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Children and the International Criminal Court : analysis of the Rome Statute through a children's rights perspective

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1.1 INTRODUCTION

In order to understand the position of children before the ICC, it is important to understand the impact that international crimes have upon them. Crimes within the ICC's jurisdiction are no ordinary crimes, and often will be massive or systematic and have serious consequences on the lives of children and their communities. This Chapter aims to give a general overview of the different roles that children play in armed conflict and other situations where the ICC may exercise its jurisdiction: as civilian victims, as participants in hostilities and also as key players in peace, reconciliation and justice mechanisms. It is important to acknowledge that many children coming before the ICC will fulfil these three roles in one way or another. Even though they may seem incompatible, they are all part of the paradox reality of armed conflict and its effect on children. As noted by Drumbl, any type of labelling or category of child image, particularly as regards child soldiers, may inordinately simplify the complex lives and experiences of children.¹ Hence, this Chapter will try to describe the various "images" of children, beyond vulnerable victimhood. It will describe children as perpetrators of heinous crimes but also as potential peacemakers in judicial and non-judicial justice mechanisms.

Although children may be resilient and endure extreme situations of armed conflict, the experiences they surpass may also have an effect on the way they will interact with the ICC either as participating victims or as witnesses in court. As will be analysed further below in this research, crimes committed against children may affect the child's capacity to trust adults (*i.e.* including lawyers and judges), and they may also corrode the child's moral values (*i.e.* importance of an oath and telling the truth). Thus, it is important to take this into account in order to protect the child's well-being in accordance with Article 68(1) of the Statute, but also to protect the probative value, reliability and truthfulness of their evidence as witnesses and ultimately protect the fairness of proceedings at the ICC.

¹ Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 6-7.

1.2 CHILDREN AS VICTIMS OF ARMED CONFLICT AND GROSS VIOLATIONS OF HUMAN RIGHTS

1.2.1 Violence against children as a method of war

In general, crimes against humanity and genocide can occur in times of peace, but frequently crimes under the jurisdiction of the ICC are committed during times of war.² A well-known fact today is that while during World War I the number of civilian victims rose to 5% of the total war casualties, civilian victims of armed conflict nowadays represent 90% of the war victims.³ The distinction between combatants and civilians has thus disappeared from most modern conflicts and civilians have become the main targets of warfare.

As noted by Kuper, children experience armed conflict differently from adults. They are often physically, economically, politically and militarily powerless in armed conflict situations.⁴ In response to the growing effects of armed conflict on civilians, and particularly children, the United Nations General Assembly (UNGA) decided to appoint an expert on the impact of armed conflict on children in 1993.⁵ In her 1996 report, the Special Representative gave, for the first time, a full view of the unprecedented effects of armed conflict on children.⁶ As for the subsequent reports in the years to come, the office of the Special Representative raised awareness of the situation of children in armed conflict around the world. For example, in the 2006 report, the Special Representative stated that at that time over 2 million children had been killed in armed conflicts around the world, 6 million had become permanently disabled as a result of an armed conflict and more than 250,000 continued to be victims of child recruitment in armed conflicts around the world. To date, little has changed. The 2012 UN Report of the Secretary General on Children and Armed Conflict denounced that 32 “*persistent perpetrators*”, that is, parties that have been listed for grave violations against children for five years or more, continued to commit crimes against children. Of these “*persistent per-*

2 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 29.

3 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 24.

4 Jemy Kuper, ‘Children and Armed Conflict: Some Issues of Law and Policy’, in: D. Fottrell (ed.) *Revisiting Children’s Rights: Convention on the Rights of the Child* (Kluwer Law International 2000) 104-105.

5 UNGA, *Protection of Children Affected by Armed Conflicts: Resolution adopted by the General Assembly* (20 December 1993) A/RES/48/157. See also: Matthew Happold ‘*Child Soldiers in International Law*’ (Manchester 2005) 36-42; Sara Dillon ‘*International Children’s Rights*’ (Carolina Academic Press 2010) 694-708; Magali Maystre ‘*Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal*’ (Perspectives Internationales No 30, 2010) 87-89.

