



Victims, Perpetrators or Heroes?

Child Soldiers before the International Criminal Court

September 2006

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Funders/Supporters:

We are very grateful for the continued support of the John D. and Catherine T. MacArthur Foundation for our ICC Programme, which funded the research for this report.

We are also extremely appreciative of the support provided by Doughty Street Chambers, for the printing costs of this report.

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“The rebels burnt my family’s house and killed my family. I was 14 years old when they took me... I am angry with the rebels and that’s why I wanted to testify... I feel guilty for the things I did, but now I’ve told the Court about it and it’s better.”¹

Executive Summary

The International Criminal Court broke new ground by charging Ugandan and Congolese warlords with recruiting or using children in hostilities. However, this also means that the Court faces new and difficult challenges to ensure child-sensitive investigations, trials and reparations.

Thomas LUBANGA, currently in custody in The Hague, has been charged solely with *conscripting, enlisting or using children under the age of fifteen in hostilities*.² Joseph KONY, Vincent OTTI and Okot ODHIAMBO, senior commanders of the Lord’s Resistance Army operating in northern Uganda, have been also charged with forcibly recruiting or using children amongst other crimes. While the Prosecutor’s focus on child soldiers is commended, the report highlights the numerous other crimes suffered by children, including child soldiers. These must also be prosecuted, as must the crimes suffered by victim communities into which child soldiers are seeking to reintegrate. Singling out child soldiers against other child victims or victims from their communities, renders reintegration more difficult and raises complex questions regarding reparations.

- **PART I - CHILD SOLDIERS IN NORTHERN UGANDA & DRC:**

The context of child recruitment and use in northern Uganda and eastern Democratic Republic of Congo (DRC) are entirely different. Children associated with armed groups and forces are recruited in different circumstances, and as a result have diverse experiences and perceptions of themselves as victims, perpetrators or heroes.

Prosecuting the recruitment and use of children in conflict must be informed by contextual understanding of the conflict (and children within it), to avoid stigmatising or discriminating against certain groups of children, or creating recriminations within the victim communities into which former child soldiers are seeking to reintegrate. Some children may have enlisted “voluntarily” into a tribal militia with the consent of their parents or out of a sense of duty. Others, particularly girls, will have been forcibly abducted, raped and enslaved. Yet others may have committed atrocities against their own communities or against supporters of rival factions. In each case, understanding the dynamic and underlying relationships between warring factions is crucial in ensuring the best interest of children. It is also crucial in ensuring an intervention that is not biased and does not reinforce local cleavages.

- **PART II - CHILD SOLDIERS AND INTERNATIONAL LAW:**

The notion of child recruitment as a war crime is recent. This section examines the developments of legal protection and rights of children in armed conflict, leading to the adoption of the ICC Statute and the war crimes of enlisting, conscripting or using children under the age of fifteen in hostilities. The activities that fall within the definition of “use of children in hostilities” are explored, as the other crimes that could be charged to better reflect the experiences of child soldiers. These include rape, sexual enslavement, killings, torture or inflicting serious suffering.

The Security Council’s role in advancing the protection of children in armed conflict is also considered, as well as the recent entry into force of the Optional Protocol to the Convention on the Rights of the Child, which raises the legal age of recruitment from fifteen to a “straight 18”. It is recommended that the ICC should follow suit and raise the legal age of child recruitment, enlisting or “use” from fifteen to eighteen.

¹ War Crimes Studies Centre, UCB (2006). Child Witnesses at the Special Court for Sierra Leone, p.3.

² Thomas Lubanga was the leader of the UPC, Union des Patriotes Congolais, an armed group with links to the Hema tribe. The UPC is alleged to have committed widespread massacres in Ituri District, eastern Democratic Republic of Congo.

• **PART III - ENSURING CHILDREN'S RIGHTS IN ALL PHASES OF THE PROCEEDINGS:**

This part highlights the rights of children at various stages of the proceedings. At all phases safeguards must be in place to ensure that children are not stigmatised and do not suffer from secondary traumatisation. In particular it is highlighted that interventions to assist children should be addressed at the community that supports the child. For example, much more could be done to ensure that information about the processes and services that concern them reach child victims. Child-specific materials about the Court need to be developed, and "outreach" initiatives with victim communities must be increased if the majority of child victims, or the adults that surround them, are to know about the Court and its procedures at all.

- **The Pre-Trial Stage** Procedures for effective protection, assistance and support of children are carefully analysed. Recommendations are provided in relation to the Court's relevant entities, such as the Office of the Prosecutor in conducting child-sensitive and child-safe investigations, and the Victims and Witnesses Unit (VWU) of the Registry, in providing support, protection and assistance.

It is suggested that specific measures must be put in place to ensure children's right to information and right to express their views and concerns at the earliest opportunity. Effective information and outreach strategies must not be considered as optional extras for the Court, but as core responsibilities in satisfying victims' rights.

- **The Trial Stage** Information flows continue to be critical for victim populations, who have a particular stake in the outcome. Effective information strategies can also ensure a witness-enabling environment as increased information reduces victims' vulnerability and insecurity. In situ trials or hearings must also be considered, as the Court is able to hold hearings away from its seat in The Hague. Lessons learned of such experiences are drawn from the Rwanda Tribunal, and generally many references are made to the Special Court for Sierra Leone, which is located "in-country" and within the "crime-scene".

Protection and support during trial are emphasised, with particular attention being given to the importance of defence training on child victims' rights and their handling of child witnesses in cross-examination. Furthermore, long-term aspects of support and assistance are examined in relation to high prevalence rates of HIV aids amongst both combatants and victims in northern Uganda and eastern DRC.

- **Ensuring Reparations** The Courts' reparations regime presents great opportunities as well as challenges. Potentially hundreds or even thousands of victims might be eligible for reparations with respect to particular crimes proven beyond reasonable doubt. Victims may apply to participate in proceedings with a view to obtaining reparations against the perpetrator. Reparations may include restitution of property, financial compensation (damages), a public apology, or other measures such as the burying of the deceased according to local practices. In view of the numbers involved, and to avoid local recriminations, collective reparations may be more appropriate than individual reparations in many cases. Furthermore, reparations should normally favour all children, as well as the communities in which they live, to avoid singling out of former child soldiers from other victims.

The Trust Fund for Victims will play an important role in implementing reparations programmes targeted at wider groups of victims, beyond those participating in the proceedings. However this crucial entity must become actively engaged in fundraising and policy development if it is to effectively satisfy victims' right to reparations.

• **PART IV - RECOMMENDATIONS:**

Wide ranging recommendations emphasise *amongst others* the need for specific outreach giving effect to children's right to be informed, as well as specific training for all those who may enter into contact with former child soldiers. Adequate provisions for long-term assistance and support for victims and witnesses should also be developed at the earliest opportunity.

Acknowledgements

REDRESS wishes to acknowledge the generous support of the John D. and Catherine T. MacArthur Foundation, which has provided funding for this Report and REDRESS' ICC Programme.

This report was researched by Mariana Goetz, REDRESS' Outreach and Advocacy Adviser, and Clementine Olivier, former REDRESS Outreach and Advocacy Officer, as well as Bukeni Beck Wazuri, REDRESS' DRC Field Researcher. The Report was written by Mariana Goetz with editorial support by Carla Ferstman, Director of REDRESS.

REDRESS would like to express its appreciation to all those who helped in the preparation of this report. In particular to Dr. Matthew Happold of Hull University; Julianne Kippenberg, Africa Division of Human Rights Watch; Bukeni Beck T. Wazuri from AJEDI-Ka/PES in Uvira (Eastern DRC); Stephen Lamony, Coordinator of the Ugandan Coalition for the International Criminal Court; Cyril Laucci, Programme Manager and Jean-François Noël, Director-General of the International Bureau for Children's Rights (IBCR); Alison Smith, Legal Counsel of No Peace Without Justice and Lorna McGregor of the International Bar Association for their many insightful suggestions and useful observations. We wish to thank Paul Siels, Senior Analyst at the Office of the Prosecutor; Gloria Atiba Davies, Head of Unit; Vedrana Mladina Damjanovic and Nicoleta Muntean from the Gender and Children Unit of the Office of the Prosecutor; Simo Väätainen, Head of Unit; and Michaela Bauer Support Officer of the Victims and Witnesses Unit for their valuable time and comments.

REDRESS also wishes to thank the following individuals who were willing to meet with us or exchange ideas during the research phases of the report including Lorna McGregor of the International Bar Association; Martien Schotsmans, DRC Desk Officer of Avocats Sans Frontières; and Karine Bonneau of FIDH, as well as all the individuals interviewed or who provided us with information in Uganda and the Democratic Republic of Congo, listed in the Methodology Section. A special thanks to Linde Wolters our summer intern for assisting with research and preparation of the report.

About REDRESS

REDRESS has undertaken this project as an international human rights organisation that seeks to promote justice for victims of torture and other international crimes. Since its inception in December 1992, REDRESS has accumulated a wide expertise on the various facets of the rights of victims under international law, and continues to promote the effective development of national and international law and institutions in order to ensure that victims' needs and rights to justice can be realised in practice.

REDRESS has actively worked on the International Criminal Court since 1997, informally coordinating NGO activity on victims' rights through the "Victims' Rights Working Group"³ since this time.⁴ The victim focused advocacy work of REDRESS and other key NGOs and experts contributed to the adoption of the ICC's progressive provisions on the rights and interests of victims, most particularly, the right of victims to participate in the Court's proceedings not merely as witnesses, but as interested parties,⁵ and more recently the adoption of regulations for the Victims Trust Fund, allowing this vital entity to become operational.

³ See: <http://www.vrwg.org>

⁴ See the Victims Rights Working Group website: <http://www.vrwg.org>.

⁵ Recent materials produced by REDRESS include the "Victims Rights Bulletin," a multi-language quarterly on victims issues [see: <http://www.vrwg.org/Publications/4.html>]; as well as policy papers on legal representation for victims, legal aid for indigent victims, etc. see: <http://www.vrwg.org/Publications/1.html>.

Methodology

Research leading to this Report was conducted from mid 2005 to mid 2006 and included a field mission to northern Uganda in February 2006, as well as ongoing research in the Democratic Republic of Congo by Bukeni Beck T. Wazuri, from AJEDI-Ka/PES, an NGO based in South Kivu, which has been working with young people and children formerly associated with armed forces and groups since 1998.⁶

In northern Uganda interviews were conducted with a number of organisations either working with formerly abducted children or on justice issues. These include UNICEF, UN-OCHA (both in Kampala and Gulu), UN Office of the High Commissioner for Human Rights, International Refugee Rights Initiative, Save the Children, Refugee Law Project, Ugandan Coalition to Stop the Use of Child Soldiers, World Vision, FIDA (the Ugandan Association of Women Lawyers), Ugandan Coalition for the International Criminal Court, Gulu NGO Forum, People's Voice for Peace, War Child Holland, GUSCO (Gulu Support the Children Organisation), ACTV, ISIS-WICCE, HURIFO, CARITAS, as well as the Chief Administrative Officer in Gulu, the Chairperson of the Ugandan Human Rights Commission (Kampala) and the representative of the Victims Participation and Reparations Section (VPRS) of the ICC in Kampala. REDRESS did not conduct interviews directly with children in northern Uganda, and uses quotes from interviews undertaken by other NGOs as cited in the Report.

In eastern DRC, through the work of AJEDI-Ka/PES, interviews were conducted with children who have been associated with armed conflict.⁷ Interviews with former child soldiers were undertaken in Bunia (District of Ituri) during the period 2-10 February 2006, and in the Uvira region during the period 10-23 January 2006. In Bunia, 7 former child soldiers were interviewed, 4 associated with the UPC and 3 children connected with the FNI. In Uvira the respondents were 4 children from the Mai-Mai movement and 2 children who had been associated with the FARDC.⁸ The interviewed children were aged 13 to 17 but were recruited in 2003 when they were between 9 and 14 years old. Interviews were also conducted with adults related to these children, including their parents and members of their community, as well as with former soldiers who as children took part in the earlier rebellion "Muleliste" in the 1960's in the east of the Democratic Republic of Congo. Interviews were also conducted with representatives of local NGO's working with child soldiers in the areas of Bunia and Uvira. These include organisations such as FFPM, Caritas-Bunia, PRADE, CARECOM, APEI and ACIAR. In addition to these interviews, the Report quotes the experiences of children interviewed by other organisations cited in the text.

Statistics regarding recruitment and demobilisation that are used in this research were provided by local NGOs and religious organisations, including AVREO, AJEDI-KA, FFPM, *Justice Plus*, *Parlement d'enfants*, Caritas, CONADER Bunia, UNICEF, MONUC-Bunia and Bukavu, AED and BVES.

All interviewees, including the children and their guardians, provided informed consent regarding the purpose of the interviews. The DRC Researcher, who has been working with children associated with armed conflict in Eastern DRC for many years, ensured in particular that concerns and risks in relation to the interviews were discussed with the child's parents or guardians in the child's best interests. All interviewees cited in this Report have been given pseudonyms in order to ensure their anonymity.

Interviews, meetings and telephone discussions with officials of the International Criminal Court have been ongoing during the course of research and drafting from October 2005 until end July 2006. Specific interviews were conducted with representatives of the Registry, including the Division of Victims and Counsel, Victims Participation and Reparation Section, Victims and Witnesses Unit, Office of Public Counsel for Victims and the Office of the Registrar on 10 April 2006. Specific interviews were also conducted with the Gender and Children Unit of the Investigations Division as well as Prosecution Team members and the Cabinet of the Office of the Prosecutor on 5 July 2006.

⁶ *Association des Jeunes pour le Développement Intégré-Kalundu /Projet Enfants Soldats (AJEDI-KA /PES)*, <http://www.ajedika.org>. Bukeni T. Wazuri is also the director of *Waruzi, B. T. (2005). The Duty to Protect: Child Soldiers in the Democratic Republic of Congo (FILM)*, <http://www.witness.org>.

⁷ For security reasons the actual names of children have not been cited.

⁸ Out of all the interviewed children, 5 were girls.

PART 1 - CHILD SOLDIERS IN NORTHERN UGANDA & DRC

With the changing nature and proliferation of conflicts following the end of the cold war, children have increasingly become victims of warfare. Commercial and illegal trafficking in small arms has replaced erstwhile inter-state arms transfers of heavier, high maintenance weapons, which had once kept children in support roles when participating in armed conflict. Light weapons such as AK-47s sell for as little as \$6 in some countries and, in addition to their widespread availability, are very easy to use and maintain, which exacerbates the use of child soldiers.⁹ Coupled with poverty, discrimination and vulnerability, children are soft targets as recruits into armed groups, and are easily recruited, trained and armed.

Children are either recruited by force or 'voluntarily', and generally undergo strenuous initiation and training. In many instances initiation requires recruits to perpetrate atrocities towards loved ones, such as parents or siblings, or younger members of the group as a means of breaking family bonds and hindering possible return.

*"They started pointing their guns in front of our mouth and they said, 'you're going to move with us and you're going stay with us'. My commander captured a young girl ... and he said, ..."you too should use this girl [for sex]." I was so small for this...I said, 'Please sir.' He said, 'If you don't do this I will shoot you.'"*¹⁰

*"They cut me and they put the cocaine, and after which they cover that with a plaster... I valued nothing and my head started turning. That was the time that the commander passed an order that my mother should be shot. So the fellow, a small boy, shot at my mother twice, and my mother started calling my name and she died finally."*¹¹

In 1996 the momentous study by Graça Machel on the Impact of Armed Conflict on Children¹² put the otherwise invisible plight of an estimated 300,000 child soldiers, deployed in some 30 conflicts worldwide, on the international agenda.¹³ The global campaign to stop the use of child soldiers¹⁴ has gained momentum ever since, seeing the adoption of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* in 2000¹⁵ and its entry into force in 2002.

One of the main achievements of the Optional Protocol on the Involvement of Children in Armed Conflict was to raise the minimum age for recruitment into armed forces from fifteen to eighteen years of age.¹⁶ The Additional Protocols to the four Geneva Conventions of 1949, as well as the Convention on the Rights of the Child¹⁷ and the Rome Statute of the International Criminal Court all identify the minimum age of recruitment as fifteen years. However, child rights advocates have sought to bring

⁹ Kalis, M. (2002). "Child Soldiers in Africa: Solutions to a Complex Dilemma." *African Journal on Conflict Resolution* 2(2): p.31-51.

¹⁰ Quoted from War Crimes Studies Center (2006). *Child Witnesses at the Special Court for Sierra Leone*. Berkley, University of California. Testimony of Child witness TF1 199.

¹¹ Ibid. Testimony of child witness TF1 180.

¹² In response to General Assembly Resolution 48/157 of 20 December 1993, the Secretary General appointed Graça Machel, former minister of Education of Mozambique, to write a report on the *Impact of Armed Conflict on Children* as an Independent Expert. The Report was published as Machel, G. (1996). *The Impact of Armed Conflict on Children*, United Nations, A/51/306.

¹³ These figures are approximate. Furthermore, it is estimated by the UN that in the past decade over 2 million children have been killed in armed conflict, and that over 6 million have been seriously injured or disabled. See: Coalition to Stop the Use of Child Soldiers (2001). *Global Report*, <http://www.child-soldiers.org>.

¹⁴ See Coalition to Stop the Use of Child Soldiers (2004). *Global Report*, <http://www.child-soldiers.org>.

¹⁵ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, General Assembly Resolution 54/263 adopted May 2000.

¹⁶ *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, UNICEF 2003, p.7-8.

¹⁷ Article 38(2) of the Convention on the Rights of the Child provides that: "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."

the minimum age in line with the definition in the Convention on the Rights of the Child, namely, that “a child means every human being below the age of eighteen years.”

Furthermore, Machel’s report recommended the appointment of a special representative on children and armed conflict. As a result, the Office of the Special Representative of the Secretary General for Children and Armed Conflict was established in 1997¹⁸ enabling a targeted approach to addressing the nature and extent of child recruitment and other crimes against children, as well as their disarmament, demobilisation and reintegration in the framework of peacekeeping operations.

In addition to these developments, the Security Council has adopted a number of significant resolutions on children in armed conflict, treating the effects of armed conflict on children as a matter of international peace and security. The resolutions recognise that children are specifically targeted during armed conflicts and call for action to halt the proliferation of small arms.¹⁹ Resolution 1379 (20 November 2001) reiterated previous concerns regarding the impact of armed conflict on children and highlighted the link between HIV/AIDS and armed conflict. It asked the UN Secretary-General to produce a list of parties to armed conflict that recruit or use children in violation of relevant international obligations in situations where the Council is seized.²⁰

In Resolution 1460 (30 January 2003), the Security Council responded to the Secretary-General’s Report²¹ calling upon all parties listed to “provide information to the Special Representative of the Secretary-General for Children and Armed Conflict on steps they have taken to halt their recruitment or use of children” by expressing “its intention to consider taking appropriate steps to further address this issue” if necessary. Furthermore, it asked the Secretary-General to put forth “specific proposals on ways to ensure monitoring and reporting in a more effective and efficient way” by 31 October 2003. As a result, the Secretary-General’s next report put forward a number of proposals,²² including: considerations for systematic monitoring and reporting on the issue;²³ the inclusion of an annual review and debate on the issue in the Security Council’s activities; and recommendations promoting application of child protection on the ground, such as systematically including child protection to all peace keeping mandates.

Where insufficient or no progress had been made, the Report recommended measures such as the imposition of travel restrictions on leaders, their exclusion from any governance structures or amnesty provisions, bans on the supply of small arms, bans on military assistance, and restrictions on the flow of financial resources.

Resolution 1539 (22 April 2004) called for the Secretary-General to devise an urgent “action plan for a systematic and comprehensive monitoring and reporting mechanism.” It called upon parties listed in the Secretary-General’s report to “prepare within three months concrete, time-bound action plans to halt recruitment and use of children”, and expressed its intention to consider imposing targeted and graduated measures on such parties. The Secretary-General’s report of 9 February 2005 detailed the requested action plan for systematic and comprehensive monitoring,²⁴ which the Security Council approved in Resolution 1612 (26 July 2005), although initially only for the monitoring of parties to armed conflict in situations where the Council is seized. This includes Burundi, Ivory Coast, DRC, Somalia and Sudan, but not for instance, the situation in northern Uganda. The Security Council also established a working group, to which the monitoring mechanism will report, and indicated that the

¹⁸ General Assembly Resolution 51/177 recommended a three year appointment of a Special Representative of Children and Armed Conflict.

¹⁹ The first two Security Council Resolutions addressing Children and Armed Conflict were adopted on 25 August 1999 (S/ERS/1261) and 11 August 2000 (S/RES/1314).

²⁰ Examined in Harvey, R. (2003). Children in Armed Conflict: A guide to international humanitarian and human rights law. Essex, International Bureau for Children’s Rights, p16.

²¹ The Report of the Secretary-General on Children and Armed Conflict was submitted to the Security Council on 26 November 2002 (S/2002/1299).

²² The Report of the Secretary-General on Children and Armed Conflict, 30 October 2003 (S/2003/1053).

²³ Including standards for monitoring and reporting, the crimes to be reported and recommendations on which entities should carry out the reporting.

²⁴ UN Document S/2005/72.

monitoring mechanism shall be extended to other situations listed in Secretary-General's Reports after 31 July 2006.²⁵

1.1 The Nature and Scope of the use of child soldiers in Uganda and DRC

Children in the Great Lakes region, as in other parts of Africa, *are always children* before their parents and community elders, even when they become adults. As such, they are never to speak out against their elders, a practice which extends to the distant relatives of their ethnic group. The role of children in society is to help their parents and community elders. These social considerations should be considered in the overall context of the situation countries. In the Democratic Republic of Congo, 47.1% of the population is under the age of 15, while in Uganda 50.4% of the population is under the age of 15.²⁶ Furthermore, the average income in the affected regions is less than \$1 per day.²⁷ As a consequence, children are generally required to contribute to the family livelihood by undertaking responsibilities such as herding cattle, gathering wood, carrying water, harvesting crops, cooking or going to the market.

Recruitment and enlisting of children must therefore be considered in the context where poverty and ethnic affiliations play a significant role. Many children, particularly in eastern DRC have joined militias in defence of their ethnic group, with the tacit consent of elders and parents, or under the powerful influence of militia leaders of their own ethnic group. Many others have been driven to enlist as a result of abject poverty, after suffering terrible losses in conflict, or as a means of putting food on their family's table or defending their family or communities' livelihood from continuous attack by other groups.

Most children associated with armed groups have received some schooling prior to their enlistment, providing them with basic reading and writing skills. A child will usually explain his age in relation to what year he or she was at school at the time of abduction or joining.²⁸

When a child joins an armed force or group, whether voluntarily or under duress, the armed group becomes the child's new community. In order to mark the importance of their new chain of command, symbolic induction ceremonies are often coupled with psychological manipulation, whereby the child is forced to commit atrocities as a passage of rite. Children are often told that as a result of these atrocities, sometimes against members of their own families, they will not be able to return home as they have burned bridges back to their own communities. Children are eventually conditioned by the military hierarchy and become reticent to betray their commanders, who may remain important figures in their lives even after initial demobilisation. As a result, parents who are reunited with their child sometimes experience a degree of fear as to whether the child will reintegrate and be able to hold family and community allegiances to heart once again. Many children on the other hand also fear whether they will be loved and accepted, particularly if they are still young. Others however, will find reintegration difficult, particularly if they have earned themselves an official rank and have become used to obtaining food, drugs or other goods by force.

These initial remarks highlight some of the difficult questions for the prosecution of crimes of "enlisting, conscripting or using children under the age of fifteen in hostilities", which are the subject of the Arrest Warrants of Thomas Lubanga²⁹, commander of the UPC in Eastern DRC, Joseph Kony,

²⁵ We are particularly grateful to Dr Matthew Happold for his comments regarding developments at the Security Council.

²⁶ Calculated on the basis of data on population under age 15 and total population from UN (United Nations). 2005. World Population Prospects 1950-2050: The 2004 Revision. Database Department of Economic and Social Affairs, Population Division. New York. <http://hdr.undp.org/statistics/data/indicators.cfm?x=44&y=1&z=1>.

²⁷ The average income in Uvira for instance is less than \$1 per day, with an average family size of six (parents and four children). Source: Uvira territory administration, 2005.

²⁸ Exact ages of children are not usually known. Parents usually determine age in relation to local events occurring at the time of their child's birth, such as "when they found gold in Tcheyi". Other sources are school or hospital records. Children usually start school when they are able to pass their right hand over their head and touch their left ear, which according to local custom indicates that the child is at least 7 years old.

²⁹ Warrant of Arrest for Thomas Dyilo Lubanga, issued on 10 February 2006, Case no. ICC-01/04-01/06-37.

Vincent Otti and Okot Odhiambo³⁰ within the high command of the Lord's Resistance Army operating in northern Uganda and southern Sudan.

As will be explored in greater detail in the following sections of Part I, the historical and social context of the conflicts, and particularly the ethnic and power cleavages underlying the conflicts are central to understanding the nature and use of child soldiers in those conflicts. It is within such contextual frameworks that the interests of particular victim groups can begin to be understood. Unlike national criminal jurisdictions, where victims will report crimes to the police, who in turn commence investigations, the commencement of investigations at the International Criminal Court is somewhat top-down, triggered by decisions by States, the Security Council or the Prosecutor, with little or no prior contact between victims and officials.³¹ It is therefore hoped that the following sections will assist in relating local perceptions of victimisation, of peace and justice and of the International Criminal Court to relevant officials in a generalised manner.

1.2 Northern Uganda

In northern Uganda at least 25,000 children have been abducted by the Lord's Resistance Army (LRA) since the beginning of the 20 year conflict.³² An estimated 12,000 children have been abducted since July 2002, the start of the International Criminal Court's jurisdiction, in an LRA backlash against President Museveni's 'Operation Iron Fist' launched in March 2002.³³ Between 70% and 80% of the LRA's forces are abducted children or youths, of which girls make up approximately one sixth,³⁴ thus characterising the LRA as "an army of children".³⁵ An unknown number of abducted children have also died, either killed in combat, as a result of beatings by their commanders, or from disease and neglect. Again, it is not known how many have escaped or have been captured by government forces during clashes, and how many of these have been 're-socialised' into the government's UPDF Battalion 105, which was especially created for former rebels.³⁶

The context within which children have been abducted, enlisted and used, and the consequences that these circumstances have had on their physical and psychological wellbeing allow us to begin to understand the local perceptions of victimisation. To displaced civilians, the LRA is made up of significant numbers of children, who are the perpetrators and the relentless terrorists of the twenty-year conflict. However, the local population's relationship with the LRA is complex, as the LRA is made up entirely of members of the Acholi and other tribes of northern Uganda, and involved in a long-standing conflict with the Museveni government, which is much resented by northerners.

1.2.1 Historical context of child soldiering and the LRA in northern Uganda

Male youths have historically been associated with fighting in the numerous conflicts afflicting the region. The Uganda-Sudan border region in particular has seen youths involved in fighting throughout its troubled history. Under British Rule the Acholi from northern Uganda were well represented in the military as they were under Milton Obote, who led the independence movement against the British in

³⁰ Warrant of Arrest for Joseph Kony, issued on 8 July 2005 and amended on 27 September 2005, Case no. ICC-02/04-01/05. Warrants of Arrest for Vincent Otti, Case no. ICC 02/04-01/05-54 and Okot Odhiambo were issued on 8 July 2005.

³¹ Article 13 of the Rome Statute of the International Criminal Court, provides for three "trigger mechanisms": a) referral of a situation by a State Party; b) referral of a situation by the Security Council acting under Chapter VII of the Charter of the United Nations; and c) an initiation of an investigation by the Prosecutor *proprio motu* on the basis of information received and subject to authorization of the Court's Pre-Trial Chamber, in accordance with article 15.

