



Office of the Special Representative
of the Secretary-General for

CHILDREN AND ARMED CONFLICT

WORKING PAPER N° 3

Children and Justice During and in the Aftermath of Armed Conflict



September 2011

Cover photo

*One of the children, holding a photograph of his father.
The pictures are intended to be sent to the families, SOS
Grand Lac centre for former child soldiers, North Kivu province,
Goma, Democratic Republic of the Congo.*

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for Children and Armed Conflict**

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About the Office

THE OFFICE of the Special Representative of the Secretary-General for Children and Armed Conflict (OSRSG/CAAC) was established following the groundbreaking report on the *Impact of armed conflict on children* (A/51/306 and Add.1) presented to the General Assembly in 1996 by Ms. Graça Machel, former Minister of Education of the Republic of Mozambique. This report provided the first comprehensive assessment of the multiple ways in which children were abused and brutalized during armed conflicts. It called the attention of the international community to better protect children affected by armed conflict.

In 1996, the General Assembly adopted resolution A/RES/51/77 which called for the Secretary-General to appoint a Special Representative as a high-level independent voice on this issue. In April 2006, the Secretary-General appointed Ms. Radhika Coomaraswamy as Under-Secretary-General, Special Representative for Children and Armed Conflict. In this capacity, she serves as a moral voice and independent advocate to build awareness and give prominence to the rights and protection of girls and boys affected by armed conflict.

One of the children, holding a photograph of his father. The pictures are intended to be sent to the families, SOS Grand Lac centre for former child soldiers, North Kivu province, Goma, Democratic Republic of the Congo.

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Preface

IN SITUATIONS of armed conflict, children are increasingly brought before the justice system, both international and national, either as victims and witnesses or to stand trial as defendants. This has exposed the grey areas in legal and judicial systems where children's participation in armed conflict has been rarely anticipated. Humanitarian actors urging the best interest of the child, often faced challenges from civil rights and defence groups fighting for the rights of adult victims. Lacking in clearly articulated principles, judicial and administrative decisions were often made on a case by case basis with a great deal of divergence in both theory and practice.

The purpose of this paper is to bring more conceptual clarity to the issue of children and justice in times of armed conflict by examining relevant legal provisions, academic discussions and a number of case studies. It attempts to articulate how children who have suffered grave violations during armed conflict can access justice and how the current system deals with child victims and witnesses. It also explores the issues surrounding responsibility of children who may have committed international crimes during conflict, the nature of their accountability and where they should be placed in the spectrum between total impunity and total responsibility.

The paper aims at guiding and supporting advocacy efforts to ensure that the rights and best interest of the children are protected while ensuring that justice is done. We hope that Member States, United Nations departments and agencies as well as civil society partners will use the information contained in the Working Paper to further protect the rights of children, both victims and those accused of crimes.

I would like to thank Member States, child protection partners as well as legal academics for their advice and support in finalizing this Working Paper. We hope this effort will bring clarity where they may have been confusion, and result in a joint commitment to ensure that children before the justice system in situations of armed conflict are better protected.



RADHIKA COOMARASWAMY

*Under-Secretary-General and Special Representative
of the Secretary-General for Children and Armed Conflict*

Waiting for justice. A girl in conflict with the law lies on the floor inside a cell at the Children Protection Brigade Centre, Haiti.



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Acronyms and Abbreviations

OSRSG/CAAC	Office of the Special Representative of the Secretary-General for Children and Armed Conflict
CAT	UN Convention against Torture
CRC	Convention on the Rights of the Child
DDR	Disarmament, Demobilisation, and Reintegration
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	United Nations Economic and Social Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMF	International Military Forces
MNF-I	Multi-National Force in Iraq
NDS	National Directorate of Security
NGO	Non-governmental organization
OPAC	Optional Protocol on the Involvement of Children in Armed Conflict
POW	Prisoner of War
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UNDP	United Nations Development Programme



Children in an internally displaced persons' camp near Suleimaniyah holding bouquets of flowers, Iraq. © UN PHOTO/PERNACA SUDHAKARAN

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."¹

TRUTH AND RECONCILIATION COMMISSION REPORT FOR THE CHILDREN OF SIERRA LEONE

IN MODERN day warfare, children, both girls and boys, are increasingly becoming the subject of military recruitment, targeted attacks, and sexual violence. The diversity of armed groups and the widespread and easy availability of small arms and light weapons have led to the recruitment and use of hundreds of thousands of child soldiers around the world. Children as young as eight are drawn into violence for a variety of reasons. Some are used by their commanders as front-line combatants, while others carry out support functions. During armed conflicts, many children are forced to witness or to take part in horrifying acts of violence. They suffer from being orphaned, raped, maimed and manipulated to give expression to the hatred of adults.² Many have lost their families, as well as education opportunities, a chance to enjoy their childhood, and to be part of a community.

Ending impunity

In the past two decades, the international community has taken a number of crucial initiatives to end impunity for grave violations against children. The Rome Statute of 1998, which established the International Criminal Court (ICC) in 2002, recognised "conscripting or enlisting children under the age of 15 and using them to participate in hostilities" as a war crime. Since the Statute came into force, crimes committed against children during armed conflict have figured prominently in indictments issued by the ICC in the Democratic Republic of the Congo (DRC) and Uganda. The first person to be tried before the ICC, Thomas Lubanga, was charged in 2006 solely

with the unlawful conscription and enlistment of children into the *Forces patriotiques pour la libération du Congo*. Charles Taylor, the former president of Liberia, is currently on trial before the Special Court for Sierra Leone (SCSL), charged with command responsibility for the crimes of enslavement, sexual violence, and the recruitment and use of children committed by the Revolutionary United Front (RUF) during the Sierra Leone civil war.

States bear the primary responsibility for bringing perpetrators of grave violations against children to justice. Over the past few years, a number of prosecutions have taken place in Myanmar and the DRC. Efforts should be strengthened at national level to ensure that crimes against children committed during armed conflict are investigated in a timely and rigorous manner, that perpetrators are held accountable for their acts and that mechanisms are put in place for the full participation and protection of children in both judicial and non-judicial processes.

Children and accountability

While many children are affected by armed conflict and some of them are direct victims of war crimes, a very small minority of children are also involved in committing crimes. Children become associated with armed forces or armed groups for various reasons. In some situations, they have been forcibly recruited or abducted by armed elements roaming streets, schools, and villages in search of new recruits. Recruitment also takes place in the context of poverty, ideological attraction, re-

venge, a sense of duty to protect the family or survival. Children are often desired as recruits because they can be easily intimidated and indoctrinated. They lack the mental maturity and judgment to express consent or to fully understand the implications of their actions. In some cases, they are forced to consume alcohol and drug and are pushed by their adult commanders into perpetrating atrocities, such as killing, torturing, and looting—sometimes against their own families and communities.

Although the need for some form of accountability is acknowledged, more effective and appropriate methods, other than detention and prosecution are encouraged, enabling children to come to terms with their past and the acts they committed. Alternatives that take the best interest of the child as the primary consideration and promote the reintegration of the child into his or her family, community and society, are recommended. This includes the use of restorative measures, truth-telling, traditional healing ceremonies, and reintegration programmes. Emphasis should be placed on prosecuting those who bear the greatest responsibility for crimes committed by children, their commanders.

Bringing conceptual clarity

This Working Paper examines how children who have suffered grave violations during armed conflict can access justice. It examines the way in which the current system enables child witnesses and victims to give evidence against perpetrators and those responsible for the orchestration of grave violations in the judicial, non-judicial, and traditional justice systems. The Working Paper also explores the responsibility of children who have committed criminal acts during armed conflict, the extent to which they should be held ac-

countable, and the different methods that can be used to assist children in reintegrating into their communities and into society.

The purpose of this Working Paper is to guide and support advocacy efforts, in particular vis-à-vis Governments, to ensure that, during and in the aftermath of armed conflict, the rights and best interests of children – as victims, witnesses, participants in hostilities or perpetrators of war crimes – are met. This publication is intended to serve as an advocacy tool aimed at United Nations' Member States, who bear the primary responsibility for protecting the rights of children affected by armed conflict, as well as United Nations agencies, funds and programmes, civil society partners, and other child protection advocates. Its purpose is to bring more conceptual clarity to the issue of children and justice in times of armed conflict, by bringing together key elements of relevant legal instruments and academic discussions, by providing a number of examples and case studies and by offering a set of concrete advocacy messages for action.

Chapter one, Children as victims and witnesses, begins with a reflection on what may constitute access to justice for children and how children may view the accountability of those responsible for the violations of their rights. It then explores the practices and main challenges of children participating in the justice system and the need for protection of children as victims and witnesses in both judicial and non-judicial justice mechanisms, including international courts and tribunals, Truth and Reconciliation Commissions (TRCs), and traditional justice systems and reparations.

Chapter two, Children, accountability and detention, addresses a much debated dilemma: where should children be placed in the spectrum between total impunity at one end, and total responsibility at the other? It also discusses the age at which children should be held criminally responsible. The Working Paper makes an important distinction between children who are perceived as a security risk, children who are members of an armed force or armed group and have actively participated in hostilities, and children who may have committed war crimes during their association with an armed force or armed group.

Children and Armed Conflict Working Paper Series

The Working Paper on Children and Justice During and in the Aftermath of Armed Conflict is the third in a series issued by the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, following *The Six Grave Violations against Children during Armed Conflict: the Legal Foundation* (2009) and *The Rights and Guarantees of Internally Displaced Children in Armed Conflict* (2010).

PART I

Children as victims and witnesses

CHILDREN ARE deeply affected by armed conflict, but perhaps none more so than those who are the victims of genocide, crimes against humanity, and war crimes, collectively referred to as international crimes or sometimes simply war crimes. Until recently, international crimes against children have gone largely unpunished and perpetrators of such crimes have not been held accountable, despite the fact that States have the responsibility to exercise criminal jurisdiction over those responsible for international crimes.³

Over the past 20 years there has been a noticeable change in attitude amongst the international community towards accountability for international crimes committed against children during times of armed conflict. The Rome Statute of the ICC (1998) defines the recruitment and use of children under the age of 15 in hostilities as a war crime.⁴ In addition, the Plan of Action incorporated in *A World Fit for Children*, adopted by the United Nations General Assembly's Special Session on Children in 2002, calls for an end to impunity and prosecution of those responsible for international crimes.⁵ This call to end impunity has been reiterated in other international documents, including Security Council Resolutions 1539 (2004)⁶, 1612 (2005)⁷, 1882 (2009)⁸ and 1998 (2011).

1. What is justice for children?

Access to justice for children who have been victims of international crimes can be achieved both during and after conflict through judicial, non-judicial, and traditional justice mechanisms. Although it is not possible to find a specific definition of what constitutes access to justice in international

legal instruments, it has been described by the United Nations Development Programme (UNDP) as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”⁹ The United Nations Common Approach to Justice for Children (2008) expands on this definition:

Children who fled the escalating violence in the southern part of Iraq share a small house with relatives in Turaq, Iraq. © UN/BIKEM EKBERZADE



International crimes as defined in the Rome Statute

Genocide refers to an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. The threshold for proving genocide is high, but military and political leaders have been found guilty of acts of genocide arising from the conflicts in Rwanda and Bosnia.

Crimes against humanity include, inter alia, murder, enslavement, torture, persecution, deportation, or forcible transfer of a population and enforced disappearance of persons, when these are part of a widespread or systematic attack against the civilian population.

War crimes are violations of the laws of war, including crimes such as wilful killing, torture and degrading or inhuman treatment, directing attacks against civilians, the passing of sentences without due process, rape, and other forms of sexual violence, as well as recruitment of children under the age of 15 into armed forces.

“Access to justice can be defined as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards [...]. Proper access to justice requires legal empowerment of all children; all should be enabled to claim their rights, through legal and other services such as child rights education or advice and support from knowledgeable adults.”¹⁰

In times of armed conflict, ensuring access to justice can be problematic due to the collapse of the judicial infrastructure and the displacement or disappearance of judicial staff, lawyers, and prosecutors. Informal, non-judicial, and traditional systems of justice are also likely to be disrupted and affected by conflict.

Children's views on justice

The State has primary responsibility for ensuring access to justice for those children who have suffered harm and damage as a result of grave violations of their rights. Children see justice as a broad concept, encompassing far more than judicial proceedings against perpetrators. Reports and research undertaken with children who are victims of armed conflict, have found that children want perpetrators who committed serious offences during armed conflict to be held accountable. Many children who participated in TRCs expressed the view that perpetrators should not go unpunished, particu-

larly when they continued to live in the same community, and when the child or the child's family had suffered at their hands.¹¹

For children, though, justice includes far more than punishing a perpetrator. Even more important to them is the restoration of their rights, especially their socio-economic rights, and an element of compensation and reparation to address the loss of those rights. Children have high expectations of non-judicial justice processes, and especially of TRCs. Follow-up research with children who participated in such commissions revealed that they had expected that this form of justice would support them to find their families, help them return to education, assist them to learn a trade so that they could find employment, and live independently. Those expectations, inevitably, could not all be met, leaving many children disappointed and disillusioned.

Challenges to justice for children

Whatever system or mechanism is put in place to enable access to justice once an armed conflict has ended, it is unlikely to meet these high expectations. In addition, there is frequently a tension between the State's search for reconciliation and children's desire that those responsible for the violations of their rights are held accountable for their human rights abuses. The issue of resources, both financial and human, also means that what can be offered to children in the form of compensation or reparation for their loss of childhood, education, and family life is limited. Neither is it likely that any system can offer access to justice for every child whose rights have been violated, let alone provide realistic compensation for their losses.

Maximising justice for children

In the face of these limitations, States need to channel their resources to ensure that children's access to justice is maximised. This may include granting children access to non-judicial forms of justice that can allow a wider number of children's voices to be heard. Whatever mechanisms are put in place, they need to take into consideration the broader impact of armed conflict



Orphaned and homeless children who live at the Ferry Port in Lungi begging for money and food from the departing United Nations Mission in Sierra Leone (UNAMSIL) Nigerian contingent, Sierra Leone. © UN PHOTO/ERIC KANALSTEIN

on children. It is clear that children will be disappointed with an approach that focuses strictly on violations such as recruitment, abduction or forced marriage, and does not acknowledge harm done to them by the loss of education, family and childhood.

