill, those who had confessed and those whose time in detention exceeded the sentence prescribed by law. Ultimately, only 24,873 detainees were released by March 2003, although a few hundred were rearrested on additional genocide charges. Official statistics for minors released in 2003 are not available. In August 2005, another wave of releases took place, which the government claimed to be related to the implementation of the 2003 Communiqué.

According to detained “1994 minors”—those who were between 14 and 18 in 1994, and in their mid to late twenties and early thirties at the time they were interviewed by the author in February and March 2005—the Presidential Communiqué of 2003 has been a persistent source of confusion. All thirty individuals in this age group spoke of how clearly they understood the Communiqué to be when it was first announced on New Year’s Day, i.e. they understood from the broadcast, and in some cases were also told by prison officials, that they would be released without condition. They also spoke of their disappointment (and feelings of having been deceived) when they were told by government officials who visited the prisons a few weeks later that only minors who had confessed would be provisionally released (pending their appearance before the gacaca), first to the ingando, or “solidarity camps,” and then to their home communities.

While the ingando is the only “transitional” mechanism in place in Rwanda that holds any rehabilitative potential—and is promoted as such by the authorities—many reports from those who have attended the ingando indicate that they are venues of political indoctrination for the RPF and offer little in the way of preparation for or assistance with life after prison. One source said that the “traditional” songs they sang in the ingando about the country’s “national heroes” contained references to the “campaigns of the ex-army of the RPF” and tried to appeal to Rwandans to “love them.” The songs referred only to “those who liberated” Rwanda—an overt reference to the Rwandan Patriotic Army (RPA)—and included names like Fred Rwigema, the former RPA commander who was killed just after the invasion in 1990.

Already, “1994 minors” who have been provisionally released and have completed their 2-month ingando stays are experiencing feelings of disenfranchisement, fear, paranoia, and other symptoms of psychological trauma, such that they find it difficult to socialize with anyone who has not been in prison. Contrary to what they were told in the ingando, many

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114 The written order of execution for this release plan, dated 9 January 2003, clarified the various categories of prisoners to be released, but in doing so, also appeared to depart from the original statement broadcast nationwide. (Copy on file with author).
115 Source: Ministry of Justice, “Imbonerahamwe iganira ibisabwa n’intangzo ryaturutse muri Perezidansi ya Repubulika,” 7 March 2003. (Roughly translates as: ‘Chart describing requirements according to the Communiqué from the Office of the President.’)
116 It is possible that these released may have been partially motivated by the ICRC’s statement in early 2005 that it would cease to provide food, medicine and sanitary supplies to central prisons. (Source: Id., note 106, supra).
117 The author interviewed a total of 10 female minors in prison between 2001 and 2005. In 2005, 2nd interviews were conducted with three female minors previously interviewed in 2001, and four female minors were interviewed for the first time.
118 Ingando are not only for released prisoners, but also for students entering university, and ex-combatants. The National Plan of Rwanda’s National Unity and Reconciliation Commission is to have every Rwandan adult attend the ingando “at some point during his or her life.” Source: Chi Mgbako, “Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda,” Harvard Human Rights Journal, Vol. 18., Spring 2005. Available at: http://www.law.harvard.edu/students/orgs/hrj/iss18/mgbako.shtml (last visited 20 November 2005)
119 Information obtained from a recently released minor, November 2005.
120 Id.
were surprised to learn that survivors were not in agreement with their releases. For some minors at least, it seems that the *ingando* has not delivered on its promise of “solidarity” and “reintegration.”

I. **AGE OF CRIMINAL RESPONSIBILITY AND SENTENCING**

Under the *Gacaca* Law (GL), there are few provisions that address the particular rights of minors accused of genocide, but its treatment of minors is in accordance with provisions pertaining to the age of criminal responsibility and sentencing for minors under the Rwandan Penal Code (RPC).[^121] Article 77 of the RPC states that “when the actor or accomplice of a crime or an offense is more than 14 years old and less than 18 at the time of infraction,” punishment for a crime that would incur the death penalty or life imprisonment as an adult will be limited to 10-20 years in prison, and punishment for a crime which incurs a specific term of imprisonment or a fine if committed by an adult is to be halved.[^122] Accordingly, these rules have been carried over to the *Gacaca* Law, and hence are to be applied to the sentences prescribed for the crime of genocide and crimes against humanity for perpetrators aged 14 to 18 at the time of the crime. In keeping with the rules on the prosecution of juveniles as set forth in the Rwandan Penal Code, individuals under the age of 14 cannot incur criminal responsibility, but may be placed in “special solidarity camps.”[^123]

While the Rwandan Penal Code excludes children who were under age 18 at the time of the crime from the death penalty for criminal infractions, Article 78 of the 2004 *Gacaca* Law permits them to be placed in the 1st Category—one under which a sentence of death for adults of the same category can be prescribed. According to the mandate of the *Gacaca* Law (see Article 2), placement in the 1st Category would preclude minors’ participation in the *gacaca* jurisdictions, making them automatically liable for prosecution under the classical judicial system. The maximum sentence for Category I minors who have “refused to confess, plead guilty, repent and apologise,” or whose “confessions, guilt plea, repentance and apology” is rejected, is 10-20 years imprisonment.[^124] For Category I minors whose attempts to meet all of these conditions are accepted, the sentence falls to 8-10 years imprisonment. For minors in Category II, sentences range from 6 months’ to 10 years’ imprisonment, depending on the severity of the crime (three levels are listed in Article 51), and whether the minor has confessed before being listed as a perpetrator by the *gacaca* court (lightest sentence), after being listed, or has “refused” to confess altogether (heaviest sentence; no community service option for refusals/rejections under points 1° and 2° listed below). In Category II, only minors who confess to crimes delineated in points 1° and 2° will serve half their sentence in custody, with the rest “commuted into community service on probation.”[^125]