³² UNICEF Report, December 2005. The figure represents the estimated number of children abducted between 1986 and 2006. http://www.unicef.org/infobycountry/uganda_25704.html.

³³ UNICEF states that at least 4,500 children were abducted in 2002 alone, see Human Rights Watch Report (2003), *Stolen Children: Abduction and Recruitment in Northern Uganda*, p.6.

³⁴ Mischokowski, G. (2005). *Abducted, Raped, Enslaved: The Situation of Girl Soldiers in the Case of Uganda*, Medica Mondiale. p.3.

³⁵ Refugee Law Project (2004). *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda*. Working Paper No. 11. Kampala, Makerere University. p.20.

³⁶ *ibid.*

1962.³⁷ As part of these often undisciplined rebel movements and later in the national army, some members of the Acholi participated in the perpetration of atrocities, including the notorious “Luwero Triangle” massacres of 1980-1985. The death toll under the second Obote regime (1981-5), which included Acholi in its national army, is estimated to be at least 500,000.³⁸

When Museveni’s National Resistance Movement overthrew Obote in 1986, he decommissioned the Acholi, relying on troops drawn from his homeland in southwest Uganda. Museveni turned on the Acholi, persecuting them back to Acholiland in the North. The returning demobilised and disenfranchised Acholi joined civilian dissenters who mistrusted Museveni and were spited by his apparent duplicity over an attempted Peace Accord in Nairobi 1986. Disenfranchised Acholi were easily recruited into the Holy Spirit Movement, started by Alice Lakwena, which engaged in numerous attacks against civilians and the government in 1986.³⁹ Its popularity spread as a result of a curious mixture of political disenfranchisement and strong Christian and traditional beliefs. The Holy Spirit Movement did not draw specifically on children. In fact, it was Museveni’s National Resistance Movement that first instituted a policy of recruiting children under the age of 16, known as “kadogos”, at this time.⁴⁰ The enlistment of much younger children, as young as seven or eight, as well as girls also became increasingly common at this time.⁴¹

Museveni’s forces defeated the Holy Spirit Movement in 1987. Joseph Kony revived the movement, which eventually became the Lord’s Resistance Army. While some argue that the LRA draws its strength from Acholi disenfranchisement, others claim that the LRA does not have a coherent political agenda (apart from the rule of the Ten Commandments) and that its relationship with the predominantly Acholi local population is entirely abusive, relying on terrorisation to supply it with resources and human capital.⁴²

The relationship between the Acholi and the LRA is therefore not clear-cut. Civilians in the north mistrust the Kampala government, and the Acholi make up most of the LRA’s members, even though civilians have been subject to innumerable atrocities at their behest. Initially Museveni’s UPDF forces mistook civilians in the North for LRA supporters, committing serious human rights abuses against them. Then the UPDF instituted a policy of forcible relocation of the Acholi and other groups into displacement camps, with some 1.8 million civilians in IDP camps today.⁴³ Many Acholi resent the relocation scheme and believe that Museveni has deliberately allowed the LRA to weaken them, undermining any possible political challenge from the North. As put by an Acholi businessman:

*This war is a ploy by the current government to impoverish the Acholi. When you are poor, you become a beggar and accept anything that is offered to you. If you are thinking of what you will eat or where you will sleep, you have no time to think about politics or your rights. You are not a challenge.*⁴⁴

³⁷ Stavrou, A. (2005). Youth Mobilisation in Uganda. *Invisible Stakeholders: Children and War in Africa*. A. McIntyre. Pretoria, Institute for Security Studies.p.9.

³⁸ Library of Congress Case Studies- Uganda, cited from World Vision (2005), *Pawns of Politics: Children, Conflict and Peace in Northern Uganda*, 2nd Edition.

³⁹ Veale and Stavru (2003). *Violence, Reintegration and Identity: The Reintegration of the Lord's Resistance Army Child Abductees in Northern Uganda*. Pretoria, Institute for Security Studies. Monograph 92.p 10. Also Refugee Law Project (2004). *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda. Working Paper No. 11*. Kampala, Makerere University., and Allen, T. (2006). *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, Zed Books.

⁴⁰ Aki Stavrou suggests that such recruitment has to be viewed within the larger framework of the economic, social and political situation in Uganda. Factors such as economic destitution (which made employment in the armed forces a viable option), the failure of the state, families and communities to guarantee children’s rights, and the idea that youth’s role is to sustain the state, may have played an important role in the development of child recruitment. pp.87-94.

⁴¹ Human Rights Watch (2003). *Stolen Children: Abduction and Recruitment in Northern Uganda*.

⁴² *ibid*.

⁴³ IOM (2006). *Fulfilling the Forgotten Promise: The Protection of Civilians in Northern Uganda*.

Jorda, C. and J. d. Hemptinne (2002). *The Status and Role of the Victim. The Rome Statute of the International Criminal Court: A Commentary*. A. Cassese, P. Gaeta and J. R. Jones, OUP. p.9.

⁴⁴ Refugee Law Project (2004). *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda. Working Paper No. 11*. Kampala, Makerere University. p.14 (Interview with businessman Kitgum, Northern Uganda, 2003).

1.2.2 Local perceptions of victimisation: forced displacement and destitution

Local perceptions of victimisation appear to relate first and foremost to forced displacement and disenfranchisement resulting from the government's reaction to the LRA. With much of the Gulu, Pader and Kitgum districts abandoned, and an estimated 80% or almost 2 million people living in overcrowded camps,⁴⁵ the issue of victims' rights, including demands for compensation, are directed at the local government, which moved people from their homes and away from their fields, sometimes forcibly, as a central element of its anti-insurgency policy since 1996.⁴⁶ UPDF detachments were supposed to be affected to each camp, but in practice, according to one author, "soldiers have notoriously failed to respond or have run away whenever there has been an attack."⁴⁷

In early 2002, there were reportedly more than 500,000 internally displaced civilians receiving food aid in the camps across northern Uganda. As a result of Museveni's 'Operation Iron Fist' against the LRA in March 2002, numbers rose dramatically in the latter half of 2002 as a result of brutal retaliation. Today there are close to 2 million people,⁴⁸ living in some 250 camps⁴⁹ across the Gulu, Kitgum, Pader, Lira and Apac Districts, including 935,000 children.⁵⁰

Living conditions and security in the camps are critical, with malnutrition and mortality rates well above the "emergency" benchmarks.⁵¹ In the words of a local religious leader: "*The IDP camps are a death warrant to the people. There is hunger, disease, insecurity and malnutrition.*"⁵² The camps are over-crowded, lacking in sanitation and their inhabitants' loss of access to livelihoods has led to widespread destitution and disease, with frequent cholera outbreaks. The loss of homes, land, cattle and other livestock has also meant the loss of a way of life. Tradition, social support networks and communities have been broken.

*"This Community is destroyed because culture has gone. What is a community without a culture? There is no privacy, no morality in the camps... The whole future of Acholi people is at stake, and this will also cause problems throughout the country. Even look at the night commuters. You are forced to let your children go each evening, but you don't know where they go."*⁵³

Indeed, many children, referred to as night commuters, commute to urban centres at night in search of safety from LRA attacks. The dramatic increase in the number of commuters in recent years⁵⁴ has further disrupted family and community life. In the view of the local government:

*"The future of the Acholi is very bleak in the whole of the Acholi sub-region. The culture of coming to town is a bad thing. If the commuters continue coming to town at night as the normal thing for the next three years, I don't know what will happen."*⁵⁵

An overwhelming majority of IDP populations are subjected to the LRA's brutality, either in the form of sexual abuse, abduction, killings or the witnessing of the infliction of these acts on loved ones. However, IDP attitudes to the government demonstrate little confidence and considerable hostility due to the perceived responsibility of the government for increasing their vulnerability and allowing the LRA to terrorise them. In the words of a war widow and mother of four, from Kitgum:

⁴⁵ IOM (2006). Fulfilling the Forgotten Promise: The Protection of Civilians in Northern Uganda. This report draws attention to the distinction between the often-quoted figures based on numbers receiving WFP food aid and actual IDP numbers.

⁴⁶ Allen, T (2006). *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, p. 53.

⁴⁷ Ibid. p.54.

⁴⁸ Ibid.

⁴⁹ Ibid. p. xiii.

⁵⁰ UNICEF Humanitarian Action: Uganda Donor Update 16 May 2006.

⁵¹ MSF Holland recorded the Crude Mortality Rate at 2.79 deaths per day per 10,000 in a 2004 survey. Ibid. p.56.

⁵² Interview with a religious leader in Gulu, October 2003, Refugee Law Project (2004), op.cit, p. 25.

⁵³ Refugee Law Project, op.cit. p.26.

⁵⁴ Ibid. p.26.

⁵⁵ Ibid.

“Women in the camp are the ones that suffer the most. They do not have food, and they have to risk going to the farms every day to look for food to feed the children. Women are raped both by rebels and soldiers. People are sick and hungry in the camps. People are not safe in the camps. They are crowded together ... which makes it easy for the rebels to abduct them... When people were in their homes, they were far apart and could easily hide. When rebels attack they surround the camps and make it hard to run away. The army is here but the soldiers cannot do anything.”⁵⁶

Thus, in the view of the local population, the UPDF has increased their vulnerability by moving them to the camps, and failed to provide them with promised protection. The UPDF are also associated with widespread abuses in the past. In earlier stages of the conflict, civilians were often confused with the LRA or accused of supporting the LRA resulting in widespread abuses, including forced labour, arrests and killings.⁵⁷ Today civilians still fear the UPDF: *“People fear to report abuses because they will be made to lead the ill-trained army to the place of the abuse. It becomes a punishment for doing a lawful thing.”* The perception is that the UPDF, in addition to their somewhat mistrustful attitude towards the civilians in the North, is seen as incompetent, tired, demoralised, lacking in welfare and hungry as a result of not receiving their full salaries.

Furthermore, the UPDF is confronted with the military dilemma of combat against an insurgency movement sometimes characterised as “an army of children”. A formerly abducted child recounts his fear of giving himself up:

“I had not had anything to eat or drink for so long, I was so weak... Then I heard soldiers coming and I hid. I heard them speaking Kiswahili, so I knew it was the UPDF. ... They found my bag and the soldier cocked his gun. They were searching the area and I was forced to speak, “Its me, I was abducted by some rebels but I ran away”. The soldier came up to me and said you are a rebel, why should we waste our time with you? We will kill you. He was about to shoot me, but two Acholi soldiers came and said to leave me. They carried me to a hut and then took me to the road. When a cyclist came along, they asked him to take me to a nearby place...”⁵⁸

It has been reported that the relationship between UPDF forces and the population of northern Uganda has improved as soldiers are no longer committing widespread abuses,⁵⁹ and that the security situation has also improved, allowing some IDPs to move from large camps to settlements closer to their homes. However, the military is apparently reticent to let people leave the camps. According to a government official, *“[The rebels] can easily keep up the insurgency if we let them [IDPs] go back and they are abducted into the rebel ranks... They will be arming the rebels by providing them with manpower.”⁶⁰* However, this argument carries little weight with a population that continues to be attacked, killed and abducted from within their so-called “protected” camps, leading to “a high degree of scepticism and uncertainty” on the ground.⁶¹

1.2.3 The LRA’s extreme brutality: crimes against children

In northern Uganda child victims of the LRA include first and foremost the hundreds of thousands of children who have died and have suffered in squalor in the camps over the past two decades: 935,000 children currently live in the camps.⁶² According to a MSF-Holland Report, the “crude

⁵⁶ *ibid.* p.25.

⁵⁷ *Ibid.* pp.29-33.

⁵⁸ Interview with escaped abductee, Gulu, Refugee Law Project (2004). Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda. Working Paper No. 11. Kampala, Makerere University.p.30.

⁵⁹ IOM (2006). *Fulfilling the Forgotten Promise: The Protection of Civilians in Northern Uganda.*

⁶⁰ Internal Displacement Monitoring Centre (May 2006). Only Peace Can Restore the Confidence of the Displaced, Norwegian Refugee Council/ Refugee Law Committee. p.37.

⁶¹ *Ibid.*

⁶² UNICEF Humanitarian Action: Uganda Donor Update 16 May 2006.

mortality rate” in the camps is at a rate of 2.79 per 10,000 inhabitants per day (above 1 is generally categorised as an emergency).⁶³ This context is critical with regard to the ICC’s charges against the use of children in hostilities. Numerous rehabilitation programmes for formerly abducted children have been criticised by locals for favouring formerly abducted children against all the other child victims. Arbitrary categories amongst child victims should be avoided and crimes against all children in the conflict should be prosecuted equally.

As regards the local perception of children associated with the LRA as victims, awareness-raising by local communities and NGOs has led to the uniform use of the term “formerly abducted children”. This term ascribes victimhood to children, as well as adults who were children at the time of abduction, and avoids their stigmatisation as “rebels” or former “child soldiers”. However, it appears that such victimhood extends to those who are “former” child soldiers who have escaped, left the bush and are seeking reconciliation with their communities.

For the local population, the victimhood of formerly abducted children is tied up with the extreme brutality of the abductions, which they have witnessed. However, the LRA’s abusive treatment of children continues in the bush after abductions as their command structure is based on fear.

Stella, was abducted in the 1990s and explains how every child is forced to become a perpetrator to prove he or she is not scared: *“On the third day a little girl tried to escape, and they made us kill her. They went to collect some big pieces of firewood. Then they kicked her and jumped on her, and they made us each beat her with the big pieces of wood. They said, ‘You must beat and beat and beat her.’ She was bleeding from the mouth. Then she died. They made us lie down and beat us with fifteen strokes each, because they said we had known she would try to escape”* (Human Rights Watch 1997, p.10).⁶⁴

Children are abducted on their way to or from school, in the fields, fetching water, in all the places of everyday life. The camps are also unsafe resulting in thousands of children, referred to as “night commuters”, seeking shelter in nearby towns at bus stations, in schools or church halls. Within several days of abduction children will be initiated, sometimes by being anointed in shea butter, which they are told will allow them to be traced if they try to escape.⁶⁵ Then they are made to commit atrocities, often against loved ones, ensuring that they cannot go home:

*“I did not kill anyone for the first four days of my captivity and then, on the fifth day, they said I had to prove I wasn’t scared, they took me back to my village and ordered me to kill my father. At first, I said no, I can’t kill my father, but then they said they’d kill us all and started beating me with a panga [machete]. I took the panga and cut him up. I then saw them do it to my mother. The first night, I was hunted by visions of my father as I tried to sleep. I could only cry silent tears, as the rebels could not know that I regretted what I had done. They do it so that you can’t go back home.”*⁶⁶

Children are assigned to a specific commander according to their age and gender, and ordered to perform a variety of duties. For those abducted before 2002, training would start several days after initiation back in the LRA bases in Sudan. Girls were often trained to operate weapons and fight in addition to performing gender specific roles of fetching water, preparing food and serving as “wives” to commanders once they had reached puberty. According to research, 70% of girls undertook formal training lasting either weeks or months, and were issued with a weapon.⁶⁷

The sexual enslavement and forced pregnancy suffered by girls is recounted by Mary, who was 14 years old when she was first abducted in 1996:

⁶³ MSF-Holland 2004 Survey, cited in Allen (2006) op.cit. p.56.

⁶⁴ Mischokowski, op.cit.p.3

⁶⁵ Denholm, E. (14 October 2005). Uganda: Former child soldiers excluded in adulthood. Amnesty International Press Release.

⁶⁶ Ibid.

⁶⁷ McKay, S. and D. Mazurana (2004). Where are the Girls? Girls Fighting in Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War, quoted in Mischokowski, op.cit.

“That evening all girls were separated from the boys, and we divided up among different men. The man I was given to had two wives. That night, he called me to him. I went obediently, expecting him to ask me to do something for him like take some drinking water. Instead, he told me to sit down next to him, and he started to feel my breast. I pushed his hand away in disgust. I was so embarrassed that I wanted to insult him. He told me to lie down. I refused. He asked me if I had ever seen a dead body. I said no, I hadn’t. Then he said: ‘You will soon see your own corpse.’ He pushed me down and lay on top of me and raped me. I cried out and begged him to stop, but instead he pushed his hand into my mouth and threatened to kill me if I didn’t stop. He raped me three times that night. In the morning, I crawled out of his hut [...] my private parts were very painful. I could not urinate without crying out in pain. I couldn’t believe it when two days later he called me again and raped me twice. My life went on this way for months.”⁶⁸

In addition to these crimes, children frequently go hungry and die of starvation:

“Sometimes we would go on an empty stomach for days. We had no food and were eating only wild leaves and wild fruit.... Sometimes we only had one handful of beans for ten people. ...Hunger kills many children, including the children of the commanders.”⁶⁹

Countless children die from injuries inflicted by their own hierarchy, but countless others also die in fighting:

“The air bombing happened a few weeks after I was abducted. It was a UPDF helicopter gunship that shot at us. I was wounded during the attack, but many abductees were killed as well as LRA soldiers. We were a group of 500 before the attack, with 400 of those abducted children and adults. Hours later only 200 had survived.”⁷⁰

Physical injury, such as gunshot wounds affect at least 15% of returnees:

“A nurse at World Vision identified gunshot wounds, skin problems from walking long distances, and sexually transmitted diseases as the major physical problems affecting returnees. She estimates that about fifteen percent return with gunshot wounds and another five percent have injuries from bomb fragments. Fifteen children assisted by the World Vision rehabilitation centre in Gulu since 1996 have had limbs amputated.”⁷¹

In addition to physical injury or death, children suffer from psychological trauma. A World Vision nurse caring for LRA returnees said:

“Almost all of them suffer from nightmares and flashbacks, especially those that were long in the bush. Some are quiet, withdrawn and don’t want to talk.”⁷²

It would appear that those who enlisted voluntarily are less prone to long-term post traumatic stress disorder (PTSD) than those who were brutally abducted, and who remember to the day the situation and circumstances of this event which changed their lives.

However, according to some researchers, children formerly associated with armed conflict have proven to be extraordinarily “resilient, not damaged, and able to reintegrate into civilian life with varying degrees of success.”⁷³

⁶⁸ Women’s Commission for Refugee Women and Children (2001). *Against all Odds: Surviving War on Adolescents*, Promoting Protection and Capacity of Ugandan and Sudanese Adolescents in Northern Uganda. p.16.

⁶⁹ Interview with Josephine M, Human Rights Watch (2003). *Stolen Children: Abduction and Recruitment in Northern Uganda*, p.11

⁷⁰ Interview with James K, age seventeen, Human Rights Watch (2003). *op.cit.* p.12

⁷¹ Human Rights Watch (2003), *op.cit.* p.18

⁷² Human Rights Watch (2003) *Stolen Children*, *op. cit.* p.18

1.2.4 *Mixed perceptions of children's victimisation: age and demobilisation packages*

Age influences the perception of children as either warriors or victims. Those who are abducted at a very young age are readily accepted as victims. Humanitarian organisations and human rights organisations working with children generally see formerly abducted children as victims in line with the Convention on the Rights of the Child, adopting a "straight 18" approach to childhood.⁷⁴ For these organisations formerly abducted children are victims even if they have become adults by the time they escaped and returned to their communities. However, for the thousands of displaced persons living in IDP camps who have suffered losses at the behest of the LRA and UPDF, children associated with the armed forces are warriors and perpetrators of unconscionable abuses. This is particularly the case if they are "kijana" or "youths" aged 15-18, who have already undergone cultural rites of passage into adulthood.

A child's self perception of victimhood varies according to age and the amount of time spent with the LRA. However, they often see themselves as returning heroes, or as brave survivors, which to a certain extent is a self-protection against the stigmatisation associated with being termed a victim. It is often only within the context of reintegration programmes run by organisations such as GUSCO or World Vision that children have an opportunity to explore and come to terms with their own experiences within the LRA. Furthermore, it is largely as a result of "successful" reintegration programmes and sensitisation undertaken by humanitarian organisations and civil society groups that children's identities are able to change from that of a "child soldier" to a "formerly abducted child", and finally just as a child in the midst of other children.

In addition to these contradictory experiences of children who are fortunate enough to have escaped, children have been known to rejoin forces again even after they have been welcomed back by their communities or undergone rituals "cleansing" them from the negative spirits of killing and living in the bush. The camp conditions to which they return do not provide a satisfactory environment for them to reintegrate either economically or socially.⁷⁵ Thus there are numerous cases of formerly abducted children voluntarily returning to the battlefield after cleansing, adding to the mixed perceptions of formerly abducted children by local communities.⁷⁶

Additionally, local perceptions are influenced by monetary aspects to demobilisation. In northern Uganda, an attractive package has been instituted to encourage the surrender of LRA troops, as well as the provision of amnesty documents under the Amnesty Act 2000. Demobilisation packages have caused resentment amongst civilians who have suffered at the behest of the LRA's savagery, and are perceived as an ironic reward for their abuses. According to interviews undertaken with humanitarian organisations, there are also allegedly "fake" former child combatants who purchase arms on the market, disappear for some time and reappear claiming that they were abducted and thereby applying for the demobilisation package.⁷⁷ This phenomenon also reinforces local perceptions that demobilisation and reintegration efforts discriminate against civilian victims.

In the same manner highly targeted rehabilitation programmes for formerly abducted children are also perceived as discriminating against other children. Several humanitarian organisations reported that they had to give up specific rehabilitation and reintegration for particularly vulnerable former abductees (girls or those who had spent many years with the LRA) due to criticism from the local community, which viewed such programmes as giving "unfair" priority to a "privileged" group of former child soldiers.⁷⁸

⁷³ Wessells, M. (2004). "Psychosocial Issues in Reintegrating Child Soldiers." *Cornell International Law Journal*: 37. p.515.

⁷⁴ See the discussion below on the Convention on the Rights of the Child (CRC) as well as its Additional Protocol.

⁷⁵ Denholm, E. (14 October 2005). Uganda: Former child soldiers excluded in adulthood. Amnesty International Press Release.

⁷⁶ Children who returned have also been used as informers by the Ugandan army for intelligence gathering. NGOs like Save the Children have campaigned to limit the time spent by former child soldiers in barracks with the UPDF. Training organised with the UPDF apparently implies that now children should be brought directly to NGO rehabilitation centres and not barracks.

⁷⁷ REDRESS interview with International Refugee Rights Committee, Gulu, February 2006.

⁷⁸ For instance in 2005, following an assessment of the risk of discrimination and stigmatisation of returning children, Save the Children implemented a special programme giving those at particularly high risk more attention, including individual follow up. While other formerly abducted children at the centre understood the specificities of those cases, the negative reaction by the local community to this special treatment resulted in Save the Children having to stop individual follow up and return to global group follow up.

1.2.5 Perceptions of the formerly abducted girl child

The issue of girl returnees is even more sensitive. Overwhelmingly girls return with one, if not more children of their own. Most communities regard the illegitimate children as a shame not only on the child and mother, but also on the family and the community as a whole, sometimes forcing mothers to choose either between their child or their community.⁷⁹ Thus, stigmatisation and alienation are common, especially since it is often assumed that girls returning will have been infected with HIV/AIDS, and that their children are a curse to the family or community. The fact that girls have been raped, paired with assumptions regarding HIV/AIDS decreases their chances of being (re)married after they return, and their chance of reintegration. Girls that are unable to reintegrate into a family structure often turn to prostitution in order to provide for themselves and/or their children, as soldiers, who are relatively prosperous, take advantage of their poverty. Other girls enter voluntarily into relations with soldiers in order to provide for their family.

The environments into which girls reintegrate are also problematic. Domestic violence is rife in the camps and in war-torn areas, as men are often depressed, alcoholic or otherwise aggravated due to the strain of war, contributing to violent behaviour. Wives are often accused of infidelity when they return from finding food.⁸⁰ For all those living in areas affected by the war, there is also the danger of being sexually or otherwise assaulted. LRA rebels, government soldiers, those assigned to protecting the camps or villages, as well as neighbours or even friends are known to rape or abuse women and girls. Finally, reintegration or demobilisation programmes are usually male-oriented, and are not adapted to girls' specific needs and problems, causing further disadvantage.

According to a survey on the views of former child soldiers towards justice, the needs of female former child soldiers are characterised by a desire to rebuild and reshape their lives. First and foremost girls appear to want forgiveness and amnesty so that the father to their children can come out of the bush. If their husband was part of their life, perhaps living with them intermittently, the majority of the girls expressed a preference for the husband to remain with them, even if that meant further violence. The prevailing view was that they wanted to share responsibility for the family with their husband. Priorities as specified by these mothers were, peace before anything and also the reconstruction of their lives: to be part of a community and to be accepted in it.⁸¹

1.2.6 Local attitudes towards the ICC: Peace First, Justice Later?

Following the joint press conference held by the ICC Prosecutor, Luis Moreno Ocampo and President Museveni on 29 January 2004, at which Ocampo announced investigations into crimes committed by the LRA, the Court has been perceived by some as political, biased and pro-UPDF. The Court's five arrest warrants issued on 13 October 2005 concern Joseph KONY, Vincent OTTI, Okot ODHIAMBO, Dominic ONGWEN and Raska LUKWIYA,⁸² the top leaders of the LRA. The UPDF's abuses have not been raised.

The view of His Highness Rwot David Onen Acana, Paramount Chief, represents the impression of many individuals that we interviewed in northern Uganda:

"How can the ICC be impartial if it is only working on one side of the conflict? There should be justice, administered impartially ... we have had [UPDF] soldiers raping men. We have had people thrown in pits ... government soldiers have committed crimes, should we ignore it? The ICC says that if the government atrocities are as bad as LRA atrocities they will investigate. I will wait and see."⁸³

⁷⁹ REDRESS Interview with People's Voice for Peace, Gulu, February 2006.

⁸⁰ Denholm, E. (14 October 2005). Uganda: Former child soldiers excluded in adulthood. Amnesty International Press Release. p.13.

⁸¹ Survey undertaken by GUSCO as discussed with REDRESS at an interview in Gulu, February 2006.

⁸² Warrant of Arrest for Joseph Kony, issued on 8 July 2005 and amended on 27 September 2005, Case no. ICC-02/04-01/05. Warrants of Arrest for Vincent Oti, Case no. ICC 02/04-01/05-54; Okot Odhiambo, Case no. ICC-02/04-01/05-56; Dominic Ongwen, Case no. ICC-02/04-01/05-57; and Raske Lukwiya, Case no. ICC-02/04-01/05-55 all issued on 8 July 2005.

⁸³ Onan Acana, Paramount Chief Elect, interview in November 2004, cited in Allen, T. op cit.p.99

According to the feedback received by the International Bar Association in workshops held in Uganda in February 2006:

“The ICC was repeatedly referred to as a political tool of the Ugandan State, following its failure to deal with the LRA militarily. Despite the allegations of crimes under international law [committed] by the Ugandan Government, three factors of the ICC’s intervention in Uganda have given rise to the perception of bias and one-sidedness:

- 1) *The Prosecutor’s announcement of the referral of the situation in northern Uganda in a joint press conference ... with President Museveni;*
- 2) *The perception that the ICC website implies that only the LRA is being investigated; and*
- 3) *The Ugandan Government has reportedly made public statements to the effect that, if the ICC finds any violation on the part of the UPDF, it will hold the perpetrators to account domestically.”⁸⁴*

Following innumerable peace initiatives, the Amnesty Act 2000, which provides a framework for the surrender and reintegration of insurgents,⁸⁵ is seen by many as threatened by the ICC’s Arrest Warrants. NGOs working in the North have witnessed years of conflict and have seen many peace initiatives fail. They have lived through the dire consequences of Museveni’s “Operation Iron Fist”, which brought terrible retaliations against civilians in 2002. As a result, NGOs express fears about the ICC’s arrest warrants. For many the fact that the arrests are to be executed by the Ugandan government or UPDF rings alarm bells of a potential repetition of “Operation Iron Fist”. It is questioned how the UPDF will catch the leaders now if they have not been able to do so during years of conflict. Fuelling this sense of apprehension, two aid workers were attacked and killed on 26 October 2005 shortly after the issuing of the arrest warrants.⁸⁶ It has never been shown that these attacks were related to the arrest warrants, however, general insecurity and fear was expressed at this time in an Oxfam press statement on the killings exclaiming that, “[f]or two decades it has been impossible to apprehend the rebel leaders. The communities that we work with are already asking how the arrest warrants will be served. There is a lot of confusion and it’s fast turning to fear”.