6 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 24.

perpetrators" seven are government security forces.⁷ Regrettably, in spite of the growing awareness of the international community of these crimes, children continue to be targets of modern armed conflict and are often caught between being civilian victims but also participants in hostilities.⁸

Children in situations of armed conflict also suffer from sexual violence in a manner that is both unprecedented and not incidental. Sexual violence against children has become a weapon of war used to terrorise the population and force civilians to flee.⁹ Children are increasingly at risk of becoming victims of sexual violence from all armed groups in a conflict, including even peacekeepers and humanitarian workers.¹⁰ Even if sexual violence has devastating effects on all victims (adults or children, men, women, boys or girls) the impact of sexual violence on children is more profound and long-lasting, given the effects it has on their development.¹¹ The long-term effects of this kind of violence on children are both psychological and physical, including the sexual transmission of diseases such as HIV-AIDS and unwanted or forced pregnancies resulting thereof.¹²

The UN Commission on the Status of Women has denounced that though all children may be victims of sexual violence, girls, particularly adolescent girls, are at greater risk of suffering these crimes due to their age and vulnerability.¹³ Although boys are also victims of sexual violence,¹⁴ this crime affects girls disproportionately and it is estimated that around the world some half a million children are "born of war": resulting from rape, forced pregnancies and sexual slavery.¹⁵ Thus in many cases, sexual violence committed against

7 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (26 April 2012) A/66/782-S/2012/261, para. 221.

8 Jeny Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy', in: D. Fottrell (ed.) *Revisiting Children's Rights: Convention on the Rights of the Child* (Kluwer Law International 2000) 109. See also: Geraldine Van Bueren, *The International Law on the Rights of the Child*. (Save the Children 1998) 329.

9 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 94.

10 UN Commission on Human Rights, *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Olara Otunnu* (28 January 2004) E/CN.4/2004/70, 7.

11 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 79.

12 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 77; Anne-Marie De Brouwer, 'Reparations of Victims of Sexual Violence: Possibilities at the ICC and at the Trust Fund for Victims and their Families' (2007) *Leiden Journal of International Law*, 207-237.

13 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, paras 6 and 30.

14 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 77.

15 UN Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011) available at: <http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf> accessed 3 September 2013.

girls also has multiplying effects that surpass generations, affecting also children born as a result of these crimes.¹⁶ These “second generation” children, as well as their young mothers, suffer rejection and ostracism.¹⁷ In addition to the problems encountered by all children in armed conflict situations, these children suffer from additional stigma and discrimination, and are often deprived of fundamental rights such as nationality, family and identity.¹⁸ Moreover, as noted by Hall-Martinez, the crime of forced pregnancy inflicts incomparable harm on the victims by occupying a woman’s body and forcing her to bear her rapist’s child.¹⁹ If, in addition to this, the young age of the victim is added, forced impregnation could have devastating physical effects on her body, which might very well be unprepared to bear a child, and also shattering emotional effects on the victim, who may not have reached maturity and psychological development to become a parent. Furthermore, they may have particular health problems resulting from the sexual violence suffered by their mothers (*i.e.* HIV/AIDS) as well as psychological problems due to their mother’s trauma.²⁰

Violence committed against children in situations of armed conflict has long-lasting effects that taint the lives of child victims often in a permanent manner. In this regard, the CRC Committee in its General Comment on Violence Against Children, determined that there are multiple short and long-term health consequences to violence, all of which are applicable to situations of armed conflict in which children are often victims of extreme acts of violence. The CRC Committee mentioned physical health problems (including sexually transmitted diseases, diarrhoea and malnutrition); cognitive impairment (including impaired school and work performance); psychological and emotional consequences (such as feelings of rejection and abandonment, impaired attachment, trauma, fear, anxiety, insecurity and shattered self-esteem); mental health problems (such as anxiety and depressive disorders, hallucinations,

16 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Save the Children 1998) 340-341.