**Category II crimes (from GL Article 51), and corresponding sentences for minors (adapted and summarized from GL Article 78)**

1° The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices;

[**Sentence range:** 3 ½ years to 10 years; if the minor has refused to confess or if confession is rejected, he/she will serve 8-10 years in prison without community service. If confession is made before or after being listed, the minor’s maximum sentence is 7 ½ years, with half of that in prison and the rest in community service]

[^121]: The RPC was established in 1977 and was revised in 2005. The age of criminal responsibility in the new RPC has reportedly been lowered to twelve. (Source: representative at the Ministry of the Interior, August 2005).

[^122]: Rwandan Penal Code, Article 77 (emphasis added).

[^123]: Rwandan Penal Code, Article 77; *Gacaca* Law Article 79. The 2001 *Gacaca* Law used the term “rehabilitation centers” in this provision.

[^124]: See *Gacaca* Law of 19 June 2004, Article 78 (emphasis added)

[^125]: See discussion of Community Service program, p. 117, *infra*. 
2° The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

[Sentence range: (same as 1°)]

3° The person who committed or aided to commit other offences persons, without the intention to kill them, together with his or her accomplices.

[Sentence range: 6 months to 3 ½ years, with half in prison and the rest in community service whether the minor has confessed or not]

There are no special provisions for minors involved in crimes relating to property (Category III), such as looting or destruction. Defendants in such crimes are only “sentenced” to pay civil reparation, an obligation which is not always easy to fulfill for either adults or minors (although such a penalty is much closer to the type of reparation that was paid in the traditional gacaca).

Given that the gacaca judges who will decide the fate of the accused coming under Categories II and III may have no formal education whatsoever, minors who come before them may be at a great disadvantage. Boys, especially, who were only 15 or 16 during the genocide, some of whom have grown taller and been toughened by their years in prison under conditions that have undoubtedly diminished their sense of self-worth, may appear physically more menacing than they were in 1994—whether or not they are actually guilty of genocide. Avocats Sans Frontières has voiced concern over this particular issue, indicating that it may be difficult for some judges, particularly those with minimal or no education, to be objective and “presume the innocence” of someone who may now literally “appear” guilty.

Bearing in mind that minors will be judged by members of the community who may have had little practice in critical thinking, and only 1-3 months’ training, it is instructive to consider the results of a study produced by Save the Children (US) in 1995. This study, which engaged the expertise of three local Rwandan human rights NGOs and the assistance of Duke University, sought to establish clear legal/age/cultural indicators by which juvenile culpability for genocide could be determined, and to inform officials of its findings for the purpose of protecting these minors’ rights.

Participants in the study—who were all adults—were asked to define the boundaries of childhood, and the results revealed that the adult interpretation/understanding of criminal responsibility for children in Rwanda does not seem to depend on a culturally defined notion of childhood, but rather on the education of the respondent. Three groups of relatively well-educated participants tended to link a child’s ability to distinguish between right and wrong to chronological age, while those with the highest levels of education employed legal definitions of childhood (i.e., that a person under 18 is a child). Those who disagreed with this definition argued—with reference to the Rwandan Penal Code—that because individuals over age 14 could incur criminal responsibility, it stood to reason that those under 14 must be considered children. Participants who were not as highly educated tended to base their opinions on social maturity in conjunction with cultural notions of childhood: an individual’s ability to assume

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126 The physical appearance of some minors can also be deceiving (with regard to making assumptions about age and maturity) in that (1) not all minors have received proper and consistent nourishment while in prison, and (2) individual differences in physical and mental development are usually not taken into account when making such assumptions.

127 Information obtained during the course of an interview with Avocats Sans Frontières, Kigali, June 2001. ASF was the primary organization involved in the preparation of training manuals for the gacaca judges, in which particular emphasis was, initially, to be placed on giving priority to trials for minors.

roles, responsibilities and autonomy “traditionally” assigned or accorded to adults and “to make independent judgments.”129

More significantly, however, the same study revealed that most Rwandan adults felt that if a child is able to distinguish between ethnicities so as to identify who should be killed and who should be spared, he or she warrants the same treatment as an adult (including the death penalty). With regard to the question of whether minors were forced to kill, or were otherwise manipulated, this same report concluded that “the vast majority of the participants said that they did not believe the minors were forced to commit these crimes, and blamed their involvement on a tradition of ethnic intolerance and hatred in Rwanda and a culture of impunity that allowed ethnic violence to go unpunished.”130

It is not known whether this 1995 study is still indicative of the prevailing broader opinion in post-genocide Rwandan society in 2005, and the willingness of the inyangamugayo to consider the impact of adult manipulation on the moral decision-making capacity of youth during the genocide may be all but absent. Based on these observations, and assuming that the majority of the gacaca judges will be relatively poorly educated, it may be a challenge to “sensitize” them to view accused children and youth through the lens of internationally recognized human rights norms and principles, especially that of presuming innocence until guilt is duly proven.

