
INTERNATIONAL CRIMINAL JUSTICE AND CHILDREN

No Peace Without Justice
UNICEF Innocenti Research Centre
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Foreword

Today's conflicts target children for the worst possible violence and abuse. It is our shared duty – our moral obligation – to end that outrage. We cannot stand by in silence while children are made victims of murder, rape and mutilation; while children are abducted and forced to fight in wars, and take part in wartime atrocities.

This guide on children and international justice and truth-seeking mechanisms is part of an ongoing effort, together with many partners, to ensure that children can grow up in a world safe from harm. It is a practical guide that summarizes the legal protection framework for children in armed conflict, and provides an introduction to the functions and statutes of justice and truth-seeking mechanisms, in particular as they relate to children. Practical experiences of children in such processes are limited so far, and many questions remain, which will require further reflection, study and application. We attempt in these pages to explore the emerging issues and address the critical gap in accountability for crimes against children, outlining practical steps that can protect children under international criminal law.

We call upon child rights advocates and international criminal justice experts to join in this effort. By giving careful attention to the broader context of international criminal justice and the special needs of children, we believe that together we can make a difference for children in this world. In fact, the success and sustainability of peace processes depends on young people who will carry forward their hopes for the future. We cannot let them down. We cannot fail to provide the leadership that will, in turn, inspire their own efforts to help build a world without violence, where justice is the foundation for stable societies, for democracy and the rule of law.

We must not delay because children cannot wait. Let their impatience motivate our actions. We must be clear that the era of impunity is over, that we are entering a new era of justice and peace.


EMMA BONINO
MEMBER OF THE EUROPEAN PARLIAMENT


CAROL BELLAMY
EXECUTIVE DIRECTOR, UNICEF

Executive summary

In the outcome document of the United Nations Special Session on Children, 'A world fit for children', adopted in May 2002 by the General Assembly, governments undertake to:

"Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, and war crimes, and exclude, where feasible, these crimes from amnesty provisions and amnesty legislation, and ensure that whenever post-conflict truth and justice-seeking mechanisms are established, serious abuses involving children are addressed and that appropriate child-sensitive procedures are provided."

Why is justice for children important?

Children are among the principal victims of war. In the last decade, an estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict. At any one time over 300,000 child soldiers, some as young as eight, are exploited in armed conflicts in over 30 countries around the world. They have been made targets of the worst possible violence and abuse. They have been abducted, raped, recruited into armed forces and groups and forced to participate in atrocities. Impunity for these crimes adversely affects not only the individual child victim, but whole generations of children. It undermines their development and the formation of their identity, values and political beliefs, thus affecting their ability to function as future leaders and decision makers.

Yet crimes committed against children have not received due attention in previous and current international justice and truth-seeking mechanisms, most often being mentioned only as part of atrocities committed against the civilian population in general.

Unless accountability mechanisms address crimes committed against children, and perpetrators of war crimes, crimes against humanity and genocide are brought to justice, children will continue to suffer, with negative consequences for future peace and stability.

Addressing the experiences of children in international justice and truth-seeking mechanisms is therefore not just desirable: it is essential.

Key actions to end impunity for crimes against children

- Ensure that accountability mechanisms address crimes against children, through investigation of crimes, prosecution of perpetrators and redress for the victims;
- Develop child-friendly procedures for children's involvement in truth and justice-seeking mechanisms.

Accountability fulfils a number of important functions

For the individual child victim or child affected by the conflict:

- Provides child victims with an opportunity for redress;
- Contributes to the process of healing and helps children understand that they are not to blame for what has happened to them and their society.

For promotion and protection of children's rights:

- Calls attention to violations of children's rights, which are more easily hidden and often overlooked by authorities and by the international community;
- Records violations committed against children;
- Helps reveal overarching criminal policies, which is vital to understanding the broader context of what happened to children.

For future peace and stability:

- Helps to break the cycle of violence and restore confidence in democracy and the rule of law;
- Increases the chances of success for the peace process, and strengthens the legitimacy and authority of the new government.

Accountability mechanisms can take many forms

- International Criminal Court;
- *Ad hoc* tribunals: International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda ;

- Special courts and tribunals: for example, the Special Court for Sierra Leone;
- Truth commissions;
- National courts;
- Combinations of the above or further innovations.

Crimes against children

The ICC, *ad hoc* Tribunals, national courts and other justice mechanisms should proactively investigate and take legal action against persons who commit crimes under international law against children.

Children can become victims of any of the criminal acts that fall within the jurisdiction of the ICC. The definitions for genocide, crimes against humanity and war crimes also include a number of crimes specific to children or to which children are particularly vulnerable, such as:

Genocide

- Forcible transfer of children from one group to another;
- Measures intended to prevent birth.

Crimes against humanity

- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization.

War crimes

- Intentional attacks on schools;
- Crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and enforced sterilization;
- Using starvation as a method of warfare;
- Use of children under age 15 as child soldiers.

Stopping the use of child soldiers

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits the

compulsory recruitment of children under the age of 18 and their direct participation in hostilities. The Protocol, which entered into force on 12 February 2002, also requires States to increase the minimum age for voluntary recruitment and introduces strict safeguards for voluntary recruitment of children under the age of 18. All forms of recruitment and participation of children under the age of 18 are banned for non-State armed groups. The Protocol reflects an emerging international consensus that 18 years should be the minimum age for recruitment into armed forces and groups and for participation in hostilities. The Rome Statute places the recruitment or use of child soldiers under 15 under the jurisdiction of the Court as a war crime, which is an important step towards the enforcement of international law prohibiting children's participation in hostilities.

Children's involvement in the ICC

The ICC has no jurisdiction to prosecute persons below the age of 18. Therefore, children can participate in the Court only as victims or witnesses. In addition to defining crimes concerning children, the Rome Statute of the ICC and the Rules of Procedure and Evidence include special provisions for the protection of children during the investigation and prosecution of cases.

For any child, the experience of giving testimony or being questioned by lawyers or investigators can be intimidating. In proceedings before the ICC, children may be asked to recall and mentally revisit horrors they have struggled to forget. There is a clear and imminent risk of retraumatization unless child-friendly procedures are adopted and staff experienced with children and psychosocial support are at hand.

The guiding principles of the Convention on the Rights of the Child (CRC) apply with respect to children who come before judicial bodies. The following principles should therefore be reflected in procedures and measures of the ICC designed for child victims and witnesses:

- The best interest of the child should guide all policies and practices (CRC article 3);
- The child has a right to be heard (CRC article 12);
- Physical and psychological recovery of a child victim, and social reintegration, should be promoted (CRC article 39).

The Rules of Procedure and Evidence address the need for special arrangements with regard to the legal representation of children. In the case of a child victim, an application to participate may be made by a person acting on behalf of the victim. The Rules of Procedure and Evidence provide that a child support person may be assigned to a child victim or witness to assist throughout all stages of the proceedings. The individual circumstances of each child – including the child’s age and gender, and the child’s wishes – should be primary guiding factors when appointing legal representatives and child support persons. For example, for girls who are victims of sexual violence, female staff of the Court should always be present and a female lawyer should conduct the questioning, provided that is the wish of the child, in order to ensure a safe and comfortable environment.

The Victims and Witnesses Unit of the ICC is mandated to provide protective and security arrangements, counselling and other assistance to ensure the safety of witnesses and victims during investigations, trial and after the trial. In addition to *protective* measures, the Unit will provide *special* measures to facilitate the testimony of a child, traumatized person, or victim of sexual violence. These measures can include, for example, hearings *in camera*, sight-screens between the victim and the accused, pre-recorded testimonies, video conferencing or closed-circuit television, and the use of pseudonyms.

Other issues relating to children’s legal representation, which are not dealt with in the Rules, will be worked out in the future. This presents an opportunity for all those with an interest in children’s rights and international criminal justice to ensure that all relevant issues affecting children are taken into account and dealt with in the best possible way.

Staffing: A child-friendly ICC

The extent to which the ICC can successfully investigate and prosecute crimes committed against children and address the special requirements and vulnerabilities of child victims and witnesses will largely depend on whether the ICC has staff who possess adequate expertise in issues related to children. The Rome Statute explicitly provides that:

- When selecting judges, States Parties must take into account the need to include judges with legal expertise on specific issues, including violence against women and children;
- The Prosecutor shall appoint advisers with legal expertise on specific issues, including sexual and gender violence and violence against children;
- The Victims and Witnesses Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. The Unit may also include staff with expertise in children's issues, in particular traumatized children, and gender and cultural diversity;
- The Victims and Witnesses Unit shall make available training on issues of trauma and sexual violence to the ICC.

Partnerships: Civil society and the ICC

The ICC creates both opportunities and challenges for child rights advocates. Ending impunity for crimes committed against children, while at the same time developing procedures and policies to ensure that the needs of child victims and witnesses are properly taken into account, will require concentrated effort and preparation.

Child rights advocates can be a vital source of information with respect to crimes committed against children, particularly as they may have information that discloses the widespread or systematic nature of the commission of crimes.

Child protection agencies may be in possession of information that is sensitive or that should otherwise be kept in confidence. The Rules of Procedure and Evidence contain specific guidelines concerning non-disclosure of privileged and confidential information, providing for

situations in which a person will not be compelled to disclose information and protected categories of relationships, in particular those related to or involving victims.

Child rights advocates can also help ensure that the ICC properly addresses the rights and needs of child victims and witnesses, and that crimes committed against children receive due attention. Training of judges, prosecutorial staff and staff of the Victims and Witnesses Unit will be essential to ensure the development of proper measures for involving children in the ICC. The training should cover international child rights standards, how to deal with war-affected children, and best practices for the participation of child victims and witnesses in judicial proceedings.

Educating children about the ICC is essential so that they have access to all relevant and appropriate information and can make informed choices about their involvement with the ICC. Thus global and national advocacy activities should seek to inform children about the work of the ICC and other international justice and truth-seeking mechanisms. Children's participation should be voluntary and, in all instances, special safeguards for their protection must be in place.

The ICC and national justice systems

The Rome Statute of the ICC is based on the principle of complementarity, which recognizes that States have primary responsibility to prosecute crimes under international law. The ICC will defer to national criminal justice systems if a State indicates that it is investigating, prosecuting or has concluded criminal proceedings in a certain case. The ICC will exercise its jurisdiction only if States have chosen not to proceed, if they are inactive or if they are clearly unable or unwilling genuinely to pursue a case.

A first step for child rights advocates at the national level is to campaign for as many States as possible to become parties to the Rome Statute. Given the jurisdictional limitations on cases that can be

brought before the ICC, widespread ratification from all regions in the world is essential. In States that are already parties to the Statute, child rights advocates can assume an active role in assisting the process of reforming national laws in accordance with the Rome Statute, particularly as it relates to children.

States should review their national legislation and make amendments as necessary to ensure compatibility with the Rome Statute, especially:

- Genocide, war crimes and crimes against humanity should be made crimes under national law, and the definitions used should be at least of the same scope as those contained in the Rome Statute;
- Penalties under national criminal law should reflect the seriousness of the crime;
- National law should not allow Head of State immunity, or any other immunity, for crimes within the jurisdiction of the ICC;
- Procedures enabling judicial cooperation with the ICC should be established under national law.

The process of national law reform, to ensure compliance with the Rome Statute, may offer a window of opportunity to advocate for additional changes that are desirable from a wider human rights and child rights perspective. Child rights advocates should therefore be aware of legislative aspirations and trends in the country in which they are working, in order to take advantage of opportunities to raise juvenile justice standards and introduce concepts such as restorative justice, or child-friendly procedures for child victims and witnesses.

***Ad hoc* Tribunals**

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been established to prosecute war crimes, crimes against humanity and genocide in the former Yugoslavia and Rwanda. The two *ad hoc* Tribunals are similar in structure and operational aspects, although each has a distinct mandate designed to address the conditions and circumstances of a specific conflict.

Both Tribunals have jurisdiction over “natural persons pursuant to the provisions of the present Statute”, without specifying a minimum age. The fact that children have not been indicted or prosecuted by either the ICTY or ICTR is arguably an indication that neither Tribunal considered it was an appropriate forum for trying children responsible for crimes within its jurisdiction.

The Tribunals have adopted victim-sensitive practices, based on the requirements in their Statutes to ensure that protective measures are available for victims and witnesses. In numerous cases, prosecutors have requested special measures to protect the identity of victims and witnesses from the public, such as the use of pseudonyms or *in camera* proceedings. Such special measures would also be available for child witnesses.

Special Court for Sierra Leone

The Special Court for Sierra Leone has been established to try those who bear the greatest responsibility for crimes committed in Sierra Leone since 30 November 1996. The Special Court is thus directed towards the leaders who were responsible for planning and implementing strategies of warfare in Sierra Leone that included atrocities directed against civilians. While the Statute gives the Special Court jurisdiction over persons aged 15 years or above at the time of the alleged commission of the crime, it is unlikely that anyone under the age of 18 would satisfy the personal jurisdiction requirements. This is highlighted by the statutory direction to the Prosecutor to consider other methods, such as alternate truth and reconciliation mechanisms, to deal with child offenders.

The Statute for the Special Court includes a number of child-specific crimes, including the recruitment of child soldiers under 15 and their use in hostilities, and the abuse of girls under the age of 14. The Statute also includes a number of child-specific provisions in its institutional design, including the appointment of judges with expertise in children’s rights and the appointment of staff within the Victims and Witnesses Unit who have expertise in children’s trauma.

Given the probability of children appearing before the Special Court as witnesses, the Special Court is likely to set precedents for the involvement, treatment and protection of children in relation to international criminal justice mechanisms.

Prosecutions in national courts

Prosecution of serious violations of international law in national courts has several advantages over trials in international courts and tribunals. Trials take place in the country where the crimes were committed, enabling the local population both to follow the proceedings and to claim ownership more easily. There is better access to evidence and the participation of the population can help build a collective historical memory. Another advantage is that national prosecutions can help rebuild confidence in the judiciary and the criminal justice system and further the rule of law and human rights principles.

However, there are also several challenges to prosecution by national courts. In particular, in post-conflict situations it takes time to restore administrative and judicial systems, which are frequently destroyed during conflicts. Another challenge is that national legal standards and judicial procedures may not be in conformity with international human rights principles. This can have serious repercussions for children who are alleged to have committed crimes under international law. In the absence of a functioning court system, children may remain in custody without trial for months or even years. Files and records may be destroyed. The community, too, may exact its revenge directly on suspected offenders without regard for due process.

National legal systems should ensure that children in conflict with the law have special protection. In particular children have the right to treatment that takes full account of their age, circumstances and needs. In all circumstances, national juvenile justice systems should be in line with international standards.

Child perpetrators

Age of criminal responsibility

The CRC requires States to define a minimum age for criminal responsibility, but does not specify what that age should be. The Committee on the Rights of the Child stresses that the age should not be set too low. Whatever the age, States retain their obligations under international law in relation to persons under 18 who are alleged to have committed a crime.

Age and criminal jurisdiction

- ICC: No jurisdiction over persons under 18;
- ICTY and ICTR: Jurisdiction over persons under 18 not excluded. However, no person under 18 has been prosecuted to date;
- Special Court for Sierra Leone: Jurisdiction over persons between 15 and 18 years of age. However, it is likely the Special Court will not prosecute children, since it is required to focus on those who bear the greatest responsibility for the crimes;
- National courts: Jurisdiction depends on minimum age set for criminal responsibility.

Standards for treatment of child perpetrators

The Committee on the Rights of the Child has stressed that children who commit crimes should also be seen primarily as victims. When dealing with children who have participated in genocide, crimes against humanity or war crimes, general principles applicable to juvenile offenders continue to apply. Objectives should be:

- Reintegration in the environment that fosters the self respect and dignity of the child, and return to a “constructive role” in society (CRC article 39 and 40);
- Reinforcing the child’s respect for the rights of others (CRC article 40).

While accountability for crimes under international law serves the best interest of children, international child rights and juvenile justice standards recommend that alternatives to judicial proceedings guided by relevant international legal standards should

be applied (CRC article 40(3)(b); UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), rule 11).

The concept of restorative justice – achieved through alternatives to criminal courts – has gained support among child rights advocates. This approach is aimed at the offender understanding and taking responsibility for his or her actions and also involves achieving reconciliation between the offender and the victim and the wider community. Any proceedings undertaken in this regard must fully respect the rights of the child and contain at a minimum the same procedural guarantees they would have in criminal proceedings.

There is growing support – in child rights and juvenile justice standards as well as international practice – to provide alternatives to judicial proceedings for alleged child perpetrators of crimes under international law. When available, truth commissions have been recognized as an appropriate alternative to criminal proceedings for children who may have participated in atrocities during times of war and civil unrest.

Sentencing

International child protection standards set limits on the sentencing of child offenders:

- Death penalty or life imprisonment without possibility of release must not be imposed on children (CRC article 37(a));
- Imprisonment should only be used as a last resort and for the shortest period of time (CRC article 37(b));
- Alternatives to institutional care should be sought, such as counselling, probation, foster care, education and vocational training (CRC article 40(4)).

Children and truth commissions

Truth commissions have been established to deal with past human rights abuses, as a complement to criminal justice mechanisms. These commissions set out to establish a historical record of past atrocities, including events and developments preceding the atrocities, and to

make recommendations for the future. Truth commissions can assign institutional or individual responsibility for past abuses and analyse shortcomings that facilitated or allowed atrocities to take place. Truth commissions can give victims a forum in which their sufferings and losses become known and recognized. While many truth commissions have in one way or another touched upon crimes committed against children, the experiences of children have not been addressed in a systematic way. The mandate of truth commissions should incorporate children's perspectives, including the official acknowledgement of what happened to children and the making of recommendations specifically addressing the rights and needs of children. In so doing, truth commissions must ensure that appropriate procedures are in place to facilitate the involvement of children.

When criminal justice mechanisms are also operating, truth commissions can play a vital role in supporting the work of those mechanisms by providing investigators with an overall picture of the conflict and drawing their attention to specific crimes, particularly those involving children. In appropriate circumstances, judicial and non-judicial methods can operate together to provide an overall accountability mechanism, ensuring that those responsible for violating the laws of war are brought to account, and providing a mechanism by which victims' voices can be heard.

In order to facilitate children's participation, special procedures and practices should be adopted to ensure children feel safe and comfortable when recounting their experiences. These can include staff trained in work with traumatized children, a child-friendly environment for interviews, keeping the identities of children confidential, and closed sessions and special hearings for children.

Traditional methods of justice and truth-seeking for children

In addition to judicial mechanisms and truth-seeking bodies, many societies have developed traditional systems for accountability, which constitute an important complement to legal proceedings and truth processes.

For children who are victims of atrocities, traditional justice measures can provide an alternative, community-based system of accountability. For child victims, it can be reassuring to see perpetrators brought to justice by the very same community that was targeted, following norms and traditions to which the children are more accustomed.

One very real challenge with traditional justice mechanisms is ensuring the rights of victims, witnesses and perpetrators are respected. Consequently, child rights advocates who have gained the trust of communities will have an important role to play in ensuring that the proposed traditional justice mechanisms are compatible with child rights, for example by offering assistance to local leaders and elders. It is essential that traditional justice mechanisms maintain basic international human rights standards and international standards of juvenile justice.

Recommendations

Child rights advocates are urged to:

- Provide training to facilitate understanding of the ICC and other accountability mechanisms;
- Work with the ICC and other accountability mechanisms to ensure that children's rights are properly integrated into their operational procedures, by providing training and expertise on child-friendly procedures;
- Inform and educate children about the ICC and other accountability mechanisms;
- Participate in discussions of children's representation in the ICC and other accountability mechanisms to ensure that procedures and guidelines reflect children's rights, particularly the right to participate in decisions affecting their lives;
- Advocate for States to undertake comprehensive national law reform to ensure that children's rights are properly protected as part of their ratification and implementation processes;
- Cooperate with the ICC and other accountability mechanisms in the provision of information relating to crimes committed against children;
- Advocate to increase the age for the crime of recruitment to 18 years at the first review conference of the Rome Statute.

The International Criminal Court is urged to:

- Focus specifically on crimes committed against children when drawing up indictments;
- Work with child rights advocates to ensure that children's rights are properly integrated into its operational procedures;
- Ensure adequate psychosocial and other support is available for all children who come in contact with the ICC at any stage during the investigations and prosecutions, including follow-up support once investigations and trials have concluded;
- Receive information in confidence from child rights advocates and others about crimes committed against children, wherever possible.

International accountability mechanisms are urged to:

- Focus specifically on crimes committed against children when drawing up indictments or preparing reports and recommendations;
- Develop procedures and mechanisms to deal with child victims and witnesses, to seek the views of children on decisions affecting their lives, and to facilitate their participation in such processes;
- Work with child rights advocates to ensure children's rights are properly integrated into their operational procedures;
- Ensure that adequate psychosocial and other support is available for all children who are involved with the institution at any stage during its work, including follow-up support once its work is concluded;
- Cooperate in ensuring that crimes committed against children are not overlooked, for example through the sharing of expertise and information, where appropriate.

States are urged to:

- Ratify the Rome Statute of the International Criminal Court and adopt comprehensive implementing legislation, including by incorporating crimes within the jurisdiction of the ICC into national law;
- Undertake comprehensive national law reform to ensure children's rights are properly protected as part of their ratification and implementation processes;
- Ensure that a sufficient proportion of candidates for judicial and other positions within justice and truth-seeking mechanisms have expertise in child rights issues;
- Ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and adopt a 'straight 18' ban on all recruitment – compulsory or voluntary – and participation in hostilities of children under 18;
- Take appropriate measures to promote the physical and psychological recovery and social reintegration of child victims;
- Ensure that appropriate mechanisms are available to deal with child perpetrators and that such mechanisms fully respect the rights of the child and maintain international juvenile justice standards.

CHAPTER ONE

JUSTICE FOR CHILDREN

Efforts over the last 60 years to put in place an international legal framework for safeguarding children's rights and ensuring their protection have been largely successful. The Convention on the Rights of the Child (CRC) – the most widely ratified human rights treaty in history¹ – explicitly outlines international obligations for the protection of children. In addition, States have committed themselves to protect children as part of their general undertakings to protect human rights and humanitarian principles laid down in various other international instruments.

While there have been significant advances in the development of legal instruments for the realization of children's rights, much work needs to be done to ensure the implementation and enforcement of these obligations. Despite the formal commitments for their protection, children have figured prominently among the victims of widespread and systematic acts of violence during the 20th century. They have been enslaved, murdered, raped and forcibly recruited as child soldiers. They have also witnessed crimes committed against family members and friends. Yet the perpetrators of these crimes have rarely been held to account. For these children, justice has not been done, and they might draw the conclusion that crimes committed against children are beyond the reach of the law.

1.1 Children have become targets of violence

By definition, crimes against humanity and genocide can occur whether there is an armed conflict or not, but the most serious crimes under international law are frequently committed during times of war. Despite the prohibitions on intentionally directing attacks against civilians, including children, which is one of the core features of international humanitarian law, civilian fatalities during armed conflicts have risen from 5 per cent at the beginning of the 20th century to an estimated 90 per cent during the 1990s. During the last decade, more than 2 million children died as a direct result of armed

¹ As of 8 August 2002, 191 States had ratified the

Convention on the Rights of the Child (CRC).

conflict, and many times that number have died from malnutrition and disease caused by war.² Millions more have been permanently disabled or injured, traumatized or orphaned.³

Children have not only been targeted as part of the civilian population, but have also been deliberately targeted specifically *because* they are children. For example, in the former Yugoslavia, elite snipers intentionally shot children in public places to intimidate the civilian population. In Sierra Leone, rebels amputated the arms and legs of civilians, including many children, as part of a deliberate strategy to spread terror. Many recent conflicts have also involved the pretence of claims of 'ethnicity' in which the enemy is defined through identification with a different group, focusing on children as the 'other' group's hope for the future. Targeting children – for extermination, torture, rape and use as sex slaves – is increasingly being used by parties to a conflict as an effective means of subduing the civilian population as a whole.

Another way in which children have been deliberately targeted is the recruitment of children – some as young as eight years old⁴ – by armed opposition forces, paramilitaries and other militant groups and, less commonly, by regular armed forces. Estimates suggest there are at least 300,000 child soldiers currently taking part in hostilities in over 30 countries around the world. Children are recruited through conscription, manipulation and pressure from adults, or they may be driven to join because of poverty or discrimination. Very often they are forcibly abducted by armed groups at school, on the streets or at home. Child soldiers are increasingly used in combat, a trend

² Graça Machel, *The impact of war on children: A review of progress since the 1996 United Nations report on the impact of armed conflict on children*, Hurst & Co., 2001, p. 1.

³ *Ibid.*; UNICEF, *The state of the world's children 2002*,

p. 42; 'Children and armed conflict: Report of the Secretary-General', United Nations, *A/55/163-S/2000/712*, 19 July 2000, para. 2.