Key Advocacy Points

- ▶ Consider ways in which children who have suffered violations of their rights can access justice and make their voices heard;
- ▶ Review current laws to ensure that children can be heard by judicial and non-judicial bodies;
- ▶ Establish judicial and non-judicial mechanisms to deal with grave violations against children, and ensure that children are included in their mandates;
- ▶ Provide technical expertise, training, and funding to those judicial and non-judicial bodies that will hear evidence of violations of children's rights;
- ▶ Raise awareness amongst children that they can have their voices heard in judicial and non-judicial forums;
- ▶ Work with children to manage their expectations of what can be achieved by giving evidence.

2. Children as victims and witnesses in judicial processes

Although national courts bear the primary responsibility for prosecuting international crimes, in many States affected by armed conflict the infrastructure of the judicial system is often either virtually non-existent or inadequate to take on the task. Judges, prosecutors, defence lawyers, and court administrators may have fled or been victims of the conflict themselves or, where they remain, cannot be trusted to be independent, and to act with integrity. By the time the judicial system is functioning again, many years may have passed and the children's recollection of the details of the crimes they witnessed may be less clear.

In order to assist States to put an end to a widespread culture of impunity, the international community has, over the last 20 years, set up new accountability mechanisms, assisting States to ensure justice. These mechanisms essentially take two forms: judicial courts or tribunals, which are formal bodies operating to set rules of procedure, and more informal, non-judicial TRCs. Children are increasingly playing a role in these mechanisms, as victims and, in some cases, as witnesses.

2.1. International courts and tribunals

Ad hoc tribunals

The first war crimes tribunal established since the Nuremberg Trials after the Second World War was the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993, closely followed by the International

Criminal Tribunal for Rwanda (ICTR), established in 1994.¹² These two tribunals, created by the United Nations Security Council, while regarded as successful overall, did not involve children to any great extent, though approximately four per cent of witnesses at the ICTY were aged 18-30. Given the delay in bringing the accused to trial, many of these adult witnesses were children at the time of the commission of the crimes.

Hybrid courts

Although there was pressure on the United Nations to establish further tribunals to try perpetrators of international crimes, an alternative approach to ensuring justice was increasingly being taken. Hybrid courts or internationalised domestic tribunals were established in Sierra Leone, Cambodia, East Timor, Bosnia and Herzegovina,¹⁵ Lebanon,¹⁶ and Iraq.¹⁷ These special courts are predominantly national courts, based within the State for which they were created and staffed by a mix of national and international judges, prosecutors, and administrators. Similar to the ICTY and ICTR, their goal is

Child witnesses at the Special Court for Sierra Leone

The SCSL is an independent judicial body set up to "try those who bear greatest responsibility" for the war crimes and crimes against humanity committed during the Sierra Leone civil war. The Court is located in Freetown. A small number of child witnesses gave evidence to the SCSL. This was largely due to the fact that for the first time ever, recruitment of children under the age of 15 into armed forces or groups, the use of children as active participants in hostilities, and forced marriage were all prosecuted as international crimes.¹⁸ The prosecution called 11 child witnesses to give evidence to support charges against the leading members of three armed groups accused of conscripting and enlisting child combatants into armed forces or armed groups.¹⁹ Children giving evidence were assured that they would not be prosecuted if they revealed that they had committed crimes as a child.

Youth witnesses before the ICTY

In the case of Krstić before the ICTY¹³ a witness, aged 22, gave evidence of what he had witnessed at Srebrenica when he was 17. Similarly, there were two child witnesses in the Foča trials (Prosecutor vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković)¹⁴ who were under 18 when they were victims of mass rape. This case is particularly important because it was the first case in which an international tribunal prosecuted sexual slavery and the first in which the accused were convicted of rape as an international crime.

to prosecute those alleged to have committed international crimes. Each court follows national legislation and has a slightly different jurisdiction reflecting the nature of the conflict in their country. In addition, most of these courts are limited to trying those persons who held leadership roles.

International Criminal Court

Building on the achievements of these tribunals, the ICC was established in 2002 by the Rome Statute.²⁰ Its jurisdiction covers the crime of genocide, crimes against humanity, and war crimes.²¹ The ICC is not intended to replace national courts but to complement them. It is, in essence, a court of last resort and will only try persons when national courts are unable or unwilling to investigate or prosecute these crimes. The Court has a limited jurisdiction; it can only exercise its jurisdiction over people from a State that has ratified the Rome Statute or a person who is alleged to have committed the crime on the territory of the ratifying State. The United Nations Security Council does, however, have the power to refer a situation to the prosecutor, even when the State has not ratified the ICC statute.²²

Child witnesses in the Lubanga case

In the first case to be tried before the ICC, the trial of Thomas Lubanga Dyilo, who is charged with the unlawful recruitment and use of children under the age of 15, the prosecution called nine witnesses who testified that they were former child soldiers. They were all under the age of 15 when the alleged crimes were committed.

2.2. Challenges regarding children as witnesses

Few children have appeared as witnesses in international tribunals and hybrid courts. There are a number of reasons for this. First, few trials, until recently, have involved violations against children; second, frequently there is a significant time lapse between the end of the conflict and the starting of a trial, by which time the child has become an adult; third, international criminal prosecutors are often reluctant to rely upon the



ICC Building. The Hague, Netherlands. © ICC-CPI/Max Koot

evidence of children, who they consider to be less reliable witnesses than adults, particularly if there is a long delay between the alleged crime and the trial.²³

Interviews with child witnesses

Multiple interviews by various investigation bodies often lead to accusations that the child's evidence is, as a result, tainted. There may be accusations that children "may be more inclined to give the answers that they think the adult wants to hear, and [...] may learn their testimony as they go, taking their cue from the adults who interview or assist them".²⁴ Apart from allegations that the evidence is tainted, it is rarely in the child's best interests to be interviewed on repeated occasions. Interviews should be kept to a minimum and should be conducted by trained professionals only.²⁵

A former child soldier as the first witness in the Lubanga case

The experience of the first witness in the Lubanga case illustrates the difficulties in balancing participation with the protection of children in justice processes. In January 2009, a former child soldier given the pseudonym Dieumer-ci, was called by the Office of the Prosecutor to testify against Thomas Lubanga, leader of the militia into which he had been recruited. Upon taking the stand, Dieumer-ci testified that when in fifth grade he, along with other school children, was kidnapped by soldiers and taken to a military camp. As the hearing progressed, Dieumer-ci became frightened and eventually recanted his testimony entirely. Two weeks later, Dieumer-ci took the stand again and repeated his initial testimony, explaining that, the first time he gave evidence before the court, a lot of things went through his mind; in particular, he felt threatened and scared by the presence of the defendant, his former recruiter and commander, in the courtroom. When called a second time, Dieumer-ci gave evidence from behind a screen. The defendant was no longer able to make eye contact or to intimidate the witness. This incident demonstrates the need for protective measures for children who give evidence and also highlights the need to familiarise child witnesses prior to the trial with the layout of the courtroom, the persons likely to be present and the procedures to be followed.

Other risks and difficulties

A further reason for reluctance to involve child witnesses includes the potential risks involved for the child. A child may face the possibility of reprisals, particularly when perpetrators and victims live in the same communities, or suffer re-traumatisation as a result of having to re-live events, and undergo cross-examination. Giving evidence might require a child to travel to a court in another country, which can be a daunting prospect for a child who may never have been abroad before.

2.3. Victims and witnesses unit

Children who give evidence against alleged perpetrators of international crimes need support and protection, both inside and outside the courtroom. All international courts and tribunals have some form of a victims and witnesses unit, though the level of support they are able to provide varies considerably. The ICC, building upon the victims and witnesses protection programme established by the SCSL, has established and implemented the most elaborate framework, leading the way for other courts.

Role of the ICC Victims and Witnesses Unit

The ICC Victims and Witnesses Unit is responsible for short and long-term protective

measures and security arrangements, medical and psychological support, and taking gender sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings. The Unit can assign a support person to specifically assist a child at all stages of the proceedings.²⁶ In addition, the Unit prepares children for giving evidence, familiarising them with courtroom procedures, the terminology used and the role of the people in the court.

Special protection measures

A number of special protection measures can be requested to assist a child to give his or her evidence:

- ▶ Hearings can be held in closed court sessions with only those persons whose presence is absolutely necessary;
- ▶ Screens can be erected in the courtroom so that the child cannot see the accused when he or she is giving evidence, or the child can sit in another room accompanied by a support person to give evidence through video link;²⁷
- ▶ When necessary, the testimony can be subject to voice and image distortion to protect the child;
- ▶ When a child gives evidence in the courtroom, the court can control the questioning so that the witness does not feel harassed or intimidated, particularly in the case of victims of sexual violence.

At the present time, all the international and hybrid courts require children to give evidence during the trial and to be subject to cross-examination. It is not possible for the child to give pre-recorded testimony, although many western legal systems now permit this. Neither does the ICC permit the use of intermediaries to rephrase questions in simpler language, enabling the child to give a clear and unambiguous response.²⁸

Participation vs. protection

While it may not always be in the best interests of child witnesses to give evidence in a court against an accused, for some it will be an effective mechanism for accessing justice. Whichever court the child appears in, national or international, the court should fully apply



Wilmot, 16, a boy delegate from Liberia, testifies on the impact of war on children, at a special meeting of the Security Council, New York, 2002.
© UNICEF/MARKISZ

the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005)²⁹ including the right to be treated with dignity, to be protected from discrimination, to be informed and to be heard, to be protected from hardship and intimidation, and to receive effective assistance.

Key Advocacy Points

- ▶ Interviews should be recorded and, wherever possible, video-taped. All interviews should be coordinated;
- ▶ Encourage national courts to permit the use of video evidence recorded when the child is being interviewed as a potential witness in place of giving direct evidence at the trial;
- ▶ Provide judges, lawyers, and lay members of the court with training on children's rights and child-specific interviews;
- ▶ Encourage national courts to set up victims and witnesses units, protect the child's privacy, and recognise that there is a need for both short and long term support and protection;
- ▶ Provide staff of victims and witnesses units with adequate training enabling them to implement the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses;
- ▶ Ensure that child victims and witnesses are accompanied at all stages of a judicial process by a trained support person responsible for conveying all relevant information to the child before, during and after the procedure.



ICC Courtroom. The Hague, Netherlands. © ICC-CPI

2.4. Victim status

The ICC offers an alternative and innovative mechanism by which children who are victims of international crimes can access justice. Rather than giving evidence as a witness in a case before the court, the ICC permits individuals who have suffered harm as a result of any crime within the jurisdiction of the Court to ask for *victim status* instead.³⁰ The option of being granted victim status at the ICC may be less stressful for a child and is less likely to cause re-traumatisation.

Participation of children with victim status

Child victims can participate either directly or through their legal representatives in a number of ways, though they may need to apply for permission to do so from the Court. Children may:

- ▶ Give observations to the judges while the Court is still deciding whether or not to proceed with an investigation or case;
- ▶ Present their views to the judges when the Court is considering what charges will be brought against the accused person;

Child victims in the Lubanga case

The ICC has in the past approved applications made on behalf of children by school teachers, community leaders, and civil society organisations. The Court recognised, in the Lubanga case, that a wide range of people must be able to act on behalf of children, as most children who have been recruited into armed forces have been separated from their parents and families at a young age, have not yet been reunited with their families and have no legal guardians.³⁵

- ▶ Attend and participate in hearings before the Court;
- ▶ Ask questions to a witness or expert who is giving evidence before the Court, or to the accused;
- ▶ Make statements before the Court at the beginning and end of a stage of proceedings.³¹

Eligibility for victim status

In order to claim victim status, a child must have suffered harm. This is defined as physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights through acts or omissions that constitute gross violations of human rights law or serious violations of international humanitarian law. The term *victim* not only covers the direct victim, but also his or her immediate family or dependants.³²

To apply for victim status the child, or someone acting on behalf of the child, must complete the proper paperwork and must provide proof of identity. The Rome Statute does not prescribe who can act on behalf of the child, and as a result, there is no requirement that it must be a parent or guardian.³³ Nevertheless, whoever acts on behalf of a child must have the child's prior and informed consent.³⁴

Advantages of victim status

1. **Representation:** Applicants are entitled to have a legal representative.³⁶ The child is not required to attend the court or to participate unless he or she explicitly wishes to. This allows children to focus on rebuilding their lives rather than worrying about appearing in court.
2. **Number of participating children:** Victim status also allows for a larger number of children who have suffered harm to access justice. The number of witnesses who are called by the Court to give evidence in a trial is inevitably limited due to time and court restraints. The number of children who may apply for victim status, on the other hand, is unlimited. Lawyers can act for groups of children, thus reducing legal costs for the Court and making it more likely that the child is able to access legal assistance.



Orphaned and homeless children who live at the Ferry Port in Lungi begging for money and food from the departing United Nations Mission in Sierra Leone (UNAMSIL) Nigerian contingent, Sierra Leone. © UN PHOTO/ERIC KANALSTEIN

3. Protective measures: As with children who are witnesses before the Court, the Victims and Witness Unit of the ICC also provides support and protective measures to children granted victim status. The protective powers of the Court include almost the same measures as for child witnesses giving evidence; the Court can hold the hearing in camera and can order measures which will prevent the public or press identifying the victim's name or place of residence. Both victims and witnesses are allowed to remain anonymous for protection reasons.³⁷

Key Advocacy Points

- ▶ Raise awareness amongst children who have suffered harm, their families and communities, and child protection actors of the possibility of claiming victim status at the ICC;
- ▶ Ensure that girls, in particular, who have been recruited into armed

forces or subjected to sexual abuse and forced marriage by armed forces or groups, are informed of the possibility of claiming victim status at the ICC;

- ▶ Work with and provide assistance to community members who wish to make an application for victim status on behalf of a child, but at the same time assess carefully the risk to a child of making a claim and ensure that, if necessary, protective measures are put in place;
- ▶ Approach lawyers to represent children who have indicated they want to apply for victim status. Such lawyers should receive appropriate training for representing children;
- ▶ Suggest that the concept of victim status, especially for children, be introduced into national legislation and applied in cases before national courts.

3. Children as victims and witnesses in non-judicial processes

For a number of reasons, only a small proportion of children who have suffered harm in armed conflict are ever likely to be called as witnesses in a trial before an international, hybrid or national court, or to claim victim status at the ICC. For other children, non-judicial mechanisms may provide a better opportunity to have their voices heard. The general view is that non-judicial mechanisms can provide more immediate accountability, enable community reconciliation, provide reparation for losses and damages occurred, and allow children to move on with their lives. They are not, however, without their own challenges.