In February 2006, when REDRESS conducted its interviews, concerns among NGO representatives in Gulu were overwhelmingly that, “*In any case they will never catch them*”, and that, “*Still it ruins the whole amnesty process because it puts the top leaders in a spirit of ‘having nothing to lose’.*”⁸⁷ A spokesperson from the Refugee Law Project explained that the initiative for the Amnesty Act came from the Gulu region, spearheaded by Acholi religious and cultural leaders, in order to reject what was perceived as a failed military approach to ending the war.⁸⁸ Furthermore, NGOs indicated that since the announcement of the arrest warrants in July 2005, the number of perpetrators coming out of the bush and leaving the LRA had decreased, to the point that no children had come out in the past two months.⁸⁹

However, while many reports have emphasised the reconciliation rites of Acholi traditional justice,⁹⁰ and the amnesty process, it appears that such rites are considered more appropriate for middle ranking LRA and less desirable or possible for the top leaders. According to a 2005 survey by the International Center for Transitional Justice, 66% of respondents favoured punishment (prison or death) when asked directly “what should happen to the top LRA leaders”, with only 22% favouring

⁸⁴ ICC Monitoring and Outreach Programme, First Outreach Report, International Bar Association, June 2006.

⁸⁵ To date the Act has handled 11,972 cases. World Vision (2005), op. cit.

⁸⁶ Oxfam Press Release, 26 October 2005: *Recent Killings of aid workers leave hundreds of thousands without help and living in fear in northern Uganda.* http://www.oxfam.org/en/news/pressreleases2005/pr051026_uganda

⁸⁷ Interview with UNICEF, Uganda, February 2006.

⁸⁸ Also expressed in Refugee Law Project (2005), *Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The potential for Conflict Resolution and Long term Reconciliation*, February 2005, cited in International Bar Association, ICC Monitoring and Outreach Programme, First Outreach Report, June 2006, p.16

⁸⁹ Interview with Peoples Voice For Peace, Gulu, February 2006. See also Reports from Save the Children, World Vision, the Internal Displacement Monitoring Centre (Norwegian Refugee Council).

⁹⁰ Rev. Fr. Dr. Okumu (2004), *Acholi rites of reconciliation*, The Examiner, HURIFO Newsletter.

reconciliation and reintegration.⁹¹ Thus, differing and changing views must be acknowledged. Furthermore, the Langi, Teso and Madi tribes, who were also exposed to atrocities, generally demonstrate more enthusiasm for arrests and punishment than the Acholi, as their traditional justice involves expelling the perpetrator and withdrawing protection from the clan as a form of punishment instead of undertaking rites of forgiveness and reconciliation used by the Acholi.

In the midst of this ambivalent environment, President Museveni has sent mixed messages with respect to the granting of amnesties on the one hand and his duty to undertake arrests on the other. On 15 May 2006, Museveni offered Joseph Kony a “final ultimatum up to July to peacefully end terrorism”, which was then extended to 12th September 2006, with negotiations taking place in Juba, southern Sudan. On the other hand, when the Ugandan Minister of Security, Amama Mbabazi, visited The Hague on 12 July 2006 he requested that they “give an opportunity to the on-going talks in Juba”, but did not request a withdrawal of the Arrest Warrants.⁹²

The ICC has responded by stressing that Joseph Kony and others remain wanted men before the Court, and that eventually Kony will face trial.⁹³ Officials at the Court have also pointed out that the warrants were unsealed *after* most of the LRA had moved to the DRC, significantly contributing to increased security in Northern Uganda. Indeed, UNICEF reported in August 2006 that the number of “night commuters” has fallen from 25,000 in February 2004 to less than 4,000 in Gulu district, due to the improved security situation.

Thus, in spite of the controversy and mixed voices, it appears that the ICC’s intervention in northern Uganda has nonetheless contributed to an improved security situation,⁹⁴ and that the on-going peace process, ICC arrests and local justice and reconciliation process are not mutually exclusive. It is suggested that significantly increased information and outreach activities in northern Uganda will assist in clarifying debates and reducing fear and insecurity further.

1.3 Democratic Republic of Congo

The context of child soldiering in the DRC is very different to that of northern Uganda. As the region has been engulfed by a protracted series of conflicts triggered and sustained in large part by external forces from neighbouring countries, the use of child soldiers has involved far more *compulsory recruitment* and *volunteering* as opposed to *forced recruitment* in the form of abductions. Compulsory recruitment occurs when persons of a specific category are legally obliged to undertake military service,⁹⁵ or, in the circumstances of eastern DRC, quasi-legally or politically obliged as opposed to simply abducted from schools, fields or homes. Nonetheless some groups, such as the UPC (*Union Patriotique Congolais*), a group with ties primarily to the ethnic Hema population in Ituri Province, also use widespread forced recruitment. For instance, on 8 November 2002, the UPC, led by Thomas Lubanga, the ICC’s first indictee in custody at The Hague, allegedly rounded up the entire fifth grade of a primary school, in Mudzi Pela, Ituri for “military service.”⁹⁶

⁹¹ International Center for Transitional Justice (2005), *Forgotten Voices: A population based survey of attitudes about Peace and Justice in Northern Uganda*. p27.

⁹² Daily Monitor, 12 July 2006, <http://www.monitor.co.ug/news/news07121.php>

⁹³ IRIN News, 7 July 2006: http://www.irinnews.org/report.asp?ReportID=54455&SelectRegion=East_Africa&SelectCountry=UGANDA

⁹⁴ Akhavan, P. (2005). “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court.” *American Journal of International Law* 99: p. 403-421.

⁹⁵ Happold, M. (2005). *Child Soldiers in International Law*, Manchester University Press. p. 8.

⁹⁶ Human Rights Watch (2003) Ituri, “Covered in Blood”, *Ethnically Targeted Violence in Northeastern DR Congo*, Volume 15, No 11.p.47.

Fabrice was recruited by the UPC by force in Sota aged 10 years and tells his story: *“My parents were killed by Lubanga’s troops, the UPC. They took me and told me I should avenge my parents by killing others. I was almost 11, I was in the 6th grade at school. When we got to the base camp I met many other children. We were trained and Kawa Mandro distributed weapons to us. I was designated as bodyguard to Kisembo. The commanders liked to have us as bodyguards. I did three months of training and participated in several fronts, most of the clashes here against the FNI. By the time we left (Lubanga allowed some of us to go for demobilisation) we were three battalions, most were my age (13 years).”*⁹⁷

In eastern DRC it is not generally known that the recruitment of children into armed groups is a war crime. Sensitisation about the criminal aspect of recruitment of children has been met with a considerable degree of surprise.⁹⁸ Children, who participated widely in the ongoing conflicts in eastern DRC since 1996, are more readily perceived as war heroes, fighting to defend ethnic or political affiliations against external aggressors or to overthrow unpopular political leaders, than as victims of crime. Rarely do demobilised children share with their parents or communities the emotional context of what they experienced or how they were treated. They communicate only the bare facts. As a result of the lack of emotional communication, reintegration into local communities raises mixed feelings. Community feelings towards the returning soldier are influenced by the political/ethnic relationship that the community had with the particular armed group the child was associated with and also with the nature of the circumstances surrounding the recruitment itself.

According to the United Nations Mission in Congo (MONUC), there were an estimated 30,000 children in armed forces or groups in 2004.⁹⁹ Children have been used by diverse groups and forces in the various time periods of the conflict since 1996. Depending on the context, children were forcibly recruited, joined voluntarily, or joined at the instigation of local militias with the tacit consent of their families. Their experiences and association with armed groups inform their perceptions of victimisation. These experiences also impact upon their willingness to testify before the ICC in view of their relationship with their former commanders and the success of demobilisation and reintegration efforts.

1.3.1 The 1996 conflict: “voluntary” enlisting against foreign incursions¹⁰⁰

During the 1996 conflict, which started in the Uvira region of South Kivu in October 1996, four major armed groups were involved, all of which recruited children amongst their ranks. The Interahamwe, who actively participated in the 1994 Rwandan genocide, set up their bases in and around the vast refugee camps of the then eastern Zaire, which had been set up as a result of the post-genocide Hutu exodus from Rwanda. The Interahamwe actively recruited children from in and around the camps to be used as porters and for pillaging, amounting to 20% of their forces.¹⁰¹ The Interahamwe made incursions into Rwanda from the camps, but also attacked the local Banyamulenge¹⁰² of Tutsi ethnicity, sparking local conflict.

⁹⁷ Interviews conducted in February 2006.

⁹⁸ Interviews undertaken in the context of local viewings of the film Waruzi, B. T. (2005). *The Duty to Protect: Child Soldiers in the Democratic Republic of Congo*, <http://www.witness.org>.

⁹⁹ Based on a 2004 estimate, which continues to be cited by MONUC, UNICEF and other agencies in their more recent reports. See <http://www.monuc.org>. UNICEF and 2004 *Global Report of the Coalition to Stop the Use of Child Soldiers* also use this figure. See <http://www.child-soldiers.org>.

¹⁰⁰ It is questionable whether children under the age of fifteen can really join armed groups or forces *voluntarily*, given the difficulty for children of a young age to have full knowledge and understanding of the consequences of their actions. Furthermore, the circumstances of their joining demonstrated in this Report indicate that in many instances the devastation and insecurity of conflict has left children with few apparent options other than “voluntarily” enlisting, raising the question of how *voluntary* such enlisting actually can be. It is noted that voluntary enlisting children under the age of fifteen is a war crime as per articles 8(2)(b)(xxvi) and 8(2)(b)(vii) of the Rome Statute. Furthermore, Article 4(3) of Additional Protocol II to the Geneva Conventions of 1949 prohibits the taking part of children under the age of fifteen in hostilities, whether voluntary or not.

¹⁰¹ Watch List on Children and Armed Conflict (2006). *Struggling to Survive: Children in Armed Conflict in the Democratic Republic of Congo*. 26 April 2006. p.45.

¹⁰² The Banyamulenge make up roughly one sixth of the population of the Uvira Region.

As a result of these attacks, the Banyamulenge received support from Rwanda,¹⁰³ Burundi and Uganda. This foreign involvement in turn angered the local government, leading to the expulsion of the Banyamulenge by the vice governor of South Kivu in October 1996. The Banyamulenge joined an anti-Mobutu alliance under the banner of the Alliance of Democratic Forces for the Liberation of Congo-Zaïre (AFDL), backed by Rwanda, Angola and Uganda.¹⁰⁴ The AFDL, with Laurent Desiré Kabila as its head, rose up against Mobutu's government and overthrew President Mobutu Sésé Seko in May 1997. Initially, the AFDL was able to recruit easily through propaganda of an alleged \$100 of monthly pay, attracting numerous young adolescents. However, the AFDL, which was a multi-ethnic and international force, soon began abducting thousands of girls and boys coming home from school, church, the market place, or from the refugee and IDP camps.¹⁰⁵ An estimated 10,000 children fought alongside the AFDL in the 1996-7 rebellion against Mobutu.

Jeanne was forcibly recruited by the AFDL at the age of 11 in 1996: *"I was recruited in Goma on my way home from school. I came across some soldiers who were pretending to mend their broken down vehicle, but in fact it was a ploy. They called me and some other children over, and when we went up to them, they grabbed me, threw me into their vehicle and took me off to a training centre. I was trained there and then we began the march towards Kinshasa. Because we were taken just like that on our way home from school, our parents had no idea where we were. To this very day, I don't know if my parents are alive. And even if they are, they don't know what's become of me."*¹⁰⁶

AFDL's opponents were Mobutu's unpaid and unmotivated government forces, the FAZ or Forces Armées Zairoises. It is not certain whether the FAZ was using child soldiers, but when it was defeated by Kabila's troops they ran away, apparently accompanied by some children associated with the forces in non-combatant capacities.

The fourth major group, often aligned with the government forces, was the Mai-Mai militia. Of the four groups the Mai-Mai were widely supported by the local population of the Uvira Region in South Kivu, serving as the resistance movement against foreign aggression and occupation. The Mai-Mai, who are known for their use of mystical rituals to protect themselves against bullets, comprised some seven separate groups in 2002. At this time children, and particularly young adolescents, accounted for very high percentages of combatants in the Mai-Mai, possibly up to 70% in some groups.

Pascal, 13 at the time of his interview explained his enthusiasm as follows:

*"We were fed up with the Rwandan military and also with RCD-Goma. We had already had enough. So, I joined my friends who were going, and we went to register in the Mai-Mai... There were many of us, I can't remember the ages, but there were kids much smaller than me too. I even pitied some of them. My parents had really agreed with me going and congratulated me for having courage."*¹⁰⁷

¹⁰³ The Rwandan government saw the Banyamulenge, originally of Rwandan origin, as natural allies. They were relatively recent residents in eastern DRC and their citizenship of DRC had been questioned for some time. The Rwandan government had ensured their training and arming in the aftermath of the genocide in Rwanda, in what it saw as an unstable border situation. See Human Rights Watch (1 March 1997), *Attacked by All Sides: Civilians and the War in Eastern Zaire*, Index No. A901

¹⁰⁴ During 1996-7 mining investors began to negotiate mining deals directly with the AFDL. See S/2001/357, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo, p. 6 – Pre-existing structures.

¹⁰⁵ Amnesty International (2003). Democratic Republic of Congo: Children at War. *AI Index: AFR 62/034/2003*, p.4

¹⁰⁶ *Ibid.*

¹⁰⁷ Pascal was 13 at the time of interview by AJEDI-Ka in a Mai-Mai camp in October 2003.

Valentine, who is now 15, also voluntarily enlisted with the Mai-Mai:

"I went myself into the Mai-Mai armed group. I was 13. I was thinking that we'll fight together with other soldiers against the Rwandans. I was encouraged by my friend (another girl), and we went. It was in 2003, when we arrived there we were very well welcomed, but after some days the commander¹⁰⁸ told us to be in charge of cooking and prepare his bed. We were more than 10 girls, and when he pointed to one of us to prepare his bed it was meant to sleep with him. None of us could try to refuse because it was an order, and after all even some soldiers were abusing us and obliging us to have sexual relations with them. My first time was in our camp, the commander obliged me to sleep with him for a whole week, I couldn't stop him and I tried to escape the camp. Unfortunately I was captured, I was beaten many times, and the commander told other soldiers to "open their eyes on me" if they wanted me. So that was our real life there until I was demobilized at the end of 2004, but I was already pregnant and now I have a baby".

Valentine added: "we were also going to the front like other soldiers, and when we would return we were asked to cook for the troops, they wouldn't consider that we were also tired like them, and also when the commander wanted to have sexual relations, he just pointed at one of us".

There were relatively few girls in the Mai-Mai armed groups, making up perhaps an estimated 5% of the forces.¹⁰⁹ While a few joined voluntarily, the majority of the girls were recruited by force from their homes, in the fields or on their way to church or school.

1.3.2 The second conflict: forced recruitment by multiple factions

The second conflict started soon after Laurent Kabila took over power as he ousted his Rwandan chief of staff and other foreign elements from his ranks, apparently in order to consolidate his power without foreign manipulation. This sent shock waves to the predominantly Tutsi Banyamulenge in the east, who caused a mutiny against Kabila's victorious forces and formed the RCD.¹¹⁰ In this context RCD-Goma recruited children representing 35–40% of their forces.

Lambert was recruited by force by RCD-Goma when he was 12 years old. *"I was taken from my home, in Kavimvira (Uvira). When they came I was about to go to sleep, it was night. I was with my young sister, my cousin and my mother, who died after some days because of what the soldiers did to her. My father was out fishing. They were about five soldiers, all of them were adult except one who was a kadogo, a young one. They asked us to follow them. My young sister couldn't because she was sick, so they raped her and left her. I did not want to go, but one of the soldiers held his gun against me and pushed me out. I heard my mum crying and I was also crying, but they said that if I cried they would shoot me."¹¹¹*

In addition to its support for RCD, Uganda created and supported its own groups, namely the Movement for the Liberation of Congo (MLC) and the Ugandan People's Defence Force (UPDF) spreading the war across large tracts of Eastern DRC.¹¹² Loyalists to Kabila called for resistance demanding civilians to bring out their machetes, declaring that "the entire population has become a military population from today onwards."¹¹³ Following a meeting in Harare in 1998, Zimbabwe, Angola, Namibia, Libya, Chad and Sudan put troop and other support behind Kabila.

¹⁰⁸The names of the commanders have been withheld in order to protect the identities of the children interviewed.

¹⁰⁹ AJEDI-Ka estimate, based in Uvira.

¹¹⁰ The *Rassemblement Congolais pour la Democratie* (RCD) or Congolese Gathering for Democracy later splintered in to RCD-K and RCD-Goma, with one faction moving its base to Kisangani, with further splintering into RCD-ML based in Bunia in 2000.

¹¹¹ Lambert was abducted in November 2002 and escaped in August 2004. He was trained as a bodyguard. Most of his training comprised learning to crawl, to open and fire weapons, to kill, jump and torture others. As all kadogo, he was beaten as part of the training to make children hardened to military life and spirit. When he escaped, he was welcomed by a transit centre run by a local NGO in Uvira.

¹¹² The war had spread to the Uvira region in South Kivu by October 1996.

¹¹³ Radio broadcast by Major Mudenke, 12 August 1998.

With more than ten countries involved and 10-12 different groups using children¹¹⁴ the war raged on. The number of child combatants is not known. However, at the Sun City negotiations in 2002, which ended most of the international involvement in the conflict, the Joint Army Commission required armed groups to provide lists of combatants. A total of some 350,000 combatants were recorded, with an estimated 50% under the age of 18. It is roughly estimated that: 10 % were under 12, 30% were between 12-15 and 20% were between 16-18.¹¹⁵

However, without the commitment of RCD-Goma, the Hema affiliated UPC or Ugandan UPDF, Sun City was not successful in ending the local conflict in Ituri. While RCD-ML attended Sun City, the UPC (Hema) leader Thomas Lubanga apparently denounced RCD-ML (then relying on Lendu) as selling out to foreigners, and circulated the slogan of "Ituri for Iturians" calling for Iturian autonomy. He is said to have demanded that every family contribute a cow, a goat or a child to the resistance effort. The weakened national army sought to gain control over the region through RCD-ML, however, this caused the Ugandans to change sides and back the UPC, intensifying conflict between the local Lendu and Hema militias. High percentages of child soldiers were recruited by all sides, with some groups including children at over 50% of their forces. Local witnesses have called the groups "armies of children".

Alain, aged 15, joined the FNI voluntarily. He explains: "I was at home with my family in 2003, things were really like a nightmare, there were dead bodies more or less everywhere, and I decided to join the FNI group as there was not really much else to do".¹¹⁶

While the Lendu (FNI)¹¹⁷ and Hema (UPC)¹¹⁸ groups recruited children by exerting pressure on parents to support their ethnic affiliations, these groups also abducted children from their opponents, with some 20% of the child soldiers of the Lendu or Hema belonging to the opposing ethnic group. The RCD-Goma also kidnapped children from the Mai-Mai.

An observer at an initiation ceremony for new recruits kidnapped from the Mai-Mai into RCD-Goma in February 2003, recounted as follows: The welcoming ceremony concerned both adults and children from the Mai-Mai, who had been ambushed during the fighting. Girls and boys were welcomed, but the girls were hand picked at the ceremony by the commanders and other high-ranking soldiers as their 'wives'. Traditional rituals were undertaken. During the magical rites children are made to believe they would acquire extra strength, and that bullets would not affect them. A central role in these initiation rituals, as well as more generally during raids, is the forced use of drugs, which is claimed to induce a spirit of manhood, a military character.¹¹⁹

Children who joined RCD-Goma forces voluntarily, did so for a variety of reasons. They were either driven by poverty, assuming that good logistic capability meant that they would be well remunerated, or in search of security and the belief that having a family or community member in the forces would ensure their families' protection from raids.

¹¹⁴ The Secretary General's Report to the Security Council on Children and Armed Conflict of 10 November 2003 reports 12 groups in DRC as using or enlisting child soldiers, including the *Forces Armées Congolaises* (FAC), RCD-Goma, *Mouvement national de liberation du Congo* (MLC), Hema militias, Lendu militias, Mai-Mai, Ex-Rwandan Armed Forces (Ex-FAR) and Interahamwe.

¹¹⁵ These include 21,800 Mai-Mai group combatants, 15,720 from RCD-Goma and 11,500 Masunzu. Interestingly, these figures which were recorded for negotiation purposes at Sun City dropped dramatically in the context of the troop numbers for integration into the national army in February 2006.

¹¹⁶ Alain, 14 years old, the interview was undertaken in Bunia (Ituri District), 5 February 2005.

¹¹⁷ In for instance the FNI (*Front des Nationalistes et Integrationnistes*) which comprised Lendu and associated Ngiti ethnic groups.

¹¹⁸ The UPC (*Union des Patriotes Congolais*) was led by Hema commander Thomas Lubanga, but also included associated Gegere ethnic groups. Fighting between the Hema and Lendu affiliated groups was exacerbated in 2000 by the internal power struggles within RCD-ML. Wamba dia Wamba, the first RCD-ML president relied on the Lendu against his opponent Mbusa Nyamwisi, who relied on the Hema. Nyamwisi ousted Wamba and took over RCD-ML. Nyamwisi (a Nande backed by Uganda), then built up relations with the Lendu, increasingly sidelining his former supporters within the Hema, including Thomas Lubanga, a leading Hema (nominally his minister of defence). In April 2002, Lubanga allegedly killed Nyamwisi's body guard and joined the UPC against RCD-ML (then known as APC- *Armée Populaire Congolaise*) establishing their own base in Mandro (12 miles from Bunia) and taking over part of the town.

¹¹⁹ Attendance at the ceremony by REDRESS' DRC researcher.

1.3.3 *Mixed perceptions of victimisation: children as perpetrators*

Children in armed groups have been trained to kill, kidnap, destroy, intimidate, rape, loot and undertake other kinds of violence against civilians, including other children. A man in his 60s described the cruel destruction of his village near Katogota in 2003, where the majority of combatants were children from RCD-Goma: *“the village was mercilessly burnt by kadogos.”*

Women were amongst their many victims. Jeanne was raped by child soldiers from the RCD-Goma in 2003: *“There were about 4 of them. They were only 13 or 14 years old. They had guns and threatened to kill me if I did not have peaceful sexual relations with them; and they raped me. I knew one of them, but I couldn’t say anything at the time because they would have killed me to avoid having witnesses. I know another woman who is about 30 years old who was raped by about 5 child soldiers from a Mai-Mai group. This kind of thing happened a lot in our rural areas.”*

The Rome statute of the International Criminal Court provides that children, who were under 18 at the time of the commission of crimes, will not be prosecuted.¹²⁰

1.3.4 *Attitudes towards the International Criminal Court*

In the DRC, the news that Thomas Lubanga was arrested by the International Criminal Court has been met with mixed reactions. In the region of Ituri, some people applauded the ICC intervention as an alternative to what is perceived as an ineffective, biased national judiciary, subjected to political interference. Others’ reactions were more ambiguous; they expressed suspicion of the “white men” whose double standards “first allowed Thomas Lubanga to commit his crimes with the arms they supplied, and now want to see him held accountable”.¹²¹

Outside Ituri, at least amongst the ranks of commanders, the arrest appears to have had an impact, as commanders appear to have understood that they too may be pursued and held accountable by the International Criminal Court. There is little understanding amongst the commanders of the Court’s challenges in apprehending suspects and its dependence on national cooperation or the UN to effect arrests.

However, as concerns Thomas Lubanga’s case, the charges concerning child soldiers have been met with surprise as most people in the DRC are unaware that recruiting and using children in hostilities is a crime under international law. Furthermore, this surprise is coupled with incomprehension and some frustration as the crimes which are perceived as “more grave”, such as rape, large scale massacres or torture have not been included in the initial list of charges. It is feared by many that these latter acts will not receive the required attention. This has caused significant disappointment given that hopes were high when the arrest was first announced.

It is hoped that at least further arrests will follow quickly to make up for the lacunae of the present charges, to maintain momentum and to cover numerous other areas and atrocities committed. As a women’s rights activist exclaimed in relation to Thomas Lubanga’s arrest: *“It’s good that they indicted him, but ‘il faut relativiser’, we need to put this single arrest into perspective!”*¹²²

¹²⁰Rome Statute of the International Criminal Court, UN Doc. A/CONF.183.9 adopted 17 July 1998, Article 26: Exclusion of jurisdiction over persons under eighteen. Children under eighteen may still be prosecuted under domestic law (including as a result of the exercise of universal jurisdiction)

¹²¹ Interviews in Ituri in the weeks following the Lubanga arrest and transfer, conducted by REDRESS’ DRC Researcher.

¹²² Representative from the “Association pour la Promotion et Développement de L’Ituri”, at the Meeting organised by the International Center for Transitional Justice on *Transitional Justice and Humanitarian Concerns*, Geneva, 17 May 2006.

PART 2 - CHILD SOLDIERS AND INTERNATIONAL LAW

2.1.1 International Humanitarian Law

The 1949 Geneva Conventions do not specifically address the participation of children in armed forces.¹²³ However, Additional Protocols to the Geneva Conventions make some provision for the use of children in armed conflict. With respect to international armed conflict, Article 77(2) of Additional Protocol I, demands that *“Parties to the [international] 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”*.¹²⁴ Thus, under Protocol I, there is an obligation to refrain from recruiting children under fifteen but no obligation to refuse their voluntary enrolment. Protocol I further provides that the death penalty should not be applied to war crimes committed by those under eighteen.

As regards the interpretation of “taking a direct part in hostilities”, the ICRC Commentaries question the implications (if any) of the insertion of the word “direct” and indicate that “the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services... as gathering and transmission of military information, transportation of arms and munitions, provision of supplies, etc.”¹²⁵ Thus, the threshold to be applied in considering which kind of activities are prohibited is wide, affording children (and civilians) an increased scope of protection. A body of law and practice has evolved interpreting the notion of “direct participation in hostilities”. The post World War II Hostages Trial established a rule that:

“[A] civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.”¹²⁶

Article 51(3) of Additional Protocol I also indicates that “[c]ivilians shall enjoy the protection afforded by this section [entitled Protection of the Civilian Population], unless and for such time as they take a direct part in hostilities.” Thus, combatant status is attributed to those “taking a direct part in hostilities”, including those who aid and abet, and not just those who fight on the front lines.¹²⁷ In this regard, the ICRC Commentary to Additional Protocol I asserts that: *“[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.”¹²⁸* Direct participation includes *“acts, which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”¹²⁹*

¹²³ However, Articles 17, 24 and 26 of the Fourth Geneva Convention relative to the Protection of Civilian Persons during times of War, 1949, do provide for specific measures aimed at protecting children as a particularly vulnerable category of civilians.

¹²⁴ Article 77, Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(2), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 International Legal Materials 1391 (1977). The ICRC Commentaries indicate that “on this point governments did not wish to undertake unconditional obligations. In fact, the ICRC had suggested that the Parties to the conflict should ‘take all necessary measures’ but this was not maintained in the final text. ICRC Commentary to Additional Protocol I, para 3184. Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., Martinus Nijhoff.

¹²⁵ ICRC Commentary to Protocol I, (op.cit at footnote 130), para 3187. See Smith, A (2004), Child Recruitment and the Special Court for Sierra Leone, J Int Criminal Justice, Dec 2004; 2: 1141-1153.