17 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 92.

18 In some cases, these children born of sexual violence are abandoned, and sometimes even killed. Many children also suffer from economic hardship, as they and their mothers are often rejected and may have no access to social benefits and education. See: Charlie Carpenter (coordinator), *Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones: Existing Practice and Knowledge Gaps* (National Science Foundation, Ford Institute of Human Security and University of Pittsburgh, December 2004-March 2005) 4, 10.

19 Kathy Hall-Martinez and Barbara Bedont, ‘Ending Impunity for Gender Crimes under the International Criminal Court’ (1999) *The Brown Journal of World Affairs*, 65-86.

20 As noted by Denov, particularly referring to girls who had been victims of sexual violence in Sierra Leone, these crimes have a profound effect on the mind and body, and scars not only the body, but also the memory of the victim who may have a long-term sense of insecurity, whether physical, psychological or socio-economic in nature. See: Myriam Denov, *Wartime Sexual Violence in Sierra Leone* (Security Dialogue Vol 37 No 3, September 2006) 327.

memory disturbances and suicide attempts); and health-risk behaviours (such as substance abuse and early initiation of sexual behaviour). Secondly the CRC Committee found that there are developmental and behavioural consequences (such as school non-attendance and aggressive, antisocial, self-destructive and interpersonal destructive behaviours) that can lead, *inter alia*, to deterioration of relationships, exclusion from school and coming into conflict with the law.²¹

All these consequences of armed conflict and violence against children, mounted with the fact that some armed conflicts last for several decades, often lead to what has been called “second generation” wars, with children who have lived their entire lives in a situation of armed conflict and violence, and see it as a permanent way of life.²²

This situation of children must not be ignored by the ICC, particularly when responding to the child victims or witnesses’ needs pursuant to Rule 86 of the RPE. Moreover, these effects of violence against children should also be considered when children become means of proof in judicial proceedings, in which the rights of the accused to a fair trial must be balanced with the duty to protect these children.

1.2.2 Socioeconomic impact of armed conflict on children

Armed conflict also has particular socioeconomic effects on children, as it often results in damage or destruction of a society’s social and cultural life (*i.e.* schools, health systems), leaving children deprived of their material and emotional needs.²³ During an armed conflict the educational infrastructure is severely affected, and children may lose years of schooling that will affect their future development into productive and economically independent individuals.²⁴ Furthermore, when adult family members are killed or displaced, children may end up assuming leadership roles in communities and families: girls become “mothers” for younger siblings and boys “fathers”, both heads of families.²⁵ All of this deprives children of fundamental rights according to the CRC: mainly their right to education and their right to rest and leisure. Likewise, after an armed conflict, many child-headed households may often lack legal and social protection, and may not be entitled to land, property

21 CRC Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13, para. 14.

22 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 43.

23 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 29.

24 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 187.

25 Coalition for the International Criminal Court (CICC) *Child Victims of Genocide, War Crimes and Crimes Against Humanity* <http://www.iccnw.org/documents/children_&_the_ICC.pdf> accessed 7 August 2013.

and inheritance rights under national law, which leaves children in a situation of extreme vulnerability.²⁶

Under such economic and social conditions, children's recruitment often occurs either "voluntarily" or compulsorily. As will be further analysed in Chapter 4 of this research, due to these socioeconomic burdens, children's recruitment is rarely, if not impossible, voluntarily, as they may join the armed conflict in order to protect themselves and their families, out of vengeance for harms suffered by family or community members, or in order to ensure their daily subsistence.²⁷ At the same time, children recruited in armed groups often lose their social and family ties, and may become addicted to drugs, all of which makes their future reintegration into society and economic life complicated.²⁸

The economic and social hardships suffered by children, particularly girls, also make them extremely vulnerable to sexual exploitation and prostitution.²⁹ As noted above, girls that have suffered from crimes of sexual violence are often rejected by their families, are not able to marry, and suffer from negative long-term socioeconomic effects that may impede their future development and growth both in the family and community spheres.