3.1. Truth and Reconciliation Commissions

The most common non-judicial accountability mechanism over the last 20 years has been the Truth and Reconciliation Commission. There have been more than 25 TRCs world-wide. The objectives of such commissions vary from State to State, but generally include: providing a forum for hearing victims; establishing the truth of events and memorialising them through the creation of a historical record; addressing impunity; and promoting community reconciliation. Sometimes the commissioners are all nationals of the State and in other cases they are a mix of both national and international staff. Similar to the ICC, most commissions have some form of victims and witnesses support unit.

Child participation in the Sierra Leone and Liberia TRCs

Early TRCs showed little evidence of child participation. A very different approach was taken in the Sierra Leone Truth and Reconciliation Commission. From the beginning there was a clear focus on children. Child-friendly procedures were agreed and adopted before the Commission started its work, taking into account the Convention on the Rights of the Child (CRC).³⁸ Children were involved in statement-taking, closed thematic hearings, and the preparation of the first children's version of a final Truth and Reconciliation Report.³⁹

United Nations Convention on the Rights of the Child

The CRC is a binding international convention setting out the civil, political, economic, social, and cultural rights of children. A total number of 193 States and observers have ratified the Convention. Notably, there is no derogation clause, normally found in other human rights treaties that allows a party to the treaty to put some of the obligations contained in the CRC on hold during emergencies.

This trend was continued in Liberia, where the Liberian Act to Establish the Truth and Reconciliation Commission of 2005 required the: "adoption of specific mechanisms and procedures to address the experiences of [...] children [...], paying particular attention to gender-based violations, as well as to the issue of child soldiers, providing opportunities for them to relate their experiences, addressing concerns, and recommending measures to be taken for the rehabilitation of victims of human rights violations in the spirit of national reconciliation and healing."⁴⁰

The Act also required child rights experts to be employed to enable children to provide testimony to the TRC and the implementation of special mechanisms to handle child victims and perpetrators, not only to protect their dignity and safety, but also to avoid re-traumatisation and to ensure that their social reintegration and psychological recovery was not endangered or delayed.⁴¹

Young people involved in the process of memorialization, inter-generational dialogue and making a map of a mass killing site, Cambodia. © YOUTH FOR PEACE IN CAMBODIA





Villagers await the return of family members and friends who have been living as refugees in a Liberian refugee camp, Camp David in Western Liberia for more than a decade, Kenema, Sierra Leone. © UN PHOTO/ERIC KANALSTEIN

Giving evidence before a TRC

The most obvious way in which children can participate in a TRC is by giving direct evidence to the Commission, although to date, only a small number of children have given such evidence. There are a number of reasons for this, including restrictions on time and the number of witnesses that a TRC can hear; the geographical location of the Commission; the need not to re-traumatise children; and children finding the giving of direct evidence intimidating. If a Commission decides to hear direct evidence from a child, special procedures need to be put in place to protect the child, including the right to privacy, confidentiality, and anonymity. It is essential that children come to give direct evidence on a voluntary basis.

In order to ensure wider participation of children, TRCs have had to rely on more innovative approaches to obtain evidence, such

as sending out statement takers across the country, particularly to areas most affected by the conflict. The Sierra Leone and Liberia cases show that this only provides useful evidence for the Commission if the statement takers are well trained in how to interact and work with children.

Other ways of participating in a TRC

Children can also participate in the work of the TRCs through workshops, special sessions, thematic hearings, and specific children's hearings.⁴² In South Africa, children submitted artwork, engaged in musical and drama performances and read testimonies. In Peru, children participated in awareness raising activities, information dissemination on the process, the objectives and activities of the Commission, and memory workshops.

Focus on the best interest of the child

Not all children will be willing or should be encouraged to give statements before a TRC about the abuses and violations they suffered. In some cases, it may result in grave psychological trauma and illness, renewal of despair, depression, or, in rare cases, even suicide. It is important that statement takers are trained on how to assess the vulnerability of the child, and to determine whether participation is in the individual child's best interest. The safety and security of the child also need to be carefully considered and psychosocial support needs to be available before, during and after the child gives a statement, either through a victim and witnesses support unit or using a trained local organisation or community members. When statements are taken, it should be in a child-friendly environment and on a one-to-one basis, unless the child wants someone to accompany him or her.

Challenges to child participation in TRCs

Although the Sierra Leone and Liberia TRCs have placed a far greater emphasis on engaging children, significant challenges to the effective participation of children remain.

1. **Limits and focus of the mandate:** Many TRCs have, in accordance with their mandate, focused on serious violations of human rights and international humanitarian law, obscuring the real impact of the conflict on children. The mandate of TRCs needs to contain specific reference to the impact of the conflict on children and provide specifically for child participation, if a complete picture of the violations is to be obtained.
2. **Need for training on child rights:** Many of the TRC staff may have little knowledge about child rights and how to work with children. In addition, a rapid turn-over of staff or a tight financial budget can make it difficult to maintain a well-trained cadre of statement takers or staff skilled to undertake participation activities with children. This requires a considerable amount of initial and ongoing training by United Nations and other child rights organisations.

3. **Dealing with expectations:** A great deal of awareness raising needs to take place if children are to understand the purpose of the TRCs, and to have realistic expectations of what they can achieve. For some children, telling their story may not be sufficient.⁴³

Key Advocacy Points

- ▶ Advocate to ensure that the mandate of TRCs include a specific focus on violations of children's rights, and provide for the participation of children and the employment of staff who are skilled in working with children;
- ▶ Establish strong partnerships with national child rights organisations, community leaders, schools, and faith-based organisations at the planning stage of the TRC to promote children's participation and protection;
- ▶ Conduct awareness campaigns among children and civil society on the mandate of and the possible participation in the TRC;
- ▶ Provide initial and ongoing training to staff of the TRC on how to interact and work with children;
- ▶ Assist in setting up child-friendly procedures to enable children to give evidence to the TRC in a variety of ways, while ensuring children's safety, confidentiality, and privacy;
- ▶ Work with the TRC to ensure that children are informed of the outcomes of the TRC.

3.2 Traditional justice mechanisms

In some countries, local traditional justice mechanisms are commonly used to resolve disputes between families and clans in a community and to bring about settlement and reconciliation. For many children in these countries, traditional justice may be the only form of justice that they and their families and communities view as meaning-

ful and to which they have possibility of access. This may be particularly the case where the national justice system is perceived as corrupt and ineffective.⁴⁴ Traditional justice can take a number of forms and can require the alleged perpetrator to apologise, compensate, or make reparation to the injured party. Decisions are generally more widely accepted by the community and can be very effective in promoting healing in the community and reconciliation between the victim and the perpetrator.

Limitations of traditional justice

As with all other forms of justice, however, there are limitations, particularly in the aftermath of armed conflict. Traditional justice relies upon oral tradition and customary practice, which can be lost as a result of displacement, dissipation of collective memory, and loss of traditional authority in times of breakdown of social structures. In addition, traditional authority often resides with the elder males of the community. A patriarchal structure may not always take into account children's rights, especially the rights of girls who can be subject to discriminatory practices leading to further violations of rights. Further, while traditional justice is generally relied upon to resolve differences between families or clans, it has not been used to address international crimes or gender-based crimes. In Uganda, the traditional justice system, preferred by most children, could not cope with either the large number of cases, nor with crimes with which it had no experience, such as forced marriage.⁴⁵

Ensuring children's rights

Research in Uganda has shown that although children favoured traditional justice, in practice they had little understanding of it, and as a result derived little relief from it. This may be particularly the case where the traditional ceremonies do not include an apology, acknowledgement of the child's suffering, compensation, or support. Traditional justice may, however, be the most accessible form of justice and the challenge is to ensure that it provides an effective remedy to children, promotes their rights and does not perpetrate further injustices. This requires

United Nations agencies, international and national NGOs to provide community decision makers with information and training on child rights, child protection, and the impact of armed conflict on children. In situations where there are inadequate resources to compensate children financially or materially, traditional justice mechanisms should at least publicly condemn violations against children, especially practices such as forced marriage or rape.⁴⁶

Key Advocacy Points

- ▶ Engage in dialogue with community leaders on how to include child rights standards and child protection into traditional justice structures and decision making;
- ▶ Raise awareness within communities who use traditional justice mechanisms to promote healing and reconciliation on child rights violations and child protection issues;
- ▶ Provide NGOs and community decision makers information and training on traditional justice systems and the implementation of children's rights;
- ▶ Advocate with communities to offer child victims some form of recognition of the rights abuses that they have suffered, and psycho-social support.

Muslim children in Vitez, Bosnia and Herzegovina. © UN PHOTO/JOHN ISAAC



4. Reparations for children

The concept of reparations

Reparations are intended to acknowledge the suffering and harm to victims and provide compensation, restitution, and redress for violations, with the aim of returning victims to their previous condition to the maximum extent possible. Reparations are also seen as a way of providing social justice in post-conflict societies where access to justice and seeking redress through the courts is not possible.⁴⁷

Customary international humanitarian law requires parties responsible for serious violations to make full reparations for the losses and injuries caused. In addition, the Rome Statute, establishing the ICC, provides that “the Court shall establish principles relating to reparations [...] including restitution, compensation, and rehabilitation.” Under the Statute, reparations are not limited to individual monetary compensation, but can also include collective forms of reparation and symbolic measures that could promote reconciliation within divided communities.⁴⁸ The right of a person to seek some form of compensation, restitution, satisfaction, or redress when he or she is the subject of a violation of human rights is also well recognised under international and regional human rights law, including under Article 39 of the CRC.⁴⁹

The principles underlying reparations can be found in the 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

(2006).⁵⁰ The document highlights the duty on States to provide “adequate, effective, prompt and appropriate remedies to victims, including reparations⁵¹, defining them as:⁵²

- ▶ **Restitution:** e.g. release from detention or custody, return home, restoration of property, and enjoyment of human rights generally;
- ▶ **Compensation:** e.g. economic compensation for physical harm, material, or moral damages;
- ▶ **Rehabilitation:** e.g. medical and psychological care, legal and social services;
- ▶ **Satisfaction:** measures to end violations, public acknowledgment of truth, identification and recovery of the disappeared, apology by perpetrator, judicial sanctions against the perpetrator;
- ▶ **Guarantees of non-repetition:** e.g. strengthening of the rule-of-law, mechanism for preventing and monitoring violations, and legal reform.

Children as beneficiaries of reparations

None of the TRCs or other bodies, with the exception of Sierra Leone and Peru, has sought the input of children in the reparation process.⁵⁵ In Sierra Leone, the TRC involved children in the process of making recommendations for the reparations programme.⁵⁶ For most children, reparations which focused on providing access to education, health care, and accommodation were more important than a cash payment.

In reality, reparations for children have been very limited. Even where the possibility of providing reparations exists in a country which has been engaged in armed conflict, funding for reparations has been an issue of concern. In Sierra Leone, the National Commission for Social Action was given approval in November 2006 to implement the reparations programme recommended by the TRC, and a Trust Fund and reparations programme was established in 2009.⁵⁷ However, the Commission lacks sufficient funding, with only 25 per cent of the funding needed available for 2009-2010 and the Government relying on international donor funds to maintain the programme.⁵⁸

Reparations at the Khmer Rouge Tribunal

Under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Khmer Rouge Tribunal, civil parties can ask the court for collective and moral reparations from persons convicted in the trial,⁵³ although individual financial compensation is not possible. Court ordered community reparations include publication of the judgment in the media or funding activities or services for victims. In the case of Kaing Guek Eav or Duch, the Court agreed to publish the apologies of the defendant, who was found guilty by the Extraordinary Chamber in July 2010, and to include the names of victims in the judgment where victims requested it.⁵⁴



Children of the Halshoo Village in Sulaymaniyah Governorate participate in the summer programme offered by UNICEF to learn about the dangers of mines and unexploded ordnance (UXO), Iraq. © UN PHOTO/BIKEM EKBERZADE

Most reparations programmes limit the violations for which reparation is possible and limit the eligibility to those registered as victims or, in some cases, to witnesses before a commission or court.⁵⁹ The crimes or harms qualifying children for reparations have varied: from children who escaped acts of genocide and persecution and who are in need (Rwanda); to children born in detention and child victims of forced marriage, sexual mutilation, rape, amputations, psychological trauma, or recruitment into fighting forces (Sierra Leone).⁶⁰

Forms of reparations

Reparations can take a number of forms and may be individual or collective. Community or collective reparations can include material benefits, but may also include symbolic measures, such as a statement of apology, the establishment of a national holiday for commemoration of the victims, the naming of a street in honour of the victims, the crea-

tion of dignified burial sites, and the funding of rehabilitation and community centres.

The effectiveness of any form of reparations is limited when the focus is simply on returning victims to the situation they were in prior to the violations, without considering whether children were already suffering violations of their rights prior to the conflict. For instance, reparation programmes may fail to take into account the denial of the rights of girl children in pre-conflict society such as their limited access to education. Without addressing underlying gender inequalities, reparations are

Reparations in Sierra Leone

In Sierra Leone, collective reparations were largely symbolic to show respect for the victims, a clear recognition of the harm suffered and a means of preserving the memory of what had happened during the conflict. The TRC envisaged such reparations as exhumations, proper burials, national memorial services, traditional ceremonies, etc.

unlikely to have a positive impact on the lives of most victims. The same applies to discrimination faced by other children in society.⁶¹

ICC Trust Fund for Victims

The ICC is the first international tribunal to include reparations to victims of war crimes in its mandate.⁶² The Rules of Procedure and Evidence of the ICC allow those persons with victim status to apply for reparations⁶³ or for the Court to initiate its own motion for reparations to the victim.⁶⁴ The Trust Fund has introduced an innovative approach to reparation in two different ways:

- ▶ The ICC is able to order that any money or property held by a person convicted by the Court shall be forfeited and transferred to the Trust Fund. In addition, the Fund is also a *basket* funded by States and voluntary donations, which means that reparations are not limited to the financial means of the convicted person;
- ▶ The Trust Fund also serves to provide general assistance in the form of physical rehabilitation, material support and/or psychological rehabilitation to general victims of international crimes where the ICC has jurisdiction, and not only those who have victim status.