¹²⁶ 1 „The Hostages Trial” XV Law Reports of Trials of War Criminals, United Nations Wartime Commission, (London, 1947–48), at 111, cited by Schmitt, M (2004), Direct Participation in Hostilities and 21st Century Conflict, in Krisensicherung und humanitärer Schutz : Festschrift für Dieter Fleck, Berliner Wissenschafts-Verlag, p.505

¹²⁷ Article 43.2 of Additional Protocol I defines combatant status by reference to direct participation: “[m]embers of the armed forces of a Party to the conflict (other than medical personnel and chaplains...) are combatants, that is to say, they have the right to participate directly in hostilities.” Cited in Schmitt, M 2004, (op.cit at footnote 132) p.506.

¹²⁸ ICRC Commentary to Additional Protocol I, (op.cit. at footnote 130), para. 1679.

¹²⁹ ICRC Commentary to Additional Protocol I, (op.cit. at footnote 130), para. 1942.

The use of children in internal armed conflicts is regulated by Additional Protocol II, which increases the protection provided under Common Article 3 of the Geneva Conventions. Article 4(3) of Additional Protocol II provides that “*children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.*”¹³⁰ This absolute provision establishes the principle of non-recruitment, prohibiting acceptance of voluntary enlistment. As confirmed by the ICRC Commentary, “[n]ot only can a child not be recruited, or enlist himself, but furthermore he will not be ‘allowed to take part in hostilities’, i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.”¹³¹ The language of Protocol II is slightly different from Protocol I, in that it uses the phrase “taking part in hostilities” as opposed to taking a “direct” part. In spite of the varying terminology, it appears that the threshold of activity that is prohibited is the same in both international and internal armed conflict.

2.1.2 International Human Rights Law

The Convention on the Rights of the Child and its Optional Protocol

In response to the overwhelming support for the Convention on the Rights of the Child (CRC), reflected in its almost universal ratification, the development of more detailed standards against the use of children in armed conflict was pursued in the form of a Protocol to the CRC, as opposed to through further clarification or protocols in humanitarian law.

The CRC defines a child as a “*human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier,*”¹³² and affirms in Article 38, that “*State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.*” As the CRC is a human rights treaty as oppose to a humanitarian law treaty, it applies also in times of peace.

The Optional Protocol to the CRC provides a more detailed and comprehensive framework regarding the association of children with armed forces and groups. It raises the age of direct involvement in hostilities from fifteen to eighteen, and requires that States “*take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.*”¹³³

The provision prohibits compulsory recruitment, such as military service, of persons under the age of eighteen¹³⁴ and raises the legal age for military voluntary “recruitment” from fifteen to sixteen,¹³⁵ recalling children’s special entitlement to protection afforded in the CRC. It also requires that States, allowing voluntary recruitment of children under the age of eighteen, to implement specific safeguards to ensure that recruitment is truly voluntary and not coerced.¹³⁶ In contrast to the provisions applying to States, the position taken with regard to non-state actors is much more stringent, asserting that “*Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.*”¹³⁷

¹³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II), Adopted on 8 June 1977. Article 4(3).

¹³¹ ICRC Commentary to Additional Protocol II, para. 4557.

¹³² Convention on the Rights of the Child, Adopted by General Assembly resolution 44/25 of 20 November 1989. Article 1.

¹³³ Optional Protocol to the Convention on the Rights of the Child of 1989, on the Involvement of Children in Armed conflict, Adopted by the General Assembly on 25 May 2000. Article 1.

¹³⁴ Ibid. Article 2.

¹³⁵ Ibid. Article 3(1).

¹³⁶ Ibid. Article 3(3). See also discussion at footnote 109 as to whether enlisting can ever be voluntary for children, particularly for those under fifteen.

¹³⁷ Ibid. Article 4.

The ILO Convention 182 Concerning Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

In 1998, prior to the adoption of the Optional Protocol, and due to the slow progress of its drafting, the International Labour Conference adopted Convention 182, which provides that States Parties “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”¹³⁸ Children are defined in line with the CRC, however some delegations, such as Ethiopia were not satisfied with the cursory nature of the inclusion of “forced or compulsory recruitment of children for the use in armed conflict”¹³⁹ amongst the worst forms of child labour, as it was felt that *all participation* of children in armed conflict amounted to the most “hazardous and injurious form of child labour possible” not just their forcible involvement, which was already covered under ILO Convention 182.¹⁴⁰ The ILO Convention 182 was adopted and entered into force in 2000.

African Charter on the Rights and Welfare of the Child

Based on the definition of the child in the CRC and its Optional Protocol, the African Charter on the Rights and Welfare of the Child places obligations on State Parties to “take all necessary measures to ensure that no child [under 18] shall take a direct part in hostilities”, which allows children under the age of eighteen to be involved in support functions. However, it further provides that States Parties shall “refrain in particular, from recruiting any child,”¹⁴¹ which should be read to include both voluntary recruitment and compulsory recruitment. This would therefore render the involvement of children under the age of eighteen less likely in the support functions to which they are technically allowed to participate.¹⁴²

Furthermore, as the African Charter on the Rights and Welfare of the Child is a human rights treaty, the prohibition on recruitment applies during times of peace as in times of conflict.

2.1.3 Customary International law

It is generally agreed that the recruitment of children under the age of fifteen into armed forces is prohibited as a matter of customary international law, with States being under an obligation to undertake “all feasible measures” to prevent children under fifteen from taking a direct part in hostilities whether they are specifically bound by their own treaty commitments or not. This assessment is based on an “examination of the negotiations of the CRC [which] shows that no state argued that the protection given to children in armed conflict should be less than that imposed by Additional Protocol 1”.¹⁴³ There may be emerging customary norms that prohibit compulsory recruitment of children under eighteen years, though this is not universally accepted at present.

The Appeals Chamber of the Special Court for Sierra Leone in *The Prosecutor v Sam Hinga Norman*¹⁴⁴ concluded that the recruitment and use of children under the age of fifteen to participate actively in hostilities was prohibited as a matter of customary international law. However, it did so on the basis of State support for the Additional Protocols and Convention on the Rights of the Child, which in and of itself may not provide sufficient evidence of custom. Nonetheless, the Appeals judges

¹³⁸ ILO Convention 182, adopted by the ILO Conference, 1998. Article 1.

¹³⁹ Ibid. Article 3(a).

¹⁴⁰ Happold (2005), *Child Soldiers in International Law*, p. 82-83.

¹⁴¹ African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990, Article 22(2). The Charter entered into force on 29 November 1999.

¹⁴² Happold (2005), *Child Soldiers in International Law*.

¹⁴³ Namely during the negotiation of Article 38 of the CRC as compared to the position already provided for in Article 77(2) of the Additional Protocol 1 to the Geneva Conventions: Happold (2005), *Child Soldiers in International Law*, p. 90-91.

¹⁴⁴ *The Prosecutor v. Hinga Norman*, Case No SCSL-2004-14-AR72(E), *Decision on Preliminary Motion based on Lack of Jurisdiction (child recruitment)*, 31 May 2004.

esteemed that customary law had crystallised in this regard prior to the commencement of its mandate in 1996.¹⁴⁵

Indeed, at the time of the drafting of the Statute of the Special Court for Sierra Leone, the Parties did not question whether recruitment of children under the age of fifteen was prohibited, taking this for granted. Instead, they questioned whether individual criminal responsibility for child recruitment had reached customary status. In this regard, in October 2000, the report of the Secretary-General of the United Nations¹⁴⁶ was somewhat doubtful, stating that:

*While the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual criminal responsibility of the accused.*¹⁴⁷

However, the Security Council took a more progressive view than what was previously understood as customary international law. It found that “conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities”, had become a criminal offence under customary international law by 30 November 1996, and amended the Secretary-General’s draft Statute accordingly.¹⁴⁸

General Assembly and Security Council Resolutions, insofar as they can be demonstrative of state practice and *opinio juris*, have confined themselves to calling on States Parties and non state parties to conflicts:

*“to respect fully the provisions of the Geneva Conventions ... and additional protocols thereto ... and to respect the provisions of the Convention on the Rights of the Child, which accord children affected by armed conflict special protection and treatment.”*¹⁴⁹

Following the General Assembly Resolution 51/77¹⁵⁰ the Office of the Special Representative of Children and Armed Conflict produces an Annual Report on Children and Armed Conflict, which covers the practices of both governments and non state actors. The report is then discussed by the Security Council leading to adoption of subsequent resolutions in respect of its contents. The Security Council now regularly “notes with concern the list annexed to the Secretary-General’s report, and calls on the parties identified in this list to provide information on steps they have taken to halt their recruitment or use of children in armed conflict in violation of the international obligations applicable to them.”¹⁵¹ This indicates the Security Council’s attempt to bind non-state actors as well as enforce States’ responsibilities to protect civilians.¹⁵² It also recognises that States have an obligation to take active steps to demobilise children who had previously been recruited.

2.1.4 Complementarity: the Laws of Uganda and DRC

The applicable laws and practice in Uganda and Democratic Republic of Congo are monitored by the Coalition to Stop the Use of Child Soldiers. However, exact determination of age is an issue in both countries.

¹⁴⁵ Happold (2005), *Child Soldiers in International Law*, p. 94-95, and Happold (2005), *International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone’s Decision in The Prosecutor v Samuel Hinga Norman*, 18(2) *Leiden Journal of International Law* 283.

¹⁴⁶ The Statute of the Special Court for Sierra Leone is annexed to the *Special Court Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone* of 16 January 2002.

¹⁴⁷ UN Doc. S/2000/915 (4 October 2000), cited in Happold (2005), *Child Soldiers in International Law*, p. 120

¹⁴⁸ Article 4(c) of the Special Court draft Statute, Annexed to the Letter dated 22 December from the President of the Security Council addressed to the Secretary-General UN Doc. S/2000/1234.

¹⁴⁹ General Assembly Resolution 52/107 of 13 February 1998, cited in Happold (2005), *Child Soldiers in International Law*.

¹⁵⁰ General Assembly Resolution 51/77 of 20 February 1997.

¹⁵¹ Security Council Resolution 1460 (2003) (30 January 2003) in response the Secretary-General’s fourth report on Children and Armed Conflict.

¹⁵² See Security Council Resolution S/RES/1674 (2006) of 28 April 2006 on the Duty to Protect.

The Laws of Uganda

As regards Uganda, the 1995 Constitution requires its citizens to defend their country as a matter of principle. Article 17 of the Constitution reads: "It is the duty of every citizen of Uganda to defend Uganda and to render national service when necessary; it is the duty of all able-bodied citizens to undergo military training for the defence of this Constitution and the protection of the territorial integrity of Uganda whenever called upon to do so."

While the Constitution does not mention child recruitment or children in armed conflict, the Ugandan National Resistance Army Statute does set the minimum age for recruitment at eighteen.¹⁵³ Article 34 of the Constitution defines children as persons under the age of 16 and states that children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development. UNICEF has proposed to also include the minimum age for recruitment into the Ugandan Defence Forces Bill.¹⁵⁴ Uganda has included special legislation with regard to the issue of age determination. Articles 107-8 of the Children's Act provides a strategy for courts to determine the age of a child.¹⁵⁵

The Laws in the DRC

As regards the Democratic Republic of Congo, Article 184 of the Transitional Constitution of 1 April 2003 banned the recruitment of persons under eighteen years or use of them in hostilities. The new Constitution adopted on 19 February 2006, has less favourable provisions. It does not specifically ban recruitment, and only provides for certain generic guarantees for the protection of minors under Article 41, such as the rendering "mistreatment or sexual abuse of minors punishable by law" and placing obligations on public authorities to "protect children in difficulty and bring perpetrators of violence against children to justice". Article 41 defines minors as those who have not yet completed their eighteenth year (*18 ans révolus*).

Specific provisions aligning national law with the Rome Statute, which was ratified by the Democratic Republic of Congo on 30 March 2002¹⁵⁶ have been drafted, into a draft "*Law Modifying and Completing Certain Provisions of the Criminal Code, Code on the Organisation and Competence of the Judiciary, of the Military Criminal Code and Judicial Military Code in Accordance with the International Criminal Court Statute*"¹⁵⁷ completed in September 2005. The draft provisions on war crimes are very similar in structure and wording to Article 8 of the Rome Statute, however, they go further, rendering conscripting, enlisting or using children under the age of *eighteen* a war crime, both in internal and international armed conflict.¹⁵⁸ The draft law was not placed on the parliamentary agenda in the 2005-6 session, as it was found to be politically too sensitive in the lead up to the national elections.¹⁵⁹ It is hoped that the draft law will be considered by the newly elected government in 2006-7.

¹⁵³ National Resistance Army Statute, 3/92, the Conditions of Service Men Regulations 1993, and the Conditions of Services (Officers) Regulations 1993.

¹⁵⁴ Coalition to Stop the Use of Child Soldiers (2004). Global Report, <http://www.child-soldiers.org>.

¹⁵⁵ The Children's Act of 1 August 1997, Article 107 demands that courts inquire after the age of children who appear before it, except in the case where a child merely gives evidence. In such proceedings the court "shall take any evidence, including medical evidence, which it may require". Article 108 then provides that certificates signed by medical officers will be accepted as proof of age. In case such proof is not available or provided. Article 108 states that it will not invalidate the order or judgment of the case if any subsequent proof comes up and that "the age declared or presumed by the Court will be (...) the age deemed by the court for the purpose of the proceedings".

¹⁵⁶ See law number 0013/2002 of 30 March 2002.

¹⁵⁷ *Loi modifiant et complétant certaines dispositions du code pénale, du code d'organisation et de la compétence judiciaires, du code pénal militaire et du code judiciaire militaire, en application du statut de la cour pénale internationale*, Kinshasa, September 2005.

¹⁵⁸ Draft new Chapter IX of the Criminal Code on "Infractions against Peace and the Security of Humanity", new article 224 – on War Crimes, subsections 224(2)(z) and 224(3)(g).

¹⁵⁹ National elections have been scheduled for 31 July 2006.

As regards the issue of age in the Democratic Republic of Congo, the “*Code de la Famille*”¹⁶⁰ provides for all births, deaths and marriages to be registered; however in practice not many are.¹⁶¹ The Congolese Labour Code prohibits child labour, and more specifically bans recruitment of children into armed forces.¹⁶² Article 67 of the Congolese Criminal Code bans kidnapping as well as forced detention, and has been referred to in military prosecutions, such as in the Biyoyo case examined below.

Other national provisions also reflect the DRC’s commitment to exclude children from its armed forces and other groups, such as the Decree Law No.066 signed 9 July 2000, which orders the demobilisation of girls and boys aged under eighteen years, associated with armed forces or groups. Law No 023/2002 of the Military Justice Code, dated 18 November 2002, defines the recruitment of children under eighteen as a war crime in its article 173, and further prohibits children under the age of eighteen from the jurisdiction of military courts. Article 7 of Law no. 04/023 of 12 November 2004, which concerns the Organisation of Defence and Armed Forces, prohibits the employment of those under eighteen in case of mobilisation.

The Democratic Republic of Congo acceded to the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict on 11 November 2001, which entered into force on 12 February 2002. As DRC follows a monist tradition, the Optional Protocol is directly applicable by national courts. This applies also to the Rome Statute of the International Criminal Court, which has been ratified but not implemented into domestic law.¹⁶³

In the midst of a justice system that seems to have almost completely broken down,¹⁶⁴ there have been nonetheless several convictions by military tribunals addressing impunity of local commanders since the end of 2005. The case of Jean Pierre Biyoyo addressed child recruitment as well as crimes of insurrection and desertion.¹⁶⁵ On 17 March 2006, the Military Tribunal of the Bukavu garrison convicted Biyoyo and two others under Article 67 of the Penal Code for the abduction of children.¹⁶⁶

On 7 June 2006, the Military Tribunal of Mbandaka garrison convicted six military personnel for life imprisonment for mass rape committed in December 2003 in Songo Mboyo¹⁶⁷. On 26 October 2005 two soldiers, as well as their associates, were convicted by the Military Tribunal of Kindu for deportation, forced displacement of people, rape, sexual enslavement, forced prostitution, forced pregnancy, forced sterilisation and other forms of sexual violence.¹⁶⁸ On 27 October 2005 the military tribunal of Ituri garrison convicted a captain to life imprisonment for war crimes for the first time.¹⁶⁹ Interestingly, these cases referred to the Rome Statute of the International Criminal Court, demonstrating the direct applicability of their provisions in domestic law, in spite of confusion caused due to lack of specific implementation.

¹⁶⁰ Article 73-5, DRC Code de la Famille, Law no. 73/84 of 17 October 1984.

¹⁶¹ The *Code de la Famille*, accepts a birth certificate that has been issued after the period that it is legally allowed to register the birth, if it is approved by a Justice of the Peace (*Tribunal de Paix*) or medical certificates, health records, a record of baptism, school certificates or witness testimonies. In case of dispute concerning the child’s age, child advocates suggest that the age that is in the child’s best interest should be presumed.

¹⁶² As required by ILO Convention 182.

¹⁶³ The Draft Implementation Bill of the Rome Statute was completed in October 2005, but has since not been placed on the agenda of parliament for debate. It is estimated that the campaign for implementation, which includes the amendment of all relevant laws to conform with the ICC Statute, will be resumed following the elections set to take place 30 July 2006.

¹⁶⁴ MONUC press release, 10 May 2006. The trial of Colonel Ademar has been on standby since 10 July 2005, following a massacre of 30 people at Kilwa and the arrest of other perpetrators known to the military justice hierarchy. In Ituri, the prosecution of military and militia leaders has stalled. The most compelling cases are of two ranking Generals living in Kinshasa under political protection, and against whom ample evidence is available, namely Jerome Kakwawu, former chief of the FAPC and Flauribert Kisembo, former force commander of the UPC. Furthermore, progress on the case of 8 Iturian warlords held in Kinshasa for war crimes and crimes against humanity, in which hearings were carried out on 5 and 9 May 2006 (monitored by MONUC), is also apparently blocked for political reasons. See: <http://www.monuc.org>.

¹⁶⁵ Jean Pierre Biyoyo was a Commander of the former Mudundu-40 movement, allegedly responsible for illegal recruitment of children in South Kivu in April 2004.

¹⁶⁶ After a two week trial in Bukavu, with the assistance of the MONUC Child Protection Section, Biyoyo was sentenced to 5 years imprisonment for the abduction of children, and received the death penalty for crimes of insurrection and desertion.

¹⁶⁷ <http://www.monuc.org/news.aspx?newsID=11387>.

¹⁶⁸ Constantin Kalonga Katamusi and soldier Alimasi, case No. RP 011/05. RMP 249/KK/05.

¹⁶⁹ MONUC Press release, 28 October 2005, “*Le chef politique d’une milice d’Ituri condamné à 15 ans de prison*”.

The Biyoyo trial raised a number of issues regarding the involvement of children, indicating that the national justice infrastructure, particularly in the east, is as yet, unable to ensure the physical and psychosocial protection of child victims and witnesses.¹⁷⁰ As indicated, one of the charges related to child recruitment. Child witnesses were brought to the hearing in public view, without consideration for closed sessions, or using pseudonyms to protect their identity, let alone provision of legal aid. Neither the child witnesses, nor their parents were properly informed of the implications of their testimony, nor of the lack of any protective measures such as a rapid alert or provisional relocation in case of threats. As a result, none of the children ultimately testified, but may have been placed at risk as a result of their unprotected presence at the hearing. Furthermore, the handling of the case was reportedly irregular, with no disclosure of evidence until the day of the trial, and allegedly a degree of confusion at trial as to the exact legal basis of the charges.

2.1.5 *Child Soldiers and the ICC Statute*

The International Criminal Court's jurisdiction "*over any person who was under the age of 18 at the time of the alleged commission of a crime*" is excluded.¹⁷¹ Thus, the focus of the ICC, with respect to children, is on children as victims, not perpetrators.

The Statute of the International Criminal Court¹⁷² moves beyond previously accepted norms that demanded that "all feasible measures" be taken to ensure that children under the age of fifteen do not take part in hostilities or that States should "refrain" from using children in hostilities. These norms, based on Article 77(2) of Additional Protocol I of the Geneva Conventions and Article 38 of the Convention on the Rights of the Child,¹⁷³ were considered by some as human rights norms,¹⁷⁴ rather than *war crimes* carrying individual criminal responsibility. Nonetheless, the diplomatic negotiations in Rome led to the incrimination of two separate elements: "recruitment" on the one hand, covered by "conscripting or enlisting children under the age of fifteen years into armed forces or groups" ; or the "use" of children in hostilities on the other, covered by the phrase "*using them to participate actively in hostilities*".

The notion in the Rome Statute of using children to "participate actively in hostilities" is somewhat different to the wording in the Convention on the Rights of the Child (CRC) and its Optional Protocol. The CRC simply prohibits recruitment into armed forces, a wider prohibition, as the prohibition does not require involvement in hostilities at all. The Optional Protocol prohibits the use of children to take a "direct part in hostilities". There has been some discussion as to the difference between "taking a direct part in hostilities" and "participating actively in hostilities".¹⁷⁵ It seems that phrase "using them to participate actively in hostilities" adopted in the Rome Statute reflects application, excluding what might otherwise be considered as "passive" forms of participation. A footnote providing interpretative guidance in the draft text read as follows:

¹⁷⁰ REDRESS' DRC researcher, Bukeni T. Waruzi, was present at the hearing and compiled the observations that follow.

¹⁷¹ Rome Statute of the International Criminal Court, Article 26: Exclusion of jurisdiction over persons under eighteen. This differs from the Special Court for Sierra Leone, which includes provisions for prosecution of crimes committed by persons aged above fifteen, providing particular juvenile justice measures in such circumstances. That Court took a policy decision early on that children could not bear the "greatest responsibility" from crimes within its mandate as prescribed by its Statute.

¹⁷² Rome Statute. op.cit.

¹⁷³ See page 29 above.

¹⁷⁴ The United States in particular took this view, see Hebel, H. v. and D. Robinson (1999). *Crimes within the Jurisdiction of the Court. The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results*. R. Lee, Kluwer Law International. p.117.

¹⁷⁵ ICRC, Commentary to the Additional Protocols to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

“The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included with the terminology”¹⁷⁶

The word “recruiting” was replaced with “conscripting or enlisting” to meet concerns of the United States,¹⁷⁷ implying a narrower scope of activity, namely the administrative act of putting the names of the person on a list, in order to exclude recruitment campaigns targeting young people. Furthermore, with regard to war crimes in international armed conflict, “into armed forces” was amended to “into the national armed forces”, to meet concerns of several Arab States, which did not wish to see young Palestinians joining the *Intifada* as falling within the provision.¹⁷⁸ This amendment did not apply to war crimes in internal armed conflict, which remained as “into armed forces or groups”. Therefore, as concerns the use of child soldiers in Northern Uganda or the DRC, both situations of internal armed conflict, the recruitment by non-state actors is clearly criminalised.

Compromises on the definition of war crimes as a whole affect the provision on recruitment of children further, as a “threshold clause” must be satisfied, demonstrating that the acts were of sufficient gravity to warrant prosecution by the International Criminal Court. All the acts constituting war crimes must meet the specific gravity threshold, which indicates that “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁷⁹

Article 8 – War Crimes

(1) The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes

(2) For the purposes of this Statute, “war crimes” means:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character¹⁸⁰ ...namely, any of the following acts:

(vii) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

The definition of the criminal act contains three elements “conscripting”, “enlisting”, or “using them to participate actively in hostilities”, which has been reflected in a three tier list of charges in the Thomas Lubanga arrest warrant.¹⁸¹ The mental element to be established for this war crime will remain controversial until the Special Court or the ICC rule on the matter. However, it would appear that the *mens rea* element would entail that “the perpetrator knew, or should have known that ... such persons were under the age of 15 years.”¹⁸²

The child-specific crimes of conscripting, enlisting or using children under Article 8, complement other provisions in the statute, which also reflect the treatment suffered by children associated with armed forces or groups. While the recruitment or use of children in hostilities is a war crime in and of itself,

¹⁷⁶ PrepCom Draft Statute, at 21, cited in Hebel, H. v. and D. Robinson (1999). Crimes within the Jurisdiction of the Court. The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results. R. Lee, Kluwer Law International.

¹⁷⁷ *Ibid.* p. 118.

¹⁷⁸ *Ibid.*

¹⁷⁹ Rome Statute, *op.cit.* Article 8(1).

¹⁸⁰ The provision is mirrored for international armed conflict under Article 8(2)(b)(xxv).

¹⁸¹ Warrant of Arrest for Thomas Lubanga, ICC

¹⁸² Elements of Crimes, ICC-ASP/1/3, pp. 144 and 153 respectively.

harm suffered includes “enslavement”,¹⁸³ “wilfully causing great suffering, or serious injury to body or health” as war crimes, as well as “rape, sexual slavery, forced pregnancy and other forms of sexual violence” both as crimes against humanity and war crimes. While these crimes existed in the statutes of the Yugoslav and Rwanda Tribunals, they have not been used as yet to address the treatment of children associated with armed forces or groups. Indeed, much of the suffering of children associated with armed groups or forces is included in these crimes, which should have been included in the indictments issued by the Prosecutor of the Special Court for Sierra Leone, and should be charged by the ICC Prosecutor along side “recruitment”, “enlisting” or “use” of children in hostilities.¹⁸⁴

Finally, crimes against children associated with armed forces or groups should not be unduly abstracted from crimes committed against children as a whole.¹⁸⁵ Child-specific crimes in armed conflict include *genocide*, in the form of forcibly transferring children of a group to another group;¹⁸⁶ *crimes against humanity*, such as rape and other crimes of sexual violence;¹⁸⁷ and *war crimes*, such as “intentionally directing attacks against civilian populations”, “intentionally attacking schools”,¹⁸⁸ or “attacks on humanitarian staff and objects”.¹⁸⁹

¹⁸³ “Enslavement” means the exercise of any or all the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children, Rome Statute, op.cit. Article 7(2)(c).

¹⁸⁴ See discussion in Happold (2005), *Child Soldiers in International Law*, p135-9 on the recruitment and use of child soldiers as the crime of enslavement.

¹⁸⁵ See further the discussion in No Peace Without Justice and UNICEF Innocenti Research Centre (2002). [International Criminal Justice and Children](#).

¹⁸⁶ Rome Statute, article 6.

¹⁸⁷ Ibid , article 7(1)(g) and 8(2)(b)(xxii) and (e)(vi).

¹⁸⁸ Ibid. article 8(2)(b)(ix) and (e)(iv).

¹⁸⁹ Ibid. article 8 (2) b (ii). When humanitarian aid does not reach civilians in need, children are the first casualties.

PART 3 - ENSURING CHILDREN'S RIGHTS IN ALL PHASES OF PROCEEDINGS

The landmark inclusion of specific crimes of enlisting, conscripting or using children in hostilities is coupled with the recognition of the victims' right to participate in the proceedings, not only as prosecution or defence witnesses, but as persons with their own interest in the outcome.

Given that the Court's jurisdiction over persons under eighteen years has been excluded, children will never be considered as perpetrators before the ICC. Children formerly associated with armed forces or groups might come into contact with the International Criminal Court in one, or a combination of the following ways, either as 1) victims participating in the proceedings in their own right, 2) as witnesses of the crimes within the Court's jurisdiction or 3) beneficiaries of the Court's reparations orders or through the Trust Fund for Victims.