Though thousands of children die as a direct result of armed conflict, many others die of diseases related to this state of violence, such as malnutrition and infectious diseases, diarrheic illnesses, and respiratory infections, all of which often occur as a result of displacement and the lack of basic health and sanitary services. During armed conflict, health services and food supplies are interrupted, leaving many children adrift. Armed conflict also affects children who suffer from war-related disabilities (both physical and mental). According to the World Health Organisation, armed conflict is the leading cause of disabilities in children.³⁰ These hardships are worsened when economic sanctions are put into place. Even though humanitarian aid is exempt from sanctions, the distribution of food, medicines and the proper working of sanitation and health systems are often affected when sanctions are put in place, affecting mostly women and children.³¹

26 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 89. See also: Charlotte Phillips, *Child-headed Households: a Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?* (Leiden University 2011).

27 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 74. See also: Matthew Happold, *Child Soldiers in International Law* (Manchester 2005) 11-15.

28 UNGA, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (17 August 2006) A/61/275 para. 12.

29 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 96.

30 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 145.

31 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, paras 128-129.

1.2.3 Refugee and internally displaced children

In the early 1980's there were 5.7 million refugees worldwide and by the end of that decade, the number rose to 14.8 million. In 2006, the number of refugees rose to up to 20.8 million persons worldwide and an estimated 23.7 million persons were internally displaced around the world.³² Among the millions of refugees and internally displaced persons around the world, it is estimated that 80 per cent are women and children, and at least 50 per cent of them are children.³³

Children are often the first victims of massive displacements, as they are more vulnerable to diseases such as diarrhoea, malnutrition, and respiratory infections, all of which increase in situations of overcrowding, lack of food and poor sanitation.³⁴ Additionally, children who are displaced are at a greater risk of being victims of crimes, such as sexual violence and recruitment, due to insecurity and lack of economic and educational opportunities for children in those camps.³⁵

The general breakdown of all social structures due to massive displacement of people often entails that States and the community are not in a position to provide the necessary protection for children without families.³⁶ Even when children are under the care of both parents, they have little potential to provide protection and act as role models for their children due to the loss of their normal livelihoods.³⁷ Some children, those that are unaccompanied and thus separated from any adult relative,³⁸ are at greater risk, since under many legal systems they will lack legal capacity to access asylum procedures and other forms of complementary protection. Moreover, children who have been displaced and lose contact with their family members also suffer psychologically as they have been separated from the people most important to them, and often under brutal circumstances.³⁹

For many children their refugee status is also complicated by the fact that they could have committed international crimes, particularly as a result of

32 United Nations High Commission on Refugees (UNHCR), *Refugees by Numbers* (2006) 19.

33 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, paras 26 and 66.

34 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 79.

35 UN Children's Fund (UNICEF), *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups* (February 2007), Principle 5.0.

36 International Committee of the Red Cross (ICRC), *Inter-Agency Guiding Principles for Unaccompanied and Separated Children* (January 2004) 2.

37 UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva 1994) 10.

38 ICRC, *Inter-Agency Guiding Principles for Unaccompanied and Separated Children* (January 2004) 7. See also: Geraldine Van Bueren, *The International Law on the Rights of the Child*. (Save the Children 1998) 342-344.

39 Geraldine Van Bueren, *The International Law on the Rights of the Child*. (Save the Children 1998) 26.

their voluntary or forced recruitment into armed groups. In accordance with Article 1(F) of the Convention relating to the Status of Refugees (Refugee Convention) none of its provisions shall apply to any person for whom there are serious reasons to consider that he or she has committed an international crime.⁴⁰ In light of this provision, many children could be excluded from the safeguards provided for in the Refugee Convention based on their participation in armed conflict. Davison has commented that if it can be discerned that the child has been forcibly recruited, refugee status could be granted to the child, albeit any crime he or she could have committed during the recruitment.⁴¹ However, it could also be argued that such an exemption would be contrary to the object and purpose of the Refugee Convention, which by no means provides children this “immunity”. This dilemma does reveal a need to modify the Refugee Convention in response of the changing nature of armed conflicts since 1951 when this international treaty was adopted.