This form of assistance is particularly novel in that it is not linked to any specific ICC case and assists victims both individually and col-

lectively. The Trust Fund is currently supporting the reintegration of former child soldiers in Uganda and the DRC, including 500 girls who have been subject to rape, sexual slavery, and other forms of sexual violence, as well as other vulnerable children, particularly those who have lost their entire family.

Key Advocacy Points

- ▶ Include specific provisions for reparations for children, both individually and collectively, in peace agreements and national legislation;
- ▶ Provide international funding, technical assistance and institutional support to ensure that the right to reparation is fulfilled and the implementation meets international standards;
- ▶ Raise awareness of reparation programmes and promote children's access to such programmes;
- ▶ Assist children to claim victim status at the ICC, if the person who caused them harm has been indicted by the Court;
- ▶ Advocate with the ICC Trust Fund for Victims to support reparation programmes for children.

PART II

Children, accountability and detention

THIS SECTION of the Working Paper examines the international legal framework covering the detention of children and the right of children to challenge that detention, the treatment of children in detention, and protection of children who are subject to prosecution and trial.

The United Nations, as well as many NGOs and child protection actors share the view that children associated with armed groups should not be detained or prosecuted, but should be primarily treated as victims by virtue of their age and the forced nature of their association. This Working Paper does not argue that children should not be held accountable for their actions, but that more appropriate forms of accountability should be used. This section, therefore, also discusses non-judicial mechanisms with more rehabilitative functions, such as TRCs, traditional justice ceremonies, restorative measures, and reintegration programmes.

Root causes of involvement of children

Children become associated with armed forces or armed groups for a variety of reasons. The Sierra Leone and Uganda models of forced recruitment, where many children were abducted, drugged, and beaten into submission was for a long time the archetype of child soldiering. While there is no doubt that many groups do abduct, intimidate, and coerce children to join them, there are also a number of other push and pull factors that result in children becoming involved in armed conflict. These include poverty, displacement, sense of identity, ideological attraction, lack of opportunities, lack of choice, defending the community, etc. In addition, witnessing parents being killed or humiliated, family members raped or their community attacked is a powerful motivating force. This

often results in a cycle of violence, where children at the same time may become both victim and perpetrator.

Forms of association of children

The degree of association of children with armed forces or armed groups also varies. Involvement may be transitory or long-term. Children may be associated with an armed group or at risk of recruitment. While some children are engaged in direct combat activities, others take on auxiliary roles, such

UNICEF Education Officer Richard Ndoute speaks with former child soldiers, Central African Republic. © UNICEF/PIERRE HOLTZ



Voluntary vs. forced recruitment

The Special Representative of the Secretary-General for Children and Armed Conflict has argued in her *amicus curiae* brief to the ICC in the Lubanga case, that the distinction between voluntary enlistment and forced recruitment is a distinction without meaning; even the most voluntary of acts can be a desperate attempt to survive by children with a limited number of options. In such circumstances, any consent given by a child cannot be regarded as truly voluntary in the full sense of the word. In any event, whether or not the child enlists or is conscripted, the line between voluntary and involuntary is legally irrelevant and practically superficial in the context of children in armed conflict.⁶⁵

as porters, spies, messengers, look-outs, cooks, and/or sexual slaves. Some of these children commit under duress of adult commanders acts that may amount to war crimes.

This Working Paper takes the position that children should not be tried simply for association with an armed group or for having participated in hostilities. It acknowledges, nevertheless, that there are instances where children are accused of crimes under national or international law and are prosecuted before a criminal court. Prosecution of a child should always be regarded as a measure of last resort and the purpose of any sentence should be to rehabilitate and reintegrate the child into society. The CRC requires that States should seek “alternatives to judicial proceedings for children at the national level”⁶⁶ and that any solution needs to take into account “the child’s reassuming of a constructive role in society.”⁶⁷ Research has shown that, for a child, understanding and acknowledging a past wrongdoing plays a crucial role in their psycho-social development and reintegration process. Some form of accountability – based on restora-

Customary IHL

Customary international law is made up of rules that come from the general practice of states followed out of a sense of legal obligation. It is an independent source of international law. Customary law is of crucial importance in today’s conflicts for two main reasons: (1) States that have not ratified IHL treaties are still bound by rules of customary law; (2) the legal framework governing non-international armed conflicts – the majority of today’s situations – is more detailed under customary IHL than under treaty law. According to the major study published by the International Committee of the Red Cross (ICRC) in 2005, the vast majority of customary IHL applies equally in international and non-international armed conflicts.⁷⁰

tive approaches – can contribute strongly to a child’s reconciliation with his community, with the victim and with him or herself.⁶⁸

1. Legal framework

Legal instruments governing armed conflict

The law protecting children during armed conflict is found in international humanitarian law (IHL) and human rights law. IHL or *the law of armed conflict* regulates the conduct of hostilities and the treatment of persons in enemy hands. IHL is enshrined in the four Geneva Conventions (1949) and the two Additional Protocols (1977). While the Geneva Conventions are universally ratified, Additional Protocol I (applicable to international armed conflicts) and Additional Protocol II (applicable to non-international armed conflicts) are ratified by 171 and 166 States respectively.⁶⁹ In non-international armed conflicts, civilians are entitled to the basic protections contained in Common Article 3 to the Geneva Conventions, as well as those in Additional Protocol II where the requisite conditions apply.

Optional Protocol on the Involvement of Children in Armed Conflict

The Optional Protocol, ratified by 142 States and the Holy See,⁷¹ prohibits both the forced recruitment of children under the age of 18 by armed forces and armed groups, and their direct participation in hostilities. The Protocol, however, allows the voluntary enlistment of children at the age of 16 by the armed forces of a State.

Human rights instruments such as the CRC, the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) of 2002 continue to apply during times of armed conflict. States are not permitted to limit the application of the CRC in times of armed conflict, but it is possible for States to derogate from certain provisions of the ICCPR, in situations of a public emergency which threatens the life of

the nation. Although human rights law continues to apply during armed conflict, IHL is regarded as the *lex specialis* (*special law*) covering situations of armed conflict.

Classifications of armed conflict

“Armed conflict” is a wide term that covers very different conflicts.⁷² Under IHL, there are two kinds of conflicts. *International armed conflict* refers to situations where two or more States are engaged in armed conflict. In such conflicts, IHL, in the form of the four Geneva Conventions and Additional Protocol I to the Geneva Conventions, applies, as does customary IHL. *Non-international armed conflict* exists whenever there is protracted armed violence between Government forces and organised non-state armed groups, or between such groups. It continues to exist until a peaceful settlement is achieved.⁷³

Applicable international law

International armed conflict: Geneva Conventions I and II (relative to the sick and wounded), Geneva Convention III (relative to prisoners of war), Geneva Convention IV (relative to civilians), Additional Protocol I, and customary IHL.

Non-international armed conflict: Common Article 3 to the Geneva Conventions, Additional Protocol II, customary IHL, human rights law, and national law;

Internal tensions and disturbances: human rights law and national law.

Two criteria are considered essential for the existence of a non-international armed conflict: a certain intensity of hostilities and the requisite organisation of the parties to the conflict. These criteria are often fulfilled by the State side. The question in practice usually is whether an armed group has the requisite organisation to be considered a party to a conflict. The basic rules governing non-international armed conflicts are found in Common Article 3 to the 1949 Geneva Conventions. Common Article 3 is recognised as reflecting customary IHL. An additional source of treaty law is Additional Protocol II of 1977, which applies provided the requisite criteria spelled out in that treaty have been met. The ICTY has given serious attention to

the definition of non-international conflicts, notably in the *Duško Tadić* case.⁷⁴

Other situations of violence that do not meet the threshold for non-international armed conflicts are generally referred to as *internal tensions and disturbances*. These can include riots, demonstrations and sporadic acts of violence. In such situations, the State may well use force to restore public order. These situations are governed by human rights law, as IHL will not be triggered.

Liberians United for Reconciliation and Democracy combatants in Bopolu, Gbarpolu County, where United Nations Mission in Liberia (UNMIL)'s disarmament, demobilization, rehabilitation and reintegration (DDRR) programme team visited to inform ex-combatants about its programme, Liberia. © UN/M. Novicki



To recall, one important purpose of categorizing armed conflict (and other situations of violence) is to determine the applicable law, in the present discussion in relation to deprivation of liberty.

2. Detention of children

Internment or administrative detention can be defined as the deprivation liberty of a person, initiated or ordered by the executive branch of government – not the judiciary – without criminal charges being brought.⁷⁵ In practice, this is most often the military or the police, rather than a court of law. Children who are interned/administratively detained may be held in military facilities, prisons, or specially designed facilities.

Internment is an exceptional measure, intended to control, and can be ordered for security reasons in armed conflict.⁷⁶ It can also be ordered to protect the security or public order of the State in situations which are not armed conflict and where human rights law applies.⁷⁷ In general, internment is subject to safeguards and limits in order to avoid the misuse of the power to intern or administratively detain a person.

In a few States, children who have been associated with armed groups or are at risk of being recruited may be seen by the State in question as a security threat. Rather than charging such a child with a criminal offence and bringing the child to trial before a criminal court, the State may decide to place the child in administrative detention, (sometimes also referred to as *preventive detention*).

The use of administrative detention in the Nepal-Maoist conflict

During the internal armed conflict in Nepal, between 1996 and 2006, the Government of Nepal promulgated a series of Ordinances,⁷⁸ giving security forces the power to arrest and detain individuals in preventive detention for a period of up to 12 months. As no minimum age was specified in the Ordinances, children suspected of being associated with armed groups were held in administrative detention under these instruments in the same facilities as adults.⁷⁹ The Secretary-General reported that the majority of children who had been held in administrative detention had been subjected to torture or ill-treatment after arrest and during interrogations.⁸⁰

2.1. Detention in international armed conflicts

Prisoner of war status

In international armed conflicts, IHL permits the internment of prisoners of war (POWs) and, under certain conditions, of civilians. POWs are “combatants” captured by the enemy.⁸¹ A “combatant” is a member of the armed forces of a party to a conflict, who has “the right to participate directly in hostilities”.⁸² As such, a POW may not be prosecuted by their captor for lawful acts of violence committed during the hostilities (this is sometimes called the “combatant privilege”), but of course can be tried and punished for violations of IHL or other serious international crimes.

When a child involved in hostilities is captured during an international armed conflict, that child may become a POW.⁸³ Under Geneva Convention III (relative to prisoners of war), a “Detaining Power” is permitted to intern POWs and may “impose on them obligations of not leaving beyond certain limits, the camp where they are interned.”⁸⁴ The internment of POWs in regular prisons is forbidden⁸⁵ and POWs must be released and repatriated “without delay following the cessation of hostilities.”⁸⁶ Under IHL, children who have been detained as POWs must be held in quarters separate from adult detainees, except where accommodated with adult family members.⁸⁷ In practice, child POWs are very rare and no cases have been registered since the Second World War.

Internment of civilians

State parties to an international armed conflict are permitted by Geneva Convention IV (relative to civilians) to place civilians, including children, in administrative detention (internment), only “if the security of the Detaining Power makes it absolutely necessary.”⁸⁸ This provision makes it clear that internment is the most severe measure of control, and can only be ordered in exceptional circumstances.⁸⁹ This means those situations where the State has serious and legitimate reason to think that a child is a member of an organisation whose objective is to cause



A boy sits against a wall covered with drawings of weapons, Chad. © UNICEF/OLIVIER ASSELIN

disturbances; or that the child may seriously jeopardise the security of the State by other means, such as sabotage or espionage.⁹⁰

Amongst those who can be interned are civilians who choose to participate directly in hostilities. While only combatants are explicitly authorised under IHL to participate directly in hostilities, civilians in fact often do, in both international and non-international conflicts. When they do participate, they lose their protected status under IHL⁹¹, and may now be the object of attack. IHL is clear – civilians are protected from direct attack “for such time as they take a direct part in hostilities.”⁹²

When civilians do not participate directly in a conflict, they may still be considered a serious security threat, thus under IHL this may lead to their internment.⁹³ In order to justify internment of civilians, a State “must have good reason to think that the person con-

cerned, by his or her activities, knowledge, or qualifications, represents a real threat to its present or future security.”⁹⁴ States must ensure that the security threat of each individual is assessed before internment is used.⁹⁵

Under IHL, a person interned in an international armed conflict has the right to challenge the decision to detain them. Of concern here, the decision to intern a minor must be reviewed as soon as possible and at least twice yearly by an appropriate court or administrative board designated by the Detaining Power for that purpose.⁹⁶

2.2. Detention in non-international armed conflicts

Child soldiers who surrender or are captured in non-international armed conflicts will not be classified as POWs – the term POW exists only in international armed conflict.

Case study: administrative detention in Afghanistan

Since 2001, an unknown number of children have been captured and arrested by the Afghan security forces, as well as the International Military Forces (IMF). Many children reported no legal assistance and some reported ill-treatment or threats against their person during interrogation. Of particular concern are children arrested under security-related charges held by the National Directorate of Security (NDS).

In Afghanistan, the Law on Combat against Terrorist Offences of 2008 requires that child terrorist suspects are treated in accordance with the Afghan Juvenile Justice Code of 2005.⁹⁷ Under this law, children suspected of committing a terrorist offence may be arrested by institutions responsible for combating terrorist offences, including the Ministry of Interior (police) and the NDS. Under the Juvenile Justice Code, an arresting officer may hold a child suspect for up to 48 hours before referring the child to the prosecutor.⁹⁸ However, in practice, it has been reported that the NDS is holding children for extended periods of time in administrative detention, in contravention of the Juvenile Justice Code.⁹⁹

The United Nations only has limited access to facilities to monitor conditions of detention and to follow up on cases of children charged with counter-terrorism and threats to national security. In addition, according to the Afghan Juvenile Justice Code the minimum age of criminal responsibility is only 13 and there are no provisions on a maximum duration for administrative detention.

In some States, child soldiers will undergo release and reintegration programmes. In many States experiencing conflict however, such programmes do not exist, particularly where children are captured midway through a conflict. These children are likely to find themselves placed either in administrative detention or subject to prosecution under national criminal law. Where national law does not specify a maximum period of detention, children can find themselves detained for long periods of time, either awaiting charge or trial, or until an armed conflict has finished. The cessation of hostilities and demobilisation of children does not always mean the end of administrative detention. A reduced or non-existent justice system can contribute to children staying for extended periods of time in administrative or judicial detention awaiting judicial trial or release.