While the Gacaca Law does not call for special arrangements with regard to the actual trials or hearings of juvenile defendants, the Organic Law originally gave some legislative acknowledgment to the idea that cases involving crimes committed by minors should be considered separately by a competent judicial body. This law, however, did not go further than to provide for “one or more” ‘benches’ of “magistrates for minors” in the Specialized Chambers of the Tribunals of First Instance and military courts, and to indicate that these magistrates would have exclusive jurisdiction over genocide crimes and crimes against humanity committed by minors. However minimal this provision establishing the Specialized Chambers may have been, Article 96 of the 2001 Gacaca Law unfortunately repealed it, and it was not reinstated in the 2004 Law.

Special ‘benches’ for minors were provided for under the Rwandan Penal Code of 1977 (which was revised in 2005), and were functioning with some regularity by the fall of 1997, but they have been used with decreasing frequency since the justice system’s institution of “group trials” in 1999, in order to process as many genocide cases as possible.131 Group trials have also resulted in bureaucratic inefficiencies with regard to juvenile defendants involved in particular group trials. According to a representative from the Rwandan NGO LIPRODHOR interviewed in 2001, it had often been quite difficult to retrieve details on juvenile defendants from the offices of the court clerks, because they rarely separated minors’ files from those of adults.132 Since 2001, however, it appears that this situation has improved, as minors’ files are now systematically separated from those of adults.133 This could be the result of efforts to organize and prepare detainees’ files in anticipation of the start of the gacaca trials.

129 Ibid.
130 As reported in the article “When Children Kill,” http://www.dukemagazine.duke.edu/alumni/dms5/gazette.html (last visited 20 November 2005). The personal experiences and political or ethnic biases of those who participated in this study are not known, but could be significant and determinative of the opinions voiced, especially since the study was conducted only a year after the genocide. The study was approved for publication by Rwanda’s Ministry of the Interior.
131 During a mission to Rwanda in February 1999, the Special Representative on Children in Armed Conflict, Olara Otunnu, commended the establishment of this special bench for minors, as well as the training of juvenile justice officials and the separation of minors from adults in prisons. However, he also noted that “only 28 out of a caseload of 5,000 detained minors had gone to trial in the past five years.” See <http://www.un.org/children/conflict/>(Country Visits, Rwanda).
133 Information supplied by LIPRODHOR, September 2002.
Finally, the only provision of the Gacaca Law that could provide for the special protection of minors can be found in Article 21, which makes only a vague reference to the possibility of holding closed hearings, without precision as to the age of a suspect:

Article 21

- Hearings for Gacaca Courts are public, except when there is a hearing in camera decided by the Gacaca Court, or on the request of any interested person and decided in a pronounced by judgement for reasons of public order or good morals.
- The decisions and deliberations of judges are made in secret.

Not only does this provision lack any kind of precision as to who an “interested person” is, it offers no guarantee as to the security of such hearings. Article 21 is the one “legal” opportunity afforded by the gacaca to protect the privacy of an accused minor, a right enshrined in Article 40.2.vii of the Convention on the Rights of the Child. Yet, this right is hardly guaranteed under the gacaca, notwithstanding that the protection of this right runs counter to the “spirit” of the gacaca as one of candor and community. The manipulation, physical torture and emotional trauma to which youth were subjected not only between 1 October 1990 and 31 December 1994, but in the years spent in detention where they have often been influenced by the political agendas of older prisoners, may be revisited upon them in a situation where they are forced to give public testimony before a community whose readiness to forgive is dubious at best.

There is already evidence of the utility of establishing closed hearings for youth. The implementation of closed hearings for youth in the South African Truth and Reconciliation Commission, which were the first of its kind, resulted in the disclosure of information that revealed the degree to which racism and fear of the ‘other’ was ingrained in children from a very young age. In addition, these special hearings “allowed participants to reflect on or critically analyze the root causes of apartheid and its effects on children.”134 In the interests of reconciliation between youth peers who will inherit Rwanda with its legacy of genocide and ethnic conflict, closed hearings in the gacaca may in fact be a very productive way to bring both accused youth and survivors together in the same space. The opportunity, or the choice, to tell their stories in an environment without intimidation, and among individuals of the same age group, may actually elicit more information about the dynamics between young Rwandans who, depending on their experience of the war and genocide, have absorbed different ideologies about the degree to which reconciliation is possible.

II. ADMINISTRATION OF JUVENILE JUSTICE IN THE GACACA AND THE IMPACT OF IMPRISONMENT ON YOUTH

The situation of incarcerated youth accused of genocide, therefore, presents several problems both with regard to the administration of juvenile justice via the gacaca system and the national justice system, and the impact of incarceration on lives of provisionally released, but still accused, youth. First, there is the problem of incarcerated minors (14-18 in 1994) who have participated in the confession and guilty plea procedure whereby they have officially accepted responsibility for their acts. Many were victims of coercion, violence and other forms of manipulation by non-state actors, such as the Interahamwe. More importantly, however, is the fact that the “popularity” of the genocide meant that “ordinary” citizens fell prey to various forms of propaganda (notably the anti-Tutsi radio broadcasts of Radio-Télévision Libre des Mille Collines, and the articles and racist humor found in its ideological twin, the newspaper Kangura), which were reinforced by local authorities. Deference to community authorities was considered “normal,” even when the authorities instructed their

134 TRC Report, Vol. 4, Ch.9, par. 10
communities to kill. Hence, ordinary Rwandans, who were not necessarily members of the Interahamwe militia became ‘non-state’ perpetrators and encouraged youth to participate in the killing, and often threatened them if they did not.