1.3 CHILDREN AS PARTICIPANTS IN ARMED CONFLICT

In over three-fourths of the conflicts around the world, children participate as combatants,⁴² and are recruited and used in hostilities in at least 86 countries or territories worldwide.⁴³

But what exactly encompasses children’s participation in armed conflict? The Rome Statute does not give a very clear definition of this concept, only making reference to the crimes of conscription, enlistment and use of children to actively participate in hostilities, without any further detail on what really is meant by “active participation”. The definition of these crimes will be analysed in-depth in Chapter 4. However, it is important to mention already the definition given by the Paris Principles and Guidelines on Children Associated with Armed Groups or Forces (Paris Principles),⁴⁴ which is a political document signed by 76 States that provides guidelines on the disarmament, demobilization and reintegration of children associated with armed groups. Although the terms of the Paris Principles may be too broad a definition in order to decide on the individual criminal responsibility of perpetrators of crimes of child recruitment, they do offer a wider concept that adjusts to the realities of today’s armed conflicts, in which children participate in countless

40 *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series, vol. 189, p. 137.

41 Ann Davison, ‘Child Soldiers: No Longer a Minor Incident’ (2004) *Willamette Journal of International Law and Dispute Resolution*, 152. See also: Magali Maystre, *Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal* (Perspectives Internationales No 30 2010) 22.

42 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 7.

43 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 5.

44 Paris Principles.

roles, from fighting in battles to serving as cooks or domestic servants in commanders' quarters.

According to the Paris Principles (which will be further analysed in Chapters 3 and 4 of this research), a "child associated with an armed force or armed group" is:

'(...) any person under 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.'

It does not only refer to a child who is taking or has taken a direct part in hostilities.⁴⁵

Armed groups and forces recruit children; they are either conscripted (recruited by force) or enlisted (recruited voluntarily). As noted above, some experts believe that since several forces including cultural, social, economic or political pressures, drive children to "voluntarily" enlist, all child recruitment should be considered involuntary.⁴⁶ However, other scholars have stated that children should not be regarded as "incompetent" individuals that have no will and that children's participation in armed conflict is a coping strategy that serves a protective psychological function compared to an alternative of frustration, poverty, hopelessness and learnt hopelessness.⁴⁷ Although the "voluntariness" will be analysed further in Chapter 4, it is necessary to determine at this juncture that, regardless of the nature of the recruitment (either by force or voluntarily), the child's involvement with an armed group has distressing consequences for the child, his or her family and ultimately his or her community. Furthermore, as will be analysed further in Chapter 4, both conscription and enlistment are prohibited by the Rome Statute and consequently, consent should thus not serve as a defence.

But why are children recruited in current armed conflicts? Singer identifies three main causes to this new warfare trend: a) social disruptions and failure in development; b) technological improvement in production of lighter and easier to use weapons; and c) the rise in brutality.⁴⁸ This author is of the view that poverty, protection and revenge are some of the most common underlying

45 Paris Principles, principle 2.1.

46 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 38.

47 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 99. See also: Magali Maystre 'Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal' (Perspectives Internationales No 30 2010) 27-28.

48 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 38. See also: Matthew Haggold, *Child Soldiers in International Law* (Manchester 2005) 8-11.

causes of the “voluntary” recruitment of children.⁴⁹ Furthermore, Singer also states that modern small weapons are much easier and lighter to use due to new technologies and lighter materials used in modern weaponry. Thus, a child can carry it effortlessly and can learn how to use it within minutes. These weapons have also become cheaper and widely available, which may explain why it is estimated that there are currently five hundred million small arms around the world: one for each twelve persons on the planet.⁵⁰

