

CHILDREN AND TRANSITIONAL JUSTICE

*Truth-Telling, Accountability
and Reconciliation*

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This book represents highlights from the research undertaken by the UNICEF Innocenti Research Centre on children and transitional justice, from 2007 to 2009. It is informed by a wide network of legal experts, child rights advocates, practitioners and activists, including many children who have engaged with the authors and whose voices are recorded in these pages. The authors have sought a way forward, using evidence and analysis as the basis for recommendations to better protect the rights of children in future transitional justice processes.

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and the Human Rights Program of Harvard Law School, at Harvard in April 2009. The experiences and insights of participants in that conference have informed the chapters of this book, as well as the Key Principles for Children and Transitional Justice, presented here as an outcome document to that conference.

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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	acquired immune deficiency syndrome
ANC	African National Congress (South Africa)
ARLPI	Acholi Religious Leaders Peace Initiative (Uganda)
BMW	Bonteheuwal Military Wing (South Africa)
CAR	Central African Republic
CAVR	Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste (Commission for Reception, Truth and Reconciliation in East Timor)
CCSL	Council of Churches in Sierra Leone
CFN	Children's Forum Network (Sierra Leone)
CONADEP	Comisión Nacional sobre la Desaparición de Personas (National Commission on the Disappearance of Persons), Argentina
CPA	child protection agency
CPN	child protection network
CRC	Convention on the Rights of the Child
CVR	Comisión de la Verdad y Reconciliación (Truth and Reconciliation Commission), Peru

DCN	Diseño Curricular Nacional (National Curriculum Design), Peru
DDR	disarmament, demobilization and reintegration
DRC	Democratic Republic of the Congo
FMLN	Frente Farabundo Martí para la Liberación Nacional (National Liberation Front), El Salvador
HIV	human immunodeficiency virus
HLA	human leukocyte antigen
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDL	Instituto de Defensa Legal (Peru)
IDP	internally displaced person
IFP	Inkatha Freedom Party (South Africa)
IRC	Innocenti Research Centre (UNICEF)
MK	Umkhonto we Sizwe ('Spear of the Nation'), South Africa
mtDNA	mitochondrial DNA

LRA	Lord's Resistance Army (Uganda)
MOU	memorandum of understanding
MRTA	Movimiento Revolucionario Túpac Amaru (Túpac Amaru Revolutionary Movement), Peru
MSWGCA	Ministry of Social Welfare, Gender and Children's Affairs (Sierra Leone)
NCRC	National Child Rights Committee (a non-governmental organization in South Africa)
NGO	non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PISA	Programme for International Student Assessment
PUCP	Pontificia Universidad Católica del Perú (Pontificate Catholic University of Peru)
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front (Sierra Leone)
SADF	South African Defence Force (now the South African National Defence Force)
SCSL	Special Court for Sierra Leone
SDU	self-defense unit
SRSG	Special Representative of the (United Nations) Secretary-General

STR	short tandem repeat
TRC	truth and reconciliation commission
UNAMSIL	United Nations Mission in Sierra Leone
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNMIL	United Nations Mission in Liberia
UPDF	Uganda People's Defence Forces

Foreword

By Graça Machel

“It’s only by reviewing the past will we know the present. Only by knowing the present will we make a perspective for the future.”¹

– Samora Machel, late president of Mozambique

In the aftermath of our struggle for liberation in Mozambique, this statement gave voice to millions who had fought for an end to oppression and injustice, and dared to hope for peace. We had achieved the aim of our struggle – liberation from colonialism – but we knew that our country had paid a high price. For children it was devastating. Their schools and health clinics had been destroyed, and the years of education they had lost could not be recovered. They lived their childhood under the burden of economic deprivations caused by the war. Most importantly, they lived through the injuries and deaths of their parents, families and friends and the destruction of their communities. As a people – as a country – we truly appreciated the need to understand why and how the struggle could help us come to terms with our past, to promote reconciliation and to build a Mozambique of equity, justice and freedom, and of social and economic prosperity.

Thirty years later, the need for justice, reconciliation and economic development in the aftermath of war is evident on every continent. Devastating wars have been waged in all parts of the world, with terrible impacts on the physical, emotional, social and psychological well-being of children. Deliberate violation of children’s rights has become the norm. We have witnessed the targeting of children for killing, torture, underage recruitment, sexual violence and exploitation, and we have failed to counteract those atrocities. We can no longer plead for accountability – we must demand it.

¹ Inaugural speech for the Reunião dos Comprometidos (the Meeting of the Compromised), Maputo, 2 July 1982.

To prevent the perpetration of these crimes on another generation of children, we must put accountability, truth-seeking, justice and reconciliation at the center of post-conflict recovery and development. Transitional justice mechanisms and processes are designed to come to terms with large-scale and systematic violations, and to support recovery in countries emerging from armed conflict or political violence. They offer a range of possibilities to achieve accountability, justice and reconciliation as part of recovery, specifically in situations where gross violations of children's rights have taken place.

Transitional justice has been the focus of growing attention in recent years, including through the work of international and hybrid criminal jurisdictions, truth commissions, national courts and local reconciliation efforts. These processes enable individuals, communities and nations to respond to the atrocities and abuse arising from war. Transitional justice processes attempt to deal with the legacy of war but also help prevent future violations by establishing a way forward, from conflict to a more just and stable society.

The potential success of such processes depends on the extent to which they prioritize children. We know from experience that if children are excluded from a country's agenda, if their rights are not addressed, a fault line will run through the heart of the nation. The measure of a country's strength and vision is not its military might but its investment in children's capacities, in their development.

Prioritizing children's issues is not all that is needed. Children's voices and their experiences must also be taken into consideration. Having been witnesses and victims of the crimes of war, children have a key role in addressing those crimes and in reconciliation and peace-building processes in their communities. Children and adolescents contribute a tremendous pool of capacity, energy, ideas and creativity, and as countries emerge from societal or political violence, that vital human resource is urgently needed.

Evidence clearly demonstrates that children have an important and unique role in processes that seek truth, justice and reconciliation. Adults can act on behalf of children and in the best interests of children, but unless children themselves are consulted

and engaged, we will fall short and undermine the potential to pursue the most relevant and most durable solutions.

Yes, we must be certain that involving children protects their rights, builds their confidence and strengthens their bodies, minds and hearts. We must bear in mind that children – especially those emerging from horrifying experiences in conflict – will need long-term support and protection to counteract the violations they have suffered. We know, for example, that girls who have been targeted for sexual crimes can suffer further pain and stigma when they return to their families and communities. We cannot turn a blind eye. Rather, we must listen carefully, and on their terms, and take decisive action to support them and bring about changes that will improve their lives.

To enable children's participation while ensuring their protection and allowing them to feel safe, secure and at ease, we need child-friendly policies, procedures and practices in all transitional justice activities. This includes supporting children's right to choose whether or not to participate and to decide how they wish to be involved, with whom they wish to engage and when.

The chapters in this book review efforts to involve children in transitional justice processes and consider the implications, relevance and impact on the lives of children.

Strengthening international legal frameworks and standards provides a basis for eliminating impunity and improving accountability for crimes committed against children in times of conflict and political violence. Recent indictments and prosecutions for crimes against children by the International Criminal Court and the Special Court for Sierra Leone demonstrate that accountability is not beyond our reach. Yet we must admit that progress has been uneven, and the involvement of children in these processes is still new and largely untested. This book seeks to evaluate a number of recent efforts and from them recommend next steps.

One issue that is the subject of ongoing debate is the age of criminal responsibility for international crimes and what it means in relation to children who have been both the victims and the perpetrators of such crimes. The deliberate abduction, forced recruitment and use of children in hostilities during armed conflict

are crimes under international law. Yet in prosecuting such crimes against children, it must be recognized that an intergenerational cycle of violence has turned the very children who were victims of these crimes into perpetrators of similar offenses.

Children who have been abducted and forced by adults to participate in war crimes are victims. Indeed, they are victims because they are forced to become perpetrators of the violence and abuse they themselves have suffered. Therefore, the participation of these children in transitional justice mechanisms must be primarily as victims and witnesses. This does not minimize the importance of accountability for children who become perpetrators. However, it does mean finding ways, within the context of child and human rights instruments, to redress the wrongs these children have suffered while they also make their redress to their communities. Transitional justice processes should promote accountability while fostering learning, self-respect and dignity and maximizing opportunities for rehabilitation and reintegration in their families and communities.

Another issue raised in the chapters that follow is the protection and participation of girls in transitional justice processes. Until recently, children have been overlooked in these processes, and girls have been even more marginalized. A senior officer in the United Nations peacekeeping mission in the Democratic Republic of the Congo recently stated “it has probably become more dangerous to be a woman than a soldier in an armed conflict.”² This statement is more true for girls. They are targeted in armed conflict because of their vulnerability and their gender. They have been subjected to rape, mutilation, forced prostitution, forced pregnancy, forced combat and death. Girls have been systematically abducted and used for forced labor and sexual slavery. This is not limited to a particular context; it reflects a global phenomenon.

Recently, these crimes have been prosecuted by international courts as war crimes, crimes against humanity and genocide. Yet

² Retired Major General Patrick Cammaert, former Division Commander of the United Nations Organization Mission in the Democratic Republic of the Congo, speaking before the United Nations Security Council upon its adoption of Resolution 1820 (2008), 19 June 2008.

prosecution has only taken place in a few instances and does not begin to address the magnitude of crimes committed.

Additionally, when crimes against girls and women have been addressed by transitional justice processes, the focus has been almost exclusively on sexual crimes, limiting attention to the multitude of other grave violations against girls and women, such as loss of education, livelihood and land, as well as forced labor, slavery, exploitation and trafficking. Focusing on sexual violence against girls can limit the understanding of the totality of their experiences in conflict and leave them marginalized in recovery efforts, in reparation processes and in the structure and relevance of post-conflict institutional reform.

Experience shows that judicial mechanisms alone are insufficient in the aftermath of massive and systematic violations. Despite attempts to strengthen and adapt them, traditional processes have also been inadequate to deal with the results of the most serious violations and the sheer number of victims of atrocities. How then can we come to terms – reconcile and rebuild – following war and large-scale political violence? How do we assure accountability?

There is no one answer. The damage to the lives of children caused by the worst impacts of armed conflict cannot be fully repaired, but much has been done to protect children and enable them to better protect themselves. The chapters in this book look at examples of the mechanisms and processes that have been engaged to this end, undertake analysis and make recommendations to strengthen both the protection and the participation of children, and to promote child-friendly and relevant outcomes.

It is clear, for example, that safe and meaningful child participation in truth commissions leads to articulation of a more complete story of a conflict. Yet, for a truth commission to have lasting impact, people need to see tangible differences in their lives after it has finished its work. Suggestions for such advances put forward by children include access to education and vocational skills, accelerated rebuilding of schools, the inclusion of lessons from the truth commission in school curricula, help for children on the streets and compensation for youth to make up

for lost years of education through the provision of economic and livelihoods opportunities. All of this has major implications for governments and donors who fund truth commissions and other transitional justice mechanisms. Sufficient funding to support children's participation and provide resources to implement recommendations is crucial.

Several chapters highlight the practical outcomes that children hope will result from their involvement in transitional justice processes. The call for accountability for the most serious of crimes under international law is echoed by children emerging from conflict in diverse countries. At the same time, children want reconciliation, and they want their own communities to be rebuilt – they want better homes, schools, streets and areas for play.

The case studies in this book reflect a number of countries and contexts. I am encouraged to note the number of examples demonstrating innovative responses by African countries and institutions to the call to engage with children in transitional justice contexts.

The preventable deaths and suffering of children, in situations of conflict and political instability, highlight the extent to which we have failed to prioritize the rights and well-being of children. Transitional justice processes are an opportunity to set things right. However, they cannot alone address the brutal inequalities, the poverty and the discrimination that have locked children behind the bars of deep and far-reaching structural injustice. Children in all countries – including developing countries and nations afflicted by war – are increasingly aware of the world they live in. They want to contribute. But they need the knowledge and the tools to realize their potential. The world cannot pretend that it lacks the resources these children need.

We live in a world where injustice and impunity are too often taken for granted. Unless we tackle the root causes of specific conflicts and general political violence, transitional justice mechanisms will prove to be short-term measures. We have the opportunity to build again and to build better. Keeping children in the forefront of reconstruction strengthens the capacity for both justice and peace.

Introduction

During ten years of civil war, from 1991 to 2002, the children of Sierra Leone were deliberately and routinely targeted, and witnessed widespread and systematic acts of violence and abuse. The Sierra Leone Truth and Reconciliation Commission estimated that more than ten thousand children were abducted as child soldiers. Thousands more were victims of rape, mutilation, forced prostitution and sexual exploitation.¹

Among the thirty thousand people who were disappeared in Argentina between 1976 and 1983 were an estimated five hundred pregnant women and young children. The military kept pregnant women captive and subjected them to torture until the birth of their babies. The infants were then taken from their mothers, and many were placed in the homes of military or police officers. The mothers were never seen again.²

The Lord's Resistance Army (LRA), a rebel force fighting the Government of Uganda, has abducted over sixty thousand Ugandan children and youth over the past two decades. Among the war-affected population of northern Uganda, one in six female adolescents has been abducted by the LRA. They have been forced to perform domestic labor and subjected to slavery-like conditions, used for fighting and for sexual purposes.³

¹ United Nations Children's Fund (UNICEF), *Adolescent Programming in Conflict and Post-Conflict Situations* (New York: United Nations Children's Fund, 2002), 56, available at http://www.unicef.org/emerg/files/adolescent_conflict.pdf.

² See Michele Harvey-Blankenship and Rachel Shigekane, Chapter 8 of this volume, "Disappeared Children, Genetic Tracing and Justice."

³ See Khristopher Carlson and Dyan Mazurana, Chapter 7 of this volume, "Accountability for Sexual and Gender-based crimes by the LRA."

Children were among the primary victims of South Africa's apartheid regime. In just the two years between 1984 and 1986, three hundred children were killed by the police, one thousand wounded, eleven thousand detained without trial, eighteen thousand arrested on charges arising out of protest and 173,000 held awaiting trial in police cells. Children constituted between 25 percent and 46 percent of detainees at any one time during this period.⁴

During the armed conflict in El Salvador from 1980 to 1992, the military raided villages suspected of being rebel support bases. Families were separated; the parents were often killed and the children taken to orphanages. Some of these children were adopted by military or police households and others were put up for international adoption. It is believed that the military were responsible for the disappearance of hundreds of infants and children.⁵

In today's world the very idea of a front line or battleground has broken down, replaced by violence involving states, non-state actors, armed groups, security forces, private contractors, gangs, perpetrators of terrorism and diverse militant cells or factions. The result of this breakdown is an increased threat to civilians, especially children.

The 1996 Graça Machel report, *Impact of Armed Conflict on Children*, together with a growing body of academic work,⁶ calls

⁴ See Piers Pigou, Chapter 4 of this volume, "Children and the South African Truth and Reconciliation Commission."

⁵ See Michele Harvey-Blankenship and Rachel Shigekane, Chapter 8 of this volume "Disappeared Children, Genetic Tracing and Justice."

⁶ United Nations, Report of the Expert of the Secretary-General, Ms. Graça Machel, Report of Graça Machel – Impact of Armed Conflict on Children, U.N. Doc. 26 AA/51/306; Graça Machel, *The Impact of War on Children* (London, Hurst and Co. 2001); United Nations, *Machel Study 10-Year Strategic Review, Children and Conflict in a Changing World*, United

attention to the many conflicts in which children are singled out for killings, disappearances, unlawful recruitment, torture and other grave violations.⁷ Truth commissions, international courts and other accountability processes have documented how children have been forced or coerced to participate in hostilities, in some cases replicating the very crimes committed against them. Children, especially girls, have been targeted for sexual violence and rape.

These acts not only violate international human rights and humanitarian law; they are among the most reprehensible international crimes. There is considerable momentum to end impunity, especially for genocide, crimes against humanity and war crimes. A comprehensive regime of international law has been established, but implementation of these standards is lagging. For children the implications are urgent and far-reaching. Failure to improve accountability, provide reparation and enable reconciliation can hamper their recovery and limit their future opportunities. Transitional justice mechanisms and processes are attempting to better enable the promotion and protection of the rights of children affected by armed conflict.

This book is a contribution toward documenting and encouraging these emerging efforts. It explores the questions raised when children's issues are prioritized in transitional justice

Nations, New York, April 2009 [hereinafter, "Machel Study 10-Year Strategic Review"]; Michael Wessels, *Child Soldiers: From Violence to Prevention* (Cambridge: Harvard University Press, 2007); Alcinda Honwana, *Child Soldiers in Africa*, (Philadelphia: University of Pennsylvania Press, 2005); Suan McKay and Mazurana, Dyan, *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique* (Canada: International Center for Human Rights and Democratic Development, 2004); T.S. Betancourt, I. Borisova, J. Rubin-Smith, T. Gingerich T. Williams and J. Agnew-Blais, "*Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The State of the Field and Future Directions*" (Austin: Psychology Beyond Borders, 2008), available at <http://psychologybeyondborders.com/Publications.aspx>.

⁷ United Nations Security Council resolution 1612 of 2005 (S/RES/1612 of 26 July 2005) called for the implementation of a monitoring and reporting mechanism for six grave violations against children during armed conflict. The six grave violations are killing or maiming; recruitment or use of child soldiers; rape and other forms of sexual violence; abduction; attacks against schools or hospitals; and denial of humanitarian access.

processes. It analyzes practical experiences to determine how the range of transitional justice mechanisms can be applied, both to improve accountability for crimes perpetrated against children and to protect the rights of children involved, primarily as victims and witnesses, but also at times as members of armed forces and groups that perpetrate violations.

The United Nations Secretary-General has defined transitional justice as:

...the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁸

The vision and ambition of transitional justice is to enable societies that have been torn apart by violence to recover and to empower individuals – victims, witnesses and perpetrators – to recount their experiences and agree on a measure of justice to inform their future. The impact of armed conflict on children makes it imperative for transitional justice processes to include children's experiences, to enable their full and protected participation and to improve children's access to justice, accountability and reconciliation.

While a definitive measure of the impact of transitional justice processes on the lives of children is not yet available, the importance and potential of transitional justice for children and young people is clear. Not only do children have the right to participate in decisions and in administrative and judicial procedures that affect them, but

⁸ Report of the Secretary-General on The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616.

also their views and experience provide unique and critical contributions to those processes and to national reconstruction efforts. To attempt transitional justice without involving children not only fails to comply with the Convention on the Rights of the Child (CRC)⁹ – the most universally ratified international instrument – but it also compromises the outcome of those processes.

In 2002, the UNICEF Innocenti Research Centre (IRC), together with the international non-profit organization No Peace Without Justice, published *International Criminal Justice and Children*, which presented an analysis of the international legal framework as it relates to children. Further academic and legal work on transitional justice and children was undertaken by UNICEF IRC in 2005. A network was initiated to generate debate and dialogue from diverse perspectives among academics and practitioners, legal experts and child rights advocates, representing specialists from both the South and the North. This led to the development of a series of expert papers by UNICEF IRC that explored new and emerging issues concerning children and international law¹⁰ and an April 2009 conference on Children and Transitional Justice convened by UNICEF IRC and the Human Rights Program at Harvard Law School. An outcome of the conference was the Key Principles for Children and Transitional Justice, which are intended to inform efforts to involve children in transitional justice activities (see Annex 1 and discussion below).

The following pages demonstrate that transitional justice processes can make a positive difference in children's lives. The evidence and discussions point to mutually reinforcing linkages between accountability, truth-seeking and reconciliation. These linkages underline the importance of a comprehensive and

⁹ Convention on the Rights of the Child, United Nations General Assembly, A/RES/44/25 61st plenary meeting of 20 November 1989, art. 12 [hereinafter CRC].

¹⁰ The UNICEF Innocenti Expert Paper Series on Children and Transitional Justice was initiated in 2007 to encourage further research and analysis on emerging issues and to better understand the potential and limits of children's participation in transitional justice processes. The Peer Review Oversight Panel for the Series was chaired by Jaap Doek, emeritus professor of Law at the Vrije Universiteit in Amsterdam.

complementary approach to transitional justice that actively engages children in recovery and benefits from their views.

CHAPTER REVIEW

The chapters in this volume analyze key issues from the transitional justice agenda through a child rights lens. On the basis of research, the authors begin to formulate responses to a number of crucial questions and debates: how to end impunity for crimes against children; what policies and procedures can better protect children and enable them to contribute to reconciliation and reconstruction efforts; what strategies are most effective in supporting children's roles and ensuring their voices are heard in peace-building efforts; how to enable children to reunite and reconcile with their families, peers and communities; how to build children's skills to become part of a stable economy; and how to reaffirm children's self-esteem and agency in the aftermath of armed conflict that has violated their childhood.

A number of cross-cutting issues and themes are introduced. Chapters 1 through 3 outline the human rights-based approach for children and transitional justice and examine the basic assumptions and international legal framework that provide a foundation for further analysis of accountability and reconciliation in different country contexts. This is followed, in Chapters 4 through 6, by case studies of children's involvement in the truth commissions of South Africa, Sierra Leone, and Liberia. Chapters 7 through 10 address thematic issues and institutional reform. This includes efforts to use traditional processes and judicial prosecutions to achieve accountability for crimes committed by the LRA in Uganda, and new techniques employing genetic tracing for judicial accountability and family reunification of disappeared children in Argentina and El Salvador. A case study on curriculum development, education and reconciliation linked to the Peruvian truth commission is followed by a study on the role of transitional justice in helping to realize social and economic rights for children living in post-conflict societies. The book covers a wide range of

transitional justice processes: international prosecutions, truth commissions, traditional and local practices, reparation efforts and institutional reform.

In Chapter 1, Saudamini Siegrist introduces a child rights approach to transitional justice, outlining recent efforts that have led to a focus on children and their involvement in justice and truth-seeking. A number of the principles of the CRC are analyzed in relation to transitional justice. The author also raises questions concerning children's best interests and their participation and protection in situations – in the aftermath of armed conflict and atrocity – that are complex and politically charged.

In Chapter 2, Alison Smith identifies basic assumptions concerning children and transitional justice. The question is raised of how the “laws of war” operate – and on whose terms. Acknowledging that until recently the participation of children in transitional justice has been something of an add-on, the author asks why and how children's perspectives should be woven into the design and operation of transitional justice mechanisms. If each post-conflict situation is subject to local factors and if no “one size fits all,” how can a range of mechanisms coherently protect the best interests of children? Ms. Smith considers the role of child witnesses in international courts and weighs the importance of their testimony against risks to their well-being.

Chapter 3, by Cécile Aptel, assesses the contribution of international and hybrid criminal courts in improving accountability for grave crimes against children. This discussion recognizes the contribution of international courts in giving visibility to the victimization of children, while noting that much remains to be done. The chapter examines the international criminal justice system and the appropriateness of international jurisdictions to address accountability for crimes committed against children, as well as for children who have participated in crimes under international law. The author contends that many questions remain as to what is in the best interests of children who have participated in grave international crimes and proposes that more attention be given to supporting their reintegration with their families and communities.

In Chapter 4, Piers Pigou reconsiders the findings of the South African Truth and Reconciliation Commission (TRC) with respect to children. While the South African TRC did not take statements from children (below age eighteen), it did focus on violations against children and young people and also held unofficial children's hearings. The chapter documents that children and young people were among the primary targets of the apartheid regime and also played a role as active participants in the anti-apartheid movement.

Chapter 5, by Philip Cook and Cheryl Heykoop, reviews children's involvement in the Sierra Leone TRC. The authors analyze the guiding principles of child participation and the precedent set, as well as the impact on children and the potential for children to become catalysts for social mobilization and community development, increasing their own awareness and building capacity for citizenship.

Chapter 6, by Theo Sowa, continues to chart the course of children's participation in truth commissions by considering the range of children's contributions to the Liberian TRC. The chapter addresses in particular their role in statement-taking and thematic and national TRC hearings, noting good practices and lessons learned. Questions are raised regarding how to best protect the rights of children and facilitate their meaningful participation. Based on concrete experience, the chapter proposes strategies for child protection and makes recommendations for involving children in future transitional justice processes without putting them at risk.

Chapter 7, authored in two parts — Part One by Christopher Carlson and Dyan Mazurana, and Part Two by Prudence Acirokiop — describes the brutal targeting of children by the LRA in northern Uganda. Considering judicial prosecution of LRA commanders on one hand and the use of traditional processes on the other, the authors question how to adequately account for these crimes. What does reconciliation mean to the victims? When children who have committed crimes against their families and communities return, what processes of truth-seeking and justice can enable them to re-establish meaningful relationships as members of the community? Two complementary and at times opposing positions are presented.

In Part One, the authors argue that international law — and the victims — demand criminal prosecution. In Part Two, the author posits that when former LRA members return to their communities, traditional mechanisms can provide a measure of accountability and help restore normalcy.

In Chapter 8, Michele Harvey-Blankenship and Rachel Shigekane review the application of genetic tracing to identify disappeared children in Argentina and El Salvador. Recent efforts are documented and analyzed, highlighting how DNA analysis is used both as a tool in family reunification and as evidence in judicial proceedings. The impact of genetic tracing in enabling the objectives of transitional justice is considered, specifically in facilitating truth-seeking and prosecutions and also as a means of restoring the dignity of victims. The link between disappearances and reparation is noted, in particular regarding the Inter-American Court of Human Rights decisions on disappearances, which paved the way for the establishment of the right to a remedy.

In Chapter 9, Julia Paulson documents and analyzes the *Recordándonos* educational resource, based on the truth commission in Peru. A clear case is made for linking education and reconciliation and for including truth commission findings and recommendations in primary and secondary school curricula. The chapter considers the potential of education as a vehicle to bring transitional justice into the lives of children and young people, enabling them to make informed decisions and to engage as responsible citizens in their communities. According to the author, educational resources can inform national history, giving children the space to wrestle with their own memories and to look to the future.

In Chapter 10, Sharanjeet Parmar addresses the role of transitional justice in relation to the violation of children's economic rights in conflict and post-conflict situations, an area that has been rarely considered. She analyzes economic justice from a child rights perspective, specifically in the context of post-conflict West Africa. Using as an example the labor of children in the diamond mines of Sierra Leone, the chapter demonstrates how war-related rights violations of children can leave them vulnerable to further

exploitation and abuse. The findings show that when children do not have the opportunity to acquire skills and learn a vocation — when their abilities are squandered or left to waste — the result is serious limitations on their future and the future of their society.

These chapters demonstrate that, in a range of country situations, children have contributed to rebuilding their communities and have proved that they are often the best informed about their needs and the actions that can help rebuild their lives. Children have made it clear that they want to be taken seriously as partners in post-conflict transition. However, they must not be viewed as a token solution or quick fix. Rather, collaborative efforts are needed over the long term to enable children's involvement in all elements of transitional justice within their own communities.

KEY PRINCIPLES FOR CHILDREN AND TRANSITIONAL JUSTICE

The conference on Children and Transitional Justice convened by UNICEF IRC and the Human Rights Program of Harvard Law School in April 2009 aimed to consolidate ongoing research and to further the debate on emerging issues and best practices in the field. During the conference, key principles to protect the rights of children participating in transitional justice mechanisms and processes were identified. The Key Principles for Children and Transitional Justice (see Annex) seek to build agreement on issues identified in panel discussions and working groups and in the expert paper series. Discussions took place in working groups, as well as over a subsequent review process that included additional specialists and partners, resulting in policy and program guidance based on the knowledge and experience of a wide range of experts and partners. The Key Principles are intended to better inform the protection and participation of children in truth, justice and reconciliation processes and to serve as groundwork for further elaboration and consensus-building on the role of children in transitional justice.

It is a point of agreement that transitional justice does not favor one model. Justice, accountability, reconciliation and reparation can involve different elements in diverse contexts. Accountability in northern Uganda is different from accountability in Canada, the Democratic Republic of the Congo, El Salvador, or South Africa; there is not only one solution or only one way forward. Instead there are specific priorities and principles that need to be adapted to local factors and situations. At the same time, there must be consistency and coherence when applying the CRC and other international standards at the national level.

In addition to outlining the basic policies and procedures to protect the rights of child victims and witnesses in transitional justice processes, the Key Principles consider a number of emerging issues. The duty to prosecute for crimes under international law is clearly stated in the Preamble, and both national and international courts are given consideration. Also included is the duty to provide effective remedies to victims, including reparation. The right of children to express their views is noted, as well as the importance of consulting with children so that transitional justice processes maximize their potential. Children's engagement with local, traditional and restorative justice processes is introduced and explained in some detail. The need for child-focused reparations is also outlined. The section on institutional reform introduces a number of new issues: the importance of working with educational experts and officials, the need to undertake legal reform and the urgency of creating economic opportunities for children and young people. The Key Principles also call for the development of common minimum standards on children and transitional justice.

One ongoing debate concerns the appropriate form of accountability for alleged child perpetrators. While the CRC states that accountability is in the best interests of children, it recommends the application of alternatives to judicial proceedings for children where appropriate. The Key Principles note that children may simultaneously be victims, witnesses and alleged perpetrators of violations. They also state that children accused of international crimes in situations of armed conflict are primarily victims. Based on the Statute of the International Criminal Court,

the Special Court for Sierra Leone and the practice of the ad hoc tribunals, there is an emerging standard that children under eighteen should not be prosecuted by international courts and tribunals. The Key Principles specify that a gender-sensitive approach to child participation in transitional justice processes should include a focus on the protection of the rights of girls and should address their specific needs and experiences.

Despite the many points still under discussion, there is consensus that transitional justice mechanisms can help steer societies emerging from a period of violence toward greater accountability and recovery. That is perhaps the most basic assumption of transitional justice. Experience demonstrates that while transitional justice is not sufficient in and of itself to guarantee lasting change, it can take a significant step in providing redress for the wrongs of the past and preventing their recurrence.

CHAPTER 1

CHILD RIGHTS AND TRANSITIONAL JUSTICE

Saudamini Siegrist¹

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



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

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INTRODUCTION

Armed conflict and political violence expose children to the machinery of war. They become the victims of firearms, landmines, missiles and aerial bombardment. They witness the killing of family and friends. When their communities are attacked and forced to flee, children lose their homes and are deprived of food, health care and schooling. Girls and boys are also directly and systematically targeted for killing, torture, abduction, recruitment and sexual violence.² They are targeted because they are young and within easy reach, precisely because of their vulnerability. Adolescents are often at greatest risk.³

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

This chapter considers a number of the issues and debates in the fields of child rights and transitional justice, drawing primarily on international documents and responses to identify points of mutual concern and common ground. Transitional justice has only recently focused on child victims and witnesses and on the involvement of children in processes of accountability, truth-seeking and reconciliation. In 2002, at the time of the entry into force of the Statute of the International Criminal Court (ICC) and the publication of the study *International Criminal Justice and Children*,⁴ the relevance of children within international criminal

² *Machel Study 10-Year Strategic Review, Children and Conflict in a Changing World*, A/62/228, at 3 (“War Violates Every Right of the Child”), available at www.un.org/children/conflict/english/machel10.html [hereinafter, *Machel Study 10-Year Strategic Review*].

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

⁴ No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children* (Rome: Xpress S.r.l., 2002).

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

What Has Changed?

Grave violations of children’s rights have figured prominently in cases before the Special Court for Sierra Leone (SCSL) and, more recently, the ICC. The SCSL was the first international or hybrid court to prosecute and convict persons for the crime of recruiting and using children in armed conflict. It also established precedent in a decision criminalizing child recruitment prior to the adoption of the Rome Statute, on the basis of customary international law.⁵ Crimes against children have gained center stage in international investigations and prosecutions, and the focus on children has helped build consensus and draw public attention. In these ongoing efforts and debates, no issue has attracted more attention than the recruitment and use of children to become – themselves – instruments of war. Children are used to commit atrocities because they are malleable and easily intimidated. They have proved themselves to be obedient and as fearless as the commanders who have forced and coerced them to wage war. In some cases, children are also influenced by economic or political pressures, by family loyalties or independence struggles.⁶

⁵ *Prosecutor v. Hinga Norman*, Decision of the SCSL Appeals Chamber, SCSL-2004-14-AR72(E), 31 May 2004, paras. 52-53. For analysis of the decision, see Matthew Happold, “International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone’s Decision in *Prosecutor v. Hinga Norman*,” *Leiden Journal of International Law* 18 2005:283–297; William A. Schabas, “The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases,” Chapter 2 *International Criminal Accountability and the Rights of Children* (The Hague: Hague Academic Press, 2006), 19-35; Cécile Aptel, “International Criminal Justice and Child Protection,” Chapter 3 of this volume. See also the *amicus curiae* brief filed by UNICEF, with No Peace Without Justice and others, 21 January 2004.

⁶ See, for example, Karen Emmons and Viktor Nylund, *Adult Wars, Child Soldiers: Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region* (Bangkok: UNICEF, 2002); Michael Wessells, *Child Soldiers: From Violence to Protection* (Cambridge: Harvard University Press, 2007); Alcinda Honwana, *Child Soldiers in Africa* (Philadelphia: Penn

The recruitment or use of children as soldiers is a war crime.⁷ It is one of six grave violations against children identified in Resolution 1612 (2005) of the United Nations Security Council, which established a mechanism for monitoring and reporting.⁸ The other violations are killing or maiming, rape and other forms of sexual violence, abduction, attacks on schools or hospitals and denial of humanitarian assistance. The purpose of the monitoring and reporting mechanism is to stop and prevent the brutal impacts of war on children, to better inform humanitarian response and to secure a basis for improved accountability for those violations.

These efforts are part of a bigger picture. Children first came to the attention of the Security Council as a result of the study undertaken by Graça Machel on the impact of armed conflict on children, at the request of the Committee on the Rights of the Child and the United Nations Secretary-General. The study was submitted to the United Nations General Assembly in 1996 and provided the foundation for a coherent and comprehensive agenda on children and armed conflict, spurring action among governments, civil society and affected communities – as well as among children themselves.⁹ It examined the effectiveness of international standards

Press, 2006); Jason Hart, “The Politics of Child Soldiers,” *Brown Journal of World Affairs* 13(1) 2006:217-226; David Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (New Brunswick: Rutgers University Press, 2005).

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

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

⁹ The *Machel Study* helped build support for adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, spurred the Campaign to Stop the Use of Child Soldiers and inspired the Colombia Chil-

in protecting children threatened by armed conflict and established a place for children on the global peace and security agenda.

The Machel report and the campaign to end impunity for grave violations against children were, in turn, informed and driven by the momentum surrounding the Convention on the Rights of the Child (CRC), in force since 2 September 1990. It provides a universally agreed-upon set of standards and obligations guaranteed by governments to protect the rights of children. From its inception, the CRC commanded attention at national and international levels, achieving rapid and nearly universal ratification.¹⁰

As the Committee on the Rights of the Child noted in its 1992 thematic debate on children in armed conflict, the CRC includes no general derogation clause;¹¹ the human rights of children should be safeguarded at all times, including during public emergencies and in times of armed conflict.¹² The CRC promotes complementarity between international humanitarian law and human rights law, specifically with regard to children.¹³ Article 38 calls on States parties to protect the rights of children in situations of armed conflict and to ensure “respect for rules of international humanitarian law.” Article 39 promotes post-conflict recovery and reintegration in an environment that fosters the “health, self-respect and dignity of the child.”

dren’s Peace Movement. See Graça Machel, *The Impact of War on Children* (London: Hurst & Company, 2001), at 23-25 [hereinafter “*The Impact of War on Children*”].

¹⁰ The Convention on the Rights of the Child has been ratified by all but two countries.

¹¹ A derogation clause permits a state to suspend some rights in certain situations, particularly public emergencies.

¹² *The Impact of War on Children*, at 141-142. See also Ilene Cohen, “The Convention on the Rights of the Child: What it Means for Children and War,” *International Journal of Refugee Law* 3(1) 1991:100-111 (noting that certain rights with respect to deprivation of liberty, education or the cultural, linguistic and religious rights of indigenous minorities are more extensive in the CRC than in the Geneva Conventions and Protocols, whereas other international human rights instruments include provisions that remain in force in wartime and offer even greater protection).

¹³ Convention on the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959), arts. 38, 39 [hereinafter CRC].

Child rights are an essential dimension of the international criminal justice framework. The importance of children to that agenda is therefore not a matter of public outcry or political expediency; it is the result of the steady development of legal standards that recognize the rights of children and require safeguarding their best interests. Relevant instruments under international law – in particular the CRC and the Optional Protocol to the CRC on the involvement of children in armed conflict – lay the groundwork for a rights-based approach to post-conflict recovery. This framework is founded on principles of accountability and rule of law, as well as universality, interdependence and indivisibility of human rights, and the four principles of the CRC: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child.¹⁴ These principles guide states in their commitment to respect and fulfill the rights of children and are critical in strengthening social and political responsibility in the transition from war to peace. Not only are child rights present and implicit in the transitional justice agenda, they are necessary for its success.

A CHILD RIGHTS-BASED APPROACH TO TRANSITIONAL JUSTICE

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

¹⁴ Committee on the Rights of the Child, “The Aims of Education,” CRC/GC/2001/1 para. 6 (listing these general principles, which fall under CRC articles 2, 3, 6 and 12). For a discussion of the general principles, see Executive Directive 98-04, “Guidelines of Human Rights-Based Programming Approach”; *Handbook on Legislative Reform: Realizing Child Rights*, vol. 1 (New York, UNICEF, November 2008). Consider Sharon Detrick, Nigel Cantwell and Jaap Dock, eds., *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (New York: Martinus Nijhoff, 1992) (detailing the development of these articles during the drafting and negotiations of the CRC).

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

In their analysis of the impacts of the armed conflict on children in Guatemala, Gibbons, Salazar and Sari found that the greatest number of children lost their lives due to economic, social and cultural rights violations during displacement and flight.¹⁵ Their deaths were caused by insufficient access to health care, nutrition, water and sanitation facilities, and adequate housing, as well as economic injustice and structural violence.¹⁶

War also has serious impacts on children who survive the violence, leaving many to grow up in poverty, suffering from malnutrition and lack of access to education and health care. During post-conflict reconstruction, a child rights focus should inform the rebuilding of health care, education and other social protection systems, as well as the reform of institutions, including the justice and security sectors.¹⁷ The educational curriculum is

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

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

¹⁷ In 2008, UNICEF introduced a new child protection strategy outlining two main,

particularly important as an expression of society's priorities and values. Linking educational and curriculum reform to transitional justice has the potential to strengthen the protective environment¹⁸ and to establish a broader understanding of human rights principles. In transitional contexts a human rights-based curriculum can promote social inclusion and active citizenship.

The destruction of social protections during armed conflict often has a devastating impact on the lives of girls and women. Both girls and boys are affected, but girls are more likely to be targeted for sexual violence and exploitation.¹⁹ Crisis and conflict also cause social upheaval and can result in a radical shift in social norms, altering the gendered roles and identities of girls and women, as well as of men and boys.²⁰ This can increase exposure to risk, including within families, in public spaces such as schools and health facilities, or when harvesting crops or gathering firewood. During armed conflict and political violence, there is often a marked increase in domestic violence and abuse by family

complementary approaches: strengthening national protection systems and supporting social change. Child protection systems include laws, policies, regulations and services needed across all sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection-related risks. The strategy is available at www.unicef.org/protection/files/CP_Strategy_English.pdf.

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

¹⁹ See Dyan Mazurana and Susan McKay, *Where are the Girls? Girls Fighting Forces in Northern Uganda, Sierra Leone and Mozambique* (Montréal: International Centre for Human Rights and Democratic Development, 2004); see also Michael Wessells and Anne Edgerton, "What is Child Protection? Concepts and Practices to Support War-Affected Children," *The Journal of Developmental Processes* 3(2) 2008:3.

²⁰ Sheila Meintjes, Anu Pillay, Meredith Turshen, eds., *The Aftermath: Women in Post-Conflict Transformation* (London: Zed Books, 2001).

members.²¹ At the same time the destruction of social protections can lead girls and women to assume greater responsibilities and take on challenges in order to survive. After the conflict, social norms and conventions may be reinstated, creating both tensions and opportunities.²²

When transitional justice processes are initiated, it is important to consider and document the diverse roles and experiences of girls and women and the often underreported acts of sexual violence committed against boys and men. In some cases, children are reluctant to speak out because they fear for their safety or because of social stigma. This is most likely in situations where there has been systematic or widespread rape and other sexual violence. It is important that procedures are in place to protect and enable the involvement of girls and young women in justice- and truth-seeking, redress and reparation, and community reconciliation.²³ The focus on women's rights and gender equality should encompass prevention and response to sexual violence, including health care, psychosocial support and assistance to children born to survivors, but should not be limited to those violations. The experiences of girls and women, both during and after conflict, are diverse. As caregivers, activists, survivors, educators and in professional capacities, young women contribute to national recovery and peace-building.²⁴ A rights-based approach is needed so that girls and women can fully participate in rebuilding their lives and societies.

²¹ See Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building* (Progress of the World's Women 2002, vol. 1).

²² UNICEF Innocenti Research Centre and International Center for Transitional Justice, *Children and Truth Commissions*, (Florence: UNICEF Innocenti Research Centre,) (forthcoming in 2010) [hereinafter *Children and Truth Commissions*].

²³ See also Ruth Rubio-Marín, ed., *What Happened to the Women?* (New York: Social Science Research Council, 2006).

²⁴ See Yasmin Sooka, "Dealing with the past and transitional justice: building peace through accountability," *International Review of the Red Cross* 88(862) 2006:311-325; see also Ruth Rubio-Marín, ed., *What Happened to the Women?* (New York: Social Science Research Council, 2006), at 21-47.

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

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

CHILD PARTICIPATION: LOCAL CONTEXTS, GLOBAL STANDARDS

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

²⁵ Ruth Rubio-Marin, ed., *What Happened to the Women?* (New York: Social Science Research Council, 2006).

²⁶ See, for example, Moses Chrispus Okello, “The False Polarisation of Peace and Justice in Uganda,” International Conference on Peace and Justice, 25-27 June 2007, Nuremberg. Available at www.beyondjuba.org/Conference_presentations/NurembergPresentation.pdf; Alex de Waal, “Sudan and the International Criminal Court: A Guide to the Controversy,” *Open Democracy*, 14 July 2008, available at <http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>.

²⁷ The high visibility of international crimes against children is demonstrated by the decision of the ICC to open its first trial, in January 2009, against the Congolese rebel

A current debate that is also caught in the crux between global and local norms has to do with recent terminology that describes specific sexual and gender based crimes committed by armed groups against girls as “forced marriage.” In February 2009, the Special Court for Sierra Leone prosecuted three Revolutionary United Front (RUF) commanders for this crime.²⁸ It was the first prosecution of forced marriage and established a legal precedent for the use of the term as a crime against humanity under international law, distinct from other forms of sexual violence, as a result of the length of the association and its domestic nature. Based on the jurisprudence of the SCSL, civil society groups and transitional justice specialists working on accountability for crimes committed by the Lord’s Resistance Army (LRA) in northern Uganda have adopted that terminology to describe abduction, forced labor, forced participation in hostilities, systemic and long-term rape, enforced pregnancy and forced domestic duties, based on the jurisprudence of the SCSL. The stated intention of the SCSL was to underline the systematic abuse of girls and young women by armed groups as a grave violation and to hold commanders who are responsible for these crimes accountable.²⁹

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

leader, Thomas Lubanga Dyilo, for crimes targeting children, specifically the crime of the recruitment and use of children as soldiers.

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

²⁹ Office of the Prosecutor, Special Court for Sierra Leone, Press Release, 8 March 2005, available at www.sc-sl.org/LinkClick.aspx?fileticket=T5eUb5Sxaso%3d&tabid=196.

ness of the debate. Not only is the term forced marriage situated and confined in the context of the power structure that informs conventional marriage, but it is additionally loaded because it imposes a diminished status on those who have been targeted for their gender and survived the brutal violence of repeated rape and forced labor. The use of the term forced marriage can be perceived as placing these girls and young women in a category that labels them as false or forced wives, rather than empowering the survivors and emphasizing the delivery of justice to the girls and young women targeted for horrific crimes perpetrated during armed conflict. While the terminology was intended to prevent impunity and deliver justice to the survivors, its implications are a matter of ongoing debate.

Another important question that has generated debate and come to the attention of practitioners and legal experts, as well as academics, is what transitional justice processes may be most appropriate for children's involvement in diverse cultural contexts. Over the last decade children's participation in truth commissions has been promoted in part because such commissions can provide a nonjudicial and nonpunitive approach to accountability. When truth commissions are in compliance with international human rights standards, they may create opportunities for children to express their views, building capacity for active citizenship and democratic processes. Truth commissions may also be linked to community reconciliation and education activities.³⁰ But truth commissions are political processes; if they are not objective and human rights-based, they can lead to risks and manipulation of children, or to disillusionment.

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

³⁰ *Children and Truth Commissions.*

support.³¹ However, traditional practices reflect the status quo, and in some post-conflict environments they may reinforce social inequalities, discrimination or gender bias.³² The tendency to make generalizations concerning traditional practices can be misleading. In fact, traditional practices cover a wide range of diverse activities. Children's involvement in traditional practices should not be romanticized; rather, the potential of such practices should be further explored in specific situations to assess under what conditions children's participation serves their best interests.³³

The involvement of child witnesses in courtroom proceedings is another area that has received considerable attention, provoking debate among child rights advocates and legal experts. Protection policies and procedures for child witnesses in international courts and tribunals were first established by a framework of cooperation between the Special Court of Sierra Leone and the country's child protection agencies (CPAs). The resulting agreement (*Principles and Procedures for the Protection of Children in the Special Court*) created a joint monitoring committee composed of the Special Court and CPAs, which reviewed the implementation of the principles and procedures on a monthly basis.³⁴ This agreement later informed the development of protection policies and procedures for child witnesses at the ICC. While the impact of testimony by individual child witnesses may be quite significant in international courts and tribunals, as has been the case in the SCSL

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

³² Michael Wessells, *Child Soldiers: From Violence to Protection* (Cambridge: Harvard University Press, 2007).

³³ See, for example, Prudence Acirokop, "The Potential and Limits of Mato Oput as a Tool for Justice and Reconciliation in Northern Uganda," Chapter 7 of this volume; Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008); Alcinda Honwana, *Child Soldiers in Africa* (Philadelphia: Penn Press, 2006).

³⁴ Donald Robertshaw and Keith Wright, "The Role of Child Protection Agencies in Supporting Children's Involvement in Transitional Justice Mechanisms, in Particular the Special Court for Sierra Leone" (paper presented at the UNICEF IRC meeting on Children and Truth Commissions, November 2005), 4-5.

and in ongoing trials at the ICC, the possibility for grassroots engagement of children in those processes is extremely limited.

Children's involvement in transitional justice processes fulfills their right to be heard in judicial and administrative proceedings affecting them (article 12 of the CRC). At a conference on children and transitional justice attended by legal experts and child rights advocates in April 2009,³⁵ the issue was raised that truth commissions have limited time and resources in which to carry out their work and that the involvement of children, as a special interest group, would be subject to those limitations. In response, a number of child protection specialists intervened, which sparked a discussion leading to a consensus on the legal obligation to involve children in transitional justice processes and to give their views due weight in decisions that affect them, as articulated in article 12 of the CRC. The legal obligation is binding. Children and young people comprise more than half of the affected population in many post-conflict situations, and they are frequently among those most targeted. Participatory processes that include children are therefore needed to achieve the aims of truth- and justice-seeking, in particular to promote reconciliation and recovery at the community level. Children's participation in transitional justice processes is critical; the question is how to determine children's appropriate role in diverse situations and how to ensure that their rights are protected and their best interests safeguarded throughout their involvement.

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

³⁵ Conference on Children and Transitional Justice, co-convened by the UNICEF Innocenti Research Centre and the Human Rights Program at Harvard Law School, 28-29 April 2009.

³⁶ An Michels, "Psychosocial Support for Children: Protecting the Rights of Child Victims and Witnesses in Transitional Justice Processes" (UNICEF, Innocenti Research Centre Expert Paper Series on Children and Transitional Justice, forthcoming in 2010). For an overview of children's participation in transitional justice processes, see *Children and Truth*

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

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

The investment in transitional justice is no less than "society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."³⁷ This quotation from the United Nations definition lays bare both the ambition and the idealism of the transitional justice agenda. The ambition too often overreaches and leaves the victims empty-handed, without redress. During a 2008 workshop on children and transitional justice convened by UNICEF and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal, a number of child participants expressed their opposition to the establishment of a truth and reconciliation commission, as called for in the 2006 Peace Agreement. They did not trust a commission established and supported by political actors to deliver the truth, and they did not want the truth to become a label for political purposes. Instead they proposed a more creative

Commissions; see also, Witness to the Truth: Report of the Sierra Leone Truth and Reconciliation Commission (2004); Republic of Liberia, Truth and Reconciliation Commission, Final Report, Volume Three: Appendices, Title II: Children, the Conflict and the TRC Agenda.

³⁷ Report of the Secretary-General on Rule of Law and Transitional Justice, UN document S/2004/616, New York, 23 August 2004.

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

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

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

³⁸ Author's observations during the workshop.

³⁹ *Truth and Reconciliation Report for the Children of Sierra Leone, Child Friendly Version*, 2004, 13, available at www.unicef.org/voy/media/TRCCF9SeptFINAL.pdf.

BEST INTERESTS OF THE CHILD

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

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

⁴⁰ James R. Himes, “Foreword,” and Philip Alston, “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights,” in *The Best Interests of the Child: Reconciling Culture and Human Rights* (New York: Oxford University Press, 1994), at v-vii, 1-25; see also Jonathan Todres, “Emerging Limitations on the Rights of the Child: The U.N. Convention and its Early Case Law,” *Columbia Human Rights Law Review* 30 1998-99:159, 169 (discussing commentary and early domestic case law concerning CRC art. 3).

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

⁴² Ibid.

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

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

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

⁴⁴ *Children and the Truth and Reconciliation Commission for Sierra Leone: Recommendations for Policies and Procedures for Addressing and Involving Children in the Truth and Reconciliation Commission*, Report of the technical meeting convened by UNICEF, National Forum for Human Rights, UNAMSIL Human Rights Section, 2001, Freetown, (1), available at www.unicef.org/emerg/files/SierraLeone-TRCReport.pdf. [hereinafter “Report of the technical meeting convened by UNICEF, National Forum for Human Rights, UNAMSIL Human Rights Section”]. See also United Nations Children's Fund (UNICEF), *Adolescent Programming in Conflict and Post-Conflict Situations* (New York: United Nations Children's Fund, 2002), 55, available at www.unicef.org/adolescence/files/adolescent_conflict%281%29.pdf [hereinafter “Adolescent Programming in Conflict and Post-Conflict Situations”].

⁴⁵ Report of the technical meeting convened by UNICEF, National Forum for Human Rights, UNAMSIL Human Rights Section, at 2.

to be provided to children's issues and measures to be taken for their protection."⁴⁶

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

CHILDREN'S EVOLVING CAPACITIES

While the best interests of children is a widely quoted principle at the core of the CRC, the principle of children's evolving capacities, though often debated, remains less quoted or understood.⁴⁷ Article 5 of the Convention states that direction and guidance, provided by parents or others with responsibility for the child, must take into account the capacities of the child to exercise rights on his or her own behalf. Twenty years after the adoption of the CRC, the articulation of this principle is still in flux, recognizing that children require varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts.⁴⁸

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

⁴⁶ Report of the technical meeting convened by UNICEF, National Forum for Human Rights, UNAMSIL Human Rights Section, at 43.

⁴⁷ See Garrison Lansdown, "The Evolving Capacities of the Child," Innocenti Research Centre, UNICEF/Save the Children, Florence (2005) [hereinafter "Lansdown"]; Committee on the Rights of the Child, "General Comment No. 12 (2009): The Right of the Child to be Heard," CRC/C/GC/12, 20 July 2009.

⁴⁸ Lansdown, at ix.

and legally.⁴⁹ As Lansdown has surmised, “This concept provides the basis for an appropriate respect for children’s agency without exposing them prematurely to the full responsibilities normally associated with adulthood.”⁵⁰ But the implications of the principle of evolving capacities present a dilemma with regard to children’s involvement in transitional justice processes. If children’s agency and their right to participate in decisions affecting them are promoted, what criteria will be used to set boundaries to prevent exposure to risk beyond their years?

As noted by Smith, the lack of protection for child witnesses in the courtroom can put them at risk; in the first trial of the ICC, it resulted in a child witness recanting his testimony.⁵¹ This high-profile lapse of protection led to immediate steps by the ICC to better protect child witnesses, including hiring a full-time child psychologist to advise on all aspects of children’s participation throughout the trial. However, it also calls into question the capacity of children to participate as witnesses in such trials. Some members of the Network for Young People Affected by War are currently debating the issue. According to Kon Kelei, one of the founders, now aged twenty-six, children should not be put on the witness stand to testify in international trials unless protection measures are in place and, even then, only as a last resort: “Truth and justice, what are they? And for whom are they meant? Young war victims were once forced to commit the most horrible atrocities, all the architecture of adults. And today we ask them to tell in detail how they were forced by the defendant to kill their parents or relatives, rape their sisters or mothers. In the case of girls, asked to tell in detail how they were continually raped by warlords and forced to go and fight. The courts and legal scholars should and

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ See Alison Smith, “Basic Assumptions of Transitional Justice and Children,” Chapter 2 of this volume.

need to recognize that the traumas with which the [former] child soldiers lived, and are still living, are too heavy.”⁵²

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

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

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

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

⁵³ For a full discussion of appropriate protection procedures for child witnesses, see An Michels, “Psychosocial Support for Children: Protecting the Rights of Child Victims and Witnesses in Transitional Justice Processes” (UNICEF, Innocenti Research Centre Expert Paper Series on Children and Transitional Justice, forthcoming in 2010).

⁵⁴ See No Peace Without Justice and the UNICEF Innocenti Research Centre, *International Criminal Justice and Children* (Rome: Xpress S.r.l, 2002), at 22-23. See also “Key Principles for Children and Transitional Justice,” Annex of this volume.

⁵⁵ Cécile Aptel, “International Criminal Justice and Child Protection,” UNICEF IRC Expert Paper Series, 24.

for crimes committed in northern Uganda. The case has been researched by Baines, who argues that because Dominic Ongwen was abducted at age nine or ten and forced into the ranks of the LRA, he is both victim and perpetrator. She uses the term “complex political perpetrator” to describe “youth who occupy extremely marginal spaces in settings of chronic crisis, and who use violence as an expression of political agency.”⁵⁶ Baines argues that the criminal responsibility of Dominic Ongwen should take into consideration the failure of society to protect him from becoming a victim and then a perpetrator of war crimes.

In considering the criminal responsibility of children below the age of eighteen, the civil conflicts of Sierra Leone and Liberia are particularly relevant. In Sierra Leone, from 1998 to 2002, nearly seven thousand children were formally demobilized from fighting forces.⁵⁷ Many of them had been drugged, threatened and forced to commit atrocities. Despite evidence that children participated in hostilities and had, in some instances, commanded younger children, the Special Court of Sierra Leone adopted a policy not to pursue prosecution of anyone who was under age eighteen at the time the offense was committed. The policy was based on a decision by the chief prosecutor that “no child could bear the greatest responsibility for the crimes that have taken place.”⁵⁸ The Sierra Leone TRC, operating at the same time as the Special Court, included among its guiding principles a decision to treat all children equally as victims and witnesses of the war, including children associated

⁵⁶ Erin Baines, “Complex Political Perpetrators,” *The Journal of Modern African Studies*, 47 (2009):163-191.

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

⁵⁸ Office of the Prosecutor, Special Court for Sierra Leone, Press Release, 2 November 2002, available at www.sc-sl.org/PRESSROOM/tabid/73/Default.aspx.

with fighting forces.⁵⁹ This was based on the recognition that all children were victims of a conflict that brutally abused and exploited them.

In Liberia more than ten thousand children were demobilized in the formal disarmament, demobilization and reintegration (DDR) program (2003-2007), and more than nine-thousand, six hundred reunited with their families.⁶⁰ Children formed an integral part of the fighting forces in Liberia, including the Small Boys Units formed by Charles Taylor in the national army.⁶¹ As in Sierra Leone, the DDR process in Liberia gave priority to rehabilitation and reintegrating boys and girls associated with the fighting forces. This included programs for family tracing and reunification, access to health care, including psychosocial care, education, vocational skills training, apprenticeships and business development services.⁶² The Liberian TRC (2005-2009), unlike the Sierra Leone TRC (2002-2004), was mandated to recommend “prosecutions in particular cases as the TRC deems appropriate.”⁶³ This created concern among some children in Liberia who feared that the TRC would call for the prosecution of children. From the outset, the TRC maintained that it would not hold children criminally responsible for grave violations committed during the armed conflict. Instead the adults who recruited and armed children would be held responsible. This position was reaffirmed in the final report of the TRC, which discussed children’s role in the wartime violations, noting that, “Thousands of children and youth were forced to take drugs as a

⁵⁹ Report of the technical meeting convened by UNICEF, National Forum for Human Rights and UNAMSIL Human Rights Section, 2001, Freetown, at 2.

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

⁶¹ Eben Kaplan, “Child Soldiers Around the World,” Council on Foreign Relations, 2 December 2005, available at www.cfr.org/publication/9331/.

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

⁶³ Liberia TRC Act, Art.VII, Sec. 26.j (iv).

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

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

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

⁶⁴ Republic of Liberia, Truth and Reconciliation Commission, Final Report, Volume Two, at 69.

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

⁶⁶ Luke Dowdney, “Children of the Drug Trade: A Case Study of Children in Organised Armed Violence in Rio de Janeiro,” *Ploughshares Monitor*, 22 June 2003, available at www.highbeam.com/doc/1G1-109267011.html.

⁶⁷ See Key Principles for Children and Transitional Justice, Annex of this volume.

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

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

⁶⁸ Cécile Aptel, “International Criminal Justice and Child Protection,” Chapter 3 of this volume.

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

⁷⁰ Cécile Aptel, “International Criminal Justice and Child Protection,” Chapter 3 of this volume.

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

⁷² The Paris Commitments and Paris Principles, adopted in 2007, are not legally binding but were endorsed by seventy-six states, including a number of countries where children are or were associated with armed forces or groups.

become responsible beyond their years. During armed conflict and political violence, children may be exposed to both short-term and long-term physical, mental and emotional harm. They may also find ways to survive in the face of extreme hardship. Following the genocide in Rwanda an estimated one-hundred-thousand children were orphaned and living in child-headed households.⁷³ This may be a sign of their resilience or an effort to cope or may simply indicate that they have prematurely taken on adult responsibilities, depending on the specific factors and conditions that individual children face. The principle of evolving capacities cannot be applied indiscriminately; it must be considered from the perspective of a child's own experience and life skills.

PROTECTION AND PARTICIPATION IN SITUATIONS OF CONFLICT AND POLITICAL INSTABILITY

The principle of indivisibility of rights is at the core of the human rights-based approach. This means that children's rights to protection and to participation must be equally respected. The relationship between children's right to protection and their right to participation during conflict has been described as a "thin red line."⁷⁴ In situations where adolescents are politicized by family ties or by national struggles for independence, or are faced with injustice, they may become involved in protests or other political movements.⁷⁵ This can put their safety and their lives at risk. Likewise in transitional justice contexts, children's participation in

⁷³ "Investing in Rwanda: Effective Choices for Orphans and Girls in Primary Education," *Working Paper* (New York: United Nations Children's Fund, Division of Policy and Planning, May 2007), available at www.unicef.org/videoaudio/PDFs/Investing_in_Rwanda.pdf.

⁷⁴ Bertrand Bainvel, "The Thin Red Line: Youth Participation in Times of Human-Made Crisis," UNICEF, unpublished draft discussion paper, 2001 (on file with the author).

⁷⁵ See "Adolescent Programming in Conflict and Post-Conflict Situations," at 4-5.

justice and truth-seeking activities may expose them to serious and unanticipated consequences.

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

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

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

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

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

⁷⁸ See Watchlist on Children and Armed Conflict, Press Release 24 April 2006, available at www.watchlist.org/news/pressreleases/20060424.php.

⁷⁹ See Report of the United Nations Fact Finding Mission on the Gaza Conflict (“The Goldstone Report”), available at www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

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

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

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

⁸⁰ "Adolescent Programming in Conflict and Post-Conflict Situations," at 7.

⁸¹ Karin Landgren, *The Protective Environment: Development Support for Child Protection*, *Human Rights Quarterly* 27(1) 2005:214-248.

⁸² *Children and Truth Commissions*.

⁸³ See Rosalind Evans, "The Impact of Concepts of Childhood on Children's Participation in Bhutanese Refugee Camps," *Children, Youth and Environments* 17(1) 2007:171-197. See also Jason Hart, Jo Boyden, Jo de Berry and Thomas Feeny, eds., "Children Affected by Armed Conflict in South Asia: A Review of Trends and Issues Identified through Secondary Research," *Handbook of International Disaster Psychology: Meeting the Psychosocial Needs of People in Humanitarian Emergencies* (Westport, CT: Praeger Publishers, 2005).

CONCLUSIONS

Involving children and young people, as well as their families and communities, in building a more protective environment is fundamental to the human rights-based approach. Engagement with communities affected by violence and armed conflict informs action in diverse situations. The Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, notes that the human rights-based approach is fundamental in times of peace and war: “In all instances, the participation of children and adolescents in home, school and community life can promote conflict resolution, tolerance and democratic principles. The human rights approach in reconciliation, in education and economic reform, and in transitional justice processes, can lay a foundation for a more stable future, contributing to nation-building and providing the opportunities that children and young people so desperately need.”⁸⁴

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

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

⁸⁴ From the statement of the Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, delivered to the 11th Annual EU-NGO Forum on Human Rights, dedicated to “Violence against Children,” Stockholm, Sweden, 6-7 July 2009.

Children are best situated to know their needs and can help inform their own protection from violence. They cannot act alone but need the immediate and long-term support and guidance of their families, peers and mentors to help create a better and more peaceful place to live.

CHAPTER 2

BASIC ASSUMPTIONS OF TRANSITIONAL JUSTICE AND CHILDREN

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A former child soldier in Afghanistan, takes part in a demobilization and reintegration program.

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INTRODUCTION

The targeting of children during armed conflict is not new: children have been victims of crimes under international law for centuries and have also been used as the vehicles through which adults commit crimes. What is new is the increasing attention being paid to this issue. The world is beginning to say “enough”: enough destruction of young lives; enough unconscionable and unnecessary suffering; enough loss of childhood; enough political expediency that allows these things to continue. Underneath it all, enough impunity for all of these things, because with impunity comes more suffering, as violations are tacitly or explicitly approved and allowed to continue.

This chapter looks at a number of the basic assumptions of transitional justice as it affects children. Perhaps the most basic assumption of all is that transitional justice mechanisms are the best vehicle to achieve an end to impunity, through criminal prosecutions and other accountability and truth-seeking strategies.² Experience demonstrates the validity of this assumption: from the tribunals in Nuremberg and Tokyo after the Second World War, to the truth commissions addressing the conflicts of the 1980s and 1990s in Latin America, to the permanent International Criminal Court (ICC) which became operational in 2002, transitional justice has signaled a break with the past and assisted societies throughout the world to move forward. However, there is less empirical data for making such an assessment regarding children, since they have been involved only recently in transitional justice processes and their participation has been something of an “add-on.”

² See, for example, D. F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime,” *The Yale Law Journal* 100 (8) June 1991:2537-2615. The author states at page 2542: “Above all, however, the case for prosecutions turns on the consequences of failing to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future?” See also L. E. Fletcher and H. M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24 2002:573-639, at 578.

Yet there is an emerging consensus that transitional justice is important for children: they are important members of society, and the children of today's transitions are also the adults of tomorrow, inheriting the results of transition. Furthermore, children and young people far outnumber adults in many countries requiring transitional justice; excluding them may exclude the majority of the affected population, which is both counterintuitive and unproductive. As the Sierra Leone Truth and Reconciliation Commission noted, "The reconciliation process in Sierra Leone demonstrates how children, as active partners in the process, can help break the cycle of violence and re-establish confidence in the rule of law."³

This chapter therefore considers why and how children's perspectives should be woven into the fabric, design and operations of transitional justice mechanisms and processes.

Transitional justice often starts with consideration as to which of the existing models or variants would be best suited for a particular country. In the aftermath of mass violence, there is an almost reflexive assumption that society will need some kind of truth commission and some kind of criminal justice process. Even while these discussions almost invariably maintain that each situation is different and there is no "one size fits all," in fact the recommendations emanating from those discussions also almost invariably advocate the use of models that have been adopted elsewhere. Since children's perspectives have not often figured prominently in transitional justice to date, this approach may leave children sidelined.

This chapter examines the "who, what, when, where, why and how" of transitional justice and children in order to rethink some of the basic assumptions about transitional justice and children. By breaking this broad issue into its constituent components, the chapter aims to outline some common questions that need to be addressed. Instead of taking a descriptive approach – listing what mechanisms have been used and the effect, impact and results they

³ Preamble to the *Truth and Reconciliation Commission Report for the Children of Sierra Leone*, at 7, available from www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf.

have had on and for children – the chapter promotes a more analytic approach. It presents a framework for analysis of different mechanisms, their objectives, and their strengths and weaknesses, so that transitional justice mechanisms and processes can respond more effectively to the needs of children, as well as other stakeholders.

WHAT DOES TRANSITIONAL JUSTICE MEAN?

The most commonly accepted definition of transitional justice was provided in the 2004 report by the United Nations Secretary-General on the rule of law and transitional justice. It defines transitional justice as: “The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”⁴

This chapter follows the Secretary-General’s definition, taking the broad view that transitional justice refers to any number of mechanisms or processes that can be used to “ensure accountability, serve justice and achieve reconciliation,” particularly following periods of massive violence or widespread abuse. Inherent in the definition of “transitional” is the temporary nature of the mechanisms and processes, which are designed to provide a bridge from the present to the future – from war to peace, from human rights violations to human rights protection, from dictatorship to democracy. They are therefore generally designed to conclude or lapse after fulfilling their objective.

⁴ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, at p. 4, para. 8.

It is worth highlighting that the work of the ICC is sometimes referred to as “international justice” rather than “transitional justice” because it is a permanent court with a forward-looking jurisdiction. This chapter takes the view that since the ICC is and will be employed for a limited time period in the countries where it is operational during times of transition and ongoing conflict, it is properly described as a transitional justice mechanism, at least vis-à-vis the population of the country where it is operating.⁵

The overarching definition in the United Nations Secretary-General’s report may appear to lack precision, but its utility more than compensates for any lack of specificity. There is a certain constructive ambiguity in leaving such a widely used term broad and non-exhaustive, as it encourages societies in transition to adopt the mechanisms that suit their needs and are most likely to meet their goals, without feeling they have to “do what country X did.” It encourages the kind of creative thinking that gave birth to transitional justice, back in the 1980s and 1990s when family members who had survived the violence in Latin America had a desperate need to know what had happened to their family members and loved ones who were “disappeared,” and even in the period after the Second World War when there was a widespread and burning desire not to let the Holocaust go unchallenged and its architects go free. The truth commissions developed in Latin America and the tribunals at Nuremberg and Tokyo were, at the time, novel approaches to extraordinary situations, responding to unprecedented levels of violations with political determination to see that the affected societies could make the transition to sustainable peace.

The fact that different approaches were chosen in those situations illustrates one basic assumption about transitional justice: one size does *not* fit all. The challenge is how to act on this assumption and identify which mechanisms or processes are the

⁵ Similarly, national courts can form part of a transitional justice process when they are charged with prosecuting crimes or hearing civil claims relating to violations that took place in the past, since they are being employed as a tool to assist society to move forward through the transition.

most appropriate for a particular country. The answer may be found in rethinking the aims of transitional justice. The most often-stated aims are those most sought after: promoting peace, achieving reconciliation within and between divided societies, strengthening the rule of law and enhancing respect for human rights. Additional purposes that transitional justice is called upon to fulfill include restoration of a society's confidence in state institutions; mending relationships between individuals, between countries in the region or with the international community more generally; or even simply being able to say "something was done" thereby closing (or attempting to close) a chapter on the past.

Other aims that fall more generally within the criminal justice context, such as punishment and vengeance, can be addressed through mechanisms that contribute to deterrence, incapacitation, rehabilitation and retribution.⁶ One basic assumption is that responses to criminal behavior are best met through a response by the state in accordance with predefined law, rather than by individual members of a society taking matters into their own hands, with no certainty about what behavior is prohibited or what the consequences might be.⁷ The dangers of individuals taking matters into their own hands are magnified when children are concerned, particularly when it comes to promoting child participation in transitional justice processes, which requires careful planning to ensure their physical and psychological protection. The

⁶ These four purposes are often described as the basic principles of (domestic) criminal justice, which fit equally well in a transitional setting; *see, for example*, G. S. Bridges, J. G. Weis, and R. D. Crutchfield, eds., *Criminal Justice* (Thousand Oaks, CA: Pine Forge Press, 1996), pp. 43-48.

⁷ *See, for example*, article 15 of the International Covenant on Civil and Political Rights, which states: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; and: Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

dangers are further magnified when it comes to alleged child perpetrators and appropriate avenues for addressing their accountability.⁸

The kind of mechanism or process most appropriate for a country in transition depends on its goals: if the aim is to assign individual criminal responsibility, then criminal justice processes are likely to be most appropriate; if the aim is to assist as many victims as possible in telling their stories, then nonjudicial processes are likely to be more effective. As such, transitional justice can (at the risk of becoming all things to all people) encompass a very broad range of mechanisms and processes, including criminal trials, either national or international; truth commissions; commissions of inquiry, like the one established to look into the Bloody Sunday incident in Northern Ireland; restitution or reparations; educational reform; and so on. A mechanism can be instigated by the state or on some other official basis, or it can be instigated by civil society or private individuals. Transitional justice mechanisms may also include other less structured or institutionalized approaches, such as national days of memory, apologies and the construction of monuments to memory or peace.