The UN Guidelines on Justice for Child Victims and Witnesses of Crime

The roles that children may find themselves in with relation to the Court are covered by the *UN Guidelines on Justice for Child Victims and Witnesses of Crime* (hereinafter "Guidelines"), adopted by the United Nations Economic and Social Council in July 2005.¹⁹⁰ The Guidelines' principles are based on the legally binding rights outlined in the Convention on the Rights of the Child,¹⁹¹ informing a "child-sensitive" approach to all aspects of the Court's work.¹⁹² These include respect for the child's dignity, the right to be protected from discrimination, ensuring the best interests of the child, guaranteeing the child's protection –both physical and emotional, promoting the child's harmonious development, and ensuring the child's right to participate and express his or her own views, and contributing to decisions affecting his or her life.¹⁹³

3.1 RECOMMENDATIONS RELATING TO ALL PHASES OF PROCEEDINGS

3.1.1 Avoiding stigmatisation and the singling out of "Child Soldiers"

Prosecuting crimes against children exponentially increases awareness about the unlawfulness of recruiting, enlisting or using children in hostilities, deterring such crimes in the future. However, singling out "child soldiers" as victims of war crimes, and ascribing them a particular *status* to the exclusion of other children who are also victims, may inadvertently lead to discrimination. The *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses*, specifically identify the right of children to be protected from discrimination on the basis of race, gender or any other particular *status*.¹⁹⁴

Experts on psychosocial support for war affected children in Northern Uganda have indicated that an overarching lesson to be applied when working with children formerly associated with armed forces or

¹⁹⁰ The Guidelines were adopted by ECOSOC Resolution 2005/20 of 22 July 2005, Doc. E/2005/INF/2/Add.1 of 10 August 2005. The International Bureau for Children's Rights (IBCR) developed the original guidelines on Justice for Child Victims and Witnesses of Crime in 2003. These were noted in ECOSOC Resolution 2004/27 of 21 July 2004.

¹⁹¹ The Convention on the Rights of the Child was adopted by UN General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990. It had 192 States Parties in November 2003. See discussion of the CRC in Part II above.

¹⁹² "Child-sensitive" denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views, Part IV – Definitions, paragraph 9(d), Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines), *op.cit.*

¹⁹³ Guidelines, Part III – Principles, para 8.

¹⁹⁴ Guidelines, Part VI – The Right to be Protected from Discrimination, para 15.

groups, is to assist the child by addressing the family and community that surrounds him or her.¹⁹⁵ They emphasise that:

“particular groups of children should not be singled out for interventions (as former child soldiers frequently are). Such singling out can contribute to the stigmatisation of those children and create jealousy among other vulnerable community members who are not receiving assistance. The child who has lost both parents in war might rightly wonder, “Why has that former child soldier received school fees when I haven’t?”¹⁹⁶

The right to be protected from discrimination cuts across children’s right to harmonious development and to have their best interests taken into account.¹⁹⁷ Children trying to re-integrate speak about their fears of being called names like “rebel!”, reminding them of their past. They indicate that they want to be able to join in with the other children and old friends. The families and communities into which they return are apprehensive and sensitive to any reinforcements of any particular status they may have as former “child soldiers”, again calling for a mindful and non-discriminatory approach to prosecuting crimes against children.

The issues that arise during so-called “rehabilitation” and “reintegration” of children formerly associated with armed forces or groups, provide useful insights surrounding the right to be protected from discrimination:

Rehabilitation is understood as “an organised process which follows children’s demobilisation, escape or capture... it is a process of re-orientation, rest, recuperation and reflection which needs to take place in a safe setting, interaction with people who have received special training to facilitate the re-adjustment. [...] There will be times of good progress followed by periods of very slow movement, and also some retracing of steps. Indeed sometimes there will be a complete halt and even active retreat. Fear, grief, anxiety, anger, guilt and shame, lack of confidence, disease, malnutrition and disability will hamper progress. Determination, good health, the comfort love and encouragement of others, and hope are the best companions on this journey, which in many cases will be life-long”.¹⁹⁸

Rehabilitation in this way has proven to provide significant benefits to children. Research indicates that children returning home without interim care might be more aggressive, unstable or confused, particularly given that they may be exhausted, suffering from disease and drug or alcohol dependent.

Reintegration is described as “the process of re-uniting a child with his/her family and facilitating their community membership”¹⁹⁹. It is described as a complex process, which is largely dependent on the success of prior rehabilitation. Organisations working with children recommend that a discussion should be had with families and communities regarding what they might understand re-integration to mean. Conversations such as these have revealed that families and communities have certain expectations of a child’s re-integration, such as whether they “will conform to certain cultural norms of behaviour” particularly towards elders, those of greater social status and the opposite sex.

Children talk of “wanting to feel that they belong and that they are loved and accepted, especially by parents and siblings”. They need much reassurance in this regard, and will generally seek out evidence that they are respected and that no-one calls them names (rebel!) which remind them of their past. They want their teachers to treat them well, and they are keen to make new friends and take up with old ones. They are afraid of being seen as

¹⁹⁵ Castelli, Locatelli and Canavera (2005) *Psycho-social support for War Affected Children in Northern Uganda: Lessons Learned*, at p.5, available from <http://www.child-soldiers.org>

¹⁹⁶ *Ibid.*

¹⁹⁷ The best interests of the child, and the child’s harmonious development are Principles enshrined in the Guidelines, Paragraph 8(c). These principles are also enshrined in the Convention on the Rights of the Children Articles 2 and 3.

¹⁹⁸ Jareg, E for Save the Children Norway. (2005). *Crossing the Bridges and Negotiating Rivers – Rehabilitation and Reintegration of Children Associated with Armed Forces*, Coalition to Stop the Use of Child Soldiers. p.2.

¹⁹⁹ *idem.* pp 2-3.

“mad” or “damaged” since these terms stigmatise and isolate them, and may, in some cultures, have long term social and economic consequences for marriage and land ownership.²⁰⁰

In this context, humanitarian organisations working with individuals in the aftermath of conflict are loath to use the term “victims”, and use instead the more positive “survivors” terminology.²⁰¹

3.1.2 Children’s right to be informed: child-friendly information, outreach and dedicated website section

The *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*, recognise that child victims and witnesses, their legal representatives and their families, have the right to be informed about processes and services which concern them. Specific duties to inform child victims and witnesses are defined in the Rome Statute and the Court’s Rules of Procedure and Evidence. These are dealt with systematically in the relevant sections below, providing recommendations for outreach and other communication strategies to implement such *duties and give effect to specific rights* of victims at different stages of the proceedings. The responsibility to inform victims, as provided in the UN Guidelines, generally falls under the responsibility of the Registry’s Public Information and Documentation Section.

The Public Information and Documentation Section should develop child-specific information and materials about the Court and undertake outreach initiatives with other relevant organs of the Court at the earliest opportunity. Ensuring that victim populations and civil society groups have some understanding of the Court’s mandate, in particular what it can and cannot do and the time frames involved, has multiple benefits. In addition to giving effect to victims’ right to information, expectations can also be managed, while creating opportunities for taking stock of victims populations’ specific concerns and interests.²⁰² Given that a key principle in child intervention is to assist a child by addressing the family and community that surrounds him or her,²⁰³ outreach activities, while being child-sensitive, must target all groups in affected societies including children.

With regard to facilitating child victims’ right to be informed regardless of the stage of proceedings, the Court’s website should include a dedicated section for child victims. While many child victims will not have access to the internet, it may be a useful tool for intermediaries such as NGOs working with children or children’s legal representatives. Child-specific materials might be developed, as is the case, for instance on the website of “Victim Support” the UK Agency supporting victims and witnesses of crime through the criminal justice process. The Victim Support website provides specific materials for “Under 12s”, “Over 12s”, and parents. It includes downloadable child-focused pamphlets, such as the “Are You OK?” pamphlet, which might inspire the ICC’s approach towards addressing child victims’ needs²⁰⁴.

Materials directed at victims and witnesses, particularly child victim and witnesses, their caretakers or legal representatives should be provided in as many relevant local languages as possible.

²⁰⁰ *Idem*. P.3.

²⁰¹ See generally CARE International’s “I am powerful” campaign materials: <http://www.care.org>.

²⁰² While the responsibility for external communications of the Court lie with the Registry, there will be times when certain critical types of information and dialogue will be more appropriately conducted by the Office of the Prosecutor.

²⁰³ Castelli, Locatelli and Canavera (2005) *Psycho-social support for War Affected Children in Northern Uganda: Lessons Learned*, at p.5, available from <http://www.child-soldiers.org>

²⁰⁴ Victim Support’s materials are translated into 12 languages:
http://www.victimsupport.org.uk/vs_england_wales/about_us/publications/leaflet_translations/index.php

Victim Support’s “Are You OK?” pamphlet is directed at under 12s:
http://www.victimsupport.org.uk/vs_england_wales/coping_with_crime/effects_of_crime/areyouok_leaflet.pdf

3.2 PRE-TRIAL PHASE

3.2.1 Children's right to effective protection, assistance and support

Child victims and witnesses have a right to safety.²⁰⁵ The UN Guidelines provide that “*Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.*”²⁰⁶ Where appropriate child victims and witnesses, as well as their family members should have access to assistance from trained professionals and that contact should be coordinated so as to avoid excessive interventions.²⁰⁷ Support from professionals, including accompanying the child throughout its involvement in the justice process should be provided, if this is in the child's best interest.²⁰⁸ Where appropriate, guardians should be appointed to protect the child's legal interests.²⁰⁹

- **The Prosecutor's duty to ensure child-sensitive investigations**

The Rome Statute reflects these principles and provides that the Prosecutor should appoint advisers with legal expertise on violence against children in establishing his office.²¹⁰ In carrying out his investigations, the Prosecutor is to respect the interests and personal circumstances of victims and witnesses, in particular with regard to violence against children.²¹¹ Responding to these statutory obligations, the Prosecutor established the Gender and Children Unit (GCU) within the Investigations Division.

The impact and work of the Unit is difficult to monitor due to the sensitive nature of its work within the Office of the Prosecutor (OTP). However, from interviews with members of the Unit, members of the Victims and Witnesses Unit in the Registry (VWU) and prosecution and investigation team members it appears that the Unit has ensured the inclusion of child-friendly guidelines throughout the investigative process and organizes training on investigative techniques for child interviews and other child related issues, apparently to the point that child-friendly considerations are now “part of the culture”.²¹² For instance, the child's psychosocial development is assessed when devising interview strategies, including the use of language, communication and interview techniques (e.g. making use of drawings).

Safeguards are built into the investigative process for all those whom investigators come into contact with, which include children.²¹³ As the investigators are based in The Hague, all investigation missions are planned in advance, including all foreseeable contacts with intermediaries and potential contact with children. Before an investigation mission can be deployed a “Risk Assessment” is conducted and a report is compiled. The Risk Assessment Report includes contextual and political input from the Jurisdiction, Complementary and Cooperation Division (JCCD) of the OTP and investigation related input from the investigation team(s). At this stage, the Gender and Children Unit does not provide strategic input on crimes of sexual violence or crimes against children, but focuses on the psychological protection and support strategies relating to victims of crime. The Registry's VWU is also involved in providing detailed safety and protective measures for the Risk Assessment

²⁰⁵ *Guidelines on Justice for Child Victims and Witnesses of Crime*, Part XII – The Right to Safety, para. 32-34.

²⁰⁶ *Guidelines on Justice for Child Victims and Witnesses of Crime*, op.cit. para. 22-23.

²⁰⁷ *Guidelines*, para 32, Part XII – The Right to Safety.

²⁰⁸ *Guidelines*, para. 30(a), Part XI – The Right to be Protected from Hardship during the Justice Process.

²⁰⁹ *Guidelines*, para. 25(c), Part IX – The Right to Effective Assistance.

²¹⁰ Rome Statute, article 42(9).

²¹¹ Rome Statute, article 54(1)(b).

²¹² Interview with members of the Children and Gender Unit, 5 July 2006. In drafting the Investigator's Guidelines the Gender and Children Unit consulted with UNICEF, Save the Children and the Women's Initiative for Gender Justice. According to GCU, UNICEF also consulted with its own partners before providing feedback.

²¹³ It was expressed during interviews that the OTP considers that all those whom it has contact with in the field are potentially at risk, hence their “low profile” approach.

Report. In order to provide their input, the Gender and Children Unit may travel to the situation country to identify possible intermediaries, and modes of operating. Such travel is often undertaken jointly with the Victims and Witnesses Unit, who will identify support and protection detail not just for the immediate needs of the investigation, but for the trial and subsequent follow up.²¹⁴ The Risk Assessment Report, which constitutes an action plan for the investigation mission on the ground, must be approved by the OTP Executive Committee (senior management) before investigators are deployed.

Once the Risk Assessment Report is approved, it is continuously updated as the situation evolves, and individual Mission Plans are devised immediately prior to each deployment. Once investigators are ready with their Mission Plans, the Gender and Children Unit will become involved with regard to crime based victims and witnesses.

The in-house psychologist (Associate Victims Expert) of the Gender and Children Unit or a qualified psychologist/psychiatrist on a roster²¹⁵ accompanies every investigation team that is to interview children. At the pre-interview stage in the field, two important assessments are made, before investigators can proceed with taking a statement from child victims of crime, including a child-sensitive presentation about the Court. The first is a security assessment done by an investigator. The second is a psychosocial pre-interview assessment conducted by the Psychosocial Expert (or a psychologist on the roster). A checklist of issues to be raised and symptoms to be verified has been devised for the psychosocial pre-interview assessment. Amongst the issues raised are whether the child wishes to be accompanied by a support person (e.g. family member, social worker from respective rehabilitation centre etc.), whether the child wishes to be interviewed by a male or female investigator and whether s/he prefers a male or female interpreter. According to the Unit's guidelines, a psychologist is present at every interview.

According to the GCU, as part of the pre-interview stage, the child or victim is informed about his or her right to participate in the proceedings independently.

The impact of the guidelines and measures in place is difficult to assess in view of the confidential nature of the investigations. In this regard, the Prosecutor has instituted a policy of involving as few children as possible in its investigations. Monitoring and evaluation of the implementation of the investigation guidelines, by an in-house Associate Victims Expert is planned, however, the unit would benefit from an additional staff member in order to adequately fulfil this task and supplement other functions with the current investigations. It is further suggested that an evaluation form be given to witnesses following interviews, so that they might provide feedback on how the process has been for them so far, raising concerns or suggestions as may be necessary.

Furthermore, as extensive awareness-raising appears to have created a child-sensitive and enabling environment within the Office of the Prosecutor, it is recommended that such efforts be extended to include organisations working with children not only at an international level but also in the field. Building support from organisations that are stakeholders of the Court's work, namely organisations having something to win or lose from the court's successes or failures, is essential in ensuring the long-term security and support for child victims and witnesses. Such support is dependent on increased awareness of the Court's mandate in prosecuting crimes against children and increased awareness of the existing investigation safeguards. Feedback from organisations working with children in the field indicates that there is much insecurity regarding the ICC as there is little information about its mandate or procedures.²¹⁶ While the Prosecutor is keen to ensure a "low profile", a middle ground is desirable which allows the members of the OTP to engage with civil society at training, sensitisation and outreach initiatives. From experience in Sierra Leone, it has been demonstrated that increased information and contact with staff from the Office of the Prosecutor has the effect of increasing perceptions of security and creating a witness-enabling environment. The Office of the Prosecutor in Sierra Leone engaged in extensive confidence building with child protection agencies. Such training and confidence-building might be organised by the Registry to

²¹⁴ Confirmed by VWU on 2 August 2006.

²¹⁵ A separate interview with Prosecution lawyers indicated that the Roster was working well, and that an experienced psychologist from the Roster also introduced the practice of debriefing the interview team every evening while in the field.

²¹⁶ Interviews with NGOs working with children in northern Uganda, February 2006.

include an OTP component given that it is inappropriate for the Registry to respond to numerous questions and issues directed at the Prosecutor's mandate.

The experience of the Special Court for Sierra Leone is relevant, as it has had a number of children testify in its trials.²¹⁷ The particular circumstances of the in-country Court allowed for comprehensive "Principles and Procedures for the Protection of Children" to be negotiated over a six-month period between child protection agencies, led by UNICEF on the one hand and the Special Court Prosecution and Registry on the other. Initially the child protection agencies were reluctant to enter into contact with the Special Court, on the basis that any association with the Court would jeopardise their neutrality and impartiality on the ground. This potential risk was particularly significant in a context where rehabilitation and reintegration work with children was on going.²¹⁸ As the mandates of many organisations did not allow for cooperation as such, the focus of the meetings was initially on mutual discussion of the mandate of the Court and concerns of the child protection agencies. Later, when a measure of confidence had been gained, the meetings focused on negotiating child-sensitive procedures for the Court. The process was deemed to be generally successful, in the words of the head of UNICEF Freetown:

*"It does appear that no children have been unduly exposed to danger as a result of being involved with the Special Court, neither has there been a negative impact on the social reintegration process of children formerly associated with fighting forces. This is likely to be due to the procedures employed and to the fact that the actions and outcome of the Special Court is not a high concern for the children at this time and not a factor in their own priorities"*²¹⁹

Lessons learned from the Sierra Leone Special Court include the importance of:

- Undertaking widespread dissemination of information, as well as training workshops with stakeholders, because information exchange and confidence-building enhances security and ensures a witness-enabling environment;
- Ensuring early engagement with UNICEF, the Office of the Special Representative for Children and Armed Conflict, child protection agencies both in the field and at headquarters, as well as the human rights sections of peace keeping missions. This builds support and good will for the Court on the ground, enhancing protection of investigation teams and those they enter into contact with;
- Fostering mutual respect and confidence between child protection agencies (humanitarian organisations) working with children in the field and ICC staff, providing ample opportunity for concerns and views of such agencies to be taken on board by ICC staff;
- Devising a workable, independent monitoring and evaluation of child-related measures.

- ***The Registry's duty to ensure effective protection, assistance and support***

In order to give effect to children's right to safety, professionals who come into contact with children should alert "appropriate authorities" regarding risks regarding a child's physical safety, or the protection of his or her psychosocial well-being.²²⁰ In accordance with the Rome Statute a Victims and Witnesses Unit (VWU) has been established within the Registry to act as the "appropriate authority". Its function is:

"to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for victims and

²¹⁷ 12 child witnesses were initially included in the Prosecutor's witness list in the CDF case, of which only 5 ultimately testified. 29 child witnesses were included in the AFRC and RUF witness lists combined, with only 5 ultimately testifying in the AFRC case and 4 in the RUF case; Child Witnesses at the Special Court for Sierra Leone, War Crimes Studies Centre, March 2006, University of Berkeley.

²¹⁸ Wright, K. (2005). *The Role of Child Protection Agencies in Supporting Children's involvement in Transitional Justice Mechanisms in Sierra Leone*. UNICEF Innocenti Expert Discussion on Children in Transitional Justice, Florence, November 2005.

²¹⁹ Idem.

²²⁰ Guidelines, Para. 32-34, Part XII – The Right to Safety.

witnesses who appear before the Court, and others who are at risk on account of testimony given by such witnesses."²²¹

- **The central role of the Victims and Witnesses Unit**

The VWU works closely with the Office of the Prosecutor during the investigation phase, providing input for its Risk Assessment Report prior to deployment of investigators to the field. Their input includes information regarding protection, support and referral assistance measures for victims interviewed by investigators. The VWU may also advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance required for victims and witnesses²²². Given the protection, assistance (including medical assistance) and support that professionals within the VWU are mandated to provide child victims and witnesses, it is unfortunate that Article 43(6) of the Statute only stipulates the inclusion of staff with "*expertise in trauma, including trauma related to crimes of sexual violence*". Article 43(6) does not require child-specific expertise, however the UN Guidelines stipulate that: "*child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out [below]*".²²³ Furthermore, the Guidelines stipulate, "*in assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions*".²²⁴

Children have the right to be treated with dignity and compassion, in addition to their physical and psychosocial safety requirements.²²⁵ Throughout the justice process, professionals must take the individual personal situation and the immediate needs of each child into account, as well as his or her age, gender, disability and level of maturity and fully respecting his or her physical, mental and moral integrity.²²⁶ Professionals should not treat any child as a typical child of a given age, or as a typical victim or witness of a specific crime. In order to ensure adequate implementation of children's right to be treated with dignity and compassion, training by experts on children's rights and child-centred interventions is recommended for professionals of the VWU, as well as all those coming into contact with children, such as OTP investigators and trial teams, VPRS staff, Public Information and Outreach staff, and if they are amenable, the Presidency and Judges of the Court. Training should include the following components:²²⁷

- (a) *Relevant human rights norms, standards and principles, including the rights of the child;*
- (b) *Principles and ethical duties of their office;*
- (c) *Signs and symptoms that indicate crimes against children;*
- (d) *Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;*
- (e) *Impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;*
- (f) *Special measures and techniques to assist child victims and witnesses in the justice process;*
- (g) *Cross-cultural and age-related linguistic, religious, social and gender issues;*
- (h) *Appropriate adult-child communication skills;*
- (i) *Interviewing and assessment techniques that minimise any trauma to the child while maximising the quality of information received from the child;*
- (j) *Skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner.*

²²¹ Rome Statute, Article 43(6).

²²² Rome Statute, Article 68(4)

²²³ See Guidelines, para. 22, Part IX – The Right to Effective Assistance.

²²⁴ See Guidelines, Para. 23, Part IX – The Right to Effective Assistance.

²²⁵ Guidelines, Para. 14, Part V – The Right to be Treated with Dignity and Compassion.

²²⁶ See Guidelines, Para. 10, Part V – The Right to be Treated with Dignity and Compassion.

²²⁷ See Guidelines, paras. 40-42, Part XV – Implementation.

In fulfilling its mandate to “provide... protective measures and security arrangements, counselling and other appropriate assistance for victims and witnesses” in accordance with Article 43(6) of the Statute, the VWU is the appropriate authority to assist the Court in safeguarding its obligations to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” in general.²²⁸ In this respect, in addition to ensuring training for its own staff, the VWU might consider, in consultation with the Presidency, what *appropriate measures*, in the form of training or expert seminars might be amenable to the Presidency and Judges of the Court, to ensure fulfilment of the Court’s obligations under Article 68(1) in line with the training requirements outlined in the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*.

In terms of the capacity of the VWU to fulfil its functions giving effect to child-specific needs, the Unit is divided into three sections comprising an “Operations Programme”, a “Support Programme” and “Protection Programme”. The Support Programme is headed by a Support Officer (P3) and includes three qualified support assistants, which are social workers at General Service level, a staffing band used for local administrative posts. Given the nature of training and expertise required in providing support to children, and the qualifications required of candidates in job descriptions, it would appear that General Service classification does not reflect the level of qualifications of the staff involved. General Service positions should be reserved for *administrative* support and not be used for *substantive* support, which might be appropriately classified at a professional level, recognising the level of substantive qualifications for Field Assistants, Protection Assistants and Support Assistants who are to work with children.

The Unit’s capacity to protect, support and assist child victims and witnesses in the field requires permanent field staff and local offices for the VWU, in reasonable proximity to where victims live.²²⁹ The VWU has recognised the need for permanent VWU field staff, further commenting that victims and witnesses “need to have one face” working with them throughout their contacts with the Court. Indeed, the *UN Guidelines on Justice for Child Victims and Witnesses of Crime* indicate that “Professionals should ... provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process... every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process.”²³⁰

Giving effect to the child victim and witnesses’ need for continuity of contact and certainty, the Court’s 2006 Budget includes a total of 35 posts for the Victims and Witnesses Unit, which is a significant advance on last years’ budget. However, the classification levels of many posts appear to be inadequate in relation to the functions listed. For instance, the General Service (local administrative) level Field Assistant is to “coordinate all VWU activities in the area of operations... develop knowledge of and links to local communities and follow the socio-political situation, conduct protection and support functions, conduct threat assessments, prepare reports on security needs of witnesses...”²³¹ The current speed of recruitment appears to imply that by the end of 2006 only a fraction of the field-based posts will actually be filled.²³² Three Support Assistants have been recruited or are under recruitment, including one social worker with experience with child soldiers to be based in Kampala, and two Congolese psychologists joining the ICC field office in Kinshasa. The Court is not considering opening field offices closer to the victims in these situation countries, be it in Gulu for northern Uganda, or in eastern DRC although all the victims are based in these locations²³³. The VWU is hoping to have one person in Chad by the end of the year, but no presence is foreseen for Sudan in the current climate.

²²⁸ Rome Statute, article 68(1).

²²⁹ Interview with VWU Support Officer, 10 April 2006.

²³⁰ Guidelines, Para. 30(b), Part XI – The Right to be Protected from Hardship during the Justice Process.

²³¹ Proposed Programme Budget for 2006 of the International Criminal Court, ICC-ASP/4/5, 25 August 2005, p.93.

²³² VWU has indicated that it is experiencing difficulties in recruiting sufficiently qualified staff who are also from the region. The post of “Associate Support Officer” would ideally have included a clinical or forensic psychologist, and was advertised twice producing unsatisfactory results. Field based posts have also been advertised at a selection of African universities and magazines again producing unsatisfactory results.

²³³ Indications from our local research missions are that opening a field office in Gulu may still entail some security risks, but that these are manageable risks and should not delay the opening of such an office any further.

The Victims and Witnesses Unit views its role as an internal “service provider” responding to requests from the Office of the Prosecutor, Victims Participation and Reparation Section, Defence Support Section or Chambers.²³⁴ It does not currently see its role as extending outwards directly to victims or their legal representatives who may be participating in proceedings in accordance with Article 68(3) of the Statute. The Rome statute provides that “victims”, namely “*natural persons who have suffered harm as a result of the commission of any crime within the jurisdictions of the Court*”²³⁵ who have been granted a right to participate under Rule 89(1) of the Rules of Procedure, may wish to participate at a distance, through a legal representative.²³⁶ Therefore, child victims and witnesses as well as their legal representatives, should be informed of the protection and support services available in a pro-active and systematic manner. It appears that victims participating in the DRC Situation²³⁷ as well as victims who have also applied to participate in the Lubanga case²³⁸ have not been provided with any information regarding protection or support from the VWU.²³⁹

According to Article 43(6) of the Rome Statute, the VWU is to consult with the Prosecutor in order to ensure “protective measures and security arrangements, counselling and other appropriate assistance”. In practice, it has developed a close working relationship with that office. While article 43(6) does not require VWU to also consult defence teams with respect to protective measures for defence witnesses, in practice, it will have to develop a similarly close working relationship with the defence.

As regards VWU’s relationship with the legal representatives of victims participating in the proceedings under Article 68(3), it is suggested that a close working relationship should equally be developed. The Victims Participation and Reparation Section might facilitate initial contact between victims applying to participate and the VWU. However, the legal representatives of victims will need direct advice and support from the VWU in order to ensure adequate psychological and physical protection, as well as assistance and support for their clients in accordance with Article 68(1) of the Statute.

As in-house representatives of the Office of Public Counsel for Victims (OPCV) can technically represent victims, they too will need to work closely with the VWU to ensure direct field level protection, support and assistance to participating victims.

- ***The Role of the Court in ordering “Protective Measures”***

The Court’s capacity to provide adequate protection, assistance and support to child victims and witnesses will impact directly on the willingness of child victims to cooperate with the court as witnesses, or to participate in the proceedings or seek reparations. A primary concern is to ensure the physical and psychological safety of child victims, and that children’s involvement with the Court does not trigger secondary victimisation or re-traumatisation.

In addition to appropriate measures being taken by the Court to “*protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses*” as a matter of course,²⁴⁰ binding orders identifying specific “*Protective Measures*” may be handed down by the Chamber at the request of parties, victims or witnesses, or at the Chamber’s own motion.²⁴¹ Such Protective Measures under Rule 87 seek to protect the identity of persons at risk through the allocation of pseudonyms, prohibition of disclosing information that may identify the protected individual or

²³⁴ Interview with VWU Support Officer, 10 April 2006, confirmed by Head of Unit 2 August 2006.

²³⁵ Rule 85 of the Rules of Procedure and Evidence, Definition of Victims.

²³⁶ See Rule 90 of the Rules of Procedure and Evidence, concerning the Legal representatives of victims

²³⁷ Victims VPRS1-6 were granted the right to participate in the DRC Situation in a Decision of the Pre-Trial Chamber handed down on 17 January 2006, No. ICC-01/04-100-Conf-Exp (French).