⁴ UNICEF/UN Department of Public Information, 'Impact of armed conflict

on children: Report of the expert of the Secretary-General, Ms. Graça Machel: Selected highlights', 1996, p. 28. See also Coalition to Stop the Use of Child Soldiers, *Global Report on Child Soldiers 2001*, London, May 2001, p. 21.

accelerated by the proliferation of small arms, which are easy to operate and light enough for a child to carry. Children have also been used as human shields or sent on particularly dangerous missions. In addition, many children not directly serving in combat are forcibly recruited to work for fighting forces as cooks, porters, messengers or spies, and to assist war efforts in a multitude of other ways; both girls and boys are exploited for sexual purposes. Girls who are abducted into armed groups are often forced into sexual slavery and the majority are exposed to sexually transmitted infections, including HIV/AIDS.

1.2 Why is justice for children important?

The impact of war and violence on children is likely to have long-term adverse consequences for the formation of children's values, identity, political beliefs and ability to function as leaders and decision makers in the future. The negative implications for future peace and stability are enormous. Mechanisms of accountability are therefore essential to halt the cycle of repeated violations and end the impunity that threatens sustainable peace. Protecting the rights of children by ensuring justice is done is an important foundation for successful peacemaking, peacekeeping and peace-building in conflict and post-conflict situations.

Under the CRC, States are obliged to protect children at all times, including during armed conflict. The principles of protection outlined in the CRC, together with other international instruments such as the Geneva Conventions and their Additional Protocols, make it clear that targeting children for genocide, war crimes or crimes against humanity is a serious violation of international law and cannot be tolerated. Accounting for atrocities committed against children in the past is therefore important to strengthen the protection of children and to highlight that such acts are criminal offences for which individuals may be held responsible.

1.3 A move towards justice for children and an end to impunity

Accountability fulfils a number of important functions. For the child victim, it can provide an opportunity for redress. It contributes to the

process of healing and helps children understand that they are not to blame for what has happened to them and their society. Ending impunity for atrocities also promotes and protects the rights of children. For example, it can call attention to and create a record of violations of their rights.

The adoption of the Rome Statute of the ICC on 17 July 1998 and its entry into force on 1 July 2002, less than four years later, reflects a global determination to bring to justice the perpetrators of genocide, crimes against humanity and war crimes. The ICC has the potential to make a decisive contribution to the end of impunity for the most serious crimes under international law, including crimes against children, by calling to account the individuals responsible for such crimes.

Accountability for crimes committed against children has also been explicitly called for by the United Nations Special Session on Children in its outcome document, 'A world fit for children', adopted in May 2002 by the General Assembly. Pursuant to that document, governments undertake to:

"Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, and war crimes, and exclude, where feasible, these crimes from amnesty provisions and amnesty legislation, and ensure that whenever post-conflict truth and justice-seeking mechanisms are established, serious abuses involving children are addressed and that appropriate child-sensitive procedures are provided".⁵

United Nations Security Council resolution 1379 on children and armed conflict, adopted in November 2001, makes a similar statement, urging governments to end impunity and prosecute those responsible for the most serious crimes against children.⁶

⁵ 'A world fit for children', outcome document of the United Nations General Assembly Special Session on

Children, 2002, United Nations, A/S-27/19/Rev.1, para. 23.

⁶ United Nations Security Council resolution 1379 of 20 November 2001, para. 9(a).

1.4 Children and international criminal justice

Children are critically affected by crimes under international law as victims, witnesses and potentially even as perpetrators. The question of how and under what circumstances children become involved with international truth and justice-seeking mechanisms therefore needs close and careful consideration. The international criminal justice system has important implications for children, primarily as a means to end impunity for crimes committed against them, whether through exercising primary jurisdiction or in a complementary role, together with national justice systems and other accountability mechanisms.

Children's contact with international justice mechanisms will, for the most part, be as victims or witnesses. The process of giving testimony or otherwise participating in the work of international criminal justice mechanisms, if properly handled, can have a healing effect on children and help them deal with their own responses in the aftermath of armed conflict. These issues have assumed a sense of urgency with the establishment of the International Criminal Court, the ongoing work of *ad hoc* tribunals, national prosecutions of war crimes and the establishment of truth-seeking mechanisms in various countries in transition.

1.5 Children as witnesses to crimes under international law

Children have been direct eyewitnesses to the most serious crimes under international law: they have seen their families and neighbours massacred, witnessed torture and abuse and seen their communities destroyed. Witnessing such crimes can leave children traumatized. Appropriate support and psychosocial care need to be provided to help them recover from what they have seen and experienced.

1.6 Children as perpetrators of crimes under international law

While children's experiences of war crimes, crimes against humanity and genocide are first and foremost as victims, children are also sometimes recruited to be active parties to those crimes. In Sierra Leone, children were abducted and made to terrorize the civilian population, including amputating the limbs of civilians. In Rwanda,

some children directly participated in killings during the genocide. Children, mostly from poor families, may be coerced into participating in crimes, either threatened, indoctrinated, manipulated or drugged. Forcing children to commit atrocities during an armed conflict is itself a war crime, resulting in severe psychological harm, and is a violation of their rights. Child perpetrators are thus victims of criminal policies for which adults are primarily responsible.

CHAPTER TWO

INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION OF CHILDREN

Children are protected by a vast body of human rights and humanitarian law. The key international legal instrument for the protection of children is the Convention on the Rights of the Child. The importance of the CRC is highlighted by the fact that it includes the whole spectrum of rights – civil and political, as well as economic, social and cultural rights – adapted to the specific needs of children. Although there is near-universal ratification of the CRC, there are still many challenges to achieving full implementation of its provisions. The CRC is complemented by two Optional Protocols, both of which entered into force in 2002: the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.⁷

In addition to the CRC, there are other instruments specifically addressing children's rights, in particular the International Labour Organization (ILO) Convention 182 on the Worst Forms of Child Labour and the African Charter on the Rights and Welfare of the Child.⁸ 'General' human rights law, which applies to all human beings, children and adults alike, includes the two International Covenants on human rights⁹ and a number of thematic human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.¹⁰ There are several important regional human rights treaties that apply equally to children, such as the African Charter on Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights.

⁷ The Optional Protocol on the Involvement of Children in Armed Conflict entered into force on 12 February 2002 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography entered into force on 18 January 2002.

⁸ African Charter on the

Rights and Welfare of the Child (1990), and International Labour Organization (ILO) Convention 182 on the Worst Forms of Child Labour.

⁹ International Covenant on Economic, Social and Cultural Rights (1966) and International Covenant on

Civil and Political Rights (1966).

¹⁰ See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

In times of armed conflict, children are also protected by the laws and customs of war, including general provisions relating to civilians, provisions specific to children and, for those children recruited into the armed forces, provisions specific to combatants. The key instruments in this respect are the four Geneva Conventions and their two Additional Protocols.

2.1 Definition of the ‘child’

The CRC defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.¹¹ Other international legal instruments have also defined children as persons under the age of 18. As the CRC has been signed by all States and ratified by all but two, the age limit of 18 can be regarded as the general legal rule for defining childhood. The CRC sets some strict obligations with respect to this age limit, such as a prohibition on the most severe punishments – capital punishment and life imprisonment without the possibility of release – being imposed on persons under 18. Some other age limits, such as those for criminal responsibility, employment and marriage, are not defined in the CRC and are thus left to the discretion of States.¹²

The Human Rights Committee has clearly confirmed that a State must comply with the obligations in the International Covenant on Civil and Political Rights (ICCPR) relating to persons under 18 years old, even if majority is reached earlier under domestic law.¹³ While various articles specifically mention children’s rights,¹⁴ article 24(1) of the ICCPR specifically recognizes the right of every child, without discrimination, to receive from his or her family, society and the State

¹¹ CRC, article 1.

¹² CRC, articles 40 and 32.

¹³ Office of the High Commissioner for Human Rights (OHCHR), ‘ICCPR General comment 17’, 7 April 1989, para. 4, commenting on article 24 (Rights of the child) of the

International Covenant on Civil and Political Rights. See also Rachel Hodgkin and Peter Newell, *Implementation handbook for the Convention on the Rights of the Child*, UNICEF, 1998, p. 4. For the sake of brevity this handbook is

referred to below as the *UNICEF handbook*.

¹⁴ See for example the International Covenant on Civil and Political Rights, articles 14(1), 23(4) and 24.

the protection required by his or her status as a minor. Similarly, persons under 18 continue to benefit from the protection provided by the Convention on the Rights of the Child regardless of whether they have attained majority under national law. In fact, article 1 of the CRC sets a general upper benchmark at 18 years. This age limit should be used by States Parties as a rule and a reference for the establishment of any other particular age for any specific purpose or activity. This provision stresses the need for States Parties to ensure special protection to every child below such a limit.¹⁵

2.2 Key principles of children's rights

The Convention on the Rights of the Child provides the most extensive articulation of the international standards relating to the protection of children's rights. The CRC has made great advances in this area of law, the key being its recognition that a child is not simply a passive recipient of protection, but a human being with specific rights and responsibilities, and the ability to exercise them in a manner consistent with the child's evolving capacities.

The CRC recognizes the human rights to which children are entitled, including economic, social and cultural rights as well as civil and political rights. That children's rights are considered to be of critical importance is reflected in the fact that the derogation clause contained in other human rights treaties, which allows States to put some obligations 'on hold' during situations of emergency, is not found in the CRC. Thus both the rights spelled out in the CRC, and the obligation on States to guarantee those rights, apply at all times, including times of armed conflict and internal disturbances. Finally, the fact that the CRC has received near-universal ratification – 191 ratifications to date – means that nearly all States have made a legal commitment to uphold its provisions. This, in itself, is recognition of the importance that the international community attaches to the protection of children.

¹⁵ Santos Pais, Marta, 'The Convention on the Rights of the Child', in OHCHR,

Manual on Human Rights Reporting, under six major international human rights

instruments, Geneva, 1997.

The Committee on the Rights of the Child plays an important role in monitoring compliance with the CRC, in particular through consideration of country reports and the Committee's concluding observations. In its deliberations, the Committee has elevated four provisions of the CRC to the status of general or guiding principles for the Convention, namely:

- Best interest of the child (article 3);
- Right to life, survival and development (article 6);
- Respect for the views of the child (article 12);
- Non-discrimination (article 2).¹⁶

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 3(1), Convention on the Rights of the Child

The overarching consideration of 'best interest' is of particular relevance in determining how to approach situations where other more specific provisions of the CRC do not apply or are otherwise unclear.¹⁷ The 'best interest' consideration also explicitly applies to "courts of law" and "legislative bodies", so it provides guidance in the formulation of policies and practices involving children in justice and truth-seeking mechanisms, whether as witnesses, victims or perpetrators.

One fundamental principle of the CRC is that States Parties must ensure that children can exercise the right to express their views freely in all matters affecting their lives and that the child's views shall be given "due weight in accordance with the age and maturity of the child".¹⁸ This is not primarily a right to freedom of expression, which is laid down in a separate article;¹⁹ rather, it is a 'participatory' right, according to which children have a right to be heard and to participate in decisions that affect their lives. This is particularly relevant to the administration of justice:

"For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative".²⁰

¹⁶ UNICEF handbook, op. cit., p. 40.

¹⁷ Ibid., p. 37.

¹⁸ CRC, article 12(1).

¹⁹ CRC, article 13.

²⁰ CRC, article 12(2).

In order for States to fulfil this obligation effectively, it is increasingly recognized that courts and other decision-making bodies need to be adapted to facilitate children's participation.²¹ Likewise, international justice and truth-seeking mechanisms should establish procedures that fulfil this right, by taking children's views and needs into consideration and providing the child with a safe and comfortable environment in which to testify. Such procedures could include providing adequate assistance for the child, such as through child support persons, and, if necessary, shielding the child from visual contact with the accused by using sight-screens, videotaped testimonies or closed-circuit television. Nevertheless, while general guidelines should be developed, effective fulfilment of the right means consulting with each child, on a case-by-case basis, to ensure that the measures employed in any particular case are best suited to that particular child.

Participatory rights reflect the very basis of the CRC, namely that children are not objects in need of protection but human beings holding rights, including the right to express their views on matters that affect their lives. The guiding principles of the CRC highlight the need to fulfil these rights through the development of mechanisms to protect children who come into contact with criminal justice systems and also provide guidance on how this task should be approached.

2.3 Protection of children in times of war

2.3.1 Special protection for children during armed conflict

The protection of children affected by armed conflict is based on two complementary bodies of international law, namely international humanitarian law and international human rights law. The CRC – applicable in times of peace and war – joins the two together into a comprehensive international legal framework for the protection of children during times of armed conflict.²²

²¹ *UNICEF handbook*, op. cit., p. 151.

²² It should be noted that the norms of international humanitarian law will take precedence over the

provisions of any other law, including the Convention on the Rights of the Child, in the event of a conflict between the two laws: see International Court of

Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25.

International humanitarian law – also known as the ‘laws of armed conflict’ or the ‘laws of war’ – consists of a series of international conventions that fall into two distinct categories. One category focuses on permissible means and methods of warfare, *inter alia*, the types of weapons that may be used and the ways in which those weapons may be employed. The other category focuses on the protection of civilians and persons who are *hors de combat*, i.e. persons not actively taking part in the conflict, such as wounded and sick combatants and prisoners of war.²³

The prohibition on intentionally directing attacks against civilians, which is applicable irrespective of the nature of the armed conflict, is one of the cornerstones of international humanitarian law and applies to children just as it does to other civilians.²⁴ This prohibition derives from one of the key tenets of international humanitarian law, that a distinction be made between legitimate and illegitimate military targets. Accordingly, some targets will always be illegitimate, such as non-defended towns and objects employed solely for the provision of humanitarian assistance, while some targets will always be legitimate, such as military installations. Additionally, some methods of attack, such as carpet bombing, and some weapons, such as indiscriminate weapons, may not be employed. A key feature underpinning humanitarian law is the principle of proportionality, according to which the military advantage expected to be gained in any attack must be balanced against the likely incidental or collateral damage to non-military persons and objects. Thus in all cases where either the target, methods, or weapons are not prohibited, the military commander must apply the principle of proportionality to weigh whether or not a particular target can be attacked in a particular way using particular weapons.

²³ Traditionally these two categories of the laws of war are referred to as ‘Hague Law’ (methods and means of warfare) and ‘Geneva Law’ (protection of persons

who are *hors de combat*).
²⁴ For a discussion on the protection of civilians and a general discussion on international humanitarian law, see Hilaire

McCoubrey, *International humanitarian law: Modern developments in the limitation of warfare*, Ashgate Publishing, second edition, 1998.

An important feature of humanitarian law is the distinction between international and non-international armed conflicts, as the rules can differ depending on the nature of the conflict. While the provisions of the Geneva Conventions in general apply during times of international armed conflict, common article 3 to the Geneva Conventions contains the minimum standards of conduct that are applicable during any armed conflict, whether it is international or non-international. The Additional Protocols expand on the law contained in the Geneva Conventions, with Additional Protocol II elaborating the norms of humanitarian law that are applicable during a non-international armed conflict.

For the purposes of the protection of children, the key legal instruments are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.²⁵ Among these, the Fourth Geneva Convention and the two Additional Protocols are the most relevant, as they regulate the protection of civilians during armed conflicts. However, the first three Geneva Conventions are also of relevance for captured or rescued child soldiers, as they regulate the protection of members of armed forces who are *hors de combat*, because they are sick, wounded, shipwrecked or prisoners of war. The general principle of international humanitarian law specifically relating to the protection of children during an armed conflict was introduced in the Additional Protocols in 1977, stating that at a bare minimum: “Children shall be provided with the care and aid they require”.²⁶ This principle is expanded on in relation to international armed conflicts, stating that: “Children shall be the object of special respect”.²⁷

²⁵ First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Third

Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949); Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949); Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International

Armed Conflicts (8 June 1977); and Additional Protocol II to the Geneva Conventions Relating to Victims of Non-International Armed Conflicts (8 June 1977).

²⁶ Additional Protocol II, article 4(3).

²⁷ Additional Protocol I, article 77.

In addition to these general principles, the Geneva Conventions and Additional Protocols contain a number of provisions specifically relating to the treatment of children during an armed conflict. These include specific references to education,²⁸ the evacuation of children,²⁹ identification, family reunification and care of unaccompanied children,³⁰ detained children,³¹ free passage of food and clothing consignments intended for children, safety zones for children,³² participation in hostilities³³ and a ban on recruitment under the age of 15.³⁴ In addition, women, including girls, are to be protected against “attacks on their honour”,³⁵ namely sexual violence and sexual assault, especially rape and enforced prostitution.

These provisions are echoed and complemented by the CRC, which, like the Geneva Conventions, contains specific provisions that seek to enhance children’s protection in times of war. Article 38 of the CRC formulates the general principle as follows:

“... States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”³⁶

Furthermore, under the CRC, States are obliged to:

“take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse... or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”³⁷

²⁸ Additional Protocol II, article 4(3).

²⁹ See Fourth Geneva Convention, articles 14, 17 and 24; Additional Protocol I, article 78; and Additional Protocol II, article 4(3)(e).

³⁰ Fourth Geneva Convention, articles 24-26, 50 and 82; Additional Protocol I, articles 74-76; and Additional Protocol II, articles 4 and 6.

³¹ Fourth Geneva Convention, articles 51, 76, 82, 85, 89, 94 and 119; Additional Protocol I, article 77; and Additional Protocol II, article 4.

³² See Fourth Geneva Convention, articles 23, 14 and 17.

³³ Additional Protocol I, article 77.

³⁴ Additional Protocol II, article 4(3).

³⁵ Fourth Geneva Convention,

article 27.

³⁶ CRC, article 38.

³⁷ CRC, article 39. For a discussion of this article see Bo Viktor Nylund, ‘International law and the child victim in armed conflict: Is this the “first call for children”?’’, *International Journal of Children’s Rights*, vol. 6, no. 1, 1998, pp. 23-53.

States have therefore undertaken to protect and care for children affected by armed conflict, including promoting their recovery and reintegration. The elements of recovery and reintegration introduced by the CRC are important complements to the protection afforded by humanitarian law. States owe this obligation to all children who have been victimized during a war, for example by sexual exploitation, displacement, forcible transfer or as victims of genocide, as well as former child soldiers, who may face significant challenges during reintegration. This obligation would extend to protecting and caring for children involved in post-conflict justice and truth-seeking mechanisms, including the ICC.³⁸

The Geneva Conventions and Additional Protocol I list a number of violations committed in international conflicts that are considered to be “grave breaches” of humanitarian law. These include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury, unlawful deportation, extensive destruction of property not justified by military necessity and making civilians and non-defended localities the object of attack.³⁹ States are obliged to bring to justice any person, regardless of nationality, who is alleged to have committed grave breaches of the Geneva Conventions. While the list of grave breaches does not include any of the child-specific provisions of the Geneva Conventions, serious atrocities committed against children are covered by the general categories of grave breaches.

The Rome Statute of the ICC defines war crimes as either grave breaches of the 1949 Geneva Conventions or other serious violations of the laws and customs applicable in armed conflicts. In the context of non-international conflicts, the ICC Statute defines

³⁸ It should be noted that the ICC also has an obligation to protect and care for children who are involved with proceedings before the ICC: see the later discussion in chapter three of the ICC

Victims and Witnesses Unit. It is therefore important that States and the ICC coordinate their efforts in this area so as not to neglect other aspects of the care of children who are

involved with the ICC.
³⁹ See Fourth Geneva Convention, article 147, and Additional Protocol I, article 85(3).

war crimes as serious violations of common article 3 to the Geneva Conventions⁴⁰ or serious violations of customary law applicable in non-international conflicts.⁴¹ The Statute lists a number of acts that constitute these crimes, including wilful killing, torture, the taking of hostages, and pillaging and looting, which are further clarified in the draft Elements of Crimes and will be discussed in more detail in the following chapter.⁴²

2.3.2 Use of child soldiers

One issue that has attracted attention and concern is the use of child soldiers.⁴³ There has been considerable progress in recent years in the development of legal standards to prohibit the use of child soldiers during times of war, largely due to the lobbying efforts of child rights advocates and others.

The Additional Protocols of 1977 to the Geneva Conventions oblige States Parties to refrain from recruiting persons under the age of 15 and to ensure that children under 15 years do not take a direct part in hostilities. Fifteen is also the age limit originally specified for the use of child soldiers in the CRC.⁴⁴ The near-universal ratification of the CRC and the adherence of many States to the Additional Protocols to the Geneva Conventions mean that the prohibition on the recruitment and use of child soldiers under the age of 15 has passed into customary international law. The customary status of the ban is primarily significant in relation to non-State entities, who are also bound by the general rule prohibiting the use of persons under 15 in armed conflict, despite not

⁴⁰ Article 3 common to all four Geneva Conventions has been called the ‘convention within the convention’. The article applies also to non-international conflicts and provides minimum guarantees for the protection of persons not taking part in the hostilities.

⁴¹ See the Rome Statute of the

ICC, article 8(2)(a) and (d).
⁴² The draft Elements of Crimes were adopted by the ICC Preparatory Commission in June 2000 and will be submitted for adoption by the Assembly of States Parties at its first meeting in September 2002. For the sake of brevity, the draft will be referred to below

as the Elements of Crimes.

⁴³ See also chapter three for a more detailed discussion of the crime of using children under 15 as soldiers.

⁴⁴ In addition, when States recruit children aged between 15 and 18, CRC article 38 provides that States “shall endeavour to give priority to those who are oldest”.

being parties to any of the relevant conventions.⁴⁵ The fact that the prohibition has the status of customary international law has also led to its inclusion in the Rome Statute, which confirms that conscripting or enlisting children under 15 or using them to participate in hostilities is a crime under international law during any armed conflict.⁴⁶ The recognition of under-age recruitment as a crime within the jurisdiction of the Court is an important step for enforcing the international prohibition against the use of child soldiers.

Since 1989, the ban on the recruitment of children has been considered in a number of instruments that prohibit the recruitment and use of children under 18. For example, in 1990, the African Charter on the Rights and Welfare of the Child obliged States Parties to refrain from any recruitment of children and ensure that no person under 18 years takes a direct part in hostilities.⁴⁷ ILO Convention 182 on the Worst Forms of Child Labour qualifies the forced or compulsory recruitment of children and their direct participation in armed conflicts as one of the “worst forms of child labour”, and defines children as “all persons under the age of 18”.⁴⁸

Most significantly, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of May 2000 entered into force on 12 February 2002. The Optional Protocol prohibits the compulsory recruitment of children under the age of 18 and their direct participation in hostilities, and requires States to increase the minimum age for voluntary recruitment. Strict safeguards are introduced for voluntary recruitment of children under the age of 18. For non-State armed groups, the standards are even stricter, banning all forms of recruitment and participation of children

⁴⁵ See ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’, United Nations, S/2000/915, 4 October 2000, para. 17, which discusses the customary legal status of this crime in

relation to non-international armed conflicts.

⁴⁶ Rome Statute, article 8(2)(b)(xxvi) and (c)(iv).

⁴⁷ African Charter on the Rights and Welfare of the Child, articles 2 and 22.

⁴⁸ ILO Convention 182 on the Worst Forms of Child Labour, article 3(a). The Convention was adopted on 17 June 1999 and had been ratified by 127 States as of 9 August 2002.

under the age of 18. Under the Optional Protocol, States are also required to report regularly to the Committee on the Rights of the Child on measures taken to implement the Protocol.⁴⁹ With a growing number of ratifications, the Optional Protocol reflects an emerging international consensus of 18 years as the minimum age for recruitment into armed groups and for participation in hostilities.⁵⁰

2.3.3 Protection of children in armed conflicts: an issue of maintaining international peace and security

The importance of the protection of children during armed conflict has been increasingly recognized in international political arenas. Since 1999, the United Nations Security Council has adopted several resolutions on children and armed conflict,⁵¹ calling on States to respect the rights of children and ensure their protection; condemning the use of child soldiers; and highlighting the importance of special measures to prevent sexual violence against children.⁵² The Security Council has also emphasized the responsibility of States to end impunity and to bring perpetrators of crimes against children to justice.

In his 2001 report to the Security Council on children and armed conflict, the Secretary-General of the United Nations devoted an entire chapter to impunity and children's involvement in justice and truth-seeking processes. A key recommendation was that both justice and truth-seeking processes in the aftermath of conflict should systematically pay attention to "the full range of children's wartime

⁴⁹ Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, article 9.

⁵⁰ As of 9 August 2002, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict had been signed by 109 States and ratified by 35 States.

⁵¹ Security Council resolutions

1261 of 28 August 1999; 1314 of 11 August 2000; and 1379 of 20 November 2001. It should be noted that the Security Council has adopted other resolutions on the protection of civilians in general which have significance for children in armed conflicts: see resolutions 1265

of 17 September 1999 and 1296 of 19 April 2000. Also noteworthy is the *aide mémoire* on the protection of civilians appended to the Security Council Presidential Statement of 15 March 2002, S/PRST/2002/6.
⁵² See, in general, Security Council resolutions 1261, 1314 and 1379.

experiences, the circumstances that allowed such abuses to occur and the long-term interventions required to ensure rehabilitation and reintegration".⁵³

What is particularly significant about these resolutions and the fact that the protection of children and civilians in general is a recurrent item on the agenda of the Security Council is that violations against children and civilians are characterized as a potential threat to international peace and security. In resolution 1314, the Security Council notes:

*"the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard [the Security Council] reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps".*⁵⁴

By categorizing crimes committed against children as "a potential threat to international peace and security", the groundwork is being laid for the future imposition of measures adopted under Chapter VII of the United Nations Charter as a response to such crimes.⁵⁵ Furthermore, the Rome Statute of the ICC provides that the Court may be given jurisdiction over a situation if the Security Council, acting under Chapter VII, refers that situation to the ICC. It is therefore

The Security Council urges States to "Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children and exclude, where feasible, these crimes from amnesty provisions... and ensure that post-conflict truth-and-reconciliation processes address serious abuses involving children".