INTERNATIONAL LAW

One basic assumption is that the general rules are reasonably clear: international and national laws govern conduct at all times, whether during war or peace, and these laws can be appealed to and applied by transitional justice processes. They are equally applicable to children, who also benefit from the protection of a specific legal framework set forth in the Convention on the Rights of the Child (CRC) and other instruments. This general legal framework, concerning crimes under international law and the protection of fundamental human rights, is both fairly well established and fairly comprehensive. It has taken root in several international legal

⁸ See, for example, Cécile Aptel, "International Criminal Justice and Child Protection," Chapter 3 of this volume.

instruments and norms that apply to most states and, in some cases, to all of them.⁹ General and specific human rights principles and prohibitions on the commission of crimes under international law are also included in numerous regional human rights instruments; in the statutes and case law of international criminal courts and tribunals; and in international guidelines and instruments governing the rights of victims. The most notable of these is the 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁰ which provides that victims of such abuses, including children, have a right to prompt, adequate and effective reparation.

Most of these international and regional treaties expressly require states to implement and enforce the rights outlined at the domestic level; the ICC, in fact, is built on the concept that states have the primary responsibility to investigate and, where appropriate, prosecute crimes under international law.¹¹ The

⁹ These international legal instruments include the Geneva Conventions, the Hague Conventions and the Additional Protocols, which cover most of the war crimes; the Genocide Convention; and most recently the Rome Statute for the International Criminal Court, which codifies the law relating to crimes against humanity. General human rights principles are covered by the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the conventions of the International Labour Organization. Specific rights that subsist for specific groups, such as children, also form part of other human rights treaties, including the CRC, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women.

¹⁰ Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005, available at www2.ohchr.org/english/law/remedy.htm.

¹¹ This principle, called the principle of complementarity, is reflected in the preamble to the Rome Statute, which states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ... [and] emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” See also article 17(1)(a) of the Rome Statute, which sets out the grounds for admissibility of a case, providing that a case cannot be heard before the ICC when it is “being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.”

challenge lies in ensuring proper implementation and enforcement of the law at domestic, regional and international levels and in the early identification and filling of gaps, such as those related to the conscription, enlistment and use of children to participate actively in hostilities or the crime of forced marriage.¹²

THE ROLE OF CHILDREN IN TRANSITIONAL JUSTICE MECHANISMS AND PROCESSES

Within the overall legal framework that binds and guides transitional justice mechanisms, several provisions relate specifically to children, including a whole treaty regime: the CRC and its Optional Protocols. These provisions set out the broad rights that children possess, guide how those rights might be exercised and lay out what can and cannot be done with regard to children, such as prohibiting the conscription, enlistment or use of children for or directly in hostilities. Article 3 of the CRC, for example, provides that the best interests of the child should be a primary consideration underpinning every action taken in relation to children, as well as in the implementation of the rights contained in the CRC itself. In addition, the CRC specifically provides that children have the right to participate in decisions affecting their lives¹³ and to redress for harms committed against them, by obligating States parties to promote the “physical and psychological recovery and social

¹² *Prosecutor v Brima, Kamara and Kanu* (AFRC Case, Case No. SCSL-2004-16-A), Special Court for Sierra Leone, Appeals Chamber Judgment of 22 February 2008, paras. 181-203. There is ongoing debate regarding whether the term “forced marriage” adequately reflects the situation in which parents give their consent for the marriage of underage daughters, who may or may not consent. In the context of crimes under international law, however, the crime of forced marriage does reflect the experiences of hundreds of girls who are often referred to as “bush wives,” in that it refers to a specific set of circumstances in which girls were abducted from their villages, often in situations of extreme violence, and subsequently held in captivity and forced to perform domestic services and provide sexual services for commanders of the forces that had abducted them.

¹³ CRC, article 12(2).

reintegration of a child victim...in an environment which fosters the health, self-respect and dignity of the child.”¹⁴ The CRC also provides for the rights of children accused of having committed crimes and is complemented by other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules,” 1985).¹⁵

The implementation of this well-developed framework – much like the implementation of international law more generally – lags far behind the examination and articulation of its theoretical and conceptual underpinnings. It is only fairly recently that the *right* of a child to participate in transitional justice processes (which also includes the right not to participate) has been explicitly articulated,¹⁶ and the number of transitional justice processes and mechanisms that have expressly built children’s participation into their standard operating procedures remains limited. This matches the relatively limited attention (with some notable exceptions) paid to children’s experiences by transitional justice processes. This situation has begun to change, following the charges brought at the Special Court for Sierra Leone in relation to crimes committed during the country’s conflict. These crimes included numerous and varied crimes specifically against children and a focus on the crimes of the conscription, enlistment or use of children under the age of fifteen, which was also the focus of the first case of the International Criminal Court against Thomas Lubanga Dyilo.

The basic assumption is that these developments, acknowledging and highlighting crimes against children, have had a positive impact. For example, since prosecutions (or the threat of prosecutions) before international courts – and similarly, the exposure of crimes in transitional justice processes – can have a deterrent effect, a focus on crimes committed against children should help deter the commission of crimes against them. However,

¹⁴ CRC, article 39.

¹⁵ CRC, articles 37 and 40.

¹⁶ See No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children*, 2002, p. 49.

specific caveats need to be borne in mind. As discussed below, when a transitional justice mechanism addresses crimes committed against children and involves them as victims and witnesses, it needs to ensure that proper protection is in place. Without such protection, children's participation becomes limited at best or damaging at worst. There is also a risk of "showcasing" specific kinds of violations, such as child soldiers or child victims of sexual violence. While this may help raise awareness of children's issues in transitional justice processes, care must be taken not to replicate the objectification, marginalization or stereotyping that children (particularly girls) have already suffered, but instead to reflect the totality of their experiences.

Recent developments to involve children in transitional justice processes still need to be matched by proper rules and procedures guiding their participation. There have been some successes, such as the involvement of children in the work of truth commissions in Sierra Leone and Liberia, through the development of child-friendly materials and specific sessions devoted to engaging children's perspectives. Yet there has been a lack of thoroughness in understanding precisely what children require to help them participate fully and effectively, including what kind of protection can help facilitate that participation.

One example was the first witness before the International Criminal Court in its very first trial: a child giving testimony against the defendant, Mr. Lubanga, who had also been the witness's commanding officer. After testifying against Mr. Lubanga in the morning, the witness, a former child soldier, returned after the lunch break and recanted his testimony. The most likely reasons for this were fear and lack of preparation. In particular, the protective measures employed in the courtroom did not include shielding the witness from seeing the accused, and the prosecution was prohibited from proofing the witness¹⁷ due to an earlier ruling by the chamber. This caused serious problems, not least of which was the distress suffered by the child, who had recanted due to his

¹⁷ Reviewing a witness's testimony before he or she gives evidence ("witness proofing") is standard practice in many domestic courts and in other international courts.

reaction when he saw – and was seen by – Mr. Lubanga in the courtroom. Later, witness protections were put in place and the witness returned to the stand and completed his testimony against the defendant.

The ICC has taken steps to prevent these kinds of problems from arising in the future, including reviewing its court procedures for vulnerable witnesses. Nevertheless, the experience illustrates the need for all transitional justice mechanisms and processes to establish protection procedures for child victims and witnesses, to employ experts in children's issues and to ensure that all relevant persons have appropriate training in children's rights and specific needs.

A basic assumption of children's involvement in transitional justice processes is that they are victims and witnesses of crimes. Nevertheless, a major issue and a cause of ongoing debate concerns children accused of crimes under international law. There is a general agreement that international criminal justice mechanisms are not an appropriate venue for addressing crimes allegedly committed by children. This is because children should be considered primarily as victims. In addition, such mechanisms focus on persons who bear the greatest responsibility for the crimes, which is understood not to include children, who lack the capacity to plan, instigate, order and implement widespread or systematic crimes.¹⁸ However, it is difficult to justify this approach to individuals who may have witnessed the killing of family members by children who did not appear to be acting under the direction of an adult.

Similarly, if the goals of transitional justice include deterrence, breaking a cycle of violence and demonstrating that actions have consequences, it is difficult to state as an absolute certainty that children who commit crimes under international law should never be held accountable for their actions. That runs the risk of designating special classes of people to whom the rules do not apply, which is anathema to the rule of law more generally. What is

¹⁸ See, for example, No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children*, 2002, pp. 54-56.

therefore needed is more consideration of the most appropriate forum for achieving accountability for children accused of crimes under international law. This will depend on the specific circumstances of the crime, the overall goals of transitional justice in that situation and the individual circumstances of the child, based on his or her best interests and rights.

One question worth asking is why there has been such a limited focus on the rights of children in transitional justice processes. Children are often disproportionately affected by crimes or violations, whether they are specifically targeted or not; children have the right to participate in decisions affecting their lives, the right to redress for the wrongs committed against them and the right to access to justice. Children are full members of today's societies and, as adults, will have to manage the system that is put in place as a result of the transition. Therefore, they have an important role to play.

Nevertheless, it is only within the last twenty years or so that society has begun to reconceptualize the position and role of children, turning away from the idea that they are passive objects in need of protection and shifting toward an understanding of children as rights-holders who need assistance in exercising their rights, appropriate to their stages of development.¹⁹ Previously it was assumed that children should not participate actively in transitional justice processes and mechanisms, as their experiences would be subsumed within society's experiences, to which adults could speak on behalf of children. With the adoption of the CRC and the reconceptualization of the child as a rights-holder, it is recognized that transitional justice processes and mechanisms need to hear the voices of children, expressing their thoughts and needs from their own unique perspectives. The engagement and expression will vary from child to child, depending on the developmental stage and the individual desire to participate. The participation of children in transitional justice processes is founded

¹⁹ See, for example, *A World Fit For Children*, UN General Assembly Resolution of 11 October 2002, UN Doc. A/RES/S-27/2, which emphasizes the obligations due to children as rights-holders, including taking measures to assist children in realizing those rights.

on the human rights-based approach, which should inform the thinking of those who are involved in designing and operating transitional justice mechanisms and processes.

AN INVESTIGATIVE APPROACH TO BASIC ASSUMPTIONS OF TRANSITIONAL JUSTICE AND CHILDREN

Analyses of the mechanisms and processes of transitional justice and the role of children have tended to focus on what has and has not worked in different instances and then using those findings to guide efforts undertaken elsewhere. This is an extremely useful approach and has benefited both conceptual thinking about transitional justice and the development of new approaches, including techniques to engage children's participation. The risk, however, is that basic assumptions may remain unchallenged. This approach also runs the risk of falling into the "one size fits all" trap, leading to adopting certain processes and procedures because they worked well in a previous situation.

This points to a crucial premise: whereas the fundamental principles and legal framework of transitional justice are standard and not negotiable, including as they apply to children, the mechanisms and processes need to be adapted to the specific context. This is because different societies have different needs that have arisen in different political, cultural and socioeconomic environments, as well as different ways of engaging with their youth.

Adopting an investigative approach²⁰ to look at basic assumptions of transitional justice and children can help increase the efficiency of meeting this challenge. The objective of such an

²⁰ The investigative technique, which is employed in criminal investigations from routine domestic crimes to the most complex and widespread crimes under international law, seeks to examine all aspects of a situation with a view to constructing a blow-by-blow narrative of a particular incident or set of incidents. Police officers and investigators around the world use this technique to ensure that they obtain the full story and that there are no gaps or missing information when it comes to reconstructing events and putting together their case.

analysis is to increase the effectiveness²¹ of children's participation in transitional justice processes. This approach is based on the six "Ws" – namely why, who, what, when, where and how. This "bottom-up" approach can help in examining the building blocks of transitional justice, encouraging scrutiny of the basic assumptions with respect to transitional justice and children and assessing how the foundations of transitional justice might be either validated or revised. It is also useful in considering how the perspectives, expectations, needs and rights of children might be woven into their fabric, so as to make whatever mechanism or process comes from or within it as strong and effective as possible, particularly for children.

Why Pursue Transitional Justice?

The question of "why transitional justice" does not refer to the broader questions of why it is needed – such as to strengthen the rule of law or to contribute to sustainable peace – although the broader question of "why" has particular resonance for children, since one purpose of transitional justice is to make the country a better place for future generations.

In this context, the question of "why" refers to the immediate, concrete goals of transitional justice mechanisms and processes. They are established for many reasons, among them obtaining redress for victims, including children; establishing a record of the past; preventing denial of crimes or human rights violations; providing justice; preventing exaction of revenge by vigilantes; securing funding or preventing the withdrawal of aid or the imposition of sanctions (as was the case with Serbia and the International Criminal Tribunal for the former Yugoslavia);²²

²¹ A very basic assumption incorporated into the fabric of this paper is that those who set up, operate and support transitional justice mechanisms and processes want them to be effective.

²² V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), p. 62.

removing human rights violators from state institutions or the government or preventing their appointment or election; and reforming institutions such as health care and education, both of which are particularly relevant for children.

Legal obligations on states also need to be considered when elaborating the reasons why transitional justice might be appropriate. For example, states have an obligation either to extradite or to prosecute serious crimes under international law,²³ and they also have an obligation to provide effective remedies, including reparations for victims of human rights abuses, including children.²⁴ The stated aim may well be different from the actual aim: a state may say it wants transitional justice to create a better future for children, while in reality it simply wants to reinforce its own legitimacy or cover up its past wrongdoings. Understanding these motivations is important for managing policy decisions on operational issues, but once the decision to set up a transitional justice mechanism has been made, its implementation, whether judicial or nonjudicial, may provide unforeseen opportunities. For example, a truth commission set up for cosmetic reasons may provide opportunities to instigate institutional reform, thereby improving children's health and access to education.

The reasons for seeking transitional justice and the intended goals are as diverse as the situations themselves. Indeed, the motivation in any given situation is generally not a single objective but a mix of objectives that may or may not be shared by all stakeholders or by all those involved in the design and operation of transitional justice mechanisms and processes. What is clear, however, is that children are always stakeholders – because they are the victims and witnesses, often disproportionately affected; because they are active members of society; and because they will inherit

²³ See, for example, M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1995).

²⁴ UN Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, 16 December 2005.

and have to implement the results of the transitional process. The perspectives of children therefore need to be woven into the very fabric of transitional justice processes, to ensure that the “why” of transitional justice includes a focus on children’s rights and issues. To this end, there is a clear need for consultation with children and other stakeholders to determine their goals and aspirations and to ensure that the process that is adopted addresses all those goals and is as responsive to children as it can be.

Identifying as clearly as possible the precise aims of transitional justice is critical in determining the choice of mechanisms and how they should operate. For example, if the purpose of a transitional justice process is to prevent human rights violators from holding public office and taking charge of educational reform, an inquiry into individual responsibility for human rights violations is needed, rather than an exclusive focus on general trends or root causes. This goal could be met in many ways, including prosecutions, compiling a report that “names names,” a commission of inquiry into individual responsibility and so on. On the other hand, an initiative that memorializes victims or a national monument to peace is intended to achieve other goals and will thus do little to keep human rights violators from holding public office.

Identifying the goals – the “why” of transitional justice in any given situation – will also help in determining whether more than one mechanism is needed and avoid the risk of placing too high a burden on any single process. The Sierra Leone Truth and Reconciliation Commission, for example, was mandated “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered,” with a specific mandate to focus on the experiences of children.²⁵ It was able to make progress toward each of these goals and even quite advanced progress toward some of them, in

²⁵ *Truth and Reconciliation Act 2000*, section 6(1).

particular incorporating and addressing the experiences of children. However, it is questionable whether the Commission was, in the end, able to fulfill its statutory mandate. Operationally, it was plagued by a range of problems, including a lack of dedicated resources,²⁶ but the burden of this long list of mandated goals certainly contributed to its inability to fulfill them completely.²⁷ This could have been avoided by a more realistic concept of what a truth and reconciliation commission is best suited to achieve and what goals would have been better addressed by other mechanisms, such as the Special Court for Sierra Leone (SCSL).²⁸

Echoing an analogy used by then-Registrar Robin Vincent to describe the role of the SCSL,²⁹ TRC Commissioner and Professor William Schabas has likened the transitional process in Sierra Leone to building a house. He described the TRC as the plumber and the SCSL as the electrician, concluding that “nobody would want to live in a finished house that lacked either electricity or plumbing.”³⁰ Similarly, nobody would want to live in a finished house where the electricity was installed by the plumber and the plumbing was installed by an electrician; the potential for error is

²⁶ See, for example, W. Schabas, “The Sierra Leone Truth and Reconciliation Commission,” in E. Skaar, S. Gloppen and A. Suhrke, *Roads to Reconciliation* (Lanham, MD: Lexington Books, 2005), p. 149.

²⁷ See, for example, B. K. Dougherty, “Searching for Answers: Sierra Leone’s Truth and Reconciliation Commission,” *African Studies Quarterly* 8 (1) fall 2004 (unpaginated), available at <http://web.africa.ufl.edu/asq/v8/v8i1a3.htm>; and No Peace Without Justice, *Closing The Gap: The Role of Non-Judicial Mechanisms in Addressing Impunity*, forthcoming 2010, 113.

²⁸ The Government of Sierra Leone, in a briefing paper prepared for the Management Committee’s visit to Freetown prior to the signing of the Special Court Agreement in January 2002, advocated for the two institutions to define their relationship more formally in part to meet this objective; see www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html.

²⁹ Personal recollection by the author. Robin Vincent often described the SCSL as an important brick in the house that Sierra Leone was rebuilding, which strengthened and was reinforced by other bricks, like the Truth and Reconciliation Commission and the Peace-building Commission.

³⁰ W. Schabas, *op. cit.*, note 120.

too high. One of the warning flags raised by the Sierra Leonean experience is the need for the earliest possible articulation of goals and a careful matching of those goals to the potential capacity of transitional justice mechanisms and processes. A good relationship between various mechanisms is critical to the overall success.

Who are the Stakeholders in Transitional Justice?

In domestic justice processes, those who benefit from justice can be identified as the victim, who is the individual with a stake in receiving acknowledgment and redress, and society, which has a stake in strengthening the rule of law through a justice process. With transitional justice mechanisms, however, a far wider range of stakeholders is affected, both individually and collectively. This is well illustrated by a cursory examination of the constitutive instruments of transitional justice mechanisms. These refer to the fact that crimes under international law shock the conscience of humanity, the need to put an end to impunity for the perpetrators of large-scale or systematic abuses,³¹ providing redress for victims³² and addressing the public's right to know the truth.³³ The range of potential stakeholders extends to entire communities and countries, and each situation requires careful examination to identify who they are and how they could or should benefit from a transitional justice process.

The most obvious stakeholder is the population affected by the violations. The affected population could best be described as the primary stakeholder in any initiative set up to assist with working through that transition, yet was somewhat overlooked in the initial operations of the ad hoc tribunals for Rwanda and the former Yugoslavia. The role of the affected population as the primary

³¹ See, for example, the preamble to the Rome Statute for the International Criminal Court.

³² See, for example, the preamble to South Africa's *Promotion of Reconciliation and National Unity Act 1995*.

³³ See, for example, the Mexico Agreements establishing the El Salvadoran Truth Commission, signed at Mexico City 27 April 1991, at para. 2.

stakeholder has achieved greater recognition more recently, with an emphasis on the need to integrate outreach to affected populations within the standard operating procedures of transitional justice mechanisms and processes, most recently at the ICC.³⁴

Within the population going through the transitional period are several overlapping subgroups, each of which is a stakeholder in its own right, with specific perspectives and aspirations. Children have been recognized as a key subgroup, not only because they are the next generation, but also because they have specific perspectives on what has happened, as well as specific needs and rights, including the right to participate in processes affecting their lives, the right to redress and the right to access to justice. The participation of children requires greater effort on the part of those designing and operating transitional justice mechanisms and processes.

It is important to distinguish between girls and boys when considering the needs and aspirations of children and how to facilitate their rights. Their experiences are often different, given the different roles they are forced to perform and the different cultural norms and expectations they face as they attempt to reintegrate into society. The gender perspective of children, both in their experiences and perspectives and in how they can be supported as participants in transitional justice, needs to be addressed at the earliest possible stage. Similarly, specific attention is needed for other groups of children who may have particular needs, such as children who are orphaned, ill or have disabilities.

Another subgroup within affected populations is comprised of victims of violations, both direct victims and their families and other loved ones. There are specific obligations to victims as demonstrated, for example, in the United Nations Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of

³⁴ See, for example, *External Audit, Internal Audit, Programme Budget for 2007 and Related Documents*, ICC-ASP/5/32, 1 December 2006, para. 28; *Strengthening the International Criminal Court and the Assembly of States Parties*, Resolution ICC-ASP/6/Res.2, 14 December 2007, para 20 (*inter alia*); and the NGO Communications Team of the Coalition for the International Criminal Court, *Comments and Recommendations to the Seventh Session of the Assembly of States Parties*, 6 November 2008.

International Humanitarian Law. It asserts that victims of abuses have a right to prompt, adequate and effective reparation,³⁵ thereby implying a duty to ensure such reparations are undertaken.³⁶ Yet another subgroup is the country's political actors, who are often included because of their responsibility for negotiating the design of transitional justice mechanisms and implementing their outcomes, including through legislative measures. The main responsibility of political actors is to respond to the needs of others within society in a sustainable way and to protect their rights, including the rights of children. Political actors are often targeted during the pre-transitional period because of their positions,³⁷ thereby making them primary victims and important stakeholders in their own right.

Affected populations typically have numerous groups of stakeholders,³⁸ and a process of consultation with local

³⁵ The establishment of the Victims Trust Fund by States parties to the Rome Statute of the International Criminal Court to provide compensation for victims of crimes within the ICC's jurisdiction is an important affirmation of this duty.

³⁶ See, for example, D. Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in L. Henkin and J.L. Hargrove, eds., *Human Rights: An Agenda for the Next Century* (Washington DC: American Society of International Law, 1994), 425-426; H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford: Clarendon Press, 1996); and M. Minow, *Between Vengeance and Forgiveness* (Boston, Beacon Press, 1998).

³⁷ In Morocco, for example, it is estimated that the security forces were responsible for the "disappearance" of hundreds of political opponents. (P. Hazan. "Morocco: Betting on a Truth and Reconciliation Commission," USIP Special Report 165, July 2006, p. 2).

³⁸ While the affected population and its many subgroups are the primary stakeholders for transitional justice mechanisms and processes, a range of other actors also have a stake, as illustrated by the brief elaboration of some of the stated aims of transitional justice mechanisms. Depending on the country situation, additional stakeholders may also include neighboring countries or countries in the region, for example, due to the breakdown of a state into separate states (as happened in the former Yugoslavia), or because of the involvement of neighboring countries (such as Rwanda's involvement in the conflict in Uganda or Liberia's in the conflict in Sierra Leone) or in the interests of peace and stability in the region. Additional stakeholders can include foreign states with a particular political or economic interest in a specific country or the international community as a whole, for example, because a situation may represent a threat to international peace and security or the commission of serious crimes shocks the "conscience of humankind" and so every state has an interest in seeing them addressed.

communities, including children, is one of the most important prerequisites to identifying them and establishing their specific perspectives and needs. This can have as big an impact on the design and operation of transitional justice processes as the reasons for their establishment. For example, a village ritual of reconciliation might be an appropriate mechanism for individual victims and/or perpetrators, but it is unlikely to have much effect on a neighboring country that also has a stake in the transitional period and its outcome. There needs to be careful consideration of the potential beneficiaries of transitional justice to ensure that stakeholders are engaged appropriately and that mechanisms are established that meet the needs of all. Particular care is needed to ensure that the “voiceless,” including children and marginalized groups, are heard and taken into account.

What Transitional Justice Mechanisms or Processes Should be Employed?

Transitional justice is not the sum of the mechanisms adopted; rather, it is a process that assists stakeholders in moving through a transitional period so as to meet immediate and concrete goals, with a view to achieving broader aims of accountability and reform. As such, it is not enough to establish a criminal justice process and a truth commission and to dedicate a day of remembrance and healing, and then claim that transitional justice is done. These endeavors may meet the trappings of transitional justice – and if the aim is to say “something was done,” this may be all that is required – but the question of whether they will provide effective and efficient transitional justice is another matter altogether.

The question of what transitional justice mechanism(s) and/or process(es) to adopt will necessarily be shaped by the goals, the stakeholders, and the political, social and cultural contexts. The design of transitional justice mechanisms and processes should be creative enough to meet potentially competing aims and to avoid sending the wrong signals and messages, particularly to children. In Kenya, for example, one early response to the violations committed during the postelection violence in 2007 was to call for a truth and

reconciliation commission, possibly coupled with amnesties.³⁹ Without discussion of the goal of ending impunity for political violence, the talk about the choice of mechanism and how it should operate obscured any message that violence would no longer be acceptable as a tool to achieve political power in Kenya. Instead, such talk reinforced the message that violence might continue to be rewarded. This is particularly relevant to the children of today and to those who were children in 1992.⁴⁰ In the absence of accountability, the lesson from Kenya's election cycles is that violence is an acceptable tool to gain political power.

Clearly articulating goals – the “why” of transitional justice – is essential to avoid placing the transitional justice eggs in the wrong basket and to avoid weighing down any single mechanism with all the laudable goals of the transitional period. If the stated objective is to provide a forum for victims, including children, to participate as witnesses in a safe and protective environment and to document their experiences, a criminal justice mechanism alone is unlikely to achieve it. Fortunately, the possible mechanisms are numerous and diverse, including criminal trials, truth commissions, commissions of inquiry, restitution/reparations, national days of memory, public apologies, and museums or monuments to memory or peace. The approaches that could be adopted are limited only by the creativity of those involved in their designs and the question of how responsive they might be to the needs and aspirations of the affected communities, particularly children. In this respect, it is worth reiterating that consultation with local communities, including children and young people, will be one of the most important prerequisites both in establishing who the stakeholders are and in

³⁹ Author's personal observations and discussions with political and opinion leaders in Kenya, January to June 2008. See also, P. Opiyo and T. Too, “TJRC ‘Won't Recommend Amnesty’ for Major Poll Crimes,” *The Standard*, 25 May 2009; P. Basham, “How Should Kenya Confront the Past?,” *African Press International*, 21 March 2008.

⁴⁰ The 2007 postelection violence in Kenya was not the first use of violence as a tool for gaining political power; the same patterns and character of violence have occurred during every election cycle in Kenya since 1992. See Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence*, pp. 3 and 17, available at www.knchr.org/dmdocuments/KNCHR%20doc.pdf.

determining their needs and priorities. Children's views are essential to this process and to deciding whether one mechanism is better suited to their needs.

An additional question regarding the choice of approach relates to whether there is a need for official or state involvement. If the purpose is to provide official acknowledgment of past events, for example, then state involvement is critical, whether through a judicial or a nonjudicial mechanism or process. In Australia, indigenous and nonindigenous individuals and civil society groups had long recognized that a serious violation – possibly genocide – had been committed against Australia's Aboriginal people by the systematic removal of children from their families for placement with white families between 1869 and the 1970s.⁴¹ Yet recognition for the "Stolen Generations" only became official when the newly elected government issued an apology on 13 April 2008. This single act had a major impact on reconciliation between Australia's indigenous and other communities, an impact that was heightened because the previous government had officially refused to apologize for over a decade.⁴²

The involvement of the state is not always critical or even desirable. If the goal, for example, is to create a record of the past and to provide a forum in which victims can voice their stories, a civil society initiative might fully meet those aims. This will depend largely on the prevailing circumstances in the country and the strength of will of its political leaders. In Bahrain, a civil society process has been proposed to investigate incidents of torture committed over the past twenty-five years. The state has declined to

⁴¹ Australian Human Rights and Equal Opportunity Commission, "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families," April 1997; for a discussion on genocide, *see* part 4, chapter 13; *see also* the Reconciliation Network on the Stolen Generations, available at <http://reconciliation.org.au/nsw/education-kit/stolen-generations/>.

⁴² Remarks by Jack Beeton, indigenous Australian educator, at the Pacific Roundtable Discussion on Non-Judicial Accountability Mechanisms organized by No Peace Without Justice and the Fiji Women's Rights Movement in Nadi, Fiji, on 24-27 June 2008, available at www.npwj.org/No+Peace+Without+Justice/International+Criminal+Justice/ICJP+Activities/Fiji+Roundtable+2008.

commit time and resources to establishing such a process, although it seems quite willing to allow one led by civil society.⁴³ Similarly, NGO documentation efforts – including the establishment of archives, such as those in Cambodia and elsewhere – can help preserve information until a transitional justice process or mechanism can be established and can also help generate political will for it.

When Should Transitional Justice Take Place?

The question of when transitional justice mechanisms and processes should be established has recently been a very contentious issue, with particular importance for children. One of the most-asked questions in the “peace and justice debate” is whether justice should be pursued before or after cessation of hostilities. Many argue that, as a practical matter, transitional justice mechanisms cannot operate during armed conflict; others argue that peace is a more important imperative than justice, so efforts should be focused on achieving peace; and still others argue that thinking about transitional justice is unrealistic when those responsible for human rights violations are still in power. The risks and opportunities for children to participate vary.

Simplifying the question of “when” overlooks the potential role of transitional justice mechanisms and processes in facilitating the transition itself. The lull in fighting and the temporary reduction in criminal activity in Bosnia and Herzegovina in 1998 have been linked to the issuance of an indictment against President Slobodan Milošević by the International Criminal Tribunal for the former Yugoslavia. In contrast, the prosecutor’s announcement that she did not have the capacity to open investigations into crimes allegedly being committed in Kosovo may have been a factor in the continuation of violations there.⁴⁴

⁴³ Conversation by the author with members of Bahrain civil society, Manama, June 2007.

⁴⁴ Author’s discussions with former Bosnian officials, July 2003.

Categorical assertions as to whether transitional justice should take place before or after peace fail to take into account the complexities of any given situation. In the Sudan, for example, there is no consensus as to whether at any given time and place there is ongoing conflict or whether the situation is “pre-conflict” or “post-conflict.” Another example is Sierra Leone, where peace – or at least an absence of conflict – existed in pockets of the country as early as mid-2000, when the President requested the assistance of the international community to establish the Special Court for Sierra Leone, although the conflict did not officially end until January 2002.

The question of “when” to apply transitional justice typically elicits the response “as soon as possible.” If one goal is deterring crimes, including underage military recruitment, the best time to achieve deterrence may be while the crimes are ongoing, as happened in the Democratic Republic of the Congo.⁴⁵ If the goal is demonstrating that actions have consequences, a particularly important message for children, action is needed as soon as possible. If the goal is recording a collective history of what has happened or is happening, stories should be gathered from people without delay. If the goal is making individual perpetrators accountable for their violations, again the best time is when people’s memories are fresh about who did what, when and where. On the other hand, the passage of time may bring stability, allowing people to feel more comfortable discussing violations of the past. Thought should also be given to other processes, for example whether transitional justice should be pursued within the context of a disarmament, demobilization and reintegration process.

One very important issue regarding the timing of transitional justice mechanisms is the potential effect on children who are at a critical developmental stage when the violations are committed. The

⁴⁵ Recruitment of persons under age eighteen into the Congolese armed forces officially ended in 2003, the year following the entry into force of the Rome Statute, which criminalizes the conscription, enlistment or use of children under the age of fifteen to participate actively in hostilities. From 2005 the United Nations reported a reduction in child soldier recruitment and use by armed forces and groups; see www.childsoldiersglobalreport.org/content/congo-democratic-republic.

very public discussion of amnesties in Kenya while the violence was ongoing during the national election sent a message that violence to achieve political aims may be rewarded, which did little to help the deterrent effect produced by the involvement of the International Criminal Court. Of greater concern, however, is the fact that the next generation of Kenya's political leaders, many of whom are preparing to enter politics in 2012, have no example to follow other than the fact that violence before, during and after elections is an effective tool to gain political power. This will be the lasting message unless there is quick follow-up to the accountability efforts undertaken to date.⁴⁶

Where Should Transitional Justice Mechanisms or Processes Take Place?

The question of the location for transitional justice processes is usually an issue only when the international community, or possibly another state, is involved. If the pursuit of transitional justice is primarily a domestic effort, any mechanism or process is likely to be established in the country where the violations took place. For example, there was no question that any of the Latin American truth commissions would take place anywhere but in the countries themselves, and the same has held for Fiji, Morocco, Timor-Leste and other countries where the pursuit of transitional justice was a homegrown, home-led effort.

By contrast, when the international community is involved, the question of "where" may become a burning and sometimes contentious issue. The question of whether a transitional justice mechanism or process should be convened in the country where the violations were committed may not adequately take into account

⁴⁶ Namely, this follow-up acting on the documentation of violations that were carried out by the Kenya National Commission on Human Rights and No Peace Without Justice and the Commission of Inquiry into the Post-Election Violence (the Waki Commission). Both commissions recommended establishing a special tribunal and a truth commission for Kenya. At the time of this writing, the Kenya Truth, Justice and Reconciliation Commission had recently been established, a bill to establish a special tribunal had stalled in Kenya's Parliament, and the prosecutor of the ICC had filed a request to open an investigation into the situation in Kenya. As such, it is still too early to judge whether these measures will be successful.

considerations of why transitional justice is being pursued at all, or for whom. The answer may instead turn on issues of security, as was the case with the transfer of the trial of Charles Taylor from Freetown to The Hague and the establishment of the Special Tribunal for Lebanon, also in The Hague. This has been a challenge for the ICC, located in The Hague, which is seeking to strengthen its field presence.⁴⁷

The location of a transitional justice process will depend on why and for whom it is being pursued. If the objective is to provide redress for victims or an opportunity for affected populations, particularly children, to contribute to a shared history, the mechanism needs to be close at hand. Hosting a transitional justice process far from the place where crimes were committed decreases its effectiveness and efficiency, limits engagement and increases the cost. This is of particular relevance for children, whose ability to participate and follow what is happening falls dramatically with distance from the process. It is also important to keep in mind the relativity of distance; to children in Bunia, Democratic Republic of the Congo, the country's capital Kinshasa can seem as far away as The Hague.

This was one of the singular lessons learned by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone (particularly in relation to the trial of Charles Taylor) and the International Criminal Court. The cost of conducting work at a distance affects all aspects of the effort, including investigations, outreach, hearings and trials.⁴⁸ It slows the process, increases the financial burden and raises the psychological cost to witnesses, who have to travel to give testimony in an

⁴⁷ See, for example, remarks by ICC Registrar Silvana Arbia at the ICC's Fifteenth Diplomatic Briefing in The Hague on 7 April 2009, available at www2.icc-cpi.int/NR/rdonlyres/1E5F488B-2FA9-40F4-9378-A386AF6CBA6E/280246/Compilation_of_State-ments_15_DS.pdf, p. 11.

⁴⁸ For a more detailed look at the issue of international courts and their presence in the field, see No Peace Without Justice International Criminal Justice Policy Series No. 3, "The International Criminal Court's Field Presence," 23 November 2009, available from www.npwj.org.

unfamiliar environment far from their homes. This has a potentially severe impact on children, even when protection procedures are in place.

When the Government of Sierra Leone and the United Nations were considering the location of the Special Court, considerable weight was given to the aims of the Court and those for whom it was being established. In his letter to the United Nations Secretary-General of 12 June 2000, the then President of Sierra Leone highlighted the need for the Special Court to sit “on Sierra Leonean soil.”⁴⁹ The Security Council agreed implicitly, only requesting the Secretary-General to report back to them on “a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone.”⁵⁰ In his report on the establishment of the Court, then United Nations Secretary-General Kofi Annan said, “In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused.”⁵¹ The answer to the question of “where” was Sierra Leone itself, in the vicinity most affected by the crimes under investigation.

The questions of “why” and “for whom” should always guide those seeking an answer to the question of “where” transitional justice processes should be located. If the decision is nevertheless taken to locate the mechanism far from the stakeholders, additional efforts will be needed to ensure that it is able to meet the needs of all, especially those most affected by the transition. This can take place through sustained outreach efforts that engage affected

⁴⁹ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, p. 3.

⁵⁰ UN Security Council Resolution 1315 of 14 August 2000, UN Doc. S/RES/1315 (2000), at operative para. 7.

⁵¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, at para. 54.

populations, including children, or other methods that will be able to explain to affected populations what is happening and why.

How Can the Transitional Justice Mechanism or Process Meet its Goals?

A perfectly conceptualized and designed transitional justice system that fails to link the aims and the operational means of the mechanism can seriously compromise the ability of the entire system. If the means by which the mechanism operates fail to provide adequately for the protection of children, the mechanism will fail to engage their participation, reflect their perspectives and protect the exercise of their rights.

The *gacaca* courts of Rwanda provide a notable example of the potential pitfalls when there is a disconnect between the aims of transitional justice and the design of its delivery processes. These courts were established to promote reconciliation by implementing a massive, nationwide system of community “trials” for the large number of people, including several thousand children, awaiting trial for genocide in Rwanda’s courts. They evolved from traditional courts used to adjudicate disputes between families concerning marriage, property and personal injury. *Gacaca* courts were not used traditionally for serious crimes such as murder; however, the Rwandan Government decided to adapt them to provide some form of accountability for the hundreds of thousands of people held in detention throughout the country who could not be processed through the normal criminal courts. Despite the enthusiasm of the international community for local solutions to local problems, the *gacaca* system has been heavily criticized for failing to protect the rights of victims and perpetrators and for failing to achieve its stated aims of ending impunity and bringing reconciliation to Rwanda. Children were especially vulnerable, as *gacaca* courts did not comply with international juvenile justice standards, in particular the protection of the identity of children accused of having committed crimes.

One complication for the *gacaca* courts has been the political environment in which they have operated. The 2003 Constitution,

which states that the 1994 genocide was perpetrated, organized and supervised by “unworthy leaders,”⁵² provides that “revisionism, negationism and trivialisation of genocide are punishable by the law.”⁵³ While the 2003 Constitution is somewhat vague about whom the “unworthy” leaders might be, the official website of the Rwandan Government is very clear: among those responsible it lists former government and local officials, the *Interahamwe* and the Hutu in the general population,⁵⁴ while seeming to excuse the actions of the Rwandan Patriotic Front (RPF).

The *gacaca* courts also have no authority to deal with war crimes. As a result, crimes committed by the RPF were excluded from the process, which caused resentment of the *gacaca* process in areas where large numbers of RPF crimes were committed. While this is grounds for concern, as no members of the RPF have been held accountable for their crimes, the scale of crimes committed by each side is vastly different; the RPF had about twenty-five thousand to forty-five thousand victims as compared with more than ten times that number who were victims of the genocide.⁵⁵ Where a conflict results in an asymmetrical distribution of victims, transitional justice mechanisms and processes cannot simultaneously give equal weight to each victim and apportion equal responsibility to all parties to the conflict.

Additionally, the operation of the *gacaca* courts has left them vulnerable to criticisms of bias, corruption and incompetence as well as failing to protect due process rights and children’s rights more generally. Some of these criticisms have to do with operational issues, particularly related to corruption and incompetence, but the main problem is that the *gacaca* courts have scored very low marks

⁵² Constitution of Rwanda 2003, preambular paragraph 1.

⁵³ *Ibid.*, article 13.

⁵⁴ The official website of the Rwandan Government on Genocide: www.gov.rw/news.php?id_article=62.

⁵⁵ Human Rights Watch, “Rwanda: Tribunal’s Work Incomplete,” 17 August 2009, available at www.hrw.org/en/news/2009/08/17/rwanda-tribunal-s-work-incomplete.

for the “how” of transitional justice: defense rights are negligible; victims and witnesses have no protection; there are no rules of evidence and no guidance as to what is required to prove the elements of a crime; there are no legally trained judges or lawyers; there is no reference to the rule of law; and there are no special protections for children. Many Rwandans have felt distanced from the process and feel no more informed about *gacaca* than about trials at the International Criminal Tribunal.⁵⁶ These problems are largely due to a failure during decision-making to connect the goals of the courts with the operations to achieve those goals and a failure to consult with and engage the affected population. As a result, the *gacaca* courts have not reached the stated aim of reconciliation between the Hutu and Tutsi peoples.⁵⁷

The Special Court for Sierra Leone (SCSL) is an example of a transitional justice mechanism that has prioritized the “how” of its operations by reference to its goals. In terms of its political environment, post-conflict Sierra Leone grappled with corruption and nepotism. Many felt wary of this new institution, believing that it could prove to be a tool of those in power.⁵⁸ Both the Special Court itself and the Government of Sierra Leone responded to this potential challenge by consistently highlighting the independence of the SCSL. The Government took a hands-off approach, restating its commitment to cooperate with the SCSL and its determination that the SCSL would operate independently of the Government.⁵⁹

⁵⁶ T. Longman, “Justice at the Grassroots? Gacaca Trials in Rwanda” in N. Roht-Arriaza and J. Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century*, (Cambridge: Cambridge University Press, 2006), p. 209.

⁵⁷ L. Waldorf, “Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice,” *Temple Law Review* 79(1) Spring 2006, p. 74.

⁵⁸ Discussions by the author with civil society and members of the general public in Sierra Leone, 2000-2002.

⁵⁹ See, for example, the remarks of then Attorney-General Eke Hallway on the execution of the first arrest warrants by the Special Court on 10 March 2003, including against then Deputy Defence Minister Chief Samuel Hinga Norman, in which Mr. Hallway said, “The non-interference of the government in the decisions of the special court is clearly reflected in the indictment against prominent members of the government.” Available at www.sierra-

In implementing its mandate, the Special Court is notable among transitional justice mechanisms, particularly international judicial institutions, in its early decisions to engage with members of the local bar in developing its Rule of Procedure and Evidence;⁶⁰ to hire Sierra Leoneans at all levels; to engage children in its work, including through calling children as witnesses to speak from their own experiences and perspectives; and to implement a countrywide outreach program that specified children as a target group and developed child-friendly materials at an early stage.⁶¹ By taking care to consider how the Special Court would achieve its aims of ending impunity and providing justice for the victims of the crimes and by linking its operating methods with its goals, including securing the engagement and involvement of children, the Special Court created a transitional justice mechanism that is largely succeeding in achieving those goals.

The “how” of transitional justice yields numerous examples that are instructive both for how they have achieved their aims and how they have not. The Special Court for Sierra Leone and the *gacaca* courts in Rwanda demonstrate that it is not sufficient to take a model that has worked elsewhere and hope it will achieve the same results. While the Special Court succeeded in engaging children, before calling children as witnesses careful thought must be given to how to identify children who may benefit from participation in a court setting, how to manage and maintain the engagement of children who may find a court setting distressing and how to ensure that children are protected at all stages of the process. More careful consideration is required about the goals of its operations so as to achieve them.

leone.org/Archives/slnews0303.html.

⁶⁰ This consultation took the form of a Rules of Procedure and Evidence Seminar, organized on 3 December 2002 by No Peace Without Justice, the Sierra Leone Bar Association and the Special Court. For a report see www.specialcourt.org/Outreach/LegalProfession/RulesSeminarReport.html.

⁶¹ See www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx.

CONCLUSIONS

Children are among those most affected by conflict and other types of transition, whether as direct victims of underage recruitment or use in hostilities, sexual violence or other crimes, or because of displacement or indirect impacts. Because transitional justice processes will invariably affect the lives of children, they have a right to participate in those processes. This is both a matter of common sense and a legal right, as reflected in the Convention on the Rights of the Child.⁶²

The legal framework on crimes under international law and the framework on the rights of the child are reasonably solid, and there have been numerous examples of how a range of actors have attempted to provide justice during times of transition. There is a temptation to take the successful models and introduce them elsewhere. However, an examination of the basic assumptions of transitional justice and how they relate to children illustrates very clearly that the full package of what works in one place will almost certainly not work elsewhere, given the many variables and contexts within which transitional justice mechanisms operate. Wrong assumptions are especially risky in the case of children. There are few examples of mechanisms in which children have participated fully and satisfactorily, and fewer still of mechanisms that have from the start built in the needs, aspirations and specificities of children and how their rights might be exercised.

These risks can be mitigated if policy makers and decision makers articulate more clearly the aims of transitional justice and undertake a thorough investigation of how they can be met, consulting broadly with all potential stakeholders, including children. To do so, they need to take a step back and examine the building blocks of transitional justice, what it seeks to achieve and why it is important to include the perspectives of children. By articulating clearly the answers to these questions, transitional justice mechanisms and processes can build a solid framework for

⁶² See article 12(2) of the CRC.

realizing the hopes, aspirations and rights of those affected by transition, including children.

A particularly important provision in considering these issues is the legal requirement in article 3 of the CRC that “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.”⁶³ Those designing transitional justice mechanisms and processes must take into account, as a primary consideration, the best interests of the child. One way to achieve that is to ask, at every stage, how children’s participation can be promoted and protected. The answers will assist in the analysis of how to design and implement a transitional justice process that is in the best interests of the individual child and of children as a group.

Transitional justice approaches need to be tailored to meet specific situations, but this does not mean that transitional justice is a free-for-all. Basic principles govern how justice is to be administered, including principles related to the involvement and participation of children, and they apply equally during times of transition. The challenge is to implement them creatively and effectively. The investigative technique of the “six Ws” can provide a useful starting point.

By examining the constituent components of transitional justice, this chapter has outlined some common questions that need to be addressed when policy makers and decision makers are contemplating how a new or existing mechanism can effectively and safely engage children and serve their best interests. Adopting an analytical, bottom-up approach to designing transitional justice mechanisms and processes, and keeping a firm eye on the perspectives of children, is one key way in which to meet the expectations, aspirations and rights of children during and after a transitional period.

⁶³ Article 3(1) of the CRC.

CHAPTER 3

INTERNATIONAL CRIMINAL JUSTICE AND CHILD PROTECTION

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ See, for example, Article 4(3)(c) of Additional Protocol II provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."

¹⁰ Article 77 of Additional Protocol I.

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

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

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

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

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

¹⁴ Article 1 of the Optional Protocol.

¹⁵ Adopted in 1999.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and Matthieu Ngudjolo Chui.³⁰

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

Conscripting or Enlisting Children

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

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

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

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

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

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

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

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

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

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

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

How Many Crimes?

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

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

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

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

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

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

Participation of Children in Hostilities

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴³ Ibid., at para. 22.

⁴⁴ Ibid., at para. 25.

⁴⁵ Ibid., at para. 26.

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

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

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

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

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

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

Child-Specific International Crimes

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

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

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

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

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

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

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

“Generic” International Crimes Victimizing Children

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

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

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

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

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

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

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

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

⁵⁴ Preamble of the Statute of the ICC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

crimes committed against children in either Tribunal.⁷⁰

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

Sexual Crimes and Crimes Targeting Girls

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

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

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

⁷² *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸¹ *Ibid.*, para. 202.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹¹ *Ibid.*, at 578.

Agenda for Investigating and Prosecuting Crimes against Children

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

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

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

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

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

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

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

⁹² Article 2 of the CRC.

⁹³ Article 3 of the CRC.

⁹⁴ Article 6 of the CRC.

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

EXCLUDING CHILDREN FROM INTERNATIONAL PROSECUTIONS

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

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

⁹⁵ Article 12 of the CRC.

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

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

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

When Is a Child Too Young to be Tried?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁵ Article 26 of the Statute of the ICC.

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

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

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

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

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

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

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

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

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

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

¹¹¹ Ibid. para. 35.

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

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

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

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

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

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

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

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

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

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

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

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

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

Alternatives to Criminal Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 4

CHILDREN AND THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

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Archbishop Desmond Tutu, Chair of the South African Truth and Reconciliation Commission, speaking at the fourth annual Day of the African Child, declared by the Organization of African Unity in 1990 to commemorate the 1976 killing of children in Soweto, South Africa.

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INTRODUCTION

Children and young people invariably bear the brunt of hostilities and the instruments of repression that typify societies in conflict. Indeed, most of the gross violations of human rights during South Africa's apartheid period, as later reported to its Truth and Reconciliation Commission (TRC), were perpetrated against children and young people between the ages of thirteen and twenty-four. Children were both indirect victims and direct targets, as evidenced by the Umtata Raid documented by the TRC.

On 8 October 1993, a Special Forces Unit of the South African Defence Force (SADF) shot dead five sleeping children, including two twelve year-olds, in a failed raid on an alleged terrorist base in Umtata, the capital of the "independent homeland" of the Transkei. The operation had been authorized by then State President F. W. de Klerk and other members of the State Security Council in response to the escalation of attacks on white civilians by the Azanian People's Liberation Army, the armed wing of the Pan Africanist Congress. According to "intelligence reports," the house contained a weapons cache, yet no weapons have ever been produced.

The murder of five children, during an operation that was sanctioned by the former government, on the eve of finalizing the negotiated settlement, was a tragic illustration of how "normalized" state violations had become, even against minors. It also came at a time when the State was resolute in its denial of the existence of security force death squads. The TRC later found that:

...the killing of the five youths in the so-called Umtata Raid was a gross violation of human rights for which the former SSC [State Security Council] and the former SADF are held accountable. In particular, the Commission finds that the withdrawal of the reconnaissance team some eight hours before the operation meant that the SADF had no real way of knowing who was in the house at the time of the raid

and regards this as grossly negligent. The Commission further finds that the failure of the SADF to produce the weapons allegedly seized in the house for the independent forensic examination casts doubt on the existence of the said weapons.²

The TRC's mandate focused on gross violations of human rights – murder, disappearances, detentions, torture and assaults. However, repression in South Africa went beyond the blatant abuses of civil and political rights that characterized apartheid between 1960 and 1994; it also permeated most aspects of political, social, economic, cultural and linguistic life. Apartheid, in other words, was a full assault on the fundamental rights now enshrined in South Africa's Constitution, and the country's children were on the front line of these abusive policies and practices. For the most part, the Commission did little probing into these practices. As a result, the architecture of apartheid and its social, economic and political consequences were not adequately addressed.

Children and young people were directly engaged in the resistance and struggle against the apartheid government, and in many instances played a catalytic and leading role in these struggles. They were drawn, for instance, into the 1976 schools protests, the subsequent radicalism of the 1980s and the community governance and security structures that evolved during the 1980s and 1990s. Many children and young people participated in the activities of antiapartheid structures, including the more radical and confrontational actions. For some, this included direct involvement in self-defense units (SDUs)³ and other local community structures.

² Truth and Reconciliation Commission of South Africa Report [hereinafter TRC Final Report], Volume Two, Chapter Seven, "Political Violence in the Era of Negotiations and Transition 1990-1994," para. 85.

³ SDUs were established in many communities across the country, primarily by ANC structures, in the wake of the internecine violence that engulfed South Africa during the negotiation period. Established under the rubric of a defensive mandate, several SDU structures did play an overtly violent role and were responsible for a number of violations both against perceived enemies, but also within and among their own "support bases."

Young people often played a frontline role in protest and defensive actions and also were active in ensuring compliance with boycotts and other political directives. Their engagement calls for a deeper appreciation of the role of children and young people in political activity and the likelihood of their involvement as supporters, witnesses and perpetrators of violations.

Such activities made children and young people a primary target of the apartheid government and its security forces in efforts to maintain white minority rule. As a result, they suffered the consequences of the increasingly militarized and repressive policies employed by the National Party government to maintain its dominance. It is unclear how many children under the age of eighteen were affected, but it is known that between 1984 and 1986 alone, three hundred children were killed by the police, one thousand wounded, eleven thousand detained without trial, eighteen thousand arrested on charges arising out of protest and 173,000 held awaiting trial in police cells. Children constituted between 25 percent and 46 percent of detainees at any given time during this period.

Children were also indirectly affected as a consequence of actions taken by the State to maintain apartheid. This had acute repercussions not only within the country's borders but also across the southern Africa region, where South Africa's destabilization program contributed to devastating loss of life and economic destruction.

These experiences and their consequences were not examined in detail by South Africa's TRC,⁴ and it gave limited attention to the participation and protection of children in its processes. The Commission's policy was not to take testimony from children under the age of eighteen, reflecting advice given by child specialists. However, the Commission did convene special hearings that

⁴ With an initial mandate of two and one-half years from December 1995 when the Commissioners were appointed, the TRC submitted a "Final Report" (which was in fact an "interim report") in November 1998. The Amnesty Committee continued to hear matters until early 2002, and the TRC handed over the codicil to the final report, which provided details on the amnesty process, to President Thabo Mbeki in March 2003.

publicly examined the experience of children and young people. Children did not testify at these hearings, but their involvement set new international precedents in efforts by truth commissions to address issues surrounding children. The research briefs developed for the hearings on human rights violations across the country include regular references to children, as does the TRC's final report, which has a chapter on the special children's hearings. The Commission also developed recommendations specific to children and their needs.

In retrospect, it could be argued that the TRC should have given greater consideration to ensuring a more dedicated focus on the experiences and impacts of the multiple levels of violations against children, who were both direct and indirect victims of apartheid. This could have been done more systematically, which would have required identifying this objective and related processes during the planning stages of the Commission's work. However, the model adopted by the South African TRC drew heavily on experiences from Latin American commissions, where the overwhelming focus was on violations of civil and political rights, with a limited focus on children. The South African TRC therefore deserves credit for efforts that were made to give attention to children's issues.

The South African TRC retains a unique presence in the evolving field of transitional justice. As the first truth commission to conduct the bulk of its work in public and the only one with the power to grant amnesty to perpetrators, it has become a touchstone for other transitional justice processes and related comparative analyses. A closer examination of the Commission's work certainly provides a basis for many lessons learned, both positive and negative. As scholarship in the transitional justice field has continued to grow, it has been accompanied by a growing body of analysis about the South African process.⁵ Nevertheless, at the time,

⁵ See, for example, Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), hereinafter Posel and Simpson, *Commissioning the Past*; Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), hereinafter Wilson, *The Politics of Truth and Reconciliation*; Charles Villa Vicencio and Fanie Du Toit, eds.,

South Africa's process proved to be a remarkable step forward in terms of state-sponsored initiatives to promote accountability and truth recovery.

THE TRUTH AND RECONCILIATION COMMISSION AND CHILDREN

Mandate and Context

The TRC was mandated to uncover as much as possible about the conflict in South Africa between 1960 and 1994, through the lens of gross violations of human rights.⁶ Its working structure was based on three committees: the Amnesty Committee, the Reparation and Rehabilitation Committee and the Human Rights Violation Committee. In its first two years of operation, the public face of the Commission was the Human Rights Violation Committee. During this time, the Commission's Amnesty Committee received and began processing over seven thousand amnesty applications and instituted a hearing process that continued until 2002. Meanwhile, the Reparation and Rehabilitation Committee was responsible for developing policy recommendations on reparation and related concerns as they arose.

Using statement-taking, research, investigations and testimonial and inquisitorial hearings, the Commission's task was to identify the causes and effects of violence associated with repression and resistance; to establish and make known the fate and whereabouts of victims; to facilitate the granting of amnesty to perpetrators; to make recommendations about reparations and rehabilitation; and

Truth and Reconciliation in South Africa: 10 Years On (Cape Town: David Philip, 2006); Audrey Chapman and Hugo van der Merwe, *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008).

⁶ TRC Final Report, Volume One, Chapter Four, paras. 33-36.

to prepare a comprehensive report about the Commission's activities and findings.⁷

The National Unity and Reconciliation Act was passed under the interim 1993 Constitution, which makes specific commitments regarding the rights of children.⁸ The TRC's governing legislation, however, made no reference to children, women or gender as a focus of its mandate or in terms of methodology. Yet this silence did not preclude a focus on children as a subject, especially with respect to assessing the causes and effects of the violence and violations. Given the scale and complexity of the conflict and its multiple fault lines, it was evident that the Commission could not practically deal with all relevant issues. The TRC, which operated from 1995 to 2002, maintained its focus on taking statements related to the perpetration of gross violations of human rights and giving people an opportunity to testify in public hearings. The public hearings were convened by the Human Rights Violation Committee across the country between April 1996 and June 1997. In order to ensure that different sectors, institutions and themes received attention, the emphasis of the Human Rights Violation Committee shifted in 1996 to specific institutions and special hearings, which then included, among others, a particular focus on children and youth.

There is a growing body of literature on the significance of the TRC's limited mandate, given the violence and damage caused by structural aspects of apartheid governance.⁹ This has implications for how South Africa assesses some of its current challenges,

⁷ Promotion of National Unity and Reconciliation Act, No. 34 of 1995, Chapter 2, Section 3(2)(a-d).

⁸ See Section 30 of South Africa's interim Constitution, available at www.constitutional-court.org.za/site/constitution/english-web/interim/index.html.

⁹ See, for example, Mahmood Mandani, "The TRC and Justice," in Robert Dorsman, Hans Hartman and Lineke Noteboom-Kroenmeijer, eds., *Truth and Reconciliation in South Africa and the Netherlands* (Amsterdam: Netherlands Institute for Southern Africa, 1999); Graeme Simpson, *Tell No Lies, Claim No Easy Victories: A Brief Evaluation of South Africa's Truth and Reconciliation Commission*, in Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002); Wilson, *The Politics of Truth and Reconciliation*.

especially as they relate to issues of violence and exclusion and notions of accountability, responsibility and identity. Although the Commission attempted to ground the analysis of its “blood crime” focus (e.g., torture, assassination) in the broader context of apartheid policies, it did not mount a full investigation of apartheid and its broader institutional basis. Neither did it excavate the broad social and economic consequences of these policies, either for children specifically or for the general population.

This narrow definition of human rights violations effectively marginalized the forms of violation that most seriously affected a wider cross section of citizens, particularly children. Indeed, the thematic hearings on children and youth focused on issues of death, torture, disappearance and severe ill-treatment. It is critical, however, to appreciate these abuses within the broader context of apartheid’s victimization of children, which was much more pervasive and devastating in its everyday impact at family and community levels, as well as socially and economically.

An absence of engagement with structural, institutional and social aspects of violation and remedy also diverted the Commission and others from examining the roots, relationships and trajectories of violence with respect to past and contemporary manifestations. This is a significant omission, given the current level of violence in South Africa and the problems associated with addressing it. It is also an area of study requiring significantly more empirical research.¹⁰

Responding to advice from many children’s rights activists and professionals, the Commission decided not to take statements from children (anyone under the age of eighteen), which in turn meant that no children’s testimonies would be available for the public

¹⁰ See, for example, Graeme Simpson, “A Snake Gives Birth to a Snake: Politics and Crime in the Transition to Democracy in South Africa,” in B. Dixon and E. van der Spuy, eds., *Justice Gained? Crime and Crime Control in South Africa’s Transition* (Cape Town: Juta Academic Publishers, 2004), available at www.csvr.org.za/docs/crime/snake.pdf. Another important set of studies is the “Violence in Transition” series undertaken by the Centre for the Study of Violence between 2002 and 2008. A series of reports relating to, among other things, vigilante/revenge violence, ex-combatants and xenophobia were produced and are available on the publications section of the CSVr website, available at www.csvr.org.za.

hearing process.¹¹ This automatically removed any immediate need to give special attention to the difficulties associated with securing children's testimony. Under the circumstances, this may have been unavoidable, but to a certain extent it marginalized the direct participation of children and thereby children's voices.

Many of the violations perpetrated during the TRC focus period took place at a time when the victims/survivors were children, but the opportunity to testify before the Commission arose when they were adults. The bulk of violations reported to the Commission covered the most violent period of the conflict, 1990 to 1994. In 1996, when the Commission began its hearings, testimonies from this period included potential deponents who were still minors, yet could have testified about incidents in the previous six years. Many children who were direct and indirect victims of violence during this period were also barred from submitting statements.

The largest category of victims reported to the Commission were ages thirteen to twenty-four, and those ages thirteen to eighteen suffered as much as those ages nineteen to twenty-four.¹² It is not clear how many nineteen to twenty-four-year-olds actually testified, as numerous violations against them were reported by other family members, especially female relatives. Indeed, many of that age group who were affected chose not to testify for reasons that have yet to be confirmed. A number of young activists chose not to engage with the Commission because they felt their participation would facilitate impunity for state perpetrators and would serve to equate their struggle for justice with the repressive actions of the security forces.¹³

¹¹ Interview with Yasmin Sooka, former TRC Commissioner, 15 January 2009.

¹² TRC Final Report, Volume Four, Chapter Nine, para. 47.

¹³ Source: author conversations. In many respects this "boycott" reflects a failure of both the political leadership and the TRC to secure adequate political buy-in at a local level and to ensure that there was adequate information available through outreach and socialization processes to address such concerns. Having said that, members and supporters of the liberation movements were numerically the largest groupings to engage both the Human Rights Violation and Amnesty Committees.

Methodology

Despite numerous academic texts on the work of the South African TRC, virtually no attention has been given to how the Commission addressed the issue of children's participation in its processes. This appears to reflect the dearth of available information and the limited actions taken by the TRC with regard to children. As such, this chapter focuses on a detailed review of the Commission's seven-volume report as it addresses the involvement of children and youth, as well as public testimonies available on the TRC website.

INTERNATIONAL STANDARDS

South Africa's Bill of Rights (1996) contains specific provisions protecting the rights of children. Unprecedented at the time, it followed the government's ratification of the Convention on the Rights of the Child (CRC). Also in 1996, South Africa became a party to the African Charter on the Rights and Welfare of the Child (ACRWC), which, like the CRC, recognizes the child as a subject of civil, political, economic, social and cultural rights.

The TRC's focus on gross violations of human rights emphasized "bodily integrity rights." These include the right to life; to be free from torture; to be free from cruel, inhuman or degrading treatment or punishment; and to freedom and security of person, including freedom from abduction and arbitrary and prolonged detention.¹⁴ Although neither the TRC's governing legislation nor its final report (and subsequent codicil) specifically mention the CRC or the ACRWC, there is an implicit endorsement of the international position that children and young people¹⁵ under age

¹⁴ TRC Final Report, Volume One, Chapter Four, para. 56.

¹⁵ The category "young people" is defined as ages fifteen to twenty-four, while "youth" includes individuals into their thirties. Although the TRC referred to its hearings as "children and youth" hearings, technically they referred to children and young people.

eighteen are entitled to special protection in their engagement with government and society.¹⁶

The CRC and ACRWC incorporate fundamental principles for working with children. These are the following:

- In all actions concerning children, the best interests of the child shall be a primary consideration;
- Children have the right to participate at all levels of society and are to be provided with the opportunity to express themselves;
- Children have the right to expect their civil, political, economic, social and cultural rights to be adequately protected to ensure their survival and development;
- Children should never be subjected to discrimination of any kind.

The absence of a discussion on how the TRC would address the issue of children's participation and related protection considerations understandably raises questions about the extent to which the Commission was able to adhere to these principles in its processes. This has yet to be fully evaluated, although it is evident that the Commission sought expert advice that informed its response to issues that concerned children. While more attention could have been given to children in the working methodologies, thereby "mainstreaming" the principles raised above from the start, the convening of special hearings for children was groundbreaking at that time.

A debate arose during preparation of the special hearings on children and young people as to whether or not children under the age of eighteen should appear and testify. The TRC had already taken the unprecedented step of holding many of its other hearings in public, but conventional wisdom among the experts consulted by the Commission held that the formal structure of the hearings might intimidate children and subject them to additional trauma. The Commission held a series of meetings and workshops to

¹⁶ TRC Final Report, Volume Five, Chapter Six, para. 159.

discuss this and related issues. It sought the opinions of international organizations such as UNICEF and over thirty South African non-governmental organizations (NGOs) working with children and young people.

Relying on the advice of NGOs working with children and child welfare professionals who argued that this was in the best interests of the child, the Commission made a decision that persons below age eighteen would not testify. The Commission accepted the recommendation that these professionals should testify on behalf of children. The Commission did, however, make extensive efforts to involve children directly in the hearings and in data collection.¹⁷

The TRC relied heavily on human rights and legal standards to support and legitimize its findings and recommendations. The codicil to the final report, released in March 2003, dedicated a further chapter to “The legal framework within which the Commission made findings in the context of international law.”¹⁸ Additional detail was provided on applying international law to findings made with respect to holding the State and the ANC accountable, as well as on command responsibility and complicity.¹⁹

THE INVOLVEMENT OF CHILDREN IN TRC PROCEEDINGS

Despite the lack of direct participation by children in the TRC’s hearings on human rights violations, the Commission soon realized that the experiences of children and young people necessitated specific attention, given the number of cases in which children were involved and/or affected and what was revealed in statements from

¹⁷ TRC Final Report, Volume Four, Chapter Nine, para. 7.

¹⁸ TRC Final Report, Volume Six, Section Five, Chapter One.

¹⁹ TRC Final Report, Volume Six, Section Five, Chapters Two and Three.

relatives, in particular from the mothers of affected children. As a result, the Commission held “children and youth” hearings.

Special Hearings on Children and Youth

Limited public information or documentation is available about the background and genesis of the children and youth hearings convened by each of the Commission’s four regional offices. The preparatory work for these hearings was driven by the Commission’s Reparations Committee and was not mainstreamed into the primary work of the Commission.²⁰

The Commission’s Human Rights Violation Committee convened six special hearings on the experience of children and young people; these took place in Bloemfontein, Cape Town, Durban, East London, Johannesburg and Pietersburg in May and June 1997. Children did not testify at the hearings, consistent with the earlier decision. At the time there was no precedent for facilitating children’s direct testimony and no policy or procedures established to protect children in such proceedings.

The hearings were well attended, although concerns were raised in the Durban process, for example, about the absence of adults as witnesses. In his opening remarks at that hearing, Professor Smangele Mangwaza, a member of the Reparations and Rehabilitation Committee, said, “The big question which I would like to ask today is where are the adults today? We know we have

²⁰ Very little secondary research has been written on the subject of children and the TRC, and during the course of research for this chapter, no specific reports focusing on children and the South African TRC were identified. This situation is further exacerbated by restricted access to TRC archives, which remain largely unprocessed and inaccessible, although some documentation has become available through the utilization of South Africa’s Promotion of Access to Information Act. *See also*, Kate Allen, ed., *Paper Wars: Access to Information in South Africa* (Johannesburg: Witwatersrand University Press, 2009). The TRC website (www.justice.gov.za/trc) provides transcripts from a number of HRV and Amnesty processes, although transcripts from the “Children and Youth” Hearings are only available for Johannesburg, Durban and Pietersburg (see section on “Special Hearings”). Only a handful of documents relating to children and the TRC are currently accessible on the *Traces of Truth* website (<http://truth.wvl.wits.ac.za>).

had previous hearings, and the adults have filled the hall. Why are the adults not here today? Is it because children are not important enough to them? That's a big question which I am asking today."²¹ Most of those who testified were youth, aged eighteen or older. A number of children attended and participated in cultural and dramatic arts presentations that were undertaken in parallel with the testimonial process. Participants were invited to tell their stories of involvement in the liberation struggle and about things that had happened to them and their families.

According to the National Child Rights Committee (NCRC), a South African NGO, it was "imperative that the trauma inflicted on children and young people be heard and shared within the framework of the healing ethos of the Commission. Recognition of the inhumanity of apartheid was seen as a crucial step toward establishing a human rights framework for children and young people in order to ensure that they be given the opportunity to participate fully in South Africa's new democratic institutions."²²

The hearings attempted to examine how children had been affected and to recognize the trauma they had experienced and the broader challenge of tackling this legacy. As Professor Mangwaza stated at the Durban hearing:

Sometimes we fail to notice trauma in our own children. At other times we don't even believe that children can grieve and mourn if they lose their parents and care-givers.... They might not even have skills to communicate their trauma. How many times have we seen sad eyes locked in frozen expressions, but being unable to express themselves? Children do suffer in silence.

²¹ South African Truth and Reconciliation Commission, Children and Youth Hearing held at Durban on 14 May 1997, <http://www.justice.gov.za/trc/special/children/youthdbn.htm>.

²² Taken from the National Child Rights Committee's contribution to "Initial Reports of States Parties due in 1997: South Africa," 22 May 1999. CRC/C/51/Add.2. (State Party Report), para. 492.

We, as adults, sometimes keep a conspiracy of silence around the suffering of children because it's too painful for us to deal with it, or simply because we don't have skills. But if we, as adults, cannot face the suffering of children, how are we going to help them to heal and forgive?...Yet despite all that pain and suffering our children here are very resilient and strong.... They represent South Africa's most critical national asset, therefore today we want to share their invaluable experiences, and we would like to hear their voices.²³

For many, the situation worsened during the negotiations period between 1990 and 1994, as internecine fighting turned some communities into virtual war zones, with particular consequences for children. This was set out in a submission by a former SDU member from the township of Katlehong in the violence-wracked East Rand area of the Witwatersrand:

Whether you were involved in defence or not, the violence affected you. It was not unknown for children attending nursery schools or creches to find a body near their jungle gym or swings. Hostel inmates and SDUs took potshots at each other across school yards. Children were not spared the horror. Schooling in the area came to a complete standstill.... It may be argued in conclusion that far from being a bunch of undisciplined comrades or the lost generation, SDUs were in many ways the backbone of defence in Katorus. If it were not for them, many of us would not be sitting here today. It is clear even from this brief submission

²³ Comments from Mr. Smangele Mangwaza, a member of the Reparations and Rehabilitation Committee at the opening of the Children and Youth Hearings convened at Durban on 14 May 1997, available at www.justice.gov.ca/trc/special/children/youthdbn.htm (accessed on 6 January 2010).

that youth involved in SDU activities have suffered a loss that can never be replaced, their childhood.²⁴

In addition, the TRC identified the impact of exile on children and youth as a concrete issue requiring further attention.²⁵ Some testified about specific experiences of abuse in African National Congress (ANC) camps.²⁶ The Commission wanted to document children's experiences and explore the effects of exposure to abuse. This entailed recognition of the "structural violence" that characterized apartheid, the inequalities and poverty that compounded the situation, and the experience of those caught up in the vortex of repression and resistance.²⁷ Indeed, apartheid policies exacerbated unstable and violent conditions in many parts of the country. The Commission found that children and young people were exposed to three kinds of violence: state oppression, counter-violence and community violence.²⁸

The TRC itself was concerned that its public-hearing processes focused too narrowly on the consequences of human rights violations, not allowing for a more rounded assessment of how children and young people had engaged with and responded to violence. This meant that children and young people's positive experiences of survival and resistance were not explored, neither was their involvement as perpetrators of violence and the complex relationship between victimhood and perpetration. Although a

²⁴ Testimony of George Ndlozi on the second day of the "Johannesburg Children's Hearings," 12 June 1997, available at www.justice.gov.za/trc/special/children/ndlozi.htm (accessed on 6 January 2010).

