



# Policy Brief

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## Overview

This document is based on a forthcoming book that unites two broad international themes: international criminal accountability and children's rights. The book examines how a child-rights approach has been gradually inserted into the practice of international tribunals. Child victims should be entitled to no less justice than adults. However, to testify on war crimes and be questioned in courtrooms may add to—not relieve—children's trauma.

Children can both suffer from and commit atrocity crimes. The book discusses the dilemma of child soldiers, who could be perpetrators of war crimes but are also victims of forceful recruitment, which is in itself a war crime. It demonstrates the growing child-protection culture at the UN and the cooperation among its agencies in combating the recruitment of child soldiers.

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## *International Criminal Accountability and Children's Rights*

**I**T IS COMMON KNOWLEDGE THAT CHILDREN SUFFER from armed conflicts—both directly, as victims of atrocities, and indirectly, as their childhood, education, family life and expectations are ruined. According to UNICEF, during the last decade more than two million children died as a direct result of armed conflicts, and more than three times that number of children were permanently disabled or seriously injured. An estimated 20 million children have been forced to flee their homes and more than one million have been orphaned or separated from their families. Some 300,000 child soldiers, boys and girls under the age of 18, are involved in more than 30 conflicts worldwide.

In recent years, major advances have been made in the progressive development of international criminal law and in the creation of international criminal justice institutions. However, despite the overall influence and impact of the Convention on the Rights of the Child (CRC) on many legal and policy fields, the needs and rights of children in international criminal accountability mechanisms have been underexposed for too long. Not until recently have they become subjects of prominent attention within international criminal law and accountability mechanisms. The Special Court of Sierra Leone (SCSL) and the International Criminal Court (ICC) are true pioneers in this field.

The development of the international criminal law with the establishment and practice of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court of Sierra Leone (SCSL) and the International Criminal Court (ICC) raises the question: Are the mechanisms of international justice suitable to address the challenge of exposing children as victims and witnesses in criminal tribunals for most serious crimes, such as genocide and crimes against humanity?

As such exposure may exacerbate instead of easing their trauma, child-specific measures of protection must be woven into the law and practice of the tribunals.

### **Child-Related International Law and Practice**

Concurrent with the increasing focus on children in armed conflicts, the international attention to the position of children and their rights in general has recently

been on a rise. The UN General Assembly Plan of Action, “A World Fit for Children” (2002), contained more specific and elaborate protection from armed conflict and the elimination of trafficking and sexual exploitation of children.

Another indication of the rising international awareness of the pervasiveness of violence against children

Assembly and to the Security Council. A Security Council working group, composed of all Security Council members, has reviewed the outcomes of the system and will advise on possible measures to be taken. The working group was established in November 2005.

A major landmark in the universal protection of children’s rights was

## In all actions the best interests of the child shall be the primary consideration

is found in the UN Security Council debates and resolutions on children. The debates and resolutions qualify the deliberate targeting of children and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including those relating to children, as constituting a threat to international peace and security. This classification is a step toward possible mandatory action under Chapter VII of the UN Charter, should violations persist.

In July 2005, the Security Council adopted Resolution 1612, signaling its approval of the proposed Action Plan for global protection of children in armed conflict. Through the resolution, the UN further extended its commitment to providing for the establishment of a monitoring and reporting system on children in armed conflict, as proposed earlier by the UN Secretary-General. This system is meant to collect and provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children. The UN Secretary-General reported on the information compiled in the aforementioned manner to the General

the adoption of the Convention on the Rights of the Child (CRC) in 1989, which is now about to secure universal ratification. In the year 2000, the CRC was complemented by two Optional Protocols that addressed the involvement of children in armed conflicts and the sale of children, child prostitution and child pornography.

In exploring the child rights’ relevance to the international criminal accountability mechanisms, the CRC is a crucial starting point. The CRC is widely seen as a solid and universal statement of the rights and needs of children in all parts of the world. It provides a helpful and appropriate framework for addressing the challenges that exist in the realm of international crimes against children. Justifying this reasoning is the fact that the CRC spans the various chapters in international law that may play a part in realizing children’s rights and in establishing international criminal accountability for violations of children’s rights. These chapters are human rights law, international humanitarian law and juvenile justice law. It is a breakthrough that the CRC unites these all too often separate parts of international law in one comprehensive document. The formal ratifica-

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tion record, with all states except the US and Somalia now bound to it, is a clear indicator for its universalism. In practice, perhaps more important is the fact that so many governmental and nongovernmental organizations have incorporated the CRC into their mission statements and are developing child-rights based approaches to their daily work.