Applicable international law

Common article 3 of the Geneva Conventions does not expressly mention internment. In contrast, Additional Protocol II does, however, it does not contain the relevant grounds for internment, nor does it set out relevant procedural safeguards. In many cases of de-

tention in non-international armed conflict, human rights law and national law may provide some or all of the protection needed.

Article 37(b) of the CRC¹⁰⁰ and Article 9 of the ICCPR both provide that children shall not be deprived of liberty unlawfully or arbitrarily. Administrative detention is recognised as legitimate in certain circumstances, but only if it is “lawful”, which means provided for and carried out in accordance with national law, and if certain procedural guarantees for children are put in place.¹⁰¹ An additional condition is that administrative detention must not be “arbitrary”, but necessary in the circumstances of the case and proportionate to the end sought.

Legal safeguards

For child detainees, the threshold for demonstrating that administrative detention is necessary and proportionate is higher than for adults, due to the CRC requirement that detention of children must only be used as a measure of last resort and for the shortest appropriate period of time.¹⁰² In addition, the best interest of the child must be a primary consideration in the decision whether or not to place a child in detention,¹⁰³ and if detained, the following legal safeguards must be provided:

- ▶ The right to be informed of the reasons for detention;¹⁰⁴
- ▶ The right to be brought promptly before a judge and to a judicial review of the legality of detention;¹⁰⁵
- ▶ The right to periodic review of the legality of the detention;
- ▶ The right to release or to a trial within a “reasonable time” where a child is accused of a crime;¹⁰⁶
- ▶ The right to have the detention acknowledged by the authorities and to communicate with relatives and friends;¹⁰⁷
- ▶ The right to legal assistance.¹⁰⁸

Administrative detention should never be used as an alternative to a criminal charge, or where there is insufficient evidence to charge a child with a criminal offence. Neither should it be used for the purposes of gathering intelligence. Further, administrative detention should “not continue beyond the period for which the State can provide appropriate jus-

tification.”¹⁰⁹ If it does, then it will cease to meet the criteria for lawful administrative detention.¹¹⁰

Children held in administrative detention during armed conflict are some of the most invisible children. Few are granted access to a lawyer or are given reasons why they have been detained. Many are held for long periods of time without charge, and often without any contact with their family. Evidence abounds that such children are particularly vulnerable.

Case study: security detention in Iraq

Since the start of the conflict in 2003, hundreds of children have been detained by both the Multi-National Force in Iraq (MNF-I) and the Iraqi security forces. These children have been detained on security and terrorism charges, and a number of them have been tried and convicted in Iraqi courts. Approximately 1,500 children were held in detention, the youngest of which only ten years old, at the time of the visit of the SRSG-CAAC to Iraq in April 2008.

Detention by the Multi-National Force in Iraq

Up until mid-2010, the MNF-I were authorised¹¹¹ “to take all necessary measures to contribute to the maintenance of security and stability in Iraq”, including “internment where this is necessary for imperative reasons of security”. Although, the MNF-I detention procedures appeared to meet international standards with regard to the right to registration, separation from adults, and conditions in detention, there was a serious concern about the vagueness of the legal basis for detention, in light of the fact that children, by their very status as minors, should be considered as “threats to society” only in the most aggravated of circumstances.¹¹² Furthermore, during security risk assessments with children, there were no child-friendly procedures in place and the interviewers were not versed in communicating with children, who may themselves have been victims of recruitment.¹¹³ Children were also denied the right to independent counsel of their choosing and full access to charges and evidence.

Detention by the Iraqi security forces

In mid-2010, the MNF-I transferred the authority for detention to the Government of Iraq. All juveniles were either released or transferred to the Iraqi justice system. Children arrested and detained for alleged association with armed groups were placed in juvenile detention centres which generally do not meet international standards. In addition, consistent delays were observed in judicial proceedings to prosecute children for security and terrorism offences. Security conditions, burdensome procedures for age determination, and lack of trained staff resulted in children having to wait in pre-trial detention for more than eight months.

Key Advocacy Points

National authorities should:

- ▶ Review their laws to ensure that where internment or administrative detention of children can be ordered, it is only where children pose a serious security risk; it is a matter of last resort and it is for the shortest period of time;
- ▶ Ensure that the law provides for all the procedural safeguards contained in IHL, the CRC and the ICCPR, and that these are known and made available to children;
- ▶ Ensure that legislation places an obligation on administrative bodies to collect and report disaggregated data on all children in internment or administrative detention;
- ▶ Refrain from using internment or administrative detention for children who are members of a non-state armed group, but have not directly participated in hostilities in a non-international armed conflict;
- ▶ Ensure legal representation for children and child-appropriate procedures;
- ▶ Ensure that there are viable alternatives to detention.

United Nations agencies, funds and programmes, international and local NGOs should:

- ▶ Monitor the use of internment and administrative detention, especially by the military and the police;
- ▶ Lobby for access on a regular basis to children who are interned or held in administrative detention to monitor treatment and conditions of detention;
- ▶ Raise awareness of the legal safeguards to be provided to children who are interned or administratively detained;
- ▶ Work with local lawyers to ensure legal representation for children who are interned or held in administrative detention.

3. Criminal prosecution

In international armed conflicts, child combatants captured on the battlefield become POWs in the power of the opposing army and may be placed in POW camps until the end of hostilities. They may not be prosecuted for lawful acts of violence committed during the conflict (this is sometimes called the “combatant privilege”). However, a child combatant can be brought before a tribunal for the alleged commission of war crimes, such as killing civilians, looting and burning villages, and rape or other forms of sexual violence. It is rare to have child POWs in modern day armed conflict, as most conflicts today are non-international armed conflicts.

In situations of non-international armed conflict or internal tensions and disturbances, children can be prosecuted for having committed acts which are regarded as crimes

in national or international law while associated with armed forces or armed groups. This should, however, remain a measure of last resort and judicial safeguards should be provided. The best interest of the child and his or her reintegration into society should at all times be the primary concern.

When a State or one of the international courts considers prosecuting a child, the two key questions are: (1) whether the court has jurisdiction to try a case against the child; and (2) whether the child has criminal responsibility. This chapter will outline the ongoing debate on the age of criminal responsibility, as well as discuss the practices at international, national, and military courts and tribunals. It will also address the issues of judicial guarantees, appropriate sentences, and possible alternatives.

One the children in SOS Grand Lac Centre for former child soldiers, North Kivu province, Goma, Democratic Republic of the Congo. © CICR/WOLTEK LEMBRYK



Customary IHL rules on the prosecution of detainees

Rule 151: Individuals are criminally responsible for war crimes they commit;

Rule 102: No one may be convicted of an offence except on the basis of individual criminal responsibility.

Rule 100: No one may be convicted or sentenced, except pursuant to a fair trial affording essential judicial guarantees.

3.1. Age of criminal responsibility

International humanitarian law

IHL does not establish a minimum age of criminal responsibility for international crimes. It has been argued, however, that Article 77(2) of Additional Protocol I does in fact set a minimum age for war crimes at 15 years old. This conclusion is based on the idea that this Article, which now forms part of customary IHL, sets the minimum age for recruitment into armed forces or armed groups, and the active participation in hostilities, at 15. This means that, if a child under the age of 15 is considered too young to fight, then he or she must also be considered too young to be held criminally responsible for serious violations of IHL while associated with armed forces or armed groups.



Centre for demobilised former child soldiers, South Kivu province, Bukavu, Beves, Democratic Republic of the Congo. © CICR/Wojtek Lembrik

Commentators have held that such a reading of Article 77(2) is not supported by the text itself, which makes no direct reference to a minimum age of criminal responsibility of child soldiers.¹¹⁴

The argument for setting the minimum age of criminal responsibility at the same age as lawful recruitment has been influential in debates about the appropriate minimum age of criminal responsibility for international crimes. The coming into force of the OPAC in 2002,¹¹⁵ which sets the age of active participation in hostilities at 18, has led to a call for the age of criminal responsibility for international crimes to be set at 18.¹¹⁶

The Beijing Rules

More guidance is provided by Rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) or *The Beijing Rules*, which state 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."¹¹⁷ The age of criminal responsibility currently varies considerably from State to State. In some States the age of criminal responsibility is as low as seven years of age,¹¹⁸ while in other States it is as high as 16 years of age.¹¹⁹ The most common minimum age of criminal responsibility appears to be 14 years of age.¹²⁰

Additional Protocol I, Article 77 – the protection of children

(2) The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces [...];

(3) If, in exceptional cases [...] children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

The CRC and General Comment No. 10

The CRC¹²¹ requires all States to establish a minimum age of criminal responsibility below which children are presumed not to have the capacity to commit a criminal offence. The effect of setting a minimum age is that children below this age cannot be charged or tried for the offence, regardless of whether or not they committed the act in fact. The CRC does not, however, set a minimum age itself and gives no guidance to States on where to set the minimum age.

It has been suggested that a child should only be treated as criminally responsible where there is some element of fault, and sufficient mental and moral awareness on the part of the child committing the prohibited act of the consequences or potential consequences of his or her actions.¹²² However, the CRC¹²³ is against taking such an approach. It takes the view that setting the minimum age of criminal responsibility according to the maturity of the child is not only confusing and unpredictable, but leaves much to the discretion of the court or the judge, who often makes this judgment without the input of trained psychologists.¹²⁴

In General Comment No. 10 (2007), the CRC Committee concluded that age should be the only criteria, that the age of 12 should be the absolute minimum age, and recommended that States should set a higher age limit.¹²⁵

The Paris Principles

In making a decision on whether to prosecute children, States should take into account the Paris Principles and Guidelines on Children associated with Armed Forces and Armed Groups (2007),¹²⁶ which provide that: "children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups, should be considered primarily as victims and not as perpetrators." If a prosecution goes forward and the child is convicted, both the Paris Principles and the CRC require that "the purpose of any sanction imposed on a child should be to promote rehabilitation and reintegration into the community and not to punish."

The Paris Principles

The *Paris Principles* (2007) lay out the global humanitarian knowledge and experience in working to prevent recruitment, protect children, support their release from armed forces or armed groups, and reintegrate them into civilian life. The Paris Principles, however, are not binding on States.

Key Advocacy Messages

- ▶ Consider excluding children under 18 from criminal responsibility for crimes committed when associated with armed forces or armed groups;
- ▶ Ensure that children are not prosecuted for association with an armed group or for acts committed during hostilities where such acts fall within what is permitted under IHL;
- ▶ Provide alternative accountability mechanisms to prosecution and trial in a criminal court for former child soldiers;
- ▶ Ensure that where a child is tried in a court, juvenile justice standards apply.

Juvenile detainees play soccer during their recreation time at the Dar al-Hikmah juvenile education center in western Baghdad, Iraq. © SPC./MICHAEL V. MAY





Special Court for Sierra Leone. © THE SPECIAL COURT FOR SIERRA LEONE

3.2. International courts and tribunals

Ad hoc tribunals

The Statutes establishing the ICTY and the ICTR did not contain a minimum age of criminal responsibility, but neither of these tribunals indicted anyone under the age of 18. The Statute of the SCSL, in response to the large number of children participating in hostilities, gave the Special Court jurisdiction over any child who was aged 15 or more at the time of the commission of the alleged crimes. However, early in his tenure the first Chief Prosecutor of the Special Court stated that as a matter of policy he did not intend to indict persons for crimes committed when they were children, but to indict those most responsible, meaning their adult recruiters and commanders.¹²⁷

The Rome Statute

The issue arose once more in the drafting of the Rome Statute, which established the ICC. The NGO Caucus on Children's Rights in the ICC negotiations had called for the Rome Statute to specify a minimum age of criminal responsibility. The Statute does indeed provide that the ICC shall have no jurisdiction over a child who was under the age of 18 at the time of the commission of the alleged offence.¹²⁸ However, the decision to remove persons under 18 from the jurisdiction of the ICC was not based on a belief that children under the age of 18 should not be prosecuted for international crimes, but rather that the decision on whether or not to prosecute should be left to States. Exclusion of children from the ICC jurisdiction avoided an argument between States on the minimum age for international crimes.¹²⁹

3.3. National courts

Judicial guarantees

If a child is to be prosecuted in a domestic court for the alleged commission of a crime under national or international law, a number of judicial safeguards should be put in place. Common Article 3 to the Geneva Conventions describes the fundamental guarantees for persons *hors de combat*, including detainees, applicable in all situations of armed conflict. It fails, however, to specify the exact rights to which an accused is entitled.

Common Article 3 to the Geneva Conventions

"In the case of armed conflict not of an international character [...] the following acts are and shall remain prohibited at any time and in any place: [...] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

The ICCPR, applicable in both times of peace and war, outlines in more detail the minimum requirements of due process in human rights law. In the determination of any criminal charge, everyone shall be entitled to the following minimum guarantees:

- ▶ To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- ▶ To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- ▶ To be tried without undue delay;
- ▶ Not to be compelled to testify against himself or to confess guilt;
- ▶ In the case of juvenile persons, the procedure shall take account of their age and the desirability of promoting their rehabilitation;
- ▶ Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Prohibition of capital punishment and life imprisonment

Article 37 of the CRC requires State Parties to ensure that: "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

Appropriate sentences

International law places restrictions on the types of sentences that may be imposed by a State, a national criminal court, a military tribunal or a State executive body, such as the police or the military:

- ▶ Capital punishment of children is prohibited in all circumstances,¹³⁰ as is the imposition of life imprisonment without the possibility of release;¹³¹
- ▶ Any form of corporal punishment as a sentence would constitute degrading treatment contrary to Article 37 of the CRC;¹²¹
- ▶ Sentences that may involve torture or other cruel, inhuman or degrading treatment, or punishment may not be ordered.¹³³

The CRC requires that States should have a variety of sentencing measures at their disposal to ensure that children are dealt with in a manner that is appropriate to their well-being, proportionate both to their circumstances and the offence, takes into account their age and promotes their reintegration and the child's assuming a constructive role in society. In times of armed conflict, States are encouraged to use restorative justice systems and reintegration programmes rather than a custodial sentence.¹³⁴

Diversion and restorative justice

Article 40 of the CRC encourages States to find appropriate and effective ways for dealing with children who are in conflict with the law without resorting to judicial proceedings. Rather than using purely punitive approaches, alternative methods may contribute more to reparation and reconciliation, and may

prevent relapse in the future. Complementing the CRC, the OPAC stipulates that States should support and provide assistance to former child soldiers in order to reintegrate into their families and communities. However, it is often in the child's best interest to understand the moral consequences of their act. This can be best achieved through the use of restorative justice mechanisms and local community-based programmes. Initiatives of this kind seek to recognise acts which have been perpetrated under command of adults, but also support the child in becoming an effective member of the community. Such measures focus on reintegration and rehabilitation, rather than punishment.