²⁵ TRC Final Report, Volume Four, Chapter Nine, para. 78.

²⁶ See, for example, the testimony of Anthon Thomazile Ntoni at the hearings in Athlone, Cape Town, on 22 May 1997, available at www.justice.gov.za/trc/special/children/ntoni.htm (accessed on 6 January 2010).

²⁷ TRC Final Report, Volume Four, Chapter Nine, para. 11.

²⁸ *Ibid.*, para. 18.

certain amount of documentation of youth involvement in violence was theoretically available from state sources such as the security forces, the Commission did not explore this archival material. In addition, human rights NGOs tended to focus on children and young people as victims of state repression, rather than on their involvement as bystanders and as perpetrators. As such, the TRC's hearings tended to focus on certain aspects of children and young people's exposure to violence. Yet the majority of people who came to the hearings spoke more broadly about experiences of hardship, pain and suffering, while also providing testimony about the bravery and enthusiasm of young people.

The Commission provided an opportunity for people to release some of the hurt they had been carrying silently for years. While many of the testimonies and statements referred only to the generally negative consequences of repression in the period under review, there was also recognition of the largely positive role that children and young people played in the country's liberation.²⁹

State Oppression

Children and young people were inevitably both pushed and pulled toward engagement with the growing resistance movement. This often took place under the rubric of youth and student structures, such as the South African Students' Organisation and the Congress of South African Students. In some cases, this led to involvement with more militant groups and direct participation in violent acts, although the bulk of student activity was nonviolent in nature.

In response to this "threat," the security police established specific sections to investigate and collect intelligence on these formations. As repression intensified, children and young people "became the primary targets of detention, torture, bannings, assassination and harassment."³⁰ Contemporaneous data collection by NGOs such as the Black Sash and the Detainee Parent Support

²⁹ TRC Final Report, Volume Four, Chapter Nine, para. 87.

³⁰ *Ibid.*, para. 16.

Committee gave basic paralegal assistance to the under-resourced legal infrastructure assisting those detained and charged. It was financed predominantly from outside the country. Such interventions helped to temper and expose some of the worst excesses of the security establishment and provided empirical data for international organizations that were taking an increasing interest in the effects on children.³¹ They also provided statistics about the numbers affected. According to the Human Rights Commission, an independent human rights NGO, approximately fifty thousand children were charged and taken to court between 1960 and 1989.³² Thousands more were subjected to the increasingly draconian detention laws.

“Thousands of children, some as young as seven years old, were arrested and detained in terms of South Africa’s sweeping security and criminal legislation,” the report said. “Sometimes, entire schools were arrested *en masse*.”³³ All available figures indicate that the largest number of children and young people were detained between 1985 and 1989, during the two states of emergency. Of eighty thousand detainees, forty-eight thousand were under the age of twenty-five.³⁴

In detention, children and young people were invariably subjected to abusive treatment, including torture. Of the cases reported to the TRC, mostly young men were affected.³⁵ This largely corroborated allegations leveled at the apartheid government in

³¹ See, for example, Lawyers Committee for Human Rights, *The War Against Children: South Africa’s Youngest Victims* (New York: Human Rights First, 1986), hereinafter Lawyers Committee for Human Rights, *The War Against Children*.

³² Testimony of Audrey Coleman (of the Detainees Parent Support Committee) at the “Johannesburg Children’s Hearings,” 12 June 1997, available at www.justice.gov.za/trc/special/children/acoleman.htm (accessed 6 January 2010).

³³ TRC Final Report, Volume Four, Chapter Nine, para. 54, citing D. Scott, “Submission on Children and Youth,” 1997. Original source: Lawyers Committee for Human Rights, *The War against Children*.

³⁴ *Ibid.*, para. 55.

³⁵ *Ibid.*, para. 62.

September 1987 during an international conference convened in Harare, titled “Children, Repression and the Law in Apartheid South Africa.” The seminal conference demonstrated the brutality of apartheid through the experiences of South African children. It also provided an opportunity for the anti-apartheid movement and its primary political arm, the African National Congress (ANC), to profile the impact of Pretoria’s policies across the region. As ANC President Oliver Tambo noted:

We are meeting here to discuss the situation of children in apartheid South Africa. As we discuss this issue, we should not forget the similar plight of children in Namibia who, in addition, are forcibly recruited into the army of occupation, corrupted into joining the various terror gangs and forced to serve as prostitutes to satisfy the animal needs of the army of terror. Neither should we, overwhelmed by the harrowing stories that describe the abuse of children in South Africa, ignore the plight of millions of children throughout southern Africa who are also dying in unimaginable numbers, thanks to the criminal campaign of destabilisation and aggression carried out by the Pretoria regime and its surrogate puppet groups.³⁶

Children and young people were also subject to post-detention restrictions.

Upon release from prison, many young people were subjected to bannings and other restriction orders, turning the young person’s home into another kind of prison. They were forced to report to police stations once a day and were prevented from participating in political and social activities.³⁷

³⁶ Oliver Tambo, “Speech at the International Conference on ‘Children, Repression, and the Law in Apartheid South Africa,” Harare, 24 September 1987, available at www.anc.org.za/ancdocs/history/or/or87-19.html (accessed on 6 January 2010).

³⁷ TRC Final Report, Volume Four, Chapter Nine, para. 60.

Counter-Violence

The escalating conflict and deteriorating conditions in South Africa were also reflected in the evolving militarization of both black and white youth, despite their vastly different experiences. Many thousands of black youth left the country, especially in the wake of the 1976 Soweto school uprisings and the insurgencies of the mid-1980s. While this obviously included some under the age of eighteen, most were older and therefore could not be classified as children; technically they fell in the category of young people (under age twenty-four).

Most young people, however, remained in South Africa, and a number became engaged in organized resistance. Some joined the fight through nascent MK units,³⁸ where they received clandestine training. Command and control over such units was limited, which resulted in a number of incidents that fell outside the operational jurisdiction of the ANC.³⁹ Several events recorded by the Commission also revealed infiltration by security forces and “false flag” operations⁴⁰ that resulted in the death and maiming of young men who thought they were being recruited into liberation movement structures but were in fact being “recruited” by security force agents.⁴¹

³⁸ MK is the abbreviation of Umkhonto we Sizwe (The Spear of the Nation), the military wing of the ANC.

³⁹ See the set of questions provided to the ANC by the TRC after the first party political hearings, available at www.justice.gov.za/trc/submit/q_anc; the ANC's second submission to the TRC, available at www.justice.gov.za/trc/submit/anc2; and the transcript of the submission and question and answer session convened on 12 May 1997, available at www.justice.gov.za/trc/special/party2/anc2 (accessed on 6 January 2010).

⁴⁰ These terror operations were conducted by the security forces and were intended to give the appearance of having been carried out by “terrorist” elements from the armed formations of the liberation movements. The extent of these operations remains unknown.

⁴¹ This included, for example, the murders of the “KwaNdebele 9” and the “Niedverdiend 10” who were young men between fourteen and nineteen years old who were killed in joint military/security police operations in 1986. See TRC Final Report Volume Two, Chapter Three, paras. 411–416.

In the late 1980s and particularly the early 1990s, increasing numbers of youth were recruited into self-defense and self-protection⁴² structures, especially in KwaZulu-Natal and in the province now known as Gauteng. Some of them became actively involved in violent conflict with security forces and opposing “political” forces. Some details of these experiences were provided at amnesty hearings of former members of SDUs.

The TRC’s special hearings for children and youth did not examine in great detail the involvement of children in militarized structures linked to the liberation movements. It could be argued that significant opportunities were missed to develop an understanding of children and youth as agents and perpetrators. This aspect is crucial in terms of developing recommendations to rehabilitate and reintegrate those affected back into communities and in establishing a more nuanced understanding of the violence and contributing factors.

Young white people were also affected, as the government’s “Total Strategy”⁴³ required an increasingly militarized response to political, economic and social realities. The TRC conducted special hearings on compulsory military service that touched on experiences of young white males who were drafted, some as young as seventeen, but the hearings did not distinguish between those over or under the age of eighteen.

Violence in Communities

While the children and youth special hearings did not explore violence within and between communities in depth, the TRC documented the conflict between the African National Congress, the United Democratic Front and the Inkatha Freedom Party (IFP). The TRC struggled to develop a comprehensive overview of the

⁴² Self Protection Units (SPUs) were established by the Zulu-dominated Inkatha movement (later the Inkatha Freedom Party), as a counterforce to ANC-aligned SDUs in the early 1990s.

⁴³ The “Total Strategy” was the government’s policy response in the late 1970s to what it described as a “Total Onslaught” from communist and revolutionary forces against it.

temporal and spatial manifestations of these conflicts and to come to terms with their core dynamics. In addition, the Commission addressed the role of vigilante groups, which acted as surrogates for the government security forces and worked to counter radical community elements, especially youth. “Many vigilante attacks were rooted in intergenerational conflicts,” the report noted. “Some men saw the dramatic surge of women and youth to political prominence as a threat to the patriarchal hierarchies of age and gender. Young people were perceived to be undermining the supremacy of traditional leaders who saw it as their duty to restrain them. Vigilantes mobilized around slogans such as ‘discipline the children’ and frequently described themselves as ‘fathers.’”⁴⁴

In addition, the Commission conducted a thorough investigation into the activities of the Mandela United Football Club, which operated from the Mandela family home in the late 1980s and involved mainly young people and certainly some children. During the mid- to late 1980s, a number of young people associated with Winnie Madikizela-Mandela’s household were implicated as perpetrators of violent crimes, under the guise of “discipline.” Many young people were also victims of these actions, including the fourteen-year-old activist Stompie Seipei, who was murdered in a vicious assault.⁴⁵

The genesis and evolution of most inter- and intra-community violence, as well as their importance for children and youth, were largely absent from TRC inquiry and analysis, and they remain a significant component of the Commission’s unfinished business. Indeed, it can be argued that such limitations have hampered understanding of the multidimensional nature of violence and its relationship to the alienation that continues to affect many black youth in South Africa. This profound drawback has been compounded by representing violence and conflict as political in the pre-1994 era and as criminal in the post-1994 era. This masks aspects of what actually transpired in terms of the politicization of crime and the criminalization of politics.

⁴⁴ TRC Final Report, Volume Four, Chapter Nine, paras. 30 and 31.

⁴⁵ TRC Final Report, Volume Two, Chapter Six (f) at 570.

Self-Defense Units

Detail about the activities of the SDUs came from several sources. A number of incidents were included in testimonies recorded by the Human Rights Violation Committee and in the powerful testimony of one former SDU member in the Johannesburg children and youth special hearings.⁴⁶

The bulk of this information, however, was provided in amnesty applications and hearings. Most of these involved SDU structures in the township conurbation of Katorus (Katlhong, Tokoza and Vosloorus), which became an epicenter of post-1990 violence. Many of the SDU members voluntarily applied for amnesty, while some who came forward had been imprisoned or faced criminal investigations. Others came forward simply because their comrades had. As the Commission itself concluded, some applications “did not, strictly speaking, require a hearing, but were ultimately heard to ensure that the Committee obtained a complete account of SDU activities.”⁴⁷

Most of the SDU amnesty cases related to the violence of the early 1990s, when such units proliferated. However, the Commission received some information from the 1980s period during the Cape Town children and youth hearings. The Bonteheuwel Military Wing (BMW),⁴⁸ formed in 1985, was an earlier example of a coordinated armed response, involving primarily youth aged fourteen to eighteen. Its goal was to render the Coloured community of Bonteheuwel ungovernable and to hit out at state organs. It became increasingly militant, operating as a paramilitary structure independent of the United Democratic Front.⁴⁹ After forging links with MK, it was brutally crushed by

⁴⁶ See testimony of George Ndlozi, available at www.justice.gov.za/trc/special/children/ndlozi.htm.

⁴⁷ TRC Final Report, Volume Six, Section One, Chapter Three, para. 14.

⁴⁸ TRC Final Report, Volume Four, Chapter Nine, Appendix on the BMW in the Chapter on Children and Youth.

⁴⁹ The United Democratic Front was launched in 1983 and at its peak had over six hundred

security force clampdowns. Several former members testified about their treatment in detention, and families testified about the murder of combatant relatives.⁵⁰ Less attention was given to BMW members' own involvement and complicity in acts of violence and retribution.

The Katorus SDU amnesty applications were heard by two of the six amnesty committees, and it was agreed that efforts would be made to develop a broader contextual understanding of the situation in the affected communities. This was a unique departure from the individualized process that characterized all of the other hearings. It also allowed for testimonies of non-governmental workers who had been involved in monitoring the violence, as well as the ANC, which had also made specific representations.

Many of the SDU amnesty applications came from persons seeking early release from incarceration, while others were persuaded to engage in the process by community activists, especially from the East Rand township of Tokoza.⁵¹ In its final report, the Amnesty Committee noted that a number of applications were refused, and the cases of applicants who claimed they had been falsely convicted were theoretically returned to the courts. The irony of releasing those claiming guilt while keeping in prison those who claimed innocence was not lost on the Committee.

Although all the applicants were adults when they applied for amnesty, many had been children or young people at the time of the incidents, yet the Committee's report is silent on whether any effort was made to accommodate that fact. As in other amnesty hearings, testimonies and questioning focused on establishing whether the

affiliate organizations. It was widely regarded as the internal front of the ANC.

⁵⁰ TRC Final Report, Volume Three, Chapter Five, paras. 309-322.

⁵¹ Although the Amnesty Committee felt that SDU applications did not reflect the "full scope of SDU activity," the support of local political leadership in the township of Tokoza resulted in approximately two hundred SDU members from this community applying for amnesty. According to the Committee, "Most had never been charged and were motivated by an appeal to their sense of political duty and the national imperative for reconciliation" (TRC Report, Volume Six, Section Three, Chapter Two, para. 21).

application fulfilled the official criteria.⁵² These were applied somewhat unevenly, and the Amnesty Committee did not base its decisions on precedent or international legal guidelines, despite its quasi-judicial *modus operandi*.

Indeed, Amnesty Committee members had not been selected based on their particular skills, experience or knowledge of international law and transitional justice. Consequently, they did not reflect on many issues, such as the gendered dimensions of the conflict; the involvement of children, young people and youth; or developments in international law pertaining to children. In spite of this, and often because SDU applicants did not receive legal advice on crafting their applications, the amnesty applications and testimonies revealed some of the richest content informing the understanding of violence and related underlying struggles from the 1990s period.

Yet the somewhat artificial dichotomy between crime and violence imposed on the process also deterred some people from coming forward.⁵³ It is important to remember that most amnesty applications and testimonies were essentially contrived to fit amnesty criteria. As such, they are likely to have had a politicized veneer and a selective reflection on the incidents and contexts under scrutiny. Information generated through the TRC processes should therefore not automatically be accepted as capturing the full picture of what has transpired around specific violations.

⁵² TRC Final Report, Volume Six, Appendix 6, Chapter Three, paras. 26-41.

⁵³ See, for example, Vanessa Baolsky, *Transitioning out of Violence: Snapshots from Katorus* (Violence and Transition Project, Centre for the Study of Violence and Reconciliation, 2005), available at www.csvr.org.za/wits/papers/papvtp11.pdf (accessed on 6 January 2010).

STRATEGIES FOR CHILDREN'S PARTICIPATION

Apart from the six special hearings on children, no specific strategies were developed to support children's participation, yet children's experiences were recorded in various ways. Indeed, background documents prepared by the TRC's research unit for community hearings invariably referred to both specific and more general issues that had affected children.⁵⁴ The impact of violations on children was also mentioned in most public hearings⁵⁵ as well as specialized hearings (such as those of faith communities, prisons, businesses and women). Many parents testified on behalf of their children. In fact, many women testified not about violations they had experienced, but rather about those committed against others, notably their fathers, sons and brothers.⁵⁶

Children and Youth Hearings

Unlike other specialized hearings, the children and youth hearings were the specific responsibility of the Reparation and Rehabilitation Committee. Relevant commissioners, committee members and staff participated in planning, preparing and conducting them. According to the TRC final report, several NGOs were also involved in the hearing preparatory processes,⁵⁷ although it provides no detail.⁵⁸

Internal TRC documents secured by the South African History Archive show that preparations for children and youth hearings

⁵⁴ See examples of background documents prepared for hearings, available in the Laura Pollectut and CSVr Collections on the *Traces of Truth* website, <http://truth.wvl.wits.ac.za>.

⁵⁵ See, for example, the synopses of cases heard at various public hearings in the Eastern Cape in reports compiled by Janet Cherry (a TRC researcher), available in the Janet Cherry Collection on the *Traces of Truth* Website, available at <http://truth.wvl.wits.ac.za>.

⁵⁶ TRC Final Report, Volume Four, Chapter Nine, para. 48.

⁵⁷ TRC Final Report, Volume One, Chapter Eleven, para. 24.

⁵⁸ TRC Final Report, Volume Four, Chapter Nine, para. 2.

began in 1996. National consultative workshops, convened in September 1996 and February 1997, subsequently fed into the work of an internal TRC task team established to facilitate the process. The September 1996 workshop focused on the physical, psychological and social aspects that affected children in the South African conflict. Child rights activist Graça Machel, author of the study *The Impact of Armed Conflict on Children*, addressed this workshop and described the challenges in process and content faced by the Reparation and Rehabilitation Committee. These included the provision of counseling and psychosocial and educational interventions, inclusive approaches for engagement around children's issues and children's participation in processes affecting them.⁵⁹

According to the report of the children's hearings task team, it was agreed that the aim of these hearings "would be to articulate the experiences of children in respect of gross human rights violations" and that the hearings should accommodate instances of both "indirect" and "direct" violations. The team also agreed that the hearings should reflect experiences from young adults who were children at the time they experienced the violations, as this would assist in identifying relevant coping strategies.⁶⁰

The format of the regional special hearings varied, although distinct efforts were made to engage children from surrounding communities. The report noted that throughout the country, schoolchildren attended the hearings and listened to the evidence. At the hearing in KwaZulu-Natal/Free State, students from a number of schools presented a play, and other schools performed songs. A dramatic presentation of the Soweto uprising was a highlight of the hearing hosted by the Johannesburg office, moving members of the audience to tears. In the Eastern Cape, musical presentations by school choirs assisted in the reconciliation process;

⁵⁹ Report on the Consultative Workshop held on 17 September 1996: "Children and Youth: Exposure to Armed Conflict," available in the CSVR Collection on the *Traces of Truth* website, <http://truth.wvl.wits.ac.za>.

⁶⁰ Report of the Children's Hearings task team from 5 March 1997 meeting, available in the CSVR Collection on the *Traces of Truth* website, <http://truth.wvl.wits.ac.za>.

in Cape Town, three high school students read a submission by two professors on the impact of apartheid on children.⁶¹ During the two days before the hearings in KwaZulu-Natal, children who had been affected by violence had the opportunity to express themselves through art and drama workshops. Their stories were subsequently presented at the hearing by facilitators, and some recordings of the children's voices were played.⁶² The KwaZulu-Natal office also convened a special hearing on children's experiences the following month in the Free State.⁶³ In East London youth groups and surrounding schools gave submissions at the hearings.⁶⁴

Conversely, very few child victims testified at the Johannesburg hearing, which consisted mainly of submissions from organizations that had dealt with children and children's issues for many years. The Commission heard about the physical and mental abuse of children when they were detained and about the efforts made to assist these victims.⁶⁵ The special hearing process provided opportunities to explore a range of contextual factors, allowing participants to reflect on and analyze the root causes of apartheid and its effects on children. A number of formal submissions were also made to these special hearings. The 1998 final report contained a partial list of written submissions, and transcripts of oral testimonies are available on the TRC website.⁶⁶

Other Truth and Reconciliation Commission Processes

⁶¹ *Ibid.*, para. 9.

⁶² TRC Final Report, Volume One, Chapter Twelve, Durban Office Report para. 36(n).

⁶³ *Ibid.*, para. 36(q).

⁶⁴ TRC Final Report, Volume One, Chapter Twelve, East London Office Report, para. 36(p).

⁶⁵ TRC Final Report, Volume One, Chapter Twelve, Johannesburg Office Report, para. 44(s).

⁶⁶ See "Special Hearings Transcripts," Truth and Reconciliation Commission of South Africa, www.justice.gov.za/trc/special/index.htm#ch (accessed on 6 January 2010).

The Reparation and Rehabilitation Committee was not specifically mandated to address the needs of children and young people affected by the conflicts of the past.⁶⁷ However, the committee chair, Commissioner Hlengiwe Mkhize, who had worked with children affected by violence, was instrumental in promoting this work. The focus on children continued through the Committee's outreach and networking activities, psychosocial support programs and workshops and policy development. Once again, no detail of this work as it relates specifically to children is provided in the final report, and the relevant archive is not publicly available. It is important to note that the Committee conducted surveys highlighting the plight of children and young people, which in turn influenced the discussion on reparations.⁶⁸

A number of NGOs provided psychological services for victims who testified before the Commission, according to the National Child Rights Committee, which participated in the consultations. Religious leaders also reached out to those unable to participate in the hearings,⁶⁹ although details on such support remain largely anecdotal. It is evident, however, that the referral system for psychological services was largely ad hoc, resulting in fragmented service provision, despite assistance to regional offices by churches,

⁶⁷ The Reparation and Rehabilitation Committee had five broad areas of responsibility: to consider matters referred to it by the Commission, the Human Rights Violations Committee and the Amnesty Committee; to gather evidence relating to the identity, fate and whereabouts of victims and the nature and extent of the harm suffered by them; to make recommendations to the President on appropriate measures for reparation and rehabilitation of victims and on measures to be taken to restore the human and civil dignity of victims; to make recommendations that might include urgent interim measures on reparation to victims; and to make recommendations on the creation of institutions conducive to a stable and fair society and on the measures to be taken to prevent the commission of human rights violations. (TRC Final Report, Volume One, Chapter Ten, para. 1.)

⁶⁸ Interview with Yasmin Sooka, former TRC Commissioner, 15 January 2009. This related to recommendations that were made regarding urgent interim recommendations (TRC Final Report, Volume Five, Chapter Five, para. 56) and generic recommendations relating to various aspects of "community rehabilitation."

⁶⁹ NCRC's contribution to the "Initial Reports of States Parties due in 1997: South Africa." 22 May 1999. CRC/C/51/Add.2. (State Party Report), para. 493.

NGOs and community-based groups. Efforts were also made to secure political support to enhance state services (health care, education, etc.) and access to them, which helped to guide the development of more detailed recommendations about service provision.⁷⁰ Any assessment of what was achieved must be understood in the context of existing service provision and the challenges of rectifying the distortions of the apartheid era.

Regrettably, no assessments of the process were conducted with people who made statements to the TRC, although deponents frequently referred to psychological impacts in their submissions. Individuals who testified at public hearings were often asked about these issues and their needs, but this information was not passed to other sections of the Commission in a coordinated manner. A subsequent attempt to evaluate psychosocial and socioeconomic needs was crudely attempted as part of the Urgent Interim Reparation process.⁷¹ A considerable amount of detail was gathered from these individuals during this process,⁷² but the information was never used to assess individual reparation needs. Instead, the Government of South Africa responded to the Commission's recommendation with a one-time payment that did not differentiate between specific needs.

The research department of the Human Rights Violations Committee was asked to examine the impact of gross violations of human rights on people's lives. It investigated impacts in four areas, one of which was children and youth. However, the TRC report includes little analysis of its methods or lessons learned, which in turn brings into question the credibility of its findings and recommendations. There is recognition that children and youth

⁷⁰ TRC Final Report, Volume One, Chapter Ten, paras. 11-15.

⁷¹ In an effort to determine urgent reparations needs, the Commission developed a protocol that was mailed to each of the twenty-two thousand people who testified to the Commission. Ideally, this information should have been gleaned at the time of the deponents' interviews, but the Commission only later realized the importance of securing this data to facilitate urgent interventions.

⁷² Based on author's discussion with the former Secretary of the Reparation and Rehabilitation Committee, 20 April 2009.

suffered disproportionately, but the broader implications of these findings for contemporary issues are not explored in the report, and consequently they still require attention.

Final Report

The TRC delivered a five-volume (interim) final report in November 1998. Although some detail was provided on principles adopted and methods employed, the bulk of the report was an overview of the information uncovered by the Commission about violations and their impact. The chapters addressing the hearings on children and youth⁷³ and on women⁷⁴ and the consequences of gross violations of human rights, provided considerable detail on the patterns and trends in psychological effects and physical consequences and how they have affected families and communities.⁷⁵

The chapter dedicated to youth and children demonstrates that male children and young people were the most affected group in terms of deaths, abductions, torture, detention and other forms of ill-treatment. Particular attention was given to the physiological and psychological consequences of these violations and the practical effects of disrupted education, dislocation, displacement and exile. Only passing mention is made of the specific experience of girls and young women. The issue of children and young people as perpetrators was not addressed. As with other components of the 1998 report, the information that subsequently emerged from the amnesty process was not available when the children's report was written.

The codicil report (volume 6), released in March 2003, detailed the amnesty process. It included considerable anecdotal evidence locating young people and children at the receiving end of a range of heinous violations. The codicil included specific recommendations regarding reparations and drew on comparable

⁷³ TRC Final Report, Volume Four, Chapter Nine.

⁷⁴ TRC Final Report, Volume Four, Chapter Ten.

⁷⁵ *Ibid.*, para. 5.

international experiences, including recommendations for affected children contained in reports from Argentina and Chile.⁷⁶

REMAINING CHALLENGES

TRC Findings

There is no doubt that the absence of a specific reference to children in the TRC's mandate led the Commission to adopt an ad hoc approach to dealing with the experiences of children. This approach, coupled with the later decision to exclude direct testimony by children, compromised the potential of children's participation in the process and led the TRC to overlook a host of sensitivities and potential complexities. Consequently, TRC statement-takers were not trained to elicit detail that might shed further light on the impact of violations on children and their development, and they did not pursue the opportunity to systematically collect information about this aspect of the conflict, nor was this information specifically requested from older youth who testified.

Nevertheless, the Commission received a considerable amount of information about violations against children and subsequently made a series of specific findings regarding the situation of children and youth. While the State was singled out for particular criticism, all the major protagonists received a share of the blame. Specific findings relating to children and young people included the following:⁷⁷

- The State – in the form of the Government of South Africa, the security forces and the civil services – was the primary

⁷⁶ TRC Final Report, Volume Six, Section Two, Chapter Three, paras. 4(d)(I & ii), 9(a), (c) and (d).

⁷⁷ The following findings are derived from the "Findings and Conclusions" chapter of the TRC Final Report, Volume Five, Chapter Six.

perpetrator of gross violations of human rights against children and youth in South Africa and southern Africa during the 1960-1994 period.

- The policy of apartheid resulted in the delivery of inferior and inadequate education to black children and deprived them of the right to develop in mind and body. This deprivation constitutes a violation of human rights.
- The government ban on student and youth organizations denied young people an avenue for discussion and protest, and resulted in the criminalizing of legitimate political activity, thus encouraging youth to turn to violent forms of protest. The State is further accountable for the political repression that forced young people to go into exile, which distorted the normal socialization of youth and family relationships.
- Identifying and targeting schools as centers of resistance, the state occupied schools and intimidated and arrested students and teachers. This created a climate that led to unnecessary violence. As a result, education was severely disrupted. Many children were unable to complete their schooling or advance to tertiary education.
- Black children and youth were demonized as “the enemy” by the security forces in particular and more generally through the political representation of youth and children as part of a communist onslaught. This facilitated and legitimized the use of violence and force against them. The Commission found that the security forces unnecessarily resorted to lethal force where alternative mechanisms of crowd control would have been adequate to control marches, protests and demonstrations. The use of lethal force against children and youth was particularly singled out and condemned.

- The State was responsible for detaining children without trial and torturing them, including through solitary confinement. Such detention included the abduction of youth and their forcible removal to places where they were illegally detained and tortured. The state was responsible for severe ill-treatment of children in custody through harassment and deliberate withholding of medical attention, food and water.
- Through its security forces, the State exploited and manipulated divisions in society and repressed children and youth by identifying youth leaders, isolating them and, through violence or financial inducement, pressuring them to act as informants or vigilantes.
- In some cases during the 1980s, the security forces infiltrated youth and student structures, posed as members of liberation movements, recruited young people for military training and then killed them.⁷⁸
- The State was responsible for militarizing young white males through conscription.
- The mass and liberation movements⁷⁹ mobilized and, in the case of the latter, armed and trained children and youth as part of their armed formations. The liberation movements and the IFP were responsible for recruiting youth into the SDUs and self-protection units in the 1990s and training them to kill, thus dehumanizing and desensitizing them.
- The war between the ANC and the IFP displaced large numbers of youth, leaving them homeless. In this respect,

⁷⁸ TRC Final Report, Volume Five, Chapter Six, para. 160.

⁷⁹ The “mass movements” were essentially internal structures that operated within the restrictive conditions in South Africa and the homelands, and were linked to but distinct from the liberation movements such as the ANC and the Pan Africanist Congress, which were the only officially recognized liberation movements at that time.

the State and both parties are responsible for committing gross violations of human rights.

- After 1994, the failure by the ANC and the IFP to reintegrate youth so they could become valued members of society and develop a sense of self-esteem led to their becoming criminalized and created the potential for further human rights violations.

None of the key protagonists have embraced the TRC's findings or accepted specific responsibility for their policies or actions as they affected children and youth. Indeed, the major players have denied culpability. This presents a major challenge for developing a national discourse and action plans to address the many issues needing responses. Both the government and the ruling party have, in most instances, palpably avoided further engagement on issues relating to the past conflicts.

TRC Recommendations

The TRC's findings led it to adopt recommendations, including those for a reparation and rehabilitation policy.⁸⁰ The policy was rooted in several key principles. It was to be development-centered, culturally appropriate, simple, efficient and community-based, and it was to promote healing and reconciliation. It stated that victims who were children at the time of the violation qualified for reparation. Indeed, children were specifically identified as a category of relatives and dependants of victims who would qualify for reparation. Although the policy was not adopted, aspects of it were implemented.

In response to concerns raised about militarized youth, recommendations were included to focus on youth in a systematic demilitarization program. The final report said that secondary and tertiary educational institutions and sporting bodies should be

⁸⁰ TRC Final Report, Volume Five, Chapter Five.

involved in implementing this program, which was to combine social, therapeutic and political processes and interventions.⁸¹ Other recommendations included the following:

- Prioritizing the establishment of community colleges and youth centers to facilitate the reintegration of affected youth into society.
- Establishing accelerated adult basic education and training programs to meet the needs of semi-literate youth and adults who lost educational opportunities due to human rights abuses.⁸²
- Rebuilding demolished schools and introducing remedial and emotional support in mainstream education, as well as developing the capacity to cater to mature students.⁸³
- Developing a Peace Corps to help communities in need but also to develop the skills of less-privileged youth. Such a body could also be used to expose more privileged citizens to the needs and living conditions of the majority of South Africans.⁸⁴

The report contained other recommendations relating to children, including proposals to support the families of the disappeared and affected children.⁸⁵

⁸¹ *Ibid.*, para. 97.

⁸² *Ibid.*, paras. 108-109.

⁸³ *Ibid.*, paras. 110-112.

⁸⁴ TRC Final Report, Volume Five, Chapter Eight, para. 35.

⁸⁵ TRC Final Report, Volume Six, Section Four, Chapter 1, para. 120.

In terms of reconciliation and unity, the Commission highlighted the importance of sensitivity to groups that had been particularly disadvantaged in the past, specifically women and children.⁸⁶ Not surprisingly, the report underscored the importance of giving priority to the needs of children and young people.⁸⁷ Recommendations also called for incorporating human rights curricula in formal education, including a focus on the rights of the child. The Commission advised combining the work of the youth and gender commissions with the South African Human Rights Commission to improve efficiency, coordination and cost-effectiveness.⁸⁸

Responses to the TRC Recommendations

No detailed evaluation has been made of what state and civil society actors have done in response to the TRC's recommendations. Anecdotal evidence suggests that many have been largely ignored. As with numerous aspects of its reparation response, the government has chosen to merge the implementation of the Commission's recommendations with its development agenda, incorporating specific needs into the country's broader service-delivery program.

Although integrating reparation and development goals does not exclude giving priority to specific groups, in practice this has not occurred with respect to victims and survivors recognized by the TRC. Consequently, no efforts have been tailored to the socioeconomic or psychosocial needs of individuals whose cases were addressed in the reparation and rehabilitation policy. This has particular ramifications for children and young people who were caught up in the militarization of the 1980s and 1990s.

Elsewhere, the links between TRC recommendations and existing government programs and processes emanated from the

⁸⁶ TRC Final Report, Volume Five, Chapter Eight (see Introduction, para. 3).

⁸⁷ TRC Final Report, Volume Five, Chapter Nine, paras. 114-120.

⁸⁸ *Ibid.*

TRC itself. Following the children and youth special hearings, for example, it was agreed that the National Programme of Action for Children (developed to fulfill the government's commitments emanating from the Convention on the Rights of the Child), "provides an appropriate vehicle for the institutional reparations"⁸⁹ relating to their needs, according to the report.

Challenges in the TRC Process

Other challenges relating to children arose from the TRC process itself. They include the following:

- The TRC's mandate to limit its inquiries to gross violations of human rights presented a formidable challenge, not only concerning the practicalities of ensuring opportunities for people to testify, but also with respect to the types of experiences, challenges and needs uncovered during the process. The Commission did not have adequate resources or the capacity to address these needs, and in most instances it did not make the necessary referrals to state and non-governmental agencies.
- The somewhat disjointed approach to handling issues relating to children and youth in the various TRC processes did not facilitate systematic attention to more practical needs, such as dedicated research and investigation, access to the TRC, counseling, protection and other special needs.
- Many potential deponents did not submit statements or testify. Some activists refused to engage with the TRC, although many communities simply had no opportunity to participate.

⁸⁹ NCRC's contribution to the "Initial Reports of States Parties due in 1997: South Africa," 22 May 1999, CRC/C/51/Add.2. (State Party Report), para. 492.

- The Commission recognized that its focus on gross violations of human rights resulted in a concentration on the most egregious violations and largely obscured the broader experiences of children living under apartheid. Partially in response, the TRC report recognized that the hardships experienced under apartheid also generated positive qualities and leadership; it noted that “children were agents of social change and harnessed vast amounts of energy, courage and resilience during the apartheid era. For many young people, active engagement in political activity resulted in the acquisition of skills such as analysis, mobilization and strategizing, as well as the ability to draw strength from friends and comrades in times of hardship.”⁹⁰ This aspect of children’s and young people’s experience was not explored in any detail during the hearings.
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- In terms of psychosocial considerations, the TRC raised concerns about the difficulty of adequately gauging the impact of individual events on the family as a whole. Cases often present complex and multiple layers of abuse and victimization. The TRC’s statement-taking and public-hearing methodologies focused almost exclusively on the individual victim. “Although the family was often a powerful support system in the event of trauma, the focus on the primary victim drew attention away from the trauma experienced by family members,” the report noted. The National Unity and Reconciliation Act made provision for this, describing victims as “such relatives or dependants of victims as may be prescribed.” However, dependants or relatives only received supportive intervention in urgent cases.⁹¹ This ad hoc response never developed into a comprehensive service, or the possibility of one, and the Commission did not explore options for interventions

⁹⁰ TRC Final Report, Volume Four, Chapter Nine, para. 86.

⁹¹ TRC Final Report, Volume One, Chapter Eleven, para. 19.

either in terms of immediate referrals or longer-term recommendations.

- No quantification has been made of the abnormalities of living under apartheid or the consequences for children in terms of violence, poverty, inequalities of opportunity, disruptions to education, dislocation or displacement – or of the resulting consequences or the actions needed in response. The statement-taking protocols did not adequately ensure that these aspects were captured in testimonies. These shortcomings highlight the importance of ensuring the involvement of child rights specialists during the conceptual, design and implementation stages of the various Commission processes.
- The TRC received little testimony relating to sexual abuse and only a very limited amount of information on the sexual abuse of minors.⁹² Sexual abuse was specifically examined in the special hearing on the experiences of women, although the silence that continues to surround this issue reflects deep-seated and continuing problems. It also reflects the limited points of access in the Commission for women and girls who might be inclined to communicate their experiences.

⁹² See, for example, TRC Report, Volume Four, Chapter 10, para. 54.

CONCLUSIONS

Although the TRC's statement-taking process endeavored to elicit statements from a wide temporal and spatial base, the process did not proactively engage communities in an effort to learn about particular experiences, patterns or trends. Little investment was made to enhance the statement-taking skills of interviewers.⁹³ The Commission often fielded inadequate resources and spent too little time in any one community or with individual deponents to build the levels of trust required for victims and survivors to impart details of the abuse they had experienced and witnessed.

Psychosocial backing is needed to support interventions designed to probe experiences about violations of human rights. In South Africa, it was not provided. The absence of provision for a "start-up" period in the TRC's founding legislation fundamentally undermined opportunities in this regard. As a result, the TRC was forced to simultaneously develop and implement its plan as well as carry out its investigative work. In this context, it is hardly surprising that special-interest areas did not receive adequate attention during this all-important preparatory phase. Subsequent truth and reconciliation commissions in other countries have had limited start-up operational periods, and it can be argued that these remain largely insufficient and do not reflect conditions on the ground. Such inadequacies are likely to hamper efforts to mainstream child and youth considerations during the planning process.

Evidence before the TRC confirms that children and young people were at the heart of the struggles, resistance and repression relating to apartheid in South Africa. There are, however, three key elements to the critique of South Africa's TRC process in its dealings with children. First is the absence of a reference to children in the mandate. Second is the narrow construction and interpretation of the mandate, which was limited to gross violations of human rights. This approach precluded a broader examination of

⁹³ Piers Pigou, "False Promises, Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in Simpson and Posel, *Commissioning the Past*.

children's experiences of the conflict related to the structural aspects of apartheid and its devastating social and economic consequences, as well as some of the less direct dimensions of victimization. Third is that the process issues relating to the Commission's work, including its findings and recommendations as set out above, would have required much more attention to planning as well as more resources and time.

Consequently, the focus on children and young people was ad hoc; they were not an explicit target group. Remedying this fact has implications covering a range of issues, from the content of statement protocols to the need for a dedicated research focus, Commission staffing, investigative capacity, construction of the database, protection and counseling issues, networking and alliances. There are a number of avenues for improving how commissions address the experiences of children.

The TRC had the resource potential to ensure a more methodical analysis of how South Africa's conflict affected children and how those consequences still manifest themselves. This could well have included an option for children to give statements and provide testimony. Because it did not, the Commission lost an opportunity to engage with the youngest participants in the conflict. Nevertheless, the Commission gathered a considerable amount of data on violations relating to children through its statement-taking, public hearings and special hearings on children and youth, much of which has yet to be carefully analyzed.

However, there appears to be an important gap between the TRC's processes regarding children and its findings and recommendations. For example, a closer link could have been established between the findings and the efforts to further the objectives of the Convention on the Rights of the Child. In this regard, more research is needed to assess how the Commission's recommendations have been addressed, taking into account developments in policymaking, service delivery and educational curriculum.

Such a focus is beyond the scope of this chapter. But it is important to point out that the politics of engagement with TRC-related issues in the aftermath of the Commission's work have been

fundamentally undermined by a lack of will to engage on the part of government, political parties and significant sectors of civil society. This is not unique to South Africa, but it highlights the importance of employing strategies crafted for particular circumstances in order to implement effective political, economic and social support that can promote children's best interests in transitional justice endeavors.

CHAPTER 5

CHILD PARTICIPATION IN THE SIERRA LEONEAN TRUTH AND RECONCILIATION COMMISSION

Philip Cook and Cheryl Heykoop¹



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Graça Machel speaks with a war-affected child in Sierra Leone while preparing research for her 1996 report on the Impact of Armed Conflict on Children.

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INTRODUCTION

Children of this country were forced to fight for a cause we could not understand. We were drugged and made to kill and destroy our brothers and sisters and our mothers and fathers. We were beaten, amputated and used as sex slaves. This was a wretched display of inhuman and immoral actions by those who were supposed to be protecting us. Our hands, which were meant to be used freely for play and schoolwork, were used instead, by force, to burn, kill and destroy.

We do not believe this is the end of our story. Rather, it is the beginning. We, who survived the war, are determined to go forward. We will look to a new future and we ourselves will help build the road to peace.

– Child-Friendly version of the Sierra Leone TRC Report, 2004²

In conflicts of the late twentieth and early twenty-first centuries, combatants have targeted children as a means of instilling terror and have used children as tools of violence and social destruction. Transitional justice mechanisms, from truth and reconciliation processes to special courts and tribunals, have had to grapple with the challenges of respecting children's rights, well-being and social reintegration while seeking to involve them in proceedings, listen to them and give due weight to their experiences.

The role of children in truth commissions has been guided by the spirit and principles of international human rights law. The Convention on the Rights of the Child is the axis around which truth commission practice has revolved and evolved, in particular its focus on children's best interests and right to non-discrimination

² *Truth and Reconciliation Commission Report for the Children of Sierra Leone, Child-Friendly Version* (2004), at 3, available at www.unicef.org/voy/media/TRCCF9SeptFINAL.pdf.

and – not least – the right for children’s voices to be heard and their views to be considered in decisions and procedures affecting them.

Children’s involvement in truth commissions and in transitional justice mechanisms is recent, and the experience in Sierra Leone was foundational in that respect. The Sierra Leone Truth and Reconciliation Commission (TRC) was the first truth commission to involve children in statement-taking and in closed and thematic hearings, as well as in the preparation of a child-friendly version of the Commission report. The role of children in the Sierra Leone TRC was also groundbreaking in setting precedent and developing policies and procedures to protect the rights of children in truth commission processes. This has had a significant impact on the emerging understanding of children’s evolving capacities to contribute to the legal and social aspects of TRC activities.

Sierra Leone endured a brutal conflict from 1991 to 2002. One of its characteristics was its extreme savagery toward children. Atrocities committed included amputation and rape, as well as systematic child recruitment into fighting forces. The conflict has since become an important milestone informing the innovative steps taken to involve children in truth and reconciliation processes, both as victims of the conflict and as change agents in social reconstruction efforts.

This chapter examines children’s participation in the TRC established in the aftermath of this conflict. It examines key issues in applying a rights-based approach to support child participation in relation to cross-cutting themes such as protecting the dignity of children as participants in truth-telling and community reconciliation; understanding children’s best interests in the complexities of transitional justice; applying a holistic, intersectoral approach to collaboration between government and civil society child protection agencies (CPAs); and building the capacity and child rights expertise of TRC commissioners and staff.

Lessons learned from child participation in Sierra Leone’s TRC experience can guide future truth and reconciliation processes and promote a deeper understanding of the implementation and application of human rights norms in a rapidly shifting humanitarian and development context. These insights are related

to three key themes that will require further reflection in the Sierra Leone context and in other countries where children are involved in the work of truth commissions:

1. Understanding children's participation in the TRC in relation to their agency (or capacity for self-efficacy) and their evolving development in a cultural context.
2. Conceptualizing the linkages between protection and participation.
3. Learning from children's meaningful participation as an impetus for broad-based legal and social policy reform and the strengthening of citizenship, especially in regard to fostering intergenerational healing and promoting sustainable peace-building in the aftermath of conflict.

The chapter concludes by considering how recommendations emerging from the experiences of the Sierra Leone TRC, at the levels of the child, family, community and society, can be used to guide applications of transitional justice involving children in Sierra Leone, as well as in other countries affected by war and political violence.

Methodology

The research for this chapter, initiated in 2007, three years after the Sierra Leone TRC had completed its work, involved various forms of data collection that were intended to assess lessons learned from the process applied to support child participation in the TRC. The methods employed included: a desk review of relevant literature; eighty-four key-informant interviews with former TRC staff, academics, government officials, child protection organizations, traditional and religious leaders, children's organizations and civil society; follow-up interviews with eighty-three children who testified in the TRC and their families; and thirteen focus-group discussions with children affected by the conflict and their communities.

A snowball sampling technique that focused on individuals and groups involved in the TRC process was used to gather information, to better understand the lessons learned from the Sierra Leone TRC and to draw conclusions on child participation in TRC processes that can be applied in other contexts. These included key-informant interviews with members of the Sierra Leone TRC; the Special Court for Sierra Leone (SCSL); the United Nations Children's Fund (UNICEF); the United Nations Mission in Sierra Leone (UNAMSIL); Ministry of Social Welfare, Gender and Children's Affairs (MSWGCA); Children's Forum Network (CFN); Save the Children; Caritas; Defence for Children International; Inter-religious Council of Sierra Leone; Council of Churches in Sierra Leone (CCSL); Talking Drum; Golden Kids Radio; parents; support groups; researchers; community members; and children.

Focus-group discussions with children were conducted in Bombali, Kailahun and Bo districts and the capital, Freetown. Diversity was sought across gender, age, role during the conflict, level of support provided by CPAs and ethnicity. Input was also sought from a broad range of individuals with international and national expertise in children's rights and transitional justice (a total of eighty-four people), including academics, government officials, international non-governmental organizations (NGOs), child protection organizations, traditional and religious leaders and community members.

Despite efforts to ensure adequate representation, it is important to note that the findings presented do not represent the views of all Sierra Leoneans or even a representative sampling of the country's children. Rather, the intention is to bring together a diversity of voices and experiences of a sample of children, their communities and key experts to shed light on the process of child participation in the Sierra Leone TRC.

FOCUS ON CHILDREN BY THE TRUTH AND RECONCILIATION COMMISSION

In 1999, the Government of Sierra Leone and the Revolutionary United Front signed a peace agreement in Lomé (Togo). The Lomé Peace Agreement provided for the creation of a truth and reconciliation commission “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, and get a clear picture of the past in order to facilitate genuine healing and reconciliation.”³ In 2000, through passage of the Truth and Reconciliation Commission Act, the Parliament created the Truth and Reconciliation Commission for Sierra Leone. The Act specified a process for selecting commissioners, including public nominations, a selection panel and a coordinating role for the United Nations. Four of the Commissioners were Sierra Leonean and three were internationals. Statement-taking teams were deployed throughout the country for four months, taking more than eight thousand statements from victims, witnesses and perpetrators. Public hearings were held in each of the twelve districts and were widely attended. Thematic hearings addressing specific issues were also held, and these included children’s hearings that were organized on the Day of the African Child on 16 June 2003.

The Sierra Leone TRC was the first to call for a focus on children and to specify the need for procedures to protect the rights of children involved. A role for children in the Commission was anticipated because they had been targeted during the conflict and had suffered devastating impacts.⁴ The efforts to involve children and to adopt child-friendly procedures for their participation and

³ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, Lomé, UN Doc. S/1999/777, article XXVI (1).

⁴ The Truth and Reconciliation Commission Act 2000, Supplement to the *Sierra Leone Gazette* CXXXI (9), 10 February 2000. Section 6(2b) provides that special attention be given to children; Section 7(4) calls for the implementation of special procedures to address the needs of children and individuals who have suffered sexual abuse so as to facilitate their participation.

protection established precedent as a model for child participation in a truth commission, both acknowledging and involving children in the process for the first time.⁵ While the efforts were largely successful, the actual results varied, depending to a large extent on the relationship with the CPA designated as the coordinating partner for the Commission in a given district. From the outset, the TRC's procedures were framed by the spirit, guiding principles and specific articles of the Convention on the Rights of the Child (CRC) as well as the African Charter on the Rights and Welfare of the Child (ACRWC).

At the time the TRC was set up, the SCSL was also established by an international agreement between the Government and the United Nations.⁶ While the TRC was mandated to establish a record of what happened during the conflict and to come up with recommendations for moving forward, the Special Court was to prosecute "those who bear the greatest responsibility" for crimes committed in the territory of Sierra Leone during the conflict. It was the first international or hybrid court to prosecute crimes committed against children. Although the Special Court has jurisdiction over persons fifteen years and older, the chief prosecutor made it a policy of the Court that children under eighteen would not be prosecuted. This was based on the understanding that children were not among "those most responsible" for crimes committed during the conflict, but instead were targeted for violations by all parties to the conflict.

Many people, especially in rural areas, were confused about the differences between the TRC and the Special Court. The two institutions were operating at the same time, and there was a lack of

⁵ For a more detailed review of child participation in past transitional justice processes, see Ilene Cohn, "The Protection of Children in Peacemaking and Peacekeeping Processes," *Harvard Human Rights Journal* 12 1999:129, 174-176; *Children and Truth Commissions: Basic Considerations* (UNICEF Innocenti Research Centre and the International Center for Transitional Justice, forthcoming, 2010).

⁶ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, annex to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

familiarity with their different objectives. This lack of clarity compromised efforts to encourage participation in the TRC process. Former child combatants and their parents feared that statements given in confidence to the TRC would be shared with the Special Court and that children might be called to testify or might face prosecution. The Special Court's policy of not prosecuting children helped alleviate some of the fears. Even so, greater outreach was needed to explain the discrete relationship and complementarity between the two institutions.

Child-Centered Guiding Principles

In 2001, UNICEF, UNAMSIL and the National Forum for Human Rights convened a technical meeting on children and the Truth and Reconciliation Commission, attended by international and national experts and a group of eight Sierra Leonean children who had been identified by child protection agencies. Social workers accompanied the child participants and helped them prepare their own account and recommendations, which were taken into consideration when the principles were drafted. The children's account noted that children "may fear telling the truth" when an incident concerns friends or family members. It also recommended that children "be permitted to participate in family discussions, put their problems forward, and be listened to and taken seriously." The outcome document of the meeting resulted in recommendations for guiding principles and it detailed policies and special procedures for involving children in TRC proceedings. The meeting also highlighted children's role as central to the TRC:

The key task of the TRC in relation to children is to create an impartial and official historical record of what happened to children during the armed conflict in Sierra Leone. In relation to reconciliation, the TRC should build upon existing mechanisms for promoting the reintegration and reconciliation of children, particularly the work of child protection agencies and

traditional leaders and structures. The TRC is thus expected to contribute to the ongoing re-integration of children back into their communities or host communities.

– Children and the Truth and Reconciliation Commission for Sierra Leone

The guiding principles, documented in the meeting report created a benchmark and set the tone for many of the later achievements of the TRC. The guiding principles are the following⁷:

• **Special attention to children:** Because children were targeted during the armed conflict for grave violations, and because of the serious impact of the conflict on children's lives, families and futures, their participation in the TRC was seen as essential. This is reflected in the mandate of the Sierra Leone TRC, which was the first truth commission mandate to call for special attention to the experiences of children and for procedures to address the needs of child participants.

• **Child rights standards should inform the process of the TRC:** In particular, the CRC and the ACRWC, as well as other international and regional legal standards for the promotion and protection of the rights of children, should guide the TRC's child-related work. Emphasis was given to the four fundamental principles of the Convention on the Rights of the Child: (a) in all actions concerning children, the best interests of the child shall be a primary consideration; (b) children have the right to be heard and their views should be taken into consideration in decisions affecting them; (c) children's civil, political, economic,

⁷ United Nations Children's Fund (UNICEF) and National Forum for Human Rights, *Children and the Truth and Reconciliation Commission for Sierra Leone: Recommendations for Policies and Procedures for Addressing and Involving Children in the Truth and Reconciliation Commission* (UNICEF: Freetown, 2001), at 16, [hereinafter *Children and the Truth and Reconciliation Commission for Sierra Leone*].

social and cultural rights should be adequately protected to ensure their survival and development; and (d) children should never be subjected to discrimination of any kind.

- **Equal treatment of all children before the TRC:** Children should not be categorized as victims, witnesses or perpetrators; rather, “for the purposes of the TRC, all children participating in its work, irrespective of their particular experience, are witnesses providing information for the TRC.” The Commission’s decision that all children who gave statements would be considered victims and witnesses of grave violations recognized that children who participated in hostilities were primarily victims of the war.

- **Special attention to girls:** The TRC should give special attention to girls, in particular those targeted for sexual crimes, and should collect disaggregated data on gender-based violence. Staff with expertise on sexual violence should be available to support the participation of girls who wish to give statements to the TRC.

- **Voluntary participation:** All participation of children in the Sierra Leone TRC should be voluntary, with the informed consent of the child and the child’s parent or guardian. In no instance should the TRC use its subpoena power to call child witnesses. In addition, because children in Sierra Leone are not encouraged to express themselves in the presence of adults, sensitization on the importance of child participation is needed.

- **Protection through confidentiality:** Any statement or information provided to the TRC by a child should be confidential and should not be shared with or released to any person, body or institution outside the TRC, including the SCSL. The TRC should guarantee the privacy of children in all aspects of its work.

- **Preserving the anonymity of children:** All children participating in the TRC proceedings should remain

anonymous. The TRC should not disclose the name of any child or present information that might identify a child.

Achieving consensus on these principles set new precedent for children's role in truth commission activities. However, the technical meeting was in 2001, one year before the TRC began its work, and the initial reluctance of the interim secretariat to meet with local CPAs resulted in a stumbling block.⁸ The TRC faced numerous challenges, which led to a period of restructuring and reorganization.⁹ At the beginning of the statement-taking phase, in 2003, the TRC entered into negotiations with UNICEF and CPAs to establish a framework of cooperation on the involvement of children. The negotiations were not easy, as the CPAs feared that children involved in statement-taking might be re-traumatized by recalling their experiences during the war. Their participation was viewed by some as a risk to their protection from further harm.

The Framework of Cooperation was informed by the guiding principles established as an outcome of the 2001 technical meeting and detailed areas of cooperation between the TRC and the CPAs, in line with their respective mandates. The protection procedures were not closely adhered to during the statement-taking process because of delays and difficulties. Despite a lack of consistency in its implementation, the Framework of Cooperation was groundbreaking in that it established norms for the involvement of children, set valuable precedent for collaboration between CPAs and truth commissions, and informed policy and procedures for protecting the rights of children involved in statement-taking and other TRC activities.

Even without full implementation of the guiding principles,

⁸ Donald Robertshaw and Keith Wright, "The Role of Child Protection Agencies in Supporting Children's Involvement in Transitional Justice Mechanisms in Particular the Special Court for Sierra Leone," (paper prepared for UNICEF IRC expert discussion on Transitional Justice and Children, November 2005), at 3, [hereinafter "The Role of Child Protection Agencies"].

⁹ *Ibid.*

their integration into the work of the TRC can be credited with much of the success of protecting children during the TRC and helping to ensure their meaningful participation. The principles also became the foundation for much of the work initiated by the CFN.¹⁰ This countrywide, elected organization led by children became the main interlocutor for children's participation in the TRC process.¹¹ The partnership between the TRC, CPAs and child-led organizations was a significant aspect of the successful linkage of child protection and participation in the TRC.

CHILDREN'S PARTICIPATION IN TRC OPERATIONS

Statement-Taking

When statement-taking began in 2003, the TRC organized a training workshop for all statement-takers. The workshop included training on child rights and outlined procedures for involving children. The statement-takers were deployed for an initial period of three weeks, and TRC staff analyzed the statements that were collected. At that point a second training workshop was convened, and a session was added due to the newly established partnership between the TRC and the CPAs, explaining the procedures to implement the Framework of Cooperation.¹²

¹⁰ Interview with Abubakar Messeh-Kamara, former head of the Children's Forum Network, November 2009.

¹¹ Information provided in e-mail communications with UNICEF Country Office, Freetown, March 2008: "The Children's Forum Network (CFN) was formed in November 2000 at the end of a two-day workshop organized by the Ministry of Social Welfare, Gender and Children's Affairs, UNICEF and Plan International.... [and] was launched on the Day of the African Child (16 June 2001). CFN has a multidimensional focus working with children's clubs in schools in the Western Area, the provincial headquarter towns of Bo, Kenema and Makeni, and other parts of the country. Membership is open to all children."

¹² Interview with Zoe Dugal, former TRC Research Officer, November 2009.

TRC policy was to keep all children's statements confidential,¹³ which required special precautions when recording the information in the database. All statements given by children were filed by number to prevent the recording of names. In addition, the specific locations, relatives and other identifying characteristics of incidents were deleted from references in the final report to prevent anyone from tracing the incident or story to an individual child.

To make sure that all children were treated equally as victims and witnesses before the TRC, the statement-taking forms for children omitted the section designated for perpetrators so that children were identified in the database only as victims or witnesses. This made it clear that the policy and approach of the TRC was to include children's experiences in the findings of the Commission, but not to hold children accountable for the atrocities that took place.

A vulnerability assessment and safety checklist were developed to help identify child participants and to ensure that procedures were in place to protect children and to confirm their feelings of security and confidence before giving statements. The checklist included, as a criterion for the interview, confirmation that consent had been given by both the child and the child's parent or guardian. This was intended to determine whether potential child witnesses had family and community support and whether their participation was voluntary.

The TRC deployed statement-takers throughout the thirteen districts in Sierra Leone, and over three hundred statements were collected from children. Girls did not participate to the same extent as boys. Many girls had been victims of sexual crimes during the conflict, and they were reluctant to speak about their experiences.

At that point, taking statements from children in a truth commission process was unprecedented. The involvement of children in the Sierra Leone TRC provided the impetus to develop policies and procedures specific for their protection and safety. According to TRC policy, all children were to be assisted by a social

¹³ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Volume 1, Chapter 5, at 145.

worker during the statement-taking and could also be accompanied by a parent, relative or friend. The vulnerability assessment and safety checklist, and CPA relationships with children during the earlier disarmament, demobilization and reintegration (DDR) process,¹⁴ were helpful in determining children's capacity and in building a support network.

According to the Framework of Cooperation, CPAs were to assist the TRC statement-takers in (a) providing guidance and advice on involving children in statement-taking; (b) identifying child statement-givers; (c) facilitating access of TRC statement-takers to child statement-givers; and (d) preparing children and providing psychosocial support to child statement-givers before, during and after the statement-taking exercise.¹⁵ In each region, a CPA was designated as responsible for supporting the TRC work. In some districts where the TRC had a close working relationship with CPAs, the efforts were generally successful, but in other districts a lack of coordination resulted in lapses in protection and psychosocial support for children.

Application of the Framework of Cooperation was also constrained by logistical dilemmas, and a number of key informants for this research highlighted the challenges in ensuring consistent quality in the statement-taking process, especially given limited time and financial and human resources. As a result, in some districts children were interviewed who had not been referred by a CPA, and in some districts fewer statements were collected from children, as referrals were not received quickly enough.¹⁶

The TRC made an effort to hire female statement-takers in every district, but this was not always possible given the country's high levels of illiteracy. However, in most cases, survivors of sexual violence were offered the option of talking to a female statement-taker. Cases of sexual violence were heard by the TRC in closed

¹⁴ "The Role of Child Protection Agencies."

¹⁵ "Child Protection Agencies and TRC Framework of Cooperation," 2003, copy on file with the authors.

¹⁶ Interview with Zoe Dugal, former TRC Research Officer, November 2009.

hearings, with only the female commissioners and staff present. To the surprise of the TRC, many adult female survivors of sexual violence decided to testify in public, wanting their stories to be heard. The TRC did not permit girl survivors to appear in public hearings.¹⁷

While the TRC policy to treat all children equally as victims and witnesses was respected throughout the process, the Commission recognized the complex nature of children's involvement with armed groups. The multiple roles of children during the conflict are analyzed in the TRC's final report, in particular the use of children in hostilities and in the perpetration of crimes.

Children's Hearings

At the conclusion of the statement-taking, the TRC reviewed the statements, and individuals were selected to testify at district hearings across the country.¹⁸ The hearings were public for adults but closed for children to assure confidentiality. Criteria for selection of children included the child's capacity to articulate his or her experiences and the range of experiences and violations suffered, as well as the child's role in the conflict, affiliations with political and armed groups, and gender and geographic location, ensuring a broad spectrum of representation.¹⁹ Upon selection, the regional coordinators sought permission from the child and his/her caregiver to participate, and the child was brought to the TRC district office to share his/her experiences in confidence.²⁰

¹⁷ Interview with Zoe Dugal, former TRC Research Officer, November 2009.

¹⁸ One week of hearings was organized in each of the twelve districts of Sierra Leone; the thematic hearings were held in the capital, Freetown.

¹⁹ Child Protection Agencies and TRC Framework of Cooperation, 2003.

²⁰ To help ensure the protection of children and to maintain their confidentiality, children traveled in a TRC vehicle with tinted windows. It should be noted that military personnel were present in the interviewing compound, which intimidated some of the children. The fear was alleviated when social workers and staff explained why the military were present. Interview with Zoe Dugal, former TRC Research Officer, November 2009.

Once inside the closed hearing, children testified individually to commissioners, who were supported by an interpreter, a videographer and a psychosocial support worker.²¹ Efforts were made to create a supportive environment and establish rapport with the child. Initial questions focused on the child's family background; these were followed with more specific, open-ended questions, such as: what did you see, what happened to you, what were your thoughts? Questions were also asked on what role the Commission could play in fostering healing and reconciliation at the community level.

The thematic hearings for children commenced in Freetown on the Day of the African Child, 16 June 2003, to give visibility to children's issues and to recommend actions to improve the situation of young people in post-war Sierra Leone. Organized collaboratively with children,²² the hearings began with a children's march through Freetown. Over 350 children attended the hearings from across Sierra Leone. They listened to testimonies and watched video clips from the closed district hearings with children. The identity of the children was not disclosed, as the statements taken in the closed district sessions were recorded with the children sitting behind a screen. Other children, representing children's clubs, appeared in person and provided statements and recommendations. The hearings included art and drama, as well as the performance of a song by members of the CFN and Voice of Children Radio. Excerpts were broadcast on Voice of Children Radio and national television by the Sierra Leone Broadcasting Society.²³ The consideration given to sharing children's experiences, views and recommendations was groundbreaking.

²¹ The interpreter did not face the child during the closed hearings and could not identify the child (personal communication, staff member of the CDHR). The interview was videotaped with the child's face hidden. A parent or child protection agency representative could also be present if reflective of the child's wishes.

²² The session was a coordinated effort of the TRC, MSWGCA, UNICEF, UNAMSIL, other CPAs, and the CFN. Children participated in both the planning and the proceedings.

²³ Interview with Saudamini Siegrist, principal writer, Children's version of the Sierra Leone TRC report, November 2009.

TRUTH AND RECONCILIATION COMMISSION'S REPORT AND CHILDREN

The TRC's final report was based on statements collected, information provided in hearings, research and investigation, and submissions from child protection agencies. One chapter of the report is dedicated to the experience of children, including the violations they suffered, and another is dedicated to youth. The chapter on recommendations includes those specific to children and young people, and addresses pertinent actors such as the Government of Sierra Leone and the international community.

Expert Submissions

The TRC received a number of expert submissions documenting the impact of the armed conflict on children. Nine submissions were submitted by various child rights and protection actors, including the MSWGCA, the Ministry of Youth and Sport, UNAMSIL, UNICEF, Caritas Makeni, World Vision, Cooperazione Internazionale and Christian Brothers. Two submissions came from children's groups, the CFN and the Kailahun Muloma Kids Club. The CFN submission was guided by the MSWGCA, UNICEF and UNAMSIL, but was written by the young people themselves.²⁴ Summaries of these reports were presented at the thematic hearings on children held in Freetown from 16-17 June 2003.

Child-Friendly Version of the TRC Report²⁵

The preparation of a child-friendly TRC report was first

²⁴ Personal communications with an official representative from the MSWGCA and an individual working for a former member organization of the child protection network, Freetown, May 2007.

²⁵ United Nations Children's Fund (UNICEF), *Adolescent Programming in Conflict and Post-Conflict Situations* (New York: UNICEF, 2002), at 56, available at www.unicef.org/adolescence/files/adolescent_conflict%281%29.pdf.

discussed during the 2001 technical meeting in Freetown. The CFN made a similar recommendation, calling for a version of the report for children “as a measure to prevent recurrence of what happened.” Preparation of the report was undertaken in 2003 by the TRC with the support of UNICEF, UNAMSIL and a number of children’s groups, including three national children’s networks – CFN, Voice of Children Radio and Children’s National Assembly – which brought together children from across the country. Formal submissions to the Commission by CPAs and others, in particular one prepared by the CFN, proved a valuable source of information.

Over one hundred children participated, with a team of fifteen children representing CFN closely involved in the drafting and design process. Many more children participated indirectly through Voice of Children Radio discussions and attendance at the first-ever Children’s National Assembly meeting in December 2003.²⁶ Children’s involvement throughout the process of drafting and producing the child-friendly TRC report furthered the partnership between the TRC and the CFN. The child-friendly version was presented together with the official TRC report to the president of Sierra Leone in October 2004.

National Vision for Sierra Leone Project

The National Vision for Sierra Leone project, initiated by the TRC, provided a platform for individuals to creatively express their expectations and aspirations for Sierra Leone after more than a decade of war.²⁷ Over 250 contributions were received, including

²⁶ Personal communication, Saudamini Siegrist, UNICEF Innocenti Research Centre, November 2008.

²⁷ The TRC advertised its campaign in newspapers, on the radio and in leaflets distributed around Freetown and in the provinces. The TRC suggested that contributions may describe the kind of society the contributor would like to live in; suggest how to make Sierra Leone a better place to live in; set out the contributor’s hopes and aspirations for Sierra Leone; describe where the contributor would like to see Sierra Leone in five or ten years; or provide anything creative that inspires peace and unity – and pride in being Sierra Leonean. *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004) Volume 3B, Chapter 8, at 502.

written and recorded essays, slogans, plays and poems; paintings, etchings and drawings; and sculptures, woodcarvings and installations.²⁸ The National Vision project was exhibited at the National Museum in Freetown and was promoted through leaflets, presentations, meetings and radio shows. By the end of January 2004, more than six hundred schoolchildren had visited the exhibit and taken part in discussions on its significance to Sierra Leone's future.²⁹

Dissemination of the Reports

The Truth and Reconciliation Commission recommended the "widest possible dissemination" of the final report to promote dialogue and debate, and it called on government and civil society to facilitate access by all people, literate and illiterate, in local languages.³⁰ The TRC recommended using the report in workshops around the country.³¹ The Commission also called for incorporating the report contents into the curriculum in schools, from primary to tertiary level, with the children's version to be used at the primary level. This has not yet been done.³²

The child-friendly version of the TRC report was disseminated in two phases. In 2004, six hundred copies were provided to children's groups, NGOs, government agencies and the media, and in 2005 an additional four thousand copies were distributed

²⁸ Among the contributors were people of all ages, backgrounds and religions, including adults and children; artists and laypersons; amputees, ex-combatants and prisoners.

²⁹ For a description of the National Vision Project, see *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Volume 3B, Chapter 8, at 499-520.

³⁰ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Volume 2, Chapter 3, Section 543, at 204.

³¹ *Ibid.*, Section 544, at 204.

³² *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Volume 2, Chapter 3, Section 545, at 204.

through UNAMSIL to child advocacy groups, educators and civil society.³³ Despite these efforts, only five of the forty-seven children with whom the authors spoke were aware of the child-friendly version.³⁴

A senior secondary school version of the TRC report was also developed for pupils aged fifteen to nineteen.³⁵ This textbook used cartoons – the story of “Sierra Rat” – to teach secondary school students and other young people about the TRC’s findings and recommendations. Exercises at the end of each chapter guide students to critically reflect on the material and to encourage classroom discussion. Two hundred books were disseminated to secondary schools throughout the country, and it reached forty thousand students. Discussions with children involved in the research for this chapter revealed that a larger percentage were aware of “Sierra Rat.” Of the forty-seven children interviewed, twenty had heard about the senior secondary school version or seen the posters around their schools and their communities. In addition, posters and storytelling were used to reach out to illiterate populations; one hundred and fifty storytellers from across the country were trained to talk about the TRC at public gatherings.

IMPACT OF THE TRC PROCEEDINGS ON CHILDREN

Children’s Reflections on Giving Statements

To date, the impact of children’s involvement in the Sierra Leone TRC has not been fully evaluated. The following

³³ Women’s Commission for Refugee Women and Children, 2007.

³⁴ This question was intended to be asked in all focus-group discussions, yet it was overlooked in three of the focus-group discussions. The five children who knew about the child-friendly version were all part of the Children’s Forum Network.

³⁵ M. Sheriff and E. Bobson-Kamara, “TRC Report: A Senior Secondary School Version.” (Sierra Leone: Truth and Reconciliation Working Group, 2005).

interview excerpts reflect the experiences and impressions of some children with regard to the TRC.³⁶ Generally, young people interviewed for this research were supportive of the TRC process, even in the face of initial misunderstanding, mistrust and skepticism. The examples below show that the children interviewed generally felt at ease during the TRC proceedings:

They [the statement-takers] came and asked who experienced something bad during the war. They asked us to come out and talk about our experiences. We were a bit afraid. We were afraid of the Special Court, we didn't want people in the community to point fingers at us, and we didn't want those that had wronged us to revenge because we exposed what they had done.

– Focus-group discussion with boys in Dare who gave statements

But, the statement-takers came in and encouraged us and made us feel okay... They told us everything would remain in secret. They also said that if we gave statements it would help bring peace to Sierra Leone. We were all afraid, but the TRC gave us confidence to talk. After talking it took several months to feel good. We thought the TRC were going to take action and take us to court. We thought the TRC would come back, but they didn't.

– Focus-group discussion with boys in Dare who gave statements

If asked to go [to give a statement] again, I would go. It was okay. I felt protected.