Secondly, incarcerated minors frequently stated that they were “beaten by soldiers” upon arrest, and also beaten in front of other prisoners in order to obtain a confession from the abused detainee and to terrify others into confessing. Minors often specified that these abuses were carried out by soldiers of the Rwandan Patriotic Army, the military branch of the RPF. While the RPF was considered a ‘rebel’ group when it invaded the country in October of 1990, it is now a state actor. Widespread and systematic incidences of abuse of youth, therefore, may implicate the current regime and could justify a call for some form of compensation to those who suffered abuse by RPA soldiers, especially in cases where youth were wrongfully arrested or accused. Several youth prisoners expressed a desire to ask for reparations for such abuse, but had very low expectations that such demands for compensation by the RPF would be met.

Thirdly, while Rwanda is party to the Convention on the Rights of the Child, it has failed to safeguard the human rights of youth upon arrest or in detention, the consequences of which are—in addition to the physical and mental impact of such abuse—potentially quite harmful to any efforts at national reconciliation. Many youth have been subjected to sexual abuse in exchange for food, due to the failure of prison administration to separate minors from adults. While the limited resources in the country make it difficult to ensure proper nourishment and medical care for the prison population as a whole, youth have been at a particular disadvantage.

Youth accused of genocide are either Hutu or of mixed ethnic parentage, and, in the latter case, often have Tutsi mothers, some of whom were killed during the genocide. These youth are invariably accused of genocide, whether justly or unjustly. Most were arrested by soldiers of the Rwandan Patriotic Army in response to information provided by neighbors who were survivors, and who may have made accusations out of vengeance without having proof. Nine out of twenty minors interviewed during the summer of 2001 professed innocence, as did nine out of fifteen minors interviewed in Q3 of 2002, and twelve out of sixteen minors interviewed in Q1 of 2005. While the veracity of their statements and stories remains unproven, similar circumstances amounting to false accusations and wrongful detention have been reported by Rwandan youth in other accounts. Their stories, however, reflect a definite pattern of abuse of young detainees, whether or not they had indeed participated in the genocide.

135 Some youth detainees interviewed by the researcher in 2001 used the word “bisanzwe,” meaning normal or usual, to describe their perceptions of the killing at the time.
136 It is widely recognized that confessions obtained under duress may falsely criminalize the “confessor,” who may say anything in order to stop the abuse.
137 Based on information collected during the author’s interviews with “1994 minors” (between ages 14-18 in 1994) in Quarter 3 of 2001 and Quarter 3 of 2002.
138 Ibid.
139 In Prison C, the head prisoner, or “capita,” remarked that young men in their early twenties (who were accused of crimes committed between the ages of 14 and 18) were “no longer minors,” and for that reason were mixed with adults. One minor at Prison C (interviewed in 2002) reported that these very same “non-minors” are sexually abused by adults regularly.
140 The one exception to this pattern of arrests was a female minor (#5) who turned herself in to the authorities of her own accord in 2000. She was released in January 2003.
141 One individual, a young woman in Prison B (#5), was interviewed in 2001, 2002 and 2005 (post-release), and is counted as a confession in 2001 and 2002.
III. **FAILURE OF THE GACACA TO ADHERE TO JUVENILE JUSTICE PRINCIPLES**

The modern *gacaca* system does not serve as a restorative justice mechanism, does not provide for alternatives to imprisonment (“diversion”) for children between the ages of 14 and 18, and does not consider detention of minors to be a last resort. In the *gacaca*, priority is given to cases in which the accused has “confessed, repented and apologized,” whether the accused was a minor or an adult at the time of the alleged crime (in this case, genocide). Minors who have not confessed (which may also indicate that they have maintained their innocence) are given second priority in the *gacaca*, which means their cases will be heard only after cases involving thousands of adults who have confessed. Until January 2003, the majority of detained minors were those accused—not tried or sentenced—of crimes of genocide committed when they were between ages 14 and 18. Only children who were *under the age of 14* at the time of the crime benefit from a “diversion” provision in the 2004 Gacaca Law which, in Article 79, states:

> Persons who were less than fourteen (14) years old, at the time of the charges against them, cannot be prosecuted, but they can be placed in special solidarity camps.

A Prime Minister’s decree determines the modalities for conducting such solidarity camps.

While the modern *gacaca* is marketed to the population as a semi-restorative system (“truth, justice, reconciliation”), in practice it is primarily retributive and may only restore the *status quo ante*. In addition, Article 76 of the Gacaca Law will have a detrimental impact on the livelihood opportunities of released youth, leaving them nothing but the ‘private sector’ to make a living, but with what education and with what other resources?