The concept of restorative justice

A restorative justice process means any process in which the victim, the offender and any other community members affected by the criminal behaviour, actively participate to find a solution for matters arising from the transgression, sometimes with the help of a fair and impartial third party.

More emphasis needs to be put on diverting children away from the judicial system. Bringing children in contact with any kind of justice system, especially detention, can have a very negative impact on their psycho-social development. If diversion programmes are put in place and restorative justice measures are introduced, custodial sentences depriving children from their liberty can in many cases be avoided:

- ▶ Education or vocational training aimed at preventing relapse;
- ▶ Repair of harms done or restitution of losses suffered;
- ▶ Community service for the most vulnerable in society.

Restorative justice processes involving children are necessarily different from those involving adults and will have to be adapted to the child's needs and capabilities. In some cases, it may be a good solution for an adult to work in the interest of a community to repair damages done. The same solution, however, may not be in the best interest of

Diversion at different stages of the judicial process

Diversion of children from the judiciary and the use of restorative justice mechanisms can be initiated and applied at all stages of the judicial process, including pre-trial, trial or sentencing stage.

- ▶ In the pre-trial phase, restorative procedures can be used by the police or prosecuting authorities. If victim and offender come to an agreement, the child can be diverted away from the formalities of a judicial procedure;
- ▶ When a case involving a child goes to court, a judge should have the authority to opt for a restorative approach and to stop the proceedings and refer the case to social workers or mediators to initiate restorative justice procedures;
- ▶ If a trial is already concluded, the judge should have the possibility to make restoration part of the sentence or pronounce a conditional sentence, the condition of which would be a restorative measure achieved.

On the road to Lubarica, South Kivu province, Democratic Republic of the Congo.
© CICR/WOJTEK LEMBRYK



Case study: the Gacaca Courts after the Rwandan genocide

Rwanda was the first country to hold individuals accountable for crimes of genocide committed as “minors,”¹³⁵ defined under the Rwandan Penal Code as individuals aged 14-18 when the crime was committed.¹³⁶ Of the 120,000 people arrested and detained following the adoption of the Genocide Law in 1996, more than 4,000 were children.¹³⁷

The first trials of genocide suspects began in the national courts in December 1996. In order to speed up trials and to deal with the large number of people charged with genocide the Government established Gacaca Courts.¹³⁸ Unlike the national courts, Gacaca courts rely on traditional processes of addressing disputes within the community as well as national law, and are staffed by lay judges.

Up until 2007, when a separate provision for “mitigating circumstances for children” was introduced,¹³⁹ those who were found to have committed genocide when they were still a child received the same punishment as adults.¹⁴⁰ Despite the late recognition of the status of children and reduced sentences, no specific procedures were put in place for an accused or witness who was a minor during the genocide.¹⁴¹

a child. The restorative outcome of working in the interest of a community are lost if the child is stigmatized as a person who is completing his task as a form of punishment. It may be a completely different outcome if the child works together with other children in the interest of the community in a way that is designed to improve relationships.

Key Advocacy Points

- ▶ Ensure that no children are subjected to capital punishment, life imprisonment, corporal punishment or sentences involving torture or other cruel, inhuman, or degrading treatment;
- ▶ Provide alternative sentences to punitive measures, taking into account the age of the child and the circumstances of the offences committed;
- ▶ Encourage the use of diversion away from the judicial system for children who have committed crimes while associated with an armed group;
- ▶ Provide training to persons that will be involved in restorative justice processes, such as judges, police, mediators, social workers, etc.

3.4. Military tribunals

In very rare cases, children involved in armed conflict are brought before military courts or tribunals. This is more likely to happen in the context of an international conflict, where a child soldier is tried by the military court of an opposing force. However, armed forces may also try their own soldiers for military offences or members of an opposing armed group in a non-international armed conflict. In Myanmar and The Democratic Republic of the Congo (DRC), child soldiers who have escaped the armed forces have been charged with desertion, tried before a military tribunal, and sentenced to imprisonment.¹⁴² In the DRC, child soldiers who have been convicted by a military tribunal have, in some cases, even been executed. In 2000, a 14-year-old child soldier was tried by a military court for murder and executed 30 minutes later.¹⁴³

Hearings before military tribunals are usually not conducted in public and, importantly, do not constitute an independent and impartial tribunal. Juvenile justice standards and procedures do not generally apply and due process safeguards, as provided in the CRC, are not vouchsafed to children.¹⁴⁴ Children are frequently tried without any legal representation or assistance, are not accompanied by their parents or legal guardian, and often do not have access to the charges brought against them. Military tribunals are not required to treat children’s best interests as their primary concern, and, therefore, are not an appropriate forum for hearing cases against children. Not surprisingly, the CRC Committee has recommended that children should not be tried before military tribunals.¹⁴⁵

Case study: Guantánamo and the precedent of Omar Khadr

The most prominent, and perhaps most controversial example of use of military tribunals for children in recent years is the case of Omar Khadr. He was the first child to be prosecuted and tried before a military tribunal for alleged war crimes committed while still a minor since at least the Second World War. Khadr, a Canadian citizen, was 15 when he was arrested by US forces in Afghanistan. After eight years

of detention, seven of which were spent mostly in solitary confinement, at Guantánamo, Khadr was brought before a US Military Commission in 2010, where he was charged with the murder of a US soldier with a grenade during a fire fight in which he was blinded and nearly died of gunshot wounds.¹⁴⁶ He pleaded guilty and was sentenced to a further eight years in prison, one of which to be served at Guantánamo Bay and the additional seven to be served in Canada under Canadian law.

Khadr was arrested in Afghanistan in July 2002 and transferred to Guantánamo Bay, Cuba, in November 2002. Khadr was detained for more than two years before he was provided access to a lawyer and for more than three years before he was charged before the Military Commissions established at Guantánamo in 2001. While other child detainees were given special housing and education in the separate juvenile facility Camp Iguana, and were eventually released back to Afghanistan for rehabilitation programmes, Khadr was refused special status as a juvenile. There were also allegations that he was subject to maltreatment in the early days of his custody at the Bagram and Guantánamo military facilities. His trial by a US Military Commission was widely condemned and the Canadian government will soon bear responsibility for his rehabilitation and reintegration into society.

Key Advocacy Points

- ▶ Review national law to ensure that children cannot be tried for a criminal offence by a military tribunal, but are referred instead to the civil prosecuting authorities or to reintegration programmes;
- ▶ Monitor and report on the use of military tribunals to hear cases against captured child soldiers, children who present a security risk, or child soldiers accused of disciplinary offences;
- ▶ Lobby Governments and military authorities for permission to ob



Camp Delta, Joint Task Force Guantánamo Bay, Cuba. © U.S. ARMY PHOTO/SPC. CODY BLACK

serve hearings before military courts and tribunals involving children associated with an armed force or armed group;

- ▶ Provide legal representation for children tried before military courts or tribunals.

4. Treatment in detention

Children who are captured and detained whether as a threat to national security, as active participants in armed hostilities or as perpetrators of international crimes, are often kept in poor conditions which do not meet the minimum standards set out in various legal instruments, ranging from IHL in armed conflict situations to human rights law in both times of peace and war.

Human rights law

In some detention centres in which children are held, conditions may amount to degrading treatment, in contravention of the CRC and the UN Convention against Torture (CAT) of 1985.¹⁴⁷ Article 37(c) of the CRC states that “[e]very child deprived of liberty shall be treated with humanity and respect for inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”.¹⁴⁸

Customary IHL rules on detention

Rule 120: “Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units;”

Rule 124: “In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty; in non-international armed conflicts, the ICRC may offer its services to the parties to the conflict, to verify the conditions of detention and to restore family links;”

Rule 125: “Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities;”

Rule 126: “Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.”

Prohibition of torture

Article 2 of the CAT demands that: “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” It also states that “no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 1 of the CAT describes torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him, when such pain or suffering is inflicted by or with the consent of a person acting in an official capacity.”

Any use of detention for children should only be for the shortest possible term. OPAC requires that States ensure that children are “demobilised or otherwise released from service”, and given “all appropriate assistance for their physical and psychological recovery and their social reintegration” when captured,¹⁴⁹ rather than being detained.

UN guidelines relating to the detention of children

In addition to these human rights instruments, the United Nations also developed an important number of normative guidelines endorsed by the United Nations General Assembly or the United Nations Economic and Social Council (ECOSOC), resulting in political commitments of Member States. These guidelines outline rules and conditions for

persons deprived of their liberty and international juvenile justice standards.

- ▶ United Nations Standard Minimum Rules for the Treatment of Prisoners (1955);¹⁵⁰
- ▶ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) or “The Havana Rules”¹⁵¹.

The Havana Rules define “detention of juveniles” as all children in a “public or private custodial setting, from which a person is not permitted to leave at will, by order of any judicial, administrative or other public authority” and detail the treatment and conditions of their detention.¹⁵² Notably, all disciplinary measures constituting cruel, inhuman, or degrading treatment are strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the child.¹⁴³

Case study: Palestinian children in Israeli detention

Since the second Intifada in 2000, over 5,500 Palestinian children under the age of 18 years, sometimes as young as 12, have been imprisoned by Israeli authorities for alleged security offenses ranging from distributing pamphlets, stone-throwing to being associated with an armed group. In all phases of the judicial treatment – from arrest, detention and interrogation to sentencing and incarceration – a legal regime is used with little or no procedural safeguards for children. In this system, children accused of offenses are tried in military courts, and many spend a long period of time in detention before coming to trial.

Administrative detention

Under Military Order #1591 of 2007 (formerly #1229), commanders of the Israeli security forces have the authority to detain Palestinian children, from the age of 12 years, for up to six months, if they have “reasonable grounds to presume that the security of the area or public security require the detention.” The Orders may be renewed an indefinite number of times. The Orders do not define security or public security, which appears

to facilitate the detention of children in circumstances where they may not pose an actual imminent threat to the security of Israel.¹⁴⁶ Concerns were raised that administrative detention orders were being applied in an “automatic and categorical way”, rather than being based on a thorough individualised assessment of the security risk posed by an individual.¹⁴⁷

Treatment in detention

Children detained by Israeli security forces were in many instances arrested at night in their homes and taken to detention centers, often located in military barracks. United Nations reports have found that many children have stated being subjected to abuse and maltreatment. Children were forced to sign confessions under coercive conditions, sometimes in Hebrew, a language foreign to them. They were subsequently tried before Israeli military courts, with no special procedures or protections for children.

Ensuring family contact and family visits

Israeli regulations require that when a minor is detained, parents must be informed immediately and the lawyer notified. Although children are allowed visits by immediate family members to Israeli prisons at intervals of two weeks, this is conditional on the approval of a permit to enter Israel, which many family members are denied.

Detention of children in occupied territories

Israel also engages in the transfer of Palestinian child prisoners from the occupied Palestinian territory where they live into Israel, in violation of Article 49 of Geneva Convention IV (relative to civilians), prohibiting “the individual or collective transfer of protected persons from occupied territory.” Such transfers are also inconsistent with Israel’s obligations under Article 76 of the same Convention, which provides that “protected persons convicted of offences shall be detained and serve their sentences within the occupied territory.”

Alternative justice approaches

International standards for juvenile justice recommend using alternative



The painting was done by a group of children in Bukavu prison, Democratic Republic of Congo
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mechanisms rather than strictly punitive approaches. The documented use of imprisonment as a measure of “first resort” by the Israeli authorities demonstrates the lack of alternative sentences in juvenile cases. The large number of Palestinian children prosecuted for non-lethal offences and the system of juvenile incarceration may feed into the cycle of violence. A more rehabilitative approach for the treatment of children who committed security infractions could contribute to peace and stability.

Key Advocacy Points

- ▶ Ensure that international juvenile justice standards are understood and implemented by those persons running the detention centres;
- ▶ Separate children deprived of liberty from adults unless it is considered in the child’s best interest not to do so;
- ▶ Ensure that no child is subjected to torture or other cruel, inhuman, or degrading treatment or punishment;
- ▶ Allow children to maintain contact with family through correspondence and visits;
- ▶ Ensure regular access to the ICRC, in both international and non-international armed conflict situations, to verify conditions of detention and restore family links;
- ▶ Grant access to the United Nations to visit detention centres for children with the purpose of monitoring safeguards and conditions of detention;
- ▶ Ensure that the children’s sentence of detention or administrative detention is reviewed regularly and that children only continue to be detained as a measure of last resort.

5. Non-judicial accountability mechanisms

As previously mentioned, prosecution of children for crimes arising from active participation in hostilities in a criminal court should only be a matter of very last resort. This does not mean, however, that children should not be held accountable for the acts that they have committed, but that there are more effective ways to ensure accountability, using non-judicial structures.

5.1. Truth and Reconciliation Commissions

A number of States, including South Africa and Sierra Leone, chose to use TRCs as an alternative to prosecution and judicial trial for children who are accused of committing international crimes. TRCs can play multiple roles, including providing a forum for hearing children who have committed war crimes and establishing the truth of what happened to them and the harms they caused; memorialising events or establishing accountability for perpetrators. If children are to participate in TRCs, some careful thought needs to be given to the purpose and mode of their participation.

Establishing truth vs. finding of guilt

Any TRC needs to consider the prevailing view that child soldiers are victims rather than perpetrators,¹⁵⁶ and that the child's best interests should be the primary concern at all times. This does not mean that atrocities committed by child soldiers should be ignored or that the truth about their acts should not be discovered. However, TRCs operate at their best for children where the purpose is to establish the truth, rather than make a finding of guilt or responsibility on the part of the child. It is important that the information and evidence given by a child is regarded as wholly confidential and not used for the purposes of other proceedings. Children need to know that they will not face prosecution because of the evidence they gave to the TRC.

Special needs of former child soldiers

In seeking the truth, TRCs need to pay special attention to which children should tes-

tify how they question children and what level of support and protection should be granted. Children should not be compelled to testify, nor should they face adversarial cross-examination. It is not always in a former child soldier's best interest to testify before a TRC, especially if he or she has already been through a release and re-integration process and is living back in the community. Giving evidence to a TRC could result in the child being threatened, denied work opportunities, or even excluded from the community.¹⁵⁷ Children giving evidence about their participation in hostilities need to receive the same level of preparation and post-statement support as children who are victims or witnesses, and should fall within the remit of the victims and witnesses unit.