²³⁸ Applicants a/0001/6, a/0002/6 and a/0003/6 filed their applications on 30 June 2006. Doc. No. ICC-01/04-163.

²³⁹ Confirmed by the Head of VWU, 2 August 2006. It may be that the appropriate body to liaise with legal representatives of victims and provide them the relevant information is VPRS or OPCV, as these Units will have immediate knowledge of which victims have been granted the right to participate, and who their legal counsel are than VWU.

²⁴⁰ Rome Statute, Article 68(1). See also Guidelines paras 26-28, Part X – The Right to Privacy.

²⁴¹ Rules of Procedure and Evidence, Rule 87.

expunging of details from public records, transcripts, audio and video footage, etc. Experience from other international or hybrid criminal jurisdictions demonstrates that these measures can reduce risks. However, in circumstances where the accused maintains a power-base, albeit in custody, the witness may automatically be at risk unless physically relocated into safety.²⁴²

Protective Measures under Rule 87 may also be used to delay disclosing the identity of a witness to the Accused until physical safety can be assured by bringing the witness into the care of the Court. Numerous practices have developed at the ad hoc Tribunals and other internationalised jurisdictions to balance security needs, the rights of the Accused and resource constraints. At one end of the spectrum, when security risks are relatively low, reliance has been made on local police to keep a loose watch on particular individuals at risk. As a mid-spectrum measure, where security concerns are temporarily heightened, individuals at risk have been relocated into safe-houses either in country or close to the Court at the moment that their identity is disclosed to the Accused. At the Rwanda Tribunal, the practice has developed to delay disclosing identity to the Accused until a few weeks before the witness is due to testify, and the witness is relocated temporarily near the seat of the Court. At the other extreme, individuals at risk at the Special Court for Sierra Leone were relocated to third countries already at the investigation phase.²⁴³ Given the detrimental life-changing impact that permanent relocation entails, it should be used sparingly and as an ultimate last resort.²⁴⁴ With respect to children formerly associated with armed groups or forces, relocation would involve uprooting the child as well as his or her family (including siblings), thwarting the objective of reintegrating the child into his or her community.

Given the possibility of hundreds of child victims participating in the proceedings that concern them, new avenues must be explored to provide protective measures for victims on the ground, working with other local actors in line with the Security Council's recent Resolution 1674 outlining the responsibility of States and non-State actors to "protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".²⁴⁵

Child-specific protection on the ground might include monitoring by peace-keeping missions, UNICEF, the Office of the Special Representative of Children and Armed Conflict²⁴⁶, or specific arrangements with local or national government authorities, community leaders or civil society groups as appropriate. As mentioned in Section 3.1 above, extra care should be given to designing protection strategies that do not single out child soldiers. Protecting certain children on the basis of a particular *status* may constitute discrimination,²⁴⁷ and may lead to children being stigmatised by members of their community, jeopardising their reintegration. As a matter of principle, when working with children formerly associated with armed forces or groups, assistance to the child should be addressed through the family (or care taker) and community that surrounds him or her.²⁴⁸ Thus, increased protection on the ground must address increased protection to the child's family and community.

²⁴² In Kosovo, in spite of UNMIK's protective measures and anonymity, witnesses have been too frightened to confirm statements or appear in court. UNMIK's chief administrator, Michael Steiner, addressed the Security Council in December 2002 stating that potential witnesses for trial in Kosovo have been systematically intimidated or killed. A source in UNMIK's department of justice, reported that prospects of providing protection to witnesses are limited, and that such protection largely depends on the willingness of UN member states to relocate witness. See Human Rights Watch (2004), *Human Rights and Armed Conflict*, World Report January 2004, chapter 14, Institute for War and Peace Reporting (2003), *Kosovo: Witness Protection Fears Grow*, Balkan Crisis Report No 426, 29-Apr-03).

²⁴³ Prior discussions with the respective Chiefs of WVSS of the Rwanda Tribunal and Special Court for Sierra Leone.

²⁴⁴ The Special Court for Sierra Leone has undertaken relocation agreements with a number of third countries and has several scores of individuals placed on relocation programmes. Witnesses and sometimes-key informants at severe risk have been relocated with their families.

²⁴⁵ Security Council Resolution S/2006/1674, 28 April 2006.

²⁴⁶ The Office of the Special Representative for Children and Armed Conflict now tend to have representatives attached to peace keeping missions, either within the Human Rights Section of a mission or as a separate section as is the case with MONUC. See: <http://www.monuc.org/news.aspx?newsID=807&menuOpened=Activités>.

²⁴⁷ Paragraph 15 of the UN Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime states that: "child victims and witnesses should have access to justice that protects them from discrimination based on the child's parent's or legal guardian's race, colour, sex, language ...or other status".

²⁴⁸ Castelli, Locatelli and Canavera (2005) *Psycho-social support for War Affected Children in Northern Uganda: Lessons Learned*, at p.5, available from <http://www.child-soldiers.org>.

- **Psychosocial Protection, Support and Assistance**

UN Guidelines on Justice for Child Victims and Witnesses of Crime stipulate that child victims and witnesses have a right to effective assistance:

*“This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child’s reintegration. All such assistance should address the child’s needs and enable him or her to participate effectively at all stages of the justice process.”*²⁴⁹

Article 43(6) of the Rome Statute, which establishes the Victims and Witnesses Unit, reflects these principles, indicating that the VWU “shall provide...protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court”.²⁵⁰ However, its scope appears to be limited to witnesses and “victims who appear before the Court”.

As regards child victims participating through their legal representative, and who may not necessarily appear in Court themselves, as well as all other victims, as defined in the Rules,²⁵¹ the Rome Statute requires that the Court take appropriate measures to protect their *safety, physical and psychological well-being, dignity and privacy* under Article 68(1).²⁵²

The VWU has confirmed that victims, including witnesses and victims participating under Article 68(3), shall receive the protection, support and assistance they require upon first contact with the Court.²⁵³ The VWU has begun identifying referral organisations that may be able to take on support roles for prosecution victims and witnesses. Child-specific referral organisations have yet to be consulted. No referral organisations have been identified to support victims already participating in the DRC situation proceedings, and no measures are currently being planned to give effect to the Court’s duty to protect the psychological well-being of the wider group of victims falling within the definition of victims of the Court.²⁵⁴

As regards assistance, particularly medical assistance and HIV/AIDS treatment, child witnesses and victims who appear before the Court should be afforded such assistance in accordance with Article 43(6), upon first contact and until such services are no longer required. Children, particularly girls who are HIV positive are particularly vulnerable, and will require long-term retroviral treatment.

- **Best Practices for defence counsel’s interaction with child victims and witnesses**

The Defence Support Section, Office for Public Counsel for the Defence (OPCD), and the International Criminal Bar should engage on the issue of training. Guidelines should be developed highlighting best practice for defence counsel interactions with children.

The defence may wish to bring child witnesses to testify as part of its case, and in this respect, the same safeguards that apply to prosecution investigations should also apply to defence investigations, protecting the child’s physical and psychosocial wellbeing.

From experience at the Special Court for Sierra Leone, it appears that establishing professional standards and undertaking extensive training for defence counsel is more difficult to organise than the

²⁴⁹ Guidelines, Para. 22, Part IX – The Right to be Effective Assistance.

²⁵⁰ Rome Statute Article 43(6).

²⁵¹ Rule 85, Rules of Procedure and Evidence defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.

²⁵² Rome Statute, Article 86(1) on the protection of victims and witnesses and their participation in proceedings.

²⁵³ How this will be defined somewhat depends on a future ruling by the Court to clarify the wording in Article 43, which states that the Victims and Witnesses Unit “shall provide ... protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court...”. It is as yet unclear whether “victims who appear before the Court” includes those applying to participate, those who have been granted to the right to participate, or those physically appearing before the Court to give evidence as witnesses or participate in reparations hearings.

²⁵⁴ Confirmed by VWU on 2 August 2006. See Rule 85, Rules of Procedure and Evidence.

in-house activities organised by the Gender and Children Unit in the Office of the Prosecutor. It is recommended that gender and child-specific training be attributed to the functions of staff of either the Defence Support Section or OPCD. Strategies should be put in place and implemented as soon as practicable, ensuring that defence counsel benefit from the kind of training listed above.²⁵⁵

3.2.2 Children's right to information

• **The Prosecutor's duty to inform and notify child victims during investigations**

In accordance with the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*, child victims and witnesses, their legal representatives and families, have the right to be informed, from their first contact with the justice process, about the processes and services that concern them.²⁵⁶ Reflecting this principle, the Prosecutor of the International Criminal Court is under a duty to notify victims of decisions that concern them at various stages of the proceedings. For instance, when the Prosecutor intends to seek authorisation from the Pre-Trial Chamber to initiate an investigation, he is under a duty to "*inform victims, known to him or to the Victims and Witnesses Unit, or their legal representatives*".²⁵⁷

In addition to his duty to notify and inform victims, the Prosecutor must consider "*the interests of victims*", in deciding whether to initiate an investigation. The Prosecutor's consideration of "*the interests of victims*" is a *contrario*, namely, it is to be balanced against whether, in "*taking into account the gravity of crimes and the interests of victims ... there are reasons to believe that an investigation would not serve the interests of justice*".²⁵⁸ Nonetheless, the Prosecutor's duty to actively consider the interest of child victims should not be overlooked.

A pro-active strategy may need to be devised in order to ensure that the interests of child victims and potential child witnesses are actually considered during the investigation phase, ensuring that child victims are able to express their views and voice their concerns freely and in their own manner.²⁵⁹

Informing and notifying victims about the Prosecutor's mandate, and the decisions that concern them will ensure an increasingly witness-friendly environment, as discussed in section 3.2.1 above. Prosecutorial "outreach" initiatives should be conceived of as a two way process, ensuring stock-taking of the interests and concerns of child victims, as well as their families (or caretakers) and the communities which surround them.²⁶⁰

Child victims and witnesses not only have the right to be informed about the justice process itself, but also about "*the availability of health, psychological, social and other relevant services, as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support where applicable*".²⁶¹

²⁵⁵ See the sub-section on "The central role of VWU" in 3.2.1 above.

²⁵⁶ See in particular Guidelines para 19(b) and 20(a), Part VII – Right to be Informed (in Annex).

²⁵⁷ Rule 50(1) specifies that "When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to article 15(3), the Prosecutor shall inform victims, known to him or her or the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims if he or she determines in the particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. In performing these functions, the prosecutor may seek the assistance of the Victims and Witnesses Unit as appropriate".

²⁵⁸ Rome Statute, Article 53. Donat-Cattin (2006) *The Interest of Victims*, Briefing Paper for Victims Rights Working Group Meeting 2-4 May 2006, London.

²⁵⁹ Guidelines, para 21(b), Part VIII – The Right to be Heard and to Express Views and Concerns.

²⁶⁰ For instance, the Prosecutor of the Special Court for Sierra Leone, undertook town hall meetings attended by teachers, children and civil society members, in each of the 17 districts of Sierra Leone within the first 3 months of investigation. The physical presence of the prosecutor in the more remote parts of the country on a regular basis gave the population confidence in the Court, thereby increasing perceptions of security, creating a witness-enabling environment. Prior discussions with Chief of Security, Prosecution staff and Chief of WVSS at the SL Special Court, 2002-3.

²⁶¹ Guidelines, Para 19(a), Part VII – The Right to be Informed. This has also been highlighted in relation to ensuring child-sensitive investigations in Section 3.2.1 above.

The right to be promptly and adequately informed, from first contact and throughout the process extends to information regarding the procedures, the role of child victims and witnesses, the importance, timing and manner of testimony, as well as the manner in which questioning will be conducted during the investigation and trial. Information should also include details of existing support mechanisms for children, means of making complaints or participating in court proceedings, details regarding places and times of hearings, as well as information regarding the availability of protective measures, and the review of decisions affecting child victims and witnesses.

According to the Gender and Children Unit, a child-friendly introduction of the Court is made prior to interviews with children. However, it appears that according to organisations working with children in northern Uganda, the ICC investigation teams have not provided adequate feed-back to victims or organisations working with victims after an initial contact, creating a sense of insecurity and confusion as to what the consequences of the contact have been.²⁶² There may be a considerable time-lapse between an initial contact and the Prosecutor's decision to initiate an investigation, or issue an Arrest Warrant. Therefore information regarding likely timeframes and future communications should be provided.

- ***The Registry's duty to inform and notify child victims in the investigation phase***

According to the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*, child victims and witnesses have a right to be informed of the progress and disposition of a specific case, including the apprehension, arrest and custodial status of the accused and pending charges.²⁶³ These principles of notification and information are well reflected in the Statute and the Rules of Procedure and Evidence. There is a first overarching obligation on behalf of the Registrar to *"take all the necessary measures to give adequate publicity to reparations proceedings before the Court, to the extent possible, to other victims, interested persons and interested States."*²⁶⁴ In order to give effect to this obligation, appropriate and sustained outreach initiatives must be devised, which inform and explain to victims the possibility to apply to participate (section 3.1.3 below) and the opportunity to obtain reparations (section 3.3 below).

In order to assist child victims wishing to participate, the Registrar must also notify all victims if the Prosecutor decides not to initiate an investigation or not to prosecute pursuant to Article 53.²⁶⁵ Indeed, in order to give effect to such wide-scale notification, the Registrar shall *"take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek... the cooperation of relevant States parties and seek the assistance of intergovernmental organisations"*.

With reference to child victims, or their legal representatives, who have applied to participate in accordance with Article 68(3), the Victims Participation and Reparation Section (VPRS) should acknowledge every application for participation and/or reparations and should respond with adequate advice regarding the substance of the application. Measures should be in place to ensure that correspondence from the Court does not endanger the victim.

As regards child victims who have been granted the right to participate in the proceedings, their rights to notification apply to all proceedings before the Court.²⁶⁶ Participating victims are entitled to be notified of all dates of hearings, postponements, and notice of deliveries of judgements.²⁶⁷ What might constitute "adequate" notification will depend on the particularities of child victims within a specific social and security context. Therefore the methods of notification should be flexible and

²⁶² Concerns were raised by Save the Children, Uganda in discussions at ICTJ Expert Meeting in Geneva on Transitional Justice and Humanitarian Concerns, 17-18 May 2006.

²⁶³ Guidelines, para. 20(a), Part VII – The Right to be Informed.

²⁶⁴ Rule 96(1). As knowledge and information regarding the proceedings of the Court in general will provide victims with the opportunity to make applications to participate in reparations hearings, this Rule should be interpreted in the widest sense possible.

²⁶⁵ Rule 92(2) specifies that "the Court shall notify victims concerning the decision of the prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.

²⁶⁶ Rule 92(1) on Notification to Victims and their Legal Representatives.

²⁶⁷ Rule 92(5), (6).

continually reviewed, always taking into local languages into account, as well as appropriate medium (radio, workshops, etc.).

However, it is noted that child *witnesses*, who may also be victims but not participating in accordance with Article 68(3), may not be afforded the same systematic notification as participating victims. Hence, the provisions requiring notification to participating victims should be adapted to ensure that the witnesses (who are also victims) are adequately notified and informed.

Special measures will need to be put in place in order to inform and notify children of the judicial events that concern them, in a child sensitive manner that respects their dignity, needs and interests.²⁶⁸ Notification and information to children as well as their parents or guardians must be child-sensitive and avoid the use of excessive technical terms or jargon.

The challenges of ensuring effective and child-sensitive outreach were put to the test in Sierra Leone, in both the Truth and Reconciliation Commission and the Special Court. The Commission trained its locally recruited “statement-takers” on how to take testimonies from children, with particular guidance on how to deal sensitively with those who had been sexually violated and those who had been combatants. A framework agreement was signed between the Truth Commission, UNICEF and several child protection agencies to provide the Commission with technical assistance during statement taking and hearings in which children were participating.²⁶⁹

The Special Court for Sierra Leone conducted child-specific outreach initiatives including numerous events at schools or with schools at different stages of the proceedings²⁷⁰, the use of street theatre, child-specific radio programmes, such as “Kids talk to Kids” programmes, and the widespread distribution of a picture book about the Special Court.²⁷¹

3.2.3 *Children’s right to be heard and express their views and concerns*

According to the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*, child victims and witnesses have a right to be heard and to express their views and concerns.²⁷² The actors in the justice process should make every effort to enable child victims and witnesses to express their views and concerns *freely and in their own manner*,²⁷³ in relation to the development of proceedings that affect them.

- ***The Prosecutor’s duty to give due regard to children’s concerns***

The Prosecutor’s regard for crimes against children to date must be commended. Of the Prosecutor’s five Arrest Warrants in the Uganda situation,²⁷⁴ three include charges of “conscripting”, “enlisting” or “using children under fifteen years of age in hostilities”. Furthermore, the only Arrest Warrant in the DRC situation against Thomas Lubanga, also focuses on such charges.

However, the acute focus on child soldiers must not result in stigmatisation and resentment by other children. As highlighted in section 3.1 above, experts on psychosocial support for war affected children in northern Uganda have emphasised that such singling out can contribute to the

²⁶⁸ Guidelines, Para. 14, Part V – The Right to be Treated with Dignity and Compassion (in Annex).

²⁶⁹ A Manual was also produced by UNICEF following the Technical Meeting on Children and the TRC organised in Freetown in June 2001. Mann, N. and B. Theuermann (2001). *Children and the Truth & Reconciliation Commission for Sierra Leone*. Freetown, UNICEF, National Forum for Human Rights, UNAMSIL/Human Rights Section. www.unicef.org/emerg/SierraLeone-TRCReport.pdf

²⁷⁰ School art and essay competitions were launched on “The Special Court and Peace in Sierra Leone” and children were involved in the opening ceremony of the court and other events.

²⁷¹ See for instance: <http://www.sc-sl.org/specialcourtmadesimple.pdf>. 35,000 copies of this booklet have been distributed to schools and educational institutions across the country.

²⁷² Guidelines, Part VIII – The Right to be Heard and to Express Views and Concerns.

²⁷³ Guidelines, para21(b), Part VIII – The Right to be Heard and to Express Views and Concerns.

²⁷⁴ The Court’s five arrest warrants made public on 13 October 2005 concern Joseph Kony, issued on 8 July 2005 and amended on 27 September 2005, Case no. ICC-02/04-01/05; Vincent Otti, Case no. ICC 02/04-01/05-54; Okot Odhiambo, Case no. ICC-02/04-01/05-56; Dominic Ongwen, Case no. ICC-02/04-01/05-57; and Raske Lukwiya, Case no. ICC-02/04-01/05-55 all issued on 8 July 2005.

stigmatisation of those children and create jealousy and resentment from their family, guardians and the communities which surround them.²⁷⁵

In this respect, the Prosecutor's consideration of "*the interests of victims*" under Article 53, should be interpreted in the best interests of the child as outlined above in section 3.2.2, requiring the implementation of pro-active outreach strategies, which provide adequate information to children, but also allow for children to express themselves, *freely and in their own manner*.²⁷⁶ Prosecutorial strategies must take into account the unique interests of children in their psychosocial contexts. It is emphasised that every intervention that seeks to assist children must address children through their families, guardians and the community that supports them.

Concerning the work of investigators in relation to children, internal guidelines put in place by the Gender and Children Unit appear to give due regard to children's concerns, but could perhaps go further to ensure that children are given an opportunity to express themselves freely and in their own manner, about what concerns them most. Furthermore, as highlighted above in section 3.2.1, effective and independent monitoring mechanisms need to be devised to evaluate how well the child-sensitive investigation guidelines work for children in practice.

- ***The Registry's duty to facilitate children's right to be heard and express their views***

Child victims and witnesses, their families and legal representatives may have particular concerns or views that they may wish to raise with the Court. The Victims Participation and Reparation Section have recognised this need, and have indicated that local mobile phone numbers of VPRS in-country staff have been disseminated at outreach workshops in Northern Uganda and in the DRC.²⁷⁷ This initiative is very encouraging.²⁷⁸ In addition, local offices prioritising victim access should be opened in Gulu, in Northern Uganda, as well as in Eastern DRC. Special care should be made to ensure that access to the VPRS premises in the field are child-friendly. In particular, it should be ensured that such premises are not shared with OTP investigators interviewing witnesses.

An additional means of facilitating children's right to express their views, is to ensure that there are safe means of communicating with the VPRS by email. While many child victims may not have internet access, their legal representatives or caretakers may have such access. Communicating with the court by email may be unsafe in certain countries where national authorities are hostile to the Court's investigations. Therefore, it is recommended that information on safe use of the ICC website and secure emailing be available in a *victims' section* of the website, as is provided for instance on the home page of the UK agency, 'Victim Support'.²⁷⁹

- ***The Registry's duty to promote children's right to participate***

Article 68(3) of the Rome Statute gives effect to child victims' right to be heard and express their views as follows:²⁸⁰

"where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court..."

²⁷⁵ Ibid.

²⁷⁶ Child-sensitive outreach was conducted as a matter of priority by the Special Court Prosecutor in Sierra Leone. See: <http://www.sc-sl.org/outreach-prosecution.html>

²⁷⁷ NGO-Registry Meetings on Strategy and Outreach, The Hague, 4-5 July 2006.

²⁷⁸ At end July 2006, the local NGOs working on victims' rights in the situation countries, members of the "Victims Rights Working Group", had no knowledge of the availability of contact phone numbers, indicating that this initiative may need to be expanded before it has an impact.

²⁷⁹ See: http://www.victimsupport.org.uk/vs_england_wales/site_information/safety.php

²⁸⁰ Guidelines, para 21, Part VIII – The Right to be Heard and to Express Views and Concerns.

In its landmark ruling of 17 January 2006, the Pre-Trial Chamber granted six Congolese victims the right to participate in the investigation phase of the DRC situation.²⁸¹ It indicated that participation at this early phase was appropriate, as the extent of victim participation was limited to generally making their views and concerns known in relation to the investigation and submission of evidence.

However, the vast majority of affected children in the situation countries are not enjoying the benefits of participation, which give effect to their *right to be heard and express concerns*. From our field research, particularly in northern Uganda, child victims and organisations working with children continue to have little knowledge, understanding or confidence in a remote and foreign court.²⁸² Even in Eastern DRC, where the International Criminal Court has received positive publicity due to the Lubanga Arrest, and where victims are familiar with the notion of participating in criminal proceedings, there is still widespread incomprehension by civil society as to what this ‘foreign’ court will provide, and how that will help meet their needs in the context of conflict and poverty. It is suggested that outreach initiatives focus on these ‘preliminary issues’.²⁸³

Following preliminary outreach that provides contextualised understanding of the Court’s mandate, further initiatives must be undertaken, in the form of workshops or interactive events, in order to give effect to victims’ right to participate and apply for reparations under the Rome Statute.

According to our field research, in addition to wanting to understand more about the Court, organisations working with child victims want to know “*what they (the children) would get from the participation?*”²⁸⁴ As Uganda’s legal system does not provide for the participation of victims in criminal proceedings, there is difficulty with understanding the notion or benefits of participation. Specific outreach is therefore required by VPRS in northern Uganda, which explains the benefits of participation, as well as the right to apply for reparations, in a context where the national justice system does not include such a procedure, and where most victims have no experience of national or formal justice at all.²⁸⁵ Special care should be taken to ensure that child victims, and in particular their families and caretakers are provided with realistic expectations of the opportunities, benefits and timeframes of the participation and reparations procedures.

In order to facilitate victim participation under Article 68(3), Rule 89 provides that, “*in order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber.*”²⁸⁶ The VPRS has developed a number of forms aimed at facilitating the processing of victims’ applications, to participate, receive legal aid, and obtain reparations. During the course of our field research, the forms have been brought to the attention of children formerly associated with armed forces and groups, as well as their caretakers. The forms average 17 pages or more, and contain technical or contextually inappropriate wording (such as ‘gross’ vs. ‘net income’), which are difficult to explain in a context of IDP camps, chronic poverty and insecurity. The forms have been found to be very difficult to complete by both local and international human rights workers, and a common complaint, is that a single form has not been devised, reducing the burden on the victim to complete various similar forms. Given that the forms merely facilitate the provision of required information to the relevant Chamber, and their completion is not *per se* a requirement for participation,²⁸⁷ it may be appropriate to consider a shorter, open-ended, “Model Application Form” along the lines of the one available for individual petitions to the Human Rights

²⁸¹International Criminal Court, Situation in the Democratic Republic of Congo, Pre-Trial Chamber I, *Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6*, of 17 January 2006, Case no. ICC-01/04-01/06.

²⁸² Ongoing interviews and research in Eastern DRC, February – July 2006.

²⁸³ These specific points were raised with the Registrar and Prosecutor by ASF-DRC participant at the NGO-Registry/OTP meetings at the ICC 4-7 July 2006.

²⁸⁴ Interviews held with numerous organizations in Northern Uganda, such as GUSCO and Save the Children, Gulu, February 2006

²⁸⁵ Furthermore, fewer Acholi people have experience of traditional Acholi justice than popularly portrayed. In 1966 Milton Obote abolished cultural institutions, which were not active until the 1990s when Museveni recognised them again. In addition, the Acholi people have been in war for twenty years and have lost much of their culture as a result. As a result, it appears that only the elders and some youth know about Acholi traditional justice.

²⁸⁶ Rule 89 of the Rules of Procedure, on “Application for participation of victims in the proceedings”.

²⁸⁷ This point was addressed by the Pre-Trial Chamber in its “*Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6*”, of 17 January 2006, Case no. ICC-01/04-01/06.

Bodies of the United Nations.²⁸⁸ Such a shorter and more open-ended format would reflect the non-mandatory nature of the form, and would focus on the substantive contents in a more victim-sensitive manner, in particular, allowing victims to express themselves in their own words.

Detailed commentaries on the forms have been provided to the Registrar and VPRS.²⁸⁹ In spite of the fact that both the participation and reparations forms have been approved by the Presidency in April 2006, they continue to be unavailable on the Court's website. Furthermore, the forms only exist in English and French, with no immediate plans to translate them into Arabic, Acholi, Swahili or other relevant local languages.²⁹⁰ Inspiration might be taken from the European Court for Human Rights, whose application forms are on-line in 32 languages.

The Rules of Procedure of the Court provide that victims shall be free to choose a legal representative. The use of 'common legal representatives' may also be provided, with the assistance of the Registry to represent groups of victims, where this increases the effectiveness of proceedings, and does not conflict with distinct interests of victims.²⁹¹ An encouraging feature of the emerging legal aid scheme for victims, is the *de facto* acceptance that children under the age of eighteen are indigent, and therefore eligible to receive free legal assistance from the Court if it so decides (there does not appear to be an *entitlement* to free legal aid on determination of indigence). However, former child soldiers, who were under the age of fifteen at the time of 'enlisting, conscription or use' may have subsequently turned eighteen, and must therefore satisfy the tests for indigence, applying for legal aid through the relevant form.²⁹² It is presumed that the free legal assistance granted to children will cease when they turn eighteen, potentially creating a gap in their representation until they satisfy the indigence application procedure. It is suggested that the VPRS explore the possibility of "presuming indigence" for all IDPS, refugees, as well as victims in situation countries or regions where the average income is below the poverty line.²⁹³ The administrative burden for the Court in processing the application forms, as well as its inconvenience to victims, must be considered against the probability that these groups of victims will be indigent. A system of retrospective checks could be instituted, placing a burden on the legal representative to notify the VPRS of any information that may indicate that a victim is *not* indigent.²⁹⁴

Qualifications and Training of Children's Legal Representatives

As mentioned above, children have the right to be treated with dignity and compassion.²⁹⁵ Throughout the justice process, professionals must take the individual situation and immediate needs of each child into account, as well as his or her age, gender, disability and level of maturity, fully respecting his or her physical, mental and moral integrity.²⁹⁶ In order to accommodate the special needs and interests of children, counsel placed on the Registry's list under Rule 90(2) should undergo specific training as outlined in section 3.2.1 above, if they are to be eligible to represent children.