Under this provision, which does not distinguish between adults and minors at the time of the crime, persons convicted of the crime of genocide or crimes against humanity may suffer the “perpetual and total loss” of civil rights if they fall under Category I. If they fall under Category II (degrees 1 and 2), they stand to lose all of the following rights:

- a. to vote ;
- b. to eligibility ;
- c. to be an expert witness in the rulings and trials, [other than simply providing information] ;
- d. to possess and carry fire arms ;
- e. to serve in the armed forces ;
- f. to serve in the police ;
- g. to be in the public service;
- h. to be a teacher or a medical staff in public or private service.

It is not clear whether some rights will be restored while others are revoked.

IV. **FAILURE OF THE RWANDAN GOVERNMENT TO ABIDE BY ITS CRC OBLIGATIONS**

While the Convention on the Rights of the Child does not condone impunity for children under the age of 18 who have committed grave criminal offenses, it does oblige states to provide juvenile offenders with a variety of alternatives to “institutional care” to ensure that they are treated in a manner conducive to their well-being and proportionate both to their circumstances and the offense (CRC, Article 40.4). Neither the *gacaca* nor the *ingando* system fulfills this obligation. It is reasonable to acknowledge that the infrastructure of the Rwandan justice system was completely destroyed during the genocide and its human

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144 Among the alternatives suggested under CRC Article 40 are: care, guidance and supervision orders, counseling, foster care, vocational and educational training programs.
and financial resources are still quite limited, but it is impossible to ignore that the overcrowded and unsanitary conditions in Rwandan prisons persist, and that both girls and boys under the age of 18 are being arrested and imprisoned today for crimes other than genocide, and without formal investigation of the allegations against them. According to Rwanda’s National Director of Prisons, Steven Balinda, most minors arrested in Rwanda today are accused of rape (both boys and girls), an assertion confirmed by several prison directors, a source at the Ministry of Justice and Penal Reform International (PRI) in Kigali. On one hand, it seems that Rwanda is unable to practically abide by its obligations to uphold the provisions in Article 37 of the Convention on the Rights of the Child (which calls for, among other things, the use of detention only as a last resort), but on the other, it seems that the principles of child protection enshrined in the CRC are simply a very low priority for the current government.

In addition, Rwanda is party to the African Charter on Human and People’s Rights (Banjul Charter), which, while lacking in specific measures relating to the protection of the human rights of children (or women), under Article 18.3, does obligate states’ parties to “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

The Presidential Communiqué of 2003 seemed to be a first, although destructively belated, step toward fulfilling not simply Rwanda’s international treaty obligations with regard to child welfare, but its responsibilities to the many intelligent and thoughtful young people who have spent over 10 years of their most formative years in prison. As one 25-year-old man who had been in detention for 5 years at the time of his 2002 interview said, “We are a category of inactive people, while we are of a generation and an age that should be contributing to the rehabilitation of the country.”

This same young man noted that he had to “put a stop to [his] ideas” in order to simply survive in prison. If handled properly, the release of minors like this young man could also represent a release of intellectual potential that would be better spent outside the prison walls, contributing to the rehabilitation of the country.

While the January 2003 decision to release detained minors into the solidarity camps was commendable, it has still not been fully implemented two years later. While the Government of Rwanda focuses on those who have confessed, “1994 minors” are still languishing in prison, and some without files. Among those who have been provisionally released, they are unable to find jobs, are unable to afford school fees (many have lost up to 10 years of formal schooling, while others have learned to read and write in prison), and do not know when their cases will be heard. This state of affairs reveals the present government’s lack of commitment not only to prioritize the release of 1994 minors, but to rehabilitate and promote the social reintegration of those who have been released, all of whom are now in their mid to late twenties, and early thirties.

V. THE IMPACT OF ADULT MANIPULATION

In a report released by Human Rights Watch in December 2001, researchers reported that the Rwandan government had been “re-educating” child soldiers who had been forcibly recruited by the Armée pour la Libération du Rwanda (ALIR) since 1994. Interestingly,

145 Author interview with Stephen Balinda, February 2005. During this same interview, Balinda stated that “there were no more genocide minors” in prison—a statement that proved to be false. One “new” prison director, in Kibungo, first denied and then was surprised to learn that there were indeed minors (accused of genocide, between 14 and 18 in 1994) in his prison.

146 Interview #1, 2002 (for full interview, see Appendix VI at http://www.trinstitute.org/ojpcr/6_lmorrill1.pdf).

147 The ALIR is considered by the incumbent government of Rwanda to be a “rebels” force that continues to threaten the security of the country. While the top-ranking officials of the ALIR are mostly ex-FAR or Interahamwe, not all ALIR troops
the report noted that the majority of these children, who had been sent to the Gitagata center for social reintegration just south of Kigali, had participated in combat only a few times and had “not been trained to commit atrocities.” This same report mentioned that on 13 August 2001, the Rwandan government made a radio announcement that the Gitagata center would be providing services to street children as well as continuing to provide reeducation programs to children under the age of 14 who had been convicted of crimes.