– Boy in Dare who gave a statement

³⁶ The interviews were conducted in May 2007.

Confusion about the Mandate

Follow-up interviews with children and young people indicate that some confusion remains as to the TRC's mandate, especially in regard to their expectations about compensation in exchange for participation. Interviews carried out in May 2008 indicate that children had unfulfilled expectations as to the role of the TRC in assisting their recovery from the war.

This underlines the need for extensive community outreach in the early phase of a truth commission, to explain its objectives, to benefit from a consultative process at the local level, and to clarify children's potential roles. In Sierra Leone some children thought the TRC would provide financial support and tuition for schooling. The following quotes from young people interviewed for this study help to articulate this perspective:

After giving a statement I thought they were going to pay us. They took us into a separate room, and I thought we would get something. I thought they would help me find my parents. They never did.

– Boy who gave a statement to the TRC and participated in focus-group discussion in Daru

I gave my testimony because I had lost my family. I thought if I said something, some assistance would come... I wouldn't do it again because it didn't help me.

– Interview with a girl who gave a statement to the TRC (without support from a child protection agency)

This confusion about reimbursement may have been partially created by the earlier precedent of the cash-for-arms policy of the disarmament, demobilization and reintegration (DDR) program. It highlights the challenges of the Commission's focus on truth-telling in the midst of chronic poverty, in a country seeking to recover from conflict. While most of the children interviewed supported the

TRC and had had positive experiences, many also identified poverty and lack of schooling as their primary concerns. Participants who expressed dissatisfaction with the TRC mostly did so in relation to the government's inability to adequately link children's truth-telling and reintegration to poverty alleviation and to the provision of basic services such as education and health care.

Effectiveness of the TRC in Promoting Reconciliation

The TRC Act advised that the Commission promote healing and reconciliation and stated that the Commission "may seek assistance from traditional and religious leaders."³⁷ Some civil society members further recommended children's participation in traditional ceremonies, yet the child participation working group advised against incorporating traditional practices and ceremonies for healing and reconciliation into the proceedings of the TRC.³⁸ Similarly, during statement-taking children (and adults) were asked to provide recommendations to the TRC, which were meant to encourage people to express their views not only about the conflict but also about the future of Sierra Leone and its children. The majority of children talked about education and asked for assistance in returning to school.³⁹

Interviews and focus-group discussions demonstrated mixed feelings about the TRC. Many people – both children and adults – recognized its value, but also felt that it wasn't enough.

³⁷ The Truth and Reconciliation Commission Act 2000, Supplement to the *Sierra Leone Gazette* CXXXI (9) 10 February 2000, at Part III 7(2).

³⁸ *Children and the Truth and Reconciliation Commission for Sierra Leone*.

³⁹ *Truth and Reconciliation Report for the Children of Sierra Leone, Child-Friendly Version* (2004), at 25; Saudamini Siegrist, "Children's Participation: Truth and Reconciliation Commission for Sierra Leone," (paper prepared for UNICEF IRC expert discussion on Transitional Justice and Children, November 2005), at 12.

The TRC was good but more needs to be done. Follow-up needs to take place and reconciliation that isn't modern or Western like the TRC.

– Interview with a staff member from the Council of Churches in Sierra Leone

Some expressed the view that the TRC did not reflect the culture of Sierra Leone:

Apologizing is alien in our culture. I didn't realize until I married my husband. He doesn't like to apologize because he feels like he's losing face. Apology isn't empowering. Maybe people would prefer silence. Maybe people prefer actions to words. What do you do with an apology?

– Interview with a Human Rights Commission staff member

A number of informants felt that reconciliation was wanted and needed, yet not really achieved:

What we needed was reconciliation. In that way we were different from South Africa.⁴⁰ People knew the story in Sierra Leone. People wanted help to reconcile. People asked me, "What can I do to live with these

⁴⁰ One respondent (Moses Khanu) indicated that the process was similar to that of South Africa, but the context was much different. We were comparing apartheid to a political conflict. Consider recent commentary critiquing the responsiveness of the Sierra Leone TRC to the prevailing local sociocultural context, especially in the face of having become part of the "first aid kit" in post-conflict societies, that is, being considered as a "must have" to bring about social reconciliation (Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly*, 27(2) 2005:361-391); Rosalind Shaw and United States Institute of Peace, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone" (Washington, DC: US Institute of Peace, 2005).

people?” Instead we should have had a reconciliation and truth commission. There was too much emphasis on truth and not enough on reconciliation.

– Interview with a Human Rights Commission staff member

The TRC was expected to promote healing and reconciliation; however, in practice, more emphasis was given to collecting statements and documenting violations in order to establish a historical record. There was no consensus on what was needed to achieve healing and reconciliation. The following quotes are from a focus-group discussion in Daru and illustrate that, according to some participants, reconciliation also requires judicial accountability:

To bring about healing and reconciliation there needs to be justice. The government said that all those who committed the greatest crimes and bore the greatest responsibility would pay. Some of those who did bad have been left out. We are offended. They should go to the same place and give accounts of what they did. They should be punished.

Those who bear the greatest responsibility should be arrested so that people won't repeat the same thing. This sets an example.

A boy who participated in a focus group in Kailahun said:

The rebel who killed my mother and father, he must be treated that way also [arrested]. Whenever I see him I still feel bad. I want him to die on the spot. He must be punished.

Yet others disagreed and felt that reconciliation could be achieved only by forgetting the wrongs committed:

We don't have that culture to talk about it. People just think it will open all the wounds.

– Interview with Paramount Chief

During a focus-group discussion in Kailahun with girls, many of whom had been victims of sexual violence, one girl stated:

They [the rebels] need to be apprehended to bring peace. The Special Court has not apprehended everyone. There are still some rebels living amongst us who forced us to participate in the conflict. We are angry with them. One is still living in the community, and he boasts about what he did during the conflict. Let the government punish him.

While those who bore the greatest responsibility for the conflict should be held accountable, many expressed the view that children can demonstrate they are sorry by not engaging in violent activities and can be reintegrated, becoming responsible members of society. This underscores an important local belief in the rehabilitative capacities of children and young people and may provide an important tool for harmonizing with child rights principles and standards.

The interviews revealed that the debilitating impact of poverty is one of the greatest limitations to achieving reconciliation. Many focus-group participants expressed the importance of material support to help facilitate reconciliation:

In our culture when someone grieves, you get material things and support. People know it is important to society when someone takes responsibility and supports them. The TRC didn't do this.

– Interview with a staff member of CCSL

This expectation was reiterated by a boy who had lost both his parents in the war:

An apology is not enough to me. I have no parents, so who will take care of me? What about my school fees, and the other members of my family? I must be taken care of.

Another child who participated in a group discussion in Kailahun stated:

To maintain that kind of peace we should be given assistance. If we concentrate on that we will forget about what happened. If we are helped and empowered we will forget. We will truly forgive.

Many people mentioned the importance of communities in promoting and sustaining reconciliation:

People live in communities and neighborhoods, and that is where the emphasis should be. Communities are the natural habitat of people.

– Interview with the former Minister of Youth and Sport

A staff member of the NGO Fambul Tok International, stated:

Specifically, traditional ceremonies and practices in communities are each community's own way to facilitate reconciliation.

But little is actually known about whether cultural practices (religious and traditional) have the potential to positively contribute to the healing and reconciliation of children, or what kind of approaches and methods best contribute to the long-term reconciliation and recovery of children.

Good Practices in Child Protection

A common theme of the discussions and interviews was that children's successful involvement in the truth and reconciliation process requires a supportive environment. In the context of the Sierra Leone TRC, this supportive environment included the child, the family, community leaders, CPAs and the government.⁴¹ There was mixed success in creating this environment, as demonstrated by the differing experiences of two participants, described below.

Sia: A Supported Statement-Giving Experience

"Sia" (not her real name) was abducted as a young girl by the fighting forces. When she returned home from the bush, she was taken in by an interim care centre, receiving food, clothing, school support, medical attention, counseling and opportunities to play. Family tracing did not succeed in locating her family, but a foster-care living arrangement was organized for Sia, with UNICEF providing school support. At the Centre, Sia developed a strong bond with one of the workers, fostering a trusting relationship. It was through this support person that the TRC found Sia, then fourteen years old. She had heard about the TRC process and the importance of child involvement, and she learned more in a discussion with a representative from the International Rescue Committee and the statement-taker, who explained the process privately and in detail. Sia was informed that the statement-taking aimed at learning the facts about the conflict to prevent atrocities from happening again. The statement-taker also reiterated that her participation was voluntary and that those who gave statements would not be identified as perpetrators but considered as victims and witnesses by the TRC.

Sia indicated she was grateful for this private explanation. The trusting relationship that was established made her more comfortable with the TRC statement-taking process. She indicated

⁴¹ Personal communication, with an official of MSWGCA, May 2007.

the importance of talking about her experiences so that “people would know about what we went through and find ways to stop it.” After Sia gave her statement, Save the Children offered follow-up support, which was supplemented by her relationships with friends and colleagues. Since giving her statement to the TRC, Sia has been able to look forward to the future rather than focusing on the past, and is attending medical school. Her experience with the TRC supported her healthy development and well-being by providing the economic, physical, emotional and social support that are the four cornerstones of healthy development identified in research on child resilience.⁴²

Fatuma: An Alienating Statement-Giving Experience

Conversely, when children did not receive sufficient support, they were often left disappointed with the process. The experience of “Fatuma” (not her real name) with the TRC serves as a case in point.

Fatuma, age sixteen, was picked with a group of girls from the community and told she had to talk to the TRC. They were told the experience would be good for them but received no further explanation about it. Once at the venue, the girls were asked to tell their stories to a male statement-taker, who asked a series of questions. Fatuma received no follow-up support and was left disenchanted and confused about the TRC and its purpose. She said, “Even if they ask me for the second time to explain my problem again I won’t do it. For quite a long time people have been coming to us to talk to us, and we have made an agreement that we should not explain our problem to any organization because nothing is being done.”⁴³

⁴² Emmy E. Werner and Ruth S. Smith, *Overcoming the Odds: High Risk Children from Birth to Adulthood*. (Ithaca, NY: Cornell University Press, 1992).

⁴³ Personal communication from a Sierra Leonean girl who provided statement to TRC, May 2007.

Fatuma lacked a clear understanding of the context or process of the TRC and lacked the human networks and connections to nurture her well-being and help navigate the experience. She was also without financial support or security. The lack of assistance provided to Fatuma heightened her vulnerability, and serves as an example of the failure of the protective network.

Creating Supportive Systems

Despite the TRC's understanding of the fundamental importance of fostering support linkages for children who participated in the process, its support for children was inconsistent. As one respondent noted, too much responsibility rested with child protection agencies and statement-takers, and they received too little assistance.⁴⁴ Creating supportive structures for children participating in truth and reconciliation mechanisms requires the involvement of many individuals, including children. This collaborative process of child involvement extends beyond transitional justice to incorporate society as a whole. It includes establishing a supportive framework for active citizenship by children and young people and creating a safe space where they can come together with their communities and governments to learn, share and support one another in improving the rights and well-being of children, their communities and the broader society.

The research findings also underline the importance of building linkages among CPAs and communities to create a protective environment that promotes child agency, healing and empowerment, both social and economic, across a wide spectrum of children's experience and interventions.

A UNICEF child protection staff member stated, "the TRC should not be treated as a report but should be integrated throughout government structures and programs from the bottom

⁴⁴ Funds were provided by UNICEF for CPAs to provide support, but according to one respondent, many organizations did not make full use of it (Interview, Sierra Leone TRC expert, May 2007). Discussions with CPA representatives suggest a wavering commitment to child participation in the TRC, which may have been a contributing factor.

to the top. In that way, when we talk about the TRC and what it means for children, it becomes part of the culture and a part of them.”

CONCLUSIONS

The question “what next?” remains, as articulated by Abubakarr Messeh-Kamara, who served as the elected President of the Children’s Forum Network during the preparation of the Truth and Reconciliation Commission report. When the twenty-one-year-old was interviewed as part of the research conducted for this chapter, he asked: But now that the TRC is over, who is there to transform recommendations and policy into action? If such recommendations are not addressed, then society is heading to a recurrence, another abuse of children. We have to turn the table around this time and divert such colossal financial, technical and human resources wasted in the planning of wars, which could otherwise be invested in children’s health and education.

The Sierra Leone TRC is an important landmark for children’s rights and has established innovative procedures for children’s protection and participation in truth-telling and reintegration processes following the country’s long conflict. Through the creative partnerships established between children’s networks, experts on child protection and children’s rights and members of the TRC, the Sierra Leone truth and reconciliation process offers important lessons linking child protection with child participation. A key strategy was the rights-based approach to children’s engagement, which allowed young people to shape the process and adapt it to the local contexts. The work anticipates a broader trend in child protection that traces a conceptual line from protection to participation to healing to citizenship.

At the core of this emerging paradigm is the notion that efforts to support child protection through processes such as truth and reconciliation commissions are more effective and sustainable when concepts of participation are broadened to include children’s agency and evolving capacities. When children are meaningfully engaged

to help shape TRC processes, as in Sierra Leone, participation broadens from simply listening to children to considering children's efficacy in defining protection systems and building better truth-telling procedures. As a result, their participation leads to better protection, which in turn improves the capacity for healing, both individually and collectively. Finally, creative partnerships with peers and adults result in stronger grassroots networks, both within and between generations, and improved citizenship. This strengthens the basis for peace-building.

Future challenges include the need to consider the broader recovery and development contexts in which TRC processes operate. Further reflection is especially needed regarding how to link truth-telling and reintegration with children and young people's basic economic, education and protection needs. More consideration should be given to linking lessons learned in applying child rights in transitional justice procedures with other areas of legal and social policy development, such as restorative justice and family and community engagement in designing and monitoring child protection systems. Finally, much would be gleaned from a deeper and more systematic engagement with children, young people and child rights experts on the changing nature of childhood and children's development in the context of war and conflict and the implications this holds for social regeneration and reconstruction processes, including transitional justice mechanisms.

The research undertaken for this chapter reaffirms the importance of family and community structures in strengthening the protective environment needed for children to successfully participate in transitional justice processes. Truth commissions need to build relationships with CPAs and community leaders so that children will have the long-term emotional, developmental and material support they need for healing and reconciliation.

Another key focus of future truth commissions should be to harmonize a human rights approach with development, concentrating on poverty reduction. It is also crucial to involve and empower organizations led by children and young people from the beginning of the process, engaging adolescents and reinforcing their peer networks.

The research demonstrates that more knowledge is needed on the intersection of international human rights law, the field of transitional justice and traditional practice and processes concerning accountability and social reconciliation. Such work could also contribute to a greater understanding of local, national and international concepts of childhood. Transitional justice processes also need to be informed by an understanding of child development, protection and agency and to respond to local and collective concepts of trust, accountability, forgiveness, atonement and reconciliation.

The growing understanding of children's agency in transitional justice processes and practices can help inform broader post-conflict social policy reforms in education, health care, social welfare, protection and justice. In addition, child participation in transitional justice processes can serve as an entry point for a larger social discourse on children and citizenship.

CHAPTER 6

CHILDREN AND THE LIBERIAN TRUTH AND RECONCILIATION COMMISSION

Theo Sowa¹



Chris Herwig/Liberia/2008

Child participant in the Liberian Truth and Reconciliation Commission Children's Gallery, Monrovia City Hall in September 2008.

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INTRODUCTION

Liberia was afflicted by a series of civil conflicts for almost twenty-five years. The roots of the conflicts are complex and can be traced back to historical, political and economic factors predating the outbreak of hostilities.² In 1980, a coup d'état led by Samuel Doe ended Liberia's first republic. Presidential elections were held in 1985 but did little to decrease growing tension or to address widespread human rights violations and poverty in the country. By 1989, armed rebel forces were active in Liberia, challenging the Doe government and, in 1990, Doe was killed. Despite the establishment of an interim government of unity in 1990 and presidential elections in 1997, the conflict in Liberia continued in various forms until 2003. Armed factions, government militias and mercenaries established "front lines" in towns, villages and the bush, killing, injuring and mutilating hundreds of thousands of Liberians and raping women and children. Many children, from the very young to adolescents, were abducted from their homes and forcibly recruited into the fighting forces.³ The conflict destroyed schools, medical facilities and other infrastructure and overturned any attempts at democratic governance.

² Max Ahmadu Sesay, "Bringing Peace to Liberia," *Accord: An International Review of Peace Initiatives* 1 1996 at 10, [hereinafter "Bringing Peace to Liberia"], available at www.c-r.org/our-work/accord/liberia/contents.php. For an overview of the causes of the armed conflict in Liberia, presented within a review of recent literature on the subject, see Christof Kurz, "A Quarter-Century of Violent Upheavals: A Review of Works on the Causes of War and Lessons for Reconstruction in Liberia," *Journal of Intervention and State-Building* 3(3) at 366. Consider also, the oft-cited piece on Liberia's civil war, S. Ellis, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (New York: New York University Press, 1999), which Kurz notes has been criticized mainly for its emphasis of the role of traditional and modern religious practices in explaining rebel strategies and patterns of violence in Liberia.

³ Republic of Liberia, Truth and Reconciliation Commission, Final Report, Vol. Three: Appendices, Title II: "Children, the Conflict and the TRC Agenda," available at www.trcofliberia.org/reports/final/volume-one_layout-1.pdf. See also Human Rights Watch, *Youth, Poverty and Blood: The Lethal Legacy of West Africa's Regional Warriors* (Human Rights Watch, 2005), at 10, 19, 29, [hereinafter "*Youth, Poverty and Blood*"].

The extensive forced recruitment of children, together with the targeting of schools and medical facilities and the conducting of the war in non-conventional battlegrounds, meant that children were disproportionately affected. In 1994, the World Health Organization reported that almost two thirds of Liberian high school students had seen someone killed, raped or tortured.⁴ At the close of the official disarmament, demobilization and reintegration (DDR) process in 2004, eleven thousand, seven hundred and eighty children had been demobilized, but the total number of children recruited was estimated to be much higher.⁵ Girls, in particular, were missing from the demobilization process.⁶ In the aftermath, some Liberian child protection agencies (CPAs)⁷ expressed concern about the continuing high levels of violence and other abuses of children's rights that came to be tolerated as "normal".⁸

The Comprehensive Peace Accord, signed in 2003 in Accra, called for transitional mechanisms and processes to promote reconciliation and democratic governance.⁹ This chapter documents and analyzes how one of those transitional mechanisms, the Truth and Reconciliation Commission of Liberia, integrated a focus on children into its work. Despite the impact of armed conflict and

⁴ "Bringing Peace to Liberia," at 12.

⁵ See Republic of Liberia, Truth and Reconciliation Commission, Final Report, Vol. Three: Appendices, Title II: "Children, the Conflict and the TRC Agenda," at 47.

⁶ Among the 11,780 children demobilized, only 2,738 were girls. ("Reparations in the Context of Children": Think Inc. submission to TRC national children's thematic hearings, Monrovia, September 2008.) For a critique of the DDR process, see *Youth, Poverty and Blood*, at 44, 47.

⁷ Non-governmental organizations (NGOs) and others that work on behalf of children.

⁸ Christian Children's Fund, "Child and Family Protection for Peace," Liberia submission to the TRC institutional children's hearings, Monrovia, September 2008.

⁹ Transitional mechanisms and processes highlighted in the peace agreement included security sector reform, electoral reform and the establishment of an independent human rights commission and a truth commission, plus the establishment of a transitional government and transitional legislature. See Liberia Comprehensive Peace Agreement, available at www.trcofliberia.org.

political instability on the lives of children, few truth commissions in other national contexts have achieved such a focus. Building on the work of truth commissions in South Africa and Sierra Leone, the Liberian TRC deliberately integrated consideration of children, child rights and child participation in its mandate, operations and outcomes. Doing so raised many challenges, such as determining the appropriate age for children to participate in truth and reconciliation proceedings, and achieving a balance between child participation and child protection. This chapter highlights key lessons from each stage of the process, which offer the opportunity to inform and strengthen the child rights focus in future truth commissions.

Methodology

The research for this chapter was undertaken during two field trips to Liberia during the course of the TRC's activities, in November 2007 and September 2008, and through a desk review of relevant documents. The field trips included individual and group interviews with children, TRC commissioners and staff, national and international child protection staff and government agencies, as well as personal observation of TRC workshops with children, TRC regional and institutional children's hearings, and planning meetings involving the National Child Protection Network (CPN)-TRC Task Force.¹⁰ At the time this chapter was written, the TRC was preparing its final report.¹¹

¹⁰ Interviews by the author were held in Monrovia, Cape Mount and Zwedru in November 2007 and September 2008 with TRC commissioners; staff from the UNICEF Liberia Country Office (past and present); TRC and child protection agencies working with children involved in truth commission activities; staff and ministers from three government departments, including the Deputy Minister of Education and the Deputy Minister for Gender and Development; the UK representative on the International Contact Group for the TRC; UNMIL child protection staff; and children who participated in TRC workshops and panel discussions.

¹¹ The TRC released its final report, including a chapter on children, in November 2009.

CREATION OF THE TRUTH AND RECONCILIATION COMMISSION

Liberia's Truth and Reconciliation Commission was established by the 2005 Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia.¹² Its objectives included the following:

- Establishing the causes, course and outcomes of the civil conflicts that beset Liberia from 1979 to 2003.
- Promoting national peace, security, unity and reconciliation, including through the investigation of the events of the civil war and recommendations for relevant responses, potentially ranging from criminal prosecutions to reparations.
- Compiling the findings of the TRC for wide distribution within Liberia.¹³

Building on the experiences of TRCs in other countries, particularly in Sierra Leone, the TRC Act referred specifically to children, noting their experiences during the conflict and their roles in the future development of the country. The Truth and Reconciliation Commission Act of 2000 that established the Sierra Leone TRC called for specific attention to be paid to sexual abuses and to the experiences of children, and for special procedures to address the needs of particular victims, but the Liberian TRC Act went into far greater detail. It set the stage for a concerted effort both to focus on the impacts of the conflict on children and to involve children in TRC activities.¹⁴

¹² See Republic of Liberia, Truth and Reconciliation Commission, Volume One, "Preliminary Findings and Determinations," at 16, available at www.trcofliberia.org/reports/final/volume-one_layout-1.pdf.

¹³ Act to Establish the Truth and Reconciliation Commission (TRC Act) of 12 May 2005, available at www.trcofliberia.org/about/trc-mandate [hereinafter "TRC Act"].

¹⁴ See, in particular, TRC Act: preamble; article IV, section 4; article VI, section 24; article

The clear articulation of children's important role in the mandate, operation and outcomes of the TRC, and the call for policies, procedures and operational concerns to secure children's safe involvement in its work, were in themselves significant achievements. They raised new challenges and opportunities requiring human and financial resources, as well as a sustained commitment by the Commission to give primary consideration to the best interests of the child.¹⁵ Activities organized for children included awareness-raising workshops at county and district levels, statement-taking, and regional and institutional children's hearings.

Age was an issue that resisted satisfactory resolution. The Commission made a decision that all TRC children's processes would apply only to those who were eighteen or under at the time of the TRC activity, rather than at the time of their involvement in the war. This meant that many of those who had suffered as children during the conflict but who were over eighteen at the time of the TRC did not take part in the children's processes. Special TRC processes for youth were intended to include the eighteen- to twenty-four age group, but the mechanisms developed for them were not as comprehensive, integrated or visible as those for children. Some CPAs expressed concern that a significant number of Liberians who were children at the time of the conflict but adults during the TRC process would not be heard or sufficiently considered. Ultimately, the experiences of children in earlier phases of conflict (1979 to 1996) were not included in the child-focused work of the TRC.

Another age-related problem can be traced to the TRC Act. It offered confidentiality for twenty years following the conclusion of the TRC's mandate, after which statements taken and testimony given at hearings would be released into the public domain. While this period of time might be adequate for adults, it could jeopardize children by exposing them to the public eye during adulthood. For

VII, section 26, article VII, section 26(n); article VII, section 26(o).

¹⁵ Consistent with article 3 of the Convention on the Rights of the Child, G.A. res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959), art 6(2) [hereinafter CRC].

example, repercussions could be severe for a girl who, at the age of thirteen, made a statement revealing rape, torture and abduction, if those details were made public twenty years later when she had reached the age of thirty-three. The TRC reaffirmed its commitment to full confidentiality for all child statement-givers, but more careful consideration of confidentiality issues relating to children is crucial for future truth commission processes. International guidance on such age-related issues would be helpful for all transitional justice processes.

ROLE OF CHILDREN IN THE TRUTH AND RECONCILIATION COMMISSION

Child-Focused Processes and Mechanisms

Sierra Leone's TRC was the first to include children in statement-taking, thematic hearings and preparation of a children's version of the final report.¹⁶ Liberia's went a step farther, including children systematically throughout the process, in Monrovia, the capital city, and in all fifteen counties. The involvement of children at the local level raised unprecedented challenges and required the Commission to develop innovative strategies to support the safe and appropriate participation of children.

From the outset, policies, procedures and tools were specifically adapted to the Liberian context. Individual commissioners were allocated responsibility for thematic areas, including for children, women, youth and persons with disabilities. A Children's Committee was made up of three commissioners who were joined by child protection specialists from UNICEF, the United Nations Mission in Liberia (UNMIL) and the CPN-TRC Task Force. The commitment of the TRC chair was crucial in maintaining a focus on children in the face of competing priorities, limited resources

¹⁶ UNICEF Innocenti Research Centre and the International Center for Transitional Justice, *Children and Truth Commissions* (UNICEF, forthcoming in 2010).

and organizational and political challenges.

The establishment of two significant relationships set the stage for a genuine focus on children – one with the UNICEF country office and one with the Liberian National Child Protection Network (CPN) (made up of child protection agencies working in Liberia). These relationships were formalized through memorandums of understanding (MOUs) that specified areas of responsibility, communication channels, frequency of contact, and the type of human, technical, financial and other support to be provided by each party. Although periodic progress reviews were done and activities were adapted accordingly, there was no formal monitoring and evaluation framework developed for the MOU and TRC child-focused activities.

Relationship with UNICEF

The MOU with UNICEF was signed by the Chair of the TRC and the UNICEF Country Representative in Liberia in September 2007.¹⁷ Underpinning it was the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Key elements of UNICEF technical support included the following:

- Funding a child protection specialist to work in the TRC offices
- Funding outreach meetings with children
- Accessing technical support for the TRC through UNICEF's international networks
- Assisting the TRC in developing child-focused frameworks and tools.¹⁸

¹⁷ Memorandum of Understanding between the Truth and Reconciliation Commission of Liberia and UNICEF, September 2007 (on file with the author).

¹⁸ Liberia TRC/UNICEF Recommendations on Participation and Protection of Children in the Liberia TRC Process (document on file with the author and in archive at the UNICEF Innocenti Research Centre, Florence).

Key elements of TRC responsibility included the following:

- Systematic inclusion of child protection issues in TRC processes, as identified through the relationship with UNICEF and the CPN TRC Task Force
- Regular liaison with child protection specialists
- Advancement of child protection and participation issues through TRC internal and external relationships
- Accountability and responsibility for organizing child-focused meetings, hearings and final report input.

Relationship with Child Protection Agencies

The decision to establish a task force of CPAs that focused on children's involvement with the TRC was one outcome of a meeting between the CPN and TRC commissioners,¹⁹ following an orientation for commissioners conducted by UNICEF in 2006. The CPN-TRC Task Force was formalized through an MOU and a Framework of Agreement, signed, respectively, in September 2006 and October 2007 by the TRC Chair and the Chair of the CPN.²⁰ These documents outlined the responsibilities, activities, communications frameworks and partnership accountability of each party. Key elements of TRC responsibility included the following:

- Recognition of the expertise of the CPAs
- Acceptance of technical advice and assistance from CPAs on matters affecting children

¹⁹ Civil society organizations working on programmatic response and advocacy for children are referred to as child protection agencies (CPAs). The National Child Protection Network (CPN) includes a large number of these CPAs, working together on issues of mutual concern.

²⁰ The Chair of the CPN was Don Bosco Homes. Eighty-one child protection agencies signed the MOU (Republic of Liberia, Truth and Reconciliation Commission, Final Report, Vol. 3: Appendices, Title II: "Children, the Conflict and the TRC Agenda," at 8).

- Regular liaison and planning meetings with the CPN TRC Task Force
- Joint development of child-focused policies and tools
- An agreement to hold a series of child-focused activities to ensure comprehensive child participation in TRC processes.

Key elements of CPN responsibility included the following:

- Regular meetings and coordination of key issues, agreements and concerns among the CPAs
- Regular liaison by the CPN TRC Task Force with the TRC
- An agreement to assist the TRC in developing policies and tools for comprehensive and protected children's involvement in TRC processes
- An agreement to facilitate TRC outreach and interaction with children throughout the country
- A commitment to monitor the approaches and implementation of the TRC work with children.

A core group of seven organizations became the base of the CPN TRC Task Force, three of which played a leadership role and undertook most of the liaison work among CPAs and with the TRC.²¹ Monthly planning meetings helped in tracking activities and assigning tasks. More CPAs were mobilized as needed for specific initiatives, such as during the awareness-raising workshops, children's statement-taking and children's hearings. The commitment, capacity, technical expertise, good will and energy of the CPAs enabled the TRC to engage with a wide and diverse community of children and to support their participation in truth commission activities throughout the country.

Substantive discussions between the TRC and CPN on child rights and child protection were convened early on, in March 2006, and produced a set of key principles for children's involvement in the TRC.²² The key principles were as follows:

²¹ These key CPAs were Don Bosco Homes, Children's Assistance Program (CAP) and the Foundation for International Dignity (FIND).

²² The principles were informed by the Convention on the Rights of the Child, the African

- The best interests of the child guide the entire process.
- Children must be treated with dignity and respect.
- Any participation of children is voluntary, on the basis of informed consent by the child and parent/guardian. There should be no power of subpoena for children.
- The safety and security of all child statement-givers is paramount, including protection of children's physical, spiritual and psychological well-being.
- Determination of the child's eligibility to give a statement is based on a vulnerability assessment and safety checklist.
- A child-friendly environment for statement-giving, one-on-one unless the child requests the presence of a social worker and/or family member or guardian. There should be no public disclosure, group discussion or direct engagement with an alleged perpetrator.
- Unless they choose otherwise, girls are interviewed by female statement-takers.
- The confidentiality and anonymity of the child is guaranteed, and no information is shared with outside bodies, including judicial bodies.
- Psychosocial support is provided before, during and in follow-up to the statement-taking process.
- All statement-takers and social workers are to receive training in child rights and child protection.
- No TRC has created a judicial link or exercised judicial powers with respect to children. It is strongly urged that judicial measures not be used by the TRC in its involvement with children.

These key principles were later revised and adapted to local contexts and conditions, but the "best interests" principle was maintained throughout as a guiding force in discussions and debate, as well as in the practical implementation of policies and

procedures. The understanding of the best interests of the child was elaborated in discussions with the Commission to reflect both international and local concerns. For example, it was noted that generating a protective environment for children in Liberian culture requires the support of parents as well as village and religious leaders. The importance of additional encouragement for girls was emphasized, and the guarantee of confidentiality for all child victims and witnesses was assured.

Discussions were undertaken on how best to address accountability for children who were forcibly recruited by armed factions and participated in hostilities. The need for age-appropriate measures was noted, and the principle of the “evolving capacities of the child” was used to inform decisions. Liberian CPAs advocated for TRC clarification that recommendations for prosecution would target those most responsible for grave violations and that children would not be identified among those most responsible or recommended for prosecution.

Local participation, ownership and decision-making were strongly emphasized. While the advice and experience of the international community were sought on issues related to child participation and protection, the local perspective held sway. For example, a Liberian candidate was identified to serve as the TRC child protection advisor to implement the MOU with the CPN-TRC Task Force. This was done to ensure that the TRC would have a national perspective and that decisions about the participation and protection of children would be based on culturally sensitive norms.

One outcome of this approach was the development of Liberian interviewing techniques for children, prepared by local CPAs for the statement-taker training.²³ The guidance emphasized that 75 percent of the interviewer’s communication with the child was

²³ The development of child-friendly interviewing techniques was facilitated by the Harvard International Human Rights Clinic, Harvard Law School, which carried out a training-of-trainers workshop with CPAs in October 2006, which in turn carried out training on child interviewing with TRC statement-takers. *See* International Human Rights Clinic, “Interviewing Tips for Children of All Ages,” (Cambridge: Human Rights Program, Harvard Law School, October 2006).

likely to be nonverbal. The techniques highlighted the importance of facial expression; embracing the child; showing respect for cultural and traditional norms, values and taboos; and listening to the child “with all five senses.” It was noted that “the child will know if you are not listening.” Instructors were also instructed to “sit in silence if that is what the child needs and wants.” Interviewers were encouraged to “use words that are easily understood by the child, in local dialect or Liberian English.”²⁴

The technical support provided by international child protection experts, including the UNICEF country office and the UNICEF Innocenti Research Centre, helped to lay the groundwork by presenting international standards and norms, which were then adapted for local use. The wisdom of this approach was borne out during TRC activities, as it served to build trust and capacity among communities. The success was possible partly because the local CPAs, which together formed the National Child Protection Network, already had a solid understanding of child rights and a deep commitment to the CRC.

Relationship with the Children’s Parliament

The TRC also sought to engage with the Liberian Children’s Parliament. This relationship was intended to generate continuing dialogue with Liberian children and young people and to encourage their representative and democratic participation, both with the TRC and more generally. Support for the Children’s Parliament was provided by the Ministry of Gender and Development, together with UNICEF and the National Child Protection Network. The county and district engagement with children also included Children’s Clubs and other groups of children in and out of school who were identified and convened by local CPAs. The impacts of the war were so widespread that all children were affected – by experiencing violence directly, by losing friends and family

²⁴ See Genevieve Freeman-Massa, *Combat Stress Liberia*, and the CPN, “Liberian Interview Techniques for Children,” (prepared in August 2006 for the UNICEF training for statement-takers), document on file with the author.

members and by being forced from their homes. The TRC findings confirmed this reality and articulated the atrocities that children experienced, both as victims and as perpetrators. The Children's Parliament became an active partner and encouraged participation in the work of the TRC as part of its policy to promote children's voices in Liberian reconstruction and development.²⁵

The work with the Liberian Children's Parliament, with the support of the CPN and the Ministry of Gender and Development, included independent submissions to the TRC regional and institutional children's hearings²⁶ as well as a number of discussions among young people, commissioners and others involved in the TRC process. However, this relationship also met with difficulties. The Children's Parliament was newly formed, replacing a children's body that had a more limited, Monrovia-based representation. Disputes arose as to which of these bodies was the legitimate representative for children.²⁷ That delayed engagement with the TRC and strained efforts to formalize a relationship with a national children's representative body. Gradually, this relationship gained traction and proved a sustainable and well-organized outreach network to children at the county level.

Another challenge was the representation of marginalized children, given that the Children's Parliament was mostly comprised of children enrolled in school. In response, the CPAs worked to engage more marginalized children through Children's Clubs and village Child Welfare Committees, which are not school-based.²⁸ The Children's Clubs, set up by CPAs following the Liberian DDR process, are run by children with adult guidance, with members both in school and out of school. The adult child welfare

²⁵ Submission from Liberian Children's Parliament to Institutional Hearing on Children, Monrovia, September 2009, available at www.trcofliberia.org.

²⁶ *Ibid.* See also submissions from Liberian Children's Parliament to regional TRC Children's Hearings.

²⁷ Interview with Ministry of Gender and Development, Monrovia, November 2007.

²⁸ Author interview and observation of CPN-TRC Task Force meeting, at TRC offices in Monrovia, November 2007.

committees are comprised of local leaders and human rights advocates who advocate on behalf of children within communities. These child-focused relationships were at the heart of the TRC's engagement with children throughout Liberia and led to a variety of activities involving children in TRC planning, operations, activities and outcomes.

TRC ACTIVITIES RELATING TO CHILDREN

Training

An initial orientation on child rights and child protection for TRC commissioners was organized by UNICEF Liberia and the UNICEF Innocenti Research Centre in March 2006, at the request of the TRC. The training laid the groundwork for the Commission's engagement with children. The goal was a child-friendly and inclusive yet secure process for children's participation.

Following the orientation, UNICEF convened a meeting with the National Child Protection Network. This meeting led to the formation of the CPN-TRC Task Force, which became the fulcrum of the Commission's interaction with children.

In August 2006, the TRC convened its first training session for almost two hundred statement-takers. Significant attention was given to the impact of the conflict on children and their roles in TRC processes. UNICEF Liberia, the UNICEF Innocenti Research Centre and representatives from the CPN-TRC Task Force led sessions on child rights and child protection, including culturally sensitive techniques for interviewing Liberian children and exercises in role play. The United Nations Development Fund for Women (UNIFEM) gave a presentation on special considerations for women and girls. Child protection strategies and tools were developed, addressing vulnerability checks, confidentiality, psychosocial support and participation in secure contexts. On the final day, the Children's Parliament convened a consultative forum on children's participation in the TRC, in collaboration with the Sierra Leone Children's Forum Network, a child-led advocacy

organization that had participated extensively in the Sierra Leone TRC. Also participating were three Liberian TRC commissioners, CPN representatives and staff from international CPAs.

Over the course of the proceedings, sixty-seven of the one hundred and ninety six²⁹ trained statement-takers were identified as specialists for children. However, due to attrition and to a postponement in statement-taking, the initial number of trained individuals was much reduced and proved inadequate. Three additional training courses were convened for smaller groups, including TRC inquiry officers and investigators. Logistical difficulties and funding constraints resulted in further postponements, and a decision was made to extend statement-taking in order to focus on statements from children.

In January 2008, an abbreviated child-focused training took place for TRC county coordinators and field officers. This training included child participation and protection elements from the generic training, but was less comprehensive in addressing children's involvement, participation and protection. However, the frameworks, tools and mechanisms developed during the initial trainings were used in the later training sessions and in the field. In addition, two statement-takers per county were identified as child specialists and based at the county TRC offices, where they received additional support through local CPAs.

Training was also provided to CPAs involved in TRC processes at the county level. Some of the training was ongoing, with staff from the agencies taking part in the statement-taking training described above. In addition, training on the mandate, aims and child-focused processes of the TRC was convened for county-level CPAs in September 2006. Facilitated by UNICEF, this session was attended by approximately thirty CPA staff, TRC commissioners and the Women and Children's Protection Section of the police force.

UNICEF facilitated additional, short orientation sessions to update agencies on the progress of the TRC and the upcoming

²⁹ Interview with Onike Gooding Freeman, TRC child protection specialist, Monrovia, September 2008.

needs of the CPN-TRC Task Force, including a training in November 2006 for a series of TRC children's awareness-raising workshops. Harvard Law School also facilitated training on child-focused communication skills in June 2007, attended by thirteen representatives of the CPN-TRC Task Force.

Key Lessons

A key lesson of the TRC training process is the fundamental importance of orienting commissioners on child participation and protection. The importance given to child rights issues and to protection tools and strategies during the generic training for statement-takers further emphasized the focus on children in the work of the TRC.

However, good training is not a one-time exercise, and the need for further training became clear, in particular for staff who were not child protection specialists and had little formal experience in interacting with children and identifying potential child protection issues. Ongoing training of statement-takers would have helped hone interviewing skills in what proved to be very challenging contexts for non-specialists. More training on child-friendly interviewing techniques would have also benefited the commissioners. While some commissioners were able to engage effectively with children in difficult circumstances, others were less adept. The skills required to encourage maximum involvement with child witnesses need to be understood and practiced.

Another lesson was the need for ongoing support to the CPAs. The CPAs proved committed, organized and knowledgeable. However, the agencies in the CPN-TRC Task Force were engaged in a variety of activities and were spread too thinly in some areas. CPA training often emphasized general information at the expense of skills enhancement. In the future, CPAs can benefit from more sharing of skills on conducting group work with children, individual communication techniques and workshop development, as well as from more information on humanitarian and human rights law.

Awareness-Raising Workshops

One of the earliest child-focused TRC activities was a series of awareness-raising workshops. These were aimed at promoting children's awareness of the TRC process and preparing them to participate in it; enabling children to provide the TRC with information on their roles and experiences and the violations they suffered during the civil war; ensuring that the TRC process and recommendations would protect the best interests of children; and generating children's recommendations for the TRC final report.³⁰

Between February 2007 and March 2008, forty-five workshops were held across the country, attended by approximately five thousand children.³¹ One workshop was held in each of the fifteen county seats, led by at least one commissioner and TRC staff member from Monrovia, with the support of UNMIL, UNICEF and representatives of the CPN-TRC Task Force. At the end of the workshops, the agendas, materials and techniques employed were transferred to local TRC staff, the lead CPA in the county and local UNMIL civil affairs representatives, who then held two more workshops elsewhere in the county. This ensured broad geographic representation of children. The children attending were encouraged to act as "ambassadors" for the TRC and to become informal peer educators.

The author attended a county workshop in Madina, Grand Cape Mount. The two-day session drew eighty children aged thirteen to eighteen from Madina and four surrounding towns. Each town sent eight school-attending children and eight out-of-school children. The numbers swelled over the course of the workshop as children from nearby communities joined out of curiosity. A third day was used as a handover, to share information

³⁰ Amara M. Kamara, "Activity Report – Child Awareness Raising Workshop," Grand Cape Mount County, 16-18 November 2007 (document on file with author and in archive at UNICEF Innocenti Research Centre, Florence).

³¹ Republic of Liberia, Truth and Reconciliation Commission, Final Report, "Preliminary Findings and Determinations," at 13.

and insights gained during the workshop with local and national TRC and CPA staff as well as with UNMIL and UNICEF personnel.

The workshop covered the mandate, role and plans of the TRC, as well as child rights issues and the role of children. In groups, the children produced much of the material later included in the workshop report, expressing their concerns and views on the TRC. This work highlighted the different experiences of boys and girls during the conflict, and smaller discussions also took place for girls only, to allow for frank discussion. The county-based representatives of national CPAs were active in identifying and bringing children to the workshop, and in helping facilitate the group work sessions.

Key Lessons

The workshops had multiple benefits. They enabled the TRC to spread the message of its mandate and how it would be implemented to large numbers of children, many of whom were in rural areas. They enhanced understanding of the TRC's role and processes among both children and adults in urban and rural areas and gave children an opportunity to ask questions and resolve misconceptions. For example, children made the following comments during workshops:

- I expect the TRC to bring development and safe drinking water; they should build hospitals for us.
- The TRC will make some parents send their children to school by force. We now know that our people have been treating us bad.
- I recommend that the TRC should provide me uniform, shoes, books and help me to go to school.³²

³² Quote from child participant, report on awareness-raising workshop, Grand Cape Mount, November 2008.

The workshops also laid the foundation for children's participation in the later statement-taking and children's hearings. Just as importantly, they provided an opportunity for children who did not wish to take part in statement-taking or hearings to convey to the TRC and CPAs their experiences during the conflict.

These workshops also provided the TRC with a chance to collaborate with local adult leaders, some of whom had misconceptions about its role. Some of the misunderstandings are evident in the expectations collected from participants at the start of the proceedings. Many people believed that the TRC would pay for their participation; some worried that it would recommend persons, including children, for judicial prosecution. Confusion about the mandate and powers of the TRC and a desire for punitive judicial measures for some violations and perpetrators were recurring issues in the course of the awareness-raising workshops and other early TRC activities. As one participant said, "I want ... the TRC to go from town to town to settle cases among people."³³

Workshop planning was thorough and was carried out with the assistance of the CPN-TRC Task Force. Problems were addressed as implementation progressed, and the workshops became stronger. Examples of these challenges included:

- Insufficient recognition of the transportation challenges in rural areas, causing delays
- A tendency at the earlier workshops for in-school children to outnumber out-of-school children
- Insufficient understanding of the nature of group work and the style of interaction that would lead to more active participation by children
- The need for careful consideration about the types and phrasing of questions asked of children and the child protection issues those questions might raise.

Finally, the earlier workshops illustrated the importance of having CPAs ready to provide psychosocial support for children in

³³ Ibid.

all TRC-facilitated, child-focused activities. This recognition was very useful later in the regional children's hearings and statement-taking exercises. In the earlier workshops, insufficient thought had been given to the emotional impact of questions about the violations children experienced and the consequent need for immediate psychosocial support.

There was little follow-up on the initial idea that workshop participants could become informal peer educators and advocates for the TRC's work. Some anecdotal reports trickled back to the CPN-TRC Task Force about success in this area in a few districts, but it was not widespread, and there was no monitoring to assess progress. Finally, the stories of children's experiences collected at these workshops only covered the final years of the conflicts within the TRC's mandate, as the children were not old enough to recall incidents from an earlier time.

Statement-Taking

The framework for taking statements from children was developed with guidance from the CPN, which worked with participants in the initial training of statement-takers in August 2006.³⁴ Local and national CPAs had a central role, helping to identify children who might give statements and ensuring that children and their parents were well briefed and prepared in advance. All statements by children were voluntary and given with the informed consent of both the child and the parent or guardian. Along with local social workers, the CPAs were responsible for making sure that psychosocial support was available before, during and after interaction with the TRC. They also worked with statement-takers to prepare interview spaces that were child-friendly and secure, and supported statement-takers in the use of open-ended interviewing techniques.

A special children's statement-taking form was developed early

³⁴ See "Statement-Takers Checklist for Children" and "Liberia TRC/UNICEF Recommendations on Participation and Protection of Children in the Liberia TRC Process" (documents on file with the author).

in the TRC process. Its style and content were meant to be more appropriate for children; it omitted leading questions and encouraged consideration of a range of experiences and child rights violations – social, economic and cultural as well as civil and political. But the categories did not match the categories of the standard statement-taking form and, due to perceived challenges with processing of the data, the children's form was not used. Later, the adult form was adapted for use with children by attaching a set of guiding principles to remind the statement-takers of child-friendly interviewing techniques and to protect children's identities.

By October 2008, statements had been taken from children in all fifteen counties, totaling almost three hundred. Children's statements were processed in the same manner as adults' statements, and the analysis of their experiences will be central in the TRC's findings and recommendations. A thorough preparation, collection and analysis of these statements is therefore central to the depth, range, relevance and accuracy of the final TRC report. It will be essential to ensure that statements taken from children are analyzed to the same degree as adults' statements. Some additional, child-focused parameters would be useful, for example, age at the time of the experience of the conflict and at the time of giving the statement.

Key Lessons

Initial implementation of guidance on statement-taking with children was weak in some geographic areas. For example, CPAs had to work hard to ensure that statement-takers and local TRC staff had a clear understanding of confidentiality issues, including the importance of finding safe and secure areas to hold interviews. In the early phases of statement-taking, some attempts were made to interview children in public areas.³⁵ Such actions were potentially dangerous given that in some cases perpetrators and victims were living and working in close proximity to each other. Where such

³⁵ Interview with Onike Gooding Freeman, TRC child protection specialist, Monrovia, September 2008.

weaknesses were identified, the CPAs provided support. Initial monitoring of children's involvement might have led to earlier identification of weaknesses and better methods of ensuring that problems in one area were not repeated in another.

Confidentiality was difficult to ensure. Although protections improved with time, early incidents continued to raise concern about the TRC's ability to guarantee protection, particularly in relation to confidentiality. For example, a video shown at a public hearing in 2007 depicted an interview of a child – who was under eighteen at the time of the interview – without protecting the child's identity. The statement was taped in 2006, prior to full implementation of child protection policies and procedures. However, the fact that the video was made and released two years later indicates the fragile understanding of the issues. The TRC commissioner with lead responsibility for children and representatives of local CPAs tried to halt the showing, but they were unable to prevail; others felt special protection was not needed because the individual was no longer under eighteen.

Following that hearing, a meeting was convened with the TRC commissioners, CPAs and UNICEF Liberia to discuss the incident and to clarify the context and strength of the child protection policy framework at the root of the MOU. Consensus was reached, and the TRC gave assurance that such an incident would not recur, an assurance that was met.

Finally, although the actual number of statements collected from children was less than three hundred, the systematic inclusion of children in statement-taking within a child rights framework further cemented the integration of children's experiences within TRC activities.

CHILDREN'S HEARINGS AND PANELS

Regional Hearings

Children's hearings gave voice to children's wartime experiences. These hearings took place in parallel with adult public hearings and preceded the institutional children's hearings in Monrovia. Three children's hearings were convened, one each in the central, western and southern regions, covering all the country's counties. In preparation, the CPN-TRC Task Force held a training of trainers for local CPAs.

The TRC, in collaboration with the CPN-TRC Task Force, decided that children would be selected to testify based on an analysis of statements given by children in each county. Each TRC county coordinator chose fifteen to twenty statements based on the criteria of age, gender, nature of experience or violation and geographic location. Following "authentication" of the chosen statements, the commissioner made a further selection in consultation with TRC and CPN staff. This approach allowed for the participation of children from each county, with reserve statements in case children who were chosen had moved or did not wish to participate.³⁶

Ten children from each county were sent to each children's hearing, including those chosen to testify (whose identities were kept secret) and two members of the local branch of the Children's Parliament. At each of the hearings, ten students from each of fifteen county-based schools were invited to be in the audience. Following a day-long hearing, a children's discussion panel was held with the TRC commissioners. Though not anonymous, the panels gave a larger group of children the opportunity to question the commissioners, and gave the commissioners the opportunity to ask children more generic questions about their views on the TRC and their expectations for the future. Both the formal children's hearings and the more informal discussion panels were recorded, and information from both processes was used as input to the TRC final

³⁶ Ibid.

report. Whereas participation in the panel discussions was public, the testimony given during the hearings was confidential, and the identity of witnesses fully protected.

In each district, the CPAs worked with the children identified to attend the regional hearings and their families. Long-term relationships between families and CPAs facilitated both parental permission and the participation of children, which in some cases required traveling hundreds of miles. None of the children attending the hearings knew who would testify. Even the CPAs were informed only on the evening before the hearings, after taking an oath of confidentiality. The CPAs then held individual sessions with the selected children, explaining confidentiality, their right to refuse to answer questions, and techniques they might use to bolster their confidence and resist being led into discussions that made them uncomfortable. These sessions took place during periods when children's absence from the larger groups would not be noticed.

All individual child witnesses at the children's hearings, both regional and institutional, gave testimony in camera to protect their anonymity and to deflect the stress and vulnerability that might come from participating in formal hearings. The children testified from inside a simple, specially constructed cubicle so that commissioners and audience could hear their voices but could not see them. Their entrance into the cubicle was not visible and their separation from the larger group was facilitated so that other children would not mark their absence. The careful implementation of protection measures by experienced CPAs proved successful, and children's participation has apparently remained confidential.³⁷

³⁷ For a more detailed analysis and description of protection measures for child witnesses and appropriate psychosocial frameworks, see An Michels, "Psychosocial Support for Children: Protecting the Rights of Child Victims and Witnesses in Transitional Justice Processes," *Children and Transitional Justice, Expert Paper Series* (Florence: UNICEF Innocenti Research Centre, forthcoming in 2010).

Key Lessons

The three regional children's hearings were crucial for TRC outreach and gave a voice to children living far from Monrovia. In addition to those who testified, larger numbers of children took part in the informal discussion panels, and hundreds participated as members of the audience. The children appreciated the discussion panels as an opportunity to interact with the commissioners.³⁸ At one such session, a child asked why the formal hearings sounded so much like a court if the TRC was not a court.³⁹ This comment provided an opportunity to clarify the purpose of the TRC and indicated how some children perceived the hearings.

Attendance at the regional hearings tended to be higher than at the institutional children's hearings in Monrovia. For example, the southern regional hearing had an audience of just under four hundred, mainly schoolchildren, while the first day of the institutional hearings in Monrovia had an audience of less than three hundred, which dropped significantly during the afternoon session.

The children and the CPAs demonstrated a remarkable commitment to the process. The southern regional hearings, which brought together some of the most isolated districts in Liberia, took place during the rainy season, causing serious problems with logistics and transport. Heavy rain led to the last-minute cancellation of the UNMIL flight bringing children from Grand Kru. The local CPAs stepped in and arranged a variety of transport, from personal cars to motorcycles, to reach children in isolated areas where rain had washed out the roads. The children of Grand Kru walked with their social workers for seventeen hours to arrive at the nearest transport.⁴⁰ Their determination was itself a

³⁸ Informal discussions between author and child participants at final discussion panel, Regional Children's Hearings, Zwedru, Grand Gedeh County, September 2008.

³⁹ *Ibid.*

⁴⁰ Story told by children at the evening panel of the southern regional children's hearing and confirmed by lead social worker Mrs. Weeks and Onike Gooding Freeman in subsequent

testimony to their commitment.

Overall, the regional hearings were successful in terms of the procedures in place to protect children involved. One potential weakness was the process for identifying children to testify. Although an objective selection process was put in place, the TRC commissioners and staff ultimately decided which stories and testimonies would be given voice, allowing for reinforcement of some assumptions. While the range of criteria for selection of testimony was intended to prevent personal bias in the selection of statements, the end result suggested a particular interest in child abduction and forced conscription. This may have overshadowed the seriousness and prevalence of other harms suffered by children during the war, such as violations of economic, social and cultural rights.

For example, at the children's awareness-raising workshop observed by the author, forced recruitment was not the violation cited most frequently by participants; the interruption or loss of education was repeated so often as to be almost a mantra. Many children also spoke about being beaten or forced to watch while parents, siblings and other relatives were beaten or killed.⁴¹ "During the war, I saw people dying from hunger, mistreatment, sick people without treatment and people fled into displacement camps, and home and valuable properties were looted or burnt down," one child said.⁴² Yet questions posed by the commissioners following testimony at the children's hearings tended to emphasize experiences of abduction and recruitment into the fighting forces.⁴³

Similarly, much of the discussion following girls' testimony related to sexual violence, abduction and forced recruitment,

interviews, September 2008, Zwedru and Monrovia.

⁴¹ Author's observations at child awareness-raising workshop (17 November 2007, Grand Cape Mount) and at the evening panel of the southern regional children's hearing (19 September 2008); *see also* Amara M. Kamara, "Activity Report – Child Awareness Raising Workshop," Grand Cape Mount County 16-18 November 2007.

⁴² Quote from child participant at Grand Cape Mount child awareness workshop, 16-18 November 2007.

⁴³ Author's observations at southern regional children's hearing, Zwedru, September 2008.

experiences of unarguable frequency and horror for girls. Yet in the awareness-raising workshops, where separate groups for girls encouraged frank discussion, girls spoke not only of these experiences but also of the domestic burden they were forced to take on because of their parents' deaths or injuries, the violence to family members they witnessed, the education they missed by being forced from their homes and the physical work or employment they took on to maintain families or siblings.

It would be useful to quantify the types of impacts on children and their frequency as highlighted in their statements, in comparison to the issues highlighted in awareness-raising workshops and the art produced for the Children's Gallery. The importance of recognizing the full range of children's rights violations – civil, political, social, economic and cultural – is crucial if the TRC is to promote true reconciliation and if follow-up activities are to have lasting relevance.

A brief orientation was initially planned for TRC commissioners prior to the children's hearings, but logistical difficulties resulted in delays and cancellation of the orientation for the last two hearings. These sessions were intended to remind commissioners of child protection issues that might arise and to alert them to appropriate techniques for interviewing child witnesses. This was important, as the regional children's hearings took place more or less simultaneously with the adult public hearings, which sometimes meant that commissioners had to move directly from the more contentious adult hearings to the children's hearings. This had the effect of introducing elements of cross-examination in some questions posed by commissioners to children giving testimony. Ideally, the children's hearings should have been scheduled separately from the public hearings for adults. Delays and the tight schedule sometimes left the impression that the children's hearings, while valued by the TRC, were not given the same priority as the hearings for adults.

Nevertheless, the commissioners who attended the children's hearings demonstrated their commitment in a variety of ways. When air transportation to one hearing was canceled due to weather conditions, the TRC Chair and another commissioner

concluded an extended day of public hearings in Monrovia and then drove through the night on difficult roads to attend the children's hearing. The TRC's commitment to a child-focused and child-rights approach was championed by the commissioner designated to oversee children's involvement.⁴⁴ She was on the scene constantly, engaging with children personally, defending their rights, supporting their efforts and helping them feel at ease.

Throughout these hearings, the commissioners raised concerns about the availability of psychosocial support for individual children giving testimony. The challenge was to make psychosocial support available at all times but not to give the impression that it was a form of "payment" for participation and also to provide support for children who chose not to participate. The CPAs provided access to all children through social and humanitarian programs, consistent with the focus on community in Liberian culture. Most importantly, the CPAs facilitated the presence of social workers at all TRC events. They monitored the children's well-being and their protection needs. But human and financial resources were limited, and more funds were needed to secure short-term and long-term support for children.

Institutional Hearings

The institutional children's hearings took place in Monrovia from 22-24 September 2008. While the regional hearings focused on gathering information and hearing the experiences of individual children, the institutional hearings highlighted collective experiences of the conflict. Representatives from a variety of sectors, including government and civil society, testified about their professional experience in working with children during and after the conflict. They also heard testimonies from three individual children. In response to a TRC request for thematic submissions, a number of agencies worked together to identify the topics to be addressed on behalf of the wider Child Protection Network, as well as government departments. The presentations included the following:

⁴⁴ The person designated for this responsibility was Commissioner Oumou Syllah.

- Ministry of Gender and Development on street children and homelessness
- Don Bosco Homes on children and the justice system
- Children Assistance Programme on governance and participation
- Christian Children's Fund on child and family protection, with a focus on children's experiences during and after the war
- Children's Parliament on children's experiences during the war and priority actions for a better future
- THINK Inc. on reparations in the context of children
- Save the Children UK on reintegration and recovery
- Action for Greater Harvest on children in the truth and reconciliation process
- Ministry of Health and Social Welfare.⁴⁵

Key Lessons

The national thematic hearings for children differed markedly from the regional hearings, most notably because children dominated the regional testimonies while the national hearings gave more prominence to organizations and child rights experts. The information provided by government ministries, national CPAs, international agencies and civil society complemented the individual accounts provided in children's statements and testimonies at the regional hearings. However, the decision of the CPN-TRC Task Force to ask individual CPAs to develop collective submissions to the TRC on specified themes caused difficulty for some agencies, and the submissions were of varying quality and scope. An approach allowing for individual institutional submissions might have produced greater depth of analysis in specific areas and a wider range of issues. However, the submissions did give voice to a number of recurring issues:

⁴⁵ See Republic of Liberia, Truth and Reconciliation Commission, Final Report, Volume Three: Appendices, Title II: "Children, the Conflict and the TRC Agenda."

- Disruption to the education system and public services caused by the conflicts
- Lack of educational opportunities for many children, including those who were forcibly recruited but also many who remained outside of fighting forces
- Problems for adolescents and young adults arising from lack of employment or sustainable livelihood opportunities
- High levels of homelessness
- Separation from family
- Inadequate resources to meet the psychosocial needs of children affected by war
- Challenges in addressing the needs and rights of the many children affected by the war in a social and political context of minimal national resources
- Support for encouraging children's participation in the TRC processes
- Hopes that TRC recommendations would promote reconciliation and a more constructive future for Liberian children.

Children's TRC Gallery

A culmination of children's participation in the TRC was the TRC Children's Gallery, which took place on 27 September 2008 at Monrovia City Hall. Titled "Past, Present and Future", it exhibited Liberian children's art and writings about their wartime experiences, current struggles and visions for the future. Every county was represented. The Children's Gallery was linked to the other TRC activities for children and was viewed as a collective celebration of their efforts. The idea for a gallery had come from children who participated in the initial awareness-raising workshops, and it gave them the opportunity to acknowledge each other and to take pride in their accomplishments.⁴⁶ In a surprise presentation of "on the spot" reconciliation, the former and current

⁴⁶ Introductory remarks from Commissioner Oumou Syllah at the press conference for the Children's Gallery, Monrovia, 25 September 2008.

leaders of the Children's Parliament gave a joint speech and vowed to work together to overcome past differences. There were also performances of songs, poems and dances.

The planning for the Children's Gallery began in May 2008 when the CPA-TRC Task Force hired a consultant to conduct a training session for CPAs on children, art and communication. Each county was represented by a psychosocial worker, who then hosted a workshop in his or her county with the lead CPA. After a day-long orientation on the TRC process and the role of children, the children spent an additional one to two days creating their artwork with the guidance of counselors and psychosocial workers.⁴⁷ The workshops were held at CPA premises or local recreation rooms, and the Task Force supplied the art materials. Between twenty and thirty children attended each workshop; they were selected through their participation in the Children's Parliament or a Children's Club or through a link to a Children's Welfare Committee. The artwork was sent to Monrovia, where the Task Force and the commissioner designated for children chose a representative collection for the Gallery.

The Gallery was organized by the TRC, Ministry of Gender and Development and the Child Protection Network. It was hosted by the Children's Parliament, whose representatives guided visitors through the displays and explained their significance. The exhibition was attended by hundreds of children from across Liberia. Also attending were the Speaker of the Children's Parliament and other national and county representatives, including the TRC commissioners and representatives from the Liberian government. The vice president attended and addressed the audience.

With pictures and words as the mediums of expression, the process was open to all age groups and literacy levels. The preparatory workshops offered opportunities for children who had not participated in statement-taking to express themselves through art. The Gallery also offered the Commission an opportunity to demonstrate its willingness to respond to children's requests and to

⁴⁷ The number of days per workshop varied from county to county.

build on their contributions.

In addition, the Gallery allowed Liberian children to communicate to a larger audience, including a diverse group of international organizations. A news conference two days before the opening created a high level of interest, resulting in coverage by the BBC World Service, UNMIL radio and a variety of local media outlets. A publication featuring artworks from the Gallery exhibition was proposed by the Special Representative of the United Nations Secretary-General for Liberia to broaden the audience and provide further opportunities for Liberian children to tell their stories.

CONCLUSIONS

The specific activities undertaken in support of children's involvement in the Liberian TRC each had merits, but it was links between activities that enhanced outreach and enabled the participation of children throughout the country. Most importantly, the rights framework underpinning all of the activities supported a holistic approach and long-term protection. Those who participated in the TRC process benefited, but so will current and future generations of children as protection frameworks are integrated into other areas of Liberian social policy and practice.

The Liberian TRC faced many challenges. A more complementary approach to transitional justice in Liberia may have enhanced efforts towards accountability and reconciliation. In Liberia, the TRC was the primary transitional justice mechanism. This caused some confusion as to its remit and the extent of its powers in addressing many of the egregious violations of rights and war crimes committed in the course of twenty-four years of conflict. In addition, the ability to collate information, to construct and voice a collective narrative and to promote reconciliation is a daunting challenge in a country facing battered human resources, destruction of social and economic infrastructure, a fragile political settlement and the knowledge that many of the worst perpetrators of rights violations and crimes continue to live openly in the community.

This combination of factors led to some unrealistic expectations by children and some adults regarding the TRC's ability to bring perpetrators "to justice." Reconciliation requires dialogue and negotiation. It also demands an acknowledgement of accountability, in whatever form deemed appropriate by local communities and national consensus.

In working with children, the TRC attempted to negotiate the tension between responsibility, accountability, reconciliation and justice in the face of a history of flagrant rights abuses. The development of a protection framework as the foundation for the broad participation of children in the TRC process was a key element of that negotiation. Yet more efforts were needed to engage youth and to include their childhood experiences in the compilation of the impact of war on children, across the range of conflicts and years covered by the TRC mandate.

The final arbiter will be the extent to which the recommendations of the TRC are implemented and protection frameworks for children are integrated more widely into the Liberian social, political and economic spheres, leading to concrete benefits for the children of Liberia. The findings and outcomes of the TRC need to be put to use in securing a more stable and peaceful future.

Further opportunities exist for integrating the TRC's work, findings and outcomes into the fabric of Liberian governance. For example, in discussions of reparation for children, there were some requests for individual support for schooling; however, the emphasis was not on individual restitution but on:

- Improved access to and quality of education, in particular for those who lost years of schooling due to the war
- Better access to and quality of skills training, livelihood support and employment for adolescents and young people, especially those who were orphaned or disabled by the war or lost their opportunity to go to school
- Widespread psychosocial support for children who saw or experienced violence during the war, some of whom are now living in close proximity to the perpetrators

- Support for conflict resolution and reconciliation at individual and community levels, including aid to address property loss and social and economic violations.

The potential exists to feed this information into implementation of the Poverty Reduction Strategy and the roll-out of the government's Community Development Programme and to give priority to these elements within that work. There is also an opportunity to build policy and legislative protections for children into the implementation of the Children's Act, to be informed by children's views and to engage them directly.⁴⁸

Also important is the potential development of a TRC component in the national curriculum. Such a component, as part of curriculum reform, would ensure that the TRC's findings – and the experiences of the Liberian people, in particular its children – are not forgotten.⁴⁹ It would also support learning about conflict resolution, reconciliation, civic responsibility and participatory citizenship.⁵⁰

An important element of the TRC's work is the creation of historical memory about the country's conflicts. Children's views and voices are an integral part of the national perspective and memory and should be highlighted in all opportunities to memorialize the history of the war and its aftermath.

⁴⁸ In April 2009, the Children's Act was adopted by the House of Representatives; it awaits adoption by the Senate.

⁴⁹ In addition to curriculum reform, however, considerable challenges remain for the rehabilitation and restoration of an education system that is truly accessible to and affordable for all Liberian children. *Consider* International Human Rights Clinic, Harvard Law School, "Eliminating and Accounting for Abuses Against Children in Liberia's Education Sector" (Cambridge, MA: Human Rights Program, Harvard Law School, 2009), outlining serious violations of children's rights as a result of corrupt practices in Liberia's education system.

⁵⁰ For a discussion on the potential of educational reform for countries in transition, see Julie Paulson, "(Re)creating education in Post-Conflict Contexts: Transitional Justice, Education and Human Development" (New York: International Center for Transitional Justice, 2009), available at www.ictj.org/static/Publications/DevT_Education_Full.pdf.

This chapter has focused on the work of the Liberian TRC with children, deliberately leaving aside the rest of the Commission's remit. The TRC faced many challenges in its more general work, including financial, logistical, human resource and timing issues. Although it had linkages with international organizations, agencies and individuals, some of these relationships did not run smoothly. A collective vision and shared understandings of the TRC's outcome for Liberia enabled joint work, but differing views of the means for reaching the ends sometimes led to fractured interaction and support.

The Government of Liberia paid for a portion of the TRC costs, including commissioner salaries, but it was dependent on international sources for much of its funding. The decision to appoint only Liberian commissioners and to have Liberians in key secretariat positions triggered debates about human resources, experience and capacity, some of which undermined donor relationships when delays and missteps occurred. At times this tension was reflected in funding decisions. Yet ultimately, these TRC decisions enhanced perceptions of local ownership of the process, allowing it to avoid some of the criticism faced by Sierra Leone's TRC that it was driven from "outside." As the TRC Chair said, "While the international community has and will continue to play a role in assisting Liberia to develop a sustainable democracy, only Liberians can establish a durable, human rights-based culture where peace, development and the rule of law are permanent features of its political heritage."⁵¹

In terms of work with children, the lead role played by Liberian CPAs led to a strong sense of Liberian ownership. It also enhanced the accountability and responsibility CPAs felt toward the participation of children, families and communities and to the process itself. Undoubtedly, these relationships and the difficulties faced in implementing the TRC mandate will be explored in other arenas. There is a delicate balance between perceptions of national

⁵¹ Republic of Liberia, Truth and Reconciliation Commission, Final Report, "Preliminary Findings and Determinations," at 2, available at www.trcofliberia.org/reports/final/volume-one_layout-1.pdf.

ownership and independence and the need for technical expertise in an area where such experience is limited. It is not yet clear whether the Liberian TRC handled that balance as adroitly in its general mandate as it did in its work with children.

Much of the TRC's work with children has been groundbreaking. Many individuals and organizations that have been critical of the TRC generally have highlighted its children's component as one of the most innovative and successful elements.⁵² Yet the tensions that beset the process in the early stages delayed the work with children. The TRC's financial difficulties and the skepticism among some in the international community postponed funding for children's activities until earmarked funds were brought in independently.

The TRC and its partners, both national and international, would benefit from learning from the successes as well as the challenges of its work with children. These lessons include the importance of:

- A collaborative relationship established early in the process to build capacity at the community and national levels, drawing on the specialist knowledge and experience of CPAs, civil society and children's groups
- The use of legislative and policy frameworks, including the TRC Act, the CRC and the African Charter on the Rights and Welfare of the Child, to inform the planning and implementation of work with children
- Progressive strengthening of the work through the ongoing inclusion of children's views and opinions
- Ongoing input from the CPAs and interaction with specialists, providing a basis for informed flexibility and the willingness to adapt to changing circumstances and political contexts.

⁵² Interviews with Onike Gooding Freeman, TRC child protection specialist, September 2008; Ibrahim Sesay, Alfred Mutiti and Sophie Parwon, UNICEF child protection staff, September 2008, Monrovia.

Challenges that arose in the work with children could also inform similar efforts nationally and internationally, such as:

- The need for ongoing “refresher” trainings for TRC staff, commissioners and other partners
- Difficulties arising from logistical issues, including scheduling and maintaining timetables
- The challenges of integrating the work of the children’s team with the work of the TRC more generally
- The importance of earmarking funding for children’s involvement to lessen the potential for marginalizing i;
- The need to make use of TRC findings and recommendations in restoring the country’s social and legislative fabric.

The TRC derived many advantages from the participation of children. Yet the benefits for children must be substantial to validate and respect their efforts – recalling painful memories, traveling long distances to workshops and hearings and finding the courage to express their views, with proper support and guidance.

The comments made by children in the various forums and the commitment demonstrated by their attendance and input into the process indicate that many children believe the benefits of participation are worth the effort. The longer-term benefits of children’s involvement in TRC activities, both for those who participated and those who did not have the desire or opportunity to participate, will depend on how the findings and recommendations of the TRC are put to use to enhance the futures of all Liberian children.