The CRC is particularly useful in supplying the main ingredients of a framework within which any form of concrete action or intervention should take place. The most fundamental of

direction. The form and nature of such guidance and direction depends on the capacities of the children (Articles 5, 12 and 14). The three main principles are in a triangular relationship with each other and jointly form the main features of child-rights based approaches.

The implications of the child-rights based approach are manifold. Such an approach entails that in all actions, whether undertaken by social welfare institutions, courts of law, or administrative or legislative bodies, the best interests of the child shall be the primary consideration. This principle

## Although child soldiers may commit war crimes, these crimes are results of superior orders. Child soldiers' forcible recruitment is in itself a war crime

such ingredients is the set of general principles that the CRC prescribes for all action affecting children and youth. The main substantive objective of the CRC is to ensure the survival and development of children.

UNICEF and many organizations categorize “survival and development” of children as a general principle of the CRC. However, the “survival and development” making up the substantive objective of the CRC could be seen as of a different order than the three general CRC principles—best interests of the child, nondiscrimination and participation—that direct the form and orientation of all implementation measures.

To achieve survival and development of children, nondiscriminatory (Article 2) and participatory (Article 12) approaches are indispensable, and the “best interests of the child” (Article 3) must be primary considerations. Children exercise their rights within the context of adult guidance and

should therefore play a major role in any decision-making on the choice of criminal accountability mechanisms and the extent to which child perpetrators are exposed to them, or child victims and witnesses are involved.

Another key element of taking a child-rights based approach to criminal accountability that has a straightforward connection with issues of agency and capacities of children is that of participation. The CRC Article 12 implies that the child shall be provided “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body.” Implementing the participation requirements of the CRC is a major challenge for many actors claiming a child-rights based mandate and requires fundamental changes in attitudes towards children.

The UNICEF Innocenti Research Centre has been involved in various child participation exercises in the

sphere of criminal justice, including the preparation of the child-friendly version of the report of the Sierra Leone Truth and Reconciliation Commission (TRC), the first of its kind and rightly qualified as unprecedented by the CRC itself. The report was produced so that the children of Sierra Leone would be able to read and understand it and others outside Sierra Leone might better comprehend what the children of Sierra Leone were involved in and what they experienced during the conflict.

The third general principle of the CRC forming the child-rights based

and excluded from their communities. They are viewed as violent, unruly and promiscuous. If post-conflict measures such as disarmament, demobilization, reintegration, educational programs or refugee camp management fail to recognize these realities, the girls involved might be discriminated against as the programs or facilities offered will not be accessible to them. In practice, less than 2% of the children participating in the DRC programs were girls.

The principles of the child-rights based approach—best interests of the child, participation and nondiscrimina-

## Compare developments in international criminal law with the ways in which other chapters of law have been employed in combating crimes against children

approach is nondiscrimination. Among others, the nondiscrimination principle prescribes gender sensitivity. For example, in relation to child soldiers this principle is still a major challenge in many settings. Up to 40% of the estimated 300,000 children associated with armed groups are girls; nevertheless, they remain largely invisible and most people see the image of a boy when confronted with the idea of a “child soldier.”

According to Save the Children’s research, it is a misconception that girls do not take part in combat. In 2002, nearly half the girls associated with armed groups in the Democratic Republic of Congo (DRC) described their primary role as “fighting.” A large majority of girl soldiers is exposed to severe sexual violence. The trauma and stigma attached to such violence often makes it very difficult for them to open up with their experiences once the conflict has calmed down. Girls returning home are often marginalized

and excluded from their communities. They are viewed as violent, unruly and promiscuous. If post-conflict measures such as disarmament, demobilization, reintegration, educational programs or refugee camp management fail to recognize these realities, the girls involved might be discriminated against as the programs or facilities offered will not be accessible to them. In practice, less than 2% of the children participating in the DRC programs were girls.