Security Council resolution 1379 (2001)

⁵³ 'Children and armed conflict: Report of the Secretary-General', United Nations, A/56/342-S/2001/852,

7 September 2001, action point 20.
⁵⁴ Security Council resolution 1314, para. 9, emphasis added.

⁵⁵ See Chapter VII of the United Nations Charter.

possible for the Security Council to find that a situation characterized by crimes committed against children is a threat to international peace and security, and, acting under Chapter VII of the UN Charter, refer that situation to the ICC. The Security Council has the power to refer situations to the ICC regardless of where the crimes have occurred and the nationalities of the alleged perpetrators, thereby overriding jurisdictional thresholds that apply to any other case brought to the ICC.⁵⁶ Thus, the ICC has the potential to strengthen the role of the Security Council in enforcing the protection of children affected by armed conflict.

These developments should be viewed against the backdrop of earlier advocacy efforts by UNICEF, the Office of the United Nations High Commissioner for Refugees (UNHCR), other UN agencies and non-governmental organizations working with children affected by conflict. In particular, groundbreaking work has been done by Graça Machel, an expert appointed by the Secretary-General in 1994 to prepare a global assessment of the impact of armed conflict on children.⁵⁷ Based on her recommendations in the 1996 report, 'Impact of armed conflict on children', a new position of Special Representative of the Secretary-General on Children and Armed Conflict was established. In 1997, Olara Otunnu was appointed to this position to act as a public advocate and 'moral voice' on behalf of children in armed conflict.⁵⁸ Thanks to the combined efforts of these actors, the plight of children in armed conflicts has remained high on the global peace and security agenda.

⁵⁶ See chapter three for a discussion of the jurisdictional limitations of the ICC.

⁵⁷ 'Impact of armed conflict on children: Report of the expert of the Secretary-General, Ms. Graça

Machel', United Nations, A/51/306, 26 August 1996.

⁵⁸ 'Protection of children affected by armed conflict: Report of the Special Representative of the Secretary-General for Children and Armed

Conflict, Mr. Olara Otunnu', United Nations, A/53/482, 12 October 1998, para. 4.

2.4 Protection of children as victims and witnesses

2.4.1 International standards

for protection of children in judicial proceedings

The first consideration in relation to children who come in contact with judicial procedures is what is in the best interest of the child.⁵⁹ Thus investigations and trials must take all possible steps to minimize the risk of harm to the child and ensure that his or her rights are fully respected. For example, the CRC specifically states that children have the right to be heard in any judicial or administrative proceedings affecting their lives,⁶⁰ which would apply to international criminal proceedings.⁶¹ These considerations also apply with respect to provisions of the Rome Statute and the Rules of Procedure and Evidence requiring that the views of witnesses or victims should be sought, including in cases affecting children.⁶² Given that the CRC does not dictate *how* the child's views should be heard, flexible procedures are needed to realize this right, for example by allowing children to express their views directly or through a representative or other appropriate body.⁶³

In addition to the general principles outlined above, CRC article 39 obliges States to take steps to promote the recovery and reintegration of a child victim of, *inter alia*, exploitation, abuse, torture or inhuman treatment or armed conflicts. This provision would apply to most if not all the crimes within the jurisdiction of the ICC, including many of the crimes to which children are particularly vulnerable, such as crimes

⁵⁹ CRC, article 3.

⁶⁰ CRC, article 12.

⁶¹ *UNICEF handbook*, op. cit., p. 150.

⁶² See for example article 68(2) of the Rome Statute, which states that in cases of sexual violence or when dealing with child victims, in camera proceedings should be implemented and in such instances the views of the victims or witnesses should be taken into account. Similarly, rule 88 of the Rules of Procedure and

Evidence states that when special measures are ordered to facilitate the testimony of a child or traumatized witnesses or victims, the consent of the person concerned should be sought. The draft Rules of Procedure and Evidence were adopted by the ICC Preparatory Commission in June 2000 and will be presented for adoption by the Assembly of States Parties at its first meeting in September 2002. For the

sake of brevity, the draft will be referred to below as the Rules of Procedure and Evidence.

⁶³ See article 12(2) of the CRC. According to the *UNICEF handbook* (op. cit., p. 151) 'appropriate body' could mean an individual or an institution, including a non-governmental organization which is in a "position to intervene on behalf of the child and be guided by his or her best interests".

of sexual violence and the recruitment and use of child soldiers. The CRC provides that recovery and reintegration of these child victims shall take place “in an environment which fosters the health, self-respect and dignity of the child”.⁶⁴ Therefore, if a child victim participates in any judicial proceedings concerning crimes committed against him or her, steps should be taken to ensure the proceedings are conducted in a way that does not negatively impact on the child’s physical or mental health, self-respect or dignity. One example of where this may arise is in relation to cross-examination, which is a fundamental right of the accused and is essential to safeguarding a fair trial, yet can be conducted in a hostile and frightening manner. In this type of situation, procedural rules need to be flexible enough to ensure that the cross-examination is done in such a manner as to minimize any harm to the child during questioning.

In addition to the CRC, there are also international standards adopted within the framework of the United Nations that deal with the treatment of victims of crimes, which – while not legally binding – set benchmarks concerning the protection of victims of crime. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power asserts that all victims of crime are to be treated with compassion and respect for their dignity and are entitled to “access to the mechanisms of justice and to prompt redress”.⁶⁵ The Declaration calls for judicial and administrative processes to be responsive to the needs of victims, to minimize their inconvenience and protect their privacy.⁶⁶ In addition, it suggests that judicial personnel should receive sensitization training. For victims of violations of human rights, which might not be recognized as crimes under national laws, the Declaration provides that remedies available should include “material, medical, psychological and social assistance and support”.⁶⁷ Of particular relevance to children, it states that “attention should be given to those who have special needs”.⁶⁸

⁶⁴ CRC, article 39.

⁶⁵ General Assembly resolution 40/34 of

29 November 1985.

⁶⁶ *Ibid.*, article 6(c) and (d).

⁶⁷ *Ibid.*, article 18.

⁶⁸ *Ibid.*, article 17.

The UN Guidelines on the Role of Prosecutors affirms the responsibility of prosecutors to consider the views and concerns of victims and to inform them of their rights – considerations that apply equally to child victims and witnesses.⁶⁹

International legal standards require judicial procedures and practices to be based on the best interest of child victims and witnesses. Furthermore, children have a right to be heard and to be treated with dignity, in a way that does not jeopardize their physical or mental health or self-respect. These provisions apply to all judicial proceedings, in national courts as well as in international courts. By analogy, these general principles and norms should also guide proceedings involving child victims and witnesses before truth commissions and traditional justice mechanisms.

2.4.2 Special needs of children in judicial proceedings

The participation of children in judicial proceedings presents particular challenges because of the experiences and developmental stages of children and the nature of the criminal justice system. Children are less familiar with and more likely to be intimidated by criminal proceedings. For example, when testifying in court, child victims may misperceive that *they* are on trial, not the accused. Experience at the national level has shown that questioning children during investigations, trials or public hearings is different from questioning adults and requires special procedures and skills. Ultimately, the process can be rehabilitative, provided children are able to testify about the crimes committed against them in an environment that is safe and supportive.

To ensure that the giving of testimony does not harm the child or subject him or her to further trauma, special support systems and measures designed to meet the needs of children participating in a

⁶⁹ Guidelines on the Role of Prosecutors, para. 13(d), adopted by the Eighth

United Nations Congress on the Prevention of Crime and Treatment of

Offenders, 1990, A/CONF.144/28/Rev.1.

criminal justice system must be put in place. Special measures used for child victims and witnesses could include the provision of psychosocial support, the use of trained investigators and the use of measures to conceal the identity of the child from the public. Particular attention should be paid to the likely effect on children of testifying in front of the person accused of causing them harm. Thus measures designed to shield the child from seeing the accused could be employed, such as sight-screens to separate child witnesses and the accused, or using closed-circuit television or video links that allow children to testify from outside the courtroom. In addition, while the right to a fair trial dictates that testimony must be tested to ensure it is as accurate as possible, children should never be exposed to the aggressive forms of questioning that may otherwise be employed during cross-examination.

There is much to be learned from national systems with respect to the issues that arise for child victims and witnesses. Some jurisdictions have implemented procedures for dealing with child victims and witnesses that are designed to take into account the special position of children and their rights and needs vis-à-vis the criminal justice system. These types of procedures should be collated and analysed with a view to informing the development of legal procedures for children who are victims of crimes under international law. Conversely, many countries lack child-friendly procedures and, in instances where special procedures have been adopted, they often deal only with juvenile offenders. Additionally, some national authorities treat child victims and witnesses in a way that may cause harm; for example, in some cases, victims of child prostitution or trafficking are treated as if they were criminals and receive no support or counselling. Training of personnel and the careful design of procedures are needed to ensure that damaging practices are not carried over into international criminal justice mechanisms. For that reason, it is essential that child rights experts are included in the staff of international criminal justice mechanisms and truth commissions.

In order to be able to make an informed choice before exercising their right to participation, children should be made aware of all relevant

aspects of the criminal justice process, including their role, the role of other actors, the aims to be achieved and the child-friendly procedures to which they are entitled. As part of the briefing provided for children who are testifying, it is important to ensure that children understand the person who committed the crime against them or the crime they witnessed might not be the person facing prosecution. If this is the case, children who testify before international criminal justice mechanisms should understand that their testimony will be valuable in establishing command responsibility or that particular conduct was widespread or systematic, even if their testimony might not lead to convicting and sentencing the actual perpetrator.⁷⁰ In general, but particularly in developing the types of measures discussed above, it is important to listen to the views of children so that the right balance is achieved between the child as a rights-holder and the child as an individual in need of special protection.

2.5 Protection of children ‘in conflict with the law’

2.5.1 Defining a minimum age for criminal responsibility

The age at which a child incurs legal responsibility for his or her acts under domestic law varies widely, from 7 to 18 years, depending on the history and culture of a country, and in many cases also on the nature of the crime. Most frequently, the age limit for criminal responsibility is set somewhere between 14 and 16 years.⁷¹

International law does not specify a minimum age at which a child can be held criminally responsible for his or her actions. The CRC only provides that States must fix a specific age below which children *cannot*

⁷⁰ For example, in the *Akayesu* case, the ICTR decided that the accused was guilty of crimes against humanity that included encouraging rapes of Tutsi women during the genocidal campaign while he was a communal leader, even if he himself was not charged with the act of rape

(*The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998). In the *Celebici* decision, the ICTY found Zdravko Mucic guilty, on the basis of command responsibility, of crimes of sexual violence committed by the guards at the Celebici prison camp (*The Prosecutor v. Zejnil*

Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, IT-96-21-T, 16 November 1998).

⁷¹ *Innocenti Insight*, issue no. 3 on juvenile justice, UNICEF International Child Development Centre, 1998, pp. 4-5.

be held legally responsible.⁷² While States have discretion regarding this age limit, the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') require that the age of legal responsibility not be set too low.⁷³ This point has repeatedly been emphasized by the Committee on the Rights of the Child, which has welcomed proposals to set this age at 18.⁷⁴

Irrespective of where the minimum age is set, States retain obligations under the CRC towards children under the age of 18. Thus all measures taken should be guided by standards set in the CRC. This also applies to children who have allegedly committed serious crimes under international law, regardless of the jurisdiction in which they may be held accountable.

2.5.2 Children and legal responsibility for crimes under international law

During the genocide in Rwanda and the armed conflict in Sierra Leone, children allegedly took part in atrocities committed against civilians. As a result, the international criminal justice system is faced with new and serious challenges. While most domestic judicial systems have rules and procedures for children who commit crimes under domestic law, there are few precedents in either national or international courts regarding children who have committed crimes under international law, namely crimes against humanity, war crimes or genocide.

The ICC will not have jurisdiction over persons under the age of 18 at the time of the alleged commission of the crime.⁷⁵ Many child rights advocates, including UNICEF, supported this provision, sharing the view that international judicial mechanisms are not well suited for prosecuting children who have allegedly committed crimes under international law. Such mechanisms should focus primarily on

⁷² CRC, article 40(3)(a).

⁷³ See principle 4 of the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), adopted by the General Assembly in

resolution 40/33 of 29 November 1985.

⁷⁴ A comment made on a proposed new children's decree for Nigeria: *UNICEF handbook*, op. cit., p. 552. See also the *UNICEF*

handbook, op. cit., pp. 551-552, which quotes several instances where the Committee has commented that the minimum age should not be set too low.

⁷⁵ Rome Statute, article 26.

prosecuting the political and military leaders who are responsible for planning and ordering the commission of such crimes. Crimes under international law do not usually occur in the heat of battle, but rather result from following orders devised by political and military leaders, who weigh the perceived gains of specific methods of warfare against the possible consequences, which include the likelihood of criminal prosecution. By focusing on those responsible for wartime policies, responsibility is placed with those who actually planned the criminal acts and ordered or allowed them to occur. For example, the Statute for the Special Court for Sierra Leone clearly states that the Court will prosecute “persons who bear the greatest responsibility” for serious violations of international humanitarian law and Sierra Leone law that occurred in Sierra Leone during the armed conflict. Arguably, by focusing on the leaders and masterminds who have planned and instigated atrocities – rather than the ‘trigger-pullers’ – the deterrent effect of international prosecutions will be increased. In addition, as resources available to international tribunals are limited, there is also a financial rationale for limiting prosecutions to the leaders.

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do not explicitly exclude persons under 18 from their respective jurisdictions, but to date, only adults have been prosecuted by those tribunals. While the Special Court for Sierra Leone has jurisdiction over persons who were aged 15 or older at the time of the alleged commission of the crime, its jurisdiction is limited to those who bear the greatest responsibility for violations, and the Prosecutor is directed to consider alternative truth and reconciliation mechanisms, such as Sierra Leone’s Truth and Reconciliation Commission, for dealing with child perpetrators. Therefore prosecutions of children before the Special Court remain unlikely.⁷⁶ The exclusion of children from the jurisdiction of the ICC and the fact that they have not been prosecuted

⁷⁶ See chapter five for a discussion of the Special Court for Sierra Leone.

before the ICTY or the ICTR can partly be seen as recognition that in situations where children have been forced to commit crimes, they are first and foremost victims and should not be prosecuted by an international court. The recognition of child perpetrators as victims can establish that they are not the rational actors in a particular case and can thus mitigate their legal responsibility for the crimes they have allegedly committed.

While children who have allegedly committed crimes under international law will not face prosecution by the ICC, other accountability mechanisms may be employed. It is arguable that, in order to restore respect for the rule of law in post-conflict societies, children should undergo some appropriate form of accountability, conducted in a way that respects the rights of the child and takes into consideration his or her age. Further examination is needed on the impact of judicial and non-judicial means of accountability on children to inform the development of alternative measures.

2.5.3 International legal standards relating to child perpetrators

According to the CRC, the key principle concerning child perpetrators is to promote their reintegration and return to a “constructive role” in society.⁷⁷ The International Covenant for Civil and Political Rights stresses that judicial procedures for young people should take into account the “desirability for promoting rehabilitation”.⁷⁸ Similarly, the Committee on the Rights of the Child has clearly stated that the application of CRC article 39 on the recovery and reintegration of child victims extends to children involved with juvenile justice systems.⁷⁹

⁷⁷ See article 40(1) of the CRC.

⁷⁸ International Covenant on Civil and Political Rights, article 14(4). See also article 17(1) and (3) of the African Charter on the Rights and Welfare of the Child.

⁷⁹ In the reporting guidelines for article 39 of the CRC, the Committee specifically asks States parties to report

on measures taken vis-à-vis children in conflict with the law. Furthermore, in its concluding observations on the reports submitted by States parties, the Committee has frequently grouped article 39 (rehabilitation of child victims) with article 40 (juvenile justice). See the

UNICEF handbook, op. cit., pp. 529 and 533. See also the Committee’s ‘Reporting guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44(1)(b) of the Convention on the Rights of the Child’, United Nations, CRC/C/58, 11 October 1996.

Article 40 of the CRC formulates an additional objective that is relevant to the current context, namely to reinforce the child's respect for the human rights of others. In the absence of measures taken to provide accountability, atrocities committed during a conflict lead to a weakened respect for human rights and the rule of law. This is of special concern for children, who are at crucial stages in their development and may have been told by adults that criminal acts are necessary or justified. In light of this, measures that foster respect for the rights of others are essential for children's recovery and reintegration into society; indeed, such measures are important for rebuilding the entire community and for preventing future violence. The challenge is to identify judicial or non-judicial measures and procedures that can achieve these objectives.

If criminal proceedings are undertaken against a child – whether by a domestic or an international court – certain basic rules apply. According to general human rights principles, the proceedings must fulfil the requirements for a fair trial as defined by human rights law, such as the act constituting a crime under national or international law at the time of its commission, the presumption of innocence until proven guilty and the right of appeal.⁸⁰ In addition, the judicial proceedings must be guided by the rehabilitative underpinnings of CRC article 40(1) and other relevant international juvenile justice standards.

Under the CRC, States should set up authorities and institutions specifically to deal with child offenders; in other words, States should maintain a separate system of juvenile justice.⁸¹ The Committee on the Rights of the Child has called for the adoption of a “child-oriented system”, stressing that all actions concerning children should be guided by the ‘best interest’ consideration.⁸² The establishment of a

⁸⁰ CRC, article 40(2). The fair trial guarantees contained in the Universal Declaration of Human Rights (article 11)

and the International Covenant on Civil and Political Rights (articles 14, 15 and 16) apply also to

children.

⁸¹ CRC, article 40(3).

⁸² *UNICEF handbook*, op. cit., p. 540.

child-oriented system for juvenile justice also requires the provision of adequate resources and appropriate training for judges, prosecutors and defence attorneys.⁸³

While this approach is suitable for national systems, it is not necessarily the right one for international criminal justice mechanisms. For example, the establishment of a separate ‘Juvenile Chamber’, as initially proposed for the Special Court for Sierra Leone,⁸⁴ would have raised an expectation that children should face prosecution before the Court, thus increasing pressure on prosecutors to bring indictments against children. This provision was removed from the final Statute for the Special Court, underscoring the fact that it is unlikely that anyone below the age of 18 at the time of the alleged commission of the crime will be indicted by the Special Court.⁸⁵

International child protection standards set limits on the sentencing of child offenders. The most severe sentences – death penalty or life imprisonment without possibility of release – can never be imposed on persons under 18 years;⁸⁶ indeed, imprisonment is to be used only as a last resort and for the shortest period of time. The CRC also requires that alternatives to (penal) institutional care are made available for children who are convicted of crimes, including counselling, probation, foster care, education and vocational training.⁸⁷ Finally, if a child is sentenced to imprisonment, a number of provisions apply in relation to the conditions of that imprisonment. For example, children must be separated from adult detainees; children have the right to receive an education; and services are to be

“Consideration shall be given, whenever appropriate, to dealing with juvenile offenders without resorting to formal trial.”

Rule 14.1, Beijing Rules, adopted by General Assembly resolution 40/33 (1985)

⁸³ Ibid. p. 543.

⁸⁴ See draft article 7 of the Statute for the Special Court annexed to the ‘Report of the Secretary-General on the

establishment of a Special Court for Sierra Leone’, United Nations, S/2000/915, 4 October 2000.

⁸⁵ See chapter five for further discussion of the Special Court for Sierra Leone.

⁸⁶ CRC, article 37(a).

⁸⁷ CRC, article 40(4).

provided to assist the child to reestablish him or herself in society upon release.⁸⁸

While not excluding prosecutions, international child rights standards and standards for juvenile justice encourage the relevant authorities to seek alternatives to judicial proceedings when dealing with child offenders. The CRC calls on States Parties whenever “appropriate or desirable” to seek measures for dealing with child perpetrators without resorting to judicial proceedings.⁸⁹ The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) also cite the need to seek “positive measures” that reduce the need for judicial intervention.⁹⁰ These provisions encourage the practice of ‘diversion’, by which criminal defendants are referred to alternative programmes such as community service, job training and education rather than facing criminal charges before a court. This is common practice in many legal systems and seeks to prevent possible long-term negative effects of criminal proceedings, such as stigmatization of the child.

Another approach is introduced by the concept of ‘restorative justice’. The aim of restorative justice is to have the offender understand and take responsibility for his or her actions, including reparations that involve the victims and the community, thereby achieving long-term reconciliation. This minimizes the possibility that the victim will be rejected or ostracized, since the community itself is involved in the accountability process. A restorative justice approach shifts from a primary focus on the offender to one that includes the victim and the community as a whole. Since community-wide mistrust and alienation – ethnic hatred, widespread violence, breakdown of law and order, and armed violence – often surround the commission of

⁸⁸ CRC, article 37(b). See also rule 17 of the Beijing Rules, *op. cit.*, and articles 1 and 2 of the UN Rules for the Protection of Juveniles Deprived of their Liberty,

adopted by the General Assembly in resolution 45/113 of 14 December 1990.

⁸⁹ CRC, article 40(3)(b).

⁹⁰ Beijing Rules, *op. cit.*, rule

1.3. See also rule 19 of the Guidelines on the Role of Prosecutors, *op. cit.*, which calls for prosecutorial action against juveniles only to the extent strictly necessary.

crimes under international law, a community-based restorative justice approach is, arguably, also suitable for children who have committed such crimes, provided it incorporates basic protective and procedural guarantees.

As discussed above, criminal prosecutions before international criminal justice mechanisms are better suited to deal with the leaders and planners who are responsible for the policies to commit crimes under international law as a method of warfare. When faced with situations of massive breakdown of law and order, as is generally the case in post-conflict situations, alternatives to judicial prosecutions must be sought for perpetrators with a lesser degree of culpability. Thus, alternative measures to achieve accountability – following the principles of restorative justice – could be considered for children who have been forced or coerced to commit atrocities.

“...Restorative justice through alternatives to courts is the kind of response that juvenile justice professionals would like to see in place when dealing with most offenders:

- The child ... has to take responsibility for, and face the consequences of, his/her acts as being illegal...
- [The child] may be involved in the decision on sanctions and compensation
- The problem can be dealt with swiftly ... not chronologically divorced from [the act]
- There is involvement of both the family and the community
- There can be salutary contact between the perpetrator and the victim
- Involvement with the formal justice system is avoided
- [There is] no recourse to deprivation of liberty
- The process is designed to reintegrate, not to exclude or marginalize the offender.”

Nigel Cantwell, ‘Starting from zero: The promotion and protection of children’s rights in post-genocide Rwanda’, Innocenti Insight, issue no. 3 on juvenile justice, UNICEF, p. 17.

CHAPTER THREE

THE INTERNATIONAL CRIMINAL COURT AND HOW IT RELATES TO CHILDREN

3.1 Basic facts on the ICC

The Rome Statute, which is the constitutive instrument for the permanent International Criminal Court, was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. By 31 December 2000, the last day on which the Rome Statute was open for signature, 139 countries from every part of the world had signed. On 11 April 2002, the 60th ratification was deposited with the United Nations, allowing the Statute to enter into force on 1 July 2002.⁹¹ As of 11 August 2002, 77 States have ratified the Rome Statute.

3.1.1 Structure of the ICC

The International Criminal Court is a permanent court, seated at The Hague in the Netherlands, which consists of the following organs:

- The Presidency;
- A Pre-Trial Division, a Trial Division and an Appeals Division;
- The Office of the Prosecutor;
- The Registry.⁹²

The judicial functions of the Court are carried out by 18 judges, elected by the Assembly of States Parties,⁹³ in the Pre-Trial, Trial and Appeals Divisions, which are organized into separate Chambers.⁹⁴ The judges will be chosen among persons of “high moral character, impartiality and integrity” who have established competence in criminal law and procedure as well as relevant areas of international law, including international humanitarian law and human rights law.⁹⁵ The judges hold office for nine years and are not eligible for re-election.⁹⁶

⁹¹ See article 126 of the Rome Statute.

⁹² Rome Statute, article 34.

⁹³ *Ibid.*, article 36.

⁹⁴ *Ibid.*, article 39.

⁹⁵ *Ibid.*, article 36(3)(b)(i) and (ii).

⁹⁶ *Ibid.*, article 36(9)(a). The judges elected during the first election will, however, serve

for periods of varying length – three, six or nine years.

Judges elected for three years will be eligible for re-election for a full term.

The Presidency, comprised of the President and two Vice-Presidents,⁹⁷ oversees the proper administration of the Court, with the exception of the Office of the Prosecutor, which is responsible for its own administration.⁹⁸

The Office of the Prosecutor is an independent and separate organ of the Court that receives referrals and information on crimes, conducts investigations and brings prosecutions before the Court.⁹⁹ The Prosecutor and one or more Deputy Prosecutors are elected by the Assembly of States Parties for a period of nine years and are not eligible for re-election.