CHAPTER 7

ACCOUNTABILITY AND RECONCILIATION IN NORTHERN UGANDA

ACCOUNTABILITY FOR SEXUAL AND
GENDER-BASED CRIMES BY THE
LORD'S RESISTANCE ARMY

Khristopher Carlson and Dyan Mazurana

THE POTENTIAL AND LIMITS OF
MATO OPUT AS A TOOL
FOR RECONCILIATION AND JUSTICE

Prudence Acirokop

This chapter examines crimes committed against children and youth, in particular sexual and gender-based crimes against girls and young women, in northern Uganda by the Lord's Resistance Army (LRA) over the past twenty years. It raises some of the issues currently being debated on accountability for crimes committed by children in armed conflict, adequate responses to sexual violence and inhuman acts, and the appropriateness and efficacy of traditional justice or judicial redress in these situations.

The authors – Khristopher Carlson with Dyan Mazurana and Prudence Acirokop – present two separate essays that address traditional, national and international responses to the abductions, systematic rape, sexual abuse, forced recruitment, enslavement and forced labor that have been perpetrated by members of the LRA on the children and youth of northern Uganda. After more than two decades of atrocities, affected communities, the national Government and international justice processes have begun to consider how to bring those responsible to justice and ensure some level of redress for the victims of these crimes and human rights violations.

Carlson and Mazurana explore the implications of accountability, in particular through the traditional justice systems of northern Uganda. They argue that the scale and nature of the sexual and gender-based crimes committed against girls and young women are too egregious to be adequately addressed by traditional justice and reconciliation systems. They further contend that traditional processes, and particularly those that have been shown to operate against the best interests of girls and young women for many generations, cannot provide adequate accountability for victims or cope with the level and nature of atrocities committed by the LRA.

Acirokop agrees that the crimes committed against children in her native Acholiland call for effective mechanisms to hold perpetrators accountable, but she argues that traditional processes have a place within a wider transitional justice response. Following an analysis of the traditional process of *mato oput* and an examination of its weaknesses, she argues that the system has strengths and elements that make it relevant to the experiences of

the young people who have managed to escape the LRA and find their way home. Acirokop posits that *mato oput* cannot on its own bring accountability for the heinous sexual crimes committed, but as part of a system of multiple responses, it has, she argues, the potential to bring some measure of community understanding and reintegration.

One of the most difficult questions – acknowledged but not answered by the authors – concerns what is the appropriate form of accountability for the crimes committed by children abducted and forced to become members of the LRA. The LRA is known to be composed of many children and youth who were forcibly recruited. The authors describe the targeting of children by the LRA for abduction, forced recruitment, rape and enslavement. These children are then forced to commit crimes, many deliberately planned to alienate the children from their communities so they have nowhere to run if they manage to escape their captors. Any attempt to escape is punishable by death, and often the senior commanders force new abductees to carry out the killings. The result is that children held as captives of the LRA grow to adulthood committing the same crimes and atrocities against other children that were committed against them.

Ultimately, although both essays argue in favor of a specific approach to addressing accountability for crimes in the conflict, neither proposes a solution that can fully address or remedy the horror experienced by thousands of boys and girls in northern Uganda. The two essays together strengthen the argument that the most effective transitional justice processes are those that use a combination of mechanisms and processes to deal with differing elements of the transition from war to peace and that encourage a range of responses to improve accountability.

ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES BY THE LORD'S RESISTANCE ARMY

Khristopher Carlson and Dyan Mazurana¹

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INTRODUCTION

This section focuses on the crimes committed against captive girls and women by the Lord's Resistance Army (LRA) and options for coming to terms with these violations, including through the use of traditional justice systems. It includes an analysis of the nature of the crimes to give context to the complications of addressing sexual and gender-based offenses within traditional justice systems. It concludes that while traditional justice methods have a role to play in dealing with some violations committed during the war, they are not appropriate for addressing the sexual and gender-related crimes committed against captive girls and women. This is especially true given that traditional structures and authority have been weakened due to the war and other factors. Adjudicating the LRA's heinous crimes against girls and women is a task more appropriate for the Ugandan High Court and international judicial authorities.

The LRA, a rebel force fighting the government of Uganda, has abducted more than sixty thousand Ugandan children and youth over the duration of the northern Uganda armed conflict that has spanned more than twenty years. Among the war-affected population of northern Uganda, one in six female adolescents has been abducted by the LRA.² Taken to rebel camps, the female abductees have been forced to cook, provide nursing services, farm, collect water and serve as armed fighters. Many of them have been bound by slavery-like conditions to boys and men within the LRA, used for sexual purposes and forced to perform domestic labor.

² J. Annan, C. Blattman, K. Carlson and D. Mazurana, *The State of Female Youth in Northern Uganda: Findings from the Survey of War Affected Youth (SWAY)* (Medford, MA: Feinstein International Center, Tufts University, 2008) [hereinafter *The State of Female Youth in Northern Uganda*].

Half of these “forced wives”³ have given birth to children fathered by their captors.⁴

Evidence collected from former captives reveals that sexual and gender-based violence is part of a systematic practice perpetrated by the order of LRA leaders. To date, no one has been held accountable for the abduction, forced marriage, rape, sexual slavery, forced pregnancy, torture or forced labor of thousands of girls and women held captive by the LRA. The LRA continues to commit widespread crimes and violations of customary international and humanitarian law.

Some progress toward ending the conflict took place between 2006 and 2008, when the LRA and the Government of Uganda engaged in peace negotiations brokered by the Government of Southern Sudan in Juba. As part of the peace process, the LRA and the Government of Uganda signed the Agreement on Accountability and Reconciliation, which calls for the creation of accountability and reconciliation institutions and procedures. Although attempts are being made in northern Uganda to move forward with some of the Agreement’s provisions, LRA leader Joseph Kony has refused to fulfill the commitments made or to sign a final peace agreement.

In fact, during peace negotiations in 2007 and 2008, the LRA continued to kill, abduct and loot the property of people from Southern Sudan, the Democratic Republic of the Congo (DRC) and

³ Within this paper, the terms “forced wives” and “forced marriage” refer to situations in which girls or women are held captive and, by threat or force, pressed into slavery-like conditions and made to perform domestic and sexual acts for male members of the LRA. The terms are used to distinguish between captive girls or women who were not taken exclusively by one man and those who were. While the Special Court for Sierra Leone has defined forced marriage as a crime against humanity, it is important to identify that none of these so-called “marriages” have validity within the LRA. Although not examined in detail within this paper, it is also important to recognize the challenges stemming from developing international criminal law that defines forced marriage within the context of armed conflict. This development has the potential to raise the threshold of what constitutes forced marriage within human rights law as it pertains to protecting females against forced marriage within a non-conflict context.

⁴ *The State of Female Youth in Northern Uganda.*

the Central African Republic,⁵ and it moved its encampments to the DRC. Since September 2008, the LRA has carried out a series of attacks, including massacres, resulting in the displacement of over one-hundred-fifty thousand Congolese and Sudanese and the abduction of hundreds of adults and children. On 14 December 2008, the governments of Uganda, Southern Sudan and the DRC launched major military operations against the LRA, destroying five of its main bases. The LRA responded with a series of vicious massacres against civilian populations.⁶

The Agreement emphasizes the role that traditional justice mechanisms should play in achieving accountability and reconciliation. Many people in northern Uganda's traditional leadership, local government, civilian population and civil society organizations voice support for traditional justice mechanisms to operate parallel to national justice systems, such as those called for in the Agreement. However, there is no consensus among these groups regarding what role traditional mechanisms should have or which LRA crimes and violations would fall within their jurisdiction. Traditional mechanisms can and should play an important role, but it is unclear how they should be used for accountability procedures, particularly with respect to sexual and gender-based crimes. Furthermore, there is some doubt, particularly among girls and women formerly held captive by the LRA, that these systems should be used at all for such crimes.

The gravity of the sexual and gender-based crimes warrants serious attention respective to the potential mechanisms for holding the LRA accountable. The crimes are similar in some aspects to those perpetrated in other conflicts. The jurisprudence developed in regard to girls' and women's rights by the Special Court for Sierra

⁵ F. Misser, *DR Congo: A Regional Analysis* (Writtenet Independent Analysis, July 2007), available at www.ecoi.net/file_upload/432_1187941615_2007-07-dr-congo-writtenet.pdf; "Sierra Leone: 'Forced Marriage' Conviction a First," IRIN: UN Office for the Coordination of Human Affairs, 10 March 2009.

⁶ Human Rights Watch, *The Christmas Massacres: LRA Attacks on Civilians in Northern Congo* (New York: Human Rights Watch, February 2009) [hereinafter *The Christmas Massacres*].

Leone and the tribunals for Rwanda and the former Yugoslavia provide legal definitions for the types of crimes perpetrated by the LRA. In February 2009, the Special Court for Sierra Leone convicted three Revolutionary United Front (RUF) commanders for their responsibility in overseeing forced marriage in that rebel group.⁷ The context in Sierra Leone is different from that in Uganda, but the effects of the experience and the subsequent sexual and non-sexual dimensions of the crimes are strikingly similar.

The Special Court for Sierra Leone established a precedent by distinguishing between forced marriage and other crimes of a similar gravity. The crime of forced marriage in armed conflict, a crime against humanity, is now a codified violation of customary international law.⁸ The Appeals Chamber of the Special Court for Sierra Leone concluded in its ruling that, while the crime of forced marriage contains elements of sexual slavery, it has additional elements: a forced conjugal relationship between a man and woman that, by its exclusivity, demands loyalty to the captor. To defy one's captor is to risk punishment, including beating and death.⁹ Former forced wives in Uganda have clarified that the LRA operates similarly in terms of forced marriage.¹⁰ Within the LRA, sexual

⁷ Special Court for Sierra Leone, Case 15: *The Prosecutor vs. Sesay, Kallon and Gbao* (RUF Case) available at www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx

⁸ "Sierra Leone: 'Forced Marriage' Conviction."

⁹ AFRC Appeals Chamber, SCSL-04-16-A (SCSL 3 March 2008). The Appeals Chamber further commented that forced marriage describes a situation in which the perpetrator, through words or conduct or through those of someone for whose actions he is responsible, compels a person by force, threat of force or coercion to serve as a conjugal partner, resulting in severe suffering or physical, mental or psychological injury to the victim. See *Prosecutor v. Brima, Karama and Kanu*, SCSL-04-16-T (SCSL February 2008).

¹⁰ Interviews with former forced wives, 2005 and 2007, Gulu, Lira and Kitgum Districts. Girls and women forced into marriage are commonly but mistakenly referred to as sex slaves. This inaccurate categorization perpetuates a common misunderstanding about their roles and experiences. This in turn leads to inappropriate responses in (a) addressing the realities girls and women face in reintegrating and (b) developing accountability mechanisms to address the multitude of crimes and rights violations they have experienced.

crimes are committed almost exclusively within the context of forced marriage.¹¹

Methodology

Fieldwork conducted between 2002 and 2007 in northern Uganda served as the basis for this chapter. The fieldwork consisted primarily of interviews with one hundred and three girls and female youth who were abducted, forced into “marriage” with LRA combatants and subsequently raped, in some cases forcibly impregnated and forced to perform domestic labor and serve the larger fighting force. Also interviewed were parents and family members of abducted females; ex-LRA combatants; religious and community leaders; local government officials; Acholi and Lango clan leaders; lawyers; and local, national and international non-governmental organizations (NGOs) working in northern Uganda. Interviews were conducted in a variety of settings, including villages, camps for the internally displaced and towns in the five most war-affected districts: Apac, Gulu, Kitgum, Lira and Pader.¹²

All interviews were transcribed, and the principal investigators managed all data during the fieldwork. Triangulation was used

¹¹ There may be some exceptions to this, however. Alleged LRA attacks in late December 2008 in the DRC reportedly involved the mass rape and murder of girls and women. Because any use of rape by the LRA outside of forced marriage was previously unheard of, for the purpose of this report, the authors focus only on those sexual crimes perpetrated against abducted girls and women. See *The Christmas Massacres*.

¹² An additional district, Amuru, is also considered part of Acholiland along with Gulu, Kitgum and Pader. However, since the district was created after field data in that area were collected, Amuru is not discussed in this report. A total of 210 people were interviewed for this paper between June 2001 and April 2007. They included 103 formerly abducted girls and women who had served as forced “wives” in the LRA; seven formerly abducted boys and men; four former LRA commanders or officers; fifteen parents or relatives of girls or women subjected to forced marriage by the LRA; eighteen local government officials; twenty-eight religious, clan and community leaders; twenty-three NGO staff; seven lawyers working with former abductees; three officials with the Ugandan Human Rights Commission; three officials with the Uganda Amnesty Commission; and seven residents of camps for internally displaced persons.

throughout the study to check data validity and consistency.¹³ Data were analyzed primarily using text analysis through deductive coding.¹⁴ Most of the informants providing information for this work were Ugandan citizens, and all “forced wives” were Ugandan. The authors also consulted a small but growing body of literature on girls and women associated with fighting forces.¹⁵

The information gathered regarding forced marriage covers LRA crimes in the larger camps in Southern Sudan from the mid-1990s to 2004, when the camps were broken up. Many of the informants were residents of these larger camps, including those that housed LRA top leaders, including Joseph Kony.¹⁶

¹³ Briefly, triangulation refers to the use of a combination of research methods in a study to corroborate results. In this study, we used observation, in-depth interviews, surveys and life histories.

¹⁴ Text analysis using deductive coding refers to analyzing the text based on codes already established by certain hypotheses around the data collected. We also used inductive coding, in which we grounded ourselves in the texts and then let meanings arise from the text itself, a more open way of exploring the data and allowing the text to generate meanings.

¹⁵ Coalition to Stop the Use of Child Soldiers, *Girls with Guns: An Agenda on Child Soldiers for Beijing Plus Five* (London: Coalition to Stop the Use of Child Soldiers, 2000); M. Hobson, *Forgotten Casualties of War: Girls in Armed Conflict* (London: Save the Children UK, 2005); Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (New York: Human Rights Watch, 2003); Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (New York: Human Rights Watch, 2005); Isis Women's International Cross-Cultural Exchange, *Women's Experiences of Armed Conflict in Uganda, Gulu District 1986-1999* (Kampala: ISIS-WICCE, 1998); S. McKay, and D. Mazurana, *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montreal: Rights and Democracy, 2004); Save the Children Denmark, *A Study on the Views, Perspectives and Experiences of "Social Integration" Among Formerly Abducted Girls in Gulu, Northern Uganda* (Gulu: Save the Children, 2003).

¹⁶ The authors have not interviewed girls or women subjected to forced marriage or other crimes in LRA camps now located in the DRC and the CAR. But Human Rights Watch's recent report details such practices in LRA camps in the DRC as of December 2008, which suggests that the practice is still taking place. The information collected from individuals who had spent significant amounts of time (several years in a number of cases) in the larger LRA camps in Southern Sudan was triangulated with other testimony and reports.

ARMED CONFLICT IN NORTHERN UGANDA

The conflict in northern Uganda began shortly after current President Yoweri Museveni took power by military coup in 1986. Museveni's National Resistance Army seized power after years of political, military and social turmoil. Museveni's army defeated the Ugandan National Liberation Army, comprised mainly of Ugandans from northern Acholi and Lango. Fearing retribution from Museveni, many soldiers fled to northern Uganda, where some demobilized and others sought refuge in Southern Sudan. Various opposition movements emerged in the 1980s, when the future LRA leader, Joseph Kony, began his armed opposition to the National Resistance Army. The LRA was organized in 1987.

After a number of Ugandan military offensives against the LRA in northern Uganda and Southern Sudan, which dislodged it from its Sudanese bases, the LRA relocated its bases more permanently to the northeastern region of the DRC. In early 2008, the LRA established camps in the southeastern region of the Central African Republic (CAR). The LRA is still active today and has made recent attacks in the CAR, the DRC and Southern Sudan.

In trying to overthrow the Museveni Government, the LRA lost popular support among the Acholi (who make up 90 percent of the population of northern Uganda) and other northern populations. Unable to secure enough volunteers and angry that the Acholis would not support their movement, the rebels purposely targeted those civilian populations. Attacks intensified in the 1990s, swiftly spreading into the Lango and Teso subregions. In response, the Ugandan army, now the Uganda People's Defence Forces (UPDF), forced populations into "protected villages." People who had previously lived among family and clan were now living in crowded camps among relative strangers, with little if any access to land.

The Government's justification for this initiative was that it was easier to protect larger groups of people in these villages, referred to as camps for internally displaced persons (IDPs). Yet many of the most serious massacres and waves of abductions occurred after people were forced into these camps. Despite the humanitarian efforts of numerous international organizations, disease and

destitution were widespread. At the height of the conflict, up to one thousand people were dying weekly in Acholiland – a rate well above emergency levels.¹⁷

The conflict has also affected northern Uganda socially and culturally. Displacement has splintered clans and village communities, disrupting social organization and causing a general breakdown of moral character among youth, according to Lango and Acholi cultural leaders.¹⁸ Limited by the constraints of camp living, elders have found it difficult to impart traditional knowledge and cultural values to the young.¹⁹

CRIMES PERPETRATED AGAINST FEMALES IN LRA CAPTIVITY

Prior to the twentieth century, females were abducted and “married” to their captors as part of intertribal warfare in East Africa.²⁰ However, such abductions happened on a relatively small scale, nothing like the massive scope of abductions carried out by the LRA. Perhaps the strongest similarity between abductions for forced marriage then and now is that such relationships are coercive and nonconsensual – a central element of forced marriage within any context – and violate customary practice. LRA forced marriage clearly violates both customary law and international law.

The LRA has abducted girls and women from Acholiland, Lango, Teso, West Nile and other areas in northern Uganda, as well as from the CAR, the DRC and Southern Sudan. It is estimated that

¹⁷ World Food Programme, *Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader District* (WFP and Uganda Ministry of Health, 2005).

¹⁸ Clan leader interviewed 9 June 2005, by Carlson, Lira, Uganda; clan leader interviewed 26 March 2007, by Carlson, Pader District, Uganda.

¹⁹ *Ibid.*

²⁰ E. Heineman, “The History of Sexual Violence in Conflict Zones,” *Radical History Review*, 101, 2008.

while in captivity a quarter of all female abductees have experienced sexual abuse or rape or witnessed the rape or other sexual abuse of another female.²¹ Although abduction of females from Uganda since 2006 has all but ceased, it continues in other countries, namely the CAR, the DRC and Southern Sudan. The LRA practice of forced marriage is unique not only in the volume of abducted and forcibly married girls and women but also in its use of these captives to enable the rebel fighting force to function. It is unknown how many of the girls and women abducted from outside Uganda have experienced forced marriage to LRA fighters; it is known that girls and women, including those from Uganda, continue to be held within LRA ranks. It is unknown how many males or females remain in captivity, in part because the LRA continues abductions.

Of those girls and women abducted, the most at risk for being forced into marriage are over the age of fifteen who are held in LRA captivity for two weeks or longer.²² LRA leaders control the females' sexuality through the group's rigid hierarchical structure and strictly enforced regulations, using intimidation, discrimination and violence. Strict rules govern how abductees may interact with each other and behave. The captor "husbands" exercise exclusive sexual access to the abductees. LRA leadership also exercises sexual control, through enforcing pregnancy and child-bearing (for example, exacting severe punishment for attempted abortions). Rules dictating interpersonal conduct are enforced by LRA leadership through beatings and killings; abducted females are sometimes forced to beat or kill other abducted females.²³ The "wives" and other abducted children who behave favorably are rewarded with material goods, including loot, food or access to medicine. This makes the captives dependent on their captors for basic provisions such as food and medicine. Those who resist are

²¹ *The State of Female Youth in Northern Uganda.*

²² *Ibid.*

²³ Former forced wives interviewed March and April 2007 by Carlson, Pader and Kitgum Districts, Uganda.

singled out for punishment and sometimes death.²⁴

The high rate of rape within the LRA has resulted in many pregnancies. The longer girls and women have been held captive, the greater the likelihood they have children born of rape. One report estimates that nearly 40 percent of the captives had one child and another 15 percent had two or more children.²⁵ Interviewees reported that girls and women who failed to conceive were punished and those caught trying to prevent or abort pregnancies were killed.

Pregnancy further increased dependence on their captors for support and protection. They also had to ultimately confront the prospect of leaving the LRA and reintegrating into their communities with a child. These dependencies reinforced the forced conjugal relationship, making it difficult to exit the LRA. Most former forced wives left the LRA by escaping; more rarely it was through capture by UPDF soldiers.²⁶

Abductees can suffer emotional distress from their captivity. One interviewee reported experiencing nightmares five years after her release. She said, "When I am sleeping I cry out at night. There is yelling. In a vision sometimes I can see that man scaring me. I see terrible things. That man comes to me and tries to pull me out of my body."²⁷

RULINGS BY INTERNATIONAL COURTS

In February 2009, the Special Court for Sierra Leone convicted three Revolutionary United Front commanders for their responsibility in overseeing forced marriage within that rebel

²⁴ Ibid.

²⁵ *The State of Female Youth in Northern Uganda*.

²⁶ Ibid.

²⁷ Former forced wife interviewed on 11 March 2007 by Carlson, Pader District, Uganda.

group.²⁸ The context in Sierra Leone is different from that in Uganda, but the effects of the experiences and the subsequent sexual and nonsexual dimensions of the crimes bear important similarities.

Examining the criminal components of forced marriage in light of the ruling by the Sierra Leone court clarifies the magnitude of what it means for a captive to be forced into sexual and domestic servitude. This form of slavery subjects the victims to beatings, rape, forced impregnation, torture, disabling physical and mental injury, psychological distress and death. These crimes contribute to physical, emotional, social, economic and spiritual suffering.

Most of the crimes perpetrated against forced “wives” in the LRA are codified violations of international customary, humanitarian and human rights law. The severity and frequency of beatings of girls and women in captivity is on par with inhumane acts as determined, for example, in cases judged by the International Criminal Tribunal for the former Yugoslavia. There the Trial Chamber determined that the link between sexual violence and physical beatings amounted to crimes against humanity.²⁹ Judgments from the international criminal tribunals for Rwanda and the former Yugoslavia linked rape and sexual violence with torture.³⁰ The rape of women and girls carried out under the order of commanders gave rise to mental and physical pain and

²⁸ Special Court for Sierra Leone, Case 15: *The Prosecutor vs. Sesay, Kallon and Gbao* (RUF Case).

²⁹ In *Tadic*, sexual violence was charged as willful killing and torture. See *Prosecutor v. Dusko Tadic*, IT-94-1-T (ICTY 7 May 1997).

³⁰ The International Criminal Tribunal for the former Yugoslavia in the *Foca* case, for example, concluded that rape and sexual violence equate to torture and enslavement. Rape was also recognized as torture in the *Furundzija* and *Delalic* cases. The *Foca* case indictments concluded that rape and sexual violence equated to torture and enslavement. See *Prosecutor v. Furundzija*, IT-95-17/1-7 10 (ICTY 10 December 1998) para. 176; *Prosecutor v. Delalic, Mucic, Delic and Landzo (Celebici case)*, Case No. IT-96-21-T, Trial Chamber (16 November 1998) *Prosecutor v. Delalic, Mucic, Delic and Landzo (Celebici case)*, IT-96-21-T (ICTY 16 November 1998), paras. 941, 963.

suffering.^{31, 32} In addition, forced pregnancy is a war crime and a crime against humanity.³³ Rape is a war crime and a crime against humanity, and under Ugandan law it carries a maximum penalty of death. Ugandan law also allows the death penalty for the defilement of any girl under the age of eighteen. Other crimes perpetrated by the LRA can be characterized as torture, including repetitious beatings and deprivation of food and water as a punishment for “bad behavior” or failure to heed the commands of “husbands.”

A defining characteristic of forced marriage as determined by the Special Court for Sierra Leone is the forced imposition of being a “wife”; by contrast, forced conjugality is not present in enslavement or sexual slavery. Forced marriage has been codified in international law as a crime against humanity.³⁴

All of the girls and women abducted by the LRA were subject to forced labor, which is a violation of the Ugandan Constitution. It is also analogous to enslavement,³⁵ a crime against humanity.³⁶ Girls and women report being beaten for not performing domestic duties to the satisfaction of their captors.³⁷ Forced labor included carrying heavy equipment, building huts and carrying out agricultural work

³¹ See the *Foca* case, *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23 and 23/1 (ICTY 12 June 2002). Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as torture. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.

³² *Prosecutor v. Akayesu*, ICTR-96-1-A (ICTR 1 June 2001), paras. 505-509, 516, 594, 597 and 688.

³³ Rome Statute, articles 7 and 8.

³⁴ AFRC Appeals Judgment, para.184.

³⁵ See *Foca* case (12 June 2002), para. 543.

³⁶ Rome Statute, article 7.

³⁷ Former forced wife interviewed on 10 March 2007, by Carlson, Pader District, Uganda.

for the “wives” of higher-ranking commanders.³⁸

These grave violations of the rights of girls and women and the magnitude of the crimes, require the application of international human rights standards to achieve justice.

MECHANISMS FOR SEEKING JUSTICE

For former captives, family or community support is critical to transitioning back into normal life and a new home. Upon returning from captivity, the former forced wives and their children may face stigma and verbal and physical abuse and threats from family. Children born in captivity also are vulnerable to rejection by the extended family, often regardless of whether the mother is accepted back.³⁹ Girls and women report hesitation about revealing what they have experienced.⁴⁰ Those unable to return to their communities typically face greater difficulties finding a means of livelihood.

A representative study found that 90 percent of former forced wives in Acholiland wish to remain separated from their LRA captors.⁴¹ Some prominent Acholi leaders, however, believe that such separations would infringe on the rights of LRA men. One official of Uganda’s Amnesty Commission⁴² believes that the fathers of children born in captivity have a right of access to those children

³⁸ Former forced wife interviewed on 8 March 2007, by Carlson, Pader District, Uganda.

³⁹ S. McKay, M. Burman, M. Gonsalves and M. Worthen, “Girls Formerly Associated with Fighting Forces and Their Children: Returned and Neglected,” *Child Soldiers Newsletter* January 2006.

⁴⁰ Former forced wives interviewed on 12 March 2007, by Carlson, Kitgum District, Uganda.

⁴¹ *The State of Female Youth in Northern Uganda*.

⁴² The Amnesty Commission oversees the issuance of amnesty certificates. Under the Uganda Amnesty Act of 2000, any person who ceases to engage in armed opposition against the State can qualify for a pardon from criminal prosecution for their involvement in armed conflict. Amnesty can apply to both abducted and non-abducted members of the LRA.

and that girls and young women who return from captivity with children become a “social problem” when they separate from these men.⁴³ Her sentiment is echoed by a member of Women in Peacebuilding, a group affiliated with the Acholi Religious Leaders Peace Initiative (ARLPI). This official believes that “in the African context the children of returnee mothers should belong to their respective LRA husbands that father the child” and that “the parents of [the returnee forced ‘wife’] should accept the father of their daughter’s children.”⁴⁴ The ARLPI can significantly influence people’s perceptions about forced marriages and the acceptable role of returnee girls and women.

Although the impact of religious groups on traditional justice mechanisms in regard to LRA crimes is somewhat uncertain, it must be assumed they will have a good deal to contribute. The ARLPI is largely dominated by Catholic and Anglican clergy in northern Uganda, who cooperate closely with Acholi traditional leaders’ associations. Together, they have issued joint statements – amounting to a consensus among religious and traditional leaders – calling for Acholi customary justice systems to be favored over nonlocal and nontraditional systems such as the International Criminal Court (ICC).⁴⁵

Opinions differ about the roles of clans in the LRA. According to three interviewed clan leaders from Gulu, some clans bear more responsibility than others because of their support of LRA activity, meaning they should accept responsibility for some of the crimes perpetrated by the LRA and provide compensation for those crimes. Although the leaders did not specifically mention sexual crimes, they agreed that forced wives should not be encouraged to

⁴³ M. Oker, Amnesty Commission, interviewed on 31 January 2006, by Carlson, Gulu, Uganda.

⁴⁴ K. Lanyero, Women in Peacebuilding, interviewed 24 June 2006 by Carlson in Gulu, Uganda. Customary law in northern Uganda is clear that a child does not belong to its father if no dowry or compensation of any kind has been paid to the family of the mother in cases where children are born of rape or outside marriage.

⁴⁵ Allen, T. (2005).

return to their LRA captors if they have the capacity to live on their own. At the same time, they felt that former captives who cannot provide for themselves should, in most cases, go back to their captor-husbands if they are willing.⁴⁶

According to one scholar on Acholi culture, clan elders are trying to determine how to apply traditional justice mechanisms to the LRA crimes. But there is uncertainty about how clan leaders will respond to sexual crimes perpetrated by the LRA. Developing a cohesive strategy will require extensive dialogue among clans.⁴⁷ However, there appears to be little discussion on sexual and gender-based crimes among clan leaders.⁴⁸

When former forced wives speak of accountability, they rarely prioritize traditional justice systems. Most of those interviewed believe that such mechanisms will not serve to adequately punish the LRA commanders. The ICC has indicted the LRA leader Joseph Kony and four top commanders on charges of war crimes and crimes against humanity.⁴⁹ Some of the interviewed survivors of forced marriage hope to see significant punishments for top LRA leaders and other ranking members of the group not indicted by the ICC.⁵⁰ When asked to describe what kinds of punishments they would choose, these women describe everything from long-term imprisonment to execution.

Other former forced wives also wish to see their lower-ranking captors face punishment. One said she wished for paid compensation, while another was relieved to hear that her “husband” had been killed, adding that “he received what he

⁴⁶ Three clan leaders, interviewed on 1 February 2006 by Carlson, Gulu, Uganda.

⁴⁷ R. Atkinson, Professor of History and Director of African Studies, University of South Carolina, personal communication with Carlson, 10 March 2009.

⁴⁸ Ibid.

⁴⁹ Of the five indictees, Joseph Kony, Okot Odhiambo and Dominic Ongwen remain at large, while Raska Lukwiya is dead, and Vincent Otti was reportedly executed.

⁵⁰ Interviews with former forced wives, 2005 and 2007, Gulu, Lira and Kitgum Districts.

deserved.”⁵¹ However, it seems that most former forced wives and community members agree that lower-ranking fighters, most often abductees themselves, were forced into taking captive wives. They feel that the commanders should be blamed for those crimes as well. The former female captives imagine punishments beyond the scope of the restorative objectives of traditional justice systems in northern Uganda.⁵²

Challenges in the Use of Traditional Justice Mechanisms

The dilemmas posed by the return of abducted females have led to varied responses from key stakeholders – the Government of Uganda, NGOs, religious and clan leaders, parents and other relatives and the ICC and other members of the international legal community. The issue is complicated when former combatants live in close proximity to former captives. Increasingly, the LRA’s top leadership, the president of Uganda and a group of religious and traditional leaders are calling for the use of traditional and customary practices of the Acholi, Lango and other affected groups to deal with the harms committed during the conflict.

The 2007 Agreement on Accountability and Reconciliation called for traditional accountability and reconciliation processes to be “promoted to become a central part of accountability and

⁵¹ Former forced wife interviewed on 14 March 2007 by Carlson, Kitgum District, Uganda.

⁵² Respondents gave mixed answers when asked what kind of punishments should be given to those responsible for sexually abusing them. While most felt that lower-ranking fighters (most often abductees themselves) should be granted amnesty, they felt differently about commanders and those they felt were responsible for ordering the abuse of girls and women. For commanders, respondents called for punishments including death by hanging, beating or other non-specified public execution. Other respondents felt that commanders should be arrested and made to pay compensation. Of those who blamed commanders, they specifically named Kony. Punishments for Kony included public hanging “like Saddam Hussein” and “something satanic.” (Four former forced wives interviewed 3 February 2006 by Carlson, Lira District; two former forced wives interviewed 4 February 2006 by Carlson, Lira District; one former forced wife interviewed 8 March 2007 by Carlson, Pader District; one former forced wife interviewed 10 March 2007 by Carlson, Pader District; and two former forced wives interviewed 13 March 2007 by Carlson, Kitgum District.

reconciliation” in northern Uganda.⁵³ The Agreement addresses crimes and rights violations against women, youth and children – a significant precedent in a post-conflict mandate. But it is important not to allow grave crimes of international law to be subsumed into traditional processes. While Acholi traditional systems can serve some aspects of reconciliation between the LRA and Acholi people, they cannot be expected to address crimes committed outside the Acholi region or to non-Acholi victims and their families or to fully address the crime of forced marriage and the other gender-based and sexual crimes carried out by the LRA. It is also crucial to apply Ugandan national law and a broad, regional accountability and reconciliation process informed by all war-affected regions of the north. National and international systems must work parallel to traditional mechanisms and in some cases take precedence over them.⁵⁴

Customary laws have governed the conduct of the ethnic groups of northern Uganda for centuries. Among the issues addressed by the laws of the Acholi and Lango people are marriage, transfer of material wealth for dowry, divorce and custody of children. They contain penalties, including compensatory payments, for crimes including abduction, murder, rape and pregnancy out of wedlock. In general, when such laws are broken, clan leaders bring the relevant individuals together, and rituals are performed to resolve the conflict or hostility. Such processes are effective when the parties are willing to participate and do so in accordance with tradition.

One of the dilemmas in using traditional means to resolve the LRA’s sexual and gender-based crimes is that these crimes have

⁵³ Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, 2007, Juba, Southern Sudan.

⁵⁴ The Ugandan Constitution recognizes differences of cultural and customary values among the many ethnic groups in Uganda, and it voids all laws or customs inconsistent with its provisions. This can be particularly important when considering challenges girls and women may face when seeking redress from former captor-“husbands” and their clans when customary laws conflict on such matters. *Constitution of the Republic of Uganda* (1996), Sec. 2.2.

been perpetrated at unprecedented levels, and the perpetrators and victims, numbering in the tens of thousands, are scattered throughout northern Uganda and across international borders. Because customary practices have not previously had to deal with forced marriage and similar crimes, using them to address such crimes would require substantial modifications or an entirely new system.

A second dilemma is the decline in traditional authority and rituals resulting from war, population displacement, loss of land and livestock and decades of economic decline. Also contributing to the decline are the influences of modernization, shifting livelihoods and lifestyles and allegations of corruption. The lack of resources strains the ability to pay compensation, a central part of traditional methods of conflict resolution.⁵⁵

Third, traditional justice is administered within a patriarchal clan structure that is biased against women's and children's rights and weak in addressing violence against women and girls. It is difficult to imagine how such a system could address the rights of women and girls competently and fairly. For example, in a number of domestic violence cases documented in Acholiland, girls and women reported that traditional processes only made their situations worse.⁵⁶ To illustrate, according to some community-elected female members of a Pader District Local Council, the traditional systems in the north are antiquated in their ability to

⁵⁵ An officer with the Amnesty Commission explained that all former "forced wives" can choose either to formalize marriage with their LRA "husband" or to separate from him. Such notions are naive, simplistic understandings of the reality facing returnee "forced wives" and further complicate their return, as the Amnesty Commission, among other prominent organizations in the north, turn the other way and largely ignore the rights of former "forced wives." Statistics officer, Amnesty Commission, interviewed 31 January 2006 by Carlson, Gulu Town, Uganda.

⁵⁶ K. Carlson and D. Mazurana, "Beating 'Wives' and Protecting Culture: Violent Responses to Women's Awakening to their Rights," *Humanitarian Exchange Magazine*, 36 December 2006 [hereinafter "Beating 'Wives' and Protecting Culture"]; Amnesty International, *Uganda, Doubly Traumatized: Lack of Access to Justice for Female Victims of Sexual and Gender-Based Violence in Northern Uganda* (London: Amnesty International, November 2007).

consider the rights of girls and women in situations involving sexual abuse (among other areas). Given that these systems lack a precedent in dealing with the widespread sexual and gender-based crimes of the LRA, these female leaders believe that formal legal mechanisms should be used to adjudicate cases of grave crimes and determine punishments proportional to their severity.⁵⁷

Given that the Agreement, as well as officials and citizens, has called for the use of traditional justice mechanisms, it is likely that they will be used in some form in northern Uganda. Addressing the needs of victims of sexual and gender-based crimes must shape these forms, and international child protection standards must be respected. Local mechanisms will need to work along with formal systems and other mechanisms, such as truth-telling bodies.⁵⁸

Joseph Kony is the only living LRA commander charged with crimes specifically perpetrated against female victims.⁵⁹ The ICC's indictments fail to recognize the breadth of the forcible marriage crimes committed by the LRA, although there is the possibility of amending the indictments. Likewise, the Ugandan Government can draft legislation to enable the national court system to handle the types of crimes perpetrated against forced wives. Indeed, some of these acts, such as rape and forced labor, are already criminalized. But it seems unlikely that customary laws in northern Uganda will be amended to address forced marriages and other sexual and gender-based crimes.

Acholi and Lango clan and village leaders share some customary practices on child custody, maintenance, sexual violence, compensation and enforcement. However, they have different approaches to handling crimes and violations that occurred as a result of forced marriage within the LRA. A majority of the LRA

⁵⁷ Three female Local Council members, interviewed 30 March 2007, by Carlson, Pader District, Uganda; Female community leader, interviewed 9 March 2007, by Carlson, Pader District, Uganda; E. Opio, Director, Forum for Peace and Development, interviewed 18 March 2008, by Carlson, Lira, Uganda.

⁵⁸ See Key Principles for Children and Transitional Justice, Annex.

⁵⁹ Those charges are sexual enslavement and rape as crimes against humanity.

male fighters are Acholi, which may account for some of the differences of approach.

Generally, Lango leaders see the abduction and forced marriage of women and girls as a broader regional issue that should be a part of peace-building and reconciliation discussions in the north. Many Acholi community and religious leaders interviewed for this study are focused more on issues affecting the Acholi people and less on how neighboring tribes are coping with the return of former captives. Lango leaders want Acholi clans to accept some responsibility for actions by Acholi LRA fighters and captor-husbands. For traditional forms of justice to apply to Lango females, the Acholi would have to be involved when the captor-husbands are Acholi. Such an arrangement will not easily be organized.

The customary practice in cases of rape is to facilitate a cleansing ritual to help the victim overcome the experience. Such rituals should not be confused with traditional justice practices, but they share common roots. Like traditional justice practices, cleansing rituals include the participation of clan elders and other family or community members. For such rituals to apply in cases of rape, the victim and the facilitators of the ritual must travel to the location where the rape took place, which would obviously be problematic given the multiple experiences of rape in various countries by individual forced wives.⁶⁰ The survivor and her family and other community members would also need to encounter the perpetrator. Concerns have been expressed that such a ceremony might enable the perpetrator to identify the clan and living situation of his former forced wife and then to pursue her or her children.

Many Acholi rituals are used to foster reconciliation and harmony between families, clans and different ethnic groups. The most widely known is *mato oput*, which literally means “drinking the bitter root.” Typically used to reestablish harmony after a murder or unintentional killing, it is performed after a mediation effort has brought hostile parties together to resolve differences. The offending party must accept responsibility for the crime; when the parties work out their differences, the bitter drink is consumed as a

⁶⁰ Four clan leaders, interviewed on 9 March 2007, by Carlson, Pader District, Uganda.

gesture of forgiveness and reconciliation. *Mato oput* traditionally includes payment of compensation by the offending parties.⁶¹

Women's Dissatisfaction with Traditional Ceremonies

Women are typically left out of traditional decision-making processes, and *mato oput* is no exception; it assigns a minor role for female participants. Therefore, unless traditional systems evolve to incorporate international human rights standards, which is doubtful, they will not achieve justice for the widespread rights violations perpetrated against women and girls.⁶²

Mato oput is not applicable to rape, forced marriage, slavery, forced pregnancy, torture or any other crimes perpetrated against former captive "wives" within the LRA. Nor do clan elders have any experience overseeing justice processes to deal with these mass crimes.

The Acholi have other customary practices for dealing with various violations, but they do not address sexual and gender-based crimes. One such practice is *nyono tonweno* (stepping on the egg to cleanse someone who has been away from home for an extended period of time). It is the ritual most likely to be practiced by former forced wives and other male and female abductees. Stepping on an egg serves as a symbolic gesture of leaving behind the experiences of the LRA and starting a new life in a new community.

The Lango, Madi and Iteso all also have their own systems of accountability. It is unclear to what extent, if any, these groups would be willing to accept Acholi rituals to achieve accountability and reconciliation.

In some cases the rituals have provided relief and alleviated guilt on the part of returnee women and girls. But most of the women and girls interviewed by the authors said they found little meaning in the ceremonies and derived little relief from them. A

⁶¹ D. Pain, *The Bending of Spears: Producing Consensus for Peace and Development in Northern Uganda* (London: International Alert and Kacoke Madit, 1997).

⁶² Ibid.; "Beating 'Wives' and Protecting Culture."

recent study also found that “forced wives” were the least likely of any category of former captives to participate in traditional cleansing ceremonies.⁶³ Some have described these ceremonies as “wasteful” and “useless.”⁶⁴ One former forced wife and young mother in Kitgum District spoke for many when she said she had been forced to participate in the ceremony because “it is what the community people want, not what I need.”⁶⁵ These women are aware of the services provided by international NGOs and other groups, which brings expectations of having access to them. Part of the disappointment many have in traditional ceremonies may be related to the limited or nonexistent follow-up or other supplemental services. Perhaps increased accessibility to professional services addressing the experiences of these former captives would give traditional ceremonies greater significance.

Clan elders say that compensation for crimes such as rape is unlikely unless the rape resulted in the birth of a child. Even then, they say, compensation would be paid not for the rape, but for the care of the child born of the relationship, as per customary practice. Therefore, rape remains unpunished and inculpable under customary Acholi practices. Furthermore, Uganda’s Amnesty Act shields most returnees from prosecution by national laws for crimes committed while with the LRA.

Female leaders in Kitgum and Pader Districts express frustration with the ossified and arcane nature of traditional ceremonies, saying that they seldom address the root of crimes committed against women and girls. One female local council member explained that the welcoming ceremonies for women, including those raped and forcibly married, are:

...old and untouchable ceremonies that cannot be adapted to fit the needs of the girls returning or [address] the crimes committed in the bush...These

⁶³ *The State of Female Youth in Northern Uganda*.

⁶⁴ Former forced wives, interviewed in March and April 2007 by Carlson, Pader and Kitgum Districts, Uganda.

⁶⁵ Former forced wife, interviewed on 11 March 2007 by Carlson, Kitgum District, Uganda.

ceremonies are the same ceremonies that have always been carried out by the elders and there is nothing that we, as women, can do to change them.⁶⁶

Another female council member said the male elders will not allow Acholi rituals to be changed because doing so would be considered an insult to Acholi culture and ancestral custom.⁶⁷

Under Acholi and Lango customary law, the parent or guardian brings a case forward. This adult is most likely to receive the monetary or material compensation and determine how it will be used; minors usually do not receive compensation for violations committed against them. Where a violation has been committed against an adult, the head of the family brings the case forward. This would typically be a man, but in the absence of a male head of household, a woman could bring the case forward. When an individual commits an offense against a fellow clan member, the clan elders mediate a resolution between the two families. If the offense is committed against a member of another clan, the offender's clan is also held responsible. It is thus the responsibility of the clans as a whole to resolve violations of customary practice through their leaders. Significantly, this dialogue must produce admission of guilt by the offending party and a verbal gesture of forgiveness by the violated party.⁶⁸ In the case of forced marriage, captor-husbands are responsible for the offense of forcibly

⁶⁶ S. Latigo, Local Council official, interviewed on 30 March 2007 by the authors, Pader District, Uganda.

⁶⁷ M. Ayo, Local Council official, interviewed on 30 March 2007 by the authors, Pader District, Uganda.

⁶⁸ Two clan leaders, interviewed on 9 June 2005 by Carlson, Lira District, Uganda; Bau-Okol, Local Council official, interviewed on 10 June 2005, Carlson, Lira District, Uganda; Y. Odur, Paramount Chief, Lango, interviewed 14 June 2005 by Carlson, Lira District, Uganda; see E. Baines, *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration* (Vancouver, British Columbia: Lui Institute, 2005) [hereinafter *Roco Wat I Acoli*]. For most important elements of traditional justice, the establishment of truth, the voluntary nature of the process, the payment of compensation and the restoration of social relations among family and clans.

“marrying” abducted women and girls, and their clan is liable for compensation for these acts under Acholi and Lango customary laws.

Restoring Traditional Justice Mechanisms

Historically, when disputes were left unsettled, compensation unpaid or revenge killings carried out, clans would arm themselves with spears and confront each other.⁶⁹ Though conflict is no longer resolved in this manner, regional instability and armed conflict have disrupted traditional systems of resolution. Rebuilding traditional methods of negotiating, paying or collecting compensation will take time. Until these systems are restored and relations among ethnic groups and clans strengthened, it is likely that violations of women’s and girls’ rights will be of secondary concern for clan and tribal leaders.

Ethnic groups have lost their authority and ability to consistently enforce customary norms.⁷⁰ Insecurity has impeded communication among clans, and this is compounded by the fragmentation of clan unity due to displacement throughout the north.⁷¹ As a result, clan authority to enforce customary law is weak, which allows local councils to play a greater role in addressing clan issues, and disputes remain unsettled between clans and ethnic groups, increasing mistrust and resentment.⁷² The weakened state of Acholi and Lango customary systems is reflected in the normative

⁶⁹ H. M. Odngo, clan leader, interviewed on 10 June 2005, by Carlson, Lira District, Uganda.

⁷⁰ Clan leader interviewed on 9 June 2005 by Carlson, Lira District, Uganda. Apart from the Local Council Courts mentioned above, there are informal customary courts established at multiple levels. They include family courts, clan courts, interclan courts and intertribal courts. These are headed by the elder within each respective group, with each working toward the same general concepts of justice, including truth, compensation and restoration. (For more on Acholi justice, see *Roco Wat I Acoli*.)

⁷¹ *Ibid.*

⁷² *Ibid.*; Father of former forced wife interviewed on 10 June 2005 by Carlson, Lira District, Uganda.

attitudes and practices for dealing with crimes and violations that have occurred within forced marriages.

Traditional methods for bringing offenders before the clans are further weakened because the LRA fighters responsible for these violations are often well outside the influence or control of their clans. As long as they remain in the bush, it is extremely difficult for their clans to hold them accountable. As a result, the former “forced wives” may have little redress through customary law. They may choose to leave the matter altogether and move on with their lives, hoping the captor-husband never reappears.

However, this does not change the fact that the clan of the offending male is responsible for addressing violations of customary law. As one clan leader said, “Each clan is responsible for bringing in their [LRA affiliated] clan member. Whatever clan one LRA fighter is from, that clan needs to be responsible for his behavior and must do what it can to bring him in.”⁷³

Informants contend that such efforts by clan leaders and elders are necessary, given the scale of involvement in the LRA by young men of particular clans and ethnic groups. If such efforts are not made and apparent, it may appear that one clan or ethnic group is not giving full respect to the laws and customs of others. This may foment resentment toward that clan or toward an entire ethnic group. Given existing resentments between ethnic groups or clans, it will be difficult to develop effective means of addressing the widespread sexual and gender-based crimes within traditional justice systems.

Acknowledging that sexual and gender-based crimes have been perpetrated against thousands of women and girls of all different ethnic groups and clan affiliations in northern Uganda could have positive outcomes. It could change negative attitudes about individual returnees and raise awareness more broadly of sexual and gender-based violence of all kinds. However, at present there is little discussion among clan leaders on how to move forward at regional or even district levels.

In the forums that will come to grips with accountability and

⁷³ Clan leader, interviewed on 9 June 2005 by Carlson, Lira District, Uganda.

reconciliation issues in conflict-affected ethnic communities, it is important for women and girls to have designated safe spaces where they can speak among themselves and be heard. Male elders dominate traditional justice mechanisms in Uganda, and women have rarely fared well within them. Parallel processes for women and girls are necessary to provide a forum in which they could speak out about their experiences and their needs for justice.

It is also important for male leaders to hear what these women and children have to say. There are clan elders, parents and others in northern communities who will support women and girls in their pursuit of justice. A number of challenges hinder women's and girls' ability to influence traditional leadership and customs, but involving male elders in community-level action could help overcome them. Male elders will also be important in bringing issues of sexual and gender-based violence to the interclan table to foster regional reconciliation.

Public condemnation of the crimes suffered by women and girls at the hands of the LRA is more helpful than attempting to persuade them to return to their LRA "husbands." Traditional, religious and social institutions can support these women and girls when they participate in public and legal forums and can advocate for robust accountability measures.

Clan leaders' opinions mirror those of most of the former forced wives with whom the authors discussed accountability for LRA crimes. As one leader explained in Kitgum-Matidi, establishing the ladder of command responsibility is key to determining responsibility. Then it is necessary to look at how the chain of command organized the abductions and forced marriages and identify the perpetrators and commanders. Only then can a determination be made on how to go forward. This process could include clan elders, tribal leaders and other community leaders, in addition to the victims themselves and their families.⁷⁴

Finally, without government action to uphold its protective obligations, customary laws remain difficult to enforce. As one clan leader explained:

⁷⁴ Clan leader interviewed on 11 March 2007 by Carlson, Kitgum District, Uganda.

Customary laws are effective only to a point, and we can appeal for their relevance and enforcement. We cannot physically act on them in the state of things now. The government is government and we do not have the power to do what government can do. If [LRA fighters] should be [held accountable], we as a clan cannot enforce these decisions.⁷⁵

Customary law in the north can be an effective tool to reconcile clans and ease the process of reintegrating former LRA commanders, male abductees and captor-husbands into clan communities. Through customary reconciliation, women and girls may be able to gain compensation. This could enable them to make decisions about where or with whom to live that are not driven by purely economic considerations. But how people work to restore harmony within and between clans may affect the avenues available to women and girls to seek redress and resolve their cases within customary law. Unless attitudes and current customary practices are modified to appropriately and effectively address forced marriages, the rights and welfare of forced wives and their children will be vulnerable to further crimes and violations.

CONCLUSIONS

The crimes perpetrated against girls and young women held in LRA captivity – which include abduction, rape, forced marriage, enslavement, sexual slavery and torture – amount to war crimes and crimes against humanity. The LRA leadership is responsible for perpetrating these crimes at unprecedented levels in the war-affected areas of northern Uganda and Southern Sudan. Millions of people have suffered injustices, and there is a great deal of discussion about crimes and accountability in northern Ugandan communities.

⁷⁵ Clan leader interviewed on 9 June 2006 by Carlson, Lira District, Uganda.

The Juba peace negotiations and the Agreement on Accountability and Reconciliation call for the use of traditional justice measures along with national justice systems. But given their magnitude, the violations are beyond the range of issues typically addressed by customary law in northern Uganda. There should be no amnesty for perpetrators of grave international crimes, and that extends to the case of forced marriage imposed on girls and women.

Accountability and reconciliation processes need to consider the best interests of both the community and the individual. Female survivors of sexual and gender-based crimes by the LRA can benefit greatly from public condemnation of the crimes. It is vital to help them regain their sense of humanity, to reestablish trust within their homes and to have a voice in reconciliation forums. Traditional, religious and social institutions need to support these women and girls when they participate in public and legal forums and to advocate for robust accountability measures. It is also crucial for male leaders to hear what these women and girls have to say.

In light of the inadequacies of traditional measures to address forced marriage, rape, forced pregnancy and other similar crimes of equal gravity, there are two acceptable and adequate remedies: first, forced marriage should be considered a crime within the mandate of the special division proposed within the Ugandan High Court to handle prosecutable crimes, not a lesser offense to be dealt with through traditional measures; and second, the special division should prosecute not only top LRA leaders but also the commanders responsible for forced marriages, rape, forced pregnancies and the other violent gender-based crimes they ordered. In addition, the slavery crimes of forced labor and torture, which should include forced marriage, should be addressed at national and international levels.

Considering the insufficient capacity at the international level to try all those suspected of crimes against humanity and war crimes as well as the reluctance of political leaders in Uganda to allow for international trials, it is imperative for the proposed special division to ensure that the crimes perpetrated against women and girls in captivity are criminalized and addressed. Treating these crimes as international crimes and trying LRA commanders for them will not

reconstruct the lives of the girls and women who were the victims. But it will underscore the importance of national and international law in strengthening the protection of women's and children's rights during conflict. This still leaves space for customary practices and ceremonies to address the challenges facing former forced wives who have reintegrated.

Implementation of the Agreement on Accountability and Reconciliation requires amending Ugandan law to provide a basis for bringing charges that would reflect the scope and gravity of those crimes presently charged by the ICC. Either the ICC should retain jurisdiction over and prosecute these crimes, or the special division in Uganda's High Court should be empowered through legislation to bring the same prosecutions. The statute for the special division should cover rape, sexual slavery, forced pregnancy and any other form of sexual slavery, indecent assault or forced marriage. Addressing sexual and gender-based violence should be an institutional priority. Traditional justice systems are not likely to prioritize it or to have the capacity to deal fairly and justly with it.

Former forced wives should be able to come forward and testify safely. They should have options for giving testimony: in camera before the commissioners or judges, at public hearings with their identity shielded, or at public hearings. The latter two options would help to break the silence and stigma around sexual crimes and violations and the myriad of abuses suffered during captivity.

Sierra Leone's Truth and Reconciliation Commission made provisions for female witnesses to testify before a female commissioner or judge when giving testimony on sexual crimes and violations. Uganda should follow this example. Consideration should be given to holding special hearings on the situation of women and girls in northern Uganda and the crimes and violations they suffered, including forced marriage.

The Agreement on Accountability and Reconciliation also calls for a truth-telling body, and its final report should address the effects of armed conflict on women and children – as stipulated in the Agreement – and discuss the use of sexual and gender-based violence throughout the conflict by all parties. Recommendations arising from the report should also pay close attention to these

findings and propose ways to help survivors move forward during the post-conflict period.

The work of the special division and the truth-telling body needs to be widely publicized so that justice is not just done, but is seen to be done. They will need human and financial resources to ensure their ability to engage in outreach and information dissemination from the beginning to the end of their mandate. Outreach must be sensitive to gender and generation and should include concerted efforts to reach out to victims.

THE POTENTIAL AND LIMITS OF *MATO OPUT* AS A TOOL FOR RECONCILIATION AND JUSTICE

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INTRODUCTION

Traditional methods of justice and reconciliation can provide opportunities for communities to heal from conflict. Through these mechanisms, children associated with armed groups can ask for forgiveness from their communities, and perpetrators can apologize to the children. This may lead to reconciliation and relieve children from psychosocial distress for crimes committed against them and by them. These practices may inform and reaffirm truth commissions and other transitional justice processes.

There have been several debates in the international arena as to whether child perpetrators can benefit from accountability measures for crimes committed during armed conflict. This author takes the view that such children can benefit from a process that (a) ensures accountability for one's actions; (b) respects procedural guarantees appropriate in the administration of juvenile justice; and (c) reflects the desirability of promoting communal reconciliation and the capacity of the child to assume a constructive role in society.

The Acholi people of northern Uganda have for centuries relied on traditional justice and reconciliation methods to resolve disputes and achieve communal reconciliation. In the wake of two decades of armed conflict between the Lord's Resistance Army (LRA) and the Uganda People's Defence Forces (UPDF), many Acholi people are considering a traditional justice mechanism, *mato oput*. With its core principles of apology, compensation and forgiveness, it can serve as a form of accountability and a tool for generating acknowledgement and long-term reconciliation.

Methodology

This chapter analyzes the process and ethics of Acholi traditional justice and reconciliation in the context of juvenile justice and international standards for children. It highlights the Acholi traditional justice ceremony of *mato oput*, paying particular attention to children's roles and their potential contribution to accountability and community reconciliation. The chapter is based

on a review of literature, the author's insight as a member of the Acholi community of Uganda and field interviews conducted in Amuru and Gulu Districts of northern Uganda in February 2008. Individual interviews were held with forty-three children, and ten focus-group discussions were held with children and young people aged fifteen to twenty-one years. Other persons interviewed included local government officials, traditional leaders, aid workers and people living in towns and camps for internally displaced persons (IDPs).

This text does not fully represent the numerous voices and views on the use of *mato oput* as a process for reconciling the crimes committed in northern Uganda, but it highlights the many relevant issues. Due to the limited geographical focus of the interviews, the opinions of those living in two Acholi districts, Pader and Kitgum, are not represented. All interviews with members of the local community were conducted in the Acholi language.

CHILDREN ASSOCIATED WITH THE LORD'S RESISTANCE ARMY

Over the past two decades, thousands of children in northern Uganda⁷⁷ became targets and victims of the conflict between the LRA, composed mostly of abducted children or adults abducted as children,⁷⁸ and the UPDF, the national army of Uganda. About 90 percent of the affected population is Acholi. The children associated with the LRA have been forced to perform atrocities against civilians as punishment for accepting the Government of Uganda's

⁷⁷ The most affected are the Acholi population of Gulu, Kitgum, Amuru and Pader Districts, but neighboring areas have also been affected, particularly Lira, Apac, Oyam, Kumi, Adjumani, Amuria and Soroti, which are mostly home to the Langi, Itesot and Madi ethnic groups.

⁷⁸ Research Brief 1: "The Abduction and Return Experiences of Youth (PDF), The Survey of War Affected Youth (SWAY): Research and Programs for Youth in Armed Conflict in Uganda," Human Rights Center, University of California, Berkeley, April 2006.

rule.⁷⁹ The tactic is intended to make it difficult for the abductees to escape and return home due to fear of reprisals from victims and members of the community.⁸⁰

The LRA movement claims a spiritual dimension, which also instills fear and respect for the commanders' powers among the captives. Children are forced to carry out atrocities to demonstrate loyalty to the "Holy Spirit" that LRA leader Joseph Kony claims anointed him to start the war. Several children who have escaped captivity report being terrified of Joseph Kony. They believe he could read their minds and would kill them for thinking about running away.⁸¹ The children tell of being forced to club to death children who were not following the orders of rebel commanders.⁸²

Children who manage to escape LRA captivity and return to northern Uganda are commonly referred to as "returnees."⁸³ They often suffer from nightmares, sleeplessness, hallucinations, withdrawal and feelings of hostility and despair.⁸⁴ Some of the children have no homes to return to; some families have not accepted their children; and some children reportedly have gone

⁷⁹ Amnesty International, "Breaking God's Commandments" (Amnesty International, 2002).

⁸⁰ Okello Lucima, ed., "Protracted Conflict, Elusive Peace: Initiatives to End the Violence in Northern Uganda" (London: Accord, Conciliation Resources) available at www.c-r.org.

⁸¹ World Vision, "Pawns of Politics: Children, Conflict and Peace in Northern Uganda" (World Vision, 2004).

⁸² Ibid.

⁸³ There are various channels for returning from captivity. Returnees captured by the UPDF pass through the UPDF child protection unit before referral to a reception center. Children who actually escape from captivity and run home do not benefit from the services, such as psychosocial support, provided at reception centers. Families and community members have been known to take some of these children to the centers themselves.

⁸⁴ Beatrice Lamwaka, "The Power of Storytelling and Reading in Healing Children Orphaned and Traumatized by War in Northern Uganda," (conference paper presented at the 29th International Board on Books for Young People (IBBY) conference, Books for Africa, 6 September 2004, Cape Town, South Africa).

back to the LRA (or have been inclined to) because they no longer felt a part of their communities.⁸⁵

The return process is further complicated by difficulties encountered by both returnees and the community in “protected villages”, camps for IDPs.⁸⁶ A particular challenge for returnees is stigma. The returned children say they prefer to keep to themselves or to associate with other returnees because people point at them and refer to them as rebels and murderers or as *duk paco* (“return home”), which they find offensive. People often lace the phrase with sarcasm and bitterness, angry at having suffered because of atrocities perpetrated by the children who are now being “rewarded” (with modest assistance).⁸⁷ The returning children also face a lack of economic and education opportunities, the risk of sexual abuse and exploitation, food insecurity and health threats, including HIV and AIDS.

Within the camps, cultural leaders and elders have assisted in mediating conflicts involving the returning children. In many cases, families and elders have adopted rituals to welcome them home and performed cleansing rituals to remove the *cen* (bad spirit).⁸⁸ The *cen* is believed to cause disease and to make people behave in a dangerous or abnormal manner, traits commonly seen in people

⁸⁵ Ibid.

⁸⁶ In response to the war, the Government of Uganda, in 1996, began a policy of forcing civilians out of their homes into what it termed “protected villages” on the grounds that it was a necessary military strategy to distinguish the LRA from the civilian population. These “protected villages” are commonly referred to as camps for internally displaced people or IDP camps.

⁸⁷ *Duk paco* is a program started by the Amnesty Commission that calls for rebels to return home. The returnees were usually provided with a package of practical items, including schoolbags with *duk paco* written on them. This is a source of bitterness to communities, who say they have suffered from the LRA’s atrocities, yet the returnees are rewarded for their crimes when they return home.

⁸⁸ *Cen* is believed to be the bad spirit of a person who has died, usually a violent and untimely death, and is out to get revenge from the person who committed the killing, failed to stop it, happened to be present when it took place or simply came across the dead body. The revenge is believed to extend to family and clan members.

with mental illness. Hallucinations, nightmares, violence, stress and chronic illness are all signs associated with *cen*.⁸⁹ For many children, these cleansing rituals have led to communal reconciliation.⁹⁰ Others express interest but have not undergone such rituals because they don't have families or are too poor to purchase the necessary items. Still others are not interested, do not identify themselves with the rituals or shun them as satanic or backward.⁹¹

In the search for a solution to the conflict, in 2003, the Government of Uganda referred the situation to the International Criminal Court (ICC),⁹² which accepted the referral and started investigations.⁹³ By 2005, the ICC had unsealed arrest warrants for the five top LRA commanders.⁹⁴ The indictments cover war crimes and crimes against humanity,⁹⁵ including charges of murder, pillage, sexual slavery, attacks against civilian populations, use of

⁸⁹ See Thomas Harlacher, Francis Xavier Okot, Caroline Aloyo Obonyo, Mychelle Balthazard and Ronald Atkinson, *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Kampala: Thomas Harlacher and Caritas Gulu Archdiocese, 2006), [hereinafter *Traditional Ways of Coping in Acholi*].

⁹⁰ Ibid.

⁹¹ For further discussion of *cen*, see Erin K. Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda," *International Journal for Transitional Justice*, 2007 [hereinafter "The Haunting of Alice"]. It tells the story of a former abductee who asks elders to perform ceremonies to relieve her of the *cen* of her dead sister. Alice had been forced to participate in killing her sister when they were abducted by the LRA rebels.

⁹² ICC press release, "President of Uganda Refers Situation of the Lord's Resistance Army to the ICC," ICC-CPI-20040129-43.

⁹³ ICC press release, "Prosecutor of the International Criminal Court Opens Investigations into Northern Uganda," ICC-CPI-20040729-65.

⁹⁴ ICC press release, "Warrants of Arrest Unsealed Against 5 LRA Commanders," ICC-CPI-20051014-110. The indicted LRA commanders are Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. Raska Lukwiya was killed in battle on 12 August 2006 and Vincent Otti was reportedly executed on or around 8 October 2007 over an internal power struggle with Joseph Kony. Of the three remaining, none have been arrested, and there is no indication that the ICC will secure arrests in the near future.

⁹⁵ In accordance with articles 7 and 8 of the Rome Statute.

child soldiers, cruel treatment, abductions, inhumane acts, enslavement and rape.

Perhaps in response to the ICC warrants, the LRA expressed willingness to engage in peace talks with the Government. These began in August 2006, mediated by the Government of Southern Sudan in the capital, Juba. The LRA and the Government signed various agreements, including a Cessation of Hostilities Agreement, an Agreement on Accountability and Reconciliation⁹⁶ and an Agreement on Disarmament, Demobilization and Reintegration.⁹⁷ Throughout the process, the LRA demanded the withdrawal of the arrest warrants for its leaders and called for matters of justice and accountability to be dealt with locally.⁹⁸ In several public statements, President Yoweri Museveni promised to request a withdrawal of arrest warrants when the LRA signed a comprehensive peace agreement.⁹⁹ But on 11 April 2008, Joseph Kony declared in a communiqué that all the signed agreements were null and void, except for the Cessation of Hostilities, which he agreed to extend for five days, and that the Juba peace talks were ended.

On 14 December 2008, the armed forces of Uganda (UPDF), the DRC and Southern Sudan launched a joint intelligence and military offensive against the LRA. It did not succeed in its intended purpose of capturing LRA commanders and ending the war. The LRA commanders are still at large; reports indicate they are roaming the forests in the CAR, the DRC, and Southern Sudan. There have been reports of the LRA abducting children in the DRC and committing atrocities against civilians, though the abductions in Uganda have stopped.

⁹⁶ Signed on 29 June 2007; on 19 February 2008, an annexure on the modalities of the Agreement was signed [hereinafter, Annexure].

⁹⁷ Signed on 29 February 2008.

⁹⁸ See "LRA's Otti Vows to Kill ICC Captors," *Daily Monitor*, 13 October 2006; "Rebel Leader Vows War over Indictments," *New Vision*, 25 May 2007; "Who is LRA's Vincent Otti?," *allafrica.com*, Uganda.

⁹⁹ See, for example, BBC News/Africa, "Museveni Rejects Hague Trial," 12 March 2008; "Uganda Explains Government Line on ICC," *New Vision*, 8 October 2006; "LRA Case to Determine Fate of ICC," 16 March 2008.

JUSTICE, ACCOUNTABILITY AND RECONCILIATION

Bearing in mind crimes committed by children, the search for a solution leads to questions of justice, accountability and reconciliation for the people affected by the conflict. The Convention on the Rights of the Child (CRC) provides for both judicial and nonjudicial proceedings to achieve accountability for crimes committed by children. In both cases, the state must take utmost care to ensure respect and protection for children's human rights and legal safeguards. In Uganda, both judicial and nonjudicial measures have been envisaged to deal with questions of justice, accountability and reconciliation.

The Agreement on Accountability and Reconciliation and its annexes provide for a special division of the High Court of Uganda to try persons alleged to have committed serious crimes during the conflict.¹⁰⁰ The prosecutions will target persons alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians or those alleged to have committed a grave breach of the Geneva Conventions.¹⁰¹

The Agreement recommends that crimes against women and children during the war should receive particular attention.¹⁰² It provides for the protection and participation of victims and witnesses, including women and children, during the

¹⁰⁰ The Court has been established administratively, but its framework and processes have not been agreed upon. See Legal and Institutional Framework, Clause 7 of the Annexure to the Principal Agreement. It is not clear whether the special division of the High Court will target the commanders already indicted by the ICC, but in the recent ICC adjudication on admissibility, Uganda submitted that its situation was still admissible before the ICC. For details, see "Situation in Uganda," in the case of *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Public Document, and "Decision on Admissibility of the Case under Article 19(1) of the Statute," Pre-Trial Chamber II, 10 March 2009, No. ICC-02/04-01/05.

¹⁰¹ See Clause 19 of the Annexure to the Principle Agreement.

¹⁰² See Clause 13(c) of the Annexure.

proceedings.¹⁰³ It is not clear from the Agreement whether alleged child perpetrators would be tried by the special division. The Ugandan penal code specifies that children aged twelve years and below are not criminally liable for their actions. It remains to be seen if substantive legislation for prosecution of serious crimes will include children above age twelve or exclude all children.

Amnesty is also seen as a possible reconciliation and reintegration measure for former rebels, although the Government has suggested that LRA commanders indicted by the ICC would not be eligible. The Amnesty Act borrows largely from traditional approaches emphasizing forgiveness and reconciliation.¹⁰⁴ It extends amnesty to all those who voluntarily surrender arms and renounce rebellion and provides for a resettlement package.¹⁰⁵ Children above the age of twelve have benefited from the amnesty. The Amnesty Commission is mandated to work toward reconciling children with their communities.¹⁰⁶

The Agreement on Accountability and Reconciliation recognizes traditional and community justice processes as a central part of the alternative justice and reconciliation framework in northern Uganda.¹⁰⁷ The Agreement mandates the Government to examine traditional practices with the aim of finding an appropriate mechanism. It also takes into consideration the impact of the process on women and children.¹⁰⁸ *Mato oput* is singled out as one

¹⁰³ See Clause 8 of the Annexure.

¹⁰⁴ See S. 16 of the Amnesty Act.

¹⁰⁵ The resettlement package includes a sum of \$150, a blanket, a mattress and other household items and is in accordance with S. 17 of the Amnesty Act.

¹⁰⁶ The Amnesty Commission is engaged in a mass education campaign to encourage the community to reconcile with children and other former rebels and to promote their reintegration into the community.

¹⁰⁷ See Clause 19 of the Annexure.

¹⁰⁸ Para. 20 of the Annexure.

Acholi traditional process for accountability and reconciliation in northern Uganda.¹⁰⁹

People interviewed as part of this research were quick to point out that traditional justice mechanisms should not apply to children accused of crimes because they are not considered to be responsible for their actions. Further questioning revealed that adolescents are not necessarily considered children in Acholi culture. Therefore, all assessments to be carried out in the context of traditional justice must clearly investigate and recommend an appropriate age of criminal responsibility for children taking part in such processes.¹¹⁰

THE MATO OPUT JUSTICE AND RECONCILIATION CEREMONY

The magnitude of killing in northern Uganda is unprecedented. The fact that many perpetrators of these crimes are returning to the community poses immense psychological and social challenges.¹¹¹ Life in the camps has diminished the status of traditional leaders, and war, displacement, poor living conditions and poverty have reduced the extent of traditional practices.

Yet many cultural rituals continue to be practiced in villages and camps for internally displaced persons (IDPs). *Nyono tonggweno* – stepping on the egg – is designed to welcome home a family member who has been away for an extended period of time. *Lwoko pig wang* – washing away tears – is performed when a person thought dead returns to the family alive. *Moyo kom* – cleansing the body – is performed to remove the negative influence of spirit forces and to prevent misfortune and ill health.¹¹² *Kwero merok* is a

¹⁰⁹ Para. 21(i) of the Annexure.