Key Advocacy Points

- ▶ Raise awareness of the role and mandate of the TRC, especially amongst children who have participated in hostilities;
- ▶ Put in place special measures and safeguards for children who have committed war crimes and are willing to testify in front of a TRC;
- ▶ Provide training to TRC staff on how to conduct interviews with children formerly associated with armed forces or armed groups;
- ▶ Provide pre- and post statement support to children who testify to the fact they have committed war crimes to ensure their protection and promote their safe reintegration;
- ▶ Assess, prior to participation in the TRC, the situation of the child vis-à-vis family and community members, so as to avoid stigma or exclusion.

5.2. Traditional and restorative justice

Local traditional justice practices may take place either in the absence of a formal judicial system or alongside it. They may also

take a variety of forms, from a relatively formal system under State control to an informal, community-based system. Often traditional restorative justice is the only form of justice offered, as the formal judicial system may have collapsed during the conflict. In Timor-Leste, it was recognised that the formal justice system would only have limited reach given the lack of resources and human capacity, and that local traditional justice could be instrumental in dealing with the urgent problems caused by the armed violence in an efficient and legitimate manner.¹⁵⁸

Restorative justice principles

Traditional justice can be most helpful in assisting reintegration where it uses restorative justice principles¹⁵⁹ and focuses on re-establishing the child in the community, rather than relying upon punishment or public shaming. According to the Lima Declaration on Restorative Juvenile Justice (2009), “restorative juvenile justice is a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence.”¹⁶⁰ The Declaration suggests that restorative justice in different countries should build upon “existing traditional and non-harmful practices of treating children in conflict with the law”¹⁶¹ and makes clear that restorative justice is applicable to conflict situations.

Restorative justice is defined as a process in which the victim and perpetrator, and where appropriate, other affected members of the community, participate in the resolution of consequences arising from a crime, generally with a facilitator.¹⁶² This process usually involves a child, who has committed a crime, acknowledging their responsibility and making reparations or apologies to the victim. Such programmes are particularly suited for children who are seen as having committed offences against their families and communities.

Restorative justice is very often the only way of bringing reconciliation to victims and offenders alike in a war-torn society. Without such reconciliation, the reintegration of former child soldiers in their communities is hardly possible.¹⁶³

CRC principles

Whichever methods of restorative justice are used, these should be tailored to meet the needs of the child and the community. In addition, the principles of the CRC need to be taken into account: the principle of non-discrimination, the best interests of the child, that the child’s voice should be heard, and their views are considered. This may require traditional justice systems to adopt new approaches to ensure that there is no inequality of treatment, especially for girls, and to abstain from the use of punitive approaches or measures that are not consistent with the best interests of the child.

Restorative principles in TRCs and reintegration programmes

Restorative justice can be most effective when it works together with other mechanisms such as TRCs and reintegration programmes. At the local level, children can make reparations by helping those who have suffered through assisting with the rebuilding of houses or schools or working the land where the farmer is no longer able to do so himself. In other cases, children may be asked to perform symbolic acts of reconciliation, often going through traditional rituals,¹⁶⁴ or a public confession and pleas for forgiveness.

Key Advocacy Points

Consider:

- ▶ Whether a local traditional justice system exists and to what extent its practice implements children’s rights;
- ▶ Whether a local traditional justice system would enhance the reintegration of children and would be in the best interests of former child soldiers;
- ▶ What financial and human resources support are needed in order to facilitate restorative justice programmes;
- ▶ What training needs exist and who will provide them.

6. Reintegration programmes

Disarmament, Demobilisation, and Reintegration (DDR)¹⁶⁵ has been a often-used process for children who have been associated with armed forces or armed groups over the past decade. The object of this process is to “contribute to security and stability in post-conflict environments so that recovery and development can begin.”¹⁶⁶ It is regarded as a more child-friendly mechanism for addressing children’s participation in hostilities than prosecution, with a focus on the reinsertion of children into society rather than on accountability.

Release and reintegration of children

Under the Rome Statute the recruitment and use of children under the age of 15 in hostilities is a war crime. In addition, the OPAC prohibits the recruitment and use of children under the age of 18 by armed groups, as well as the direct participation in hostilities.¹⁶⁷ Because of these provisions, children undergoing a reintegration process should be considered primarily as victims and treated differently from adults.¹⁶⁸ In particular, the release and reintegration of children should not be contingent on adult DDR and should not wait until an adult DDR mechanism is in place.

Community reconciliation

The main objective of reintegration is to promote reconciliation and acceptance of the child back into the family or local community, especially children who have committed crimes. Implementing this objective requires sensitivity and an appreciation of local feelings and values, and, often, an acknowledgement by the child of the harm or suffering that he has caused by his actions. This acknowledgement is sometimes achieved through traditional healing mechanisms or through negotiation with community leaders. In some cases, like in other forms of justice previously mentioned, the child is encouraged to make reparations through voluntary work in the community, assisting those who have been made vulnerable as a result of the conflict.

An opportunity to cut links between children and the military

Reintegration involves a long-term process which aims to give children a viable alternative to their involvement in armed conflict and helps them resume life in the community. Elements of reintegration include: family reunification (or alternative care if reunification is impossible), education and training, appropriate strategies for economic and livelihood support, and in some cases, psycho-social support.¹⁶⁹

Reintegration programmes need to be carefully constructed and planned. The services provided to children formerly associated with armed forces or armed groups may use a large amount of available resources, thus reducing the assistance that is provided to communities as a whole. It is increasingly accepted that reintegration assistance should target communities as a whole, rather than deal with child soldiers separately and risk stigmatisation.

Cash payments and “family kits”

In many countries, reintegration programmes provided material benefits to children formerly associated with armed groups, including cash payments (Mozambique and Liberia) or “family kits” (El Salvador). It has now been recognised that it is not in children’s best interests to offer material benefits. Such benefits can be viewed as a potential incentive for children to engage in armed conflict in the future. It can also cause tension with local communities who see those responsible for the losses and harm they had suffered being rewarded, while their children receive nothing. Most organisations have now agreed that any reintegration package for children must be of a long-term sustainable nature rather than in the form of an immediate reward.¹⁷⁰



Pictured are boys from the Shallah Juvenile Home, a rehabilitation centre for juvenile offenders, in El Fasher, North Darfur, Sudan.
© UN PHOTO/ALBERT GONZALEZ FARRAN

Key Advocacy Points

- ▶ Provide reintegration programmes for children formerly associated with armed or armed groups both during an armed conflict and as part of a peace process;
- ▶ Ensure that former child soldiers are considered primarily as victims and are treated differently from adult ex-combatants;
- ▶ Put in place reintegration programmes different from and not contingent on adult reintegration

mechanisms, focusing on the specific needs of girls and boys;

- ▶ Communicate clearly to children, their families, and communities, the purpose and objectives of reintegration assistance offered;
- ▶ Ensure that reintegration assistance target communities as a whole rather than only former child soldiers, thus avoiding isolation and stigmatisation;
- ▶ Encourage the inclusion of an accountability element in reintegration programmes, such as traditional healing ceremonies or community reparations.



*An Afghan girl at
Gudham Shahar Camp
in Mazar-i-Sharif.*
© UN PHOTO/LUKE POWELL

Conclusion

During the past two decades, children have increasingly been affected by armed conflict. They have witnessed their villages being attacked, their relatives being raped, and their parents being killed. They have also been direct victims of deliberate attacks, sexual violence, and military recruitment. Hundreds of thousands of children around the world have been forced or enticed to join armed forces and armed groups for a variety of reasons. During their involvement, they are often abused, beaten, exploited, and pushed by commanders to commit criminal acts which may, on occasion, amount to war crimes. It is sometimes difficult to determine whether a child is a victim or a perpetrator of crimes, and there is often only a thin line between them.

The purpose of this Working Paper has been to explore these two very different aspects of children affected by armed conflict. It first examines the mechanisms by which child victims and witnesses can seek justice for violations of their rights and, second, the extent to which children who commit war crimes should be held accountable for crimes under national or international law, and the measures that should be used to address their accountability. After reviewing the applicable legal frameworks, the practices of international courts, and other non-judicial mechanisms and taking into account the principles of the best interest of the child, the right to be heard and the need to focus on reintegrating children into society, this Working Paper has identified a set of recommendations constituting a way forward in addressing the needs and rights of children as victims, as witnesses, and as perpetrators.

Recommendations

Children as victims and witnesses

1. Child victims and witnesses should be allowed to participate in the trials of

those accused of perpetrating war crimes against them. If participation is to be meaningful, however, prosecuting authorities and courts need to reconsider the way in which children's evidence is taken and used. In particular, courts and other bodies need to introduce provisions that will enable children to give evidence before a court, and at the same time ensure that children are protected from any adverse consequences as a result of giving evidence.

2. National courts should enact legislation that makes the best interest of the child victim or witness the primary concern. Legislation should also contain special measures for the support and protection of children, such as the admission of pre-recorded testimony, voice and image distortion, anonymity, closed hearings, etc.
3. In order to encourage participation and to protect child victims and witnesses, all international courts and tribunals have established some form of victims and witnesses unit responsible for short- and long-term protective measures and security arrangements, medical, and psychological support and pre- and post-statement assistance. National courts are strongly encouraged to set up similar victims and witnesses units in their jurisdictions.
4. The ICC has introduced an innovative and game changing alternative mechanism by which children who are victims of international crimes can access justice. Individuals can request victim status before the Court. This allows children to participate in a trial without actually having to give evidence. States are recommended to introduce this concept for children into their national legislation.
5. Being that, for many reasons, only a small proportion of children who have suffered harm during armed conflict can partici-

pate in proceedings before national or international courts, non-judicial mechanisms may provide a larger number of children with an opportunity of accessing justice and having their voices heard. States emerging from conflict should consider introducing non-judicial structures, such as Truth and Reconciliation Commissions and traditional justice, to bring more immediate justice and reconciliation.

6. Reparations, whether tailored for individuals or communities, can be a useful way of ensuring justice for a large part of the population affected by armed conflict, in particular the most vulnerable. The concept of justice goes far beyond punishing a perpetrator and also includes an acknowledgement of the harms suffered and a restoration of socio-economic rights lost during the conflict, including loss of education and loss of livelihood. All States should be encouraged to introduce a system that permits children to seek reparations for violation of their rights.

Accountability of children

1. The Rome Statute made the recruitment and use of children in armed forces or armed groups a war crime. States should focus on prosecuting adult recruiters and commanders both for the crime of child recruitment and for the crimes they force children to commit. The emphasis on prosecuting those who violate children's rights can serve as a powerful deterrent for adult perpetrators and prevent further violations.
2. States are encouraged to fulfil their obligation under the CRC to determine a minimum age of criminal responsibility, below which children cannot be tried for an offence, regardless of whether or not they actually committed the act. In addition, States should consider excluding children below 18 from criminal responsibility for crimes committed while associated with an armed force or an armed group, by virtue of their age, the chain of command and the forced nature of their recruitment.
3. If States decide to detain and prosecute children for criminal acts under national or international law committed during their association with an armed force or armed group, detention conditions should comply with international standards and judicial guarantees should be put in place, meeting the varying needs of girls and boys. The United Nations should be allowed access to child detention centres to monitor and report on these important safeguards.
4. States should not use administrative detention for children under 15, and only as a measure of very last resort for children under the age of 18. Instead, States are urged to find more appropriate and effective ways of dealing with children involved in armed conflict, without using detention, a practice which could negatively affect their psycho-social development. Children should be diverted away from detention and the judiciary, applying a wide range of restorative justice measures and community-based programmes, thus avoiding deprivation of liberty and encouraging reintegration into their communities.
5. Although the need for some form of accountability is acknowledged, there are more effective ways than detention and criminal prosecution, to enable children to come to terms with their past and the acts they committed. Alternative mechanisms that take the best interest of the child as the primary consideration and promote the reintegration of the child into society should be introduced, including truth-telling, traditional ceremonies, and reintegration programmes.

Endnotes

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- 3 The obligation to prosecute suspected perpetrators of crimes under international law is reflected in a range of provisions of binding international treaties. The preamble of the Rome Statute, for example, recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”
- 4 Article 8(2)(e)(vii) Rome Statute
- 5 “A World Fit for Children”, UNGA Resolution S-27/2, 10 May 2002 para. 44.23.
- 6 Security Council Resolution 1539, 22 April 2004, fourth preambular paragraph.
- 7 Security Council Resolution 1612, S/RES/1612, 26 July 2005, fourth preambular paragraph.
- 8 Security Council Resolution 1882, S/RES/1882, 4 August 2009, para. 16.
- 9 UNDP, *Programming for Justice: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, 2005, 5. Note that for this consultancy we will look at criminal, civil, administrative and informal.
- 10 UN Common Approach to Justice for Children, March 2008 p.4.
- 11 See Phillip Cook and Cheryl Heykoop, ‘*Child Participation in the Sierra Leonean Truth and Reconciliation Commission*’ in Parmar, Roseman, Siegrist and Sowa (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, UNICEF, Innocenti and Harvard Law School, 2010, 159–193 and Theo Sowa *Children and the Liberian Truth and Reconciliation Commission* in Parmar, Roseman, Siegrist and Sowa (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, UNICEF, Innocenti and Harvard Law School, 2010, 193–231.
- 12 S/RES/955(1994) 8 November 1994.
- 13 Case No IT-98-33
- 14 Case No IT-96-23-T and IT-96-23/1
- 15 The War Crimes Chamber in Bosnia and Herzegovina was established in 2004 through amendment to the Law on the Court of Bosnia and Herzegovina, Official Gazette 61/04.
- 16 The Special Tribunal for Lebanon was established under Security Council Resolution 1757 (2007) to try the alleged perpetrators of a series of assassinations and assassination attempts on prominent Lebanese political and media figures starting in 2004. The Court will sit in the Netherlands but will apply Lebanese law and will be staffed by a mix of Lebanese and international staff. The Resolution provided that the Court would run for three years and if its activities had not been completed, its term could be extended. It has a narrower jurisdiction than the other international tribunals, and is confined to trying crimes under Lebanese law. The Tribunal is not a UN body but maintains links with the UN.
- 17 The Interim Governing Council created a special tribunal within the national justice system in December 2003 under The Statute of the Iraqi Special Tribunal for Crimes Against Humanity (Law No. 1 of 2003). The name was changed to the Iraqi High Tribunal in 2005 (see Law of the Supreme Iraqi Criminal Tribunal, Official Gazette of the Republic of Iraq, 18 October 2005).
- 18 This repeats the provision contained in the Rome Statute establishing the International Criminal Court, Articles 8(2) (b) (xxvi) and (e) (vii).
- 19 By the close of the December 2005 trial session, 191 witnesses had testified for the prosecution in three cases. Of these only 13 were child witnesses. See Child Witnesses at the Special Court for Sierra Leone, Kyra Sanin and Anna Stirnmann, War Crimes Study Centre, University of California, Berkeley, 2006 pg.13 and footnote 51. By the end of the Charles Taylor trial (the last trial to be held before the Special Court, 511 witnesses had given evidence. There is no information on how many of these were children.
- 20 Rome Statute of the International Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court of 17 July 1998, UN Doc. A/CONF.183/9 (Rome Statute).
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- 22 See Articles 12 – 15 of the Rome Statute.
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- 25 Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 annex, Guideline 13.
- 26 Rule 17(3) Rules of Procedure and Evidence for the International Criminal Court, adopted by the Assembly of State Parties, first session, New York, 3–10 September 2002, Official Records ICC-ASP/1/3 pursuant to Article 43(6) of the Rome Statute.
- 27 ICC Rules of Procedure and Evidence UN Doc PCNICC/2000/1/Add.1 (2000). In Sierra Leone, all child witnesses gave evidence seated outside the court room, using video conferencing.