The Registry handles all non-judicial aspects of the administration and servicing of the ICC. In addition, the Registry will also set up a Victims and Witnesses Unit¹⁰⁰ that will, in cooperation with the Prosecutor and the defence,¹⁰¹ provide protective measures, security arrangements, counselling and other assistance to victims and witnesses.

3.1.2 Crimes within the jurisdiction of the ICC

The ICC will deal with the “most serious crimes of international concern”, namely genocide, crimes against humanity and war crimes.¹⁰² The Rome Statute provides definitions of genocide, crimes against humanity and war crimes, and enumerates the acts that constitute them. The Preparatory Commission has also drafted the

⁹⁷ The judges will elect the President and two Vice-Presidents among themselves: see article 38 of the Rome Statute.

⁹⁸ Rome Statute, article 42(2).

⁹⁹ *Ibid.*, article 42.

¹⁰⁰ *Ibid.*, article 43.

¹⁰¹ The Rules of Procedure and Evidence, rule 17.

¹⁰² Article 5 of the Rome Statute also provides that the ICC will have jurisdiction over the crime

of aggression, once the definition of the crime and the conditions for the exercise of jurisdiction are adopted by the Assembly of States Parties. As this will not occur at least until the first review conference, which will take place seven years after the entry into force of the Statute, i.e. in 2009, the crime of aggression is not being considered during this

discussion of the crimes within the jurisdiction of the ICC.

¹⁰³ The Assembly of States Parties will oversee the work of the Court and provide management oversight regarding the administration of the Court for the President, the Prosecutor and the Registrar; decide on the budget for the Court; decide whether to alter the number of judges; and

'Elements of Crimes' for adoption by the Assembly of States Parties,¹⁰³ which will assist the Court in interpreting those definitions.¹⁰⁴ Each of the three categories of crimes has its own common elements in order for an act to fit within a particular category. For example, in order for an act to constitute a war crime it must have been committed in the context of and been associated with an armed conflict. In addition to these common elements, each crime listed under the three general categories of crimes has specific elements that must be proven beyond a reasonable doubt in order for the Court to find an accused guilty of that crime. Financial and statutory requirements also dictate that crimes must be of a certain gravity in order to be brought before the ICC.¹⁰⁵

3.1.2.a Genocide

The crime of genocide was first defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which has since passed into customary international law and is the basis for the definition of the crime of genocide contained in the Rome Statute:¹⁰⁶

" 'Genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;*
- b. Causing serious bodily or mental harm to members of the group;*
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- d. Imposing measures intended to prevent births within the group;*
- e. Forcibly transferring children of the group to another group."*¹⁰⁷

In order to constitute the crime of genocide, an act must have the following attributes: any of the *above-mentioned acts* carried out *against*

consider any questions relating to non-cooperation of States with the Court. See article 112 of the Rome Statute for a full description

of the Assembly of States Parties, its functions and powers.

¹⁰⁴ Rome Statute, article 9.

¹⁰⁵ *Ibid.*, article 17(1)(d).

¹⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide, article 2.

¹⁰⁷ Rome Statute, article 6.

one of the listed groups with the intent to destroy that group in whole or in part.¹⁰⁸ If one of these elements is missing, then the act – while possibly amounting to a war crime or crime against humanity – will not constitute the crime of genocide. Thus, even the killing of over 1 million Cambodians during the Pol Pot regime would not constitute genocide according to this definition, since the main targets for the killings were chosen because they were political opponents and Cambodian intellectuals, regardless of ethnicity or race. This example demonstrates that the process whereby certain acts are found to constitute the crime of genocide can be quite complex and, at times, counter-intuitive.

3.1.2.b Crimes against humanity

Prior to the Rome Statute and the Elements of Crimes, there was no single document defining crimes against humanity and their legal elements; rather, the various definitions were spread across 11 international legal instruments. Although the term originated in the preamble to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, which codified the customary law of armed conflict, the crimes were first defined in article 6(c) of the Nuremberg Charter.

In order for an act to constitute a crime against humanity, the following general elements must be fulfilled:

- The act is committed as part of a widespread or systematic attack directed against any civilian population;
- The act is committed pursuant to or in furtherance of a State or organizational policy to commit such attack, which is understood to mean that the State or organization actively promotes or encourages such an attack against a civilian population.¹⁰⁹

¹⁰⁸ Steven R. Ratner and Jason S. Abrams, *Accountability for human rights atrocities*

in international law: Beyond the Nuremberg legacy, Oxford University Press,

1997, p. 27.

¹⁰⁹ Elements of Crimes, preamble to article 7.

The Rome Statute identifies a number of acts that can constitute crimes against humanity such as murder, extermination, enslavement, torture, persecution, deportation or forcible transfer of a population, enforced disappearance of persons and apartheid. In addition to these acts, the Statute explicitly identifies rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence as crimes against humanity.¹¹⁰ Enslavement is also listed as a crime against humanity and, according to the Elements of Crimes, is understood to include trafficking in persons, particularly women and children,¹¹¹ provided the general elements of the crime are established. It is important to note that crimes against humanity can occur in times of peace and during an armed conflict.

3.1.2.c War crimes

War crimes are violations of the laws of war that attract individual criminal responsibility,¹¹² and include acts such as murder, torture and inhumane treatment, the taking of hostages, the passing of sentences without due process, recruitment of children under the age of 15 years, rape and other forms of sexual violence. War crimes also include intentional attacks against civilians, humanitarian personnel or protected buildings such as schools.¹¹³ Other acts, such as the use of certain types of weapons or means and methods of warfare that cause unnecessary suffering, may constitute war crimes, depending on whether they were committed in the course of an international or non-international armed conflict. Most of the child-specific war crimes or war crimes to which children are particularly vulnerable apply in all types of armed conflict.¹¹⁴

One element common to all war crimes is that they occur in the context of and in association with an armed conflict.¹¹⁵ Further, the acts

¹¹⁰ Rome Statute, article 7.

¹¹¹ Elements of Crimes, article 7(1)(c), footnote 11.

¹¹² Steven Ratner, 'Categories of war crimes', in Roy Gutman and Michael Rieff (eds.), *The*

crimes of war: What the public should know, Norton, 1999, p. 374.

¹¹³ Rome Statute, article 8.

¹¹⁴ An exception is the crime of using starvation as a method

of warfare, which only applies in international conflicts.

¹¹⁵ See any of the articles on war crimes in the Elements of Crimes, for example article 8(2)(a)(iii) and (e)(iv).

must have been carried out against persons protected under one or more of the Geneva Conventions,¹¹⁶ namely non-combatants, including civilians and medical or religious personnel who are not taking an active part in hostilities; and combatants who are *hors de combat*, including sick and wounded combatants on land; sick, wounded or shipwrecked combatants at sea; and prisoners of war.¹¹⁷

Under the Fourth Geneva Convention, “protected persons” are civilians who find themselves in the hands of a State of which they are not nationals.¹¹⁸ The ICTY has held that this concept should be interpreted in light of its object and purpose, namely the provision of the maximum possible protection to all civilians, and should not be dependent upon formal relations and purely legal bonds.¹¹⁹ In the *Tadic* case, the ICTY held that Bosnian victims – who appeared to have the same nationality as the Bosnian Serb perpetrators – were nevertheless protected under the Geneva Convention, since they did not owe allegiance to the Federal Republic of Yugoslavia, on whose behalf the Bosnian Serbs had been fighting.¹²⁰ For children, the approach adopted by the ICTY is preferable because it ensures protection for minority children and children with disputed nationalities who are effectively ‘stateless’. International humanitarian law should not leave the protection of these children to national citizenship laws, because in many cases these laws operate to deny them a nationality and leave them unprotected by the State.

¹¹⁶ This is a common element for all war crimes occurring in international armed conflicts. See for example article 8(2)(a)(iii) of the Elements of Crimes.

¹¹⁷ This is a common element for all war crimes occurring in non-international armed conflicts. See for example article 8(2)(c)(i)-(3) of the Elements of Crimes.

¹¹⁸ Article 4 of the Fourth Geneva Convention states that “persons protected by the Convention are those

who... find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. It should be noted that articles 13-26 of this Convention apply to all civilians and provide general protection against certain consequences of war.

¹¹⁹ *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber (IT-94-1-A), 15 July 1999, para. 168.

¹²⁰ *Ibid.*, paras. 166-168; *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (*Celebici* case, IT-96-21-T), 16 November 1998, para. 275; and Knut Dörmann, ‘Preparatory Commission for the International Criminal Court: The elements of war crimes’, *International Review of the Red Cross*, no. 839, September 2000, pp. 771-795.

3.1.3 Who can bring a case before the ICC?

There are three ways in which a case can be brought before the ICC:

- A State Party may refer a situation in which a crime appears to have been committed;
- The Security Council of the United Nations may refer a situation if it determines that the situation fulfils the requirements of Chapter VII of the UN Charter, namely that the situation constitutes a threat to or breach of international peace and security;
- The Prosecutor may initiate investigations *proprio motu*, namely on his or her own authority, on the basis of information about crimes within the jurisdiction of the Court.

In the case of the Security Council referring a situation to the ICC, it is important to note that the Security Council can refer situations to the Court irrespective of where the crimes allegedly occurred and the nationality of the alleged perpetrator(s). A referral by the Security Council therefore overrides jurisdictional thresholds applicable to other situations, since decisions taken under Chapter VII of the UN Charter are binding on all States.¹²¹

The Prosecutor's authority to investigate crimes *proprio motu* is important, as it gives the Prosecutor the ability to pursue cases in the absence of a referral from the Security Council or States Parties. The Prosecutor can receive information on crimes within the jurisdiction of the Court from many sources, including States, the United Nations and its organs, and intergovernmental or non-governmental organizations, such as those working in the field of children's rights. If the Prosecutor decides that there is reasonable basis to proceed, he or she will request the Pre-Trial Chamber to authorize an investigation.¹²² Given this, one role that child rights advocates can play is to encourage the Prosecutor to adopt prosecutorial policies requiring proactive and systematic collection of information on crimes committed against children.

¹²¹ Rome Statute, article 13(b).
See also Chapter VII of the

United Nations Charter.
¹²² Rome Statute, article 15(3).

3.1.4 What cases can be brought before the ICC?

To be prosecuted before the ICC, an act must constitute one of the crimes within the Court's jurisdiction as set out in the Statute, namely genocide, crimes against humanity and war crimes.¹²³ Further, the acts in question must have occurred after the entry into force of the Rome Statute, i.e. on or after 1 July 2002.¹²⁴ In the absence of a referral from the Security Council, the Court may only exercise its jurisdiction in the following circumstances:

- The crimes occurred on the territory of a State that has accepted the Court's jurisdiction; or
- The conduct was committed by the national of such a State.¹²⁵

By becoming a party to the Statute, States automatically accept the Court's jurisdiction, although they may lodge a declaration stating that the provisions of the Statute in respect of war crimes committed on their territory or by their nationals will not apply for a period of seven years.¹²⁶ A State that is not party to the Statute may also accept the Court's jurisdiction by filing a declaration to that effect with the Court's Registrar.¹²⁷

The ICC has jurisdiction over natural persons over the age of 18 and may exercise that jurisdiction irrespective of an individual's official capacity, such as Head of State or member of government.¹²⁸ Individual criminal responsibility will apply in cases where an individual commits the crime, orders that the crime be committed, aids or abets the commission of the crime, or – in respect of genocide – directly and publicly incites the commission of the crime.¹²⁹

¹²³ As noted above, article 5 of the Rome Statute provides that the ICC will also have jurisdiction over the crime of aggression, once the definition of the crime and the conditions for the exercise of jurisdiction are adopted by the Assembly of States Parties in 2009.

¹²⁴ Rome Statute, article 11;

see also article 126.

¹²⁵ Ibid., article 12(2)(a)-(b).

¹²⁶ Ibid., article 124. France has lodged such a declaration, withholding the jurisdiction of the Court in relation to war crimes for a period of seven years. It should be noted that such a declaration can only be made in relation to war

crimes and not for other categories of crimes under the ICC's jurisdiction. It is a transitional provision which is intended to apply only for a period of seven years after a State becomes a party to the Rome Statute.

¹²⁷ Rome Statute, article 12(3).

¹²⁸ Ibid., article 27.

¹²⁹ Ibid., article 25.

Commanders can be held criminally responsible for crimes committed by forces under their effective control if the commanders failed either to prevent the crime or to punish its commission.¹³⁰ Individual criminal responsibility, including command responsibility, applies irrespective of whether the individual concerned is a civilian, a political leader, or is serving in regular armed forces or in other forces, such as paramilitaries or irregular armed groups.

The jurisdictional limitations of the ICC and their effect on possibilities for the prosecution of crimes committed against children have important implications for the protection of children during armed conflict. Violations committed against children cannot be brought before the ICC unless they fit the strict parameters of the crimes over which the ICC has jurisdiction and unless the jurisdictional thresholds are met.¹³¹ Therefore, only crimes committed in the territory of or by nationals of ratifying States can be brought before the Court, unless, in exceptional circumstances, the Security Council refers a case to the Court.

The most effective way to address these limitations is by advocating at both the national and international levels for widespread ratification, thereby providing the Court with the broadest possible jurisdictional base. This is an area where child rights advocates have an important role to play, both in terms of direct advocacy to governments and State representatives, as well as in building support for the Court at the grass roots and assisting local efforts to advocate for ratification and implementation of the Rome Statute.

3.1.5 When is a case admissible?

The ICC is founded on the concept of complementarity, based on the principle that States have the primary responsibility to investigate and prosecute crimes under international law within their own national systems. The investigation or prosecution of a

¹³⁰ Ibid., article 28.

¹³¹ For definitions of these crimes, see section 3.1.2.

case within a national system will therefore normally bar the ICC from commencing proceedings, unless a situation has been referred by the Security Council. Prior to commencing any investigation, the Prosecutor must notify all States Parties and all States who would normally exercise jurisdiction over the crimes concerned.¹³² This permits a State to inform the Prosecutor that the State itself is investigating or has investigated the case. Therefore, even if the ICC *prima facie* has jurisdiction, a case can be declared inadmissible if a State that also has jurisdiction over the case:

- is currently investigating the case or prosecuting the perpetrators; or
- has already investigated the case and decided not to proceed with prosecutions.¹³³

However, the ICC may step in if it finds that the State concerned is unable or unwilling genuinely to take action, with respect either to investigating or to prosecuting a case. In the case of unwillingness, the Court will consider whether proceedings were undertaken for the purpose of shielding an individual from criminal responsibility; whether there have been unjustified delays that are inconsistent with an intent to bring the accused to justice; and whether proceedings were conducted impartially or independently. In the case of inability, the Court will consider whether the national justice system has suffered total or substantial collapse to the extent that it is unable properly to carry out its functions.

A case can also be declared inadmissible if:

- the person concerned has already been tried for the conduct which is the subject of the complaint (*ne bis in idem*);¹³⁴ or
- the case is not of sufficient gravity to justify further action by the Court.¹³⁵

¹³² Rome Statute, article 18(1).

¹³³ *Ibid.*, article 17(1).

¹³⁴ *Ibid.*, article 20. The principle of *ne bis in idem*, which is a fundamental principle of criminal law,

also known as double jeopardy, does not prevent victims from bringing civil law suits against those that are responsible for harming them.

¹³⁵ Rome Statute, article 17(1)(d).

It should be noted that even if a person has already been tried in a national court for conduct constituting a crime within the jurisdiction of the ICC, the ICC may still exercise jurisdiction if the prosecution is determined not to have been genuine. This will be evidenced by the finding that proceedings were designed to shield the perpetrator from justice or were not otherwise conducted impartially or independently and in a manner consistent with the intent to bring the person to justice.¹³⁶

3.2 The International Criminal Court and children

The ICC has no jurisdiction over children under the age of 18 at the time of the alleged commission of the crime. The decision to exclude persons under 18 from the jurisdiction of the ICC recognizes that children are not likely to hold positions of leadership during armed conflict, and that other mechanisms – such as national courts or truth commissions – are more appropriate forums to address crimes allegedly committed by children. Therefore the role of a child in the ICC process is restricted to that of victim and/or witness. Three types of child-related provisions, examined in detail in this section, can be found in the Rome Statute and its accompanying documents:

- Crimes against children within the jurisdiction of the Court;
- Special measures to protect children during the investigation and prosecution of cases;
- Requirements for ICC staff with expertise on children's issues, and other provisions relating to administrative matters.

3.2.1 Child-specific crimes

While children can become victims of any of the crimes within the jurisdiction of the Court, the Rome Statute enumerates some 'child-specific' crimes, which by definition can only be committed against children, such as the genocidal act of transferring children from one group to another and the recruitment of children under 15 into armed forces or groups. The Statute sets out other crimes, not

¹³⁶ Ibid., article 20(3).

exclusively committed against children, that are of particular relevance to children, such as crimes of sexual violence, the genocidal act of preventing births, the use of starvation as a method of warfare and attacking humanitarian staff or objects.¹³⁷

DEFINITIONS OF CHILD SOLDIERING

“A child soldier is any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks.”

Graça Machel, The impact of war on children: A review of progress, Hurst & Co., 2001, p. 7.

“‘Child soldier’ ... means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms. ‘Recruitment’ encompasses compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force or armed group.”

Cape Town Principles, adopted 30 April 1997 at a joint UNICEF/INGO symposium.

3.2.1.a War crime: Using, conscripting or enlisting children as soldiers

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime within the jurisdiction of the ICC.¹³⁸ This holds true under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered. The crime is focused on children who participate directly in hostilities as combatants, yet child soldiers may perform many related tasks, as messengers, porters, cooks or spies, or they may be exploited for

¹³⁷ For commentaries on the other criminal acts that do not specifically apply to children, the reader can refer to a general

commentary on the Rome Statute, such as Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal*

Court, Nomos Verlagsgesellschaft, 1999.
¹³⁸ Rome Statute, article 8(2)(b)(xxvi) and (e)(vii).

sexual purposes. It is often difficult to separate these roles, since the same child may be forced to cook, bear arms and serve as sex slave. In many instances, support functions constitute an 'entry level' position for children from which they can be promoted in rank to become soldiers. UNICEF and other child protection agencies use, in their work on war-affected children, the Cape Town Principles definition of child soldiers (see text box).¹³⁹

The abduction or kidnapping of children by armed groups has been common in many ongoing and recent armed conflicts, for well-documented reasons. Children are perceived as cheap and obedient; they are more easily manipulated and controlled. Children are recruited into armed groups due to a variety of pressures, economic, cultural, social and political. Once initiated, they may stay on with armed forces and groups simply to be sure of regular meals, clothing and survival. Additionally, children in a militarized environment may feel that by belonging to an armed group they are afforded some protection. In numerous cases, children have been forced to commit atrocities in their own villages, precisely to prevent their return. For those who are recruited young, life with an army might be the only way of life they know, and their comrades-in-arms might have come to represent their 'family'. Very often, children who are targeted for recruitment are marginalized before they join an armed group. They might be living on the street or they may belong to ethnic minorities or socio-economically disadvantaged groups or they may be orphans. Thus, children have in most cases already suffered hardship or are disadvantaged prior to their involvement with the armed forces and groups. When it comes to children – especially children under 15 – so-called 'voluntary recruitment' is always a misnomer. Child rights advocates maintain that children's participation in armed forces will always

¹³⁹ For a definition of child soldiers, see the Cape Town Principles, adopted by a Symposium on the Prevention of Recruitment of Children into the Armed

Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, organized by UNICEF in cooperation with the NGO Working Group on the

Convention on the Rights of the Child, Cape Town, 30 April 1997. Another definition is supplied in Graça Machel, op. cit., p. 7.

involve some form of pressure, be it cultural, political, or simply the need to ensure their safety or daily subsistence.

Based on research and the experiences of child rights advocates there is an increased knowledge and understanding of the wider contexts of child soldiering. These realities are also reflected in the definitions used by child protection agencies and advocates. The definitions need to address clearly the realities on the ground; a definition should include both girls and boys; it should reflect all forms of recruitment, i.e. whether forced or voluntary; and it should include recruitment both by regular armed forces as well as by armed groups, paramilitaries and other irregular forces.

While not all of the elements mentioned in the definition used by child protection agencies are explicitly included in the Rome Statute, the provisions relating to child soldiers are formulated broadly to cover, for example, child soldiers who have been recruited by an armed group but have not been used directly in combat.¹⁴⁰ Therefore, the enlistment and exploitation of children under 15 by armed forces and groups can be prosecuted before the ICC, regardless of whether the children are out in the front lines or forced to serve as porters or to perform sexual services.¹⁴¹ It should be noted that unless the practice of recruitment or using children to participate in hostilities attains a significant magnitude, it will not reach the level of seriousness necessary for prosecution by an international judicial body.

¹⁴⁰ It should be noted that other legal instruments also provide a wide interpretation of what constitutes members of armed forces. For example, the Regulations annexed to the Hague Convention IV of 1907 recognize that the armed forces may consist of combatants as well as non-combatants. The Third Geneva Convention of 1949 relating to prisoners of war states that persons who

accompany the armed forces without actually being members thereof, such as members of services responsible for the welfare of the armed forces, shall be granted prisoner of war status if captured by the enemy forces.

¹⁴¹ The term 'child soldier' does not include only combatants within the meaning of international humanitarian law. Child soldiers, whether

or not they are actively involved in hostilities, in all circumstances come under the protection of the relevant Geneva Convention. In particular, they are entitled to the special protection accorded by international humanitarian law to children.

The Elements of Crimes require that the perpetrator “knew or should have known” that such a person was under the age of 15 years.¹⁴² Difficulties may arise in determining the exact age of children who lack birth documentation or are uncertain of their age. In order for the Court to establish that a crime has occurred, i.e. that a child soldier was in fact under the age of 15 at the time he or she was recruited, the prosecution will most likely look for the youngest children who have been conscripted or enlisted. Child rights advocates and organizations therefore need to support and advocate for better and more reliable birth registration mechanisms in order to enhance protection of all children.

There are a number of ways child rights advocates might assist in identifying instances where children under 15 have been recruited. In general, child rights advocates, both local and international, are well positioned to obtain information on child recruitment; indeed, as part of their mandates and for their own programming needs, they collect this type of information on a regular basis. Child rights advocates could provide information, training and briefings for the ICC on the specific factors and dynamics of child soldiering in a particular context. They can also assist the Court in finding child victims and witnesses, as they are likely to have contacts through demobilization programmes with former child soldiers, and would be in a position to help children make informed choices about whether they want to testify. In some cases, child rights advocates might choose to bring information on the use of children by armed groups and armed forces to the attention of the Prosecutor.¹⁴³

As noted, the inclusion of the recruitment of children under the age of 15 as a war crime reflects customary international law at the time of the adoption of the Rome Statute.¹⁴⁴ However, the entry into force of

¹⁴² Elements of Crimes, article 2(b)(xxvi) and (e)(vii).

¹⁴³ Rome Statute, article 15.

¹⁴⁴ See article 38 of the CRC; article 4(3)(c) of Additional Protocol II to

the Geneva Conventions; and article 77(2) and (3) of Additional Protocol I.

the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict raises the minimum age for compulsory recruitment and participation in hostilities to 18, signifying the gradual emergence of a new standard. Given this, criminalization of the recruitment and participation of children under the age of 18 might be among the first amendments proposed for the Rome Statute. Child rights advocates have a significant role to play in advocating and lobbying for such a strengthening of the Statute.

3.2.1.b Genocide: Forcibly transferring children of a group to another group

The forcible transfer of persons under age 18, belonging to a national, ethnical, racial or religious group intentionally targeted for whole or partial destruction, constitutes genocide.¹⁴⁵ 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.¹⁴⁶ The prosecution needs to demonstrate that the transfer was part of a "manifest pattern of similar conduct" directed against the specific group or was conduct that could itself effect the destruction of the group.¹⁴⁷

Guided by the CRC, child protection agencies help implement a child's right to be cared for by his or her own parents (CRC article 7) and not be separated from the parents against their will (CRC article 9). Child protection agencies are situated to assess the circumstances on the ground and what steps were taken to prevent separation. They very often lead the way in tracing efforts and family reunification. Agencies collect data on lost persons and document the events surrounding separation. This information could be important in establishing whether the separation or transfer of children was forced and part of a genocidal policy, and whether there was a manifest pattern of similar conduct. As with the other crimes, child protection agencies can support the ICC in identifying child victims who could serve as potential witnesses.

¹⁴⁵ Rome Statute, article 6.

¹⁴⁶ Elements of Crimes, article 6(e).

¹⁴⁷ Ibid., article 6(e)(7).

3.2.1.c Crimes of sexual violence

Sexual violence is used as a tool of war for a variety of purposes, including terrorizing individuals and communities, destroying a group's ability to reproduce, and forcibly impregnating an enemy population in order to vilify the victim and her community, to affect their morale, or to achieve any other political objective. Sexual violence is also a consequence of war, because armed conflict strips away many of the protections of women and girls and leaves them particularly vulnerable to attack. Victims of sexual violence may suffer psychological and physical harm, unwanted pregnancies, sexually transmitted infections including HIV/AIDS, and social ostracism. The consequences of sexual violence are often exacerbated by societal attitudes that prevent victims from seeking redress and from obtaining counselling or medical assistance.