¹¹⁰ A Traditional Justice Committee has been set up by the Judicial, Law and Order Sector in Uganda to assess the viability of using traditional justice as a transitional process.

¹¹¹ See *Traditional Ways of Coping in Acholi*, at 64.

¹¹² Rwot Otinga Atuka Otto Yayi of Lamogi, interviewed on 12 February 2008 by the author in Lacor IDP camp.

cleansing ceremony for warriors returning from war. Traditionally it was not performed on a person who killed members of his or her family or clan, but it is being used with returnees who have done so and who suffer from extreme psychological distress.¹¹³ There is some debate as to whether this ritual should be performed on returnees because the war in northern Uganda is a war between family members and clans, not enemies.

The phrase *mato oput* has been used generically to refer to nearly every traditional ritual taking place in Acholi today, causing confusion.¹¹⁴ *Mato oput* literally means “drinking bitter root,” as it is made from the ground, bitter roots of the *oput* tree, which is common in Acholi. The ceremony aims at reestablishing relationships suspended between two clans in response to a killing, whether deliberate or accidental.¹¹⁵ Participants share this bitter drink at the peak of the ceremony, at the end of a long process of confession, mediation and payment of compensation. Essential to the process is the willingness of the offender’s clan (not the offender as an individual) to assume responsibility for the act committed and a readiness and ability to pay compensation.

The ritual also addresses a crucial spiritual concern. Until the ceremony is concluded, the *cen* would be expected to haunt the killer and cause diseases in his/her family or clan. This belief has been a strong motivation for initiating *mato oput*, especially when the offender has nightmares or diseases that could be interpreted as spirit-related. Even if the killer does not believe in the traditional interpretation of *cen*, escaping its social consequences is often difficult, as he/she could be accused of causing disease and misfortune in the family.

The ceremony was usually performed in conjunction with *gomo tong*, a symbolic ceremony to mark the end of a war or a bloody conflict between different Acholi clans, chiefdoms or neighboring

¹¹³ See *Traditional Ways of Coping in Acholi*, at 100.

¹¹⁴ *Ibid.*, at 79.

¹¹⁵ *Ibid.*

ethnic groups.¹¹⁶ Elders from conflicting clans meet to resolve the conflict, and the mediator bends the spear to signify the end of discussions. If the conflict starts again, it is said that the tip of the spear will turn against the aggressor.¹¹⁷

As this demonstrates, all Acholi traditional systems share core principles of apology and forgiveness, which are seen as necessary precursors to reconciliation, based on the principle of restorative justice. Accompanied by requests for forgiveness, compensation is intended to eliminate enmity between parties and to restore harmony in the community.

Erin Baines states that aspects of these traditional approaches appear to meet both the procedural and the accountability standards of international justice, such as those of the Rome Statute of the International Criminal Court and the International Covenant on Civil and Political Rights. Regarding accountability, she argues that the Acholi justice system combines elements of retributive and restorative justice and that international standards of justice can be met through the process of *mato oput*.¹¹⁸

The key question this chapter addresses is whether the *mato oput* mechanism as practiced meets the international standard for a nonjudicial intervention in juvenile justice in light of CRC

¹¹⁶ Sometimes the ritual is performed on its own.

¹¹⁷ The Liu Institute for Global Issues and the Gulu District NGO Forum, with the Support of Ker Kwaro Acholi, 'Roco Wat I Acoli: Traditional Approaches to Justice and Reintegration (September 2005) at 30. This symbolic ritual was last performed in 1984 between the Acholi and Madi neighbors to stop the cycle of violence between the two groups, which spiked after the fall of Idi Amin Dada in 1979. This indicates that symbolic acts of reconciliation and peace-building rooted deep in the past can still have relevance in the present, even if the weapons of war have changed. Many respondents agreed that the bending of spears could be done in conjunction with *mato oput* to mark the end of the present conflict and to help in achieving reconciliation within the Acholi, neighboring ethnic groups and perhaps the government, with both sides vowing not to lift a weapon against the other. For further reading on the traditional rituals of Acholi, see *Traditional Ways of Coping in Acholi and Roco Wat I Acoli*.

¹¹⁸ See "The Haunting of Alice."

principles and as elaborated by the Committee on the Rights of the Child in General Comment 10, as discussed in the next section.¹¹⁹

JUVENILE JUSTICE AND *MATO OPUT*

General Comment 10 provides guidance to States parties in establishing administration of juvenile justice in compliance with the CRC.¹²⁰ The General Comment references other international standards, particularly the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”),¹²¹ the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”). The aim is for states to develop comprehensive juvenile justice policy.¹²² The following discussion is based on General Comment 10.

Use of Alternative Justice Measures

A key goal of juvenile justice is to establish alternative measures, such as diversion and restorative justice, rather than deprivation of liberty for children in conflict with the law. These measures are meant to serve the best interests of both the child and the society at

¹¹⁹ The Committee on the Rights of the Child, a body of independent experts, monitors implementation of the CRC by States parties. The Committee also monitors implementation of the Optional Protocols on the involvement of children in armed conflict and the sale of children, child prostitution and child pornography. The Committee publishes its interpretation of elements of the CRC in the form of General Comments on thematic issues, among other activities. For more information on the Committee, see www.ohchr.org.

¹²⁰ CRC/C/GC/10, 25 April 2007; see para. 3.

¹²¹ These Rules were the first international legal instrument to comprehensively detail norms for the administration of juvenile justice with a child rights approach, and many of their principles were incorporated into the CRC.

¹²² Para. 4 of General Comment 10.

large.¹²³ Nonjudicial proceedings should reflect not just the protection guarantees in articles 37 and 40 of the CRC but also the general principles enshrined in article 6 (the right to life, survival and development); article 3 (the best interests of the child); article 2 (non-discrimination); and article 12 (the right to express their views). Also relevant are articles 4 (appropriate legislative and administrative measures) and 39 (measures to promote physical and psychological recovery and social reintegration).¹²⁴

Accountability measures should be used only when there is compelling evidence that a child committed the alleged offense. The child must freely and voluntarily admit responsibility, and the admission may not be used against the child in any subsequent legal proceeding.

The Agreement on Accountability and Reconciliation clearly provides that a person shall not be compelled to undergo any traditional ritual.¹²⁵ The *mato oput* process commences only on the basis of information obtained from the alleged offender. The information and confession should be given voluntarily without any force or intimidation. Negotiations and mediation take place under the watchful eye of elders and with the participation of many clan members, helping to eliminate any doubts about fair justice.

However, several studies have shown that many returnees conceal their identity for fear of being identified by family members of the victim(s) and fear of stigma. Therefore, few former LRA youth have participated in a communal cleansing ceremony.¹²⁶ It is unlikely that many perpetrators will voluntarily admit responsibility for crimes unless given assurances and protection against retribution by the Government and the community.

¹²³ Para. 3 of General Comment 10.

¹²⁴ Para. 4 of General Comment 10.

¹²⁵ See Principal Agreement clause 3. 1 and Annexure, para. 22.

¹²⁶ See, for example, "The Haunting of Alice."

Informed Consent and Assistance

The child should freely and voluntarily give informed written consent to take part in an alternative system, and for children aged sixteen and below, parents must also give consent. In addition, the child must be given the opportunity to seek legal or other appropriate assistance. In northern Uganda traditional leaders and elders pass down community values and traditions from generation to generation. Children who have gone through traditional justice processes indicated that their parents, family members and elders informed them about the process and offered assistance before they agreed to take part:

When we returned home, we were asked to take part in the *nyonno tongwenno* ceremony, which our father told is to welcome us home. A few days later my father and some elders came and asked us to take part in the *moyo kom* ceremony. They explained to us that this would cleanse us of the *cen* we may have contracted while with the LRA. We agreed and the ceremony was performed.¹²⁷

However, not every returning child is surrounded by family and clan. In the past, elders would support these children, but such help may not be forthcoming given current prejudices and economic insecurities. It is therefore necessary for the Government to establish a mechanism to inform children of the nature, content and duration of the *mato oput* process and its possible consequences. Children without relatives also need support in deciding whether to take part.

¹²⁷ Interview with two brothers, ages fifteen and seventeen, who returned from LRA captivity in 2001, conducted in Lacor IDP camp in Amuru District.

Protection from Discrimination

States parties to the CRC should take all necessary measures to ensure that children in conflict with the law are treated equally and not subjected to discrimination, for example, in school or in the labor market. Measures are needed to prevent discrimination and to help former child offenders reintegrate into society. Public information campaigns should be conducted that emphasize children's right to assume a constructive role in society.¹²⁸

According to the ideal, the purpose of the *mato oput* ritual is not to judge but to reinforce the dignity and worth of the individual. It teaches the capacity for rehabilitation to the whole community, not just to the offender.¹²⁹ However, traditional systems have broken down during the conflict, raising concerns about the neutrality and capacity of elders to adapt local approaches to crimes committed during the conflict.¹³⁰ In addition, many studies¹³¹ report that women and girls are not involved in the processes of decision-making, arbitration or negotiations in *mato oput*. This suggests a degree of discrimination in implementation. Cultural revival is needed; women and youth need to be encouraged to play a more active role in issues of justice and accountability.

Finality to the Case

Diversion should result in final closure of the case. Confidential records can be kept for administrative and review purposes for a limited time, but they should not be viewed as criminal records. A child who has undergone a traditional process should not be seen as

¹²⁸ See article 40(1) of the CRC.

¹²⁹ See *Traditional Ways of Coping in Acholi*.

¹³⁰ For further reading, see Erin Baines, Eric Stover and Marieke Wierda, "War Affected Youth and Children in Northern Uganda: Towards a Brighter Future. An Assessment Report," John D. and Catherine T. MacArthur Foundation, 2006.

¹³¹ *Ibid.* and "The Haunting of Alice."

having a previous conviction. The Agreement on Accountability and Reconciliation partly addresses this concern as it adheres to the legal principle of double jeopardy.¹³² Judicial proceedings, traditional justice and other alternative justice mechanisms are all considered alternatives for addressing crimes committed during the conflict. Only one can be applied to a particular event.¹³³ That said, however, it is not clear whether a child who has undergone the traditional process will be seen as having a clean record. Given the stigma surrounding the children associated with the LRA, the community may still view them as offenders, even after the process is completed.

Furthermore, research suggests that taking part in the traditional rituals does not always lead to acceptance. Many returnees report ongoing stigma, even after undergoing such rituals, and live in fear of reprisal from the offended family. The Government needs to invest in communication programs to promote the reintegration of such youth into society and to promote their right to survival and development, as guaranteed under the CRC.

Right to Life, Survival and Development

Juvenile justice policies should respect and support children's development. The death penalty and life imprisonment without parole are explicitly prohibited by the CRC, and Ugandan law does not allow the death penalty for children.¹³⁴ It is widely agreed that deprivation of liberty is bad for a child's development and seriously hampers reintegration into society; therefore, it should be used only as a measure of last resort and for the shortest appropriate period of time. Acholi tradition abhors the death penalty – it does not impose

¹³² Meaning a person cannot be tried a second time for an offense for which he/she has been previously acquitted. See Clause 3.10 of the Principal Agreement.

¹³³ See Para. 23 of the Annexure.

¹³⁴ See article 37(a) of the CRC, Uganda's Children Act and the 1995 Constitution.

the death penalty on any offender who undergoes *mato oput* – nor does it include deprivation of liberty.¹³⁵

Best Interests of the Child

In all decisions taken in the context of juvenile justice, the best interests of the child should be the primary consideration. In the case of *mato oput*, careful consideration will be needed throughout the process and its outcome to ensure that children's best interests are at the forefront and inform decision-making. The *mato oput* mechanism deals collectively with questions of accountability through compensation and restoration and helps prevent juvenile crime. The negotiation process and the final ritual are open to the community, with the process itself acting as a deterrent. The final agreement recommends reconciliation, and with the sanction of the entire community and clan, it is accepted without question and implemented to the satisfaction of both the victim's and the offender's communities.

The Committee on the Rights of the Child acknowledges that traditional justice measures may redress stigma and promote a child's reintegration into the community. The majority of the children interviewed who were formerly associated with the LRA indicated having undergone traditional rituals, yet they felt the need for more elaborate ceremonies to live comfortably in their communities.¹³⁶ Bob, a seventeen-year-old boy in the Lacor IDP camp put it this way:

If an elaborate traditional ceremony is done satisfactorily for me, then perhaps the people's feelings and attitudes towards me will change. I need a ritual like *mayo kom* to be performed for me to live

¹³⁵ The Acholi myth of Labong and Gipir explains the division of the lwo-speaking people in Uganda because of revenge undertaken by two brothers, who made a vow not to speak to each other, which led to the creation of different groups.

¹³⁶ Some of the children indicated they had gone through the more elaborate rituals, but many more could not because of the cost of the items required for the ceremony.

comfortably in the community. But I don't have money to buy a goat and chicken for the ceremony and my mother does not have the money, so I continue to suffer.¹³⁷

Many other children in northern Uganda echoed this child's sentiment. The evidence demonstrates that participation in traditional rituals may work in the best interests of children returning from conflict and captivity, but there is an urgent need for the Government, donors and aid agencies to support such rituals for children who wish to take part but cannot afford to participate because of financial constraints.

Questions inevitably arise about community perceptions of ceremonies supported by the government and aid agencies. One reason identified for stigma and hatred of returnees is the package they receive from the Amnesty Commission. People resent such resettlement packages because they feel that the perpetrators are being rewarded while they (the people) bear the brunt of the conflict. Therefore, the Government needs to invest in widespread sensitization programs to help the community understand the need for government and donor involvement in the process to help support children and families who cannot afford to participate on their own.

Right to Privacy

The Committee recommends keeping all juvenile justice proceedings confidential and undertaking them in the presence of only family members. The *mato oput* process takes place outside the home and is open to any onlookers, which could be seen as conflicting with a child's right to privacy. Though respondents did not raise concerns about this, the government, with help from the elders, should encourage the use of a child-friendly process that safeguards children's rights. The importance of confidentiality requires further consideration.

¹³⁷ Interviewed on 28 February 2008.

Participation of Children

The children involved in the juvenile justice system have the right to be heard and to express their views in all decisions that affect them. The Agreement on Accountability and Reconciliation includes procedures to protect and ensure the participation of victims, including women and children, in all accountability and reconciliation processes.¹³⁸

Participation should strengthen a child and enhance his/her protection, and protection measures should enable participation. Because *mato oput* is community-based and engages children together with their families and peers, it provides opportunities to enable both the participation and protection rights of children. Most of the children interviewed expressed their desire to participate in the *mato oput* and other traditional processes but said external influences and lack of resources prevented it. This undermines their potential to serve as catalysts for reconciliation and peace-building in their own communities.

A number of factors may affect the eligibility of children to participate in traditional rituals performed at the family or clan level. In particular, children without known relatives, children born in captivity, children whose parents may still be in the bush or dead and returning children who have not been accepted by their families face obstacles in securing eligibility.

One such child is Rose (not her real name), who, with her sister, was abducted in 2001 when she was eleven. On the long journey to the Sudan, a rebel commander forced her to kill her sister, who was too tired to go on. Since returning from the bush in 2005, Rose has tried several times to make contact with her family, asking to have *mato oput* performed so she can reconcile. But they blame her for the sister's death and want no contact. Rose is a tortured child who keeps to herself, has no friends and does not go to school.

Another example involves five adolescent mothers aged sixteen to eighteen who participated in a focus-group discussion. They indicated that they were abducted at different times and escaped

¹³⁸ Para. 24 of the Annexure.

LRA captivity at different times. They were all given as “wives” to LRA commanders and returned from the bush with children. None have been accepted by their families. Two are married but suffering from rejection by their in-laws. They had a message for the elders and their families:

It was not our wish to be abducted; it was not our wish to commit crimes and have children; we were forced to do so. Our families need to understand that, and it is our prayer that the elders can plead on our behalf to our families to take us back home and treat us like their children again.

A possible solution for such children could be a mass cleansing ritual for anyone, including children, who desires to attend. However, such mass ceremonies have been criticized by many in northern Uganda as ineffective because the crimes committed require different rituals and because the victims are different for each case. A robust effort to educate society and promote reconciliation is therefore crucially needed and should be supported by the Government.

Faith-based non-governmental organizations (NGOs) operating reception centers that assist many returnees can further limit children’s right to participation. Returning children who found their way to such a center in Gulu said they were told the cultural rituals are satanic and ungodly and that they should not participate in them.¹³⁹ The children were advised to pray and to forgive and forget what happened in the bush.

Recent returnees are extremely vulnerable and susceptible to external influences. They need to be given time to make decisions appropriate for their circumstances. Many Acholi people strongly identify with Christian teachings yet are also still rooted in traditional practices and beliefs.¹⁴⁰ Pitting Christian teachings against

¹³⁹ See *Roco Wat I Acoli*.

¹⁴⁰ See *Traditional Ways of Coping in Acholi*.

traditional beliefs results in confusion and conflict.¹⁴¹ Conversely, traditional practices are not relevant to all Acholi people, perhaps especially young people who have grown up during the war with few possibilities to experience such practices.¹⁴² These limitations underscore the importance of supporting children by giving them time to reflect and make decisions based on their beliefs and situation.

Acholi traditional justice mechanisms can be tailored to local beliefs and conditions and adapted for children who want to take part. They remain meaningful to the people of northern Uganda. The government and international actors should seize upon the strengths of the traditional system during the transitional justice process. This approach may also hold lessons for other states recovering from conflict.

THE LIMITS OF *MATO OPUT*

Nature of Offenses

Many people interviewed expressed doubts that *mato oput* can adequately address accountability for all the crimes committed in northern Uganda. One reason cited is that the process was never meant to address systematic crimes of rape and other sexual offenses, abductions, forced use of children in hostilities, mutilation, pillage, looting, destruction of property or massacres.¹⁴³ Some of the offenses committed during the war with the LRA, such as abductions and the use of child soldiers, are not defined as offenses in Acholi society, and yet there is no question that these offenses must be dealt with. *Mato oput* and other traditional

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Crimes described in international law as war crimes and crimes against humanity; see articles 6 and 7 of the Rome Statute of the International Criminal Court.

mechanisms cannot stand on their own; they must be supported by judicial intervention.

Nor are sexual offenses such as rape and sexual slavery defined in Acholi society. Field interviews underscore that traditional leaders have paid no particular attention to such offenses, and it is not clear how traditional justice would address them. LRA commanders and other fighters kept many abducted women and girls in captivity and used them for sexual purposes and domestic labor. These relationships were enslavement, not marriage. In addition, no *luc* (compensation to the mother's family for a child born in wedlock) was paid for the children born of these rapes. These are some of the difficulties that traditional leaders and other stakeholders need to carefully consider in seeking a solution. Consultations with the community, including victims and witnesses, would be required to define the atrocities involved and to develop acceptable rituals and compensation for them.

Magnitude of Offenses

Many respondents also doubted that *mato oput* could adequately deal with the scale of killings that have taken place in northern Uganda. One respondent said:

There has never been any killing to this magnitude in the history of the Acholi, so how do we go about drinking the *oput*? There are so many deaths that cannot be accounted for, so many children missing. Nobody knows where they are, nobody is admitting responsibility. By 2006, Kony claimed to have 832 children in captivity, while in Soroti they claimed that 2,000 of their children are missing. How do we account for this, how do we go about drinking *oput*?¹⁴⁴

This raises complex questions with no clear answers. Another critical point is compensation. Traditionally, it was both a means of

¹⁴⁴ Ochora Walter, Resident District Commander, Gulu, interviewed on 10 February 2008.

punishment and a symbolic replacement of the life that was lost. It is not clear if the clans of those responsible for the LRA killings would pay such compensation. Even more complex is the question of the children who have not been accepted by their clans or families. Who would pay compensation, negotiate or drink the bitter root on their behalf?¹⁴⁵

Requirement of Confessions

The fact that the war is ongoing also creates a problem for *mato oput*. A core component of the LRA remains in the bush. It is not clear if and when they will come out and whether they will be ready to confess their guilt. Many respondents also pointed out that some of the killings have been committed by the UPDF and common thieves posing as the LRA. For *mato oput* to succeed, these perpetrators would also be required to face their guilt.¹⁴⁶

Identity of Victims

Reconciliation between the clans of the perpetrator and the victim is central to *mato oput*, but this requires the perpetrator to identify the victim. The LRA have moved across several districts in Uganda, Southern Sudan and the eastern DRC, abducting children and committing atrocities.¹⁴⁷ They often do not know the people they attack. Some of the atrocities are committed against travelers on the roads, whose origin may be unknown to the perpetrators.

¹⁴⁵ See James Ojera Latigo, "Northern Uganda: Traditional Based Practices in Acholi Region," in International Institute for Democracy and Electoral Assistance (IDEA), *Traditional Justice and Reconciliation after a Violent Conflict: Learning from African Experiences* (Stockholm: IDEA, 2008).

¹⁴⁶ Ochora Walter, RDC Gulu interviewed on 10 February 2008.

¹⁴⁷ Districts in Uganda include, Gulu, Kitgum, Pader, Lira, Apac, Soroti, Moyo, Nebbe and Adjumani. More recent reports indicate that the LRA has extended its activities to the CAR and the DRC.

The conflict is so big, it has involved so many deaths, and it is hard to identify and relate who is responsible for each death. It is impossible to come up with a correct list of victims. Without the victim's identity, the perpetrator is unable to confess his/her crimes and to ask for forgiveness from the victim's clan or to pay compensation to the clan. Confession, compensation and reconciliation are central to the success of *mato oput*, but how can they be achieved in the LRA crimes?¹⁴⁸

Suitability of Elders for the Role

Another reservation expressed by respondents is whether Acholi elders and chiefs can lead an independent and neutral justice system. Many have suffered trauma or live in extreme poverty or have turned to alcohol, losing the respect of younger generations. Many respondents fear that economic gain would be the elders' main motive for taking part in the ceremonies.¹⁴⁹

In addition, there are debates in northern Uganda as to whether some traditional leaders are part of the Acholi heritage. Cultural leaders were not officially recognized in Uganda until the 1995 Constitution reinstated their place in society. Many regained their position of respect, but this has not been the case in northern Uganda, where communities have been embroiled in conflict since the reinstatement. In addition, many were reinstated based on political connections rather than heritage or community recognition.¹⁵⁰ Resources would be needed to train them to take on this role in the justice system and to regain their status in Acholi society.

¹⁴⁸ Interview with Opoka Vinango, LC III Chairman, Paicho subcounty, conducted on 24 February 2008.

¹⁴⁹ See "The Haunting of Alice."

¹⁵⁰ Ibid.

CONCLUSIONS

There are no easy answers for bringing about justice, peace and reconciliation in northern Uganda's broken society. Traditional rituals such as *mato oput* are one strategy. The process has been helpful in restoring the psychological well-being of many children and in reconciling communities. It is important to respect the trust it has earned among some people in the region. The Government of Uganda and national and international actors should seize on its strengths as one transitional justice process.

But it is also important to avoid viewing traditional mechanisms as the definitive answer to justice and reconciliation. Times have changed, and the cultural identity of the Acholi people today is shaped not only by tradition but also by religious faith and judicial processes. The complex and dynamic blend of identities and beliefs must be respected when developing interventions to support justice and reconciliation. Excessive reliance on traditional approaches as a cure for this war-torn society could lead to devastating results. But describing such practices as useless or antireligious only compounds the problems. It is important to acknowledge the potential of traditional rituals and religious approaches and to recognize that they can complement formal judicial systems.

Legally, Uganda already allows for the possibility of diverse approaches. The Amnesty Law promotes forgiveness to end the conflict and facilitate reintegration of former combatants. The Special Division of Uganda's High Court is an important mechanism for trying those most responsible for the crimes committed during the conflict. Traditional justice is another opportunity to promote reconciliation. The Government, NGOs and other developmental partners should use all these opportunities to their fullest potential, systematically evaluating the effects of various justice and reconciliation mechanisms. The involvement of children as participants in these processes is crucial for their success. However, children's roles will need to be carefully considered and well-supported by family, community and government actors in order to ensure respect for children's privacy and to safeguard their rights.

CHAPTER 8

DISAPPEARED CHILDREN, GENETIC TRACING AND JUSTICE

Michele Harvey-Blankenship and Rachel Shigekane¹



Liz Barnert/El Salvador

Family reunion of a child who was disappeared during the armed conflict in El Salvador.

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INTRODUCTION

During the latter part of the twentieth century, several authoritarian regimes in Latin America “disappeared” subversives or suspected subversives.² Children, in particular, were disappeared during the “Dirty War” in Argentina (1976-1983) and in El Salvador during its armed conflict (1980-1992).³ The regimes in Chile, Guatemala, Peru and Uruguay also carried out disappearances. In the years since, genetic tracing has become an important tool to identify persons who were disappeared, bring perpetrators to account, and seek justice for the families of victims. Civil society groups have played a key role in advocating for the use of genetic tracing to document these crimes. Genetic tracing is a tool for identifying the remains and recovering the personal histories of those who were disappeared.

It is critical to provide survivors with the truth about what happened to their loved ones, to ensure accountability and to provide some form of reparation. These are fundamental elements in transitional justice, paving the way toward more democratic and

² In the case of forced disappearance, the word disappear is used transitively, or actively. Persons are said to “have been disappeared” when force is used, often by authorities or State officials, to abduct, detain, frequently torture and then kill the victims, without leaving evidence or any trace of the murder. In international human rights law, disappearance at the hands of the State has been codified as enforced or forced disappearance. It has been defined in a number of international treaties: The Inter-American Convention on Forced Disappearance of Persons, adopted at Belem do Para (Brazil) on 6 September 1994 and entered into force 28 March 1996 (Article II); the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002 (Article 7); and the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 20 December 2006 (Article 2), which is yet to come into force. As of February 2010, it has been ratified by eighteen countries. For further elaboration, see “International and National Law Regarding Enforced Disappearances” in this chapter.

³ While the armed conflict in El Salvador is commonly referred to as a civil war, the active and influential role played by the United States in providing military assistance and thereby increasing the duration, scope and level of violence has led some to argue that it amounted to international armed conflict. Regarding US involvement in the Salvadoran war, see “From Madness to Hope: The 12-Year War in El Salvador,” Report of the UN Commission on the Truth for El Salvador 1993, at 22, 109, 129, footnote 34 [hereinafter “From Madness to Hope”].

peaceful societies. Finding the truth and acknowledging crimes helps to restore the dignity of the victims,⁴ which can lead to reconciliation.

Among the thirty thousand people who were disappeared in Argentina were an estimated five hundred pregnant women and young children. The military kept the pregnant women captive and subjected them to torture until the birth of their babies. The infants were then taken from their mothers and given away through adoption agencies, which proceeded without documentation and often placed the infants in the homes of military or police officers. The mothers were never seen again. Young children were also abducted along with their parents. Some were immediately placed with neighbors or relatives, while others disappeared, only to later reappear in orphanages or schools under falsified birth certificates, in homes of women known not to have been pregnant, or in military or police households living among the very individuals responsible for the murders of their parents.

In El Salvador, the military raided villages suspected of being rebel support bases. Families were separated; the parents were often killed and the children taken to orphanages. Some of these children were adopted by military or police households, and others were put up for international adoption. It is believed that hundreds of infants and children may have been disappeared by the military.

A number of explanations have been given as to why the Argentine and Salvadoran governments systematically disappeared children. In some cases, such acts – described as removing children from subversive influences and giving them an opportunity to be raised as model citizens and servants of the State – were presented as “patriotic”. For the troops, abducting children may have been less

⁴ “When a victim is forgotten or excluded from the rightful acknowledgment of his/her dignity, a double offense is committed against him/her. The first one, is the act that harms, tortures, violates or kills the victim. The second one, is to imply that nothing happened. That the crime committed against him/her is not a crime. That life goes on with no worries even though the whole of humanity has been harmed through the harm committed against the dignity of one single person.” (translated from Spanish). José M. Tojeira, “Necesidad de Símbolos,” *Diario Co-Latino*, 17 November 2009, available at www.diariocolatino.com/es/20091117/opiniones/73824/.

demoralizing than being ordered to slay them. In other instances, abducted children were given to members of the military and police as rewards for exemplary public service; children were bartered as “war booty.”

Enforced disappearances result in devastating harm. Children who are disappeared lose their history and their cultural and familial identities. This violates article 8 of the Convention on the Rights of the Child (CRC), which establishes the child’s right to an identity. Identification of the disappeared, family reunification, support for the disappeared and redress for their families have been identified as crucial to achieving justice in the wake of mass atrocities perpetrated during war.⁵

However, identifying the disappeared, particularly those who disappeared as children, remains extremely challenging for a number of reasons. Politically, tracing and identification typically require the cooperation of various state institutions, including the military and police, who may refuse to cooperate, especially in states where government forces continue to operate with impunity. Also, the judiciary may remain weak or lack independence from the executive branch, while at the same time the prevailing political climate may preclude civil society from advocating effectively.

Practically, tracing such children is more difficult when the child was disappeared at a very young age and significant time has elapsed. Children abducted as infants or toddlers may not be able to recount family histories, and, as children grow, they become unrecognizable to their families. Family reunification also poses complications when the disappeared child remains a minor and custody must be established.

In response to some of these issues, human rights investigators in Argentina and El Salvador turned to genetic tracing to identify disappeared children who are alive. While genetic tracing is the most accurate way of determining kinship, reliance on this technology has its own complexities. Establishing a system of

⁵ See Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004).

genetic tracing requires an active and engaged civil society to seek out and coordinate the expertise of specialists in genetics, forensic criminology and mathematics, who understand applying this technology to solve human rights abuses. Genetic tracing requires the cooperation of living blood relatives. In addition, the laboratory work of DNA analysis⁶ is expensive and thus requires substantial political and financial support. Given these issues, genetic tracing frequently complements, but does not necessarily supplant, traditional investigative methods, including witness reports and public records searches.

This chapter presents case studies from Argentina and El Salvador on the use of DNA testing to identify disappeared children. The case studies illustrate the potential role of genetic evidence in the pursuit of justice for enforced disappearances and related human rights violations.

INTERNATIONAL AND NATIONAL LAW REGARDING ENFORCED DISAPPEARANCES

Enforced disappearances are prohibited under international human rights and criminal laws. The Inter-American Convention on the Forced Disappearance of Persons defines enforced disappearance as “the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.” Under article X, the Convention provides that neither a state of war nor “the threat of war, internal political instability or any other public emergency” can

⁶ DNA analysis is defined as any technique used to analyze genes and DNA, including PCR (polymerase chain reaction), STR (short tandem repeat) analysis and DNA sequencing, among others.

be invoked to justify the forced disappearance of persons.

Committing such disappearances carries individual responsibility as a crime against humanity under international criminal law. Specifically, under article 7(i) of the Rome Statute of the International Criminal Court, enforced disappearances are considered crimes against humanity when conducted in a systematic manner or on a widespread basis. The Statute defines enforced disappearance as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

The prohibition against enforced disappearances has recently been affirmed by the international community in a treaty on the subject. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (yet to enter into force) defines enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

The CRC⁷ establishes under article 8 every child’s right to an identity. During the drafting of the CRC, this article was proposed by the Argentine delegation on the grounds that it was necessary to secure the speedy intervention of the State when a child’s right to preserve his or her identity had been violated.⁸ The proposal came

⁷ Adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September 1990.

⁸ Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child, fully revised edition* (New York: UNICEF, 2002), at 123. For more details on the Argentine presentation, see Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires,”* (1992), at 292-293.

about as a result of the disappearance of children that Argentina was experiencing at that time. The article in the Convention reads as follows:

1. State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

According to CRC article 8(1), identity is formed by three main elements: name, family relations and nationality. When a child is forcibly disappeared and then placed for adoption, concealing his or her origins, the right to identity has been violated, which results in serious harm. Armando, a boy who was disappeared as a child in El Salvador, said, “When I found my family, my life changed 180 degrees; it was the incentive I needed to try to give meaning to my existence.... I had a history, a reason for being.”

Article 8(2) of the CRC obligates State parties to reestablish the identity of the child who has been deprived of some or all aspects of identity. In this context, genetic tracing and other mechanisms to determine the child’s identity can play a fundamental role in realizing this international obligation.

In addition to existing obligations to prevent, investigate and punish violations on the prohibition of enforced disappearances, when dealing with grave violations of human rights, the right to an effective remedy must also be considered. This right is particularly relevant to the process of healing and reconciliation of the victims and/or their families. Remedies for victims of gross violations of human rights include the following:

- Equal and effective access to justice
- Adequate, effective and prompt reparation for harm suffered

- Access to relevant information concerning violations and reparations mechanisms.⁹

In responding to violations of the American Convention on Human Rights, the Inter-American Court of Human Rights is empowered to deliver remedies for such violations.¹⁰ The Inter-American Court has held that “it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately.”¹¹ As a component of this right to an effective remedy, the Inter-American Court has defined reparations as “a generic term that covers the various ways a state may make amends for the international responsibility it has incurred.”¹²

In the case of *Serrano-Cruz Sisters v. El Salvador* (discussed later in this chapter), the Inter-American Court held that reparation of the damage caused by the violation required full restitution, meaning the reestablishment of the previous situation. However, in the case of enforced disappearances, such an approach is not possible, and therefore “the International Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations

⁹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly, A/RES/60/147, 21 March 2006, para. 11.

¹⁰ See American Convention on Human Rights article 63(1): “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” On the interpretation of this article, see also *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 (Reparations and Costs), para. 43.

¹¹ *Serrano-Cruz Sisters v. El Salvador*, Judgment of 1 March 2005 (Merits, Reparations and Costs), para. 133. See also *Garrido and Baigorria v. Argentina*, Judgment of 27 August 1997 (Reparations and Costs), para. 40, and *Lori Berenson-Mejia v. Peru*, Judgment of 25 November 2004 (Merits, Reparations and Costs), para. 230.

¹² *Garrido and Baigorria v. Argentina*, para. 41.

are remedied and compensation paid for the damage caused. It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated.¹³

At the national level, Argentina has taken the lead in passing legislation to regulate the situation of the disappeared and their families. In 1994, Law No. 24.321 was approved, defining enforced disappearance¹⁴ and regulating the process for obtaining a judicial declaration of disappearance.¹⁵ Later that year, the approval of Law No. 24.411¹⁶ established the right to pecuniary reparation for families of the disappeared.

El Salvador is yet to pass a national law concerning the practice of enforced disappearances. Nonetheless, the Salvadoran human rights group Pro-Búsqueda has presented to Parliament a draft law titled “Search for Children Who Disappeared during the Internal Armed Conflict.”¹⁷ The objective of the proposed legislation is to promote respect for the right to the truth, to justice and for reparations of the victims of enforced disappearance (article 1). It defines three types of disappearance:¹⁸

- a) Enforced or involuntary disappearance of children during the armed conflict, defined in terms similar to those of the Inter-American Convention on the Forced Disappearances of Persons.

¹³ *Serrano-Cruz Sisters v. El Salvador*, para. 135.

¹⁴ Law No. 24,321, approved 11 May 1994 and sanctioned 8 June 1994. For a definition of enforced disappearance, see article 2.

¹⁵ *Ibid.*, articles 3-6.

¹⁶ Law No. 24.411, approved 7 December 1994 and sanctioned 28 December 1994.

¹⁷ The draft law is available (in Spanish) at www.probusqueda.org.sv/Docs/Anteproyecto_Ley_de_Busqueda.pdf.

¹⁸ *Ibid.*, article 4.

- b) Disappearances due to the failure of the State to fulfill its obligation to protect.
- c) Other forms of disappearances, such as those perpetrated by guerrillas, insurgent armed groups and other non-state actors.

In the draft law presented by Pro-Búsqueda, genetic tracing is mentioned as a means of determining the biological affiliation of a person who was disappeared as a child.¹⁹

ARGENTINA: THE DISAPPEARANCE OF CHILDREN DURING THE “DIRTY WAR”

Between 1976 and 1983, up to an estimated thirty thousand²⁰ Argentines disappeared during the rule of the military junta as part of a systematic purge of perceived political subversives. The military’s intentions in this campaign were clear: “First we will kill the subversives; then we will kill their collaborators; then... their sympathizers; then...those who remain indifferent; and finally we will kill the timid.”

– General Ibérico Saint Jean, Governor of Buenos Aires, May 1976²¹

¹⁹ Ibid., at article 22.

²⁰ The official report of the National Commission on the Disappearance of Persons (CONADEP) reported a conservative estimate of nine thousand persons disappeared. Other accounts by Rita Arditti (1999) and Marguerite Guzman (1994) estimate thirty thousand and forty-five thousand disappeared, respectively. The most-often quoted estimate is thirty thousand, but this has not been supported by forensic evidence. It is more likely that the number of disappeared is closer to the number reported in the CONADEP report.

²¹ As quoted in John Simpson and Jana Bennett, *The Disappeared: Story of Argentina’s Secret War of Oppression* (London: Sphere, 1986), at 66.

Men, women and children from all walks of life were systematically abducted, imprisoned in hundreds of detention centers, tortured and murdered. Estimates suggest that hundreds of pregnant women and young children were among those who disappeared.²²

Very early on, as disappearances increased and fear permeated the country, a small group of grandmothers banded together. In April 1977, at the peak of the disappearances, they marched publicly, wearing white head scarves embroidered with the names of their missing relatives, to the Plaza de Mayo in Buenos Aires, the center of federal government offices. There they asked for an audience with President Jorge Rapheal Videla.²³ They were refused. From that day, the grandmothers – Las Abuelas de la Plaza de Mayo – have been a public presence. They march in the plaza every Thursday, along with other relatives of the disappeared, demanding to know the whereabouts of their disappeared grandchildren. They still march today.

Las Abuelas organized themselves and began a tireless search to document their missing. As investigations began, it became clear that transparency would be impossible without the involvement of the international community, due to the secretive political climate created by the military dictatorship and the many false documents and testimonies.²⁴ Despite the pervasive fear in the country, people approached the grandmothers with snippets of information. During their weekly marches, notes were slipped into their hands. By telephone, in meeting places or on the street, people told them of children appearing in the houses of women who had never been pregnant, or who were unable to bear children. Schoolworkers

²² *Nunca Más*, report of CONADEP, 1984, Part 1, Repression, Section Detention Centres. General Considerations.

²³ Arditti Rita, *Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina* (Berkeley, California: University of California Press, 1999).

²⁴ See, for example, Viviana Alonso, "Rights – Argentina: Abduction Trials Revive Prospects for Justice," InterPress Service, 1998; Marcela Valente, "Rights – Argentina: Six Officers Arrested in Adoption Scandal," InterPress Service, 2000.

notified them of falsified birth certificates of newly registered children. Neighbors told them of conversations overheard regarding the sudden appearance of a child.²⁵ All of the information was documented and investigated.

Estella Carlotto, a member of Las Abuelas, described one such investigation. A child had suddenly appeared in the home of a woman known to have had a hysterectomy. Ms. Carlotto, disguised as a vacuum cleaner saleswoman, approached the house and offered to demonstrate the apparatus. Although her offer was declined, she was able to get a glimpse of a child through the doorway and to estimate the child's age and stature.²⁶ These types of clever techniques were the hallmark of Las Abuelas.

Detailed records, each dedicated to a particular grandchild, were kept in binders that lined their office walls. Traditional investigative techniques such as matching estimated birth dates, locations and testimonies successfully proved identity in many of their early cases,²⁷ but Las Abuelas realized that more scientific proof would be required.²⁸ Many children, especially those abducted at a young age, had no recollection of the event, and birth certificates were notoriously falsified.

Actions Taken to Trace Disappearances: *Nunca Más*

The disappearances continued until 1983. Then, with a worsening economy, growing attention to human rights abuses, and a failed attempt to gain control of the Falkland Islands from the United Kingdom, the Argentine military junta lost national and international support. Democratic elections were held in 1983, and

²⁵ Ibid.

²⁶ Estella Carlotto, personal communication, September 1997.

²⁷ Traditional investigative techniques would rely more on subjective information such as personal experiences and memories gleaned from interviews.

²⁸ Many cases have involved claims by the "imposed" (adoptive) parents that the child is their biological child.

Raúl Alfonsín won the presidency, partly through his focus on human rights. Soon after his election, President Alfonsín appointed the Commission on the Disappearance of Persons (CONADEP) to investigate and document the human rights abuses of the military government. Its report, *Nunca Más* (“Never Again”), was based on testimony from thousands of witnesses and visits to hundreds of secret detention centers. The widely published report documented the military’s systematic approach to the abduction, kidnapping, captivity, torture and murder of many thousands of victims. The report specifically addressed the issue of children who had disappeared:

When a child is forcibly removed from its legitimate family to be put in another, according to some ideological precept of what’s “best for the child’s welfare,” then this constitutes a perfidious usurpation of duty. The repressors who took the disappeared children from their homes, or who seized mothers on the point of giving birth, were making decisions about people’s lives in the same cold-blooded way that booty is distributed in war. Deprived of their identity and taken away from their parents, the disappeared children constitute, and will continue to constitute, a deep blemish on our society. In their case, the blows were aimed at the defenceless, the vulnerable and the innocent, and a new type of torment was conceived.

– *Nunca Más*

With CONADEP’s findings, the Alfonsín government began charging and prosecuting top military officials for their crimes. Although the trials were high-profile and set the stage for declaring the military responsible for the disappearances, expectations fell short. President Alfonsín was pressured into passing two partial impunity laws, *Ley de Punto Final* (the Full Stop Law) and *Ley de Obediencia Debida* (the Law of Due Obedience).²⁹ In 1986, the Full

²⁹ “Full Stop Law” (*Ley de Punto Final*), Law No. 23,492, 1986, available at www.nuncamas.com.

Stop Impunity law (Law 23,492) set a sixty-day deadline for initiating new prosecutions. Then, because it was not enough to stop prosecutions (although they became less far-reaching), the 1987 Due Obedience Law (Law 23,521) was passed. It stated that subordinate officers were the least criminally culpable when following orders issued by superiors. However, neither law exempted kidnapping and concealing children, or the substitution or misrepresentation of a child's identity. Unfortunately, application of these exemptions was hampered by the early termination of Alfonsín's presidency in 1989. It was not until 2005, when the Supreme Court of Argentina repealed the two amnesty laws, that a more concerted effort could be made to charge former military officers under criminal law.

Despite the adverse political and judicial context throughout the regime of the junta and afterward, Las Abuelas de la Plaza de Mayo worked continuously to document and search for their missing grandchildren. Initially, identification of the children relied on more traditional techniques such as photos of children prior to their captivity, original birth certificates and personal testimonies from neighbors and friends of the disappeared. These techniques worked well for children not born in detention centers. But the secretive nature of the centers precluded photographs, legitimate birth records and personal accounts, which underscored the need for more objective techniques.

The Use of DNA to Determine Identity³⁰

In June 1984, Las Abuelas de la Plaza de Mayo took documentation of the disappearance of seventy-seven of their grandchildren to the international community. They requested assistance from the American Association for the Advancement of

[org/document/nacional/ley23492.htm](http://www.nuncamas.org/document/nacional/ley23492.htm); Law of Due Obedience (*Ley de Obediencia Debida*). Law No. 23,521, 1987, available at www.nuncamas.org/document/nacional/ley23521.htm.

³⁰ This section summarizes the basic techniques used in forensic identification. For more detailed information, please refer to: US Department of Energy, Office of Science, 'Human Genome Project Information – DNA Forensics', available at http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml.

Science to establish scientific, objective procedures for forensic investigations. One such technique is genetic identification. A fundamental premise in establishing genetic identity is that significant genetic differences exist between unrelated individuals, and insignificant differences exist between related individuals. A genetic match indicates that two individuals are related biologically. The accuracy of genetic testing is unprecedented; virtually all cases have a greater than 99.9 percent certainty of biological match. This means that otherwise subjective evidence can be enhanced using genetic techniques, leading to more conclusive identification.

In 1984, the most reliable method for establishing genetic relationships was human leukocyte antigen (HLA) typing, the kind used for testing compatibility for organ transplantation. However this method has significant limitations, including limited population variability and the requirement for live cells and multiple close family members.

Two genetic methods are used today for genetic identification: mitochondrial DNA (mtDNA) sequencing and short tandem repeats (STRs). Two characteristics make mtDNA particularly useful in Argentina: its maternal inheritance (that is, men and women inherit mtDNA, but only women transmit it), and the fact that it rarely changes from generation to generation. Therefore, distant maternal relatives can be used for identification (for example, a maternal uncle or great-aunt).³¹ As a result of this inheritance pattern, even very distant maternal relatives may share the same sequence. However, if multiple relatives of the same maternal lineage are missing, it will not be possible to differentiate them by mitochondrial sequence alone.

STRs, areas of the human genome that have repetitive sequences that are three to five nucleotides long, are located throughout the human nuclear genome. These are highly variable between unrelated individuals but much less variable between related individuals. Nuclear DNA is inherited from both parents, resulting

³¹ See, for example, K. N. Owens et al., "Genomic Sequencing in the Service of Human Rights," *International Journal of Epidemiology*, 31(1) 2002:53-58; C. Ginther, "Identifying Individuals by Sequencing Mitochondrial DNA from Teeth," *Nature Genetics*, 2(2):135-138.

in an almost unique combination. STR analysis, which works by comparing multiple STRs, is useful when there are living, direct biological relatives of the missing person. Currently, STR analysis is the primary genetic technique used for DNA databases internationally.

The Case of Paula Logares

In May 1978, Paula Logares, then twenty-three months-old, was abducted in Uruguay where she had been taken by her parents, who had fled from Argentina for safety. It is assumed her parents were murdered; their bodies were never recovered. After five years of searching for Paula with the help of Las Abuelas, her grandmother, Elsa Pavon, found her living with Ruben Lavallen, a police officer, and his wife. Paula had been registered in kindergarten using a false birth certificate.

Establishing Paula's identity was challenging. Court-ordered X-rays determined that she had the bones of a six-year-old – the age claimed by the Lavallens – while Pavon claimed Paula was seven years old. The Lavallens refused to take a blood test for DNA testing, but ultimately the court required them to be tested. HLA typing, the only genetic identification technique available at the time, established that the child registered as Paula Lavallen was in fact Paula Logares.

Once biological identity was determined, Pavon had to fight a legal battle. A lower court refused to grant her custody of Paula, who was left in the care of the Lavellens. Pavon appealed the federal lower court's decision, and eventually the federal court determined that Paula should be returned to her biological family.

Prior to Paula's meeting with her grandmother, the judge told Paula what happened during the war, explaining how her grandmother had searched for her and how her biological identity had been established. The initial meeting between Paula and her grandmother was difficult. Gradually, she was able to accept her identity, assisted by photographs from her early childhood showing her biological parents, and by the return journey to her grandmother's home, where she immediately went to the bedroom

where she had slept as a baby and looked for her toys.

The federal court custody decision galvanized other court cases on disappeared children, particularly cases regarding biological identity and legal custody. The case of Paula Logares set the legal precedent for genetic testing to identify a child who had been disappeared. The court noted the value of objective, highly accurate identifying information in the face of falsified documents, conflicting interests of various parties and the morphological changes of children over time. Additionally, the genetic testing established the basis of both exclusion – Paula *was not* the biological offspring of the Lavallens – and inclusion – Paula *was* biologically related to Elsa Pavon, the grandmother who had searched for more than seven years to find her.

The judges' decision that Paula should learn the truth about her origins resulted from consultation with psychologists, who felt that her transition would be less difficult if she were to learn about her origins early and warned of a later psychological crisis should Paula find out as a young adult. Her case set a precedent for revealing and restoring the biological identity of a disappeared child without delay.

National Genetic Database

With the legal precedent established for the use of DNA in establishing biological identity, Las Abuelas lobbied nationally and internationally, eventually pressuring the Government to support the development of a national genetic database that would allow all relatives of missing children to submit a blood sample for genetic testing and that could also be used for comparison when disappeared children are found. Established in 1989, Argentina's database continues to be instrumental in the investigation of disappeared children, as well as in other investigations regarding affiliation,³² such as testing for paternity, rape and incest. The precision and objectivity the database provides to cases of disappeared children was an unprecedented breakthrough.

³² In most cases of disappeared children, the "imposed" (adoptive) parents claimed a biological relationship to the child.

Las Abuelas have been extremely successful in informing the public about the availability and accuracy of the genetic database. They have undertaken several extensive advocacy campaigns leading to notable increases in the submission of blood samples. Las Abuelas demanded that all children who suspected they may have been abducted should be able to search for their biological identity at any time during their lives, which underscores the need to maintain the database for decades. Personal testimonies fade and disappear with death, documents can be falsified, personal effects can be lost – but genetic evidence can be retained in perpetuity.

The Argentine genetic database set an important precedent and enabled the expansion of genetic tracing as an important tool in accounting for the disappeared and providing a remedy for victims. So far, about one hundred Argentinian grandchildren have been identified using the database established by Las Abuelas.³³ The program is expanding to Guatemala and Peru, two countries that also experienced many disappearances.

With the passage of time since the “Dirty War,” the children of the disappeared have become adults.³⁴ They are now initiating their own investigations, approaching Las Abuelas with questions about their origins, and they can submit blood samples to the genetic database as part of the investigation of their identities. Although in some cases family members have died before finding their disappeared children, it is a consolation that their genetic information may help young adults determine their biological identity. National and international funding for the database has been budgeted until the year 2050, covering both the generation of parents and grandparents who are searching for missing family members and the children (now reaching adulthood) who may want to determine whether they were disappeared.

³³ Abuelas de Plaza de Mayo, available at www.abuelas.org.ar. The number of grandchildren identified continues to increase as new cases are solved.

³⁴ The children of the disappeared have formed an organization, HIJOS (*Hijos por la Identidad y la Justicia contra el Olvido y el Silencio*, in English, Sons and Daughters for Identity and Justice Against Forgetting and Silence). Part of their mandate is to encourage and support children who suspect or who have been identified as being children of disappeared parents.

Progress and Challenges

In May 2003, Nestor Kirchner became President of Argentina. Demonstrating his commitment to fully prosecute human rights abuses committed during the war, his government ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.³⁵ This set the stage for the Supreme Court's repeal of the two impunity laws in 2005. A number of prominent military officials and civilians have since been tried for their involvement in violating the human rights of children during the Dirty War. The trials related to children have focused primarily on two areas: the kidnapping and concealment of children, and the misrepresentation of a child's identity. The news headlines are striking: "Former Argentine policeman handed 25-year prison sentence for human rights abuses";³⁶ "Argentine ex-leader faces kidnapping trial";³⁷ and "Dirty War adoption couple jailed."³⁸ Significant figures who have been arrested include General Jorge Rafael Videla, Admiral Emilio Massera and General Reynaldo Bignone, three of the military's top-ranking officials. Their arrests prompted further arrests and the prosecution of subordinates previously protected under the amnesty laws. It is noteworthy that all of these trials have relied heavily on DNA-based identification of children who had been disappeared.

³⁵ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the UN General Assembly 26 November 1968. Argentina ratified the Convention on 26 August 2003.

³⁶ "Policeman Gets 25 Years for Human Rights Abuses during Dictatorship," *Americas News*, 4 August 2006, available at www.monstersandcritics.com/news/americas/news/article_1187181.php/Policeman_gets_25_years_for_human_rights_abuses_during_dictatorship#ixzz0bteRqqHE.

³⁷ *Los Angeles Times*, 24 April 2007, available at <http://articles.latimes.com/2007/apr/24/world/fg-argentina24>.

³⁸ BBC World News Friday, 4 April 2008, available at <http://news.bbc.co.uk/2/hi/americas/7331857.stm>.

One recent case highlights the role of DNA in resolving cases of identity many years later. In December 1977, Leonardo Ruben Sampallo and his wife Mirta Mabel Barragán (who was six months pregnant), both union delegates and Communist party members, were arrested and taken to a clandestine torture and detention center. They have not been seen since and are presumed to have been murdered. Las Abuelas had evidence that Mirta had given birth to a girl, named Maria Eugenia. At age seven, the girl was told that she had been adopted and that her biological parents had been killed in a car accident. She initiated her own search, eventually going to Las Abuelas as an adult. Twenty-four years after Maria Eugenia Sampallo's birth, Las Abuelas de Plaza de Mayo used genetic testing to confirm that she was not the daughter of the adults who had raised her – Osvaldo Rivas, a member of the military, and María Cristina Gómez Pinto – but the child of Ruben Sampallo and Mirta Barragán.³⁹ She has since formed strong ties with her extended biological family.

Armed with the genetic evidence, Ms. Sampallo brought to trial the couple who raised her, along with Army Captain Enrique Berthier, who had provided her to them. In April 2008, Army Captain Enrique Berthier was sentenced to ten years in prison for kidnapping Ms. Sampallo. Osvaldo Rivas received an eight-year sentence for the “illegal retention and hiding of a minor under the age of 10” and for forging public documents to conceal the girl's true identity. María Cristina Gómez Pinto received a seven-year sentence for illegal retention.

These trials highlight the role genetic evidence can play even decades after a disappearance by providing victims with undeniable proof of biological identity and objective physical evidence against the perpetrators.⁴⁰ Not only is genetic evidence objective, it also

³⁹ M. Elkin, “Maria Barragán Succeeds in Getting Adoptive Parents Jailed,” *The Times Online*, 2008.

⁴⁰ Recent trials of many members of the junta have been complicated by the kidnappings and murders of key witnesses. Julio Lopez was disappeared after testifying against the former Buenos Aires Police Chief Miguel Etchecolatz. Juan Puthod was kidnapped prior to testifying in several high profile trials; he was released after the swift involvement of the

provides documentation of the occurrence of a specific event, such as a disappearance, murder or rape. Additionally, it gives the individual a proven legal identity and a sense of justice.

EL SALVADOR: FROM MADNESS TO HOPE⁴¹

The Salvadoran military engaged in systematic disappearances during the country's armed conflict from 1980 through 1992. At least 2,598 people were disappeared, including children living in areas believed to be rebel strongholds.⁴² The abductions resulted from efforts to quell a growing leftist rebellion.

On 24 March 1980, government agents assassinated the Archbishop of San Salvador, Oscar Arnulfo Romero, a champion of the poor, while he was saying mass. Days before, he had publicly denounced the ongoing state violence and abuse of human rights. Beloved by many, particularly the *campesinos*, for his compassion and outspoken nature, the Archbishop's public slaying proved to be a lightning rod for organized armed resistance. His assassination helped coalesce leftist forces under the National Liberation Front (FMLN), which mounted an armed attack against the military and the civilian president, José Napoleón Duarte.

By 1984, the insurgents exercised control over the northern third of the departments of Morazán, La Unión, Chalatenango and Cabañas, as well as along the southeastern coast and around the Guazapa volcano near San Salvador.⁴³ The military's murder of six Jesuit priests, their housekeeper and her daughter on 16 November 1989 on the grounds of the University of Central America, brought

president and police.

⁴¹ This heading echoes the title of the 1993 report of the UN Commission on the Truth for El Salvador.

⁴² Amnesty International, "El Salvador: Where are the "disappeared" children?" July 2003, available at www.amnesty.org/en/library/info/AMR29/004/2003.

⁴³ *Ibid.*, at 11.

heavy international criticism against the government and hastened the peace process.

Under pressure from the United Nations and other persuasive international players, the government and the FMLN entered into peace talks, resulting in the United Nations-brokered Chapultepec Peace Agreement, signed on 16 January 1992. The agreement called for the establishment of the Commission on Truth to “investigate serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”⁴⁴

On 15 March 1993, the Commission published its report, *From Madness to Hope: The 12-year war in El Salvador*. Three days later, President Alfredo Cristiani signed into law the General Amnesty Law for the Consolidation of Peace, providing a blanket amnesty to all those who had engaged in political crimes between 1980 and 1992. The law remains in effect today, preventing the criminal investigation and prosecution of almost all civilian and military leaders for crimes that may have been committed during the armed conflict.

The Search for Disappeared Children

Guarjila, in the northeast sector of Chaletanango, witnessed heavy fighting during the conflict. Shortly after the signing of the peace agreement, Father Jon Cortina, a Jesuit priest in Guarjila, began to hear from parishioners who had suffered abuses at the hands of the military during the war. Father Cortina was particularly struck by hearing from mothers and other family members about government soldiers snatching their children, sometimes from their very arms. Others recounted seeing their abducted children boarded onto military helicopters and flown away.

⁴⁴ The Chapultepec Peace Accords, article 2, signed 16 January 1992 at Castillo de Chapultepec, Mexico.

In August 1994, Father Cortina, together with families of the disappeared, founded Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos (Organization for the Search of the Disappeared Children). Its mission is to locate children who were forcibly disappeared as a result of the armed conflict, and to seek both accountability for perpetrators and justice for families of the missing.⁴⁵ To help find the disappeared, Father Cortina contacted human rights activist Eric Stover, who had been instrumental in bringing forensic scientists to Argentina to identify disappeared children. In response, Stover and a team of forensic scientists went to El Salvador to meet with Father Cortina and families of the disappeared.⁴⁶

Through this collaboration, DNA testing was used for the first time in El Salvador in 1995, reuniting Juan Carlos (originally known as Nelson) with his biological mother thirteen years after his disappearance at the age of six months. According to his mother, Maria Magdalena Ramos, the boy had been wrested away by government troops during a counterinsurgency sweep in May 1982 in San Antonio Los Ranchos, in the department of Chalatenango. The boy had been brought to an orphanage in San Salvador where he was being raised. Upon being reunited with his mother, Nelson expressed an interest in remaining at the orphanage to pursue his studies.⁴⁷

Through an active outreach and education campaign, including public talks, community meetings, radio programs, coordination with local and international organizations and a later developed website, by July 2007 Pro-Búsqueda had received 790 requests for

⁴⁵ Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos [hereinafter Pro-Búsqueda], available at www.probusqueda.org.sv.

⁴⁶ With the help of the UN Observer Mission in El Salvador, Father Cortina communicated with Eric Stover, then the head of Physicians for Human Rights, requesting forensic assistance in finding the disappeared children. He invited Stover, together with a forensic team, to El Salvador to meet with him and families of the disappeared.

⁴⁷ Barbara Crossette, "DNA Test Reunites Salvadoran Mother and Child," *New York Times*, 21 January 1995.

assistance. Of those, 331 cases have been resolved, resulting in 182 family reunions. A total of 459 cases remain under investigation.⁴⁸

Pro-Búsqueda receives requests both from families seeking their disappeared children and from adoptees seeking information on their biological families. Children who had been abducted by the military or otherwise separated from their families under duress have been found not only in Salvadoran orphanages but also in Salvadoran military households, as well as in Honduras, Guatemala, the United States, France, Italy, Spain, the United Kingdom, Belgium and the Netherlands.

Pro-Búsqueda estimates that government troops and their allied security forces were responsible for the disappearances of children in 52 percent of their documented cases while the FMLN was responsible for 8 percent.⁴⁹ The group further estimates that over 65 percent of the children who disappeared were under the age of seven.⁵⁰ Their young ages underscore the need for genetic tracing since they may remember very little about their families.

Genetic Tracing as a Tool to Find Disappeared Children

Due to the evolution of DNA analysis, blood samples are no longer needed to trace the disappeared; DNA is now easily retrieved from a swab taken from the inner lining of the cheek. The swab samples are sent to the Alliance of Forensic Scientists for Human Rights and Humanitarian Investigations (the Alliance), a volunteer group of forensic scientists and mathematicians with ties to the Jan Bashinski DNA Laboratory of the California Department of Justice, United States of America. The Alliance analyzes the samples to develop genetic profiles, which can then be compared with those of family members to determine kinship.

⁴⁸ Pro-Búsqueda Website, "Where Are They?," available at www.probusqueda.org.sv.

⁴⁹ In 40 percent of the cases, there was not sufficient evidence for Pro-Búsqueda to determine the party responsible for the disappearance.

⁵⁰ Pro-Búsqueda, "Forced Disappearances of Children," available at www.probusqueda.org.sv.

DNA samples are taken, stored, transferred and analyzed in compliance with strict forensic standards so that they can withstand judicial scrutiny and be used as evidence in future war crimes trials. Pro-Búsqueda is careful to obtain informed consent from each DNA donor, and each donor's information is collected and stored in a secure location. Pro-Búsqueda and the Alliance use a "chain of custody" form that accompanies each sample and records where it has been kept. Strict quality control mechanisms are in place to ensure accurate DNA analysis. When kinship is positively determined, a re-confirmation sample is taken from the adoptee and analyzed independently.

Following the Argentine example, the Alliance in 1993 proposed creating a DNA family reference database for Pro-Búsqueda that would contain genetic profiles of all the Salvadorean family members who are searching for their disappeared children. The database allows storage of genetic information from family members and permits simultaneous comparison of multiple families against a single adoptee's genetic profile, resulting in what is known as a "cold hit" – a kinship determination that is not expected and could not have been discovered but for the database. The main difference between the two countries' genetic databases is that the Salvadoran database is currently administered by Pro-Búsqueda, a non-governmental organization, whereas the Argentine database is administered by the State.

El Salvador's database, available since 2006, now contains over nine hundred family genetic profiles. With the support of a grant from the US Department of State in 2007, Pro-Búsqueda has hired a geneticist to operate it. The Alliance is working closely with the geneticist to build the organization's forensic capacity so that substantially more of the analysis can take place in the country.

One of the first cases using the family reference databank resulted in a cold hit, further underscoring the importance of using DNA analysis to trace disappeared children. A young man who had grown up in a Salvadoran military household had recently learned that he had been adopted. Without the knowledge of his family, he approached Pro-Búsqueda to learn of his biological origins. Curiously, his genetic profile matched the profiles of family

members who had been searching for two girls but no boys. Upon further discussions with the family, Pro-Búsqueda learned that indeed a boy, along with the two girls, had been lost when the military attacked their village, but it had been assumed the male infant had been killed along with his mother, who was holding him at the time of the attack. The young man turned out to be the family's disappeared child. Family members had had no hope of recovering him and had not even mentioned his existence to Pro-Búsqueda. Eventually, a discrete family reunion was held.⁵¹

While DNA analysis may be the most accurate tool for identifying the disappeared, Pro-Búsqueda uses a broad range of investigative tools, including adoption, birth and court records, photographs, family histories and witness testimonies. Sometimes weak genetic kinship determination⁵² can be supplemented with other investigative methods to confirm the genetic results. The Alliance writes a report detailing the findings and kinship determination to Pro-Búsqueda, which in turn communicates this information to the adoptee and the family of the disappeared. Pro-Búsqueda's psychosocial team then speaks with the adoptee, the biological family and the adopted family to discuss the possibility of a family meeting.

The Fight to End Impunity: Pro-Búsqueda and the Serrano Cruz Sisters

For nearly two decades, Pro-Búsqueda has tried to engage all three branches of the national government in searching for the disappeared children, with almost no success. However, the historic

⁵¹ The young man insisted on a very private and discrete family reunion because he did not want his adopted family to discover that he had found his biological family. Pro-Búsqueda suspects that the young man believed that his father, a former military officer, may have been complicit in his disappearance, and did not wish to cause him harm.

⁵² For example, kinship based on DNA results may be weak (i.e., the probability of kinship is low and does not meet the standard threshold) in cases where only a minimum number of remote references are available. In these cases, other evidence may be used to bolster a kinship determination.

presidential election of Mauricio Funes of the FMLN party in March 2009 has generated hope that the new government may begin to play a more active role in the search for these children, and to more broadly seek accountability for crimes committed during the armed conflict.⁵³

Initially, Pro-Búsqueda and the families of the disappeared sought the help of the national courts. Despite the political risks, they persevered and achieved some groundbreaking results. One well-known effort was the case of the Serrano Cruz sisters. The case dates back to 2 June 1982, when a military operation known as the *guinda de mayo* (May stampede) took place. The family of Maria Victoria Cruz Franco was forced to flee from its home. After walking for three days and then hiding in the brush, her daughters Ernestina and Erlinda Serrano Cruz, aged seven and three, were discovered by a military patrol of the Atlacatl Battalion and flown away in a Salvadoran Armed Forces helicopter. Their older sister who was hiding nearby confirmed that after returning to the place where she had left the girls, they were no longer there.⁵⁴

In 1993, their mother filed a criminal complaint in the Chalatenango Trial Court against the Atlacatl Battalion.⁵⁵ Two years later, in 1995, Ms. Franco asked the Constitutional Chamber of the Supreme Court of Justice to grant a writ of habeas corpus (asking the Court to “produce the body”) in favor of them. Both court actions went nowhere.

The following year, in 1996, Pro-Búsqueda filed a complaint before the Ombudsman’s Office concerning the disappearance of

⁵³ National elections held in March 2009 brought sweeping political changes to El Salvador. The ARENA party lost the presidency for the first time since the peace agreements were signed in 1992, and Mauricio Funes of the FMLN party was elected president.

⁵⁴ See *Serrano-Cruz Sisters v. El Salvador*, Inter-American Court of Human Rights, 1 March 2005.

⁵⁵ The Atlacatl Battalion, created in 1980, was an elite unit of the Salvadoran army trained as a rapid-response and counter-insurgency unit at the US Army’s School of the Americas. The Battalion was responsible for carrying out some of the worst atrocities of the armed conflict, including the massacre at El Mozote in December 1981 and the assassination of six Jesuit priests, their housekeeper and her daughter in November 1989. See “From Madness to Hope.”

145 children during the armed conflict, including the two girls. Franco and Pro-Búsqueda then turned to the National Assembly for redress. In 1999, Pro-Búsqueda submitted draft legislation to create a national commission to trace children who were disappeared as a result of the armed conflict. The proposal failed to garner support.

Later that same year, Pro-Búsqueda filed a petition before the Inter-American Commission for Human Rights on behalf of Ernestina and Erlinda Serrano Cruz. Eventually, the case of the *Serrano-Cruz Sisters v. El Salvador* made its way to the Inter-American Court of Human Rights, becoming the first case ever heard by the court against the Government of El Salvador for alleged human rights violations. Under the doctrine of continuing violation,⁵⁶ the Court ruled in favor of the Serrano Cruz sisters, finding that the State had violated articles 8(1) and 25 of the American Convention on Human Rights, which secure the rights to judicial protection and a fair trial (due process of law). In particular, Article 8 (1) establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

⁵⁶ The doctrine of continuing violation can be employed “in the case of a continuing or permanent violation, which begins before the acceptance of the Court’s jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects.” *Moiwana Village v. Surname*, Inter-American Court of Human Rights (ser. C) No. 124 at 10 (15 June 2005). The doctrine of continuing violation has been used by the Inter-American Court or Inter-American Commission to exert authority over any failure to investigate a past violation on the grounds that an ongoing failure violates the victims’ convention-protected right to judicial protection. See Pablo A. Ormachea, “Moiwana Village: The Inter-American Court and The ‘Continuing Violation’ Doctrine,” *Harvard Human Rights Journal*, 19 Spring 2006: 283-288.

Article 25 establishes that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The State Parties undertake:
 - a) to ensure that any persons claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b) to develop the possibilities of judicial remedy; and
 - c) to ensure that the competent authorities shall enforce such remedies when granted.

To redress these violations, the Court required the state to do the following:⁵⁷

- Conduct criminal investigations and identify and punish those responsible and conduct a genuine search for the disappeared
- Establish a national commission to trace the children who were disappeared during the armed conflict with the participation of civil society
- Create a website to aid in tracing of disappeared children;
- Create a genetic data system to assist in the tracing of disappeared children
- Engage in a public act to acknowledge responsibility and to make amends to Ernestina and Erlinda Serrano Cruz and their next of kin
- Publish this judgment in a newspaper with national circulation

⁵⁷ See *Serrano-Cruz Sisters v. El Salvador*.

- Designate a day dedicated to the children who disappeared during the armed conflict
- Provide medical and psychological care to the family of the disappeared sisters, and
- Pay monetary damages and costs and expenses.

However, because El Salvador did not accept jurisdiction of the Court until 6 June 1995, the Court declined to rule on the alleged underlying forced disappearance of the girls, which occurred in 1982.

For families of the disappeared and their advocates, the Serrano Cruz decision constituted a watershed. Previously, the State had refused to even acknowledge that children had been disappeared by the military. Although the case of the Serrano Cruz sisters remains unresolved, the judgment reaffirmed the importance of DNA analysis in tracing disappeared children and required the State to develop a system of genetic tracing similar to the one employed by Pro-Búsqueda.

With relative speed, the state declared 29 March as the Day of the Disappeared Child, which Pro-Búsqueda and families of the disappeared commemorate with public events including marches, demonstrations and educational programs. It also engaged in a public act of acknowledgement;⁵⁸ published the text of the judgment; provided medical treatment to the Serrano Cruz family;⁵⁹ and paid some damages and expenses. However, the State failed to comply with the judgment with respect to creating a national genetic database and a national commission to search for disappeared

⁵⁸ Pro-Búsqueda does not believe that this public act of acknowledgment fulfills the spirit of the Court's decision because it did not include an apology to the Serrano Cruz family, but the Court has found the State action in compliance with its decision. Interview with Zaira Navas, Pro-Búsqueda staff attorney, 15 January 2009.

⁵⁹ According to Pro-Búsqueda, the State provided medical assistance for two years to the Serrano Cruz family but did not provide any psychological support. Interview with Zaira Navas, Pro-Búsqueda staff attorney, 15 January 2009.

children, two areas of great importance for families of the disappeared.⁶⁰

In August 2009, the new administration announced that it intended to create a national Commission for the Disappeared to investigate cases of children forcibly disappeared during the armed conflict in accordance with the judgment in the Serrano Cruz case. In his announcement, the Minister of Foreign Affairs noted that the creation of such a commission would serve as payment of a historical debt to the Salvadoran people.⁶¹

The State has also made progress in conducting a criminal inquiry into the disappearances of Ernestina and Erlinda Serrano Cruz by questioning top military officers. In June 2008, General Rafael Flores Lima, former Chief of State of the Armed Forces, was compelled to appear before Judge Morena Lainez of the First Criminal Court of Chalatenango to testify about military operations in and around Chalatenango, where the sisters disappeared.⁶² In October 2008, Colonel Juan Rafael Bustillo, who had commanded the Salvadoran Air Force during the time of the armed conflict, was also compelled to appear.