### Children as Victims and Perpetrators

Children are victims in most cases but could also be perpetrators of international crimes. Shall juveniles committing war crimes be prosecuted? If not, is there a danger that warlords may delegate more atrocities to be committed by child soldiers? It is argued that although child soldiers may commit war crimes, these crimes are results of superior orders. Child soldiers’ forcible recruitment is in itself a war crime. The examples of Darfur, Congo, Sierra Leone, Philippines, Nepal, Colombia and others tragically illustrate this fact.

The SCSL is the only international court that has the jurisdiction to try child soldiers. However, it has deliber-

“The Rome Statute is a miracle. We now have a set of global principles established by national states saying that genocide, crimes against humanity and war crimes affect humanity and that the international community works to monitor this. That is a huge step. Those who are not lawyers might ignore this, but the evolution of the national criminal system was a 10-century process. We are now going from a national system to a global system, which is yet another huge step. This is an impressive development, a quantum leap.”

**Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court**

ately never done so, and this has been met with appreciation by the people in Sierra Leone. Apart from non-prosecution, positive obligations must be developed and implemented to alleviate and heal former child soldiers. One possible successful strategy would be to employ their energy into participation in peace-building exercises instead of leaving them unoccupied.

The international criminal accountability mechanisms have gradually developed child-oriented measures. The practice of the existing international courts demonstrates that vulnerable groups of victims, including children, are gradually given more consideration in the judicial process. For example, the prosecution office of ICTY in the case *Prosecutor v. Kunarac* demanded aggravated sentences for the suspects based mostly on the fact that among the victims were many children. This precedent must be further followed and strengthened.

The development of relevant international norms in this field is also encouraging. While the CRC contains a range of important provisions—among others, on the recruitment of child soldiers and various juvenile-justice related aspects—it pays scant attention to the position of child witnesses. Both for the SCSL and for the ICC, children are a crucial group of witnesses, especially in cases relating to the recruitment of child soldiers, abduction and other crimes that explicitly target children. These courts have developed special measures and are elaborating further policies for working with child victims and witnesses.

In July 2005, the UN Economic and Social Commission made an attempt to further profile the role of child witnesses by adopting a set of “Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.” These guidelines set forth

good practice based on the consensus of contemporary knowledge and relevant international and regional norms and standards. The Guidelines are meant to assist in the review of domestic laws, procedures and practices and in the design and implementation of relevant legislation, policy, programs and practices, and to guide all those working with child victims and witnesses at national, regional and international levels.

In recent case law—the groundbreaking *Hinga Norman* case at the SCSL and the *Roper v. Simmons* case at the US Supreme Court—some decisions of the Inter-American Commission on Human Rights provide credible legal arguments that the existing customary international law extends legal protection against child recruitment and the death penalty for minors. The practice of the European Court of Human Rights in Strasbourg is another positive example of a child-oriented approach to both prosecution and defense. A similar approach pertaining to vulnerable people including children is exemplified in the Rome Statute for the ICC and by its chief prosecutor, Luis Moreno-Ocampo, who made it clear that the approach would further the emerging practice.

International criminal accountability mechanisms have primarily responded to crimes that occurred during times of armed conflicts; however, crimes against children also take place during peacetime. Issues of trafficking, sexual exploitation, forced labor and the like have international features as they are often supported by transnational criminal networks. It is often more difficult to tackle these problems than it is to tackle genocide, war crimes and crimes against humanity. Besides international human rights law—which by itself has only limited enforcement instruments—it is pri-

“This book is the first both to analyze and to advocate the insertion of the rights of the child into international criminal accountability. It demonstrates various efforts by UN organs to ensure effective protection for children exposed to war, including through combating the recruitment of child soldiers.”

**Olara Otunnu, UN Special Representative for Children and Armed Conflict (1997–2005)**

“Over centuries the victimization of children in war has received scant attention. This publication goes some way to redress this neglect. Children are victims when civilian populations are attacked, when their loved ones are killed and, perhaps most egregiously, when they are forced to become soldiers themselves. I commend this impressive book to policymakers, the academic community and to the public at large.”

**Justice Richard Goldstone**



marily the national legal systems of affected states that are equipped to deal with these problems.