Young girls are most often targeted for sexual abuse because they are less capable of defending themselves and because they are perceived as being less likely to have sexually transmitted infections such as HIV/AIDS. Particular attention also needs to be paid to sexual violence against boys. When boys have been raped or forced into prostitution, powerful social taboos that restrict discussion of sexual violence against males generally prevent any mention of the crime.¹⁴⁸

The Rome Statute has jurisdiction over the following acts of sexual violence, which, depending on the circumstances, can constitute war crimes or crimes against humanity:

- Rape;
- Sexual slavery;
- Enforced prostitution;
- Forced pregnancy;
- Enforced sterilization;
- Other forms of sexual violence of comparable gravity.¹⁴⁹

¹⁴⁸ Graça Machel, *op. cit.*, p. 55.

¹⁴⁹ Rome Statute, articles 7(1)(g)

and 8(2)(b)(xxii) and (e)(vi).

If such acts are committed during an armed conflict they are war crimes, whether they take place during an international or non-international armed conflict. If they are committed against civilians as part of a widespread or systematic attack and pursuant to or in furtherance of a State or organizational policy, they can be prosecuted as crimes against humanity, in times of peace and in times of war.

The Elements of Crimes further clarify each of the above-mentioned acts. For example, rape is defined as the penetration of any part of the body of the victim with a sexual organ or, in specific cases, with any object. The definition therefore includes the rape of boys. To constitute rape, the act must have been committed using some kind of force or threat; by taking advantage of a coercive environment; or, of particular relevance to children, if it was committed against a person incapable of giving genuine consent, which includes age-related incapacity. This is further elaborated in the Rules of Procedure and Evidence, according to which consent cannot be inferred from the words or conduct of a person incapable of giving genuine consent.¹⁵⁰ This is an important provision that acknowledges the fact that consent to a sexual act by a person below the age of 18 may not constitute genuine consent in the context of these crimes.

The crime of enforced prostitution is committed if a person is forced to engage in sexual acts and thereby the perpetrator or another person obtains money or other advantages in exchange for or in connection with the sexual acts.¹⁵¹ The same considerations with regard to genuine consent and age-related incapacity, as outlined above, apply. The crime of forced pregnancy requires that a woman is confined and made pregnant against her will, with the intent being to affect the ethnic composition of a population or to carry out "any other grave violations of international law".¹⁵²

¹⁵⁰ Elements of Crimes, article 8(2)(b)(xxii)-(1) and Rules of Procedure and

Evidence, rule 70(b).
¹⁵¹ Elements of Crimes, article 7(1)(g)-(3).

¹⁵² Ibid., article 7(1)(g)-(4) and article 8(b)(xxii) and (e)(vi)-(4).

Sexual slavery involves the perpetrator exercising 'ownership' over other individuals by selling, buying, lending or otherwise depriving them of liberty and causing such persons to engage in sexual acts. The crime of sexual slavery is also understood to cover trafficking in persons, in particular women and children.¹⁵³ In relation to trafficking, it should be noted that the ICC will only prosecute those cases where the other elements of a war crime or crime against humanity have occurred. For example, if the trafficking occurs in the context of and in association with an armed conflict or as part of a widespread or systematic attack against a civilian population pursuant to or in furtherance of a State or organizational policy, charges could be brought before the ICC.

While the Rome Statute does not directly consider sexual violence as genocide, recent jurisprudence by the *ad hoc* Tribunals has created precedents according to which sexual violence has been found to constitute genocide. For example, the ICTR found Jean-Paul Akayesu, a former communal leader in Rwanda, guilty of genocide, partly on the grounds of having witnessed and encouraged rape and other acts of sexual violence against Tutsi women during a genocidal campaign targeting the Tutsi population.¹⁵⁴ In addition, forced pregnancies can be a constitutive element of genocide if the aim is to affect the ethnic composition of a population.

It is important that in situations where sexual crimes have been part of a widespread policy directed against a civilian population, the ICC prosecutorial staff consider to what extent such crimes were also committed against children. While the experience of any person who has suffered crimes of sexual violence is devastating, the impact on child victims will be more profound and long-lasting, given the effect on their development. This is especially so in cases where children have been gang-raped, forced into prostitution or used as

¹⁵³ *Ibid.*, article 7(1)(g)-(2), footnote 18.

¹⁵⁴ ICTR: *The Prosecutor v. Jean-Paul Akayesu*

(ICTR-96-4), 2 September 1998. See also Human Rights Watch, 'Kosovo backgrounder: Sexual

violence as international crime', *Human Rights Watch World Report 1999*.

sex slaves in so-called 'rape camps'. These crimes have all been committed in the recent past.

In addition to psychological distress and trauma, sexual violence has long-term socio-economic implications. Research demonstrates that sexual exploitation of women and girls during times of conflict can become generally accepted within society after the war is over.¹⁵⁵ In many societies, girls and boys who have been raped or forced into prostitution might be rejected by their families. Girls might not be able to marry and may be pushed into prostitution as a means of survival; they might have become pregnant and so become heads of households of one or more children. In addition to this, children might have contracted HIV/AIDS, which further increases their need for care and treatment. These specific considerations need to be taken into account when the ICC is considering the issue of reparations to child victims of sexual violence and exploitation.

For all of these reasons, it is important that sexual crimes committed against children are carefully reviewed in all indictments and deliberations before the ICC. In fact, crimes involving sexual violence against children should form specific and separate indictments, on the basis that they are crimes of extreme gravity, and not simply part of an overall pattern of sexual violence committed against the civilian population. Child rights advocates could support efforts to this end and actively lobby the ICC to ensure there is no impunity for sexual violence against children.

3.2.1.d War crime: Intentionally attacking schools

Intentionally directing attacks against protected buildings is a war crime, regardless of whether it occurs during an non-international or international armed conflict.¹⁵⁶ This crime is defined as an intentional attack on protected buildings; the Elements of Crimes specify that the perpetrator must have launched an attack intending to target a school

¹⁵⁵ Graça Machel, *op. cit.*, p. 58.

¹⁵⁶ Rome Statute, article 8(2)(b)(ix) and (e)(iv).

or other protected object. In addition to schools, the list of protected buildings includes buildings dedicated to education, religion, art, science or charitable purposes, and historical monuments, as well as hospitals and other places where the sick and wounded are cared for,¹⁵⁷ provided they are not used for military purposes. Therefore incidents where the damage to or destruction of a school is the unintended result of an attack against a legitimate target are not included.

This provision is increasingly important because of the trend in recent years towards targeting places where children should be safe and protected and where cultural heritage is preserved. For example, UNICEF estimated that 45 per cent of schools in Kosovo were either totally destroyed or seriously damaged during the war.¹⁵⁸ It should be noted that, for the purposes of the ICC, 'victims' are not restricted to natural persons, but can include schools or other protected institutions,¹⁵⁹ thus allowing schools access to reparations that could be vital for rebuilding after an armed conflict.

In prosecuting perpetrators of intentional attacks on schools and other educational or cultural facilities, the Court would be looking for information on schools that have come under direct attack, and for evidence that the school was not used for military purposes. Child rights advocates can help to gather information on this crime, for example by documenting the destruction of schools during their discussions with children and others, and by referring information on the location of the buildings and other details to the ICC.

3.2.1.e War crime: Attacks on humanitarian staff and objects

Attacks against humanitarian operations – including their staff and resources – have become a common feature of recent armed conflicts. This is a very effective means of blocking civilian access to essential supplies and services, as humanitarian organizations cannot operate if

¹⁵⁷ Ibid.

¹⁵⁸ UNICEF press release, 2 September 1999,

CF/DOC/PR/1999/35.

¹⁵⁹ Rules of Procedure and Evidence, rule 85.

their protected status is not respected. When aid does not reach civilians in need, children are likely to be among the first casualties.

Under the Rome Statute, intentional attacks against “personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter” constitute a war crime.¹⁶⁰ The inclusion of the war crime of attacking humanitarian operations marks an important development of international humanitarian law, as attacks against humanitarian operations are included neither in the list of “grave breaches” in the Geneva Conventions of 1949, nor in Additional Protocol I of 1977.¹⁶¹

According to the elements of this crime, humanitarian or peacekeeping personnel or objects must be the target of the attack. Furthermore, the attack must take place within the context of and be associated with an armed conflict, whether international or non-international. An important precondition for making attacks on humanitarian or peacekeeping operations punishable, and entitling their personnel or objects to the protection given to civilians or civilian objects, is that they do not take direct part in the hostilities. It is important to note that only attacks directed against humanitarian actors, including murder and kidnapping,¹⁶² constitute the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission under the ICC Statute. Intentional denial or hampering of aid efforts must be considered under other categories of war crimes, for instance, the starvation of civilians as a method of warfare in international armed conflicts.¹⁶³

During recent years, the Security Council has taken an increasing interest in the protection of civilians and children affected by armed conflict.¹⁶⁴ A number of thematic resolutions have been adopted on

¹⁶⁰ Rome Statute, article 8(2)(b)(iii).

¹⁶¹ Fourth Geneva Convention, article 146, and Additional Protocol I, article 85.

¹⁶² Elements of Crimes, article 8(2)(b)(iii).

¹⁶³ Rome Statute, article 8(2)(b)(xxvi).

¹⁶⁴ See for example Security

Council resolutions 1265 of 17 September 1999, 1314 of 11 August 2000, and 1379 of 20 November 2001.

these subjects, highlighting the role of humanitarian agencies and calling for safe and unhindered access to victims of war. In country-specific resolutions, the Security Council has also stated that attacks on relief workers and the deliberate impeding of humanitarian assistance can threaten international peace and security.¹⁶⁵ It is conceivable that the Security Council would use its powers to refer such situations to the ICC.

3.2.2 Child victims and witnesses before the ICC

For any child, giving testimony or undergoing questioning by lawyers or investigators can be a very daunting experience, recalling painful or traumatic experiences. Therefore, special measures and procedures for children have been established in most legal systems, in recognition of the vulnerability of children and the need to protect child victims or witnesses. The risk of renewed trauma in court is compounded by the fact that they will have suffered and experienced some of the worst crimes known to humanity.

3.2.2.a Specific provisions relating to victims and witnesses

In order to minimize the risk of excessive distress for victims and witnesses, the ICC has established a victims and witnesses protection and support scheme, as outlined in the Rome Statute. A number of provisions applying generally to all victims and witnesses require that specific regard be paid to children and victims of sexual violence, such as:

*“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, gender... and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual violence or gender violence or violence against children”.*¹⁶⁶

¹⁶⁵ See for example Security Council resolutions 757 of 30 May 1992, 1072 of

30 August 1996, and 1078 of 9 November 1996.
¹⁶⁶ Rome Statute, article 68.

This article (Rome Statute, article 68) requires that appropriate measures are taken during investigations and prosecutions,¹⁶⁷ while ensuring that these measures are not prejudicial to the rights of the accused or to a fair and impartial trial. Based on article 68, the Rules of Procedure and Evidence formulate a general principle according to which the organs of the Court, in performing their functions,

“shall take into account the needs of all victims and witnesses... in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence”.¹⁶⁸

The constitutive and supporting documents of the Court therefore clearly specify that particular care and consideration is to be given to any and all child victims or witnesses who come in contact with the ICC.

3.2.2.b Special measures for child victims and witnesses

The Rome Statute and the Rules of Procedure and Evidence of the ICC contain provisions that call for special measures to be put in place for child victims or witnesses. The Prosecutor, the defence, the victim or witness, or his or her legal representative, each have the right to request special measures with respect to a witness. The Chamber involved may, following such a request or on its own motion and in consultation with the Victims and Witnesses Unit, order special measures to facilitate the testimony of a traumatized victim or witness, a child, or a victim of sexual violence.¹⁶⁹ In ordering such special measures, the Chamber must also take into account the views of the victim or witness on whose behalf the special measures are being ordered. While there are specific provisions regarding child victims and witnesses in the Rome Statute and the Rules of Procedure and Evidence, this general rule is sufficiently flexible to allow the Court to create additional measures, as needed.

¹⁶⁷ See also article 54(1)(b) of the Rome Statute, which specifically requires the Prosecutor to “respect the interests and personal circumstances of victims and witnesses, including

age, gender ... and health, and take into account the nature of the crime, in particular, where it involves sexual violence, gender violence or violence against children”.

¹⁶⁸ Rules of Procedure and Evidence, rule 86.

¹⁶⁹ Ibid., rule 88.

In general, hearings before the ICC must be conducted in public to ensure that justice is not only done, it is seen to be done. However, in order to protect certain victims and witnesses, a Chamber might order that specific parts of the proceedings be conducted in such a way as to protect the identity of a witness. For example, hearings can be held *in camera*, i.e. behind closed doors, or evidence can be presented by electronic or other special means, such as video conferencing or recorded testimony.¹⁷⁰ The Statute explicitly states that such measures are mandatory in the case of a victim of sexual violence or a child witness or victim, unless the Court orders otherwise after considering the views of those victims and witnesses.¹⁷¹ The Rules of Procedure and Evidence require the Chamber to be vigilant in controlling the manner of questioning so as to prevent harassment or intimidation, particularly in relation to victims of sexual violence.¹⁷² Should the Court decide the case does not warrant these measures, but that the identity of the victim or witness should nevertheless be withheld from the public, the Court¹⁷³ can order the name of the victim, witness or other person at risk to be expunged from its public records¹⁷⁴ or the person to be referred to by a pseudonym. Furthermore, measures for the alteration of voice or picture, video conferencing or closed-circuit television might be ordered in appropriate circumstances.

One rule directly referring to children states that a child witness appearing before the Court, who is the child of the accused, shall not be required, unless he or she chooses, to make any statement that might incriminate the accused parent.¹⁷⁵ This is an important provision for children and, where applicable, the content of the rule should be explained to the child so that he or she may make an informed decision whether or not to testify.

¹⁷⁰ Rome Statute, article 68(2); see also rules 67 and 68 of the Rules of Procedure and Evidence.

¹⁷¹ Rules of Procedure and Evidence, rule 68(2). See also rule 112(4), which

provides that the Prosecutor can use audio or video recording when questioning victims of sexual or gender violence, or a child, where such measures could reduce any subsequent detrimental

effects to the victim.

¹⁷² Rules of Procedure and Evidence, rule 88(5).

¹⁷³ *Ibid.*, rule 87(3)(c) and (d).

¹⁷⁴ *Ibid.*, rule 87(3)(a).

¹⁷⁵ *Ibid.*, rule 75(1).

Another important aspect of the ICC is its ability to order reparations for victims of crimes within the jurisdiction of the Court, including child victims. The Court may make orders for convicted persons to pay reparations to victims for damage, loss or injury.¹⁷⁶ Awards for reparations can also be made through the Trust Fund established pursuant to the Rome Statute.¹⁷⁷

Both the rule relating to incrimination of another person and the procedures by which reparations may be sought should be dealt with by someone who is competent both to explain these issues to the child and to act on his or her behalf, such as the child's lawyer or other support person. For these and other reasons, the Rules of Procedure and Evidence address the need for special arrangements with regard to the legal representation of children. In the case of a child victim, in order to exercise the rights of victims to participate in certain parts of the proceedings, an application to participate may be made by a person acting on behalf of the victim.¹⁷⁸ Other issues relating to children's legal representation, which are not dealt with in the Rules, will be worked out in the future. This presents an opportunity for child rights advocates to ensure that all relevant issues affecting children are taken into account and dealt with in the best possible way.

3.2.2.c *The Victims and Witnesses Unit and its functions*

While all the organs and sections of the Court are required to take the needs of witnesses and victims into consideration, there will also be a separate Victims and Witnesses Unit within the Registry. The mandate of the Unit is formulated as follows:

*"[The Victims and Witnesses Unit] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling 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."*¹⁷⁹

¹⁷⁶ Ibid., rules 94-98.

¹⁷⁷ Rome Statute, article 79.

¹⁷⁸ Rules of Procedure and Evidence, rule 89(3).

¹⁷⁹ Rome Statute, article 43(6).

The Victims and Witnesses Unit is intended to operate for the benefit of all witnesses and victims who appear before the Court, by providing whatever assistance is necessary and appropriate under the circumstances. The Rules of Procedure and Evidence define a victim as a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the ICC.¹⁸⁰ Another category of people who will fall within the mandate of the Victims and Witnesses Unit are “others who are at risk on account of testimony given by such witnesses”. This group would include, for example, children who might be at risk of retaliation for testimony given by a parent before the ICC. It should also be noted that the mandate of the Victims and Witnesses Unit operates for the benefit of both prosecution and defence witnesses.

As noted above, the functions of the Victims and Witnesses Unit include protective and security measures, as well as other support functions.

Protective and security functions

Protective measures can be initiated by the Prosecutor, the defence, or at the request of a witness or victim, their legal representative, or by a Chamber (after having consulted the Victims and Witnesses Unit).¹⁸¹ The security functions of the Victims and Witnesses Unit are intended to protect the physical safety of witnesses and victims during the investigation, the trial and after the trial. These functions ensure the safe arrival of witnesses to the court, as well as their safety after returning home. This might involve measures to ensure that applications for passports or entry or exit formalities at border checks or at airports do not unintentionally reveal the identity of the witness or the reason for the travel. It will also involve guaranteeing that the witness is safely accommodated in The Hague, which may include frequent change of lodging, should a stricter security protocol be necessary.

¹⁸⁰ Rules of Procedure and Evidence, rule 85.

¹⁸¹ *Ibid.*, rule 87.

The ICC is bound to encounter situations where a witness, as a result of giving testimony, will need to relocate, potentially together with his or her entire family. As an indication, the ICTY received 50 relocation requests in 1999, and 20 requests in 2000. Relocation is a drastic measure and requires a long-term commitment by the Victims and Witnesses Unit to persons for whom relocation is required. If relocation is to a third country, cooperation is required from the receiving State, for example through granting refugee status, by accepting the person or family in question into the domestic witness protection programme, or other appropriate measures.¹⁸²

Figures on witnesses and victims in the ICTY and ICTR

- Number of relocation requests
ICTY: 50 in 1999 and 20 in 2000.
ICTR: 32 in 1999 and 38 in 2000.
- Witnesses' average length of stay at the hearing
ICTY: 7 days in 1999.
ICTR: 13 days in 1999.
- Number of countries from which witnesses have been called
ICTY: 30 countries.
ICTR: 28 countries.

It should be noted that while witness protection before, during and after trial can be life-saving, such measures are also likely to increase the distress and anxiety of any victim or witness, and even more for a child called on to testify. Therefore, it is of utmost importance to inform and consult the child properly about the measures being considered and to offer continued support and counselling to minimize the potential risks, which are compounded for children undergoing critical stages in their development.

Support functions

Alongside the protective and security functions, the Victims and Witnesses Unit is tasked to provide “counselling and other appropriate

¹⁸² The ICTY has entered into various agreements, for example with the Government of the United Kingdom, concerning cooperation with their

witness protection programme. See Thordis Ingadottir, Françoise Ngendahayo and Patricia Visseur Sellers, ‘The International Criminal

Court: The Victims and Witnesses Unit’, Project on International Courts and Tribunals (PICT), ICC Discussion Paper no. 1, March 2000, p. 26.

assistance". The Rules of Procedure and Evidence provide some guidance concerning the likely nature of this type of assistance.¹⁸³ Nevertheless, the Registrar and personnel of the Victims and Witnesses Unit will be required to elaborate their functions and develop operating procedures in accordance with the needs of victims and witnesses, which will necessarily be an ongoing and constant process, taking account of new situations and developments. In undertaking this task, it is likely that the experience of the ICTY and the ICTR will serve as a precedent for what the Victims and Witnesses Unit might expect and how best to meet the needs of victims and witnesses.¹⁸⁴ The constitutive documents of the ICC also give details on specific areas of expertise the Victims and Witnesses Unit should have in order to fulfil its mandate. These include expertise in social work and counselling, health care, psychology, law, logistics, trauma and especially trauma related to sexual violence, gender and cultural diversity, language interpreting and administrative matters.¹⁸⁵ This wide range of skills and knowledge indicates that the Unit will be expected to respond to varying needs and issues as they arise.

It is important for the Victims and Witnesses Unit to remain flexible enough to cater to the wide variety of practical considerations and needs that will arise with respect to child victims and witnesses. A child who is brought to The Hague to testify will often come from a different culture, speak a different language and be unaccustomed to travel across or between continents; indeed, the child might never have entered an airplane before. Children who appear before the Court will most likely be unfamiliar with judicial proceedings in any jurisdiction, let alone in an international criminal court. The educational background of the children will vary widely, and consequently they will have very different ways of understanding what is happening and what is expected from them. This is heightened in the case of a child

¹⁸³ Rules of Procedure and Evidence, rule 17.

¹⁸⁴ While the statutory provisions for support services by the ICTY and

ICTR are less detailed than those outlined for the ICC, extensive practice has developed in terms of the services provided by the

victims and witnesses protection units of these two Tribunals.

¹⁸⁵ Rules of Procedure and Evidence, rule 19.

who has spent the last years as a child soldier, living in hills and dense forests, or has been victimized in other ways.

Providing specific briefings to children who come before the Court should be incorporated into the support functions of the Victims and Witnesses Unit, which is required to “give due regard to children” in the performance of its functions.¹⁸⁶ Any briefings given to a child should be appropriate to the age of the child, and as concrete and ‘hands-on’ as possible. This preparation should include a visit to the courtroom together with a brief description of the various actors in the room and where they will be seated. If any technical equipment is to be used during the course of the child’s testimony, such as language interpreting and recording equipment, that equipment should be shown and explained to the child in advance. The impact of possible technical protective measures, such as measures to conceal the child’s visual image, must also be explained to the child so there is no surprise.¹⁸⁷ This function would properly fall within the mandate of the Victims and Witnesses Unit and could be carried out by the child support person or someone else the child trusts.

Support functions also include practical travel arrangements, arranging travel documents, ensuring immigration entry and exit for victims and witnesses, provision of travel support, arranging for safe accommodation during trial and, possibly, compensation for loss of income. One practical problem that has emerged, especially for the ICTR, is that victims and witnesses who have taken refuge in a third country but have not secured legal immigration status may be unable or unwilling to jeopardize their situation by leaving the country in order to testify. These problems are likely to require lengthy negotiations with States to obtain emergency travel documents, enabling potential witnesses to travel to the Court and return safely to their country of residence.¹⁸⁸ To the extent possible, proper procedures and agreements should be worked out in

¹⁸⁶ *Ibid.*, rule 17.

¹⁸⁷ Thordis Ingadottir and

others, *op. cit.*, p. 31.

¹⁸⁸ *Ibid.*, p. 28.

advance, so as to minimize the impact on victims and witnesses and avoid any potential delay in the proceedings.

The provision of counselling is explicitly mentioned in the Rome Statute and further elaborated in the Rules of Procedure and Evidence to include assisting victims and witnesses in obtaining medical, psychological and other appropriate assistance.¹⁸⁹ Specifically in relation to children, the Rules of Procedure and Evidence provide that a child support person may be assigned to a child victim or witness to assist throughout all stages of the proceedings.¹⁹⁰ The impact of recounting or reliving the worst moments in the child's life can reopen old wounds and tear down the child's defences, leading to long-lasting damage, especially if there is no follow-up or continued support.¹⁹¹ Indeed, the need for post-trial follow-up with witnesses emerged as an important issue in interviews with women who testified before the ICTR in cases involving sexual violence,¹⁹² and the needs of children in this regard are likely to be even greater, given their developmental stage in life.

In general, the type of assistance that may be required is illustrated by the experience of the ICTR, where the Victims and Witnesses Unit has provided medical, gynaecological and psychological care to witnesses.¹⁹³ The *ad hoc* Tribunals report positive experiences with 'witness assistants' who are present to provide practical and emotional support 24 hours a day.¹⁹⁴ This round-the-clock presence of support staff is of particular importance for children, to help them feel secure, knowing that someone is there to take care of their needs, whether physical, psychological or emotional. While giving proper explanations and support prior to the trial is necessary to help minimize adverse

¹⁸⁹ Rules of Procedure and Evidence, rule 17(2)(iii).

¹⁹⁰ *Ibid.*, rule 17(3). In assigning a support person to a child, the Victims and Witnesses Unit should seek the agreement of the parents or

the legal guardian.

¹⁹¹ Graça Machel, *op. cit.*, p. 86.

¹⁹² Fourth annual report by the President of the International Tribunal for Rwanda, United Nations, A/54/315-

S/1999/943, 7 September 1999, para. 82.

¹⁹³ Thordis Ingadottir and others, *op. cit.*, p. 32.

¹⁹⁴ *Ibid.*, p. 31.

impact, it is also critical that the Victims and Witnesses Unit develop policies and practices for continued care and support of child victims and witnesses. This includes coordinating with States and child protection agencies to provide proper care and support for children after they return home or have moved on to a third country.