In its research, Human Rights Watch noted that some child soldiers in the ALIR were able to articulate political goals that were also cited by adult combatants: to overthrow a repressive government and bring an end to injustice. More significantly, however, when considering the broader role that youth may potentially play in the reconciliation process, were the range of children’s experiences and observations that reflected ethnic prejudices that were learned from adult soldiers, including a remark that Tutsi were more “‘cruel’ than others”:

One said he had been taught that "Hutu and Tutsi are different ethnic groups and there will never be good relations between them.” Another said he heard commanding officers saying that Tutsi kill and imprison people in Rwanda. Others said simply that they did not know or were still waiting to find out what the war was all about.

As in Sierra Leone, children and adolescents in Rwanda were sometimes drugged or intoxicated, or forced under threat of death to commit atrocities during the genocide. The younger the child, the less likely he or she may have understood the implications of his or her actions. However, Rwandan youth between the ages of 14 and 18, while old enough to incur criminal responsibility under national law, were often subjected to the same threats and forced to make snap decisions about whether to take another life or save his or her own. Certainly, the moral dilemmas that these young people have had to face, especially during the genocide, when their sense of morality was severely challenged even as it was evolving, have left scars upon their collective consciousness.

This idea of “moral development” has been further distorted by the fact that youth who have spent the last several years in prison have been exposed to the political biases of bitter adults and “true” criminals. Some adults have influenced young prisoners’ perceptions and understanding of the civil war and genocide—sometimes constructively, sometimes destructively—but others, especially those who have been condemned to life, have taken advantage of minors physically, making them feel even more powerless to control their own lives. Therefore, any rehabilitation scheme for imprisoned youth must take into consideration the complicated historical path that these young people have been forced to follow, and the fact that their personal and intellectual development have often been shaped by those least interested in their safety and well-being.

VI. REHABILITATION AS A FORM OF COMPENSATION FOR RELEASED MINORS

George P. Fletcher’s theories of punishment and compensation seem particularly pertinent to the case of Rwanda. He asserts that the notions of punishment and compensation are closely related in that both “function as sanctions imposed against persons, who, in general terms, cause harm or endanger others.” The purpose of punishment is “to rectify a public imbalance generated by the defendant’s wrongdoing,” while the purpose of

were involved in the 1994 genocide. The ALIR is also thought to be an alias for or to have been absorbed by the FDLR ( Forces Démocratiques de Libération du Rwanda), which also opposes the RPF.


149 Id.

“compulsory” compensation is to rectify the “private imbalance generated by the defendant’s causing harm.” As a prosecutorial mechanism designed to ‘end the culture of impunity’ in Rwanda, the gacaca may succeed in rectifying the public imbalance created by the genocide. However, it may fall short with regard to the ‘correction’ of the private imbalance that will linger between victims and perpetrators. The imbalance is not simply between ethnicities; it is between generations.

The common assertion that every living Rwandan national—whether Hutu, Tutsi, or Twa—has been affected either directly or indirectly by the genocide is no exaggeration. Every Tutsi has lost either an immediate family member, or a more distant relative, and every Hutu has either lost a family member or has one in prison—whether or not the detention is in fact justified. When the socio-political and economic context of the Rwandan case is examined fully, the broad social impact of the genocide and extra-judicial killings perpetrated by the RPA seems to defy the application of any general theory of compensation. Failure to offer reparation in some form, whether it be through restitution, compensation, rehabilitation, or satisfaction—among other methods suggested in the Van Boven Principles on the right to reparation—would be tantamount to a failure to acknowledge genocide survivors. When perpetrators are children who were ‘victimized’ into committing crimes by adults, the question of who should give reparations becomes as complex as who should receive them. And when children are imprisoned wrongfully and arbitrarily for years without trial or investigation, and are found innocent more than a decade later, the very idea of reconciliation loses meaning.

“1994 minors” began to be released at the end of January 2003, along with elderly and extremely sick detainees. The last wave of releases that the author was aware of took place on 29 August 2005. According to a source in the Prosecutor General’s office, 1,880 of the approximately 21,000 detainees recently released (July-August 2005) were minors at the time of their crimes. However, the question of what happened and continues to happen to them both during and after their 2-month stays in the ingando remains unreported and unstudied. In a report published online in the fall of 2004, this author wrote that released minors “must not be left to fend for themselves in a social environment where acts of revenge are still probable.” Indeed, these acts of revenge include having newly released detainees re-arrested, and some minors who have been released have been returned to prison after completing the ingando. Such is the case of one female minor detainee, first interviewed in July 2001, released from Kigali Central Prison on 22 February 2003, and returned to prison without explanation on May 4 of the same year. She was released a second time on 29 August 2005. According to another source, a male minor released on the same day in August was returned to prison after the ingando by the same RPA soldier who had occupied his family’s land and imprisoned him several years earlier. The source cites the RPA soldier’s desire to keep his family’s land as the reason for having the young man returned to prison.