In order to ensure that legal representatives are able to give effect to children's right to *express their views and concerns freely and in their own manner*,²⁹⁷ they will need to be able to travel readily to meet with their client, and be able to communicate with the client in a language understood by the child. In this respect, it is suggested that the Registry pro-actively encourage and provide requisite

²⁸⁸ See the UN Human Rights bodies Model Complaint Form: <http://www.ohchr.org/english/bodies/docs/annex1.pdf>

²⁸⁹ See for instance the Victims Rights Working Group (VRWG) "Submission to the ICC Regarding its Application Forms for Indigent Victims", available at: "<http://www.vrwg.org/Publications/01/VRWG%20paper%20on%20indigence%20forms%20FINAL.pdf>

²⁹⁰ Accurate at end July 2006. Arabic translations are necessary for use in Sudan, where even the most highly qualified human rights lawyers rely on Arabic texts.

²⁹¹ Rule 90, Rules of Procedure and Evidence.

²⁹² The actual rate of income below which indigence is presumed has not yet been defined by the Court.

²⁹³ The average income in rural areas in Eastern DRC is less than \$1 per day.

²⁹⁴ See for instance the Victims Rights Working Group (VRWG) "Submission to the ICC Regarding its Application Forms for Indigent Victims", available at: "<http://www.vrwg.org/Publications/01/VRWG%20paper%20on%20indigence%20forms%20FINAL.pdf>

²⁹⁵ See in particular, Guidelines, Para. 14, Part V – The Right to be Treated with Dignity and Compassion.

²⁹⁶ Guidelines, Para. 10, Part V – The Right to be Treated with Dignity and Compassion.

²⁹⁷ Guidelines, para21(b), Part VIII – The Right to be Heard and to Express Views and Concerns.

training to appropriate local counsel from regions within the situation country. This may be an appropriate role for the Office of Public Counsel for Victims. The requirement of being fluent in one of the working languages of the Court (English or French) may be acceptable in Northern Uganda or eastern DRC. However, for lawyers in Sudan, Arabic will be lingua franca, in addition to local languages. Where counsel do not have sufficient language skills, they should be able to act as co-counsel or as an assistant under Rule 22(1). Furthermore, Rule 41 should be interpreted so as to enable local counsel to act as counsel with an assistant who has the required language skills. In this regard, the Office of Public Counsel for Victims might develop innovative arrangements.

Qualifications for victims' representatives are currently the same as for defence counsel,²⁹⁸ though it may be found that a separate list, maintained by VPRS may provide better management and quality control in favour of victims. In order to better assist child victims in particular, it is suggested that counsel be required to indicate experience of representing and interacting with particularly vulnerable clients. The list should also include other professionals with relevant expertise in working with child victims, who may be asked to assist victims in accordance with Rule 22(1).

An additional concern has been raised with regard to the requirement of a letter from the counsel's national bar association in order to satisfy eligibility to the list. It is suggested that this requirement may need to be treated flexibly with respect to counsel applying from certain States, who do not accept the jurisdiction of the Court or are hostile towards the Court and its investigations.²⁹⁹

As regards the possibility of victims being jointly represented by a 'common legal representative', Rule 90 provides that, "*where there are a number of victims*" the Chamber may choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may assist, by referring the victims to the list of counsel maintained by the Registry, or to suggest one or more common legal representatives.³⁰⁰

The Trial Chamber and Registry are bound to take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of victims (such as their safety, physical and psychological well-being, dignity and privacy) are represented and that conflict of interests are avoided.

Assisting the parents, families or caretakers of children formerly associated with armed groups or forces will require pro-active engagement on behalf of the VPRS on the ground, as well as engagement by human rights activists or child protection agencies operating in the field.³⁰¹

Attention should be given to issues of conflict of interest in joint legal representation. Children formerly associated with armed groups or forces may have committed crimes within the jurisdiction of the court. Although they cannot be prosecuted for these crimes if they were under the age of eighteen at the time of the acts, potential conflict of interests should be taken into consideration with respect to the representation of former child soldiers and other victims from the same region. In general, it is recommended that children recruited, enlisted or used by a particular group or force should not be jointly represented with other victims of that group or force. Furthermore, separate representation should be provided in a manner that does not stigmatise such children.

²⁹⁸ Rule 22(1), ICC Rules of Procedure and Evidence, "*A counsel for the defense shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity in criminal proceedings. A counsel for the defense shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defense may be assisted by other persons, including professors of law, with relevant expertise.*"

²⁹⁹ It is unlikely that genuine human rights lawyers in Sudan for instance would be provided with such letters of recommendation, with respect to representing victims. Furthermore, requesting such letters of recommendation may place the human rights lawyer or victims at risk.

³⁰⁰ Rule 90(2), ICC Rules of Procedure.

³⁰¹ It should be noted that child protection agencies, and humanitarian organisations generally, may be sensitive to being in any way associated with the Court, in view of their need to remain independent in an environment where armed groups and forces are still operating or maintain control over access to certain victim populations.

3.3 THE TRIAL PHASE

3.3.1 Children's right to effective access to justice

- **Registry outreach during trials**

Child victims, their families and legal representatives have the right to continue to be informed of the progress and disposition of cases that concern them, including the apprehension, arrest and custodial status of the accused. They have a right to be kept informed of any pending changes to the status of the accused, prosecution decisions and relevant trial and post trial developments.³⁰²

Furthermore, according to the *UN Basic Principles and Guidelines on the right to a Remedy and Reparation*, child victims and witnesses have a right to effective access to justice, which includes taking necessary measures to minimise the inconvenience to victims and their representatives in accessing proceedings that affect their interests.³⁰³

The Rome Statute establishes the seat of the Court at The Hague in the Netherlands. It recognises that “*the Court may sit elsewhere, whenever it considers it desirable*”.³⁰⁴ As regards the place of trials, “*unless otherwise decided, the place of trials shall be the seat of the Court*”.³⁰⁵ In view of the distance of proceedings in The Hague from victim populations, pro-active strategies must be put in place in order to satisfy children's right to effective access to justice. The possibility of holding *in situ* trials or hearings is discussed below, however, effective outreach may facilitate children's access to justice with respect to the default option of holding trials in The Hague. With the trial of *The Prosecutor v. Thomas Lubanga* scheduled to start at the end of March 2007, the Court must now move from a “developmental phase”³⁰⁶ regarding such outreach strategies to increased activities on the ground.

Ensuring effective participation in the proceedings satisfies child victims' right to access to justice at a procedural level. In this respect, applications to participate may be filed during the trial, implying that the issues raised in relation to victim participation in the pre-trial phase also apply to the trial (see section 3.1.3 above).

Access to justice also implies providing child victims with a means to engage with the justice process that concerns them, in a manner that is relevant to them and that restores their dignity.³⁰⁷ To a certain extent, *access to justice* for child victims, as well as their families and communities, implies a *reparative recognition* of their status as victims. It is because victims have suffered crimes within the jurisdiction of the Court, that they are entitled to access the proceedings. Therefore, on the basis that access to justice demands a *reparative recognition* of their status,³⁰⁸ specific outreach activities, which allow child victims to express themselves freely about the justice process, in a manner that restores their dignity, can constitute powerful and effective access to justice.

³⁰² Guidelines, para 20.

³⁰³ See Article 12 (b), Part VIII – Access to Justice, *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*, adopted by the General Assembly on 16 December 2005. C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005) See also, REDRESS (2006) *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*. London, <http://www.redress.org/reports.html>

³⁰⁴ Article 3(3), Rome Statute.

³⁰⁵ Article 62, Rome Statute.

³⁰⁶ Victims Participation and Reparations Section Discussion Paper, “*Recommended Strategies for Children's involvement in the Proceedings of the International Criminal Court*”, 4 November 2005. Presented at the UNICEF Innocenti Expert Discussion on Children in Transitional Justice, Florence, November 2005.

³⁰⁷ See article 22 on Satisfaction, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit.

³⁰⁸ See the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, op. cit., in particular article 19 on restitution, which, as a form of reparation, includes acts which restore victims' dignity and reputation, their enjoyment of human rights, identity and citizenship. From the victim perspective, access to justice, includes a recognition of all these.

In this respect, the work of the TRC for Sierra Leone and the outreach activities of the Special Court for Sierra Leone, provide much insight. Focusing just on the activities developed for children by the Special Court, these activities demonstrate a singular attention to the importance of participatory and empowering engagement of children in the Court's long-term success in contributing to "ending impunity". At the Special Court, the notion of access to justice has been translated into *participation in outreach activities*. Children participate through "Kids Talking to Kids" radio programmes. Quizzes, debating competitions, art and essay competitions and other activities are organised within schools around the subject of justice. Efforts to reach children have also included nationwide training workshops for teachers in collaboration with the national Teachers Union, local universities and frequent visits by Special Court staff, including the Registrar, Prosecutor, Principal Defender and the Court's President. "Accountability Now Clubs" were established at eight universities across Sierra Leone with instruction and training provided by the Court's Outreach Section. The clubs are said to have become self-sufficient since mid 2005 and focus on the broader issues of justice, accountability and human rights, thereby educating people for years to come.³⁰⁹

Such activities are complemented by other extensive and varied outreach initiatives targeting civil society generally across Sierra Leone. These include town hall meetings, extensive coverage of hearings on TV and radio, as well as discussion programmes, dissemination of video excerpts of hearings, the hiring of local theatre troops to act in market places, and numerous training programmes.³¹⁰

As regards strategies to facilitate visits by child victims to participate in, or observe trials at the ICC, these would need to be explored in partnership with organisations working with children as well as children's legal representatives. Such visits would require considerable support for the children involved, and should not put children at risk. While such initiatives should not be dismissed as too sensitive or difficult, they might be best conceived of as part of a specific programme run by an intermediary organisation, which aims at developing leadership skills and capacities for the rehabilitation of children formerly associated with armed forces or groups.

- **Chambers initiatives to hold *in situ* trials or hearings**

The Rome Statute establishes the seat of the Court at The Hague in the Netherlands, but recognises that "*the Court may sit elsewhere, whenever it considers it desirable*",³¹¹ and "*unless otherwise decided, the place of trials shall be the seat of the Court*".³¹² In light of these provisions, and in order to give effect to child victims' right to "access to justice", it is suggested that early consideration is given to holding trials or hearings in-country, closer to victims' populations.

Such *in situ* trials or hearings would significantly advance victims' right to access the justice process, minimising their inconvenience in accordance with the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*.³¹³ Additionally, such hearings would assist the Judges and court staff involved in visualising the scenes of certain incidents as well as understanding them in relation to contextual factors such as geography or local customs. This was found to be particularly useful at the Rwanda Tribunal, when in November 1999, Trial Chamber I held *in situ* hearings in the Bagilishema case in response to a request from the defence.

In this ICTR case, all parties to the proceedings expressed enthusiasm for the visit in the interests of justice as it assisted understanding of events, and particularly how witnesses could have heard or seen what was happening in neighbouring hills.³¹⁴ Representatives of the Rwandan government,

³⁰⁹ See: <http://www.sc-sl.org/outreach.html>

³¹⁰ The ICTR has also stepped up its external relations strategy in recent years, opening an outreach centre, including library and research facilities in the centre of Kigali in 2001. See the ICTR home page for further information about the recent development of the ICTR's Satellite Service: <http://www.icttr.org>

³¹¹ Article 3(3), Rome Statute.

³¹² Article 62, Rome Statute.

³¹³ Op. cit at footnote 6.

³¹⁴ *The Prosecutor v Ignace Bagilishema*, Case ICTR-. The judges and court staff of Trial Chamber I, visited sites in Kibuye Commune between 14 November 1999, in the Tribunal's first ever judicial visit to Rwanda. Representatives of the Rwandan government, speaking on behalf of victims, were pleased with the visit and

were also pleased with the visit and hoped such visits would increase. However, Judges were overly weary of their judicial independence, and being seen to be influenced by the visit. As a consequence, they decided not to visit a major memorial site on their way. Locally this was incomprehensible and was seen to offend the dignity of victims. Hirondele Press reported at the time:

"Judges were taken to witness homes and mass graves, and to sites in the mountains of Bisesero, where Tutsis tried to resist Interahamwe attacks. However, the court chose not to pass by the Bisesero genocide memorial, where thousands of skulls and bones of genocide victims are displayed.

This decision was taken on the grounds that the visit was strictly judicial, that the memorial was not directly linked to the Bagilishema case, and that it could prejudice his right to be assumed innocent until proven guilty.

A group of survivors guarding the memorial ... failed to understand why the court did not visit the memorial. "What are they coming here for if they are not going to see the bones and skulls?" asked Simon Ngaminje, who lost 20 members of his family in the genocide. "It is as if they had stayed in Arusha and listened to witness testimonies."

Other Rwandans, including journalists and officials, expressed similar sentiments. "I didn't realize that they went to Bisesero for any other reason than to visit the memorial," said current mayor of Mabanza Mathias Abimana, who is also a survivor. "Judges are also human beings. And I think it would have been better if they had been able to experience the emotional significance of the situation."³¹⁵

It is recommended therefore, that sensitive precautions be taken not to offend victims, in particular child victims, as they have a right to be treated with dignity and compassion. It is suggested that meetings with civil society groups should be organised well in advance, in order to ensure respect for local customs and in order not to discriminate between categories of victims. In particular children formerly associated with armed groups or forces should not be singled out in any manner. They should merely be recognised as child-victims amongst other child-victims.

Outreach activities involving children might usefully precede any such *in situ* hearings, in order to ensure that adequate understanding and information is available, and that child victims, as well as their families and communities, are given ample opportunity to be heard and express their views and concerns.

3.3.2 Protection and Support during Trial

In principle, trials involving children should be expedited, unless delays are in their best interests. The *UN Guidelines on Justice for Child Victims and Witnesses of Crime* recommend the adoption of special procedures and rules that provide for cases involving child victims or witnesses to be expedited³¹⁶ and that children should be protected from hardship during the justice process.

- **Prosecution and defence interactions with child victims and witnesses at trial**

While protective measures will have been awarded for child witnesses well before trial, and further "special measures" (discussed below) may be in force to protect the child witness during trial, prosecution and defence counsel, as professionals interacting with children during the trial should "approach child victims and witnesses with sensitivity", in order to "ensure that the best interests and dignity of child victims and witnesses are respected" in accordance with the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*³¹⁷

³¹⁵ Hirondele, 5 November 1999. See: <http://www.hirondele.org>

³¹⁶ Guidelines, para 30 (c), Part XI. The Right to Be Protected from Hardship during the Justice Process.

³¹⁷ Guidelines, para 29-30, *ibid*.

In this respect, the Office of Defence Counsel, as well as the Office of Public Counsel of Defence (OPCD) should engage with the International Criminal Bar and other appropriate agencies on the issue of specific training, standards and guidelines for establishing best practices in bringing child victims and witnesses to trial (with the support of VWU) and best practices for addressing child victims and witnesses in Court.

- **“Special measures” to protect child victims and witnesses at trial**

As highlighted in section 3.2.1 above, Article 68(1) provides that the Court shall “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, mentioning specifically the case of violence against children as a matter for particular attention.³¹⁸

Furthermore, special measures, in accordance with Article 68(2) may be necessary to protect children’s identity during trial, both as a matter of privacy and safety, but also to protect children from re-traumatisation or undue pressure. In accordance with Rule 88, “special measures” may be requested by either of the parties, by a witness or victim, or his or her legal representative. The rules of procedure provide that the VWU may be consulted with regard to ordering special measures to facilitate the testimony of a traumatised child victim or witness, or a victim of sexual violence. The measures might include the requirement that a counsel, legal representative, psychologist or a family member be present during testimony, or that testimony be undertaken from a remote location via closed circuit television, or that voice distortion technology be applied.³¹⁹

The VWU has recommended that prior to trial, children should be familiarised with the court room and should be prepared as to what to expect by being shown films or footage of how court proceedings are usually conducted. Other measures which might be considered include minimal use of jargon by Parties, non use of judges and attorney’s robes and a child friendly seating arrangements in interview and court rooms.

Further measures that are highlighted in the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*, include the use of “interview rooms designed for children, [...] modified court environments that take child witnesses into consideration, recesses during a child’s testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure that a child only goes to court when necessary and other appropriate measures to facilitate the child’s testimony”.³²⁰

Expert seminars for judges on detecting symptoms of secondary victimisation and Post Traumatic Stress Disorder (PTSD) may be recommended in view of handling child witnesses in court, and ensuring that appropriate breaks are provided, as well as appropriate interventions when counsel employ insensitive examination strategies.

- **Assistance and support for victims following testimony and court appearances**

According to the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*, child victims and witnesses are entitled to receive effective assistance until such services are no longer required.

In view of the extent of the traumatisation and the high percentage of girls formerly associated with armed groups or forces who have suffered rape and sexual enslavement, and who may consequently have contracted the HIV virus,³²¹ this category of victims will require long-term assistance.

³¹⁸ Rome Statute, article 68(1)

³¹⁹ Rule 88, Rules of Procedure and Evidence.

³²⁰ Guidelines, para 30(d), Part XI. The Right to Be Protected from Hardship during the Justice Process.

³²¹ The link between conflict, rape and HIV/AIDS has not been forensically documented in a systematic manner. However, there are numerous reports have been produced by the World Health Organisation, UNAIDS and NGOs alike. According to Amnesty International’s report *Democratic Republic of Congo – HIV: the Longest Lasting Scar of War*, 1 December 2004: “Mass rape in the DRC has contributed to the spread of HIV, which is predicted to have a catastrophic future effect on the health of the country. The DRC National Aids Program estimates that the rate of infection has reached 20% in the eastern provinces and could threaten more than half of the population within the next ten years. Some experts believe that the HIV prevalence rate in the east may actually be much higher.”

The issue of long-term medical support for victims and witnesses who have contracted HIV/AIDS can become a highly controversial issue for the Court, as it did at the Rwanda Tribunal.³²² Overwhelmingly male detainees were provided with anti-retroviral drugs at the cost of the Tribunal as necessary, however, female victims and witnesses were only given temporary assistance. It is recommended that the VWU develop strategies for long-term support with child protection agencies or other support networks to devise long-term support strategies for victims and witnesses that have contracted HIV/AIDS.³²³

3.4 REPARATIONS

The *UN Guidelines on Justice in Matters involving Child Victims and Witnesses* stipulate that ‘child victims should, wherever possible, receive reparations in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.’³²⁴

- ***The Registry’s duty to notify child victims of opportunities to apply for reparation***

According to the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*, child victims and witnesses, their families and legal representatives have a right to be promptly and adequately informed of “opportunities to obtain reparation from the offender or from the State through the justice process or ...through other processes”³²⁵.

Article 75 of the Rome Statute represents a milestone in giving effect to victims’ right to reparation. It provides that “the Court shall establish principles relating to reparations to, or in respect of, victims including restitution, compensation and rehabilitation”. Victims may request the Court to determine the scope and extent of any damage, loss and injury,³²⁶ in view of obtaining an order for reparations either directly against a convicted person or in respect of victims, including restitutive, compensatory or rehabilitative measures.³²⁷ In exceptional circumstances, the Court may make such a determination on its own motion.

Rule 94 facilitates such requests from victims, outlining the procedure that should be followed. Applications should be made in writing and should contain the identity and address of the claimant, a description of the injury, loss or harm. The location and date of the incident should also be included, as well as, to the extent possible, the identity of the person(s) the victim believes to be responsible. If assets or property are sought to be restituted, then a description of these should be provided. Claims for compensation, rehabilitation and other forms of reparation should be outlined. The application should be supported, as far as possible, with relevant documentation, including the names and addresses of witnesses.

- ***Principles relating to reparations***

It is not clear whether the principles relating to reparations referred to in Article 75 will be determined in the course of individual applications or as a special set of principles developed independent of ongoing cases. Nonetheless, the Court should develop its thinking on reparations in accordance with Article 75 as a matter of priority. This should include principles on restitution, compensation and

³²² Goetz, M (2006). *Women and Girls Demands from Transitional Justice*, ACTIONAID, p 15.

³²³ See Michels, A. (2006). *Expert Discussion on Transitional Justice and Children: Outcome Document*. Florence, UNICEF Innocenti Research Centre, and Wright, K. (2005). *The Role of Child Protection Agencies in Supporting Children’s involvement in Transitional Justice Mechanisms in Sierra Leone*. UNICEF Innocenti Expert Discussion on Children in Transitional Justice, Florence, November 2005.

³²⁴ Guidelines, Para. 35. Part XIII – The Right to Reparation

³²⁵ Guidelines, para. 20(b). Part VII – The right to be Informed.

³²⁶ Article 75(1), Rome Statute.

³²⁷ Article 75(2), Rome Statute.

rehabilitation, as well as “satisfaction” and “non-repetition”, as further forms of reparation listed in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*,³²⁸ which provides a non-exhaustive list of forms of reparation. Additionally, the Court will need to consider how best to approach the procedural aspects of the reparations process, including evidentiary standards and enforcement procedures.

The Court is encouraged to build upon the work of the United Nations, which adopted its Basic Principles and Guidelines on Reparations in December 2005.³²⁹ These basic principles define the various forms of reparation as follows:

- Restitution includes the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return of property, return to one’s place of residence and the restoration of employment.³³⁰
- Rehabilitation includes medical, psychological care and social and legal services.³³¹
- Compensation generally implies monetary compensation for physical, mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, and moral damage, and possibly costs required for legal or expert assistance, medicine and medical services and psychological and social services.³³²
- Satisfaction can entail effective measures aimed at the cessation of continuing violations, or the verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, for the identities of the abducted children or the bodies of those killed. Assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the local cultural practices is also an effective form of reparation.³³³ Indeed, other acts of satisfaction, that would amount to effective reparation may include an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, or a public apology, including acknowledgement of the facts and acceptance of responsibility, which may be particularly pertinent for crimes for which the State bears responsibility.³³⁴
- Guarantees of non-repetition might include measures that would also contribute to the prevention of future violations. Such measures may include the provision of effective civilian control over the military, strengthening the independence of the judiciary or promoting mechanisms for preventing and monitoring conflicts in the future. Reviewing and reforming laws on gross violations of international human rights law and serious violations of international humanitarian law can also constitute guarantees of non-repetition.³³⁵

Some of the above-listed measures will be more appropriate than others with respect to reparations orders against individual perpetrators (opposed to a State), nevertheless, the Court will need to develop measures that will have the most impact on the beneficiaries.

³²⁸ Article 18 of the *UN 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* were adopted by the General Assembly on 16 December 2005, *op.cit.* at footnote 6.

³²⁹ See also, REDRESS (2006) *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*. London, <http://www.redress.org/reports.html>

³³⁰ Article 19 of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, *op. cit.*

³³¹ *Ibid.*, article 21.

³³² *Ibid.*, article 20.

³³³ *Ibid.*, article 22.

³³⁴ *Ibid.*

³³⁵ *Ibid.*, article 23.

- **Reparations orders issued by the Court**

At the commencement of a trial, the Registrar is under a duty to notify the existence of requests for reparation made under article 75 to all persons named in such requests, as well as any persons named in the charges, and to the extent possible interested persons or States. Such notification must be carried out in accordance with any protective measures in place, in order to protect the identity of victims and witnesses.³³⁶

If the Court seeks to make a determination of the scope and extent of any damage, loss or injury on its own motion, it shall ask the Registrar to provide notification to person(s) against whom it is considering making a determination, as well as the victims, interested persons or States.

Therefore, if child victims are named in requests for reparation, submitted to the Court under article 75, or are victims subject to a determination that the Court intends to make of its own motion, these children should be notified through their legal representative and in accordance with protective measures in place. If victims, who are the subject of a determination that the Court intends to make of its own motion, are not legally represented, then appropriately trained staff within the VPRS with the assistance of the VWU as necessary, should make contact with such child victims, through their caretakers and communities, ensuring that all necessary precautions are taken not to stigmatise particular children in the process.

In accordance with Article 75(2), the Court can either issue a reparation order directly against a convicted person, specifying appropriate reparations, to be made (including compensation, restitution and rehabilitation), or it can order that an award be made through the Victims Trust Fund provided for in article 79 of the Statute.

Before making such an order, the Chamber shall take into account representations made on behalf of the convicted person, victims, other interested parties or interested States. In the case of child victims, their legal representatives may raise with the Court issues regarding the nature or extent of harm suffered, as well as considerations regarding their on-going reintegration and best interests.³³⁷ In this respect children's needs change rapidly, and given the time lapse between initial applications for reparations and conviction at the end of trial, it is appropriate for the Chamber to enquire as to the current needs and level of reintegration of children formerly associated with armed groups or forces.

- **The operation of the Victims Trust Fund**

The Victims Trust Fund has been established by a decision of the Assembly of States Parties, in accordance with Article 79 of the Statute, for the benefit of victims of crimes within the jurisdiction of the Court, and families of such victims.³³⁸ The Trust Fund is administered by a Secretariat, under the supervision of an independent Board of Directors.³³⁹ In accordance with its Regulations, which were adopted in December 2005, the Victims Trust Fund may disburse funds in two different respects.

On the one hand, the Trust Fund will give effect to reparations orders made directly against a convicted person under article 75(2) when it receives instruction by the Court to do so, with funds collected by the Court from fines, forfeiture or reparations orders against the convicted person, where such assets have been collected upon conviction or through cooperation with States who have forfeited the convicted person's assets in response to a request of the Court.³⁴⁰ In the case of Thomas Lubanga, the Pre-Trial Chamber has already requested States to freeze or seize his assets for this purpose.³⁴¹ The Trust Fund will determine the use of such resources, in accordance with

³³⁶ Rule 94 - Procedure upon Request, Rules of Procedure and Evidence.

³³⁷ Rome Statute, article 75(3).

³³⁸ Article 79(1), Rome Statute.

³³⁹ Chapter I, Regulations of the Trust Fund for Victims, adopted by the Assembly of States Parties on 3 December 2005, Resolution ICC-ASP/4/Res.3.

³⁴⁰ Article 57(e) provides for the Pre-Trial Chamber to seek the cooperation of States pursuant to article 93(1)(k), to take protective measures for the purpose of forfeiture.

³⁴¹ Pre-Trial Chamber I's *Request to States Parties to the Rome Statute, for the Identification, Tracing and Freezing or Seizure of the Property of Mr. Thomas Lubanga Dyilo*. ICC-01/04-01/06-62.

stipulations or instructions contained in the Chamber's order.³⁴² If there are no collected resources, the reparations order might be able to be given effect on the basis of voluntary contributions received by the Trust Fund, however there is uncertainty as to how the VTF Board will interpret this aspect of its mandate. The Chamber may make particular specifications in its order for reparations, namely where the number of victims and the scope of damage render collective reparations more appropriate.³⁴³ Furthermore, the Chamber may order an award through the Trust Fund to an intergovernmental, international or national organization.³⁴⁴

Therefore, in the event that Thomas Lubanga were convicted for crimes of 'enlisting, conscripting and using children under the age of fifteen in hostilities', the Court might, after taking into account representations on behalf of child victims, make an order directly against Thomas Lubanga in respect of those victims, including undertaking reparative acts as identified above. The Court might also make an order against Thomas Lubanga for monetary reparations, to be entrusted to the Trust Fund in favour of victims. The Court may decide to specify reparations that it deems appropriate for the Trust Fund to implement. However, if Thomas Lubanga were to be found insolvent, the award for reparations might nonetheless be able to be funded through voluntary contributions of the Trust Fund. On the other hand, the Trust Fund for Victims can use voluntary contributions, or "other resources" as per Rule 98(5), to implement *assistance activities or projects* for the benefit of victims of crimes within the jurisdiction of the Court and the families of such victims.³⁴⁵ The notion of *assistance* is therefore broader than reparations, as it may reach a wider group of individuals, and can be implemented at earlier stages of the proceedings. For the purposes of implementing such *assistance activities or projects*, the Board of the Victims Trust Fund may consult victims, as defined in Rule 85 of the Rules of Procedure,³⁴⁶ as well as experts or expert organisations. The Board may find it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims or their families, in which case it will formally notify the relevant Chamber in accordance with its Regulations, which allow for a response period, and issue a public communiqué thereafter.