3.2.3 A child-friendly ICC: Staffing requirements

The extent to which the ICC can successfully investigate and prosecute crimes committed against children and address the special requirements and vulnerabilities of child victims and witnesses will largely depend on whether the Court has staff who possess adequate expertise in issues related to children. Fortunately, this has been foreseen by the Rome Statute, which includes specific provisions to ensure sufficient expertise in these areas. Thus, the Rome Statute explicitly provides that:

- When selecting judges, States Parties must take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children;¹⁹⁵
- The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children;¹⁹⁶
- The Victims and Witnesses Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. In addition, the Unit may have staff with expertise in children's issues, in particular traumatized children, and gender and cultural diversity.¹⁹⁷

The Assembly of States Parties will elect the judges of the ICC from a pool of candidates nominated by States Parties. Given this and the need to include judges with expertise in children's issues, it is important that States adopt national procedures for identifying and nominating candidates with the right expertise for international judicial positions. In order to ensure a broad range of qualified

¹⁹⁵ Rome Statute, article 36(8)(b).

¹⁹⁶ *Ibid.*, article 42(9).

¹⁹⁷ *Ibid.*, article 43(6). See also

rule 19 of the Rules of Procedure and Evidence.

candidates, these procedures should include broad consultation within the legal community and civil society. Child rights advocates can assist the process by lobbying for appropriate identification and nomination procedures and by identifying candidates with appropriate child expertise.

Given the nature of the crimes within the jurisdiction of the Court, the ICC requires staff who are familiar with child support services and juvenile justice issues and, in particular, have experience relating to children affected by armed conflict and displacement. In addition, the ICC will need to ensure that all staff members, particularly those likely to come in direct contact with children, receive training in issues relating to children and child protection. The training should address relevant issues such as child soldiers, sexual violence against children and discrimination against girl children. The Rules of Procedure and Evidence mandate the Victims and Witnesses Unit to make available to the Court, and to all relevant parties, training in issues of trauma, sexual violence, security and confidentiality,¹⁹⁸ which could extend to issues specific to child trauma. Child protection agencies could provide valuable contributions to such training initiatives, given their expertise and practical experience on the ground.

The importance of having staff in the ICC with experience in child protection and children's issues, especially in the context of war and displacement, cannot be overstated. While many of the needs of witnesses and victims are covered in the Statute and the Rules of Procedure and Evidence, the concerns of children can often be solved only on a case-by-case basis, frequently through practical measures. For example, while it might be reassuring for an adult witness to be escorted by police or security staff in uniforms, it might be a frightening experience for a child, especially if the child has suffered or witnessed crimes perpetrated

¹⁹⁸ Rules of Procedure and Evidence, rule 17(2)(a)(iv).

by people in uniform. The ways in which children express anxiety and fright might also differ from adults and be influenced by the children's own culture; thus staff will need to be trained to recognize these reactions and deal with them accordingly. In the case of girls who are victims of sexual violence, female staff of the Court should always be present, and a female lawyer should conduct the questioning, provided that this is the wish of the child, in order to provide the child with as comfortable and safe an environment as possible. Considerations of this type are familiar to persons experienced in supporting children through judicial proceedings and to persons experienced with children and armed conflict. Their expertise will be invaluable for the ICC.

3.2.4 Cooperation between child rights advocates and the ICC

The ICC creates both opportunities and challenges for child rights advocates. Ending impunity for crimes committed against children, while at the same time developing procedures and policies to ensure that the needs of child victims and witnesses are properly taken into account, will require concentrated effort and preparation.

3.2.4.a Preparation for the ICC

Child rights advocates will need to ensure they are properly prepared to work with the ICC in the most constructive manner possible, which will require training on relevant issues. In particular, such training will be needed for staff based in countries where there is an armed conflict or there is a risk of breakdown of law and order. This training should familiarize staff with the role and work of the ICC, ensuring that they understand the processes and what information might be relevant for the prosecution of crimes against children so as not to hinder ongoing or future investigations. Equally important, training will enable staff to inform children and civil society about the ICC and answer questions they may have. In addition, child rights advocates should define their policies vis-à-vis the ICC and adopt practical guidelines on how they will cooperate with the ICC, including the role of individual staff members.

3.2.4.b *Providing information and testifying*

Child rights advocates can be a vital source of information with respect to crimes committed against children, particularly as they may have information that discloses the widespread or systematic nature of the commission of crimes. In general, child rights advocates can work with the ICC to develop proper guidelines concerning their information-sharing and the cooperation of their staff with the ICC including, when necessary, testifying before the Court.

The Prosecutor may seek information from child rights advocates and organizations, for example, in determining whether to request authorization to commence an investigation.¹⁹⁹ The Rules of Procedure and Evidence specify that the Prosecutor shall protect the confidentiality of such information.²⁰⁰

In many cases, child rights advocates may be in possession of information that is sensitive or should otherwise be kept in confidence. The Rules of Procedure and Evidence contain specific guidelines concerning non-disclosure of privileged and confidential information, outlining cases in which a person will not be compelled to disclose information. Of relevance to child rights advocates, the Rules of Procedure and Evidence specifically provide for protected categories of relationships within which such communications might be made, in particular those related to or involving victims.²⁰¹ Where the Court determines that reasonable expectations of privacy and confidentiality are essential to the relationship – patient and therapist, for example – the information is protected, provided recognition of the privilege would further the objectives of the Statute.²⁰² Following these rules, it is likely that information shared by a child with his or her social worker would qualify as privileged information, and consequently the social worker would not be compelled to disclose that information when giving testimony before the ICC. In this context privileged information relates primarily to information received from an individual child in the

¹⁹⁹ Pursuant to article 15 of the Rome Statute.

²⁰⁰ Rules of Procedure and Evidence, rule 46.

²⁰¹ *Ibid.*, rule 73(3).

²⁰² *Ibid.*, rule 73(2).

context of a professional relationship, rather than information on children overall. However it should be noted that the ICC grants special status to the International Committee of the Red Cross (ICRC), in that any information or evidence in its possession is regarded as privileged and not subject to disclosure.²⁰³

3.2.4.c Advocating with the ICC

Child rights advocates must also work to ensure that the ICC addresses the rights and needs of child victims and witnesses and that crimes committed against children receive due judicial attention. Training of judges, prosecutorial staff and staff of the Victims and Witnesses Unit will be essential to ensure proper measures for involving children in the ICC. The training should encompass international child rights standards, ways of dealing with war-affected children and best practices for the participation of child victims and witnesses in judicial processes.

3.2.4.d Advocating for national action

Given the jurisdictional limitations on cases that can be brought before the ICC, widespread ratification from all regions in the world is essential. Child rights advocates based in States that are not parties to the Statute can play an important role in advocating for that State to become a party. In States that are already parties to the Statute, child rights advocates can assume an active role in advocating for implementation, for example by assisting the process of reforming national laws in accordance with the Rome Statute, particularly as it relates to children. They can also use the prospect of an ICC case to encourage national authorities to investigate and prosecute cases involving crimes against children properly, since failure to do so could result in the ICC exercising jurisdiction over those crimes.

3.2.4.e Educating children about the ICC

Educating children about the ICC is essential so that they have access to all relevant and appropriate information and can make informed choices about their involvement with the ICC. Thus, global and

²⁰³ Ibid., rule 73(4).

national advocacy activities should seek to inform children about the work of the ICC and other international justice and truth-seeking mechanisms. Children's participation should be voluntary, and in all instances, special safeguards for their protection must be in place.²⁰⁴

3.2.4.f *The ICC and the United Nations*

While the ICC is not an organ of the UN, it will be closely linked to the UN through various agreements, the most important being the draft Relationship Agreement between the Court and the United Nations. The Relationship Agreement defines the nature and scope of the cooperation between the Court and the United Nations.²⁰⁵ The Agreement is important since the UN provides humanitarian assistance in areas of conflict and also deploys peacekeeping and other missions. It is anticipated that the ICC will investigate and prosecute crimes occurring in areas and at times when the UN has personnel on the ground.

The Agreement outlines a general obligation of cooperation between the two institutions,²⁰⁶ implementing the provision of the Rome Statute that authorizes the Court to ask intergovernmental agencies for information or documents or other forms of cooperation.²⁰⁷ According to the Relationship Agreement, the UN will undertake to provide to the Court information or documents, as requested.²⁰⁸ If the disclosure of information or documents would endanger in some way the safety of current or former UN staff or would prejudice or affect the security of UN operations, either the Court or the UN may order appropriate protective measures.

The United Nations, including its funds, programmes and agencies, will also cooperate with the Prosecutor, although information or

²⁰⁴ CRC, articles 12 and 40. See also *UNICEF handbook*, op. cit., sections on these CRC articles.

²⁰⁵ 'Report of the Preparatory Commission for the International Criminal Court, Addendum, Draft Relationship Agreement

between the Court and the United Nations', United Nations, PCNICC/2001/1/Add.1, 8 January 2002. The draft Relationship Agreement will be submitted for adoption to the first Assembly of States Parties in 2002.

For the sake of brevity, the draft will be referred to below as the Relationship Agreement.

²⁰⁶ Relationship Agreement, article 3.

²⁰⁷ Rome Statute, article 87(6).

²⁰⁸ Relationship Agreement, article 15(1).

documents may be provided to the Prosecutor on a confidential basis, ensuring that the information will not be shared with other organs of the Court or outside the Court without the consent of the UN.²⁰⁹ A UN body can enter into any necessary arrangements with the Prosecutor to ensure the confidentiality of information, the protection of persons including current or former UN staff, and the “security and proper conduct” of any UN operations or activities. Such agreements with the Court may be considered for UN entities which seek to highlight crimes committed against children, while also ensuring the safety of children and the continued security and proper conduct of its operations.

Staff of the United Nations, including its funds, programmes and agencies, can be called to testify before the Court.²¹⁰ Should this occur, there is an obligation to cooperate, through the provision of testimonies by UN staff; if necessary, the UN will waive the staff’s duty of confidentiality in line with the Relationship Agreement.²¹¹ The Court might also authorize the Secretary-General to appoint a representative to assist a staff member who appears before the Court as a witness.²¹² If giving testimony would endanger current or former UN staff, or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations, protective measures can be ordered by the Court, according to the usual rules governing the protection of witnesses and victims.

The Relationship Agreement between the UN and the ICC also provides that the Court and the UN shall “cooperate in the interchange of personnel” and “strive for the maximum cooperation in order to achieve the most efficient use of specialized personnel, systems and services”.²¹³ This article leaves room for the secondment of child protection staff from the UN to the ICC, which might be worth pursuing during the Court’s initial stages to ensure that the ICC has appropriate child expertise.

²⁰⁹ Ibid., article 18.

²¹⁰ Ibid., article 16.

²¹¹ Ibid., article 16(1).

²¹² Ibid., article 16(1) and (2).

²¹³ Ibid., article 8.

CHAPTER FOUR

THE ICC AND NATIONAL JUSTICE SYSTEMS

It is anticipated that the majority of cases that would fall within the jurisdiction of the ICC will be tried in domestic courts. According to the principle of complementarity, the ICC will only step in when States are unable or unwilling to take action. Thus States have the primary responsibility to prosecute genocide, war crimes and crimes against humanity within national justice systems. Ratification of the Rome Statute entails various obligations for States; for example, once States have ratified they must be prepared to cooperate fully with the Court and to ensure that procedures are in place under national law that will enable the various forms of cooperation the Court may require.

4.1 Principle of complementarity

All States have a duty either to prosecute or extradite (*aut dedere aut judicare*) those suspected of having committed certain crimes under international law.²¹⁴ The ICC is therefore structured according to the principle of complementarity, according to which national courts have the primary duty to bring such persons to justice before their own courts. The ICC will only exercise jurisdiction where a national court fails to fulfil this primary obligation and, as such, the ICC serves as a complement to national criminal justice systems.²¹⁵ In keeping with the basic principle by which national courts will work together in a complementary relationship with the ICC, it is important to note that the ICC does not function as an appeals court or an international 'Supreme Court' where cases can be appealed.

Given the principle of complementarity, when a case is referred to the Court and the Prosecutor determines that there are reasonable grounds to initiate an investigation, he or she must first notify all States that also have jurisdiction over the crime.²¹⁶ If one of these States has already commenced a *bona fide* investigation or prosecution, whether or not that process has been completed, the ICC will defer to

²¹⁴ Rome Statute, preamble, para. 6.

²¹⁵ *Ibid.*, article 18(2).

²¹⁶ This notification can, if

necessary, be confidential in order to protect potential witnesses or victims, to prevent destruction of

evidence or to prevent alleged perpetrators from fleeing; Rome Statute, article 18(1).

the national justice system and the case will proceed through the national courts.

Nevertheless, the ICC can still hear a case that has been brought before a national court if there are indications that a State is unwilling or unable genuinely to investigate or prosecute the case. For example:

- The domestic proceedings were undertaken only to shield the person from individual criminal responsibility;
- There have been unjustified delays that seem incompatible with the intent to bring the person to justice;
- The domestic proceedings were not impartial or independent;
- The national justice system has collapsed.²¹⁷

Through the principle of complementarity, the ICC becomes a safety-net mechanism, enabling States to fulfil their obligation to prosecute or extradite those suspected of having committed crimes under international law, while at the same time ensuring that persons suspected of having committed genocide, crimes against humanity or war crimes against children and others, cannot escape justice.

4.2 Cooperation by national authorities with the ICC

States Parties to the Rome Statute have a general obligation to cooperate fully with the Court in its investigations and prosecutions,²¹⁸ which includes an obligation to put procedures in place under national law for all forms of cooperation, as specified in part 9 of the Rome Statute.²¹⁹ In particular, the Rome Statute specifies that States Parties shall provide assistance in relation to investigations or prosecutions,²²⁰ as follows:

- The arrest and surrender of persons who have been formally requested by the ICC,²²¹

²¹⁷ Rome Statute, article 17(2) and (3).

²¹⁸ *Ibid.*, article 86.

²¹⁹ *Ibid.*, article 88. It should be noted that procedures for international judicial

cooperation already exist in many States, through bilateral and regional agreements.

²²⁰ See in general articles 93(1) and 54(3)(a), (b) and (c) of the Rome Statute.

²²¹ See articles 59(1), 89 and 90 of the Rome Statute. It should be noted that the Statute distinguishes between 'surrender' – namely delivery of a person by a State to the

- The identification and whereabouts of persons or the location of items;
- The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- The questioning of any person being investigated or prosecuted;
- Assistance with the voluntary appearance of persons as witnesses or experts before the Court;
- The temporary transfer of persons, such as the transfer of persons in custody for the purpose of obtaining testimony;
- The examination of places or sites, including exhumation of gravesites;
- The execution of searches and seizures;
- The provision of records and documents, including official records and documents;
- The protection of victims and witnesses and the preservation of evidence;
- The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties;
- Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

As the ICC will have investigators but no police force, law enforcement officials or permanent detention facilities of its own, an important role for States Parties will be to perform law enforcement functions. This assistance would be required during all stages of a case, from initial investigations to the enforcement of sentences, orders and

Court pursuant to article 102(a) of the Rome Statute – and ‘extradition’ – namely delivery of a person by one State to another State pursuant to a treaty, a convention or national

legislation (article 102(b) of the Rome Statute). The ability to surrender a person to the Court is an important distinction as extradition processes between States can be quite lengthy and cause

delays to legal proceedings. See Human Rights Watch, *Making the International Criminal Court work: A handbook for implementing the Rome Statute*, September 2001.

judgements of the ICC, such as the payment of reparations to victims, and the incarceration of convicted criminals.

The Rome Statute provides very few grounds for States to deny requests by the ICC for assistance in the investigation or prosecution of cases. In principle, States can deny requests for the production of documents or evidence that would prejudice national security interests.²²² The Statute also provides that a request for “any other type of assistance”²²³ can be refused if the assistance requested is prohibited by law.²²⁴ While these might seem fairly broad exceptions, the Rome Statute sets strict limits regarding the circumstances under which such refusals would be acceptable. Even when a refusal is accepted, States are obliged to do their utmost to cooperate, such as by seeking alternative ways in which the request from the Court might be satisfied. The Statute also provides for certain protective measures that can be used to accommodate the national security concerns of a State, such as *in camera* hearings or providing a summary of a requested document.²²⁵ If a State Party fails to comply with a request to cooperate, the Court has the option to refer the case to the Assembly of States Parties or to the UN Security Council, if the Council initially referred the case to the Court.²²⁶

Child rights advocates on the ground can play an important role in assisting States to fulfil their duty to cooperate with the ICC. For example, if crimes committed against children are under investigation, child rights advocates can support and make their expertise available to government ministries or departments tasked to cooperate with the

²²² Rome Statute, articles 93(4) and 72.

²²³ Rome Statute, articles 72 and 93(1)(l), (4) and (5).

²²⁴ However, a refusal on the ground that the assistance requested is prohibited by law needs to be taken together with the obligation of States Parties to ensure that national laws and

procedures provide for cooperation with the ICC and to consult with the ICC if problems arise, according to article 97 of the Rome Statute.

²²⁵ Rome Statute, article 72(5)(d).

²²⁶ *Ibid.*, articles 87(7) and 112(2)(f). The Court may also refer to the

Assembly of States Parties a situation of non-cooperation by a State that is not a party to the Statute but has entered into an *ad hoc* arrangement with the ICC. It should be noted, however, that the Statute does not specify what sanctions could follow if a State fails to cooperate.

ICC. In addition, child rights advocates can play a vital role by identifying potential child witnesses and ensuring that child victims and witnesses are treated in a manner that takes their rights, their age and the nature of the crime into consideration.

Finally, child rights advocates can cooperate directly with the ICC in the investigation and prosecution of child-specific crimes and other crimes committed against children. If there are concerns regarding confidentiality of information or protection of potential witnesses, child rights advocates can provide such information to the ICC and the prosecution team. Finally, if child rights advocates have reason to believe that evidence related to crimes committed against children is being destroyed, they should alert the Prosecutor's Office directly.

4.3 Changes to national law

States that ratify the Rome Statute should review their national laws to ensure that they are compatible with the provisions of the Rome Statute, although they are only legally obliged to do so in respect of their cooperation obligations under part 9 of the Statute.²²⁷ Where existing constitutional or legislative provisions are incompatible or are simply absent, those provisions should be amended or enacted to make relevant laws consistent with the principles in the Statute. Failure to do so could result in that State being deemed unwilling or unable genuinely to investigate or prosecute a case, which may result in the ICC exercising jurisdiction over a particular situation. In addition, as discussed above, changes in legislation may also be required to enable national authorities to cooperate with the ICC and to establish proper procedures for such cooperation.

In the first instance, States that ratify the ICC Statute should ensure that genocide, crimes against humanity and war crimes are punishable under national law. While national law may already criminalize many

²²⁷ The ways in which international agreements such as the Rome Statute are incorporated into

domestic law vary depending on the legal system: in general, see for example Ian Brownlie,

Principles of public international law, fifth edition, Oxford University Press, 1998.

of the acts prohibited by the Statute, it is important that the definitions of crimes under national law have, at a minimum, the same scope as the definitions contained in the Statute. A corollary of this is that national law should provide for penalties that reflect the seriousness of the crime and are consistent with the intent to bring the perpetrator to justice. It should be noted that States may expand on the definitions in the Rome Statute, provided that acts that could be prosecuted before the ICC would fall within the scope of the new national law. This is important with respect to the role child rights advocates can play in facilitating national law reform, for example by advocating the criminalization of the recruitment of children under the age of 18.

In addition, criminal law provisions relating to matters such as defence and limitation periods²²⁸ should not be inconsistent with the Statute. The Statute does not, for example, allow immunity for a Head of State. In limited circumstances, it does allow the accused to raise the defence that they were following orders from their superiors.²²⁹ Also, according to the principle of command responsibility, commanders can be held criminally responsible for acts committed by their subordinates.²³⁰ These types of provisions should also be reflected in national laws in order to avoid a State appearing to be unable or unwilling genuinely to investigate or prosecute a case.

Domestic rules of criminal procedure and evidence should not create obstacles for the full investigation and prosecution of crimes under international law. For example, some jurisdictions have impossibly onerous requirements for the prosecution of individuals who have committed crimes of sexual violence, such as the legal requirement that there be several male eyewitnesses in order to prosecute a rape charge. Those requirements make it nearly impossible to achieve a fair trial for rape, in particular because rape is often committed in the absence of eyewitnesses. In some cases,

²²⁸ 'Limitation period' refers to a period defined by law after which a lawsuit or

prosecution cannot be brought in court.

²²⁹ Rome Statute, articles 27(1)

and 33.

²³⁰ *Ibid.*, article 28(1).

procedures or practices may create barriers to the proper investigation and prosecution of crimes against children. If these types of obstacles exist in domestic rules of procedure and evidence, failure to remove them could indicate that a State may be unwilling or unable genuinely to investigate or prosecute individuals who commit crimes within the jurisdiction of the Court. As dictated by the principle of complementarity, the ICC could then decide to proceed with a case, in spite of current or past investigations or prosecutions by national courts.

4.4 Role of child rights advocates at the national level

As a first step, child rights advocates at the national level should actively lobby for the State to become a party to the Rome Statute. Obtaining the greatest possible number of States Parties, from all regions of the world, is the best way of ensuring that crimes under international law do not go unpunished, which – as argued throughout this guide – is of utmost importance for the overall protection of children.

In countries that have ratified the Rome Statute, child rights advocates should assist governments in ensuring that national law reform also reflects the concerns of children, for example by including crimes committed against children, witness protection schemes and victim-friendly procedures. Ensuring that legal procedures related to the investigation and prosecution of crimes against children meet, at a minimum, the requirements outlined in the Rome Statute and the Rules of Procedure and Evidence reduces the likelihood that victims and witnesses might suffer unduly during interrogations and national legal proceedings.

It is likely that the ICC will primarily prosecute leaders and those who bear the greatest responsibility for atrocities, while lower-level perpetrators would be investigated and prosecuted within national systems or their crimes addressed through non-judicial mechanisms. Thus domestic legislation compatible with the ICC could have a broad impact at the national level. For example, domestic legislation that

criminalizes the use of child soldiers would have a deterrent effect throughout the ranks of armed forces and groups, since even ordinary soldiers and lower-ranking officers who use children in their forces could face prosecution in national courts. Armed forces must therefore be informed of their responsibilities under international humanitarian law, as required by the Geneva Conventions, and also the implications with respect to domestic criminal law.

The ICC will not, in any case, investigate or prosecute children under 18 at the time of the alleged commission of the crime. The assistance of national child protection agencies is needed to ensure that any legal action taken against children under 18 at the national level for crimes within the jurisdiction of the ICC does not expose alleged child perpetrators to harm. Every effort should be made to safeguard children's rights, in accordance with international juvenile justice standards, and to employ other accountability mechanisms, as appropriate.

The process of national law reform to ensure compliance with the Rome Statute may offer a window of opportunity to advocate for additional changes that are desirable from a wider human rights and child rights perspective. Some countries might opt for a thorough, 'once and for all' revision of their criminal laws, while others might adopt a case-by-case approach, amending different pieces of legislation at different times. In any case, the revision of criminal law provides some opportunity for broader law reform. Child rights advocates should therefore be aware of legislative aspirations and trends in the country in which they are working, in order to take advantage of possibilities to raise juvenile justice standards and introduce concepts such as restorative justice, or child-friendly procedures for child victims and witnesses.

CHAPTER FIVE

JUSTICE FOR CHILDREN THROUGH OTHER MECHANISMS

Accountability for crimes under international law has been sought through a number of judicial and non-judicial means within the emerging international criminal justice system. During the last decade, the international community has, in selected situations, established *ad hoc* Tribunals for the prosecution of large-scale violations of international humanitarian law. In some cases, individuals accused of war crimes, crimes against humanity or genocide have been brought before national courts. Other countries have chosen to deal with past atrocities through truth commissions or traditional justice mechanisms, or a combination of methods. For example, in Sierra Leone, a Special Court has been established to address the most serious violations of international law, while a Truth and Reconciliation Commission will address accountability and create a historical record, giving victims a public forum to voice the wrongs they suffered.

By assigning individual responsibility for crimes, judicial proceedings can help diminish the perception that all the members of a particular group within society bear responsibility for the crimes committed by some members of that group. They can also demonstrate that trials can and should be conducted fairly, with respect for the rights of the accused and the rights of the victims. This is not only important in itself, since due-process rights are often violated during times of conflict, it can also assist in the restoration of the rule of law. Other mechanisms, for their part, can ensure that the victims' sufferings and losses do not go unmentioned or unnoticed, which is important particularly from the perspective of rehabilitation and reconciliation. In addition, such mechanisms can establish that consequences are attached to any violation of human rights or humanitarian law, thereby contributing to achieving sustainable peace for the future. Thus the strengths of each type of institution, judicial and non-judicial, can bolster the work of the other.

Crimes committed against children have been largely ignored in the context of international criminal justice systems. It is essential to re-examine these mechanisms to see how crimes against children can be addressed and how these mechanisms can be adapted to

accommodate child victims and witnesses, emphasizing the right to participation and protective measures. Appropriate methods for addressing child perpetrators should also be considered in that context, since for the purpose of rebuilding respect for the rule of law it is equally important to ensure that children are in some way held to account for the crimes they have committed.