Likewise, armed conflicts have become more brutal, and the use of children turns them into fearless fighters who may often be unaware of the effects of the crimes they commit. Along this view, the ICRC has affirmed that recruitment of children is not only a crime against children being recruited, but it also increases the crimes committed against the civilian population in general, as children who take part in hostilities not only place their own lives at risk, but also their immature and impulsive conduct endangers the lives of everyone around them.⁵¹ As a result of this modern warfare trend, adults are no longer the main recruits in some armed conflicts, and children have become the primary source of fighters. As stated by the UN Secretary General in the 10th Annual Report on Children and Armed Conflict, the crime of child recruitment is “migrating” within regions, as rebellious groups move across borders in search for new child recruits and children are “recycled” from one conflict to another.⁵²

In light of the above, any effort to demobilise and reintegrate child soldiers seems as a titanic task. According to the UN, demobilisation programmes aim to discharge active child combatants from armed forces or groups, whereas reintegration programmes are the processes by which ex-combatants acquire civilian status and gain sustainable employment and income.⁵³ In general, all demobilisation and reintegration programmes should take into account the particular needs of children, and should be organised separately into child-specific programmes.⁵⁴ For example, child demobilisation requires taking into consideration aspects such as: education, recreation, psychological treatment, reunification with their families, etc. However, implementation of these standards is often problematic. For example, incentives, such as the promise of money upon presentation of a weapon, which were implemented in some demobilisation programmes in the past, brought more negative effects than

49 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 61-63.

50 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 46-47.

51 ICRC, *Children in War* (July 2004) 2.

52 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (26 October 2006) A/61/529-A/2006/826 para. 4.

53 UN Disarmament, Demobilization and Reintegration Resource Centre, *What is DDR?* <<http://www.unddr.org/whatisddr.php>> accessed 31 August 2012 (webpage no longer available).

54 Geraldine Van Bueren *The International Law on the Rights of the Child* (Save the Children 1998) 348.

benefits to former child soldiers.⁵⁵ It also lead to discrimination against girls who formed part of the same armed groups.⁵⁶

Another aspect of child recruitment that has its own particularities is that one committed against girls.⁵⁷ The reasons for which they join the armed groups, the potential for their release, and the effects of their experience on their physical, emotional and social well-being, and the long-term effects on their social reintegration are all too different from that of boy recruits.⁵⁸ Although these crimes committed against girls will be further analysed in Chapter 4, it is important to generally describe the manner in which girls are recruited by armed groups. For example, many girls are recruited to help armed groups in domestic chores, such as fetching water or preparing food. Also, girls are recruited as sexual slaves, and are often “married” to fighters in ceremonies. Girls face deep-rooted stigmas in their families and communities, along with traumas resulting from the abuses and harms they have suffered.⁵⁹ Moreover, many girls, though initially abducted and raped, later develop ties with their perpetrators, and create “family units” with them and the children resulting from rape.⁶⁰ In many cases, girls have to deal with residual relationships or feelings for their captors, who are perpetrators of serious crimes, but also their “husband” and often father of their children.⁶¹

What is most paradoxical as regards children associated with armed conflict is the fact that although victims for some, they are ultimately also perpetrators of crimes just as serious and grave as those committed against them. Although pursuant to Article 26 of the Rome Statute, the ICC may not prosecute children, this does not mean that child perpetrators of crimes should remain absolved of any criminal or at least moral responsibility.⁶²

55 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (9 February 2005) A/59/695-S/2005/72 paras 138-144.

56 UN Disarmament, Demobilization and Reintegration Resource Centre, *What is DDR?* <<http://www.unddr.org/whatisddr.php>> accessed 31 August 2012 (webpage no longer available).

57 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, para. 30.

58 Paris Principles, principle 4.

59 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, para. 32.

60 UN General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (17 August 2006) A/61/275, para. 13.

61 Paris Principles, principle 7.59.

62 Matthew Happold 'Child Soldiers in International Law' (Manchester 2005)141-159; Christina Clark, 'Juvenile Justice and Child Soldiering: Trends, Challenges and Dilemmas', in: Charles Greenbaum and others (eds), *Protection of Children During Armed Political Conflict: A Multi-disciplinary Perspective* (Intersentia 2006) 311-328; Magali Maystre 'Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal' (Perspectives Internationales No 30 2010) 135-138.