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151 Id.
152 See the Van Boven Principles on the Right to Reparation.
153 Information obtained directly from detainee during a 2nd prison interview, 1 March 2005 (coincidentally the 10th anniversary of her arrest at the age of 15). She was told she was initially imprisoned for her own protection, but suspects it is because one of her brothers worked for a known interahamwe leader.
154 Communication received in November 2005; notes on file with the author.
155 This same young man was found innocent in the prison gacaca sometime between 2001 and 2005. He is reported to have escaped out of desperation. Indeed, property conflicts are sometimes the real reasons behind continued false imprisonment, but there are many other factors that erode the respect for due process in Rwanda, including the practice of “preventive” arrest and detention.
While the Community Service program (Travaux d’intérêt general or TIGs) envisaged by the *gacaca* system will theoretically include minors, and observe fair labor practices with regard to minors, it should not be treated as a proxy for further social reintegration programs after they leave the *ingando*. The design of reintegration programs should reflect the economic and educational needs of youth who have lost skills and been deprived of a regular education due to imprisonment, without marginalizing youth who are genocide survivors. However, to date, the TIG plan still consists of unpaid and heavy labor three days a week, in the public or private sector, that is deemed to be for the public benefit, such as planting trees, building schools and the construction and repair of roads and bridges. As Penal Reform International points out, the concept of “work as punishment” harks back both to the colonial era in Rwanda, when it was known as “forced labor” or “*ubuletwa*,” and to the ancient Rwandan system of “*ubuhake*,” which created a sort of serf-overlord relationship between Hutu and Tutsi.158 It is thus imperative that the goals of the TIG are explained thoroughly, and represented to the community with an awareness of the historically negative association that might be attributed to it, both by survivors and newly released detainees.

The implementation of the TIG has been extremely slow, and released detainees are not to begin community service until after being sentenced by *gacaca*. On 23 September 2005, over 1000 convicts from the central prison in Gitarama, who were released after confessing, became the first group to begin community service.159

**VII. CONCLUSION**

As noted in UNICEF’s Recommendations on the Truth and Reconciliation Commission for Sierra Leone, previous truth commissions in other parts of the world have involved children in their proceedings to varying degrees.160 Such involvement has ranged from a brief commentary regarding the impact of conflict on children in El Salvador, to a more thorough analysis of the effects of violence against children in Guatemala (although neither children nor adults who had been abused as children were interviewed), to the special hearings and workshops for children and youth in South Africa, to which an entire chapter of the TRC’s final report was devoted.161 The Sierra Leone TRC is the first truth commission to fully integrate children into its proceedings by permitting them to formally testify before the Commission.162 Unfortunately, Rwanda has not endeavored to undertake measures similar to those embraced by South Africa and Sierra Leone with regard to the experiences of children and youth, and thus has not abided by its obligations under international law and other guidelines on the administration of juvenile justice.

Rwandan youth who have been and are still in the process of being released from prisons across the country are an integral part of the national reconciliation process, and should not be marginalized. Based on the accounts relayed to the researcher through in-depth personal interviews, many—but not all—youth detainees interviewed for this report appear to have been falsely accused of participating in the genocide, and were quite skeptical of the *gacaca* system. Given the repeated delays in making the system operational, many voiced doubts that the *gacaca* would happen at all. While the provisional releases of minors which started in late January 2003 was a step in the right direction, it raises a number of concerns for

160 UNICEF/UNAMSIL Report, 2001, p. 110
161 Special Hearings for Children and Youth: Volume 4, Chapter 9 of the South African TRC’s Final Report
162 Lome Accord, 7 July 1999, [http://www.sierra-leone.org/lomeaccord.html](http://www.sierra-leone.org/lomeaccord.html) - The Lome Accord recognizes the vulnerability of children (esp. child soldiers) and their need for special protection during the disarmament, demobilization, and reintegration process in Sierra Leone in its preamble and under Article XXX.
young people who will be released, but who no longer have family to support them. If it is to take accountability, justice and reconciliation seriously in the *Inkiko-gacaca*, Rwanda must provide its young people not only with the means to support and protect themselves, but with tangible reasons to respect the government as well. Youth who have spent almost all of their adolescence in prison are particularly vulnerable both to recidivism and delinquency, especially if they are parentless and without a guardian. So far, the current government has not remotely examined the post-imprisonment circumstances of these young people, or considered the impact of imprisonment on them.

If youth detainees are to be effectively rehabilitated and reintegrated—whether they come before the *gacaca* or are tried in an ordinary court—the government and other organizations within whose mandate it is to protect the welfare of children and youth, must be aware of the social context from which these young people have just emerged. Two months of reeducation in the *ingando* will not undo the damage that ten years of prison have done. While the government is constrained in several ways by what it can practically do to support newly released detainees, international and local NGOs can fill in the gaps. Collectively, as a generation of transition, and individually, as agents of social change, Rwanda’s youth—both those released after many years in prison and those never imprisoned or accused of wrongdoing—have an indispensable role to play in national reconciliation, in rebuilding the country, and in rebuilding—or perhaps simply creating—the most elusive element in all human relationships: trust.
Reform of Juvenile Justice in DRC

Trish Hiddleston

The situation in the DRC was and remains very complicated. The main conflict spanned two periods: 1996-1997 and 1998-2003. The conflict involved the regular armies of DRC, Rwanda and Uganda, but also of other countries (Zimbabwe, Chad, Angola, etc.) and many irregular armed groups with constantly shifting alliances and varying degrees of organisation. It was characterised by various different conflicts within the larger conflict and by the presence of numerous rebel armed groups and/or armed bands. Although peace accords have been signed and a Transitional Government is now in place, with elections due in 2006, internal conflict continues in certain areas.

Transitional justice in the DRC for children – whether as perpetrators, witnesses or as victims – relates primarily to the issues of children recruited into armed groups and forces and sexual violence.