5.1. Judicial mechanisms

5.1.1 *Ad hoc* international tribunals

In 1993, in response to crimes committed against civilians during the war in the Balkans, the UN Security Council adopted resolution 827 pursuant to Chapter VII of the United Nations Charter, establishing the International Criminal Tribunal for the former Yugoslavia (ICTY).²³¹ One year later, approximately 800,000 people were slaughtered during the genocide in Rwanda,²³² prompting the Security Council to establish the International Criminal Tribunal for Rwanda (ICTR).²³³ The establishment of these two Tribunals marks the first time since the Nuremberg trials that steps were taken to establish accountability for crimes committed during an armed conflict within the framework of international law. As such, they represent a sea change in the attitude of the international community to end impunity for crimes committed against civilians in times of war. The creation of a permanent international criminal court has further strengthened that resolve.

The two *ad hoc* Tribunals are similar in structure and operational aspects, although each has a distinct mandate designed to address the conditions and circumstances of a specific conflict. The ICTY is mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. As no end-date for the Tribunal's jurisdiction has been set, the ICTY has jurisdiction over crimes committed in the territory of the former Yugoslavia from 1991 until

²³¹ Security Council resolution 827 of 25 May 1993.
²³² 'Report of the Independent Inquiry into the actions of the

United Nations during the 1994 genocide in Rwanda', United Nations, S/1999/1257, 15 December 1999.

²³³ Security Council resolution 955 of 8 November 1994.

the present, which includes Kosovo and the former Yugoslav Republic of Macedonia. The ICTR was established to prosecute persons responsible for serious violations of international humanitarian law committed between 1 January 1994 and 31 December 1994 in Rwanda and neighbouring countries. The crimes within the jurisdiction of both Tribunals include genocide, crimes against humanity and war crimes, although the content of the provisions regarding war crimes differs, as the armed conflict in the former Yugoslavia was international and in Rwanda the conflict was non-international.²³⁴ Some child-specific crimes have been included in the Statutes of the *ad hoc* Tribunals; for example, the crime of genocide in each Statute includes the forcible transfer of children from one group to another group,²³⁵ and crimes of sexual violence are also addressed.²³⁶

Both Tribunals have jurisdiction over “natural persons pursuant to the provisions of the present Statute”.²³⁷ Since the personal jurisdiction makes no reference to the age of the alleged perpetrator, both the ICTY and the ICTR could, in theory, prosecute persons under the age of 18 at the time of the alleged commission of the crime. Unlike the Special Court for Sierra Leone, which requires the Court to try those who “bear the greatest responsibility” for the crimes committed in Sierra Leone,²³⁸ the personal jurisdiction of the two *ad hoc* Tribunals is not limited by reference to the degree of responsibility of an accused.²³⁹ In the case of the Special Court for Sierra Leone, the personal jurisdiction limitation can effectively prevent the prosecution of child perpetrators, since children are unlikely to have occupied positions of leadership. The fact that children under 18 have not been indicted or prosecuted by either the ICTY or the ICTR is arguably an indication that neither Tribunal considered it was an appropriate forum for trying children responsible for crimes within its

²³⁴ See articles 1 to 5 of the ICTY Statute, and articles 1 to 4 of the ICTR Statute.

²³⁵ ICTR Statute, article 2(2)(e); ICTY Statute, article 4(2)(e).

²³⁶ ICTR Statute, articles 3 and 4; ICTY Statute,

article 5.

²³⁷ ICTR Statute, article 5; ICTY Statute, article 6.

²³⁸ Statute of the Special Court, article 1(1).

²³⁹ The first case prosecuted before the ICTY was Dusko Tadic, often described as

one of the ‘small fish’, who could in no way be considered to bear the greatest responsibility for the crimes committed in the former Yugoslavia.

jurisdiction. This policy is reflected in the Rome Statute, which limits the jurisdiction of the ICC to persons over the age of 18.²⁴⁰

Concerning child witnesses, the Rules of Procedure and Evidence of the two Tribunals allow children to testify without taking an oath,²⁴¹ provided the Chamber believes the child is able to report the facts within his or her knowledge and understands the duty to tell the truth. However, a judgement cannot be based only on the unsworn testimony of a child, due to international human rights standards on the right to a fair trial. Therefore, if a child is unable to take the oath because he or she does not understand the nature of the oath, corroboration of the child's testimony is required to enable the Tribunal to rely on that testimony. Apart from this, the Rules of Procedure and Evidence of the two Tribunals contain no child-specific provisions, therefore any children giving testimony before the Tribunals would be included within the general provisions regarding the protection of victims and witnesses. To date, both the child-specific provision regarding testimony and the application of the general provisions in relation to children remain untested, since no child has been called before either Tribunal. While a statement by a witness who was a child at the time of the alleged commission of the offences was admitted into evidence before the ICTY pursuant to rule 92bis of the Rules of Procedure and Evidence, the witness was not called to testify in court.²⁴²

The Tribunals have also adopted victim-sensitive practices, based on the requirements in their Statutes to ensure that protective measures are available for victims and witnesses.²⁴³ In numerous cases, prosecutors have requested special measures to protect the identity of victims and witnesses from the public, such as the use of pseudonyms or *in camera* proceedings. Recent amendments to the

²⁴⁰ Rome Statute, article 26.

²⁴¹ ICTY Rules of Procedure and Evidence, rule 90(b); ICTR Rules of Procedure

and Evidence, rule 90(c).

²⁴² ICTY: *The Prosecutor v. Slobodan Milosevic* (IT-02-54).

²⁴³ ICTR Statute, article 75; ICTY Statute, article 22.

Rules of Procedure and Evidence of the ICTY provide that once protective measures have been ordered, those measures will continue to apply in all subsequent proceedings before the ICTY, unless they are rescinded or varied by the Trial Chamber.²⁴⁴ Both Tribunals have Victims and Witnesses Units with a mandate to ensure the safety and security of witnesses and provide support both during and after trials. Unfortunately, it appears that not enough importance is ascribed to the work of these units, particularly in the ICTR, since they remain underfunded, which hampers their effectiveness.

Neither Tribunal is statutorily required to have staff with expertise in child rights and child protection; the ICTY Statute, for example, simply refers to “qualified staff”.²⁴⁵ This is in contrast to the ICC, which in part owes its provisions on the expertise required of staff to the increasing advocacy and lobbying efforts of child rights advocates during negotiations. The Special Court for Sierra Leone benefited from similar efforts, and specifically requires that staff have expertise in child rights.

While there has been no case focusing specifically on crimes committed against children,²⁴⁶ both Tribunals have handled cases that involve crimes against children. Where children are mentioned as part of the broader civilian population against whom crimes were committed, including rape and crimes of sexual violence, the testimony of adults has been sufficient to prove that crimes were committed against children. For example, the case law of both the ICTY and the ICTR has recognized rape as a crime against humanity, as genocide and as a war crime. Commanders have also been held legally responsible for rape and sexual violence committed by their

²⁴⁴ ICTY Rules of Procedure and Evidence, rule 75(E) to (H), which entered into force on 5 August 2002. If an application is made to any Chamber other than the one that originally ordered the protective measures, the Chamber is required to

consult with the Judge who made the original order, if possible.

²⁴⁵ ICTY Statute, article 16(3).

²⁴⁶ It should be noted that unless the practice attains a particular significant magnitude, it will not attain the level of seriousness

necessary for prosecution by an international judicial organ: see ICTY, *Tadić Jurisdiction Decision* (IT-94-1-AR72), 2 October 1995, paras. 94 and 143.

subordinates, according to the principle of command responsibility.²⁴⁷

In the case against Jean-Paul Akayesu, the former mayor of Taba commune in Rwanda, witnesses testified that girls as young as 12 or 13 had been raped, forced to parade naked, and killed during the genocidal massacres.²⁴⁸ The Chamber found Akayesu guilty of the crime of genocide, based on evidence that he had encouraged rapes and sexual mutilation of women in the course of a genocidal campaign against the Tutsi population while he was a communal leader. He was also found guilty of crimes against humanity, based in part on evidence that he had forced one young girl to dance naked and had encouraged rapes of Tutsi women while he was a communal leader.²⁴⁹ The Chamber found that the rapes were both systematic and widespread. The ICTY has also handed down judgements in cases involving sexual violence against young girls, most notably in the *Foca* case against Radomir Kovac and others. In that case, a 12-year-old girl ('A.B.') was among those abducted and taken to a house called Kuraman's House, where they were repeatedly raped by Serb soldiers. Over the course of a few months, A.B. was sold as a sex slave a number of times before she finally disappeared. Kovac was charged and convicted of crimes against humanity and war crimes with respect to the rape and sexual enslavement of A.B. and three other girls, and sentenced to 20 years imprisonment.²⁵⁰ This was an important decision in many respects, particularly since it sets a legal precedent for sexual enslavement as a crime against humanity.

Despite the fact that crimes against children are mentioned in the jurisprudence of the ICTY and the ICTR, there has not been any systematic or specific focus on crimes committed against children in

²⁴⁷ Rape and sexual violence as war crime: the *Furundzija* case, ICTY (*The Prosecutor v. Anto Furundzija*, IT-95-17/1). As torture: the *Celebici* case, ICTY (IT-96-21). As genocide: the *Akayesu* case,

ICTR (ICTR-96-4). As command responsibility: the *Celebici* case.
²⁴⁸ *The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4), 2 September 1998, paras. 416, 421-4, 429-31 and 437.

²⁴⁹ *Ibid.*, paras. 452 and 706.
²⁵⁰ ICTY: *The Prosecutor v. Dragoljub Kumarac, Radomir Kovac and Zoran Vukovic* (*Foca* case, IT-96-23 and IT-96-23/1, 22 February 2001).

either Tribunal. In addition to the specific nature of the situation concerned, the reasons for this are most likely the lack of child-specific provisions in the Statutes of both Tribunals and the lack of statutory requirements for staff with expertise in child rights. It may also reflect a reluctance to call children as witnesses, because of concerns regarding the impact on children of giving testimony and their capacity to provide testimony in a manner consistent with fair trial guarantees. Nevertheless, the precedents and practices, or lack thereof, in the *ad hoc* Tribunals in relation to children during trial and pre-trial stages, including during investigations, should be collated and analysed from a child rights perspective. The findings of such a study, particularly an assessment of the practices and policies regarding the involvement of children, could become an important reference tool for the ICC in determining how to deal with crimes committed against children.

5.1.2 The Special Court for Sierra Leone

Children were targeted in many ways during the decade-long conflict in Sierra Leone, either as part of the civilian population or, very often, specifically because they were children. Atrocities committed against civilians included the widespread and systematic amputation of limbs, often carried out by children against children and adults. Thousands of children, both girls and boys, were abducted and forced to serve as combatants or to perform various functions for armed groups, including serving as sex slaves.

The Special Court for Sierra Leone has been established by an international agreement between Sierra Leone and the United Nations, in response to the atrocities committed during the conflict.²⁵¹ While the idea of criminal prosecutions had been raised prior to the negotiations on the Lomé Peace Agreement, it gained momentum both internationally and within Sierra Leone after the breakdown of the Lomé Agreement, which had included an amnesty for all combatants. Although the Special Court was established by international treaty, it

²⁵¹ For a good overview of the Special Court, see

www.specialcourt.org.

has been described as a 'hybrid' court because of the extensive national involvement, both in substantive and in practical terms. In addition, a national Truth and Reconciliation Commission will consider the causes of the conflict, giving as many people as possible an opportunity to recount their experiences and contribute to the historical record, and also make recommendations for the future. The Special Court and the Truth and Reconciliation Commission will inevitably encounter large numbers of children involved in the conflict, whether as victims, witnesses or perpetrators. Since children have rarely been involved in international justice and truth-seeking mechanisms, the institutions set up in Sierra Leone are likely to set useful precedents for policies and practices for children's involvement in future judicial and non-judicial mechanisms.

The Special Court has the mandate to prosecute those persons who bear the greatest responsibility for crimes committed during the conflict, both crimes under international law as well as some specified provisions of Sierra Leonean criminal law.²⁵² Thus the Special Court is directed towards the leaders²⁵³ who were responsible for planning and implementing strategies of warfare in Sierra Leone that included atrocities directed against civilians. While the Statute gives the Special Court jurisdiction over persons aged 15 years or older at the time of the alleged commission of the crime,²⁵⁴ it is doubtful that anyone under the age of 18 would satisfy the personal jurisdiction requirements. While children were often given the title of 'commander', it is extremely unlikely that anyone between 15 and 18 held a position of real leadership, i.e. where they would bear "the greatest responsibility" for the crimes committed during the conflict. This is highlighted by the statutory direction to the Prosecutor to consider other methods,²⁵⁵ such as

²⁵² Statute of the Special Court, articles 1-5. Articles 2 to 4 of the Statute deal with crimes under international law; crimes under Sierra Leonean law are dealt with in article 5.

²⁵³ For example, article 1(1) of

the Statute of the Special Court states that the Court will try those who bear the greatest responsibility for crimes committed in Sierra Leone, "including those leaders who, in committing such crimes, have

threatened the establishment and implementation of the peace process in Sierra Leone."

²⁵⁴ Statute of the Special Court, article 7(1).

²⁵⁵ *Ibid.*, article 15(5).

alternate truth and reconciliation mechanisms, to deal with child offenders.²⁵⁵ The United Nations Security Council has also expressed the view that it is extremely unlikely juvenile offenders will come before the Special Court and that other institutions, such as the Truth and Reconciliation Commission, are better suited to address cases involving children.²⁵⁶ However, if a person between 15 and 18 at the time of the alleged commission of a crime should appear before the Court and be convicted, the Court cannot sentence them to imprisonment. Rather, the Court is limited to alternate and non-custodial sentences, such as counselling, foster care, training programmes and disarmament, demobilization and reintegration programmes.²⁵⁷

The specific crimes within the jurisdiction of the Special Court include crimes against humanity, war crimes as defined in common article 3 and Additional Protocol II to the Geneva Conventions, as well as "other serious violations of international humanitarian law".²⁵⁸ The Statute contains crimes particularly relevant to children, such as rape, sexual slavery, enforced prostitution and indecent assault.²⁵⁹ Prosecutions can also be brought for the conscription or enlisting of children under the age of 15 into armed groups or making them participate actively in hostilities.²⁶⁰ Within the crimes under Sierra Leone law, prosecutions can be brought against persons accused of abusing girls under the age of 14 or abducting girls "for immoral purposes".²⁶¹

Several child-specific provisions have been included in the Statute for the Special Court. Due consideration must be paid to appointing judges and staff with experience in juvenile justice.²⁶² A Victims and Witnesses Unit will be set up and must include personnel with expertise on trauma related to violence against children.²⁶³ In addition, as noted, prosecutors must take care that child rehabilitation

²⁵⁶ Letters from the Security Council President to the Secretary-General on the Special Court for Sierra Leone: S/2000/1234 of 22 December 2000, para. 1, and S/2001/95 of 31

January 2001. Letter from the Secretary-General to the Security Council, S/2001/40 of 12 January 2001.

²⁵⁷ Statute of the Special Court, article 7(2).

²⁵⁸ *Ibid.*, articles 2-4.

²⁵⁹ *Ibid.*, articles 2(g) and 3(e).

²⁶⁰ *Ibid.*, article 4(c).

²⁶¹ *Ibid.*, article 5(a).

²⁶² *Ibid.*, articles 13(2)

and 15(4).

²⁶³ *Ibid.*, article 16(4).

programmes are not placed at risk by the prosecution of juvenile offenders, and that alternative truth and reconciliation mechanisms are used where appropriate and available.²⁶⁴

The Special Court will initially follow the Rules of Procedure and Evidence of the ICTR in force at the time the Special Court was established; as already noted, these rules are not necessarily the most appropriate or desirable procedural rules from a children's rights perspective. Given the lack of participation by child witnesses and victims in the ICTR, these rules remain largely untested, particularly regarding their suitability to meet children's rights concerns. Since child witnesses are very likely to play a key role in the Special Court, the procedural rules will need to be adequate to the task. According to the Statute, the Rules of Procedure and Evidence of the Special Court can be amended by the judges having regard, where appropriate, to the provisions of the Sierra Leone Criminal Procedure Act, 1965.²⁶⁵ Therefore, child rights advocates can play a useful role in advocating for the Rules to be amended to take proper account of the special position and requirements of children who are likely to come into contact with the Special Court. The child-specific rules and procedures of the ICC can provide a key reference in that regard.

The Truth and Reconciliation Commission and the Special Court have separate but related roles to play in establishing accountability for serious crimes committed against children. Indeed, the two institutions can complement each other's work, thereby making the work of each institution more effective. For example, while the Truth and Reconciliation Commission can report on the ways in which children were recruited and used, the Special Court can prosecute those responsible for recruiting and using children as soldiers. The information gathered by the Truth and Reconciliation Commission can assist in the reconstruction of the overall picture of the conflict, the impact of the conflict on children, the order of battle and the chain of command. The findings of the Truth and Reconciliation Commission

²⁶⁴ Ibid., article 15(4) and (5).

²⁶⁵ Ibid., articles 14(1) and 14(2).

could also establish that attacks or certain criminal acts were widespread or systematic in nature, which is a necessary element to prove the commission of crimes against humanity. These findings, together with the Commission's recommendations, can enable investigators to focus on patterns of conduct related to the commission of crimes, including crimes against children, and can generate leads for the investigation of specific situations. In this way, the findings of the Truth and Reconciliation Commission can help build cases against those leaders who bear the greatest responsibility for the atrocities committed in Sierra Leone.

The establishment of these two institutions has great potential to provide a system of accountability for Sierra Leone. Therefore it is vital to inform the public about the nature and operations of the two institutions as well as their ongoing work. While the details of the relationship between both institutions will need to be worked out by the institutions themselves,²⁶⁶ there is much that child rights advocates can do to prepare children for the roles they are likely to play. This is particularly important because children may have difficulty distinguishing Special Court proceedings from the Commission's work. It needs to be made clear that testimony before the Truth and Reconciliation Commission will not lead directly to punitive sanctions, although under conditions yet to be determined, information given to the Commission might be shared with the Special Court. Children will also need to understand that the Special Court is mandated to prosecute those who bear the greatest responsibility, therefore the people who stand trial may not be the people who personally committed crimes against them or the people the children witnessed committing crimes. Explaining these types of issues will help children understand the modalities and reasons for the different ways in which the Special Court and the Truth and

²⁶⁶ See 'Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone', United Nations, S/2002/246,

8 March 2002. For a discussion of legal and policy considerations regarding the relationship between the Truth and Reconciliation

Commission and the Special Court, see the Sierra Leone Government briefing paper of January 2002 on this issue at www.specialcourt.org.

Reconciliation Commission will operate and how each is important for establishing accountability for what happened in Sierra Leone. A public education campaign designed for children will be essential to address these concerns and avoid misunderstandings.

The Special Court for Sierra Leone provides one example of an *ad hoc* body established to bring to justice perpetrators who have committed crimes during times of armed conflict. In East Timor a Serious Crimes Panel is operating and the establishment of a judicial body is under consideration for Cambodia. Child rights advocates can influence the work of these institutions in various ways. As with the ICC, they should lobby to ensure that crimes against children are addressed. They can also provide training and advice regarding child-friendly procedures and practices that are in the best interest of child victims and witnesses. They can lobby for children's concerns to be reflected in instruments – such as rules of procedure and evidence, and codes of conduct for counsel – and for experts in psychosocial interventions for children to be appointed to relevant positions, for example in the Victims and Witnesses Units. They should work to ensure that special programmes for children who come in contact with these mechanisms are well funded and effective. Additionally, in those cases where problems have been encountered during the institutional design or in implementation, child rights advocates can push for the effective establishment and operation of these institutions as a means of ensuring an end to impunity for crimes committed against children.

5.1.3 Prosecutions in national courts

It is important to emphasize that persons who commit war crimes, crimes against humanity or genocide can be brought to justice in domestic courts. According to the principle of complementarity reflected in the Rome Statute, national courts have primary jurisdiction over crimes under international law. The jurisdiction of the ICC is thus complementary to domestic judicial systems and will only be exercised when the State in question is either “unable or unwilling” to carry out the investigation or prosecution.

Prosecution of serious violations of international law in national courts has several advantages. For example, during national prosecutions, trials take place in the country where the crimes were committed, enabling the local population both to follow the proceedings and to claim ownership more easily. There is better access to evidence and witnesses and the participation of the population can help build a collective historical memory. Another advantage is that national prosecutions can help rebuild the judiciary and the criminal justice system in accordance with rule of law and human rights principles.

The Security Council has recently welcomed a report from the International Criminal Tribunal for the former Yugoslavia that recommends moving more cases to competent national courts,²⁶⁷ calling at the same time for States to help support the process of rebuilding the national judicial system. The Security Council endorsed the ICTY's strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions, stating that the ICTY should be concentrating its attention on civilian, military and paramilitary leaders.

However, there are also several challenges to prosecutions in national courts. In particular, in post-conflict situations it takes time to restore administrative and judicial systems, which are frequently destroyed during conflicts. Judges and lawyers may have fled or been killed in the war. In some cases, national courts are subject to bias as a result of recent hostilities, or there may be widespread corruption due to the collapse of government and State institutions. Another challenge is that national legal standards and judicial procedures may not be in conformity with rule of law and human rights principles. For example, in Rwanda, hundreds of judges and lawyers fled the country or were killed during the 1994 genocide, while others participated in the genocide. Court buildings were damaged or destroyed and the judicial

²⁶⁷ Security Council
Presidential Statement

of 23 July 2002,
S/PRST/2002/21.

system was decimated, having far-reaching consequences on the ability of Rwandan courts to ensure justice is done. The national court system has been overwhelmed by the number of detainees, with approximately 115,000 alleged perpetrators, including children, still awaiting trial in July 2002 in overcrowded detention camps on suspicion of having participated in the genocide.

These challenges can have serious repercussions for children who are alleged to have committed crimes under international law. In the absence of a functioning court system, children may remain in custody without trial for months or even years. Files and records may be destroyed. The community, too, may exact its revenge directly on suspected offenders without regard for due process.

National legal systems should address these concerns and should ensure that children in conflict with the law have special protection. In particular, children have the right to treatment that takes full account of their age, circumstances and special needs. Key elements of a child-friendly juvenile justice system are the establishment of alternatives to deprivation of liberty and a successful reintegration of the child into society. In all circumstances, national juvenile justice systems should be in line with relevant international standards, including those contained in the CRC and the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules').

Deprivation of children's liberty should only be used as a last resort and for the shortest possible time. If they are detained, children should be separated from adults, both to protect the children from exploitation, abuse and negative influences by adults, and to ensure that children are placed in facilities that can provide their basic needs according to their age and stage of development.

Alternatives to deprivation of liberty should be promoted for children, including the development of 'diversion' structures and programmes that enable juvenile offenders to be dealt with by non-judicial bodies. A restorative justice approach, which is aimed at the

reintegration of the child into society, could be suitable for alleged child perpetrators, provided it incorporates basic protective and procedural guarantees. In several countries, the involvement of traditional justice mechanisms has created alternatives that support reintegration and rehabilitation. For example, in Rwanda, the unlikely prospect of bringing those accused of involvement in the genocide to trial – either in national courts or in the ICTR – led to a decision in 2002 to move most of the cases to traditional *gacaca* courts.²⁶⁸ The thousands of juveniles awaiting trial are now being brought before these community courts.

Child rights advocates can play an important role in advocating for States and the international community to support the rebuilding of national judicial systems, including ensuring that the judicial system provides sufficient procedural guarantees and protections for children. Another important contribution is advocating for the protection of children when new legislation or policies are adopted. Child rights advocates can also help facilitate the rebuilding of national judicial systems by supporting training for judges, prosecutors, public defenders, judicial officers and prison staff on juvenile justice and child rights and by promoting alternatives to deprivation of liberty for children.

5.1.4 Universal jurisdiction

Normally, a State's domestic jurisdiction is based on the principles of territoriality or nationality (active or passive), which means that a State has jurisdiction over those crimes committed on its territory or, sometimes, by or against its own nationals. However, the situation is different when it involves crimes under international law such as genocide, crimes against humanity and war crimes, which are subject to the principle of universal jurisdiction. According to this principle, all States have a legitimate interest in prosecuting the perpetrators of these crimes regardless of where they are committed, by whom and against whom. Indeed, the Rome

²⁶⁸ BBC, 18 June 2001, 'Rwanda launches village courts'.

Statute reiterates that States have a duty to prosecute persons responsible for crimes under international law.²⁶⁹

The principle of universal jurisdiction is a concept that has long been recognized by international law, first emerging in relation to the piracy and slave trades over a century ago. In the current context, the principle of universal jurisdiction in relation to war crimes was codified in the 1949 Geneva Conventions, which lay down a duty for States to bring to justice perpetrators of grave breaches of the Geneva Conventions and, furthermore, oblige States to search actively for these perpetrators. While State practice since 1949 – or rather the lack thereof – has indicated a manifest reluctance on the part of States to live up to this obligation, it is nevertheless part of customary international law. In recent years, there has been greater willingness among States to fulfil this obligation, both by prosecuting those within their jurisdiction and by seeking extradition of those who are suspected of having committed crimes under international law.

“Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed... grave breaches of the present Convention... Each... Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”
Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 146.

In most national jurisdictions, crimes under international law are already punishable under national law. If not, States that become parties to the Rome Statute should revise their national criminal law accordingly, or risk being considered unwilling or unable to investigate and prosecute cases that fall within the jurisdiction of the ICC. Several States have already adopted national laws granting their courts jurisdiction over some crimes under international law, thereby implementing their obligations to prosecute or extradite those who are alleged to have committed such crimes. Some States have, however,

²⁶⁹ Rome Statute, preamble para. 6.

limited the application of these laws either temporally or geographically, for example by restricting jurisdiction to crimes committed by officials of the Nazi regime in Europe.²⁷⁰ More States have adopted national legislation granting their courts jurisdiction over war crimes and genocide than crimes against humanity, most likely because specific treaties codify the law relating to war crimes and genocide; until the adoption of the Rome Statute, there was no comprehensive legal instrument defining crimes against humanity.²⁷¹

In light of these developments, there have been many recent cases where individuals have been prosecuted for war crimes, crimes against humanity or genocide in a State other than the one where the crime allegedly took place. While the earlier cases mostly concerned crimes committed during the Second World War, more recent cases address crimes committed in the former Yugoslavia or Rwanda. For example, Denmark prosecuted a Yugoslav national for crimes committed against civilians during the armed conflicts in the Balkans.²⁷² German courts have tried several perpetrators from former Yugoslavia for genocide and for grave breaches of the Geneva Conventions, i.e. war crimes.²⁷³ In addition, four Rwandan nationals were tried in a Belgian court and convicted of war crimes for their role in the Rwandan genocide.²⁷⁴

The approach in national courts concerning prosecution of perpetrators of crimes under international law committed against

²⁷⁰ One instance is the Australian *War Crimes Act* of 1945, which limits jurisdiction to those war crimes committed by enemy forces on or after 1 September 1939 and on or before 8 May 1945: *War Crimes Act 1945* (Commonwealth), sections 5 and 9.

²⁷¹ International Committee of the Red Cross, 'State consent regime versus universal jurisdiction', background

paper, 10 December 1997. States which have conferred universal jurisdiction for crimes against humanity include Canada and Israel.

²⁷² *The Prosecution vs. Refik Saric*, Danish High Court, Eastern Division, Third Chamber, case no. S-3396-94, decision 25 November 1994.

²⁷³ For an overview of German case law in relation to war crime and genocide, see Kai Ambos and Steffen Wirth,

'Genocide and war crimes in the former Yugoslavia before German criminal courts' in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds.), *International and national prosecution of crimes under international law: Current developments*, Berlin Verlag Arno Spitz, 2001, p. 778.

²⁷⁴ News feature, Fondation Hirondelle website; *The New York Times*, Wednesday 6 June 2001.

children mirrors, for the most part, the approach seen in international tribunals. That is, while atrocities committed against children are mentioned and have formed the basis for conviction, they only emerge when criminal acts against civilians in general are being discussed. Cases that specifically focus on crimes against children have not been brought before national courts. A thorough evaluation of prosecutions in national courts for war crimes, crimes against humanity and genocide committed against children would be useful to determine how national courts have dealt with those issues. Although such research is not within the scope of the current study, it could be undertaken in the future and would be a useful basis for further work on international justice and children.

It should be noted that jurisdictional limitations applicable to criminal proceedings do not necessarily apply to civil proceedings. Whether or not criminal laws grant a court jurisdiction over acts that constitute a crime under international law, a victim may be able to bring a civil action against an alleged perpetrator for the same acts. For example, a civil claim has been brought against Radovan Karadzic, the former Bosnian Serb leader, in the United States, partly in relation to war crimes allegedly committed in the former Yugoslavia.²⁷⁵ In the US, these types of claims are brought under the Alien Tort Claims Act or the Torture Victims Protection Act; in other jurisdictions it would depend on laws governing such claims.

5.2 Non-judicial mechanisms

5.2.1 Truth commissions

A number of States have chosen to address accountability for human rights abuses by establishing a truth commission. At least 25 truth commissions with varying mandates and resources have operated since 1974, in countries as diverse as Germany, Guatemala, Haiti and South Africa.²⁷⁶ Currently, truth commissions are under way in several countries.

²⁷⁵ *Kadic v. Karadzic*, United States, 70 F.3d 232 (2nd Circuit Court 1995).

²⁷⁶ Priscilla Hayner, *Unspeakable truths: Confronting state terror and*

atrocities, Routledge, 2001, p.14 and appendix 1.

5.2.1.a Aims of truth commissions

Truth commissions are often headed by a panel of eminent persons who are tasked with the investigation of violations committed during a conflict by a previous regime.²⁷⁷ The aim of a truth commission is to address accountability and establish an accurate historical record of past atrocities by gathering testimony that clarifies what took place and publicly acknowledges previously undisclosed crimes. The mandates of truth commissions vary: some have been empowered to name persons responsible for atrocities, while others have limited their work to a general description of what occurred.²⁷⁸

As a separate aim and as part of this process, truth-seeking mechanisms give victims a forum in which to voice their grievances, taking statements from a wide range of people.

On the basis of collected testimony, truth commissions can make recommendations for the future and they can also assign institutional or individual responsibility, highlighting the shortcomings that allowed or facilitated the atrocities and recommending reforms to prevent future abuse.

Whereas legal proceedings are likely to reach only a fraction of the perpetrators of large-scale atrocities, truth-seeking mechanisms have the potential to reach members of the public directly and involve the entire community in the process. By engaging a broad spectrum of individuals, truth commissions provide a feasible way to address

Truth finding in Uruguay

“[Concealing the truth] makes a generation, especially the youngest, ignorant about itself and causes it to move without an historical awareness with regard to the essential elements in the formation of its own identity – because identity implies asking oneself, and answering on a more or less permanent basis, who we are, where we come from and where we are going. And to respond, one needs the ‘whys’.”

Servicio Paz y Justicia Uruguay, Uruguay Nunca Más: Human rights violations 1972-1985, Temple University Press, 1992.

²⁷⁷ Neil J. Kritz, ‘Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights’, *Law and Contemporary Problems*, vol. 59, no. 4,

autumn 1996, p. 141.

²⁷⁸ The question of whether a commission should ‘name names’ of individual perpetrators has been a point of tension. While most commissions have had

a mandate broad enough to allow ‘naming names’, only a few have chosen to do so. See Priscilla Hayner, op. cit., pp. 107-108.

accountability at the community level. Truth commissions can thus provide an important complement to judicial proceedings. In some instances, judicial and non-judicial methods can operate together to provide an overall accountability mechanism, prosecuting those who violate the laws of war and providing a mechanism through which victims' voices can be heard. The fact that a society has dealt with its past through a truth-seeking mechanism can have a cathartic effect and become an important stepping stone towards community reconciliation and rebuilding.²⁷⁹ Truth commissions can thus contribute to other accountability mechanisms operating contemporaneously, for example by ensuring that both the overall picture and specific crimes come to the attention of prosecutors.

5.2.1.b Truth commissions and children

Truth commissions have adopted a number of methods for gathering information related to children. For example, the Argentine Commission received considerable testimony about violence against children from adults, in particular the 'Mothers of the Plaza de Mayo', parents and health care workers.²⁸⁰ By contrast, the Uruguayan Commission gathered information on violence against children by conducting opinion polls among children.

In the report of the Guatemalan Historical Clarification Commission, significant attention is devoted to the various crimes committed against children during the civil conflict, including the forced participation of boys under 15 in the hostilities, the widespread torture and murder of children, and sexual violence committed against girls. The report reveals how violence perpetrated against children had a specific purpose, namely to eliminate any possible reconstruction of the community.

²⁷⁹ See in general Priscilla Hayner, *op. cit.*, pp. 24-31.

²⁸⁰ Christian Salazar Volkmann, 'Child rights in truth commission reports: A technical paper for the

preparation of the Truth Commission for Sierra Leone', in *Children and the Truth and Reconciliation Commission for Sierra Leone*, UNICEF, NFHR, and

UNAMSIL/Human Rights (eds.), 2001, p. 62.

The report of the Argentine Commission, *Nunca Más*, gives a complete account of atrocities committed against children, including forced adoptions, deliberate denial of children's identities, and torture and killings of children.²⁸¹ The National Commission on Disappeared Persons (CONADEP) in Argentina was also specifically mandated to determine the fate of children who were removed from their parents and, where appropriate, to intervene in judicial and non-judicial institutions to ensure the proper protection of those children.²⁸²

To date, the South African Truth and Reconciliation Commission has been the most successful commission to integrate children into its work, despite excluding children under 18 from the formal process of giving testimony. The method it adopted was to arrange separate hearings for children to come forward and 'tell their stories'. These hearings were held at regional locations, and children were allowed to participate in a number of ways, by giving statements or through games, art and group work, according to their age.²⁸³ The Commission felt that 'child-friendly' hearings were needed to avoid the intimidation and further detrimental experiences that children might experience during more formal hearings. It is interesting to note that before child-specific hearings were arranged, very few children had approached the South African Commission to tell their stories.²⁸⁴ The South African Truth and Reconciliation Commission also specifically highlighted crimes committed against children and adolescents, stating that "children and youth were the dominant victims in all categories of gross human rights violations... For almost every adult that was violated, probably two or more children or young

²⁸¹ Ilene Cohn, 'The protection of children in peacemaking and peacekeeping processes', *Harvard Human Rights Journal*, vol. 12, 1999, pp. 174-175.

²⁸² *Ibid.*, p. 174.
The Argentine Commission

operated 1983-1984 and covered the period 1976-1983. See Priscilla Hayner, *op. cit.*, p. 292.

²⁸³ Christian Salazar Volkmann, *op. cit.*, pp. 73-75; Ilene Cohn, *op. cit.*, p. 175.

²⁸⁴ *The Truth and Reconciliation Commission of South Africa report* (5 vols.), Palgrave/St. Martin's Press, 1999, vol. 4, chapter 9, special hearings on children and youth, para. 1.

people suffered".²⁸⁵ The South African report discusses the role of children in the anti-apartheid struggle and draws attention to the particular consequences for children of the legacy of the regime.²⁸⁶

While several truth commission reports have included some information on violence against children, in general there is a need for truth commissions to integrate children more systematically into their work, for example by allowing them to give statements.²⁸⁷ In compiling the information necessary to produce their reports, truth commissions have generally relied on the testimony of adults about children. This imposes adult perceptions and perspectives on children's experiences and also denies children the right to tell their own stories. According to the CRC, children have the right to give a first-hand account and to tell their stories in their own way.²⁸⁸ Any such participation must be voluntary, and children must be assured basic protections throughout their participation in justice and truth-seeking mechanisms, such as their right to privacy, confidentiality and anonymity.

In order to facilitate children's participation, truth commissions need to adopt special procedures and practices ensuring that children feel safe and secure when recounting their experiences. Depending on the situation in their country, truth commissions will have to determine whether a minimum age for children's participation should be set and which methods are most appropriate for children of different age groups.²⁸⁹ Furthermore, commissions will need to consider how and to what extent children should be offered separate procedures. At a minimum, in order to ensure that the right to participation is realized for all children, commissioners will need to be open to a variety of possibilities for receiving statements in different

²⁸⁵ *Ibid.*, vol. 4, p. 268.

²⁸⁶ *Ibid.*, vol. 4, pp. 252-261.

²⁸⁷ See Carolyn Hamilton: 'Children and the TRC: Legal Protection of Children in Investigations

and Hearings', in UNICEF, NFHR, and UNAMSIL/ Human Rights, (eds.), *op. cit.*, p. 110.

²⁸⁸ CRC, articles 12 and 40.

²⁸⁹ See a discussion on the age of

participation in the Sierra Leone Truth and Reconciliation Commission in Carolyn Hamilton, *op. cit.*

forms. For example, the special hearings arranged by the South African Commission have formed the basis for recommending 'social-paedagogic workshops' as the best way to gather information from children on violations. During these workshops children can share difficult experiences in a secure environment.²⁹⁰

Child rights advocates can play an important role in assisting the gathering and verifying of children's statements and in other aspects of children's involvement with truth commissions. In particular, child rights advocates can:

- Ensure that the truth commission specifically addresses the experiences of children;
- Provide information about children to the truth commission;
- Conduct awareness campaigns on the truth commission among children and civil society;
- Assist in developing procedures, training and expertise on child-friendly procedures;
- Support the truth commission by providing ongoing psychosocial support for children;
- Disseminate the commission's report and recommendations.

Even when children are involved, it is likely that adults will continue to be the main source of information concerning crimes committed against children. It is therefore crucial that truth commissions systematically question all witnesses about crimes committed against children. In addition, in order to get a complete picture of the nature and extent of crimes committed against children, child rights should be an integral part of any information-gathering system or investigative methodology used.²⁹¹ Truth commissions should also gather information that is age-specific so that statistics related to children can be made available.²⁹²

²⁹⁰ Christian Salazar Volkmann, *op. cit.*, p. 74.

²⁹¹ *Ibid.*

²⁹² On data collection in relation to violation of children's rights see in

general *ibid.*, p. 61 onwards.

If children are to participate in a truth commission – as victims, witnesses or perpetrators – international child rights and juvenile justice standards should guide the proceedings and policies. The proceedings should, as a primary concern, consider the best interest of the child and, where appropriate, ensure the integration of measures that are aimed at the rehabilitation and reintegration of the child, including measures designed to foster the child's respect for the rights of others.

The mandate of the Truth and Reconciliation Commission for Sierra Leone includes an explicit focus on sexual abuse and the experiences of children during the armed conflict.²⁹³ In preparation for the proceedings, an international expert meeting on children and the Truth and Reconciliation Commission for Sierra Leone developed recommendations for the involvement of children in the Commission's work (see text box), which can serve as an illustration of the types of issues that need to be addressed and the procedures that are required in order to make the truth-seeking process responsive to children.²⁹⁴

Child rights advocates can play an important role in future truth commissions by advocating for the commissions to focus specifically on the experiences of children and by providing assistance for the development of guidelines and practices to facilitate children's participation in their work.

5.2.1.c What impact could truth-seeking processes have on children?

An important outcome of a truth-seeking process is the perspective it can provide regarding crimes committed against children, placing them in the correct historical, social and cultural context. The educational effect of truth commissions can be particularly valuable, teaching children about the history of their society and helping them understand what happened during a period of conflict or political

²⁹³ Truth and Reconciliation Commission Act (Sierra Leone), 2000, section 6(2). In relation to victims, the Commission is further tasked to help restore the human

dignity of victims, promote reconciliation, give victims an opportunity to speak out about the abuses suffered, and create a climate that fosters constructive

interchange between victims and perpetrators.
²⁹⁴ UNICEF, NFHR, and UNAMSIL/Human Rights (eds.), op. cit.

strife. Truth commission reports should thus be promoted in schools, which could include incorporating them into the school curricula. This understanding can help shape children's perception of right and wrong.²⁹⁵ Research conducted among children affected by political repression and armed conflict reveals that hiding or denying past atrocities negatively affects children's sense of identity and their character development. Truth commissions can also make recommendations on the reform of institutions and systems that facilitated violence against children. They have the potential to prevent the transmission of prejudices and hatred from one generation to the next by establishing a historical record, clearly explaining the reasons for the conflict and outlining steps for a more peaceful future. In so doing, truth commissions can help prevent future abuses or even the outbreak of further conflicts. In this way, truth commissions can create a context for understanding the past and provide a stepping stone in the search for a new collective identity.²⁹⁶

5.2.2 Traditional methods

Many societies have developed traditional systems for accountability, which can constitute an important complement to legal proceedings and truth-seeking processes. In many countries recovering from widespread atrocities, conventional justice systems may suffer from a combination of factors, including inadequate financial and human resources, the judiciary still being linked to the 'old' regime, or a system that might have been dysfunctional prior to the outbreak of hostilities. In short, the national and international justice system may simply lack the means to deal with the potentially large number of cases arising from a conflict, particularly where the violations have been widespread or systematic. For example, in Rwanda some 115,000 persons are still in prison more than eight years after the genocide, waiting for their cases to be heard in court.²⁹⁷

²⁹⁵ See in general Christian Salazar Volkman, *op. cit.*, p. 59.

²⁹⁶ *Ibid.*, p. 56. See also Christian Salazar Volkman,

'Some psychological and social consequences of the traumas suffered by children and adolescents because of political repression and armed

conflict in Guatemala: A review of international research', 1998.

²⁹⁷ BBC, 18 June 2002, 'Rwanda launches village courts'.

Recommendations for policies and procedures for addressing and involving children in the Sierra Leone Truth and Reconciliation Commission (TRC)

Extract from a report drafted by an expert group meeting, Freetown, Sierra Leone, 4-6 June 2001

Key task in relation to children: Create an impartial and official historical record of what happened to children during the armed conflict in Sierra Leone, facilitate reconciliation, and make recommendations for the future.

Guiding principles for the TRC's work on children

- The 'best interest of the child' shall be a primary consideration and international child rights standards should inform all work of the TRC.
- Equal treatment of all children – victims, witnesses and perpetrators – before the TRC. Child perpetrators must be seen and treated primarily as victims.
- Special attention to girls and gender-based violence.
- Children should participate in the TRC only on a voluntary basis.
- The identities of children should be kept confidential.

Forms of participation of children in the TRC

- The participation of children in the TRC should primarily take the form of giving confidential statements to statement takers. They should be assisted by a psychosocial worker, and accompanied by a parent, relative or friend.
- If children are to participate in formal sessions of the TRC, such sessions should be closed to the public. Special public sessions on children can be held. However, children should not directly give evidence in such public sessions.
- Special procedures should be followed at all stages to ensure that the needs and interests of children are met and that they do not experience further detrimental experiences by participating in the process (e.g. child-friendly environment for interviews, interview techniques tailored to the age and maturity level of the child, etc.).

Collaboration with ongoing child protection initiatives

- The TRC should seek to build upon and strengthen ongoing processes of reintegration and reconciliation of children with their communities.
- The TRC should collaborate closely with child protection agencies.

TRC structure and staffing

- TRC staff should include experts on children's issues. All staff should be trained on child rights and child protection issues. A Director of Women's and Children's Affairs should be appointed and a Committee on Children and Women established.

The TRC report

- The experiences of children should be documented throughout the report of the TRC, both in a specific chapter focusing on children and in other relevant chapters and recommendations.

In such situations, traditional means for accountability can provide a viable and valuable complement to legal proceedings and other truth-seeking mechanisms. In Rwanda, *gacaca* courts are being established, based on traditional justice, to act in part as a filter mechanism, determining which persons currently in prison should face trial for their role in the genocide.²⁹⁸

5.2.2.a Traditional accountability mechanisms

For children who are victims of atrocities or children who participated in the commission of atrocities, traditional justice measures can provide an alternative, community-based system of accountability. For child victims, it can be reassuring to see perpetrators brought to justice by the very same community that was targeted, following norms and traditions to which the children are more accustomed. However, it is essential that traditional mechanisms maintain basic international standards of justice.

When dealing with child perpetrators, traditional justice mechanisms concentrate on rehabilitation, reintegration and fostering respect for the rights of others, which are also important juvenile justice principles. In addition, traditional methods often focus on providing reparations directly to the community that has suffered harm, such as rebuilding a house that has been destroyed, or giving help to a neighbour who has been the victim of atrocities. As traditional justice measures tend to take place at the community level, they are likely to facilitate reintegration of the child into that community. These mechanisms have proven effective in rehabilitating juvenile offenders and have the added advantage of being perceived as legitimate in the eyes of the community.

²⁹⁸ See 'Rwanda: Training of *gacaca* judges begins', Nairobi, 10 April 2002,

IRIN News website, UN Office for the Coordination of

Humanitarian Affairs (OCHA).

While traditional mechanisms have much to commend them, they are not necessarily the most appropriate venue to provide accountability for crimes under international law. No matter what type of mechanism is employed or the jurisdiction in which it is employed, the rights of the individuals involved, including witnesses, victims and perpetrators, must be respected in terms of process, outcome and consequences. In short, children should not be made worse off by participating in traditional mechanisms than by participating in international criminal justice mechanisms, both in terms of procedural rights and guarantees, as well as in terms of sentencing. For example, the hearings and any sanctions imposed should not involve humiliating treatment, inhumane punishments or discrimination based on age or gender.

To ensure that children participating in traditional accountability mechanisms are properly protected, some elementary procedural guarantees are necessary, even if the traditional mechanisms are non-judicial in nature. Children alleged to have committed atrocities should have some means to defend themselves; for example, they should be given the chance to question the veracity of what is said by people making allegations against them. In addition, there is the problem of how to ensure anonymity in order to protect child victims participating in such mechanisms within their own community. This is especially important when dealing with children who are victims of sexual violence, given the stigmatization that follows in many societies and the child's own potential desire for privacy.

One very real challenge with ensuring the rights of victims, witnesses and perpetrators within traditional justice mechanisms is that they can be difficult to monitor and resistant to change. Consequently, child rights advocates who have gained the trust of communities will have an important role to play in assessing the 'child rights compatibility' of proposed traditional justice mechanisms. One way would be to offer their assistance to local leaders and elders to ensure that traditional justice mechanisms meet international human rights standards. Child rights advocates

can also propose training in the fundamental principles of children's rights and juvenile justice to those working in traditional mechanisms, to help them apply their traditional rules in a manner consistent with human rights standards.

Unfortunately, information and analyses of traditional justice methods, in particular how they relate to children, are very scarce. Not enough is known about whether such methods facilitate the reintegration of the child and their long-term effect in general. In order to enable child rights advocates to analyse these practices and their long-term impact on children, and to support the work of justice and truth-seeking mechanisms in a manner responsive to community needs, more work need to be done on traditional methods in a range of countries and societies.

*5.2.2.b Using traditional practices
to facilitate reconciliation of child soldiers*

During the war in Sierra Leone, thousands of children were abducted and forced to fight in armed groups by all parties to the conflict. They were forced to commit atrocities, sometimes against their own families. Their return is plagued by many questions for the community and for the children who are coming home. While many victims want children to be held accountable for the wrongs they committed, they also find it difficult to view children who committed crimes under the influence of drugs, pressure and torture as truly responsible for their actions. Yet without some form of accountability, communities will be unable to reconcile past anger and pain.

Child protection agencies, with the support of UNICEF and the Government of Sierra Leone, have turned to traditional ceremonies to help facilitate this reconciliation and reunification of children with their communities. These exercises, while varying from village to village, are a symbolic gesture that the child is forgiven and accepted back into the community. For example, in northern Sierra Leone, village members wash the soles of children's feet and their

mothers or female guardians then drink the water. In the south and east, the parents of the children dress in rags and take to the streets as community members follow, singing. In addition, village elders sometimes consider it appropriate to impose monetary fines. In rural Sierra Leone, the use of these traditional methods for the acceptance and reconciliation of child ex-combatants has been vital in restoring the social fabric and in laying the groundwork for a more peaceful future.

CONCLUSIONS

The conflicts of the 20th century have demonstrated that wars are being fought using methods that target civilians and civilian objects, in breach of the most fundamental laws of armed conflict. Civilians, and specifically children, are being increasingly targeted for some of the most serious crimes known to humanity.

Impunity for crimes committed against children adversely affects not only the individual child victim, but also whole generations of children. It undermines their development and the formation of their identity, values and political beliefs. This has far-reaching effects on their ability to function as leaders and decision makers in the future, which itself has negative implications for future peace and stability.

To date, international criminal justice mechanisms and national courts have not adopted a systematic focus on establishing accountability for crimes committed against children. Non-judicial truth-seeking mechanisms, similarly, have paid only limited attention to the experiences of children involved in armed conflicts and other situations of civil unrest. Where children's experiences have been addressed, this has generally occurred in the context of crimes committed against the civilian population. Until sufficient focus is placed on crimes committed against children, both the crimes themselves and impunity for these crimes will continue. It is therefore essential that accountability for crimes committed against children is fully integrated into justice and truth-seeking mechanisms.

The international community agrees that children's rights must be respected and promoted, as evidenced by the near-universal ratification of the Convention on the Rights of the Child. Similarly, it is well understood that children are among the most vulnerable members of society and therefore require levels of care and protection appropriate to their age and stage of development. The Security Council, General Assembly and individual Member States of the United Nations have all spoken vigorously on numerous

occasions about the need to ensure that children's rights are respected, that children are protected during armed conflicts and that there must be no impunity for crimes committed against children.

There is a need to strengthen the commitment to end impunity for crimes committed against children, in particular by adopting concrete measures to encourage international criminal justice and truth-seeking mechanisms to place more emphasis on the experiences of children and to involve children in their work.

With the establishment of the International Criminal Court, the *ad hoc* Tribunals, and the Special Court and the Truth and Reconciliation Commission for Sierra Leone, there is an opportunity for all those working in the areas of children's rights and international criminal justice to ensure that crimes committed against children are being addressed and to help bring an end to impunity. Integrating children's rights and promoting an institutional focus on crimes committed against children in these bodies is one way in which the experiences of children can be brought to the forefront of the international community's attention. By working together and developing a proper understanding of the role of international criminal justice in relation to children's rights, professionals working in these areas can promote a culture of accountability for children.

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