With reference to reparations in favour of children formerly associated with armed groups or forces, collective reparations should generally be favoured. However, even if the court provides for broad collective awards, there will be significant challenges for the court to enforce its mandate without creating discrimination or stigmatising these particular child victims. If a reparation order were to be made in respect of children 'enlisted, conscripted or used' by Thomas Lubanga's UPC, this may discriminate against other child soldiers from other factions that were not prosecuted, and might stigmatise child soldiers against other child victims. In this respect, insights from the reparation principles identified by the Sierra Leone Truth Commission (see below) may be helpful, particularly with regard to its experience in addressing the use of child soldiers and crimes against children generally.

In northern Uganda, the issue of reparations has other difficulties. During the course of our research, it was found that merely raising the issue of reparations was met with hostility by local authorities due to existing demands by displaced populations for monetary compensation for the loss of their homes and livelihoods as a result of forced displacement.³⁴⁷ Furthermore, due to the issue of reparations already being 'live' for internally displaced persons, the notion of reparations is understood exclusively as 'compensation'.

- ***How the TRC for Sierra Leone developed its guiding principles on reparations***

³⁴² Article 43, Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3.

³⁴³ Rule 98(2), Rules of Procedure and Evidence.

³⁴⁴ Rule 98(4), Rules of Procedure and Evidence.

³⁴⁵ See article 79(1), Rome Statute.

³⁴⁶ Rule 85, Rules of Procedure and Evidence reads: "*Victims*" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'

³⁴⁷ Interestingly, the implication that reparations might trigger considerations of state responsibility was discussed at length in the negotiations regarding reparations provisions in the Rome Statute. See Muttukumaru, C. (1999). Reparation to Victims. [The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results](#). R. Lee, Kluwer., cited in Ferstman, C. (2002). "The Reparation Regime of the International Criminal Court: Practical Considerations." [Leiden Journal of International Law](#) 15: 667-686.

In view of the requirement that the Court establish principles relating to reparation, the experience of the Truth and Reconciliation Commission for Sierra Leone is provided as an example, as this institution was faced with recommending a reparations programme in respect of victims of a nine-year conflict, but more significantly, it effectively addressed issues of reparations for children formerly associated with armed forces and groups.

In a manner perhaps similar to the mandate of the ICC's Trust Fund for Victims, the Sierra Leone Truth Commission did not limit reparations to those who had testified.³⁴⁸ However, it did not have the mandate or budget to provide reparations to victims itself and therefore focused its attention to producing recommendations for a comprehensive reparations programme on the basis of guiding principles that it developed, drawing on the experience of other truth commissions.³⁴⁹

The recommendations were largely informed by questions on reparations included in the statement forms used by statement takers across the country.³⁵⁰ Those who testified in the TRC's hearing phase also indicated what kind of reparation they might benefit from most. Thus, the Commission was largely guided by the views of participating victims. After completing its statement taking and hearing phases, the Commission organised a number of consultations and meetings with NGOs, civil society groups and victims groups in order to elaborate guiding principles on the reparations programme. As a result, the Commission decided that its reparations programme should be guided by principles of feasibility and sustainability. These principles inform other principles such as avoiding stigmatisation and alleviating suffering.³⁵¹

The Commission felt that providing reparations for specific categories of people might create new or additional stigma. *Avoiding new stigma or the reinforcement of existing stigma* was a guiding principle behind their recommendations. As a result former child-soldiers were not singled out and all children were considered together. Furthermore, *increasing awareness and understanding of the specific needs of victims* was considered integral to reducing stigma, and was also seen as a necessary measure in reducing suffering of its own right, thus providing further guiding principle.³⁵²

To ensure *sustainability*, the programme focused on the reduction of dependency and the empowerment of victims. Restoring the human dignity of a victim means helping him or her to become a fully participating member of society again. Having an income may contribute significantly to the feeling of recovered dignity. Therefore, many of the recommended reparations measures focus on education, skills training, micro-credit, entrepreneurship, and employment. Empowering victims to take responsibility for themselves is the only way to make them and their families economically autonomous and ultimately independent of life-long state support programmes.³⁵³ With respect to children, this translates into creating opportunities to recover lost years at school or benefit from vocational training.

When faced with the choice of individual reparations payments or devising a programme based on social service packages, the Commission preferred social service packages as these were in line with its principles of sustainability and feasibility. Moreover, the Commission found that as poverty was widespread in Sierra Leone, individual cash payments could lead to division and friction between

³⁴⁸ The similarity lies in the fact that not all victims that will benefit from reparations or assistance through the Trust Fund must necessarily have participated. The South African Truth and Reconciliation Commission limited reparations to those who testified. However, the difference lies in the fact that the Sierra Leone Truth and Reconciliation Commission did not have the mandate to implement reparations, just to recommend. Unlike the Victims Trust Fund which has a mechanism for the receipt of voluntary contributions, the fund to support the Sierra Leone reparations process envisioned by the Lome Peace Accords has not yet been established.

³⁴⁹ For both health care reparations and pensions, the Commission looked to both the Chilean and Peruvian Truth Commissions.

³⁵⁰ The Commission trained its statement-taking staff on how to take testimonies from children, with particular guidance on how to deal sensitively with those who had been sexually violated and those who had been combatants in the conflict. UNICEF and the CPAs provided assistance to the Commission during such statement taking as well as during the hearing phase. The Commission reports that a fundamental principle underpinning such cooperation was that the physical and psychological security of the children should be secured at all times.

³⁵¹ In view of ensuring sustainability and feasibility, the Commission sought clear political commitment from the government, including the President, Parliament, political actors and the rest of the country, in order to restore civic trust in government institutions and to assure that reparation measures receive long-term commitment. Schotsmans, M. (2006). "Sierra Leone: Reparation Delays Mean More Suffering." *The Reparation Report, Redress Trust* (7).

³⁵² *Ibid.* para. 77.

³⁵³ *Ibid.* para. 78.

people, which it sought to avoid.³⁵⁴ In determining which types of social services to recommend the Commission relied on the wants expressed by the victims themselves, as well as by the organisations working with them.³⁵⁵ The Commission also took into account the views of experts working in the field that were able to identify the needs of those victims that could not express themselves. For instance, trauma counselling is often not recognised as a need by victims, but is recommended by experts in psychosocial counselling.³⁵⁶

Another principle guiding the Commission was the *rehabilitation and reintegration of victims in their original communities*. The Commission recommended that where possible and desirable, victims needed to be reintegrated in their own communities.³⁵⁷ In keeping with the guiding principles, the Commission sought to recommend reparations measures that can fit into existing programmes that are currently being implemented by donor agencies and NGOs.³⁵⁸

In line with the principle of feasibility, the Commission devised a timeframe for implementation, making recommendations for both the short and long term, with priority being given to those reparations that directly affect the survival and livelihood of the beneficiaries.³⁵⁹ Due to resource constraints, the Commission had to narrow down the categories of those eligible for reparations. Children that are eligible are subdivided into the following five categories:³⁶⁰

- Children who suffered from physical injury, such as amputees, other war-wounded or victims of sexual violence;
- Children whose parents were killed as a consequence of any abuse or violation as described in this report;
- Children born out of an act of sexual violence and whose mother is single.
- Children who suffer from psychological harm.
- War-Wounded children;
- Children are eligible for reparations if they were 18 years of age or younger by 1 March 2002.

In addition to the recommendations on health care for amputees, war-wounded and victims of sexual violence, which apply to equally to children, the Commission recommended certain measures specifically for children in the areas of physical care and education, including the scar removal surgery for those children who still have letters branded by the fighting forces on various parts of their bodies. Free education at senior secondary school level was recommended for children who are amputees, 'war-wounded' or victims of sexual violence. Free education was also prescribed to children who had been abducted, conscripted by force, orphaned, or if they were children of amputees, war wounded, or if their parents experienced a 50% or more reduction in earning capacity as a result of the violation committed against them, and victims of sexual violence.³⁶¹

³⁵⁴ The Final Report of the Truth & Reconciliation Commission of Sierra Leone, Volume 2, Chapter 4, Reparations, para. 71.

³⁵⁵ Ibid, para. 72.

³⁵⁶ Ibid, para. 73.

³⁵⁷ The commission recognised that this may be a long-term goal, stating that that through time, sensitisation and economic independence this may be achieved.

³⁵⁸ Ibid, para. 83.

³⁵⁹ Ibid, para. 84, para 235.

³⁶⁰ Ibid. para. 79.

³⁶¹ Op cit para. 155-58 and 173-83.

PART 4 - RECOMMENDATIONS

To the International Criminal Court

To the Assembly of States Parties:

- Give effect to the right of child victims and witnesses to be informed and to have effective access to justice by recognising the centrality of outreach and ensuring adequate funds for outreach from the Court's core budget;
- Adopt a resolution at each session of the Assembly of States Parties recognising the contributions of States Parties to the Trust Fund for Victims and encouraging further support;
- Develop effective mechanisms to monitor and follow-up requests from the Court to States Parties to identify, trace and freeze or seize property and assets, and in particular the request issued by the Court on 31 March 2006 in respect of Mr. Thomas Lubanga Dyilo, and otherwise comply with the eventual reparations orders of the Court;
- Facilitate dialogue and exchange amongst States Parties on best practice in respect of the drafting and adoption of national legislation implementing the Rome Statute, and in particular, the inclusion of adequate and effective provisions to give effect to victims' rights to physical and psychological protection and support, the ability for victims to participate in criminal processes in full dignity and their right to a remedy and reparations for the harm suffered;
- Encourage States Parties to ratify and implement the Optional Protocol to the Convention on the Rights of the Child, bringing the lawful age of recruitment from 15 years of age to 'straight 18' and to amend the Rome Statute accordingly;

To all organs of the Court:

- Ensure sensitivity in the use of terms such as "victims" and "child soldiers" in communications and outreach work directed at "victim" populations, as the use of such terms may engender new forms of stigmatisation or reinforce existing stigmatisation, particularly where children are undergoing rehabilitation or reintegration;
- Ensure that the vision and strategic plan of the Court incorporates the interest of victims as rights holders in the justice process, including in particular the 'best interests of the child,' taking into account the different functions and roles of Court organs in the investigative, trial and post-trial phases;
- Ensure continued dialogue and collaboration between the various organs and units of the Court on child rights, taking into account the need to avoid re-traumatisation and stigmatisation.

To the Presidency:

- Ensure that consultations on "principles relating to reparations", in relation to article 75 take adequate account of existing principles, and are developed in consultation with experts and organisations working with victims and with victims themselves;
- Ensure, in collaboration with the Victims and Witnesses Unit and other specialised units of the Court that all Judges develop expertise on the effective implementation of child victims' rights;

To the Office of the Prosecutor:

- Ensure that child soldiers are not "singled out" as the only victims in the DRC situation: this may result in stigmatisation and further challenges to their psychosocial reintegration;
- Prosecute all factions in order to avoid perceptions of bias, and consider the interests of victims in a given context in order to understand their perceptions of victimisation;

- Include charges of sexual violence along side charges of recruitment, enlisting and use of children in hostilities in the Lubanga case. Rape and sexual enslavement are amongst the worst atrocities that child soldiers endure;
- Give effect to the principle of complementarity in its work, by sharing information and best practices regarding child soldiers with national police, investigators and prosecutors through training and other initiatives;
- Develop and implement targeted outreach in victims' communities in order to create a witness-enabling environment;

To the Registry:

- Increase the number and scope of outreach activities giving effect to child victims' and witnesses' rights to information and access to justice;
- Ensure outreach with entities working on the protection of children in the Situation Countries in order to develop mutual confidence and support in the best interests of children (including UNHCR, UNICEF, IOM, UN-OCHA, victims associations, national military, police, child protection agencies, civil society groups, religious or faith-based groups, etc.);
- ***To the Public Information and Documentation Section***
 - Ensure a child-sensitive section of the Court's website enabling child victims and witnesses access to information regarding their rights and their role in the proceedings;
 - Produce child-specific informational material about the Court, including specific materials developed with other relevant units regarding child victims and witnesses rights and their role in the proceedings;
- ***To the Victim Participation and Reparation Section***
 - Ensure that all VPRS staff are adequately trained, in order to ensure effective implementation of child victims' rights;
 - Ensure forms for participation are child-friendly and available in relevant local languages;
 - Give effect to child victims' rights to information and participation, through the provision of outreach activities;
- ***To the Victims and Witnesses Unit***
 - Ensure sufficient and adequately classified field staff in order to ensure child victims and witnesses are afforded required and continuous professional contact;
 - Ensure sufficient levels of training for all staff entering into contact with children;
 - Assist in the provision or design of child-specific expert seminars for other professionals within the Court who will interact with children, defence counsel, public information and outreach staff and, if they are amenable, the Presidency and Judges of the Court;
 - Ensure adequate provisions are made for referrals to local organisations able to provide long-term support to victims and witnesses;
- ***To the Board of the Victims Trust Fund***
 - Ensure that Board members and their staff have access to specialised information, training and local knowledge to effectively implement child victims' rights;
 - Be alert to the physical, psychosocial rehabilitation or material support needs of child victims and their families in relation to the Lubanga case, as well as the victims of the situations currently under investigation;
 - At the earliest opportunity, given the pressing needs in situation countries, develop the operational capacity to decide on the utilisation of voluntary contributions;
 - Undertake fundraising initiatives in relation to the extent and scope of victimisation in the situation countries and particularised in the Arrest Warrants issued to date;

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- ***To the Defence Support Section***

- Ensure adequate requirements for training for counsel placed on the Registry's list for assigned counsel, in order to ensure effective implementation of child victims' rights, particularly where defence counsel intend to bring child witnesses to trial;
- Organise adequate training sessions for the benefit of defence counsel on the Registry's list for assigned counsel (see recommendations to Bar Associations and OPCD);

To the Office of Public Counsel for Victims

- Ensure adequate training of OPCV staff, as well as counsel, in order to ensure effective implementation of child victims' rights, particularly where defence counsel intend to bring child witnesses to trial;
- Ensure that strategies to represent child victims do not generate conflicts of interest between children formerly associated with armed forces or groups and other victims that may have suffered from crimes committed by groups or forces using children;

To the Office of Public Counsel for Defence

- Ensure child-specific training for defence counsel, in order to ensure the effective implementation of child victims' rights during investigation, trial and particularly in the examination of child witnesses;
- Organise adequate training sessions for the benefit of defence counsel on the Registry's list for assigned counsel as well as OPCD staff and in-house counsel (see recommendations to National and International Bar Associations and DSS);

To National and International Bar Associations

- Ensure child-specific training for counsel, in order to ensure the effective implementation of child victims' rights during investigation, trial and particularly in the examination of child witnesses;
- Ensure child-specific training for counsel representing child victims;

To Governments

- ***To the Government of Uganda***

- Review national legislation in order to effectively implement the Rome Statute, and in particular, include adequate and effective provisions to give effect to victims' rights to physical and psychological protection and support, the ability for victims to participate in criminal processes in full dignity and their right to a remedy and reparation for the harm suffered;
- Develop effective mechanisms to implement requests from the Court to identify, trace and freeze or seize property and assets, and otherwise comply with the eventual reparations orders of the Court;
- Implement in domestic law provisions on enlistment, conscripting and use of children under 15 years to 'straight 18' in line with the Convention on the Rights of the Child and its Optional Protocol on the involvement of Children in Armed Conflict, which was ratified by the Republic of Uganda on 6 June 2002;
- Consider victims' rights to a remedy and reparation for gross violations of international human rights law and serious violations of international humanitarian law in the context of its peace negotiations with the LRA;
- Give effect to the Arrest Warrants issued by the Court;

- Give effect to the notion of Complementarity and undertake security sector reform, prosecuting members of its military hierarchy that are suspected of crimes under the jurisdiction of the Statute;
 - Ensure child-specific training for the military, the security sector and all national authorities on the criminal nature of child recruitment, and ensure adequate training for all those coming into contact with children in order to give effect to their rights;
 - Support and facilitate the work of Non governmental organisations working to rehabilitate children formerly associated with armed groups or forces;
- ***To the Government of the Democratic Republic of Congo***
 - Ensure that the draft implementation law approved in October 2005 is placed on the parliamentary agenda in its first session after the July 2006 elections;
 - Ensure that the draft implementation law effectively implements the Rome Statute, and in particular, includes adequate and effective provisions to give effect to victims' rights to physical and psychological protection and support, the ability for victims to participate in criminal processes in full dignity and their right to a remedy and reparations for the harm suffered;
 - Implement in domestic law provisions on enlistment, conscripting and use of children under 15 years to 'straight 18' in line with the Convention on the Rights of the Child and its Optional Protocol on the involvement of Children in Armed Conflict, which was ratified by the DRC on 12 February 2002;
 - Implement requests from the Court to identify, trace and freeze or seize property and assets, and in particular the request issued by the Court on 31 March 2006 in respect of Mr. Thomas Lubanga Dyilo, and otherwise comply with the eventual reparations orders of the Court;
 - Give effect to the notion of Complementarity and undertake security sector reform, prosecuting members of its military hierarchy that are suspected of crimes under the jurisdiction of the Statute;
 - Ensure child-specific training for the military, the security sector and all national authorities on the criminal nature of child recruitment, and ensure adequate training for all those coming into contact with children in order to give effect to their rights;
 - Establish protective measures for victims and witnesses in national trials, such as safe-houses;
 - Provide assistance and guidance to the DRC judiciary on how to implement ICC provisions within the national jurisdiction;
 - Support and facilitate the work of Non governmental organisations working to rehabilitate children formerly associated with armed groups or forces;

To Inter-governmental Organisations

- Explore strategies to provide assistance and support to the ICC, in accordance with role that regional and other intergovernmental organisations play in the protection of civilians, particularly children, in accordance with Security Council Resolution 1674, which imposes measures on States as well as non-State actors to "protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity";
- Give effect to victims' right to information about all available remedies, by informing victims about the ICC's mandate and the possibility to participate in its proceedings;
- Ensure child-specific training for staff, particularly for those coming into contact with children, or working on children's issues, in order to ensure the effective implementation of child victims' rights;
- Ensure training on the ICC for staff, particularly for those working on child protection issues in the field such as DDR programmes;

To Non-Governmental Organisations

- ***To human rights organisations***
 - Identify and assist victims and witnesses of crimes within the situation countries under investigation, providing them with information regarding their right to participate in proceedings;
 - Assist child victims in respect of their psychosocial needs, and protect safety when at risk;
 - Press for reforms in the national system in order to give effect to child victims' right to a remedy and reparation;
 - Raise awareness with authorities, victims, their families, and civil society at large about the children's rights and children protection;

- ***To humanitarian organisations***
 - Explore synergies between humanitarian mandates to protect children and the ICC's mandate in ending impunity;
 - Ensure training on the ICC for staff, particularly for those working on child protection issues in situation countries, such as DDR programmes;
 - Raise awareness with authorities, child victims, their families or caretakers about the children's rights, child protection and the crime of child recruitment;
 - Provide information and sensitisation to children, their families or caretakers about the ICC and the possibility of participating in its proceedings;
 - Gather information and policy suggestions regarding the ICC's guiding principles for reparations, in the best interest of children formerly associated with armed forces and groups as well all children.

Abbreviations

ACTV	African Centre for the Treatment of Torture Victims (Ugandan NGO)
AJEDI-Ka/PES	<i>Association des Jeunes pour le Développement Intégré-Kalundu /Projet Enfants Soldats</i> (Association for Integrated Youth Development – Kalundu/ Child Soldiers Project)
AFDL	Alliance of Democratic Forces for the Liberation of Congo-Zaire
APC	<i>Armée Populaire Congolaise</i> (Congolese People's Army)
AVREO	<i>Association des volontaires pour la récupération des enfants Orphelins</i>
BVES	<i>Bureau pour le Volontariat au Service de l'Enfance et de la Santé</i>
CDF	Civil Defence Force (Sierra Leone)
CONADER	<i>Commission Nationale de Démobilisation et Réinsertion</i> (National Commission for Demobilisation and Reintegration), DRC
CPAs	Child Protection Agencies
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council of the United Nations
FAC	<i>Forces Armées Congolaises</i> (Congolese Armed Forces)
FAZ	<i>Forces Armées Zairoises</i> (Zaire Armed Forces)
FIDA	Ugandan Association of Women's Lawyers
GCU	Gender and Children Unit (Investigation Division, Office of the Prosecutor, ICC)
FNI	<i>Front des Nationalistes et Intégrationnistes</i> (Integrationalist Nationalists' Front)
GUSCO	Gulu Support the Children Organisation
HURIFO	Human Rights Focus (Ugandan NGO)
ICC	International Criminal Court
IOM	International Organisation for Migration (UN)
IDP	Internally Displaced Person
ISIS-WICCE	Women's International Cross Cultural Exchange
LRA	Lord's Resistance Army
MLC	Movement for the Liberation of Congo
MONUC	UN Mission in Congo (<i>Mission de l'Organisation des Nations Unies au Congo</i>)
OPCD	Office of Public Counsel for Defence (Registry, ICC)
OPCV	Office of Public Counsel for Victims (Registry, ICC)
OTP	Office of the Prosecutor
PTSD	Post Traumatic Stress Disorder
RCD	<i>Rassemblement Congolais pour la Démocratie</i> (Congolese Gathering for Democracy)
SCSL	Special Court of Sierra Leone
UPC	<i>Union Patriotique Congolais</i> (Union of Congolese Patriots – a Hema ethnic based armed group in Ituri region – led by Thomas Lubanga).
UNHCR	United Nations High Commissioner for Human Rights
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNICEF	United Nations Children's Fund
UPDF	Ugandan People's Defence Force (Museveni's government forces)
VPRS	Victims Participation and Reparations Section (Registry, ICC)
VWU	Victims and Witnesses and Unit (Registry, ICC)

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Annex 1: UN Guidelines on Justice in Matters involving Child Victims and Witnesses

I. Objectives

1. The present Guidelines on Justice for Child Victims and Witnesses of Crime set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles.
2. The Guidelines should be implemented in accordance with relevant national legislation and judicial procedures as well as take into consideration legal, social, economic, cultural and geographical conditions. However, States should constantly endeavour to overcome practical difficulties in the application of the Guidelines.
3. The Guidelines provide a practical framework to achieve the following objectives:
 - (a) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime and contribute to the implementation of the Convention on the Rights of the Child,⁴ by parties to that Convention;
 - (b) To assist Governments, international organizations, public agencies, non-governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime;
 - (c) To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;⁵
 - (d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime.
4. In implementing the Guidelines, each jurisdiction should ensure that adequate training, selection and procedures are put in place to protect and meet the special needs of child victims and witnesses of crime, where the nature of the victimization affects categories of children differently, such as sexual assault of children, especially girls.
5. The Guidelines cover a field in which knowledge and practice are growing and improving. They are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles.
6. The Guidelines could also be applied to processes in informal and customary systems of justice such as restorative justice and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

II. Special considerations

7. The Guidelines were developed:
 - (a) Cognizant that millions of children throughout the world suffer harm as a result of crime and abuse of power and that the rights of those children have not been adequately recognized and that they may suffer additional hardship when assisting in the justice process;
 - (b) Recognizing that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs;
 - (c) Recognizing that girls are particularly vulnerable and may face discrimination at all stages of the justice system;
 - (d) Reaffirming that every effort must be made to prevent victimization of children, including through implementation of the Guidelines for the Prevention of Crime;⁶
 - (e) Cognizant that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses;
 - (f) Recalling that the Convention on the Rights of the Child sets forth requirements and principles to secure effective recognition of the rights of children and that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance;
 - (g) Recalling international and regional initiatives that implement the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including the *Handbook on Justice for Victims* and the *Guide for Policy Makers on the Declaration of Basic Principles*, both issued by the United Nations Office for Drug Control and Crime Prevention in 1999;

- (h) Recognizing the efforts of the International Bureau for Children's Rights in laying the groundwork for the development of guidelines on justice for child victims and witnesses of crime;
- (i) Considering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimization and more supportive of the justice process;
- (j) Recalling that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused and convicted offenders;
- (k) Bearing in mind the variety of legal systems and traditions, and noting that crime is increasingly transnational in nature and that there is a need to ensure that child victims and witnesses of crime receive equivalent protection in all countries.

III. Principles

8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

- (a) *Dignity*. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;
- (b) *Non-discrimination*. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;
- (c) *Best interests of the child*. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
 - (i) *Protection*. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
 - (ii) *Harmonious development*. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;
- (d) *Right to participation*. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

IV. Definitions

9. Throughout these Guidelines, the following definitions apply:

- (a) "Child victims and witnesses" denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;
- (b) "Professionals" refers to persons who, within the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system and for whom these Guidelines are applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and, where appropriate, defence lawyers; diplomatic and consular staff; domestic violence programme staff; judges; court staff; law enforcement officials; medical and mental health professionals; and social workers;
- (c) "Justice process" encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice;
- (d) "Child-sensitive" denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.

VICTIMS, PERPETRATORS OR HEROES?

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socioeconomic condition and immigration or refugee status, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, *inter alia*:

- (a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;
- (b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;
- (c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;
- (d) The specific places and times of hearings and other relevant events;
- (e) The availability of protective measures;
- (f) The existing mechanisms for review of decisions affecting child victims and witnesses;
- (g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

- (a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;
- (b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

- (a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;
- (b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;
- (c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

24. Child victims and witnesses should receive assistance from support persons, such as child victim/ witness specialists, commencing at the initial report and continuing until such services are no longer required.

25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:

- (a) Child victim and witness specialists to address the child's special needs;
- (b) Support persons, including specialists and appropriate family members to accompany the child during testimony;
- (c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.

27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

- (a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;
- (b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;
- (c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;
- (d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

- (a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;
- (b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;
- (c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

- (a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;
- (b) Using court-ordered restraining orders supported by a registry system;
- (c) Ordering pre-trial detention of the accused and setting special “no contact” bail conditions;
- (d) Placing the accused under house arrest;
- (e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.

39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

XV. Implementation

40. Adequate training, education and information should be made available to professionals, working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes in order to protect and deal effectively and sensitively with child victims and witnesses.

41. Professionals should be trained to effectively protect and meet the needs of child victims and witnesses, including in specialized units and services.

42. This training should include:

- (a) Relevant human rights norms, standards and principles, including the rights of the child;
- (b) Principles and ethical duties of their office;
- (c) Signs and symptoms that indicate crimes against children;
- (d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;
- (e) Impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;
- (f) Special measures and techniques to assist child victims and witnesses in the justice process;
- (g) Cross-cultural and age-related linguistic, religious, social and gender issues;
- (h) Appropriate adult-child communication skills;
- (i) Interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;
- (j) Skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner;
- (k) Methods to protect and present evidence and to question child witnesses;
- (l) Roles of, and methods used by, professionals working with child victims and witnesses.

43. Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.

44. International cooperation should be enhanced between States and all sectors of society, both at the national and international levels, including mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.

45. Professionals should consider utilizing the present Guidelines as a basis for developing laws and written policies, standards and protocols aimed at assisting child victims and witnesses involved in the justice process.

46. Professionals should be enabled to periodically review and evaluate their role, together with other agencies in the justice process, in ensuring the protection of the rights of the child and the effective implementation of the present Guidelines.

ECOSOC Resolution 2005/20, 36th plenary meeting, 22 July 2005.

Annex 3: Map of Eastern Democratic Republic of Congo