The court appearances of both men raised the expectations of the public and brought the issue of governmental accountability into the political limelight. Many people were surprised that the courts had the power to summon military officers and expressed a

⁶⁰ Since the Executive failed to fully comply with the court judgment, Pro-Búsqueda sought redress in the National Assembly. In November 2008, legislation was introduced calling for the creation of a national tracing commission that meets the criteria articulated by the Court in the Serrano Cruz case, which would require all branches of the government to cooperate with the Commission, and that an invitation be extended to members of civil society to serve on the Commission. The proposed legislation also required that any kinship determinations made by the National Commission be confirmed by genetic testing and that the State must set aside public resources to establish and maintain a national genetic reference database.

⁶¹ Child Rights Information Network (CRIN), "El Salvador: Probe for Missing Children," 4 September 2009.

⁶² Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos Press Release, "Former Salvadoran Army Chief of State Testified in Court about the Serrano Cruz Case," undated), available at www.probusqueda.org.sv.

hope of learning the truth. Others felt that this was an exercise in futility and accused leftist elements of reopening old wounds and revisiting the past purely for political gain.⁶³

More military officers may be questioned. Judge Lainez has expressed interest in seeking the testimony of Colonel Mario A. Reyes Mena, who was in charge of the military brigade in Chaletanango during the armed conflict, and General Jose Guillermo Garcia, the former Minister of Defense.⁶⁴

The criminal inquiry and the government's announcement of the Commission for the Disappeared both appear to be direct results of political pressure applied to the State by the Inter-American Court. The judgement in the Serrano Cruz case may well represent a milestone in the use of genetic tracing to identify the disappeared and end impunity.

CONCLUSIONS

Genetic tracing has played a key role in identifying disappeared children and in efforts to seek judicial accountability for enforced disappearances of children in Argentina and El Salvador. The success in both countries is anchored in an engaged and active civil

⁶³ Interview with Zaira Navas, Pro-Búsqueda staff attorney, 15 January 2009.

⁶⁴ General Garcia currently resides in the United States. In 2000, Garcia and General Carlos Eugenio Vides Casanova, former director of the Salvadoran National Guard, were sued in US federal court under the Torture Victims Protection Act, for the rape, abduction and murder of three American nuns, Maura Clarke, Ita Ford and Dorothy Kazel, and Jean Donovan, a lay missionary, on 2 December 1980. The two generals were cleared by a jury. In 2002, both generals were sued again in US federal court (the case of *Romagoza Arce et. al. v. Garcia and Vides Casnova*) by Juan Romagoza, Neris Gonzalez and Carlos Mauricio, all of whom had been detained and tortured by the Salvadoran military. The jury found in favor of the plaintiffs and awarded them \$54.6 million. In January 2006, an appellate court upheld the verdict. On 23 February 2009, the US Department of Justice charged General Garcia with two counts of immigration fraud. If convicted, he could face up to ten years in prison for using a passport procured illegally and up to five years for making a materially false statement to a federal officer. He could also be deported. (Center for Justice and Accountability Press Release, "Salvadoran Minister of Defense Indicted on Immigration Fraud Charges," 23 February 2009).

society, in which families of the disappeared play an important decision-making role. Without the emergence of Las Abuelas de la Plaza de Mayo during the war in Argentina, and Pro-Búsqueda shortly after the signing of the peace agreement in El Salvador, little attention would have been paid to the disappearances of children.

Genetic tracing owes its success to the work of Las Abuelas and Pro-Búsqueda in publicly protesting the disappearances and conducting extensive outreach and education among the general public and in war-affected communities. This level of civic engagement laid the foundation for both organizations to politically pressure their respective national governments to search for disappeared children. In Argentina, Las Abuelas has succeeded in convincing the national government to maintain the DNA reference database. In El Salvador, the new central government has promised to create a national commission to search for the disappeared children, which would include procedural and organizational safeguards long sought by Pro-Búsqueda and the families of the disappeared.

In Argentina, disappeared children, now adults, are stepping forward to uncover their biological origins. Some are playing a role in the prosecution of their adoptive parents for their own disappearances. In El Salvador, a historic decision by the Inter-American Court for Human Rights requires the government to criminally investigate those who may be responsible for disappearing children, to establish a national commission to search for the disappeared and to create a DNA reference database, similar to the one used by Pro-Búsqueda, to identify those who were disappeared as children.

The work of Las Abuelas in Argentina and Pro-Búsqueda in El Salvador demonstrates that the future of solving some human rights violations, reuniting families and seeking justice requires the embrace of evolving scientific technologies such as DNA analysis. But technology is only useful where there is advocacy and pressure for its use. The successes of Las Abuelas and Pro-Búsqueda underscore the potential of community-based movements to achieve accountability and justice. The organized engagement of

civil society and victims must be supported and encouraged to remedy future human rights violations, including enforced disappearances.

CHAPTER 9

TRUTH COMMISSIONS AND NATIONAL CURRICULA: THE CASE OF *RECORDÁNDONOS* IN PERU

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A girl and a boy studying at a shared desk in a school in a small town of Peru.

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Unless otherwise indicated, all Spanish language texts and interviews in this chapter have been translated into English by the author.

INTRODUCTION

We must come to understand that the threat of the past repeating itself will continue to exist so long as we deny that the events of the violent past were not solely the product of the actions of subversive groups but rather the effect of profound inequalities, injustices, exclusion and mistreatment that predate the conflict and continually undermine the conditions which make possible a true democracy. From this need to understand comes the necessity to engage children and youth in reflection and moral inquiry about the past as an essential part of the educative process.²

This excerpt comes from the opening pages of *Recordándonos*, an educational resource based on Peru's Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación or CVR³), which was developed for use in schools around the country. The final report of the CVR, presented in 2003, recommended preparation of national curriculum materials about Peru's recent conflict. This chapter outlines the process through which these materials were developed and explores the political and practical challenges that have thus far prevented the incorporation of *Recordándonos* (in English, "reminding ourselves") into Peru's national curriculum.

The potential for linkages between the initiatives and goals of transitional justice and of educational reform in the post-conflict

² Former President, CVR, Introduction to each of the *Recordándonos* workbooks. (See, for example, *Conviviendo con Nuestras Diferencias: 1 y 2 de Secundaria*, 2nd ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2006).

³ The Spanish acronym CVR (Comisión de la Verdad y Reconciliación) will be used throughout this chapter to refer to the Peruvian Truth and Reconciliation Commission. The acronym TRC is also used throughout to refer to truth commission processes more generally.

context is increasingly recognized.⁴ Education, it is overwhelmingly acknowledged, can play a powerful role in peace-building. Unequal and discriminatory access to education, divisive educational content and violent or authoritarian pedagogy can contribute to conflict, whereas equality of educational opportunity, creative and democratic educational content and progressive pedagogy can contribute to social transformation. The educational sector is well placed to enhance the impact of transitional justice processes and to play an important role in remembering conflict and shaping peace-building processes in communities. Transitional justice initiatives are similarly well positioned to identify how educational processes and structures might have contributed to social division and violent conflict. Such initiatives increasingly seek to effect educational change. For instance, recommendations for educational sector reforms are increasingly seen in truth commission reports, as evidenced in Guatemala, Peru, Sierra Leone and Timor-Leste. These recommendations can offer important starting points for addressing the legacies of conflict within the educational sector, an important element of post-conflict educational reform.

Within this important but to date underdeveloped area, the greatest focus is on opportunities for transitional justice to transform curriculum initiatives and educational content. In addition to the specific recommendations calling for broader educational reform, many truth and reconciliation commissions (TRCs) are recommending curriculum revision and increased attention to peace and human rights education. The Peruvian case offers what is arguably one of the most comprehensive efforts to incorporate the results of a transitional justice initiative into the national curriculum. An exploration of the effort in Peru offers both practical lessons for improving similar initiatives elsewhere and additional conceptual insights into the challenges of teaching about conflict and the politics behind national curriculum reform.

⁴ Elizabeth A. Cole, "Transitional Justice and the Reform of History Education," *International Journal of Transitional Justice* 1(1) 2007; Julia Paulson, "(Re)Creating Education in Postconflict Contexts: Transitional Justice, Education and Human Development" (International Center for Transitional Justice, 2009), available at www.ictj.org/static/Publications/Devt_Education_Full.pdf.

This chapter begins by exploring the potential for linkages between transitional justice and education, particularly in the area of curriculum reform, before outlining the limited degree to which transitional justice initiatives have informed curricula around the world. It then explores the twenty-year conflict in Peru, particularly in terms of its linkages with education, and introduces the CVR process. The chapter then details the development of the *Recordándonos* curriculum resource and the various practical and political challenges it faced. Finally, the chapter considers the potential and the politics of truth commissions in national curricula.

The chapter is based on field research conducted in Peru between January and October 2008. It relies on interviews with key actors from the *Recordándonos* development team, the CVR and the Ministry of Education.

The Peruvian case demonstrates a deep political attachment to the national curriculum within and beyond the Ministry of Education. It highlights numerous political and practical challenges in teaching about the violent past – and particularly in teaching about the role of the State in human rights violations. Despite these challenges, the chapter argues that there is a strong rationale for including materials based on the findings of a TRC within national curricula. However, as the Peruvian case demonstrates, for such an initiative to reach students and teachers, it should be accompanied by a conscious, articulated policy on teaching and learning about the recent past, and on addressing the legacy of conflict in education.

TRUTH COMMISSIONS AND CURRICULUM: OPPORTUNITIES AND REALITIES

Transitional Justice and Post-Conflict Educational Reform

On the cover of the manuals that introduce Peruvian teachers to the curriculum resource *Recordándonos* is the phrase “A country that forgets its past is condemned to repeat it.” The manuals begin:

“The Final Report of the CVR is a fundamental tool that must be taken advantage of. The report presents the opportunity for teachers to instigate a profound debate around the real causes of violence in the country.” The authors explain that “through the elaboration of educational materials, we believe that schools can stimulate students – the children and adolescents of our country – to approach the violent past as part of their personal and social history. We hope that this material will contribute to strengthening a sense of collective identity and a culture of peace.”⁵

In these words resonate the goals articulated by those calling for both transitional justice and for educational reform in the post-conflict context. Indeed, remembering the conflicts and human rights violations of the past and teaching future generations about them are frequently put forward as important components of complex processes such as reconciliation and peace-building.⁶ A post-conflict educational reform committed to addressing the legacies of conflict within the educational sector, and to contributing to peace and democracy, shares many of the same goals as a transitional justice initiative that seeks to repair and clarify the past in order to prevent future violence. One of the most straightforward areas for thoughtful collaboration between education and transitional justice actors is around curriculum reform and the development of curricula about recent conflict and recovery from conflict.

Educational sector reform is increasingly recognized as a critical part of a humanitarian response to conflict and a necessary part of post-conflict transformation, while revising the national

⁵ *Manual del Docente Primaria: Un País que Olvida su Historia esta Condenado a Repetirla*, 2nd ed, Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2006, at 3-4.

⁶ Elizabeth A. Cole, ed., *Teaching the Violent Past: History Education and Reconciliation* (Lanham, MD: Rowman & Littlefield Publishers Ltd., 2007), [hereinafter, *Teaching the Violent Past*]; Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), [hereinafter *Between Vengeance and Forgiveness*]; Sobhi Tawil and Alexandra Harley, eds., *Education, Conflict and Social Cohesion* (Geneva: UNESCO International Bureau of Education, 2004), [hereinafter *Education, Conflict and Social Cohesion*].

curriculum is generally an integral part of the post-conflict educational reform agenda, despite the inherent challenges it presents.⁷ Transitional justice actors are increasingly concerned with ensuring that initiatives contribute to broader peace-building and development efforts, leaving longer-term and tangible legacies.⁸ Thus, for both education and transitional justice actors, there is considerable potential for a productive overlap between transitional justice and curriculum reform. This potential can suit the needs of teachers and children if it results in a balanced, pedagogically sound, dynamic curriculum resource that is understood and used by teachers and students to explore a nation's recent past.

Truth commissions, with their aims of revealing, clarifying and acknowledging the past, hold clear pedagogical potential. For Priscilla Hayner, "the most straightforward objective of a truth commission is sanctioned fact-finding: to establish an accurate record of a country's past, clarify uncertain events, and lift the lid of silence and denial for a contentious and painful period of history."⁹ Truth commissions draw, at least to a degree, on methods grounded in historical inquiry. As Elizabeth Cole and Judy Barsalou point out, they offer strong didactic material since "they present the voices of ordinary people with compelling stories to tell."¹⁰

Engaging children and teachers in learning about TRC processes and the past is perhaps one of the most active ways that the overarching goals of a truth commission – fostering reconciliation and preventing future human rights violations – can be made concrete. Curriculum resources may aid a truth

⁷ Peter Buckland, *Reshaping the Future: Education and Postconflict Reconstruction* (Washington D.C.: World Bank, 2005).

⁸ Pablo de Grieff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

⁹ Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002), at 24.

¹⁰ Elizabeth A. Cole and Judy Barsalou, "Unite or Divide? The Challenges of Teaching History in Societies Emerging from Conflict" (Washington, DC: USIP Special Report 163, 2006), at 12, [hereinafter "Unite or Divide?"].

commission's process and impact, especially given that TRCs are regularly criticized for lacking follow-through and "fading away" at the close of their mandates. As Laplante and Theidon argue, "measures which accompany or follow the truth commission process...are indispensable in contributing to reconciliation and to a more just and peaceful future."¹¹ Such measures, which might include the development of learning materials, are also important in determining the long-term impact and perceived success of a TRC.

It is logical to assume that a TRC's findings will have a wider impact if they are well known and accessible and seen to be facilitating real social change. Developing curriculum materials based on truth commission final reports can at once make the reports more widely available and ensure that the findings are disseminated among a significant portion of the population. Curriculum materials can also bring greater longevity to a final report by introducing it to successive generations. Used by teachers and students, the materials can also facilitate exploration of the meanings of the past at personal and collective levels.

Since the national curriculum and its narrative of nationhood, identity and history hold considerable symbolic, cultural and political weight, including TRC findings within it can be seen as an important sign of the report's legitimacy and the government's acceptance and acknowledgment of its findings. Teaching about the violent past, and particularly about the State's role in human rights violations, can indicate a significant break with this past. In Germany, for instance, teaching materials that condemn German actions during the Second World War "have frequently been cited as one of the central proponents of a reconciliatory stance towards wronged populations."¹² The development of a curriculum based on the findings of a TRC may similarly demonstrate a reconciliatory position by the State and may contribute symbolically to closing a period of violence or repression.

¹¹ Lisa J. Laplante and Kimberly Theidon, "Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru," *Human Rights Quarterly* 29(1) 2007:230.

¹² Julian Dierkes, "The Trajectory of Reconciliation through History Education in Postunification Germany," in Cole, *Teaching the Violent Past*, at 33.

From the perspective of those involved in post-conflict educational reform and curriculum development, the “truth” produced by a TRC might offer a useful route through very contested terrain. Developing a curriculum about recent conflict is, after all, an incredibly complex and provocative process. As demonstrated in numerous countries, historical narratives are tightly tied to group identities, and the narratives chosen to tell a nation’s history through its curriculum are inevitably political and often controversial.¹³ Therefore, efforts to change, modify, open, erase or add to such narratives are likely to be challenged and challenging, particularly following a period of conflict or mass atrocity. Indeed, the politics and power dynamics of transition are linked to these very narratives; this is demonstrated powerfully in the Peruvian case, where political and personal biases within the State worked to block materials that directly acknowledge human rights violations committed by the State.

While truth commissions do not necessarily resolve contention or create consensus, they accumulate considerable and diverse historical information over a relatively short time period and present a version of the past based on that information. Moreover, as officially sanctioned bodies, TRCs engage in producing an “official” version of the truth. That this “official” truth is constructed from the testimonies of those who lived through the past speaks to the educational potential of truth commissions. Within the fraught space where the historical narrative is revised, therefore, the versions of the past produced by a truth commission, particularly one with a high degree of public support, can be significant.

TRC processes are inevitably complex and imperfect. The fact that they distill a version of the past within a charged social and political landscape makes them a useful resource for revising and developing a curriculum, particularly for the timely development of educational material to address recent conflict. Indeed, where a

¹³ *Teaching the Violent Past*; Sarah Warshauer Freedman, Harvey M. Weinstein, Karen Murphy and Timothy Longman, “Teaching History After Identity-Based Conflicts: The Rwanda Experience,” *Comparative Education Review* 52(4) 2008: 665-690, [hereinafter “Teaching History after Identity-Based Conflicts”].

truth commission holds considerable legitimacy, collaboration with educational actors may validate both the need for curriculum revision and reform and the importance of addressing conflict and peace within it. The Peruvian case is perhaps the best example of an effort to realize the potential of a national curriculum based on the results of a truth commission, and it demonstrates the many practical and political challenges inherent in this process.

International Examples

Despite the strong rationale for including exploration of TRC processes and findings in national curricula, in only a few cases have such efforts been undertaken. As mentioned above, education and its reform have been the focus of recommendations in the final reports of many TRCs; recommendations for human rights and peace education are particularly common. However, these recommendations have generally not resulted in TRC-based curricula.¹⁴

For example, South Africa's 1998 TRC recommended including its work and findings in the country's new history curriculum.¹⁵ The TRC process itself did not have a strong focus on education, which was not the subject of an institutional hearing. Nonetheless, following the release of the TRC's final report, panels were formed in the Department of Education to address teaching about the past and to investigate values and citizenship education. Despite this effort, a specific TRC-based curriculum element was never developed.

In Sierra Leone, UNICEF, with children's participation, supported the development of a children's version of the TRC final report. However, the Ministry of Education, Sports and Technology was not involved either in developing the resource or in the work of the TRC. UNICEF distributed the children's version to schools in

¹⁴ The Final Reports of TRCs in Chile, South Africa, Guatemala, Sierra Leone, Timor-Leste and Peru all recommend human rights and/or peace education.

¹⁵ Truth and Reconciliation Commission of South Africa report, available at www.info.gov.za/otherdocs/2003/trc/.

2006, but because of a limited governmental response to TRC recommendations and the lack of a formal agreement between the Ministry and the TRC about the report, it has not been approved for use as a national curriculum resource.¹⁶

In Guatemala, non-governmental organizations (NGOs) developed teaching resources based on the country's truth commission report, but these materials have not yet been incorporated into the national curriculum.¹⁷ As in Sierra Leone, there were no formal links between the Ministry of Education and the educational initiatives, or between the Ministry and the TRC process. These NGO-led initiatives, therefore, remain ad hoc and do not reach all of Guatemala's schools or children.

In Timor-Leste, there is some momentum to incorporate reference to the report of the TRC (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste or CAVR) into the newly developed primary curriculum and the evolving curriculum for secondary schools. Though the process has been slow, productive relationships have developed between the Ministry of Education, donors and a post-CAVR secretariat. This presents opportunities for curriculum components based on the CAVR.¹⁸

In Liberia, TRC actors considered development of a TRC component within a broader process of national curriculum reform, but the truth and reconciliation process is not complete and so far no further action has been taken.¹⁹

As will be outlined in more detail below, the Peruvian case is

¹⁶ Julia Paulson, "The Educational Recommendations of Truth and Reconciliation Commissions: Potential and Practice in Sierra Leone," *Research in Comparative and International Education* 1(4) 2006.

¹⁷ Elizabeth Oglesby, "Educating Citizens in Postwar Guatemala: Historical Memory, Genocide and the Culture of Peace," *Radical History Review* (97): 77-98 2007, [hereinafter "Educating Citizens in Postwar Guatemala"].

¹⁸ E-mail communication from Ann Linnarsson, UNICEF Innocenti Research Centre, September 2009.

¹⁹ E-mail communication from Saudamini Siegrist, UNICEF Innocenti Research Centre, October 2009.

unique in two ways: there was an agreement between the CVR and the Ministry of Education to develop materials, and the Ministry of Education participated, albeit to a limited degree, in the CVR process.

CONFLICT, EDUCATION AND THE CVR IN PERU

Peru's twenty-year internal armed conflict was initiated in 1980 by the Communist Party of Peru-Shining Path (Sendero Luminoso) following more than a decade of military rule and an economic crisis. The conflict began in the mountainous interior of the country, which had long suffered from widespread poverty and the social exclusion of indigenous people. Both government forces and Shining Path members were responsible for widespread brutality, including killings, disappearances, torture and rape, all of which fell disproportionately on indigenous groups. All of the armed actors deliberately targeted civilians, and the conflict was bloodier than any other war in Peruvian history. It ultimately killed almost seventy thousand people and displaced hundreds of thousands.

Comisión de la Verdad y Reconciliación

In 2001 the transitional government of Interim President Valentin Paniagua established the CVR by a Supreme Decree, which was ratified later that year by the elected government of Alejandro Toledo. The CVR was made up of twelve commissioners and one observer, all Peruvian. The President of the CVR was then Rector of the Pontifical Catholic University of Peru (Pontificia Universidad Católica del Perú or PUCP). Other commissioners were academics, religious leaders and human rights experts, and also included a retired army lieutenant and a former congresswoman.²⁰ While many saw the diversity of the Commission as a strength, the makeup of the Commission was criticized as biased by groups on both the left and the right.

²⁰ Comisión de la Verdad y Reconciliación (CVR), Informe Final, available at: www.cverdad.org.pe/ifinal/index.php [hereinafter CVR]. Details about CVR Commissioners are available at: <http://www.cverdad.org.pe/lacomision/nlabor/comisionado.php>.

During its two-year working period, the Commission investigated human rights violations committed between 1980 and 2000. Its mandate was to “clarify processes, events and corresponding responsibility – not only of those who executed crimes but also of those who ordered or tolerated them – and to propose initiatives that affirm peace and reconciliation among all Peruvians.”²¹ The CVR opened five regional offices, collected testimony from nearly seventeen thousand people, conducted three exhumations and held several public hearings, including one on political violence and the educational community.²²

The CVR was created following the fall of the corrupt and increasingly authoritarian government of Alberto Fujimori in 2000, which opened the political opportunity to advocate for a truth commission. Its mandate for investigations spanned the governing periods of Presidents Fernando Belaunde (1980-1985), Alan García (1985-1990) and Alberto Fujimori (1990-2000). Therefore, the actions of each government were investigated, along with those of the Shining Path and Túpac Amaru Revolutionary Movement (Movimiento Revolucionario Túpac Amaru or MRTA) subversive groups.²³

The CVR produced a final report of nine volumes and eight thousand pages, which found that Shining Path was responsible for 54 percent of deaths and the armed forces for 34 percent.²⁴ It reported that 75 percent of the victims of the conflict spoke Quechua, 79 percent lived in rural areas and 85 percent came from a handful of Andean and jungle departments. Two thirds of the victims had not completed secondary school.

The report states that “veiled racism and scornful attitudes”²⁵

²¹ Decreto Supremo N. 065-2001-PCM ‘PCM – Crean Comisión de la Verdad,’ 2001, available at: <http://www.cverdad.org.pe/lacomision/cnormas/normas01.php>.

²² CVR, Volume 1.

²³ *Ibid.*, Volume 2.

²⁴ *Ibid.*

²⁵ CVR, ‘Executive Summary’ (English version), 2003, available at: <http://www.ictj.org/>

persist in Peruvian society. The CVR found that these attitudes and social divisions in the country created indifference in powerful social circles and in the “moderately educated urban sector” toward the violence that was occurring predominantly in rural areas and mainly directed at poor and indigenous communities.²⁶ The CVR final report heavily emphasized the embedded, structural causes of conflict in Peru, rooted in inequality, racism and indifference. The *Recordándonos* resource, based on the CVR, does the same, which has created specific political challenges for its entry into the national curriculum.

The CVR’s final report, presented in 2003, was accepted by the Government of President Alejandro Toledo, who committed his administration to addressing its recommendations. The fact that President Toledo and his party were political newcomers and not involved in the conflict eased their acceptance of the report, though the administration made limited progress in terms of CVR recommendations. In 2006, when Alan García was again elected president, the State’s perception of the report and its legitimacy changed. Mr. García had been president from 1985 to 1990, a period during which the State had committed a series of human rights violations, according to the CVR. Under the García administration, the political will to address CVR recommendations has diminished; some sectors of the government have made efforts to discredit the CVR.

Education and Conflict

The Shining Path movement, committed to a Maoist revolution that would violently overturn Peru’s government, emerged²⁷ on the campus of National University of San Cristóbal de Huamanga,

static/Americas/Peru/TRC.FinalReport.eng.pdf, at 9.

²⁶ Ibid.

²⁷ Abimael Guzmán broke off from the Bandera Roja Communist Party of Peru (PCP-BR) to form Sendero Luminoso (Shining Path).

where its leader, Abimael Guzmán Reynoso, taught.²⁸ The movement, initially considered a marginal group consisting primarily of radical faculty members and students, grew during the 1980s and 1990s.²⁹ Through its influence in the teacher's union and at certain universities, Shining Path sought to place sympathetic teachers in schools where it wished to recruit young people.³⁰ The CVR found that authoritarian pedagogy – grounded in rote learning and obedience, long the norm in Peru – lent itself well to Shining Path's dogmatism and facilitated young people's alliances with the movement. The CVR also found that the "incapacity of the State and the country's elites to respond to the educational demands of youth frustrated their efforts towards social mobility and aspirations for advancement" and that this frustration may have motivated young people to join Shining Path.³¹ What Bush and Saltarelli call "the negative face of education"³² – education's ability to perpetuate and entrench inequality and foster violent attitudes – was present in, and contributed to, Peru's conflict.

Education took on a powerful symbolic role in Peru's conflict, often expressed violently. During certain periods the State largely equated public schoolteachers at all levels with terrorists, presuming guilt where frequently there was none.³³ This led to the installation of military bases on campuses, the arbitrary detention and disappearance of students and staff from several university

²⁸ Kimberly Theidon, *Entre Prójimos: El Conflicto Armado Interno y la Política de la Reconciliación en el Perú* (Lima: IEP Ediciones, 2004).

²⁹ *Ibid.*, at 27.

³⁰ CVR, 'Executive Summary', at 22.

³¹ *Ibid.*, at 23.

³² Kenneth Bush and Diana Saltarelli, *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (Florence: UNICEF Innocenti Research Centre, 2000).

³³ Pablo Sandoval, *Educación, Ciudadanía y Violencia en el Perú: Una Lectura del Informe de la CVR* (Lima: TAREA and IEP, 2004).

campuses and a number of deaths.³⁴ Education, or in the words of the former president of the CVR “mis-education,” figures prominently in the CVR’s final report and is identified as one of the causes of conflict in Peru. The CVR assigns serious responsibility to the State for neglecting public education, stigmatizing entire communities of teachers and students and allowing grave human rights violations against them. The CVR’s findings about the role of education in the conflict provide a strong imperative for post-conflict educational reform in Peru.

The CVR and Educational Reform

The CVR is notable among truth commissions in having had a staff member – the coordinator of the sub-area of education – through most of the period. In April 2002, the CVR signed a contract with the Ministry of Education, which facilitated a working relationship and laid out areas of cooperation.³⁵ These included CVR advice to the Ministry on the curriculum review that was then in process and resulted in the 2006 National Curriculum Design (Diseño Curricular Nacional or DCN); in the production of educational materials, emphasizing citizenship education and the CVR; in the preparation of teacher-training materials and workshops to develop teachers’ skills in teaching about conflict and reconciliation; and in a national survey of secondary school students’ knowledge of themes in citizenship education.³⁶ Importantly, the CVR had to generate the financial resources for all these activities.

Initially, relations between the Ministry and the CVR were good. The coordinator of the sub-area of education, who had

³⁴ CVR, ‘Executive Summary’, at 136.

³⁵ “Convenio de Cooperación Institucional entre el Ministerio de Educación y la Comisión de la Verdad y Reconciliación”, SCO-571-05, 2002, available at Centro de la Memoria Colectiva y los Derechos Humanos, Lima (login required).

³⁶ “Convenio de Cooperación Institucional entre el Ministerio de Educación y la Comisión de la Verdad y Reconciliación.”

previously worked in the Ministry, said that when she went to the Ministry “the doors were wide open. People were very committed; they gave you all the support.”³⁷

However, in late 2002, a new Minister of Education was appointed. Many of the contracted activities were left incomplete, including the national survey and the development of educational materials. The new Minister did not share his predecessor’s enthusiasm for working with the CVR and apparently did not prioritize the contract or the maintenance of a working relationship. Nonetheless, the CVR held several workshops with teachers and trainee-teachers in the five regions with CVR offices and undertook a public hearing on education.³⁸ It also developed some materials for distribution to schools, including summary versions of its final report and booklets on values education. Although distributed with the collaboration of the Ministry of Education, these were considered additional resources, not Ministry-approved curriculum texts.

Near the conclusion of the CVR’s work, a consultant was hired to assist in developing recommendations for educational reform. The recommendations put forward for “reforming education to promote democratic values”³⁹ were included among the four “essential institutional reforms” recommended by the CVR. The educational recommendations’ focus on improving the quality of rural schools, prioritizing intercultural education, improving girls’ literacy, transforming authoritarian pedagogy and ending violence in schools, and encouraging learning for citizenship and democratic values. They are broadly seen by the Peruvian educational community as having captured the needs and realities facing Peru’s educational sector.⁴⁰ However, there is strong sentiment that the

³⁷ Interview with former coordinator of CVR Sub-Area of Education, 27 February 2008.

³⁸ CVR. Information on the public hearing is available at: <http://www.cverdad.org.pe/apublicas/audiencias/index.php>

³⁹ CVR, Volume 9.

⁴⁰ Interviews, January-October 2008.

recommendations should have included concrete implementation steps. This absence, along with the limited time frame of the CVR and the inaction of a body with formal responsibility for follow-up, is perceived to have limited the resonance and power of the recommendations.

The Origins of *Recordándonos*

The CVR recommendations call for educational reform to be grounded in human rights, and the contract between the Ministry of Education and the CVR included the development of CVR-based curriculum. As a former CVR commissioner pointed out, earlier TRC experiences in El Salvador and Guatemala suffered from a lack of follow-up after presentation of the final reports. Therefore, the CVR pushed to ensure that processes would carry on beyond the Commission's term, including mental-health initiatives with the Ministry of Health, development of national standards for exhumations and development of educational resources based on the CVR.⁴¹

Due at least partly to the change in ministers and the diminishing enthusiasm of the Ministry of Education, work on a formal curriculum resource did not begin during the mandate of the CVR, although Commission staff and members of the educational community discussed it. An agreement to begin work on the *Recordándonos* project was signed in late 2003 by the well-established human rights NGO Instituto de Defensa Legal (IDL), at which a former commissioner is based, and the Faculty of Education at PUCP, where the president of the CVR served as rector. The impetus for the contract came from these two organizations that were determined to carry forward the CVR's recommendation. While the Ministry of Education was informed of the contract, indicating its support and a pledge to review the completed materials, it was not a signatory to the contract for the initial design of the *Recordándonos* materials or for its financing.

⁴¹ Interview with former CVR commissioner, 28 February 2008.

The Spanish organization Fundación Santa Maria funded development of the first version of materials, which was completed in 2004. UNICEF and Save the Children then agreed to fund a pilot and the development of a second version based on feedback from the pilot and the Ministry. The Ministry remained supportive as the *Recordándonos* team sent progress updates. Several respondents interviewed felt that the Ministry's enthusiasm was due at least in part to international pressure to comply with CVR recommendations.⁴² One of the *Recordándonos* project coordinators expressed regret that the Ministry of Education had not been involved during the development of the first version, suggesting that this lack of engagement led to the Ministry later distancing itself from the project.⁴³

The *Recordándonos* materials were developed and presented to the Ministry of Education during the government of Alejandro Toledo's Perú Posible party (mid-2001 to mid-2006). Many respondents stressed that the Toledo government did not have any "human rights debt"⁴⁴ since it was a new political party, uninvolved in the decades of conflict. Although there were certainly political challenges to teaching about the recent conflict within and outside the Ministry of Education during the Toledo period, these have intensified since the government of Alan García came into office in 2006.

THE *RECORDÁNDONOS* RESOURCE

Recordándonos and the National Curriculum Design

Recordándonos was developed by a team from the Faculty of Education at PUCP and IDL with expertise in education, pedagogy,

⁴² Interviews, January-October 2008.

⁴³ Interview with former IDL *Recordándonos* coordinator, 16 September 2008.

⁴⁴ This term ("No tiene deuda en términos de derechos humanos") was used repeatedly during interviews from January to October 2008.

human rights and the CVR. The coordinators of the *Recordándonos* team spoke with conviction about the need for children to learn about and engage with the CVR and the past. The former coordinator from IDL framed this within a broader societal need to engage with and acknowledge the past, explaining that:

Two things impressed us during the entire process of the CVR: how little many people knew about what had happened and the sentiment that once the period of violence was over, it was seen as something that happened to other people, that it wasn't their problem. So, we thought that especially younger generations, youth, must be seeing this period as even more distant. We thought that it was important within the framework of a process of reconstruction of social ties and of reparation that people could understand this period of political violence as part of our history as Peruvians as well as part of their personal history. That is the objective of this material.⁴⁵

Content was developed over the course of more than a year. It was then piloted in 2005 in schools around the country that were participating in a larger PUCP research project on educational policy and regional development. Teachers first participated in training workshops, which helped them deal with their discomfort in teaching about the recent conflict. Feedback from the pilot study and comments from the Ministry of Education were incorporated into a second version, which was released on a compact disc in 2006.

The second version of the *Recordándonos* material consists of six workbooks, three for primary-level students and three for secondary, and two teachers' manuals. The colorful booklets include many high-quality illustrations, and the secondary level workbooks contain photographs, mostly from a powerful exhibit assembled by the CVR. The booklets also include activities for students.

⁴⁵ Interview with former IDL *Recordándonos* coordinator, 28 February 2008.

According to the coordinator from IDL:

It was our institutional position that students didn't need to know about absolutely all of the atrocities that occurred; what they did need to know were certain examples in order to understand deeply and to be able to analyze why these things occurred and to be able to speak to this truth without generating a lot of anxiety or fear.⁴⁶

The coordinator from PUCP said the goal was to bring together three themes – reconciliation, recognition of the past and new values – in a way that would mesh with the curricular structure.⁴⁷

Recordándonos was designed to complement the “integral communication” and “social personal” curriculum at the primary level and “social sciences” curriculum at the secondary level – all core national curriculum elements. It was also to be a resource for teaching human rights, which was approved as a cross-cutting theme across the 2006 DCN. Because history is not a topic in its own right at either the primary or secondary level in Peru – instead it is included in “integral communications” at the primary level and “social sciences” at the secondary level. *Recordándonos* was therefore not designed as mandatory curriculum content but as a resource for teaching relevant elements of the national curriculum.

The DCN is oriented toward the objectives of basic education in Peru: personal development, exercise of citizenship, creation of a knowledge society and linkages with the world of work.⁴⁸ It lays out a series of characteristics that education should develop and establishes learning outcomes to measure the acquisition of these characteristics. *Recordándonos*, therefore, aims to foster these outcomes. The teachers' manuals explain that the materials were

⁴⁶ Interview with former IDL *Recordándonos* coordinator, 28 February 2008.

⁴⁷ Interview with former PUCP *Recordándonos* coordinator, 14 April 2008.

⁴⁸ Ministerio de Educación, República del Perú, Diseño Curricular Nacional (Lima: Ministerio de Educación, 2006).

developed to foster competencies and capacities outlined in the DCN, such as critical thinking, problem-solving, decision-making and creative thinking.⁴⁹ Such an approach to teaching human rights and history presents limitations, particularly when teachers do not receive training in how to implement these elements, which are often considered beyond the actual stuff of national curriculum and conflict with the mandate to teach toward standardized outcomes.

At the secondary level, the DCN includes a brief syllabus of national and world events. It deals with the second half of the twentieth century in the fifth (and final) level of secondary schooling. The topic “subversive movements and peace processes in Peru” appears among a list of points that includes the cold war, international politics of the United States and processes of decolonialization.⁵⁰ “Violence and internal conflict in contemporary Peru: Truth and justice” appears later, under the “citizenship” component of the social sciences curriculum for the fifth level of secondary education.⁵¹ The limited DCN guidance for teaching about Peru’s conflict therefore offers little support to teachers who may feel some trepidation about doing so.

The *Recordándonos* resources use a similar approach at primary and secondary levels. An introductory section motivates students to discuss their impressions of the themes developed in the volume. A section designed to explore students’ existing knowledge follows, often including stories, case studies and projects to investigate personal and family history. Next are the themes of the particular volume, the section that includes most of the historical content. Students are often encouraged to undertake research projects and group work.

The *Recordándonos* materials take seriously the CVR’s recommendation to transform authoritarian pedagogy in Peru, and they offer participatory and largely child-centered lessons. In

⁴⁹ *Manual del Docente Primaria*.

⁵⁰ *Ibid.*, at 191.

⁵¹ *Ibid.*, at 193.

addition to the content, itself potentially challenging to teachers, the teaching style envisioned requires pedagogical skills, such as facilitating group discussion and dynamic classroom activities, which many teachers trained prior to or during Peru's conflict may not possess. Therefore, teacher-training workshops were envisioned, and these were part of the pilot.

Piloting *Recordándonos*

The first version of *Recordándonos* was published in ten bound workbooks.⁵² Preceded by the training workshops, it was distributed in 2005 to four schools (both public and private) in each of the seven regions attached to the PUCP's research project on educational policy and regional development.⁵³ Rich and enthusiastic feedback was received from students and teachers on the workbooks and their feelings about approaching these subjects in the classroom. Teachers shared projects completed by their students as part of the many activities suggested in the *Recordándonos* materials, and the team was impressed with their depth and thoughtfulness. The content was largely focused around urban and Andean experiences, with fewer examples from coastal and jungle regions. It was felt that the teachers and students had approached the materials with greater enthusiasm and commitment in certain regions than in others. The coordinator explained:

We could see that in regions like Iquitos, for example, where there wasn't a lot of terrorism, they didn't encounter a lot of importance in the working on these themes; same thing in some of the regions of the north of the country, Chiclayo, Piura. On the other hand the

⁵² The first version combines the primary and secondary teachers' manuals into one volume; the second version splits these into two.

⁵³ The seven regions were Huanuco, Cajamarca, Cusco, Ayacucho, San Martín, Iquitos and Trujillo. There are twenty-four regions, called departments, in Peru. Pilots were also conducted in Lima. Instituto de Defensa Legal, *Resultados del Cuestionario de Evaluación Proyecto Recordándonos* (Lima: IDL, undated).

materials were impacting for people in Ayacucho, for people in Cusco; for them these were themes that they really felt. They really appreciated much more the importance of the materials.⁵⁴

This is an important finding, given the reconciliatory aim of the materials and the CVR's insistence that the conflict is a national concern that was caused, at least to a degree, by the indifference of particular regions to the suffering of others.

Generally, the materials were well received by teachers, particularly those in the state sector. On a scale of zero to one, the lowest rating the materials received from teachers was 0.75 and the highest was 0.92. The PUCP coordinator said, "State teachers really appreciate receiving material that permits them to work in a straightforward way with their students."⁵⁵ Especially in Ayacucho department, the teachers expressed both willingness to and fear about approaching the violent past in the classroom. Many teachers were grateful for the entry the materials gave to this topic, which they acknowledged they had been unsure how to address.⁵⁶ Teachers suggested the materials should be amplified, should present a more critical view and should be specific to the conflict experiences of their region.⁵⁷

Despite the positive overall impression, the pilot uncovered ambivalence among teachers about the conflict and its causes. The teachers' union was and is heavily politicized, and many teachers surveyed worried about how the materials would be seen by factions within the union. As the former IDL coordinator explained:

⁵⁴ Interview with former PUCP *Recordándonos* coordinator, 14 April 2008.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Instituto de Defensa Legal, at 3.

In reality, the teachers themselves did not have a consensus around how to approach the topic or around the causes of conflict. There were teachers who were sympathetic to Shining Path; there were teachers who told us the materials would cause a problem in the union because there were people there from the Patria Roja party [the Communist Party of Peru] who did not agree with the CVR's final report. Others said the materials would cause problems with the forces of order in their communities.⁵⁸

This feedback led the *Recordándonos* team to present the materials to the Ministry of Education with a very strong recommendation to provide teachers not only with “training in how to approach these topics with children, but also a space in which to reflect upon the significance of the period of violence in their own lives.”⁵⁹ Teachers’ perceptions of conflict and their reluctance to deal with it in the classroom also indicate a wider need in the educational sector to reflect on the linkages between education and conflict in Peru and their legacies in current educational practice, and to provide policy guidance to overcome these. This process was not initiated during the Toledo administration, however, and has certainly not been a priority during the García government.

Students generally responded positively to both the materials and the opportunity to discuss the violent past. An initial survey found that student knowledge of the conflict varied considerably by region and that students in regions most affected by the conflict attributed more importance to learning about it than did their peers in less-affected regions.⁶⁰ As with the teachers’ perceptions, this finding is significant when considered next to the CVR’s message that grappling with the conflict is essential for the nation as a whole.

⁵⁸ Interview with former IDL *Recordándonos* coordinator, 28 February 2008.

⁵⁹ Ibid.

⁶⁰ Instituto de Defensa Legal, *Cuanto Saben los Niños de la CVR? Estudio en 8 Regiones del Perú* (Lima: IDL, undated).

The pilot also found that student knowledge of conflict increased across regions after using the *Recordándonos* material with trained teachers.⁶¹

State schoolteachers and students complained about the visual quality of the first version of the *Recordándonos* materials. These comments were taken into account in revising *Recordándonos*; the second version is dynamic and colorful, but as a result has been too expensive to print within the *Recordándonos* project budget and remains in CD format. This challenge remains to be addressed by the Ministry of Education (and donors) should *Recordándonos* eventually be approved and distributed.

RECORDÁNDONOS AND THE POLITICS OF TEACHING ABOUT THE RECENT VIOLENCE

Challenges in the Ministry of Education

In 2004, the Ministry of Education's Vice Minister of Pedagogy and Management spoke publicly in favor of the *Recordándonos* materials,⁶² and in several interviews conducted by this writer respondents indicated significant support for the materials in the Ministry of Education during the Toledo government. However, given that the materials were to be distributed nationwide with the Ministry's seal, there were political sensitivities. This led the Ministry to partially revise the *Recordándonos* materials in late 2005. The first edition of the primary education volumes was revised by a team from various areas in the Ministry, including basic primary, intercultural and bilingual education and specialists in the culture of peace. The former director of the basic primary area, who expressed a positive opinion about the materials, said that he and his team felt that "in many cases the activities generated discrimination" and that "in certain cases the topic of

⁶¹ Ibid.

⁶² As quoted in "Informe CVR en las Escuelas," 2005.

discrimination was not adequately managed” and “actually fostered a situation of violence.”⁶³

These comments, the *Recordándonos* coordinators argued, were based on fears that the materials would be difficult for children with family members tied to the police or armed forces, whose peers would accuse their families of violence. Although the materials avoid individual blame and accusatory statements, exercises repeatedly ask children to engage with their families’ personal histories and to interview family members. This is a process that may be difficult for children whose families were directly involved in the conflict on either side and for their families.

The Ministry team was also concerned about content referring to the role of the military and police forces. The former director of the basic primary area explained:

We undertook a full process of revisions and we changed – though not substantively, but yes, we did change – certain things because, as a part of the State, we [the Ministry of Education] cannot openly present information against the State. We cannot. Being very sincere, we simply cannot. So we undertook a revision and we rewrote the sections about the State without losing their foundation or their denunciation.⁶⁴

The *Recordándonos* team discussed the revisions with the Ministry and agreed to many suggested changes when they “felt the changes really didn’t modify what the material was trying to say.”⁶⁵ In some cases, the changes were quite substantial. For instance, in the first edition of the volume for third- and fourth-grade students, a timeline of Peru’s conflict included a box that read: “The government decided to rely on the Armed Forces and the Police Forces to resolve the situation. They also used violence and in many

⁶³ Interview with former director of the Basic Primary Area, 18 February 2008.

⁶⁴ *Ibid.*

⁶⁵ Interview with former PUCP *Recordándonos* coordinator, 14 April 2008.

cases did not respect human rights.”⁶⁶ The same timeline in the second edition reads: “In many cases innocent people were killed in the fight against the subversive groups. Communities organized to defend themselves against this situation.”⁶⁷

In the first version of the volume for grades five and six, a passage explains that the armed forces committed a series of human rights violations against civilians and includes in brackets: “assassinations, forced disappearances, etc.” The passage goes on to say that the military deemed this to be a “necessary cost” and names certain areas as “red zones” where anyone suspicious was killed without evidence as to whether they were part of a subversive group.⁶⁸ In the second edition, this section reads:

The military had the mission to end the conflict as rapidly as possible, and they thought that by responding with equal violence they would reach this objective. The result was bad: many innocent people were killed because the human rights of all people were not respected.⁶⁹

Certainly the issue of how to present human rights violations committed by the State is challenging in any curriculum context. However, acknowledgment of past human rights abuses by the State in the national curriculum can demonstrate a profound break from the past and a desire for change. That such an acknowledgment was not forthcoming, even under the Toledo administration, indicates

⁶⁶ *Aprendiendo a Convivir en Paz Desde la Escuela: 2 Ciclo Primaria* 1st ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2005), at 19.

⁶⁷ *Aprendiendo a Convivir en Paz Desde la Escuela*, 2nd ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2006), at 22.

⁶⁸ *Recordando Nuestra Historia Para Construir la Paz: 3 Ciclo Primaria*, 1st ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2005), at 12, [hereinafter *Recordando Nuestra Historia*, 2nd ed.].

⁶⁹ *Recordando Nuestra Historia*, 2nd ed., at 14.

both the degree of this challenge in Peru and the deep attachment in Peruvian education to the “military hero” – a trope that dominated Peruvian history education prior to the introduction of the DCN in 2006.

The area for basic secondary education did not respond to the materials with the same interest as the primary area, and the *Recordándonos* team received no comments from the Ministry. This may be due to less-developed relationships between the team and the secondary-level administrators. It may also be due to unwillingness to introduce the materials into the curriculum, particularly among older students, for whom more detailed content had been developed. The second edition of the secondary workbooks, therefore, was only modified based on feedback from the regional pilot. This means that the secondary volumes, which go into greater depth about the conflict and human rights violations than do the primary ones, do not shy away from presenting the human rights violations committed by the armed forces and police.

Illustrations in the secondary-school version show armed men in uniform loading civilians into a truck, soldiers destroying homes as civilians look on and masked subversives shooting indiscriminately. The middle workbook in the series includes CVR testimony from a woman who was raped by members of the armed forces, along with a three-page section on “crimes and violations derived from state strategy.”⁷⁰ This section concludes by proposing two topics for classroom debate: “Was it necessary to use a ‘hard hand’ to combat subversion?” and “What are the consequences – for the State and Peruvian citizens – of the twenty years of violence?”⁷¹

As the *Recordándonos* team stressed, all references to state violence are derived directly from findings of the CVR and describe crimes in similar language, though in slightly simpler phrasing for younger audiences. Nowhere do the materials mention the name of

⁷⁰ *Ejerciendo Ciudadanía y Derechos: 3 y 4 Ciclos de Secundaria*, 2nd ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2006), at 13.

⁷¹ *Ibid.*, at 18.

any member of the police or armed forces. Photos of the three presidents in power during the conflict appear on pages detailing the principal human rights violations committed during their administrations. A photo of Peru's current President, Alan García, who served his first term during the period of conflict, appears in the book for the final secondary level. The photograph appears below a paragraph describing the failure of García's attempts to condemn military violence at the beginning of his regime followed by his decision to increase the presence of the armed forces in certain regions. The paragraph closes by describing the massacres that killed 270 people at the Canto Grande and El Frontón prisons.⁷²

Political Challenges

Recordándonos was developed during the government of Alejandro Toledo, the president who ratified the CVR decree and accepted its final report. The release of the CVR report generated considerable momentum both domestically and internationally, particularly around its recommendations, and the government and international donors encouraged initiatives using the report and recommendations. As the former director of the basic primary area at the Ministry of Education said, "At this time, the Ministry and the educational sector had the mandate to comply with the recommendations of the CVR."⁷³ The former coordinator of the education sub-area at the CVR said, "Toledo didn't have any debt when it comes to human rights. In other words, his party was new, he was new to the political scene and therefore he was able to support the CVR with considerable strength because he didn't have any fault in its findings."⁷⁴

⁷² *Apriendiendo de Nuestro Pasado*, 2nd ed. (Lima: Facultad de Educación, Pontificia Universidad Católica del Perú y Instituto de Defensa Legal, 2006), at 12. Many inmates linked to Shining Path were killed during an uprising at El Frontón prison in 1986.

⁷³ Interview with former director of the basic primary area, 18 February 2008.

⁷⁴ Interview with former coordinator of the sub-area of education, 27 February 2008.

Nonetheless, various sectors of Toledo's administration – including the Intelligence Services, the Chorillos Military Academy, the Ministry of Defense and the Congress,⁷⁵ which all employed officials with connections to earlier governments – expressed reservations about the *Recordándonos* initiative.⁷⁶ The former director of the basic primary area said, “They weren't censoring, but the very fact of their questions made us realize there were special interests involved.”⁷⁷

The Minister of Defense in office during the final year of the Toledo administration wrote a letter to the Ministry of Education in 2006, which was copied to IDL and PUCP, stating that the materials were insulting to the armed forces and were therefore not acceptable as national curriculum content.⁷⁸ This letter was taken very seriously. Members of the *Recordándonos* team and former CVR commissioners view it as having effectively stalled the process of *Recordándonos* approval in the Ministry. Indeed, the Ministry did not defend the initiative or mention DCN guidelines (still being finalized at this time) regarding teaching about conflict, human rights and citizenship.

With the run-off election of Alan García in June 2006, resistance to the materials persisted and intensified among many sectors outside the Ministry of Education. García's administration was not free from human rights debt; his first term as president coincided with part of the period investigated by the CVR, and his government was found responsible for serious violations of human rights. The CVR report names members of the current administration and in some cases suggests their prosecution. The current Vice President, a retired navy admiral who was linked to the El Frontón prison massacres, in 2006 added his voice to other state calls to stop distribution of the *Recordándonos* materials.

⁷⁵ Interview with former director of the basic primary area, 18 February 2008.

⁷⁶ Interview with former coordinator of the sub-area of education, 27 February 2008.

⁷⁷ Ibid.

⁷⁸ Interviews, January-October 2008.

The former director of the basic primary area, currently heading another area in the Ministry of Education, states that he is not aware of any current discussion of the CVR, its recommendations or the *Recordándonos* project in the Ministry. Other ministry respondents concur. In its last communications with the *Recordándonos* team in 2006, however, the Ministry stated that a validation of the primary school materials was underway.⁷⁹

The Educational Emergency

The twenty-six hundred primary schools that received *Recordándonos* materials were schools targeted under Peru's "educational emergency" policy framework in place from 2004 to 2006. In 2004, the Ministry of Education declared the country's public education system to be in a state of emergency, largely due to students' poor results on the standardized Programme for International Student Assessment (PISA) tests. The Ministry said that students were not learning basic skills for personal development and subsequent national growth, that many students were studying in suboptimal conditions and that students were not being trained as citizens.⁸⁰ In order to address the emergency, the Ministry developed a series of actions, particularly focused on schools in the most "marginalized and excluded" communities.⁸¹

In October 2004, the Vice Minister of Education announced to a group of representatives from regions affected by violence that "the agenda of the educational sector coincides with the recommendations of the CVR."⁸² Since the CVR's recommendations also called for addressing educational quality in rural schools and in

⁷⁹ Interview with former PUCP *Recordándonos* coordinator, 14 April 2008.

⁸⁰ Susana Frisancho, "La Educación Ética en el Perú: Aportes de la Psicología Evolutiva," *Palestra: Portal de Asuntos Públicos la PUCP*, 2004, available at <http://palestra.pucp.edu.pe/?id=132>.

⁸¹ Oficina de Prensa y Comunicaciones, Ministerio de Educación, República del Perú, "Agenda del Sector Educativo Coincide con Recomendaciones de la CVR," 27 October 2004.

⁸² *Ibid.*

communities living in poverty, the Ministry bundled its CVR obligations into its plan to address the educational emergency, though it did not explicitly include or plan for conflict-related elements in its emergency plan. This bundling included the preliminary distribution of *Recordándonos* to schools targeted in the emergency, the first step in the Ministry's pilot and the possible validation of the materials as a national curriculum resource.⁸³ The former director of Basic Primary Education explained that twenty-six hundred primary schools were prioritized because Shining Path was known to target and recruit in zones suffering the greatest poverty. He felt the *Recordándonos* material was sent specifically to these schools "as prevention against the possible resurgence of violence."⁸⁴

Certainly there is resonance between the policy goals of the educational emergency and the CVR's recommendations for educational reform, particularly regarding educational quality for the most marginalized. Similarly, pilot distribution of the *Recordándonos* material within the emergency programming was likely most convenient for the Ministry. While it is certainly appropriate to target particular educational interventions, especially those aimed at redress and repair, toward communities most affected by violence, curriculum resources aimed at national reflection about recent conflict are perhaps less appropriate for targeted interventions. Framing the *Recordándonos* material as most appropriate – or worse still, only appropriate – for communities heavily affected by violence or for excluded and marginalized communities, can perpetuate some of the very attitudes the CVR identified as playing into Peru's conflict. Indeed, the Ministry's decision parallels the attitudes of some teachers and students collected in the IDL-PUCP pilot: that the materials were more appropriate and more interesting for particular regions.

The *Recordándonos* tools are geared toward reconciliation and aim to reach a national audience of students and teachers. They seek

⁸³ Interview with former coordinator of the Sub-Area of Education, 27 February 2008.

⁸⁴ Ibid.

to stimulate reflection among all of Peru's young people, not only those whose families and communities experienced violence. The development of empathy and understanding among children, families and communities who experienced the period of political violence in different ways is one of the goals behind the material. The framing of *Recordándonos* as a "preventive" resource, relevant only to the most marginal communities, where violence is "likely" to take root, detaches the materials from their emphasis on the deep structural causes of conflict within Peru as a whole. In many ways, it reiterates the very structures of difference, division, regionalism and racism that the CVR identified as causes of Peru's conflict.

The educational emergency policy framework, always envisioned to be finite, ended definitively in 2006 when the García government took power and a new minister of education was appointed. The current Ministry of Education policy makers do not consider the emergency to have been a successful initiative, and the Ministry has not continued its programs. As the former director of the Basic Primary Area said:

Because the CVR materials were part of the "educational emergency" framework and because the national program for the educational emergency was an initiative of the previous administration, well, today nobody speaks about the educational emergency at all.⁸⁵

Thus, the validation of *Recordándonos* for curriculum approval by the Ministry of Education remains stalled within a larger, discontinued initiative for which there is little political appetite. Pressures to avoid teaching about the findings of the CVR applied by state entities outside the Ministry and the failure of the "educational emergency" both pose serious challenges for the eventual approval of *Recordándonos*. These are reinforced by the lack of political will in the García government to engage with or even acknowledge the CVR findings and recommendations. In the

⁸⁵ Interview with former director of the Basic Primary Area, 18 February 2008.

words of the former director, “What I want to emphasize is that this issue makes waves, and this is probably one of the reasons why no one wants to bring it to the forefront again, so it will again make waves and polarize everything.”⁸⁶

Technical Challenges

In addition to the political challenges the *Recordándonos* resource faced within and outside the Ministry of Education and under the Toledo and García administrations, a series of technical challenges colluded to further hinder its incorporation into the national curriculum.

The Ministry’s lack of involvement in developing *Recordándonos* and its resulting lack of ownership created a number of challenges. For one, it discouraged ministry engagement in piloting and approval of the materials. As political pressure to comply with CVR recommendations lessened, the *Recordándonos* team had to rely on the personal commitment of individuals in the ministry rather than on any imperative for ministry participation. The lack of ministry engagement also meant that no budget was provided to print, review, pilot and distribute the *Recordándonos* materials, creating a further disincentive for ministry personnel to push for their incorporation. Likewise, neither the ministry nor the *Recordándonos* team had secured funds for the large-scale teacher training needed to successfully introduce *Recordándonos* into classrooms.

Finally, an ongoing partnership with the Ministry could have encouraged or facilitated the development of educational policy on teaching about the violent past. Ideally, this could have been undertaken within a larger process of educational policy-making to address the legacies of conflict, which has yet to occur in Peru. Such a policy would offer both an opportunity and political justification for the *Recordándonos* resource and would assist the Ministry in justifying to less enthusiastic sectors of the State the importance of teaching about the recent conflict.

⁸⁶ Ibid.

CONCLUSIONS

Opportunities and Challenges

As Elizabeth Cole emphasizes, “perhaps the key actors in the process of history education reform are ordinary people at all levels of society – teachers, principals, parents and students themselves.”⁸⁷ It is unfortunate that the debate generated by the *Recordándonos* resource in certain sectors of the State has not included such voices and their perspectives on teaching and learning about conflict. Shifting the debate toward discussion of how and why to teach about the recent conflict could in itself open space for policy-making.

Should a consensus emerge that not only permits but calls for teaching about Peru’s conflict, the existence of an internally piloted, high-quality resource like *Recordándonos* will certainly be useful. The fact that it is not in wide use in schools today does not mean it never will be; the fact that it is already developed and is of high quality in design, content and pedagogical appropriateness presents a great opportunity for the future.

This said, however, the current government’s lack of political will to engage with the CVR may suggest that a TRC should not be viewed as the only source for teaching about the conflict. TRC content could usefully be accompanied by information from other sources, such as fictional works, historical and scholarly sources, newspaper and other media reports and artistic sources. Margaret Sinclair and colleagues argue that teaching about conflict from multiple vantage points offers entry points for teachers and learners coming from diverse viewpoints.⁸⁸ An approach of multiple perspectives may also help diffuse political responses that may attempt to discredit all teaching about the past.

⁸⁷ *Teaching the Violent Past*, at 17.

⁸⁸ See, for example, Margaret Sinclair (in collaboration with Lynn Davies, Anna Obura and Felissa Tibbits), *Learning to Live Together: Design, Monitoring and Evaluation of Education for Life Skills, Citizenship, Peace and Human Rights* (Eschborn, Germany: GTZ and UNESCO, 2008).

The quality of the *Recordándonos* material itself also presents considerable opportunity. It appears to have the potential to promote nuanced and balanced learning about conflict, fostering reconciliatory attitudes without compromising historical and collective memory. In Guatemala, Elizabeth Oglesby found that NGO educational materials based on the truth commission report obscured the agency, resistance and diverse experiences of victims of the conflict, and ultimately sacrificed the development of contextual historical memory to the development of a more globalized idea of a “culture of peace.”⁸⁹

The *Recordándonos* materials navigate the difficult terrain between the facts of violence and the aims of reconciliation more successfully – indeed, doing so was a priority of the team. They appear to have followed Martha Minow’s advice that “by focusing on the history of responses to atrocity rather than atrocity alone, scholars [in this case, educators] can underscore that continuing human project of dealing with – and preventing – mass inhumanity.”⁹⁰ The use of well-developed, thought-provoking and creative activities throughout the materials can chart a course to guide students through the CVR’s findings in a way that fosters the skills and capacities desired as part of the curriculum that the material has been designed to complement.

However, teachers’ trepidation about introducing such discussion into their classrooms (as expressed during the pilot), along with their positive responses to the idea of training on the topic, demonstrate not only the need for solid policy direction around teaching about the past, but also for teacher training and support. Cole and Barsalou argue that “reforming pedagogy – the way history is taught – should take priority in many contexts over curriculum revision, especially when resources are scarce.”⁹¹ Indeed, such processes need not be either-or; engaging resources offer

⁸⁹ “Educating Citizens in Postwar Guatemala.”

⁹⁰ *Between Vengeance and Forgiveness*, at 144.

⁹¹ “Unite or Divide?,” at 10.

opportunities for teachers to experiment with new pedagogies, provided they also receive pedagogical training.

Certain practical or technical steps taken at the outset of a TRC and/or curriculum-revision process may enhance collaboration between the two. These include establishing a working partnership between the Ministry of Education and the truth commission, involving the Ministry throughout the process, and budgeting for substantial teacher-training to support the introduction of the materials and particular pedagogies. Political challenges might be minimized by considering from the outset how to best present human rights violations committed by state actors and by linking the development of TRC materials with ministry policy on teaching about the past. Where such policy does not exist, materials should be linked to the development of policy.

Politics and Potential

Sarah Warshauer Freedman and colleagues, in working to develop history curriculum in Rwanda, found that the process reflected in microcosm the forces behind that country's conflict.⁹² The same can be said for certain episodes in the story of the CVR-based curriculum in Peru. By directing the piloting of *Recordándonos* only to communities most likely to have been victims of Peru's conflict, the Ministry of Education in the Toledo government chose to reiterate and highlight geographic, socioeconomic, linguistic and racial divisions and stereotypes that fed into conflict in Peru. The García government chose to deny the reality of the State's past human rights abuses by disengaging from the *Recordándonos* resource and furthering calls to keep it out of the national curriculum.

In addition to offering insight into dynamics that fueled Peru's conflict, these episodes paint a picture of the current state of reconciliation. If acknowledging past human rights abuses in national curricula indicates a breaking from the violent past, a reconciliatory stance toward victims and a new beginning, does refusing to do so indicate the opposite?

⁹² "Teaching History After Identity-Based Conflicts."

Despite its lack of human rights debt and its CVR mandate, the Ministry of Education in the Toledo government did not strongly articulate the importance of teaching about the violent past, nor did it build a strong policy framework to support it. This lack of infrastructure, combined with political disincentive to look backward in the García government (except to discredit what came before, like the CVR) has led to a stalemate in terms of teaching about Peru's recent conflict.

The Peruvian case demonstrates the degree to which political and technical challenges can undermine attempts to access the potential inherent in TRC-based curriculum material. Consideration of this case might provide insights for the design of similar initiatives elsewhere that avoid or minimize the challenges that hindered *Recordándonos*. In fact, the Peruvian case does not discredit the potential for links between the education sector and transitional justice initiatives like truth commissions. Rather, it demonstrates the importance of embedding initiatives to tap such potential within institutional processes that include policy- and capacity-building opportunities and long-term vision.

CHAPTER 10

REALIZING ECONOMIC JUSTICE FOR CHILDREN: THE ROLE OF TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES

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A boy, 16, who was forcibly recruited into a rebel faction in the Democratic Republic of the Congo, and is now reunited with his family in a village near Goma.

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INTRODUCTION

How can we tell what happened to us? There are no words to describe what we have witnessed. What we saw, what we heard, what we did, and how it changed our lives, is beyond measure. We were murdered, raped, amputated, tortured, mutilated, beaten, enslaved and forced to commit terrible crimes.²

– Truth and Reconciliation Commission Report for the Children of Sierra Leone

Children suffer grave violations of their fundamental rights as a result of war.³ The violations committed against them during armed conflict include their recruitment and use by armed forces and groups; killing and maiming; rape and other sexual violence; abductions; the denial of humanitarian access; and attacks against schools and hospitals.⁴ However, war also deprives children of their basic rights to survival and development. As reported in the Machel Study ten-year strategic review, *Children and Conflict in a Changing World*, the impact on children is “more brutal than ever,” and the indirect consequences of war – “the severing of basic services, and increased poverty, malnutrition and disease” – continue to exact a devastating toll.⁵ The task of restoring the lives of war-affected children must therefore involve redress for social and economic violations, as well as for violations of children’s physical well-being.

² *Truth and Reconciliation Commission Report for the Children of Sierra Leone Child-Friendly Version*, 2004, at 14, available at www.unicef.org/voy/media/TRCCF9SeptFINAL.pdf.

³ See “Machel Study 10-Year Strategic Review, *Children and Conflict in a Changing World*,” A/62/228, at 3 (“War violates every right of the child.”), available at www.un.org/children/conflict/english/machel10.html, [hereinafter Machel Study 10-Year Strategic Review].

⁴ These violations have been identified by the Security Council as “grave violations against children during armed conflict.” UN Security Council Resolution 1539 (2004).

⁵ Machel Study 10-Year Strategic Review, at 4, 5.

Transitional justice mechanisms, an integral part of post-conflict recovery, have generally engaged in truth-telling and accountability for gross violations committed during war but have not deeply considered questions of social and economic rights. In exploring the relationship between transitional justice and post-conflict development, this chapter aims to identify how transitional justice processes can complement, motivate and improve efforts to realize children's social and economic recovery from the destruction caused by armed conflict.

The field of transitional justice generally seeks to support justice and peace in societies emerging from armed conflict or political violence by identifying, accounting for and redressing the harms resulting from the commission of gross human rights violations.⁶ Transitional justice measures can include prosecutions, truth-telling, reparations and institutional reforms. This chapter considers how transitional justice resources can be mobilized for the recovery of war-affected children, particularly through development initiatives that can lead to economic justice for them. Children and young people can be agents of change when given access to education and opportunities for reasonable livelihoods. Thus, it is critical in the planning and implementation of transitional justice processes to consider how to complement and reinforce development initiatives in order to realize the rights of children in post-conflict societies.

For the purposes of this chapter, economic justice is considered to encompass a range of social and economic rights, including the rights to health, education, housing and livelihoods, as protected under the Convention on the Rights of the Child (CRC) and other

⁶ Consider the discussion in the UN Secretary-General's report, in which transitional justice "comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." United Nations Report of the Secretary-General on Rule of Law and Transitional Justice, S/2004/616 (New York: United Nations, 23 August 2004) at 4-5.

international human rights instruments. Realization of these rights is recognized as critical to combating poverty and supporting long-term social progress,⁷ in addition to maintaining children's survival and development. As will be demonstrated, economic justice is necessary to enabling children to become healthy, educated and well-adjusted individuals who can make meaningful contributions to society as adults. This chapter argues that transitional justice processes should consider how to support the realization of economic justice for children, as it will help them to sustain transitions from conflict to peace as adults. Through examples from western Africa, the chapter will demonstrate the importance of realizing the economic rights of war-affected children and show that failing to do so can undermine efforts to establish just and peaceful societies.

The chapter considers the complementary role that transitional justice processes can play in promoting and shaping the realization of economic justice for children. First, it addresses the relationship between human rights and development and presents the international legal framework that obliges states – and correspondingly, transitional justice processes – to prioritize the realization of the full range of children's rights in post-conflict recovery efforts and institutional reforms. Next, it explains how war-related rights violations can leave children vulnerable to further exploitation and abuse in the aftermath of war, and demonstrates the potential benefits of economic justice for post-war social recovery and reintegration of children. The destabilizing effect of failing to address economic justice for children is also examined. The final section considers how transitional justice mechanisms can influence and complement measures to realize economic justice for children in post-conflict societies.

⁷ Consider the Millennium Development Goals, which include ending poverty and hunger, achieving universal education, realizing child and maternal health and gender equality; see www.un.org/millenniumgoals. Consider also the UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev.1, which recognizes the importance of a holistic approach in strengthening national protection systems for children.

HUMAN RIGHTS, PEACE-BUILDING AND DEVELOPMENT

Social and economic rights have received increasing attention during post-conflict recovery and peace-building. Practice concerning the implementation of the CRC confirms the importance of a holistic, integrated, rights-based approach to development, which aims to achieve an enabling environment for children, as opposed to simply meeting their immediate needs. In post-conflict societies, the CRC provides standards through which domestic and international actors can pursue protection of children's rights as part of reconstruction and recovery efforts.

Rights Protection and Development

Starting with a recognition of the “deep and mutually constitutive links that exist between” development and freedom,⁸ Amartya Sen uses an economic argument to explain the need to remove major sources of “unfreedom,” which include poverty, tyranny, poor economic opportunities, systems of social deprivation, neglect of public facilities and intolerance. Building on the work of Sen and based on his eyewitness accounts of human suffering resulting from structural violence,⁹ Paul Farmer argues that promoting the social and economic rights of the world's poor is the most important issue facing the world today. Doing so involves analysis and redress of the mechanisms and conditions that generate violations of human rights, since these violations represent “symptoms of deeper pathologies of power that are linked

⁸ Freedom is defined as including basic political and civil rights as well economic rights, which together are “instrumental,” “constitutive” and “constructive” for development. Amartya Sen, *Development As Freedom* (Oxford: Oxford University Press, 1999).

⁹ Ascribed to Johan Galtung, “Violence, Peace, and Peace Research,” *Journal of Peace Research* 6(3) 1969:167-191 (referring to extreme poverty, social inequalities ranging from racism and gender inequality and more specific forms of violence in the form of human rights abuses as “offensives against human dignity,” the latter which may result from “efforts to escape structural violence”).

intricately to the social condition that so often determines who will suffer abuse and who will be shielded from harm.”¹⁰ While considerable progress has been made at the international level through formal commitments to mainstreaming human rights into development programming, there remains “a very long way to go before such approaches become the norm” in domestic practice.¹¹

In situations of armed conflict, the relationship between human rights, peace-building and development is especially complex. These contexts require policies, actions and solutions that integrate both “negative peace”, which can be understood as the absence of violence, and “positive peace”, which involves the long-term process of transforming attitudes and institutions in order to create and sustain a peaceful and just society.¹² Protection of the full range of human rights, including social and economic rights, is an integral component of peace-building.

The CRC is a pathbreaking human rights treaty in that it includes social and economic rights, as well as civil and political rights. Supported by the work of UNICEF, this aspect of the CRC has been noted as reflecting the intention of the international community to “insinuate at least a part of the overall human rights agenda into development activities as they relate to children.”¹³ Indeed, under the right to survival and development (one of the

¹⁰ P. Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley: University of California Press, 2005), at 7, 11.