- 28 See Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable? Beresford, *Journal of International Criminal Justice* 3 (2005) 721-748. For this practice, see for example, s29 Youth Justice and Criminal Evidence Act 1999 (UK); s170A of the Criminal Procedure Act 1977 (South Africa) s.106F (2) Evidence Act 1906 (Western Australia) and s.23E(4) of the Evidence Act (NZ).
- 29 ECOSOC Resolution 2005/20.
- 30 Rule 85 Rules of Procedure and Evidence.
- 31 Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court. See also Rules 89 and 91 of the Rules of Procedure and Evidence.
- 32 The court has accepted that the definition of victim contained in the Basic Principles and Guidelines to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law applies. See Principles 8 and 9.
- 33 ICC decision N°. ICC-01/04-01/06 21/41, 15 December 2008, para. 67.
- 34 Rule 89(3), Rules of Procedure and Evidence.
- 35 ICC decision N°. ICC-01/04-01/06 4/61, 21/41, 15 December 2008, para 68.
- 36 Rule 90, Rules of Procedure and Evidence.
- 37 Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation, 1 February 2008, ICC-02/04-01/05 -134, paragraph 20.
- 38 See Children and the Truth and Reconciliation Commission for Sierra Leone, Mann and Theuman (UNICEF), 2001.
- 39 See Cook and Heykoop: *Child Participation on the Sierra Leonean Truth and Reconciliation Commission* in Parmar, Roseman, Siegrist and Sowa (ed) *Children and Transitional Justice, Truth-telling, Accountability and Reconciliation*, Human Rights Law Program at Harvard Law School, chapter 5.
- 40 Act to Establish the Truth and Reconciliation Commission of 12 May 2005, Article IV, section 4(e).
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- 42 For more detail, see Cook and Heykoop: *Child Participation on the Sierra Leonean Truth and Reconciliation Commission* in Parmar, Roseman, Siegrist and Sowa (ed) *Children and Transitional Justice, Truth-telling, Accountability and Reconciliation*, Human Rights Law Program at Harvard Law School, chapter 5.
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- 44 Accountability and Reconciliation, Perspectives from Children and the Youth in Northern and Eastern Uganda, Concerned Parents Association in associations with the Trans-cultural Psychosocial Organisation, Save the Children and UNICEF, September 2007.
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- 49 E.g., International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, A/6316 (1966), 999 U.N.T.S. 171, art. 2; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, A/44/49 (1989), art. 39; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7(1)(a); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978), art. 25; and [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13.
- 50 UN General Assembly A/Res/60/147, 21 March 2006 [Basic Principles on Remedy and Reparations]
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- 61 The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007) highlights this dilemma and calls for reparations to "go above and beyond the immediate reasons and consequences of the crimes and violations ... [and] aim to address the political and structural inequalities that negatively shape women's and girl's lives."
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- 67 United Nations Convention on the Rights of the Child, Article XX
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- 86 Article 18 Geneva Convention III.
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- 90 International Committee of the Red Cross, 'Commentary on the Fourth Geneva Convention', Article 42, Geneva, 1958, p. 257-258: <www.icrc.org/IHL.nsf/COM/380-600048?OpenDocument> [accessed 29 January 2011].
- 91 Additional Protocol I, article 51 (1) & (2).
- 92 Additional Protocol I, article 51(3) and Additional Protocol II, article 13(3).
- 93 Fourth Geneva Convention, article 42(1), article 78(1). The wording on the standard of grounds for internment varies between detention on the States's own territory or in occupied territory. This difference in wording may imply that internment in occupied territory should be even more exceptional: see Geneva Convention IV, Commentary, J. Pictet (ed.), ICRC, Geneva, 1958, p. 367.
- 94 Ibid., p. 258.
- 95 Article 78 of Geneva Convention IV.
- 96 Article 43 Geneva Convention IV.
- 97 Article 5 of Law on Combat against Terrorist Offences 2008. The Juvenile Code stipulates that detention of a child should be used as a last resort and for the shortest possible time (Article 8). Juveniles can only be detained in Juvenile Rehabilitation Centres (as opposed to adult prisons). It includes other protections, such as the child's right to legal defence; the police's obligation to inform the child's parents/legal guardian upon arrest; prohibition of torture, capital punishment and life sentence; and stipulates that children's cases should be dealt with by specialized prosecutors and judges only. The Juvenile Code sets the minimum age of criminal responsibility at 12 years.
- 98 Articles 13 and 14 of Juvenile Justice Code 2005.
- 99 United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict (2009), U.N. Doc. S/2009/158. para 12.
- 100 All but two States, the USA and Somalia have ratified the UN Convention on the Rights of the Child.
- 101 Bolanos v. Ecuador, Communication No. 238/1987; United Nations Human Rights Committee, Domukovsky v. Georgia, No. 623, 624, 626 and 627/1995.
- 102 Article 37(b) CRC
- 103 Article 3 CRC
- 104 Article 9(2) of ICCPR. See also Human Rights Committee, General Comment No. 8 (1982). The

Human Rights Committee noted that while this requirement appears only to apply persons charged with a criminal offence, it also applies to persons held in administrative detention.

105 Article 37(d) of CRC; Article 9(4) of ICCPR.

106 Article 9 (3) of ICCPR.

107 Article 1 of International Convention for the Protection of All Persons from Enforced Disappearance, 2006; Human Rights Committee, General Comment No. 29 (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 13(b).

108 Article 37(d) of CRC; Article 9(4) of ICCPR.

109 A. v. Australia, 1997, para. 9.4; C. v. Australia, Communication No. 900/1999 2002, para. 8.2.

110 A. v. Australia, 1997.

111 The administrative detention framework in Iraq is governed by United Nations Security Council Resolution 1546 (2004) issued under Chapter VII of the United Nations Charter.

112 United Nations, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Visit of the Special Representative for Children and Armed Conflict to Iraq and the Region (2008), U.N. Doc. OSRSG/CAAC, p. 16.

113 Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Visit of the Special Representative for Children and Armed Conflict to Iraq and the Region (2008), U.N. Doc. OSRSG/CAAC, p.16.

114 See Happold, The Age of Criminal Responsibility for International Crimes under International Law, ch5 in Arts and Popovski International Criminal Accountability and the Rights of Children; 2005; p. 73.

115 Optional Protocol to the UN Convention on the Rights of the Child A/RES/54/263 25 May 2000.

116 For an overview of the Member States and their Declarations and Reservations, see the United Nations Treaty Collection on <http://treaties.un.org>, Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (New York, 25 May 2000).

117 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Adopted by the General Assembly resolution 40/33 of 29 November 1985.

118 For instance, United Arab Emirates (Children's Code, 1996, Art. 94); Yemen (Republican Decree for Law No. 12 for the Year 1994, Concerning Crimes and Penalties, 1994, Art. 31).

119 See Cipriani, D., 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective', Ashgate, 2009.

120 See the very helpful chart of minimum ages of criminal responsibility set out in Cipriani, op. cit.

121 Article 40(3)(a) CRC.

122 See Happold *ibid* at p. 74.

123 UN Committee on the Rights of the Child, General Comment No. 10 (2007), para. 34: "The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible."

124 Committee on the Rights of the Child, General Comment No. 10 (2007), para. 30.

125 Committee on the Rights of the Child, General Comment No. 10 (2007), para. 32.

126 United Nations Children's Fund, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007.

127 Special Court Sierra Leone, Public Affairs Office, press release, Special Court Prosecutor Says he will not Prosecute Children, 2 November 2002. In his report on the Special Court of Sierra Leone, the UN Secretary-General acknowledged the difficulty of prosecuting child soldiers for war crimes and crimes against humanity given their dual status as both victims and perpetrators. (Report of the Secretary-General on the establishment of a Special Court for Sierra Leone) UN Doc. S/2000/915, 14 October 2000).

128 Article 26. Rome Statute.

129 See R.S. Clark and O. Triffterer, 'Article 26: exclusion of jurisdiction over persons under eighteen', in O. Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court: "Observers Notes, Article by Article (Baden-Baden, Nomos Verlag 1999) pg 499.

130 Article 37(a), CRC; Article 6(5) ICCPR; Rule 17.2 Beijing Rules.

131 Article 37(a), CRC; CRC, General Comment No 10, para. 77.

132 General Comment No 10, Para. 71, states: "The Committee reiterates that corporal punishment as a sanction is a violation of ... Article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment". (See UN Committee on the Rights of the Child (CRC), CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia), 2 March 2007, CRC/C/GC/8).

133 Article 7 of ICCPR; Article 37(1) of CRC; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984.

134 Sentences that courts should consider are set out in Article 40(4), CRC. See also Rule 18(1) Beijing Rules. In times of armed conflict though, many of these sentences may not be viable options due to the destruction or inadequacy of social services.

135 Sara Rakita et al, Lasting Wounds: Consequences of Genocide and War for Rwanda's Children, New York: Human Rights Watch, 2003, pg 18.

136 Article 77 Penal Code. Children under the age of 14 cannot be held criminally responsible. However, they can be placed in rehabilitation centres. *Ibid*.

137 See, Q&A: Rwanda's Long Search for Justice, BBC News, 18 December 2008, available at <http://news.bbc.co.uk/1/hi/world/africa/3246291.stm>; Constance F. Morrill, Reconciliation and the Gacaca: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees, OJPCR 6.1 Fall: 1-66 (2004), citing, amongst other sources, statistics from the Rwandan Ministry of Interior (MININTER).

138 The courts were due to cease functioning in 2011. As of May 2011, 97 cases are pending, most involving individuals appealing convictions made in absentia. See Frank Kanyesigye, "Only 97 cases pending in Gacaca", The New Times, 7 May 2011.

139 Article 16 Organic Law No. 10/2007 of 01/03/2007 modifying and complementing Organic

Law no. 16/2004 of 19/06/2004 establishing the organisation, competence, and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date.

140 Article 72 Organic Law No. 16/2004 Establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994; Article 16 Organic Law No. 10/2007 of 01/03/2007 modifying and complementing Organic Law no. 16/2004 of 19/06/2004 establishing the organisation, competence, and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date.

141 Article 24 of the 2001 Gacaca Law does allow for in camera hearings, "for reasons of public order or good morals". This provision is not contradicted in subsequent versions of the law.

142 Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, pg 18.

143 Amnesty International, *Democratic Republic of Congo: Massive violations kill human decency*, May 31, 2000 p. 1.

144 Statement of SRSg Ms. Radhika Coomaraswamy on the occasion of the trial of Omar Khadr before the Guantanamo Military Commission, August 10, 2010, available at <http://www.un.org/children/conflict/english/09-august-2010-trial-of-omar-khadr.html>.

145 Concluding Observations on US Compliance with the Optional Protocol on the involvement of children in armed conflict CRC/C/OPAC/USA/CO1 25 June 2008.

146 Khadr subsequently admitted the offence under a plea bargain arrangement. Human Rights Watch, "Khadr's Plea Agreement and Sentencing: Questions Never to be Answered", (Jurist), November 5, 2010.

147 See, for instance, Committee against Torture, *Concluding Observations: Burundi* (2007), U.N. Doc. CAT/C/BDI/CO/1, para. 17.

148 Rule 28 of the Havana Rules states "[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations".

149 Article 6 of Optional Protocol. See also Article 39 of CRC.

150 UN Standard Minimum Rules for the Treatment of Prisoners approved by the Economic and Social Council by its Resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

151 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

152 Rule 11(b), Havana Rules. See also 'Guidance for Legislative Reform on Juvenile Justice. Children's Legal Centre and UNICEF, June 2011 part 9.

153 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

154 Tyler Davidson and Kathleen Gibson, 'Experts Meeting on Security Detention Report' (2009) 40 *Case Western Reserve Journal of International Law* 323, 359

155 Defence for Children International – Palestine Section, 'Palestinian Child Prisoners' (2009), 74.

156 See the UN Study on the Impact of Armed Conflict on Children (Graca Machel, UN Doc. A/51/306 of 26 August 1996 and Add.1 of 9 September 1996, New York and the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict A/RES/54/263 of 25 May 2000.

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160 Lima Declaration on Restorative Juvenile Justice, 2009, pg 3.

161 Lima Declaration on Restorative Juvenile Justice, 2009, pg 3.

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166 United Nations Disarmament, Demobilization and Reintegration Resource Centre, "What is DDR?", <http://www.unddr.org/whatisddr.php>.

167 United Nations, Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS) "Children and DDR", (2006) pg 1, http://www.unddr.org/iddrs/05/download/IDDRS_530.pdf.

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169 Coalition to Stop the Use of Child Soldiers, "What is DDR?" <http://www.child-soldiers.org/childsoldiers/ddr>.

170 Jean-Claude Legrand, *Lessons Learned from UNICEF Field Programmes, For the Prevention of Recruitment, Demobilization and Reintegration of Child Soldiers*, (1999), pg 25.



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