Child recruitment began in 1996 – children were generally not found in the armed forces or armed groups before then. Boys and girls have been used for a variety of roles by armed groups and forces – bearing arms, fighting, as spies, as cooks, as porters, as sexual objects, etc. Generally it has been found that reintegration of children who have been associated with armed groups and forces in the DRC are accepted back into their communities (boys generally more than girls it is said). There tends to be some community understanding of the reasons the children were involved and their lack of maturity linked with their limited responsibility for their acts.

Child recruitment is still going on and it has been going on continuously since 1996 to varying degrees and in varying areas. There were instances of forced recruitment but also coercion or “volunteering” by children who felt that this was the best opportunity open to them (sometimes based on false promises by recruiters, and false expectations) and sometimes by children and/or their families who felt the need to defend themselves or their communities.

Peace talks and peace agreements were followed by reunification of the country and the installation of a transitional national government in 2003. The Transition was to last for two years at the end of which elections are due to be held, with the possible and likely extension for another 6 months. Currently there is an unelected government made up of people from the main political and armed groups. There is barely a political agenda, trust between members of the government is weak and each is preparing to secure their remaining in power at the elections.

The situation remains very fragile. Armed conflict has abated and is no longer on a national scale. But fighting still continues, populations are attacked, and displacement, recruitment (including of children) and sexual violence continue and show few signs of abating. It is argued – nationally and internationally - that the Transition has held, and although fragile has been more successful than was expected and should be supported. Because so many of those currently in power were in positions of leadership and closely associated with atrocities that took place between 1996 and 2003 (and in some case since then also), it is very unlikely that those most responsible will be held accountable at national or international level while holding power in the interests of maintaining the fragile national peace. Those who might be
arrested are the people who are further down the chain of responsibility.

The national judicial system today is very similar to the situation of disarray prior to the conflict due to the many years of poor governance under Mobuto, although now exacerbated by the many years of conflict: magistrates, lawyers and other members of the legal system are not paid for their work, are paid very poorly and/or accept payment from whichever party in the case is willing to offer it to them. An EU project examining possible support and/or reform of the judicial system has not progressed beyond a situational analysis because of the overwhelming size and nature of the needs and difficulties. UNICEF works in coordination with other organisations in order to speak with one voice and has been relatively successful although in a very limited way, in a context where the Transition remains very fragile.

Rape and other forms of sexual violence have been used as a weapon of war in DRC and have continued in peace time. All parties to the conflict have been associated with sexual violence. This poses complex and serious issues for any system of transitional justice: how can we and should we distinguish between rape by individual soldiers, groups of soldiers, group of bandits or rape by individuals not associated with an armed group at any one time in any one area – conflict zone or non-conflict? In times of official peace or areas that are deemed peaceful, how does or should sexual violence committed by a member or members of an armed group or the armed forces differ or be deemed different from when it is committed during a time of clear conflict in a conflict zone? The considerable allegations against MONUC’s personnel (civilian and military) for sexual abuse and exploitation also remain to be addressed. MONUC are taking action but have been criticised for reacting too slowly and without sufficient determination to what has become a very serious and widespread problem.

During this period of Transition, managing the expectations of children, communities and donors, as well as a realistic appraisal of what can be provided and achieved is essential. For instance in the case of demobilisation of children, the expectation is that child protections agencies will be able to “fix the situation” but often this is not possible. Children cannot be given back their childhoods and the acts they witnessed while associated with armed groups and forces deleted from their experience. Children – as adults – will have to live with the knowledge and memory of those acts for the rest of their lives and although psychological support and a functioning, fair judicial system could help, this is unrealistic in the foreseeable future for DRC even with very serious and significant investment of resources.

Initially children or their families living as they do in an extremely vulnerable situation, may appear more interested in receiving cash on demobilisation and may demand this. Although most families want their children to go back to school and most children ask for this too, their immediate needs sometimes over-ride the longer term needs. The education and health systems like the judicial system have deteriorated with the years of poor governance followed by years of war – no programme for the reintegration of children will be able to afford to fix all the problems and even with extensive resources, the problems will take decades to resolve. Programmes for the reintegration of children who have been associated with armed groups and forces simply cannot ensure that all of these children can return to a functioning school and benefit from proper health care in their area of origin or area of choice.

Most of these children are going back to very vulnerable communities. If these children receive benefits that are not available to other children in the community, there is a possibility that they will be resented which will not facilitate their reintegration and sets unrealistic expectations for the time when they will need to be independent. This could also send a
message that in order to access benefits that are not available to the ordinary population – e.g. access to free health and education of quality – children should be recruited in order to be demobilised and be entitled to these benefits. There is a great need to reinforce all community infrastructures.

During a period of transition money, public attention (including at the international level) and resources are more readily available, so this is the time when we should try and come up with policies and procedures that will benefit all children in the longer term, profiting from that opportunity to build up a functioning and fair judicial system. The attention and money that is being made available to international justice for DRC – which will only ever address crimes by a few of the most responsible – should be used in such a way to support the national judicial systems. The opportunity, while there are funds and there is attention drawn to the subject, should be used to associate local personnel in training courses, and to inform the population about minimum standards, obligations, expectations, as well as to use the international system to set the bar higher for minimum standards in the Congolese justice system in the future.