¹¹ P. Alston and M. Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005), at 1, 2 (outlining the developments by the international community to promote “meaningful and productive linkages” between the human rights and development agendas), [hereinafter *Human Rights and Development*].

¹² J. Mertus and J. W. Helsing, *Human Rights and Conflict: Exploring the Links between Rights, Law and Peacebuilding* (Washington, DC: United States Institute of Peace, 2006). (This volume explores an integrated approach to the human rights, humanitarian law and conflict resolution agendas). See also A. Hurwitz, ed., *Civil War and the Rule of Law: Security, Development, Human Rights* (New York: International Peace Academy, 2008), [hereinafter *Human Rights and Conflict*].

¹³ *Human Rights and Development*, at 2.

CRC's four core principles¹⁴), development of the child has been defined as "including physical, mental, spiritual, moral, psychological and social development, in a manner compatible with human dignity, and to prepare the child for an individual life in free society."¹⁵

Programs implemented during post-conflict reconstruction are internationally obligated to lay the foundation for the survival and development of children. Under the CRC, States parties must consider the needs of children and undertake measures to promote the "physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse...or armed conflicts" through measures that "take place in an environment which fosters the health, self-respect and dignity of the child."¹⁶ Moreover, States parties must provide appropriate assistance for the "physical and psychological recovery" and the "rehabilitation and social reintegration" of children involved in armed conflict.¹⁷ Finally, states have been called upon "to take all necessary measures, as a matter of priority, to mitigate the impact of conflict on children that inhibits their full and equal enjoyment of all human rights and fundamental freedoms."¹⁸

¹⁴ Convention on the Rights of the Child, adopted on 20 November 1989 [hereinafter CRC].

¹⁵ Committee on the Rights of the Child, General Guidelines Regarding the Form and Contents of Periodic Reports to be submitted by States Parties under Article 44, para. 1(b) of the Convention, UN Doc. CRC/C/58, (New York: United Nations, 20 November 1996), para. 40. See Manfred Nowak, "Article 6 The Right to Life, Survival and Development," in *A Commentary on the United Nations Convention on the Rights of the Child* (London: Martinus Nijhoff, 2005), at 47: "Only those States which fully comply with all civil, political, economic, social and cultural rights of the child guaranteed in the CRC can be considered as having ensured, 'to the maximum extent possible,' the development of all children within their jurisdiction").

¹⁶ CRC, article 39.

¹⁷ United Nations Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted on 25 May 2000, paras. 6-7, [hereinafter CRC Optional Protocol].

¹⁸ Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/9/3, 27 June 2008, para. 49.

Rights-Based Approaches to Post-Conflict Development

The international community has affirmed the need to place children at the center of the peace and security agenda.¹⁹ The Machel report notes that the “task of rebuilding war-torn societies is a huge one that must take place not only at the physical, economic, cultural and political, but also at the psychosocial level.” Reconstruction must thus relate to the child as well as to the family, the community and the country.²⁰

In many contexts, children’s social and economic rights may in fact be indirectly realized through the realization of the same rights for their parents and families. However, child rights programming can play an important complementary role to broader reconstruction efforts aimed at repairing the societal devastation of armed conflict. Specifically, as the Machel ten-year review highlights, a child rights-based approach “seeks to create an ‘enabling’ environment that is conducive to children’s overall well-being.” The text further states, “in addition to encouraging practical actions and delivery of services, child rights programming is balanced with efforts to protect children against violence, abuse and exploitation, encourage their participation, build the capacity of institutions and systems, support community networks, and hold authorities to account.”²¹

A child rights-based approach can also provide important standards or points of reference for developing national policies and benchmarks against which interventions can be monitored and assessed.²² Consider the right to education: Both the CRC and the International Covenant on Economic, Social and Cultural Rights

¹⁹ Consider, for example, UN Security Council Resolution 1612 (2005).

²⁰ Graça Machel, *Impact of Armed Conflict on Children*, UN Doc. 26 AA/51/306, para. 241.

²¹ Machel Study 10-Year Strategic Review, at 107.

²² Betherman, Fares, Luistra and Prouty, “Child Labor, Education and Children’s Rights,” in *Human Rights and Development*, at 177. See also Machel Study 10-Year Strategic Review, at para. 274.

(ICESCR) set a clear obligation to ensure free and compulsory primary education;²³ under the CRC the realization of this right is to be undertaken to the maximum extent of a State's available resources.²⁴ Through the joint implementation of CRC articles 28 and 29, education must be made available and accessible at primary and secondary levels. The availability criterion encompasses establishing and maintaining an educational system of good quality, subject to the developmental context of the State. The accessibility criterion encompasses three parts: children should have access to education without discrimination, education should be provided within a safe and reasonable distance, and education should be affordable to all.

Notwithstanding these signposts, the actual realization of children's right to education remains a struggle for war-affected societies. The Special Representative of the United Nations Secretary-General for Children and Armed Conflict has recently reported that the "education and livelihood aspects of reintegration

²³ See ICESCR, article 13(2)(a) ("Primary education shall be compulsory and available free to all"); CRC, article 28(1)(a) ("Make primary education compulsory and available free to all"). Secondary education – both general and vocational education – must also be made available and accessible to all, including through financial assistance when necessary. See ICESCR, article 13(2)(b) ("Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."); CRC, article 28(1)(b) ("Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need").

²⁴ Under the ICESCR, realization is subject to the concept of "progressive realization", which reflects recognition that resource limitations constrain state action. However, progressive realization of a particular right imposes upon states an "obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." Committee on Economic, Social, and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, para. 9, UN Doc. E/1991/23 (14 December 1990).

programming require greater investment and identification of effective models.”²⁵

In sum, efforts to protect and implement human rights are both “essential to the constructive management of conflict”²⁶ and an integral part of development. Opportunities exist for the fields of transitional justice and post-conflict development to collaborate in protecting children’s social and economic rights. The remainder of this chapter discusses the importance of working toward the realization of the social and economic rights of war-affected children, and seeks to enhance understanding of the complementary and mutually reinforcing relationship between transitional justice and post-conflict development.

SOCIAL AND ECONOMIC RIGHTS VIOLATIONS EXPERIENCED BY WAR-AFFECTED CHILDREN

The experience of child miners in Sierra Leone demonstrates how children’s social and economic rights are violated during war and how these violations leave them vulnerable, in war’s aftermath, to further exploitation and abuse. Empirical research also demonstrates the potential benefits of economic justice for the welfare and social development of war-affected children. Finally, social science research undertaken in western Africa explores the relationship between systemic failures to realize economic justice for children and youth²⁷ and the root causes of political violence

²⁵ United Nations General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict; A/62/228, (New York: United Nations, 13 August 2007), Part II, para. 99.

²⁶ *Human Rights and Conflict*, at 513.

²⁷ Understandings and definitions of “youth” vary across social contexts; youths can be viewed to include adolescents to middle-aged individuals or extending to anyone who is not in a position of privilege or power. For the purposes of this chapter, references to “young people” include those between ten and twenty-four years and references to “youth” include those between fifteen and twenty-four years, as defined by the World Health Organization (WHO), which overlap with the international definition of a child (any individual under the

and armed conflict. The research points to how failures to realize children's social and economic rights can ultimately undermine the development of just and peaceful societies. These findings underline the need for the transitional justice field to consider how it can complement and shape development initiatives to protect the social and economic rights of children in post-conflict societies.

Child Miners of Sierra Leone

Sierra Leone's eleven-year civil war (1991-2002) left children in desperate need of education, family support and livelihoods. Eight years after the official end of the conflict, post-war reconstruction efforts have not adequately addressed the needs of the country's child miners. Children working in diamond mines represent a cross-section of the country's most vulnerable groups, including former child soldiers, children living or working on the street, unaccompanied children and children from households living in extreme poverty. Working under grueling conditions for little or no pay, child miners personify a gross failure by the Government of Sierra Leone, as well as donor agencies, to realize economic justice for children living in the areas that were among those worst affected by the war. The situation facing these child miners results from and demonstrates the social and economic rights violations they experienced during war, which have left them vulnerable to continued exploitation and abuse.

The Nature and Impact of Social and Economic Rights Violations

In addition to war-affected children, Sierra Leone's diamond mines employ many individuals aged eighteen to twenty-five years whose childhoods were disrupted by the war, forcing them into new

age of eighteen). For a discussion of the cultural and political influences of the definition of youth, see Tristan Anne Borer, John Darby and Siobhan McEvoy-Levy, *Peacebuilding after Peace Accords: The Challenges of Violence, Truth, and Youth* (South Bend, IN: University of Notre Dame Press, 2006) [hereinafter, *Peacebuilding after Peace Accords*]; see also D. Durham, "Youth and the Social Imagination in Africa," *Anthropological Quarterly* 73(3-4) 2000:15-116.

roles with considerable responsibilities. Many of the circumstances that led children and young people to toil in the mining pits can be attributed to violations of their social and economic rights during the armed conflict. These violations include separation from or loss of their parents; disruption or loss of education; and abduction and forced labor or recruitment by armed groups.

These violations left them with economic responsibilities, including caring for younger siblings, which were exacerbated by inadequate material assistance for children who had lost parents. Denied access to education and livelihoods after the war, war-affected children and young people now find themselves engaging in risky income-generating activities such as diamond mining to support themselves, their siblings and their families. The shortcomings of disarmament, demobilization and reintegration (DDR) processes drove those who had been associated with fighting forces to the mines.²⁸ Thus, war-related rights violations contributed to the poverty that exposed children and young people to this hazardous form of work.

Socioeconomic Vulnerability and Child Exploitation

Children as young as ten commonly work in Sierra Leone's diamond-mines.²⁹ Indeed, the country's Truth and Reconciliation

²⁸ *Consider* MacCartan Humphreys and Jeremy M. Weinstein, "What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone, June –August 2003," Interim Report 27-28 (2004), at 9, available at www.columbia.edu/~mh2245/Report1_BW.pdf (DDR programs "discriminated against women, children, and others who participated in the conflict primarily as forced labour or sex slaves, and who may have participated in active conflict when defending their bases or villages from attack"); Human Rights Watch, *Youth, Poverty and Blood: The Lethal Legacy of West Africa's Regional Warriors* (New York: Human Rights Watch, 2005) [hereinafter *Youth, Poverty and Blood*], at 3-4 (Finding that a majority of DDR participants "were kept out of skills training aspects of the program, or did not receive any benefits at all"); and, Paul Richards *et al.*, "Where have all the young people gone? Transitioning ex-combatants towards community reconstruction after the war in Sierra Leone" (2003) (Finding "a strong sense of grievance among young people who believe that they have not been fairly treated").

²⁹ See *Digging in the Dirt: Child Miners in Sierra Leone's Diamond Industry* (Cambridge, MA: International Human Rights Clinic, Harvard Law School, 2009), [hereinafter *Digging*

Commission (TRC) found that the number of children working in diamond mining increased during and after the war.³⁰ Child miners labor under hazardous and unhealthy conditions, shoveling and washing gravel six days a week, for long hours and little pay, and without access to medical attention.³¹ They face the constant risk of collapsing mining pits and live in unhealthy conditions, which include poor shelter and meager food, and expose them to worms, malaria and other diseases.³² Many child miners reported having experienced physical pain: “I do not feel well. Since I’ve started this work, my body has not felt well.” These children have little sense of self-worth and express few hopes for the future. As one boy explained, “I have had no achievement; nothing really good has come in my life – I make just enough for survival, for some food.” Expressing the sentiments of many, one child miner said, “If there’s a way for me to get out of the mines, I’ll be very happy, because this is a man’s job.”³³

in the Dirt] (IHRC researchers visited over a dozen artisanal diamond mining sites in the two principal diamond-producing regions of Sierra Leone, Kenema and Kono Districts, where they observed the widespread prevalence of child miners), available at www.law.harvard.edu/programs/hrp/documents/Digging_In_The_Dirt%28LR%29.pdf; World Vision Sierra Leone, Report on Children in Mining Activities (CIMA), Assessment Survey, Kono District (2002) [hereinafter World Vision Report] (interviewing 497 child miners and finding “a sizeable proportion of children between the ages of 6 – 18 years in Kono that are involved in mining activities”); Morten Bøås and Anne Hatløy, “Living in a Material World: Children and Youth in Alluvial Diamond Mining in Kono District, Sierra Leone” (2006) (interviewing 616 children in four diamond mining sites in Kono District who were working directly and indirectly in diamond mining), available at www.faf.no/pub/rapp/515/515.pdf.

³⁰ Sierra Leone TRC Report, Volume 3b, Chapter. 4, para. 335 (2004). World Vision found that the “war aggravated the involvement of children in mining activities.” World Vision Report (Based on interviews with 497 child miners conducted shortly after the end of the conflict).

³¹ Daily wages for child miners range from approximately US \$0.15-US \$0.60, while those digging on contract (i.e., who do not receive any percentage of their diamond finds) reported being paid approximately US \$2.10 per day. *Digging in the Dirt*, at 23, 24.

³² *Ibid.*, at 25-28.

³³ *Ibid.*, at 31.

Violation of International and Domestic Obligations to Protect Children's Rights

Sierra Leone's diamond-mining communities were the hardest hit by the war, and the levels of brutality against civilians were unprecedented. Members of armed groups committed serious violations of international law by targeting children. Among these violations were physical and sexual violence, destruction of homes and schools and forced recruitment of hundreds of children.³⁴ Children lost their opportunity to go to school, faced separation from their parents, were offered inadequate measures to help them earn a livelihood and in general suffered from a lack of social assistance. Indeed, community leaders and individuals in these areas lament the lack of livelihoods, the poor infrastructure and the denial of basic rights such as adequate housing, food and clean water.³⁵

Yet it appears that the country's post-conflict reconstruction efforts gave little priority to the recovery and development of these children. Despite consideration of the interests of children and young people in post-conflict peace-building and transitional justice processes, such as the country's TRC, there persists a lack of official commitment to seriously redressing violations of children's rights.³⁶ The situation facing these children puts the Government of

³⁴ See *Witness to the Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004) [hereinafter Sierra Leone TRC Report]; *We'll Kill You if You Cry* (New York: Human Rights Watch, 2001); *War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment* (Cambridge, MA: Physicians for Human Rights, 2002). For a detailed overview of the conflict and a review of recent literature on the causes and nature of the war, see Christof Kurz, "Greed, Grievance and Atrocities: Recent Literature on the Causes and Dynamics of the War in Sierra Leone, 1991–2002," *Journal of Intervention and Statebuilding* 1(1) March 2007:132.

³⁵ See *Digging in the Dirt*, Annex A, "Community Voices – Expressing Local Development Needs."

³⁶ *Infra*, Section C, Part I. See also Angela McIntyre and Thusi Thokozani, "Children and Youth in Sierra Leone's Peacebuilding Process." *African Security Review* 122003:73–80 (noting the failure to address youth issues during the peace process and the marginalization of

Sierra Leone in violation of its domestic and international obligations to protect the rights of children to life, survival and development, including an obligation to ensure an environment that fosters dignity and respect for the child.³⁷

The experiences of child miners and their vulnerability to post-conflict exploitation and abuse highlight the importance of child-centered approaches to reconstruction and development, including measures that can redress war-related vulnerabilities. While eradicating child mining requires broad-based reforms to address basic inequities, more immediate measures are critical, such as providing affordable and accessible primary education and alternative livelihoods for impoverished children and their families.

Benefits of Economic Justice for the Post-War Recovery of Children

Recent empirical research supports the importance of providing education and ensuring livelihood opportunities for the post-war recovery of children. In an important study published by Psychologists Without Borders on the psychosocial well-being of children affected by war, Theresa Betancourt et al. interviewed two hundred and sixty-six former child soldiers (male and female) in Sierra Leone at the time of their re-entry into their communities. Three years later, the team was able to re-interview one hundred and thirty-three of them, plus a group of self-integrated former child soldiers who were now young people.³⁸ Many former child

youth that persisted in the country's peace-building phase).

³⁷ Consider the government's domestic obligations to prohibit child labor (The Child Right Act, 2007, Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43, preamble, paras. 128, 130, 2007) and to ensure access to education (The Education Act, 2004, Supplement to the Sierra Leone Gazette Vol. CXXXV, No. 19, para. 3, 2007).

³⁸ T.S. Betancourt, I. Borisova, J. Rubin-Smith, T. Gingerich, T. Williams, and J. Agnew-Blais, *Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The State of the Field and Future Directions* (Austin, TX: Psychology Beyond Borders, 2008), available at <http://psychologybeyondborders.com/Publications.aspx>, [hereinafter Psychosocial Adjustment and Social Reintegration].

soldiers reported that the post-war socioeconomic challenges they faced were more problematic than their experiences during the war. Others had managed to lead productive, healthy lives, “particularly when provided with some basic assistance to pursue schooling or develop a trade.”³⁹ The authors concluded that there has been “a consistent failure of development agendas to invest in developing systems of care beyond primary health care and education (i.e., child protection, social welfare systems).”⁴⁰

The loss of educational and economic opportunities experienced by children associated with the fighting forces poses serious threats to their long-term stability.⁴¹ Longitudinal research of former child soldiers in Mozambique, for example, found that “their daily economic situation has been, and continues to be, one of the major obstacles in their transition to daily life.”⁴² In research on the reintegration of war-affected children in Uganda, Jeannie Annan and Chris Blattman found that more education led to the

³⁹ Ibid., at 2, 3.

⁴⁰ *Psychosocial Adjustment and Social Reintegration*, at 51. Adding that particular attention is needed for war-affected girls and women and that “[s]ervice providers must recognize the double indemnity that girl soldiers face as extreme levels of exposure to violence are often compounded by increased risk of sexual violence, unwanted pregnancy and its social consequences.”

⁴¹ Consider, for example, N. Boothby, “When Former Child Soldiers Grow Up: The Keys to Reintegration and Reconciliation,” in N. Boothby, A. Strang and M. Wessells, eds), *A World Turned Upside Down: Social Ecological Approaches to Children in War Zones* (Bloomfield, CT: Kumarian Press, Inc, 2006); N. Boothby, J. Crawford and J. Halpern “Mozambique Child Soldier Life Outcome Study: Lessons Learned in Rehabilitation and Reintegration Efforts” *Global Public Health* 1(1) 2006:87–107; J. Williamson, “The Disarmament, Demobilization, and Reintegration of Child Soldiers: Social and Psychological Transformation in Sierra Leone” *Intervention: International Journal of Mental Health, Psychosocial Work, and Counselling in Areas of Armed Conflict* 4(3) 2006:185–205; and T. S. Bettancourt, S. Simmons, I. Borisova, S. Brewer M. De la Soudiere, “High Hopes, Grim Reality: Understanding Issues Surrounding the Education of Former Child Soldiers in Sierra Leone,” *Comparative Education Review* 52(4) 2008:565.

⁴² Bettancourt et al, at 18, citing N. Boothby, J. Crawford and J. Halperin, “Mozambique Child Soldier Life Outcome Study: Lessons Learned in Rehabilitation and Reintegration Efforts,” *Global Public Health* 1(1) 2006:87–107.

increased employment of young people.⁴³ The authors also noted that those with higher levels of education were less likely to undertake risky income-generating activities.

Social Risks Posed by Economic Injustice, Especially in War

It is difficult to prove a direct causal link between economic inequality and war.⁴⁴ The role played by young combatants and child soldiers in the recent civil wars of Liberia and Sierra Leone, however, has been considered extensively in this regard. Human rights and social science research addressing these wars has confirmed that certain factors, especially poverty, produced disaffected young people who “became dependent on the patronage of military commanders as a way to transform their physical vulnerability and economic desperation.”⁴⁵ In reviewing findings from this body of work, Jean-Harvé Jézéquel draws attention to how

⁴³ J. Annan, C. Blattman and R. Horton, *The State of Youth and Youth Protection in Northern Uganda* (New York: UNICEF, 2006). See also J. Annan and C. Blattman, *The Psychological Resilience of Youth in Northern Uganda: Survey Of War Affected Youth, Research Brief 2* (Uganda: Survey for War Affected Youth, 2006).

⁴⁴ The root causes of conflict are deep and complex, and no one factor may be pointed to as the ultimate trigger or cause. See Paul Collier and Anke Hoeffler, “Greed and Grievance in Civil War,” *World Bank Working Paper*, 2001 (arguing that profit-seeking motivations – or greed – provide a strong explanation for civil war); but see Cynthia J. Arnson and William Zartman, *Rethinking the Economics of War: The Intersection of Need, Greed and Greed* (Washington, DC: Woodrow Wilson Center Press, 2005); and Karen Ballantine and Jake Sherman, eds., *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (New York: International Peace Academy, 2003).

⁴⁵ William Murphy, “Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars,” *African Studies Review* 46(7) 2003:61 at 66. See also Paul Richards, *Fighting for the Rain Forest: War Youth and Resources in Sierra Leone* (Great Britain: International African Institute and James Currey 1996), at xvi-xviii; Ibrahim Abdullah, “Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone” *Journal of Modern African Studies* 36(2)1998:204; Morten Bøås, “Liberia and Sierra Leone – Dead Ringers? The Logic of Neopatrimonial Rule,” *Third World Quarterly* 22(5) 2001 697, 718 (“Recruitment to various groups (was) often built on a master-apprentice principle,” where young men were connected to “respected and highly feared warlords”).

“involvement in armed movements provides a means of escaping the marginalisation of a society in which social and economic integration has broken down.”⁴⁶ The research demonstrates that young people are prone to recruitment in armed conflict as a result of “economic, social and political exclusion, threats to identity, layers of trauma, and direct and indirect experience of a variety of forms of violence and displacement.”⁴⁷

Social science research has long debated the causes of violence in Africa.⁴⁸ The complexity of this issue makes it important to avoid “monolithic views of male youth as threats,” which can lead to the presumption that “where there are young males...there *will* be violence.”⁴⁹ Indeed, Ismail Olawale emphasizes that dysfunctional youth culture should be viewed “as a consequence rather than a cause of state collapse.”⁵⁰ In view of these findings, it is imperative to remedy the war-related harms and corresponding economic needs of Sierra Leone’s child miners and to prevent the potential repetition of pre- and post-war cycles of exploitation and abuse.

In 2005, Save the Children identified primary responses needed to reduce the recruitment of children into armed forces in western

⁴⁶ Jean-Hervé Jézéquel, “Les Enfants Soldats d’Afrique, un Phénomène Singulier.” (Child Soldiers in Africa: A Singular Phenomenon?) *Vingtième Siècle. Revue d’Histoire* 89, January to March 2006, translated into English by Edward Gauvin. Available in English at: www.diplomatic.gouv.fr/en/img/pdf/jezequelgb.pdf.

⁴⁷ *Peacebuilding after Peace Accords*, at 42.

⁴⁸ See, for example, Reuben Loffman, “Review Article – A History of Violence: The State, Youth, and Memory in Contemporary Africa,” *African Affairs* 108(430), 125–133; David Keen, *Conflict and Collusion in Sierra Leone* (Oxford: James Currey, 2005) [hereinafter *Conflict and Collusion in Sierra Leone*]; William Reno, “Political Networks in a Failing State: The Roots and Future of Violent Conflict in Sierra Leone,” (IPG Paper 2/2003: International Politics and Society: 60).

⁴⁹ *Peacebuilding after Peace Accords*, at 45.

⁵⁰ Ismail Olawale, “Youth Culture and State Collapse in Sierra Leone: Between Causality and Casualty Theses,” (paper presented at the UNU-Wider Conference, Helsinki, 3-6 June 2004); consider also David Keen’s argument against labels of young people such as “lumpen,” which “run the risk of further stigmatiz[ing]” youth, in *Conflict and Collusion in Sierra Leone*, at 65.

Africa. These included ensuring that children remain with their families where possible and are properly cared for and protected; reducing household poverty; and providing children with alternatives through schooling or skills training.⁵¹ However, the situation facing young people in the region appears far from fulfilling these recommendations.⁵² The failures are both social and economic. According to an analysis by Human Rights Watch, these young combatants are “suspended in a grim world of deprivation, boredom and poverty,” where “defeated by the socio-economic conditions back home – conditions created in part by their own violent behavior – they slipped, optimistic, across borders and into their next war.”⁵³ In the case of Sierra Leone, Olawale finds that building a positive “youth culture” has been “regrettably neglected by, and excluded from, post-war reconstruction and peace building.”⁵⁴

TRANSITIONAL JUSTICE AND SUPPORT FOR THE ECONOMIC RECOVERY OF CHILDREN

This section considers how transitional justice initiatives can complement efforts to protect the social and economic rights of children in post-conflict societies. Through participatory processes, transitional justice can provide valuable information on the nature

⁵¹ “Fighting Back: Child and Community-Led Strategies to Avoid Children’s Recruitment into Armed Forces and Groups in West Africa,” 2005.

⁵² See, for example, IRIN, “Sierra Leone: Could Youth Unemployment Derail Stability?” (3 March 2009) (Reporting that according to the UN “just 1.4 percent of Sierra Leone’s annual budget was earmarked for youth issues in 2008”).

⁵³ *Youth, Poverty and Blood*, Conclusion (conducting a comprehensive analysis of the experiences of child and youth soldiers during and after the recent conflicts in West Africa).

⁵⁴ Olawale refers to the positive impact of the National Youth Service in Nigeria as part of wider youth sector reform during the country’s transition from military rule, which he argues was instrumental “to repair the damaged youth culture, to re-channel the energy of the youth population towards productive ventures, to make youth imbibe democratic ethos and to reawaken a spirit of positive nationalism in youth.”

and scope of children's socioeconomic vulnerabilities, which tend to perpetuate continued violations of their rights. Transitional justice processes can facilitate the direct participation of children and young people in setting priorities for post-conflict development and remedial measures. They can also advocate for giving priority to child-centered development programs that address these vulnerabilities, including through reparations policies. Finally, transitional justice mechanisms can initiate and inform much-needed collaboration with relevant child protection and institutional actors to ensure that institutional reforms are designed to respond effectively to the information gathered. Although the task of realizing economic justice is enormous and faces many practical limits, transitional justice measures can in some cases undertake a complementary role, making considerable contributions to development initiatives.

Links between International Development and Transitional Justice

Transitional justice can complement initiatives aimed at advancing economic justice for people living in societies in transition, including children. Efforts to rebuild and rehabilitate societies have historically been at the center of international development practice, while questions of accountability for perpetrators of grave violations have dominated the practice of transitional justice. Recently, however, the transitional justice field has begun to examine deeper questions concerning recovery from structural violence and armed conflict and its relationship with social reconstruction and development.⁵⁵ In a review of literature and practice, Zinaida Miller notes the past failures of transitional

⁵⁵ See, for example, Pablo de Grief and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) [hereinafter *Transitional Justice and Development*]; volume 2 (2008) of the *International Journal of Transitional Justice*, which was entirely devoted to the subject of transitional justice and development. Consider also the findings and recommendations of the Truth and Reconciliation Commission for Sierra Leone and the Truth and Reconciliation Commission of Liberia, available at www.trcofliberia.org/.

justice discourse “to investigate fully the socioeconomic background to the conflicts in question, to elucidate the structural violence of the past or to fully grapple with the economic aspects of transition.”⁵⁶ Among the costs of this “invisibility” of economic questions, Miller counts the incomplete understanding of the origins of conflict and the related possibility of future violence.

Reviewing research undertaken in Argentina, El Salvador and South Africa, Lisa Laplante also calls for transitional justice to engage in questions of economic justice, noting that a failure to spread the benefits of economic development “looms like social and economic dynamite,” that, once ignited, can undermine the work of transitional justice mechanisms to sustain peace and reconciliation.⁵⁷ Laplante draws attention to the opportunity for transitional justice mechanisms to support development work by framing “socioeconomic roots of conflict in terms of rights... (thus) making social justice a legitimate priority in post-conflict recovery,” facilitating participatory processes to raise such claims and generating rights-based recommendations to promote social justice.

Prioritizing economic justice for children is critical to realizing the overarching objectives of ensuring peace and reconciliation for societies in transition. However, transitional justice and international development initiatives cannot replace state obligations to protect and promote the social and economic rights of children. Indeed, these responsibilities are vast; they require marshaling considerable financial resources and building state capacity over generations. Given these realities, it is important to recognize the risks inherent in ever-expanding mandates of transitional justice mechanisms and the danger of overreaching.⁵⁸

⁵⁶ Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2(266) 2009.

⁵⁷ Lisa Laplante, “Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2(331) 2009.

⁵⁸ For a discussion of the risks inherent to linking transitional justice and development, see Pablo de Greiff, “Articulating the Links between Transitional Justice and Development,” in *Transitional Justice and Development*, at 39, 40, 41 (highlighting questions of significance,

Right to an Effective Remedy for War-Affected Children

Transitional justice features prominently in the post-conflict programming toolkit as an established societal process for considering the past and accounting for rights violations and potentially remedying them.⁵⁹ Under international law, the right to an effective remedy presents a robust normative foundation for transitional justice processes to engage in and prescribe remedial measures, such as reparations and institutional reforms that encompass economic justice for children. However, practice to-date has been limited.

Remedying Violations of International Law

As underscored in international human rights treaties and declarations, the right to an effective remedy imposes an obligation on states to investigate, prevent and, in some cases, punish human rights abuses.⁶⁰ The right to an effective remedy is reflected in numerous human rights treaties, including the Convention for the Protection of Human Rights and Fundamental Freedoms,⁶¹ the

overload and efficacy when transitional justice mechanisms attempt to engage in matters of direct developmental impact from an economic perspective).

⁵⁹ Consider Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34(4) 2007:412 (finding that transitional justice has become "normal, institutionalized and mainstreamed"); R. Teitel, "Transitional Justice Genealogy" (Symposium: Human Rights in Transition), *Harvard Human Rights Journal* 16 2003: 69-94.

⁶⁰ Consider article 8 of the Universal Declaration of Human Rights, considered to reflect international human rights law, which states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." UN Doc. A/810 (12 December 1948).

⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms, article 13, 4 November 1950, 213.

American Convention on Human Rights,⁶² the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶³ and the International Covenant on Civil and Political Rights.⁶⁴

Several sources under international law acknowledge reparations as a core element of the right to an effective remedy for violations of international law. As early as 1927, the Permanent Court of Justice established reparations as an element of providing an effective remedy: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”⁶⁵ Guarantees of the right to a remedy for violations of protections under international human rights

⁶² American Convention on Human Rights, article 25, 22 November 1969. In general, the Inter-American Court on Human Rights’ jurisprudence concerning article 1(1) of the American Convention on Human Rights requires State parties to “ensure” the rights set forth in the Convention and affirms the right to a remedy under international human rights law.

⁶³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force* 26 June 1987 (consider the operation of articles 4, 5, and 6).

⁶⁴ International Covenant on Civil and Political Rights, article 2(3) expressly states that any person whose treaty rights are violated has the right to “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Some international legal jurists argue that this right has attained the status of customary law. Bassiouni, for example, has stated that a well-established principle in international law holds that each state has a duty to provide a domestic legal remedy to victims of human rights abuse. See M. Cherif Bassiouni, “International Recognition of Victims’ Rights,” *Human Rights Law Review* 6 2006:203, 213. See also Jordan J. Paust, “On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts,” *Michigan Journal of International Law* 10 1989:543, 616 (“the right of access to the courts and the concomitant right to an effective remedy are...recognized as fundamental human rights having a basis in customary international law”).

⁶⁵ *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21. The Permanent Court of Justice was established after World War I; it was followed by the United Nations International Court of Justice. This holding was recently reaffirmed by the Permanent Court’s successor — the International Court of Justice — in its advisory opinion in the Israeli Security Wall case. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 9 July 2004 (holding that Israel has an obligation under international law to provide reparations to Palestinians for material damages sustained due to the construction of an illegal wall on their territory).

instruments have also been interpreted to include reparations.⁶⁶ For example, article 2(3) of the International Covenant on Civil and Political Rights,⁶⁷ which guarantees an effective remedy to any individual whose rights have been violated, has been determined by the Convention's human rights committee to require "that State Parties make reparation to individuals whose Covenant rights have been violated."⁶⁸ Finally, the right to adequate reparations in connection with armed conflict has also enjoyed long-standing protection in the body of international humanitarian law.⁶⁹

More recently, the United Nations General Assembly in 2005 adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,⁷⁰ which affirm the legal obligation to provide adequate, effective and prompt reparations.⁷¹ Reparations

⁶⁶ Consider article 8 of the Universal Declaration of Human Rights; Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 39, CRC; Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination.

⁶⁷ International Covenant on Civil and Political Rights, adopted on 16 December 1966.

⁶⁸ CCPR Human Rights Committee, General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, para. 15, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004). Note, the Committee identified reparations as "central to the efficacy of article 2, paragraph 3."

⁶⁹ Consider Convention Respecting the Laws and Customs of War on Land, article 3, 18 October, 1907, 1 Bevans 247 (the Fourth Hague Convention); Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949; Article X of the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

⁷⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Reparations Principles"), adopted 16 December 2005, G.A. res. 60/147, UN Doc. A/RES/60/147 (2005). For general recommendations regarding children and reparation, see the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20, Section 8, "The Right to Reparation," 2005.

⁷¹ "Reparations Principles," Preamble and para. 2.

for gross human rights violations were recognized to include restitution, compensation, rehabilitation, satisfaction and guarantees of nonrecurrence.⁷²

Thus, under international law, the normative basis of the right to reparations has progressively broadened from that of ensuring restitution for a violation of state obligations to encompassing a variety of broader remedial measures, including reparations. These can extend to individual and collective measures, financial and nonfinancial measures and commemorative and reform measures.⁷³ Enjoying a broad foundation under international law, reparations can therefore be considered as grounded in both rights and policy.

As defined, the right to a remedy, including in the form of reparations policy, can and should include measures for economic justice, which can redress rights violations of an economic nature. The formal element of “compensation,” for example, can be provided in the form of education and other social benefits, while “rehabilitation” can include medical, psychological and other social services. Both are critical to repair the type of harms that undermine children’s right to survival and development, in addition to having considerable benefit for the recovery of war-affected children from serious violations. Indeed, “where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed.”⁷⁴

⁷² For a summary of these elements, see “Rule of Law Tools for Post-Conflict States: Reparations Programmes,” Office of the United Nations High Commissioner for Human Rights (Geneva: OHCHR, 2008), available at www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

⁷³ See Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, at 18; Stef Vandeginste, “Reparation,” in International IDEA Handbook on Reconciliation After Violence Conflict (2009), at 146 [hereinafter “Reparation”]. For a comprehensive presentation of the varied forms of reparations programs and policy, see Pablo de Grief, *The Handbook of Reparations* (Oxford: Oxford University Press, 2008). See also Naomi Roht-Arriaza and Katherine Orlovsky, “A Complementary Relationship: Reparations and Development,” in *Transitional Justice and Development*.

⁷⁴ Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20, para. 37, 22 July 2005.

Reparations Policies and Programs for War-Affected Children

Though international law provides a broad foundation from which to consider how to remedy systematic violations of children's rights during and after conflict, practical challenges remain. These concern how to determine the nature and scope of potential remedial policies, as well as appropriate eligibility criteria and means to ensure program effectiveness. To-date, reparations policies, programs and institutional reforms have yielded little to instruct or inform these questions.

Dyan Mazurana and Khristopher Carlson recently conducted a comprehensive survey of eight truth commissions and their consideration of child rights violations, as well as development of reparations policies and programs.⁷⁵ “With the notable exceptions of Peru and Sierra Leone,” the authors found that “in no other reparations program were child survivors of grave rights violations or child rights organizations systematically consulted to help shape the scope, processes and outcomes of reparation programs.”⁷⁶ In terms of substance, the reparations programs they surveyed generally failed to recognize or address grave violations suffered by children, which resulted in a failure to consider children as individual rights holders and thus, corresponding failures; to consider and define crimes in ways that include children; and conduct targeted outreach to child survivors. Also, the truth commissions surveyed were generally found to impose barriers that impeded children from accessing reparations, such as age- and time-limited benefits, and a requirement for the child to have experienced multiple harms in order to qualify. Also noted was an

⁷⁵ Dyan Mazurana and Khristopher Carlson, “The Role of Reparations in Recognizing and Addressing Crimes and Grave Rights Violations Against Girls and Boys During Situations of Armed Conflict and Under Authoritarian and Dictatorial Regimes,” in Ruth Rubio-Marin, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (Cambridge: Cambridge University Press, 2009), at 176.

⁷⁶ Ibid.

overall failure to ensure that age-appropriate benefits accounted for the change in children's roles and responsibilities after transition.

An argument can be made that such shortcomings could have been avoided if these processes had fully applied the CRC in their treatment of children and had considered child rights violations and remedial measures. The CRC articles and interpretations provide a comprehensive foundation for realizing the full range of children's rights; indeed, "the interdependence of children's political, civil, economic, and social rights [under the CRC] suggests that a child-friendly reparations policy" must consider how children have experienced violations of this broader set of rights.⁷⁷ It may be necessary to explicitly identify children for particular post-transition measures. Consider the conclusions of Piers Pigou in this volume with respect to the South African experience. The author notes that although the integration of reparation and development goals did not "exclude giving priority to specific groups, in practice this has not occurred [especially] with respect to victims and survivors recognized by the TRC."⁷⁸

When children are explicitly included in the mandates of transitional justice processes, it appears that more consideration is given to the violations they have suffered and the remedial measures necessary to redress such violations. The Sierra Leone TRC was explicitly mandated to consider the experiences and needs of children.⁷⁹ They participated in statement-taking and hearings, and the TRC considered child rights violations and corresponding remedies in the final report.⁸⁰

⁷⁷ Saudamini Siegrist, Kelli Muddell, Samar Al-Bulushi, Roger Duthie and Marieke Wierda, *Children and Truth Commissions: Basic Considerations* (Florence: UNICEF Innocenti Research Centre, forthcoming in 2010).

⁷⁸ Piers Pigou, "Children and the South Africa Truth and Reconciliation Commission." Chapter 4 of this volume,

⁷⁹ Sierra Leone TRC Report, Chapter Four, Children and the Armed Conflict in Sierra Leone.

⁸⁰ The process included the development and publication of a children's version of the final report. See *Truth and Reconciliation Report for the Children of Sierra Leone, Child-Friendly*

Despite these groundbreaking advances, serious questions and concerns remain following application of the country's reparations policy and program. Specifically, in addition to the protection gaps described earlier, initiatives undertaken by the United Nations Peacebuilding Commission⁸¹ and the government agency responsible for implementing the reparations policy (National Commission for Social Action)⁸² have been criticized by local and external actors for their failure to meaningfully address the post-war reparations needs of the population, especially children and young people. Armed with US \$1.8 million,⁸³ the Peacebuilding Commission has been found to be "an advisory inter-governmental organ [that] lacks [the] operational executive authority to preside over or affect policy coherence and coordination."⁸⁴ In Liberia, the Truth and Reconciliation Commission (TRC) "undertook significant preparatory work and acquired the necessary technical expertise through partnerships with a number of specialized [child protection] agencies and civil society organizations." It did this as part of its mandate to undertake "specific mechanisms and procedures to address the experiences of...children and vulnerable

Version, 2004, at 14, available at www.unicef.org/voy/media/TRCCF9SeptFINAL.pdf.

⁸¹ IRIN, "Sierra Leone" ("In 2006 the UN Peacebuilding Commission [PBC] selected Sierra Leone as a recipient country of its Peacebuilding fund, and together with the Sierra Leone government the PBC identified youth employment as a priority issue for peace consolidation. However, since then the government has downgraded youth on its priority list, according to staff at the Centre for Coordination of Youth Activities in Sierra Leone").

⁸² Consider reports that the government of Sierra Leone is not providing the National Commission for Social Action with the necessary funds to implement the reparations program recommended by the country's Truth and Reconciliation Commission (IRIN, "Sierra Leone: Lack of Funds for Amputees, Rape Survivors, War Widows," 23 February 2009, available at www.irinnews.org/Report.aspx?ReportId=83100); see also "NACSA Doles out U.S. \$1.3 Million as Micro-Grants," *Concord Times*, 7 October 2009, available at <http://allafrica.com/stories/200910070768.html>.

⁸³ United Nations, Outcome of the Peacebuilding Commission High-Level Special Session on Sierra Leone, (New York: United Nations, 5 June 2009), para. 4(d).

⁸⁴ Severine Rugumamu, "Does the UN Peacebuilding Commission Change the Mode of Peacebuilding in Africa?" *Friedrich-Ebert-Stiftung Briefing Paper*, 8 June 2009.

group[s], paying particular attention to...child soldiers” and to give “special attention to...the experiences of children and women during armed conflicts in Liberia.”⁸⁵ The recommendations proposed in the Final Report of the TRC include a broad-based reparations scheme that encompasses symbolic and material reparations to address the post-conflict needs of children. According to the Commission, “ideally, any reparation schemes will target entire communities and children as a group rather than single out individual children.”⁸⁶

Role of Transitional Justice in Realizing Economic Justice

How can transitional justice support the work of governments, as well as donor and international and local development agencies, to repair the socioeconomic harm suffered by children during and after political violence or armed conflict? As discussed above, transitional justice processes may not be the best mechanisms for realizing economic rights.⁸⁷ However, transitional justice processes can determine the nature of the systemic harms endured by war-affected children while identifying and advocating for appropriate forms of redress to fulfill their socioeconomic needs.

Responding to Child Rights Violations Before, During and After War

Fashioning remedies, laws, policies and programs to sustain the long-term protection of children’s rights requires an understanding of children’s war-related vulnerabilities. Reactive and fragmented

⁸⁵ Ibid., citing TRC Act, Article IV, Section 4e; Article VII, Section 26(f).

⁸⁶ Republic of Liberia, Truth and Reconciliation Commission, Volume Three: Appendices, Title II: Children, the Conflict and the TRC Agenda, at 107.

⁸⁷ “With their relatively short timeframes and undoubtedly large increase in number of potential victims who would fall under their purview, charging these mechanisms with the causes and consequences of poverty, and with establishing individual guilt for economic crimes may well decrease their ability to accomplish their work in any sort of effective way.” *Violence, Truth and Youth*, at 37.

efforts to remedy violence against children remain insufficiently funded, and they focus narrowly on symptoms and consequences of violence, as found by the Independent Expert for the United Nations Study on Violence against Children.⁸⁸ Thus, researchers analyzing child rights violations have been urged to consider “(i) the breakdown of education and health care systems, (ii) child rights violations that happen as part of aggression against the family, (iii) human rights violations targeted directly against children, such as arbitrary executions; (iv) rights violations that are unique to children, for example, family separation; and (v) violations perpetrated by adolescents.”⁸⁹ Transitional justice processes can support information-gathering on these issues, complement the measurement of continuing harms endured by children and consider how they persist despite the end of war.

Children have been the casualties of serious rights violations in times of peace and war. Based on his review of research exploring the societal treatment of children across multiple periods, Jézéquel links the prevalence of child soldiers (and consequently, the abuse of children during war) to a “longer history of child labor in colonial and post colonial African economies.”⁹⁰ Jézéquel emphasizes the need to understand the role and use of children in society because the “omnipresent figure of the child soldier, perceived as an aberration of modern times, prevents us from seeing the continuities in the violence perpetrated on children in times of peace as well as war. Even today the figure of the child

⁸⁸ United Nations General Assembly, Report of the independent expert for the United Nations study on violence against children, A/62/209 (New York: United Nations, 7 August 2007) para. 61.

⁸⁹ UNICEF, Expert Meeting on Transitional Justice and Children, convened by UNICEF Innocenti Research Centre, November 2005.

⁹⁰ Jean-Hervé Jézéquel, “Child Soldiers in Africa,” *op. cit.* Recognizing the need for deeper historical treatment on the topic of children in Africa, Jézéquel considers the existing work of historians and anthropologists covering the history of children on the continent from the slave trade to the key role played by child labor in colonial economies, which leads him to conclude that “we can, however, put forward the hypothesis that the study of child soldiers would have greatly benefited from being put back in the context of a longer view of history.”

miner, exploited in the pit mines of Sierra Leone or the East Congo, does not arouse the same international mobilisation as do child soldiers.” The present depiction of child soldiers has skewed our understanding of children’s experiences during war because a focus on denouncing those behind the victimization of children during war ignores the influence of pre-war sociopolitical dynamics.⁹¹

Major donor agencies and development institutions already give considerable attention and funding to areas such as health and education in post-conflict countries. However, the rights violations of war-affected children can reflect a long-standing systemic failure to protect the social and economic interests of children and their families. Transitional justice mechanisms can thus also complement the development process by enhancing understanding of children’s experiences during war and proposing solutions to violations of children’s rights that are linked to broader economic injustices that persist prior to, during and after war.

Sustaining the survival and development of children requires identifying the causes and the remedial approaches to dynamics that perpetuate endemic poverty, structural violence, social instability and the resulting violations of children’s rights. Consider, for example, the findings of Liberia’s Truth and Reconciliation Commission: “Liberia’s history of deprivation of large parts of the country and large segments of the population had left many children extremely vulnerable to potential exploitation and abuse.”⁹² Specifically, the chapter on children in the Liberian Truth and Reconciliation Commission Report finds that the “[inequitable] distribution of educational opportunities across the country mirrored the highly unequal distribution of health and other social services across the country. [These circumstances] reflect the deep inequalities inherent to Liberian pre-war society, and [were] translated into economic opportunities, which meant that most

⁹¹ Ibid. According to Jézéquel, failing to contextualize the experience of children with respect to violence tends to “emphasize, unfortunately, the tragic ordinariness of the instrumentalisation of children in war.”

⁹² Republic of Liberia, Truth and Reconciliation Commission, Volume Three: Appendices, Title II: Children, the Conflict and the TRC Agenda, Chapter 7 – “Reparations,” at 3.

children from far-off counties and from rural areas had no prospects of social mobility.”⁹³

The Machel Study Ten-Year Strategic Review emphasizes the continuing need to strengthen monitoring and reporting on “all impacts on children and violations of their rights.”⁹⁴ In carrying out their mandates, transitional justice processes have typically collaborated with child-rights advocates and practitioners, including coordinating community-based networks and training of statement-takers in child-friendly techniques. To ensure continued value from this process, transitional justice mechanisms should also consider what measures can be sustained after their mandates to build on these collaborative efforts and to facilitate continued data collection.

Finally, through participatory mechanisms, transitional justice processes can involve children and their families. These processes support the collection of valuable information on community needs and can serve to inform communities about initiatives to ensure that state actors and international agencies are held accountable. This approach is an important complement to development enterprises that do not inherently involve participatory processes or transparency. Indeed, as Pablo de Greiff argues, transitional justice can make a significant contribution to development by strengthening the notion of inclusive citizenship, which promotes participatory rights through which citizens can engage in a common political project.⁹⁵

Post-Conflict Reform Agenda

Corresponding with the objective to “build trust in the state and

⁹³ *Ibid.*, at 23.

⁹⁴ United Nations General Assembly, Report of the Special Representative for Children and Armed Conflict, A/62/228, reporting on findings of the Machel Study 10-Year Strategic Review (New York: United Nations, 13 August 2007), Recommendation 4, para. 106.

⁹⁵ Pablo de Greiff, “Articulating the Links between Transitional Justice and Development,” in *Transitional Justice and Development*, at 62.

in its commitment to guaranteeing human rights in the future in an inclusive way,”⁹⁶ transitional justice processes can help set an agenda in support of children’s rights by prescribing institutional reforms and reparations policies and programs as part of post-conflict reconstruction efforts. Indeed, as visible political actors, transitional justice mechanisms such as truth commissions have the “legal and/or moral authority” to draw attention to systemic obstacles to justice and to mobilize support for reforms.⁹⁷

Based on international obligations to provide a remedy for serious rights violations, transitional justice measures can prescribe reparations policies and programs as well as institutional reforms. The ability of such measures to systematically highlight violations of the rights of children can lead to “public recognition of their status as victims, public recognition of their suffering and the damage they have sustained, and a serious public effort to repair at least symbolically the harm done.”⁹⁸

Beyond symbolic repair, however, promoting children’s economic rights can influence the development and practice of post-conflict reconstruction strategies, as well as an overall peace and security agenda. Recommendations of transitional justice processes for reparations policies and institutional reform serve as immediate post-conflict pronouncements on the systemic repairs needed to ensure economic and social justice for children. As such, they can enable prioritizing the social and economic needs of

⁹⁶ International Center for Transitional Justice, “Reparations in Theory and Practice,” *Reparative Justice Series*, available at www.ictj.org/static/Reparations/0710.Reparations.pdf, [hereinafter “Reparations in Theory and Practice”]. Recent work on the gender of reparations similarly argues for the need to set an agenda for realizing women’s rights through reparations; see Ruth Rubio Marin, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009) [hereinafter *The Gender of Reparations*].

⁹⁷ See Rolando Ames Cobián and Félix Reátegui, “Toward Systemic Social Transformation: Truth Commissions and Development,” in *Transitional Justice and Development*, at 146. (The authors argue that transitional justice unfolds “in the field of profound social transformations, and that a central aspect of those transformations is the change in collective beliefs regarding, precisely, the feasibility of achieving justice in practice.”)

⁹⁸ “Reparation,” at 148.

children in post-conflict programming agendas. Shifting agendas is important, as it can lead to real impacts by reshaping the margins of acceptable action; creating opportunities for redefining reputations and naming and shaming; changing incentive structures and the definition of interests and preferences; and influencing expectations.⁹⁹

Undertaking a broader approach to socioeconomic reparations and reforms for children is critical for societies in transition where there exists a viable opportunity for institutional and structural reforms. Individual compensation mechanisms alone are not likely to result in the most appropriate and comprehensive responses to gross human rights violations; instead, some combination of individual compensation and broad policy measures to benefit victims is needed to accomplish reparation.¹⁰⁰ Considering the redistributive potential of certain transitional justice measures, “reparations must cast an eye to the future as part of a broader effort to sow the ground for future peace and stability” because, “as a utopian project, transitional reparations must be justified by the goal of achieving reconstruction and reform. In particular, reparations must reflect the primary goal of achieving new social and material conditions for former victims.”¹⁰¹

In the case of war-affected children, post-conflict recovery measures should include collective remedies rooted in social programs. According to Bettancourt, “systems must be developed to ensure that all war-affected [children and] youth get some basic services and that screening, referral and treatment systems are in place to ensure that individuals needing a higher level of care receive it.”¹⁰² For instance, UNICEF’s Child Protection Strategy aims

⁹⁹ Peter Uvin, “On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise,” *Praxis: The Fletcher Journal of Development Studies* 17, 2002:2.

¹⁰⁰ “Reparations in Theory and Practice.”

¹⁰¹ David Gray, “A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice,” *Washington University Law Review* (forthcoming).

¹⁰² Bettancourt, at 4. See also Erika George, “After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability,” *Loyola*

to enable fulfilment of immediate recovery needs and provides a strong framework for assessing appropriate responses to those needs. The framework identifies strategic actions for supporting the development of national child protection systems that can support and strengthen families to reduce social exclusion, and to lower the risk of separation, violence and exploitation.¹⁰³ Directed policies that outline the immediate realization of social and economic rights of children can reinforce their role as “equal citizens in the new political order.”¹⁰⁴

CONCLUSIONS

I want the TRC to help us have good health and free education for our country Liberia. I want the TRC to help us to redevelop our country Liberia, and finally, I want the TRC to help us have a peaceful nation, not go back to war.

– Statement by a girl participating in a Liberian TRC workshop¹⁰⁵

For societies to recover from the harms inflicted by armed conflict and to sustain peace, development priorities must include protection of the full range of children’s fundamental rights. The field of transitional justice can play a complementary role in this process. Developing and implementing sustained programs to

International Law Review 5(59) 2007:78-85; Julia Paulson, “(Re)creating Education in Post-Conflict Contexts: Transitional Justice, Education and Human Development” (International Centre for Transitional Justice, 2009), available at www.ictj.org/static/Publications/Devt_Education_Full.pdf.

¹⁰³ United Nations, UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev.1 (New York: United Nations, 20 May 2008), Part II. A., para. 12.

¹⁰⁴ Rubio Marin, “Introduction,” in *The Gender of Reparations*, at 25.

¹⁰⁵ Gbargna, Bong County, 19-20 October 2007. Republic of Liberia, Truth and Reconciliation Commission, Volume Three: Appendices, Title II: Children, the Conflict and the TRC Agenda, Chapter 7, at 2.

respect the fundamental social and economic rights of children is critical for a number of reasons. First, international law requires realization of children's rights to development and welfare, including after armed conflict. Second, children become adults, and without a healthy foundation from which they can contribute positively to society, marginalized youth are easy prey for actors seeking to profit from sociopolitical instability.

Transitional justice processes can complement post-conflict reconstruction efforts by informing and advocating for institutional reforms and reparations policies that link multiple social, economic and political variables and ensure that child-focused measures are initiated and sustained amid competing development priorities. Consider, for example, the approach recommended in the chapter on children in the Liberian Truth and Reconciliation Commission final report.¹⁰⁶ It calls for achieving justice for children and advocates "multiple interventions at many different levels of the political system and society, a mix of measures toward reconciliation and prosecutorial justice as well as renewed attention to offer the young war generation the opportunities they have been missing out on in terms of education, health care, opportunities to advocate for their rights and interests, to earn a living and to be master of their own normal lives."¹⁰⁷ Embarking on such reforms will not be an easy task. Though the TRC has articulated the way forward, child rights advocates would be advised to repeat this message continuously and to ensure that the interests of children are integrated in all policies of every government ministry.

A large-scale, post-conflict reconstruction strategy cannot completely eradicate childhood poverty and youth unemployment. However, giving priority to the realization of economic justice for war-affected children is clearly a key component of maintaining long-term social stability and of breaking cycles of child exploitation and abuse. Economic justice can thus go far in protecting

¹⁰⁶ Theo Sowa, "Children and the Liberian Truth and Reconciliation Commission." Chapter 6 of this volume

¹⁰⁷ *Ibid.*, at 104.

children from falling victim to grave rights violations. Transitional justice processes not only provide the means to understand how to remedy violations of children's rights resulting from armed conflict, but can work to motivate and inform sustainable, child-sensitive post-conflict development initiatives.

ANNEX

Key Principles for Children and Transitional Justice

**Key Principles for Children and
Transitional Justice:
Involvement of Children and Consideration
of Children's Rights in Truth, Justice and
Reconciliation Processes**

**Outcome of Children and Transitional Justice
Conference**

**Harvard Law School, Cambridge, Massachusetts, USA
27-29 April 2009**

I. Preamble

Children have an important role to play in transitional justice processes because they are victims and witnesses of crimes committed, and may also be recruited and used in hostilities. In addition, as family members and citizens of their communities, children are key partners in reconciliation and peace-building processes. In all cases, children have a right to express their views in matters and proceedings affecting them.

States have a duty to prevent, investigate and prosecute crimes under international law, and to provide effective remedies to victims, including reparations. Unless perpetrators responsible for such crimes – including crimes committed against children – are brought to justice, there are likely to be negative consequences for future peace and stability.

Truth, justice, reparation and reconciliation processes have begun to specifically address crimes committed against children in situations of armed conflict or political violence, and have involved children proactively. A range of options exists for engaging children as participants, including through testimony that bears witness to

their experiences. In some cases children may be simultaneously victims, survivors and alleged perpetrators of violations.

Truth, justice, reparation and reconciliation processes should reflect local conditions and priorities for children. At the same time, consistency and coherence are needed across national and regional contexts. Complementarity among diverse transitional justice mechanisms is crucial to provide a comprehensive framework for child protection and participation. Whatever combination of transitional justice mechanisms is chosen, it must be in conformity with international legal standards and obligations, and respect, protect and promote the rights of children.

Common minimum standards on children and transitional justice should be developed, drawing on good practices and lessons learned, and based on the Convention on the Rights of the Child (CRC) and other international and regional standards and treaties.

Children's participation in transitional justice processes should strengthen their protection, and protection should enable their participation. Effective participation and protection of children in transitional justice processes, when properly supported and guided, can build the capacity of children as active citizens and help break the cycle of violence and conflict.

II. Definitions

Child: A child is a person who is below 18 years of age (CRC, article 1). Adolescence is defined as the period of life between 10 and 19 years of age (World Health Organization).

Transitional justice: The term 'transitional justice' comprises "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or

none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” (Report of the United Nations Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies,” United Nations, New York, 23 August 2004 (S/2004/616), para 8.)

III. Principles for Child Protection and Participation in Transitional Justice

- The best interests of the child should guide transitional justice processes.
- Children must be treated with dignity and respect.
- Transitional justice mechanisms – including when designing and implementing policies and child-friendly procedures – should ensure the protection of children against violence and promote their physical and psychological well-being.
- Protection of the identity of the child and the child’s privacy must be guaranteed at all times.
- Children have the right to participate in decisions affecting their lives. The participation of children should be voluntary, with the informed consent of the child and parent or guardian. The decision not to participate can also be a form of participation.
- Policies and procedures to protect the rights of children involved in transitional justice processes should include a specific focus on adolescents and should be consistent with the evolving capacities of the child.
- A gender-sensitive approach to participation in transitional justice processes should include a focus on the protection of the rights of girls and should address their specific needs and experiences.
- Participation should be non-discriminatory and should include, as appropriate, diverse ethnic, racial, religious and other groups, and take into consideration the specific needs of children with disabilities.

- Transitional justice processes should facilitate the realization of children's civil, political, economic, social and cultural rights. A human rights-based approach to transitional justice processes should be holistic and sustainable, addressing the root causes of armed conflict and political violence, and strengthening the protective environment for children in their families and communities.

IV. Specific Principles and Programmatic Recommendations

Judicial mechanisms

Judicial mechanisms include national judicial systems, the International Criminal Court (ICC), ad hoc tribunals established by the United Nations, and other special courts and tribunals that investigate and prosecute persons allegedly responsible for the commission of serious crimes under international law. States have the primary duty to investigate and prosecute those responsible for serious crimes under international law. Where the national justice system is unable or unwilling to conduct effective investigations or prosecutions, international or hybrid criminal courts may exercise complementary jurisdiction.

- Justice mechanisms should address serious crimes under international law, including those committed against children, through investigation, prosecution of perpetrators and redress for victims. These crimes encompass genocide, crimes against humanity and war crimes, including the conscription, enlistment or use of children to participate actively in hostilities, enforced disappearances, extra-judicial killings, torture, sexual violence and slavery. Where children are victims of crimes under international law this should be considered as an aggravating factor during sentencing. International cooperation and extraterritorial jurisdiction to pursue accountability for crimes committed against children should be encouraged and supported.

- There should be no amnesty for perpetrators responsible for the commission of crimes under international law, specifically genocide, crimes against humanity, war crimes and gross violations of human rights, including those against children.
- There is emerging consensus that children associated with armed forces or armed groups who may have been involved in the commission of crimes under international law shall be considered primarily as victims, not only as perpetrators.
- In principle, children should not be held criminally responsible under an international jurisdiction.
- Children accused of crimes under international law must be treated in accordance with the CRC, the Beijing Rules and related international juvenile justice and fair trial standards. Accountability measures for alleged child perpetrators should be in the best interests of the child and should be conducted in a manner that takes into account their age at the time of the alleged commission of the crime, promotes their sense of dignity and worth, and supports their reintegration and potential to assume a constructive role in society. In determining which process of accountability is in the best interests of the child, alternatives to judicial proceedings should be considered wherever appropriate. In addition, no child should be tried in a military justice system. Neither the death penalty nor life imprisonment should ever be imposed against children.
- Detention of children should be used only as a last resort and for the shortest appropriate period of time. Children who are detained should be separated from adults, unless it is not in their best interests to do so. Children should never be detained solely due to their alleged association with an armed force or group.

- Children's participation as victims and witnesses in investigations and court proceedings for crimes under international law should be voluntary, with the informed consent of the child and a parent or guardian. Before interviewing or obtaining testimony, a careful assessment should be undertaken of the child witness to determine that the interview or appearance in court is in the best interests of the child, and what special protective measures are required to facilitate the testimony. All investigators and prosecutors involved with child witnesses should be trained in child rights and child-friendly interviewing techniques.
- When a child is participating in judicial proceedings, legal procedures should be adapted to the needs and evolving capacities of the child, in accordance with the provisions of the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (UN Guidelines).
- Protection measures should include shielding the child from viewing the accused, provision of culturally appropriate psychosocial support, use of specially trained judges and court staff, and protection of the child's identity and privacy. Processes must be conducted in the child's language, and measures should be taken to ensure that the child understands the aims and objectives of the trial process, as well as the potential consequences of participation. Every effort should be made to minimize disruption to the life and well-being of the child.

Truth commissions and truth-seeking mechanisms

Truth commissions are official, temporary, non-judicial or quasi-judicial fact-finding bodies that investigate abuses of international human rights and humanitarian law. They constitute an important mechanism to examine the impact of armed conflict and political violence on children. Truth-seeking processes that address past

human rights abuses, including human rights archives, commissions of inquiry and consultative bodies, should also protect and promote the rights of children and encourage children's participation, as appropriate.

- The investigation and documentation of civil, political, economic, social and cultural rights violations by truth commissions should include a specific focus on crimes and violations against children, and should take into consideration the full spectrum of rights guaranteed under the CRC and other international norms and treaties.
- When children are accused of committing crimes under international law, truth commissions should recognize that children are primarily victims of armed conflict or political violence. Truth commissions should consider the age of the child at the time of the alleged violation in establishing the extent of his or her responsibility.
- Truth commissions should take into account children's agency and their role as active citizens contributing to justice and reconciliation in their communities. The involvement of children in truth commissions should thus include participation in diverse activities, such as outreach, statement-taking, thematic and closed hearings, creative expressions, community-based reconciliation efforts, contribution to the formulation of recommendations, and the preparation of a child-friendly report.
- Statements and testimony to truth commissions should capture children's distinct experiences and their diverse roles as victims and witnesses and, when appropriate, as participants in hostilities or political violence. Truth commissions should establish policies and procedures to ensure the safe and meaningful participation and protection of children. They should specifically encourage participation by girls and children from diverse ethnic, racial, religious and other groups, as appropriate.

- Truth commissions should include experts on child rights among commissioners and staff, and should ensure that all commissioners and staff receive appropriate training in child rights and child protection procedures.
- Truth commissions should partner with national and international child protection agencies to support their engagement with children, including in the provision of psychosocial support.
- The participation of children in truth commissions should be in their best interests and should promote their physical and psychological recovery and social reintegration. Culturally appropriate and holistic psychosocial support services should be provided before, during and as a follow-up to children's involvement in truth and reconciliation processes. Where possible, they should be community-based and should involve the family. Specific consideration and follow-up measures are needed for survivors of sexual violence.
- A children's version of the truth commission's final report should be disseminated in local languages. Children should have the opportunity to participate in efforts to ensure implementation of truth commission recommendations, particularly those affecting children.

Outreach and consultations

National and community outreach to inform and engage children is critical for their successful participation in transitional justice processes. Children should be consulted on the most effective forms of outreach, helping to ensure that transitional justice processes reflect their experiences and needs and maximize their participation.

- Consultation with children on transitional justice processes should: i) make use of existing structures such as schools, clubs, child welfare committees, religious and faith-based groups; ii) involve child protection agencies and local leaders in identifying and supporting child participants while recognizing possible risks; iii) ensure girls voices are encouraged and heard through separate consultations for girls, as needed; iv) include children from ethnic, racial, religious and other groups, as well as children with disabilities; v) give feedback directly to the communities on consultation outcomes; and vi) explain limitations, whether in the case of a court, truth commission or reparations program or any other form of accountability process, so that expectations are realistic and realizable.
- Meaningful child and adolescent participation should also inform and engage parents, caregivers, teachers, religious and community leaders, and other adults in transitional justice processes.

Local, traditional and restorative justice processes

Local, traditional and restorative justice processes can contribute to accountability for the broad range of crimes committed during armed conflict and support transformation to a more peaceful and stable society, when the state has entrusted such process to carry out certain legal tasks in its legal order. However, such processes must conform to international human rights standards, in particular with regard to judicial guarantees, gender equality and the protection of children's identity and well-being.

- Local, traditional and restorative justice processes that have been entrusted by the legal order of a state to carry out judicial tasks may be used to decide minor criminal and civil matters, provided human rights standards are recognized and respected. Such mechanisms can help to address the impunity gap at the community level. The

judgments of local, traditional and restorative justice proceedings must be able to be challenged in a way that conforms with international human rights law. These mechanisms, however, cannot be used to try serious crimes as defined in national law, and are never to be used to try or otherwise address crimes under international law.

- Where local, traditional and restorative justice processes have not been entrusted by the state as part of its legal order to decide minor criminal or civil matters, such alternative fora may nevertheless play a significant informal role in dispute resolution. However, such processes are not to be used to try any type of crime but rather to find an outcome between parties when a wrongful act has been committed. Provided these processes respect human rights standards, and in particular the principle of gender equality, they can contribute to resolving disputes. When such processes are not recognized in the legal order, there can be no solution to a dispute that would be similar to a judgment rendered by a criminal court, including in particular the deprivation of liberty.
- Local, traditional and restorative justice processes should respect, protect and promote the rights of children and all other participants, whether as victims, witnesses or perpetrators. They should support the reintegration of children formerly associated with fighting forces, and assist in rebuilding trust within communities. The participation of children in those processes should be based on the voluntary and informed consent of the child and the parent or guardian, and must be in full compliance with international child rights standards and must follow the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. Practices used in local, traditional and restorative justice processes must not re-victimize children who have been recruited or used in hostilities.

- Local, traditional and restorative justice processes can include opportunities for alleged perpetrators to acknowledge and apologize for acts committed. When such processes involve children as alleged perpetrators, they must ensure respect for children's legal guarantees as outlined in the CRC and the UN Guidelines. The focus of children's participation should be their reintegration and psychosocial recovery. Under no condition should children be subjected to public shaming.
- Where such mechanisms are in conformity with human rights standards, support from the international community, including United Nations agencies, international non-governmental organizations and donor countries, has the potential to strengthen the work of local, traditional and restorative justice mechanisms in the reintegration of children and protection of their rights. Such support, when appropriate, may be directed to and co-ordinated with community and traditional leaders, teachers, parents and others who are involved with children on a daily basis and together can form an effective safety net.
- Local, traditional and restorative justice processes possess both strengths and shortcomings concerning the protection and promotion of children's rights and their role in relation to transitional processes. Further review, analysis, monitoring and evaluation of these processes are needed to better understand their potential in diverse situations.

Reparations for children

Through a range of measures, reparations programmes attempt to repair the impact of violations suffered by victims during armed conflict and political violence. Reparations can contribute to children's recovery and their reintegration within their families and communities.

- Reparations programmes should be based on a careful assessment of the harms suffered by girls and boys during armed conflict and political violence to determine their individual and collective needs. Eligibility for reparations should consider the multiple ways in which children have been affected. Safeguards should be put in place to ensure that eligibility for reparations does not categorize or stigmatize groups of children identified and that children's rights to protection of identity and privacy are fully respected.
- The design and implementation of reparations programmes should be coordinated with child protection agencies, child rights experts and representatives from key sectors, including education and health care, as well as with a broad range of civil society groups, community leaders, and children and youth groups.
- In determining reparations for children, due account should be taken of the relevant provisions and principles of the CRC, such as the right to health care and education and the rights of children with disabilities to special care.

Institutional reform

Child-focused institutional reform in transitional contexts should build a protective environment for children by strengthening health care and education systems, social services and public institutions to protect and promote children's rights. Early engagement and coordination is needed among sectors undertaking institutional reform and transitional justice processes to enable children's protection and participation. The genuine and meaningful participation of children in institutional reform can strengthen the protective environment and assist in preventing the recurrence of violence and conflict.

- States should sign and ratify international and regional treaties that protect and promote the rights of children, and should establish national institutions to ensure the implementation of child rights at the national and local levels, including children's ombudspersons offices.
- National laws should explicitly define and criminalize acts prohibited under international law, specifically those against children, including the conscription or enlistment or use of children to participate actively in hostilities, enforced disappearances, extra-judicial killings, torture, sexual violence and slavery. Specific measures should be implemented to define, criminalize and combat gender-based violence.
- Security sector reform should prioritize the prevention of violence against children and other child rights violations. Measures to improve accountability and legal oversight mechanisms, including vetting, complaints procedures and training on child rights, should be adopted for all components of the security and justice sectors, as well as private security actors.
- Legal reform and the reform of national justice systems should prioritize justice for children and the adoption of child-friendly legal procedures. Reform should include training in child rights for judges, prosecutors, judicial officers, police and staff in correctional facilities. Where suitable given the nature of the particular offence, alternatives to deprivation of liberty should be promoted for children, without resorting to judicial proceedings, as appropriate and in line with international standards and the best interests of the child.
- Reforms to health-care delivery should include measures specific to children, such as vaccinations, malaria prevention, health education and easily accessible local

clinics that will lead to stronger and healthier future generations.

- Institutional reform should prioritize the education system, addressing inequalities or discrimination that may have inhibited the provision of quality education or contributed to societal intolerance and violence. Training for teachers and school officials should be given priority, addressing issues such as child rights, citizenship and civic responsibility, and the abolition of corporal punishment. When appropriate, transitional justice institutions, in particular truth commissions, should directly engage with the education sector to support curriculum reform, helping to ensure that human rights, citizenship, life skills and the history of the conflict are included in the primary and secondary public school curricula.
- Measures to improve systems of child protection and social and psychosocial welfare should be included in national development plans and strategies, with psychosocial support integrated into education systems in areas affected by conflict. These services should target children's needs, in particular children orphaned by war and child-headed households. Specific attention should be given to educational and vocational training to enable children to realize their rights in post-transition societies and to decrease disparities in future economic development. Special attention should be given to measures to promote physical and psychological recovery and social reintegration of child victims of armed conflict and political violence.

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