Children who perpetrated serious crimes could be prosecuted under national juvenile criminal systems.⁶³ Where these systems have been established in accordance with international human rights standards (such as Article 40 of the CRC), bringing a child to justice could help achieve truth and reconciliation. As commented by Davison, in order to provide some sort of respite for the victims and the community and to favour children's reintegration into society, justice mechanisms should be put in place for child perpetrators.⁶⁴ However, juvenile criminal systems must take into account the child's age and promote his or her reintegration. It should also bear in mind the child's role in post-conflict reconstruction and reconciliation and provide for alternatives to imprisonment, such as foster care, education and vocational programmes that benefit the child's reintegration into society.⁶⁵

However, it could be argued that children under the age of 15 should not be prosecuted by national criminal jurisdictions due to their inability to consent to their recruitment. In such instances, particularly when national jurisdictions are barred from prosecuting young children, other non-judicial justice mechanisms could be of significance not only for the child perpetrator of crimes, but also for their families and communities and ultimately their victims.⁶⁶ Although these mechanisms could help create a climate of justice and reconciliation, they should also be consistent with international human rights standards (such as the right to a fair trial) and should be used in a non-discriminatory manner (*i.e.* on grounds of sex, race, religion or ethnicity).⁶⁷

63 For an analysis on the drafting history of Article 26 of the Rome Statute, see: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 119-122.

64 Ann Davison, 'Child Soldiers: No Longer a Minor Incident' (2004) *Willamette Journal of International Law and Dispute Resolution*, 154.

65 See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 128-133.

66 Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations', in: Sara Dillon (ed), *International Children's Rights* (Carolina Academic Press 2010) 729. See also: Amnesty International, *Child Soldiers: Criminals or Victims?* (2000) available at: <<http://amnesty.org/en/library/asset/IOR50/002/2000/en/049a91ec-dc61-11dd-bce7-11be3666d687/ior500022000en.html>> accessed 7 August 2013.

67 UN, Guidance Note of the Secretary General, UN Approach to Justice for Children (September 2008) 3. See for example the report of Human Rights Watch on the Gacaca courts in Rwanda, and how these were well below international standards, particular as regards fair trial. Human Rights Watch 'Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts' (2011). See also: Institute for War and Peace Reporting 'Can Traditional Rituals Bring Justice to Northern Uganda?' (2007). Available at <<http://iwpr.net/report-news/can-traditional-rituals-bring-justice-northern-uganda>> accessed 7 August 2013; Christopher Carlson and Dyan Mazurana 'Accountability for Sexual and Gender-Based Crimes by the Lord's Resistance Army' in Sharanjeet Parmar and others (ed) 'Children and Transitional Justice, Truth-Telling, Accountability and Reconciliation' Harvard Law School Human Rights Program and UNICEF (2010) 236. These authors emphasise how women and girls are often excluded or given minimal participation in traditional justice mechanisms.

Most importantly, regardless of whether justice mechanisms are judicial or non-judicial, children associated with armed groups should not be marginalised from post-conflict peace and justice efforts. Former child soldiers are not only defenceless victims or evil children who committed heinous crimes. They are also children who may have developed important skills and leadership experience, placing them in a better position of confidence, self-reliance and maturity vis-à-vis others their age.⁶⁸ Hence, post-conflict justice mechanisms (either national or international, judicial or non-judicial) should take into account the identity transformation between the child and the community, resulting from the child's recruitment.⁶⁹ In this sense, even though the childhood of former child soldiers should not be denied, their experiences as members of an armed group must also be taken into consideration, as regrettably, though they could be children as regards their age, they could have reached a level of maturity uncommon for others their age as a result of their recruitment but also lack the innocence of childhood as a result of the crimes committed against them and the crimes they could have committed against others.⁷⁰