The attention to children would be somewhat narrow in outlook if it were to consider international criminal law proper and focus only on atrocity crimes. This would have left many fields of current crime and injustice to children uncovered such as child pornography, sexual exploitation and human trafficking, to name just a few that clearly have strong international features. From this perspective, it is important to compare developments in international criminal law with the ways in which other chapters of law have been employed in combating crimes against children and to identify the lessons learned.

### **Criminal Accountability of Minors**

Besides being major victims of international crimes, children are also known to be perpetrators of such crimes. This duality, of being both culprit and victim, renders serious complications in deciding the best interest of children. Whereas children have the right to claim the exercise of criminal justice and the judicial processes, witnessing and cross-examination or interrogation in courts may deepen their grief.

Although there are many compelling reasons not to prosecute child perpetrators of crimes in international proceedings, it is also a fact that in most national legal systems it is possible, and is found necessary and opportune, to prosecute juvenile perpetrators of crimes. However it is fitting to mention here that the ideas about the desirability and the required modalities of national criminal proceedings against minors vary considerably across national justice systems worldwide. In the end, to determine the best interests of the child a careful

analysis and weighing of all interests and circumstances of the particular case is required.

The whole point of introducing the best-interests principle in the CRC was to compel an examination of those very circumstances and interests and to ensure that the child's interests would get proper emphasis. The CRC only pronounces on these issues in part. Article 40 insists on setting a minimum age below which children shall be presumed to be incapable of infringing the penal law. In cases where criminal proceedings are found to be appropriate, CRC Articles 37 and 40 provide a set of requirements that such proceedings should respect, whether they are of a national or an international character. Those provisions set standards for arrest and detention, legal assistance and fair trial conditions. Any mechanism set up by state parties to the CRC would need to honor these standards in high regard.

The criminal responsibility of minors is a sensitive political and legal matter and needs further deliberation regarding the age of criminal responsibility in international and national law, the criminal capacity of minors, and the role and importance of individual psychological factors in assessing capacity and responsibility. There seems to be a strong consensus that strict age limits for acquiring certain rights or privileges, or for gaining certain capacities, deny the realities of the process of the “evolving capacities of the child” and deny the differences in circumstances within which children and youth grow up.

The ICC will not prosecute individuals for crimes committed by them when they were below the age of 18. Usually, child soldiers commit or are made to commit serious crimes alongside adult soldiers. According to Amnesty International, there appar-

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ently are cases in which the child soldiers were clearly in control of their actions and were not coerced, drugged or forced into committing atrocities. Some have become child soldiers voluntarily and committed atrocities of their own discretion. However, the ICC intends to focus on those who bear greatest responsibility. While there may be situations where it could be in the interest of children to be held accountable, these are not matters for an international court, which is more of an opportunity to bring to justice leaders and architects of crimes who would otherwise escape from justice in unwilling or incapable states.

In the end, what would justify non-prosecution of the children involved whereas the adults would be exposed

### Prevention Required

Efforts are being made to make international criminal accountability mechanisms more child-friendly and to improve their respect for children's rights. This includes military training as a concrete tool to prevent child recruitment and other crimes against children committed by the military. The adoption of Codes of Conduct for UN personnel serving on peacekeeping missions provides another interesting example. More broadly, further campaigns to emphasize the main messages of the CRC to all children and adults in this world, and to point out how concretely children's rights can be respected and promoted on the ground, will remain a sheer necessity for a long time.

## Accountability does not necessarily involve criminal responsibility and holding children accountable does not necessarily require criminal proceedings

to criminal proceedings regardless of the level of crime? One may argue that child recruitment into armed forces is in itself a war crime, and that child soldiers are overwhelmingly victims rather than perpetrators and should therefore not be prosecuted. Yet such impunity may encourage military commanders to delegate the "dirtiest" orders to child soldiers. In that way, a decision not to prosecute child perpetrators would indirectly expose child soldiers to more risks rather than protecting them from the same risks. The likely solution seems to rest in taking seriously the idea that accountability does not necessarily involve criminal responsibility and that holding children accountable therefore does not necessarily require criminal proceedings, and finally that a wide range of other options exist.



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**INSIDE:**

## Policy Brief

### *International Criminal Accountability and Children’s Rights*

The injection of a child-rights approach into the practice of international criminal tribunals is necessary for a modern system of jurisprudence.

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