1.4 CHILDREN AS KEY PLAYERS IN PEACE, RECONCILIATION AND JUSTICE MECHANISMS

Armed conflict and violence have an impact on children that is likely to have long-term adverse consequences for the formation of children's values, identity, political beliefs and ability to function as leaders and decision makers in the future.⁷¹ This affirmation may be applicable to many children living in situations of armed conflict, but also of massive human rights violations, and particularly in situations where international criminal within the ICC's jurisdiction are committed. In the case of child soldiers, but also as regards other children affected by crimes within the ICC's jurisdiction, reintegration, peace and reconciliation mechanisms, including international justice, should be processes towards civil life in peace. Within these processes, children should have meaningful roles and children's access to education, family unity, dig-

68 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 100. See also Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 53-58.

69 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 105.

70 See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 79-80.

71 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 3.

nified livelihoods and safety from damage should be protected.⁷² All children, including those who were not involved in hostilities, need to be involved in the reconciliation process so that they can become adults that will contribute to the peace-making efforts.

Although the ICC proceedings cannot address all the needs of children or any part of the civilian population in post-conflict situations, ICC proceedings should endeavour to act jointly with the peace and reconciliation process or at least, cause no harm to the civilians who may be attempting to regain civilian life in peace. As regards children in particular, although the ICC should protect them as witnesses and victims pursuant to Article 68 of the Rome Statute, it should also allow children to participate in the international justice arena, while safeguarding their well-being and security and the rights of fair trial.⁷³ As will be analysed further in Chapter 5 of this research, when children give their voluntary consent, either individually or through their parent or legal guardian, they can participate in justice mechanisms. Most importantly, as will be further observed, allowing children to participate either as victims or witnesses in ICC proceedings could prevent having testimonies based only on the adult perception and perspective of the experiences lived by civilians during an armed conflict.⁷⁴

For example, in the South African Truth and Reconciliation Commission, children under 18 could not give testimony, but were able to participate in special hearings for children and youth.⁷⁵ In the Sierra Leone Truth and Reconciliation Commission a child-friendly report was created, which includes pictures made by children and a text suitable to read at elementary school level. Other initiatives include the establishment of youth-to-youth networks, in which children can work on issues of children and armed conflict, or “Voice of Children”, a radio programme created in Sierra Leone so that children could participate in the peace-making process.⁷⁶ Although these examples may not be applicable to the, in essence, ICC criminal proceedings, such ventures could become part of the reparations proceedings foreseen in the Rome Statute.⁷⁷

72 Paris Principles, 7.

73 Statement by Thoraya Ahmed Obaid, Executive Director, United Nations Population Fund, One Young Woman, Making a Richer World, International Youth Day, 12 August 2007.

74 Paris Principles, 9.

75 Truth and Reconciliation Commission of South Africa (TRC), *TRC Report* (29 October 1998) Vol 4, Ch 9.

76 UN Commission on Human Rights, *Rights of the Child: Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr Olara A. Otunnu* (3 March 2003) E/CN.4/2003/77, 7.

77 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 242.

1.5 CONCLUSIONS

Child victims and witnesses appearing before the ICC should not only be regarded as vulnerable individuals that require protection pursuant to Article 68 of the Rome Statute. Although this may be the case in many cases involving children, the ICC should also take into consideration that child witnesses and victims who have experienced international crimes may have developed great resilience and could have also perpetrated crimes themselves. Regrettably, these children's moral values could also have been affected by early exposure to violence and separation from their parents and their communities. This complex reality must be taken into account throughout the judicial process, which should not label children solely as "vulnerable" individuals. As will be analysed further in Chapter 5, a former child soldier witness may need to be reassured that he or she will not be prosecuted in his or her own country for crimes he or she will testify about in ICC proceedings (*i.e.* by ordering that all of his/her testimony remains confidential pursuant to Rule 74 of the RPE). A former child soldier or any child exposed to extreme levels of violence may also need further preparation before his or her testimony, particularly to understand the notion of telling the truth and taking an oath, but also to gain trust and confidence in all the adults involved in the ICC proceedings (judges, prosecutors, counsel).

