

# ADVANCING JUSTICE FOR CHILDREN:

## innovations to strengthen accountability for violations and crimes affecting children in conflict

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and crimes affecting children in conflict





## EXECUTIVE SUMMARY

Children are among the principal victims of violations of international human rights law and international humanitarian law, including those amounting to core international crimes under international law, such as, *inter alia*, war crimes, crimes against humanity and genocide. They also constitute half of the world's forcibly displaced population. The harm inflicted on children in war and other situations of mass violence is egregious. They suffer the full gamut of international crimes, including torture, sexual violence, enforced disappearance, intentional starvation, other inhumane acts, and indiscriminate attacks. They are vulnerable to recruitment and use as child soldiers, a moniker that contains within it a panoply of egregious violations and human rights abuses. Such abuses have a destructive impact on children's overall well-being, development and mental health.

Children benefit from protection under international human rights, humanitarian, and criminal law. However, while preventing, monitoring and responding to violations of children's rights in conflict have formed part of the United Nations' (UN) international peace and security agenda for over two decades, their plight has not received comprehensive attention from all UN fact-finding and investigative bodies and international criminal courts and tribunals. Impunity negatively affects children's right to development and the well-being and stability of communities they live in, and risks influencing negatively the adults they will become. It further affects children's right to a judicial remedy and reparations and strips them of an opportunity to participate in the judicial process.

In 2019, its centenary year, Save the Children launched its **Stop the War on Children** campaign to reassert the norms, standards, policy, practice and rules relating to the protection of children in conflict.<sup>1</sup> The three pillars of this campaign are centred around upholding standards and norms for the protection of children in conflict, holding perpetrators of violations and crimes to account,<sup>2</sup> and taking practical action to protect conflict-affected children and to enable their recovery. Against this background, Save

<sup>1</sup> Save the Children, '[Stop the War on Children](#)'.

<sup>2</sup> For ease of reference, the term "crimes affecting children" is used throughout this paper to denote both crimes *against* children that are constituted if the victim is a child (e.g. recruitment and use) and generic crimes against the civilian population that disproportionately *affect* children (e.g. attacks on hospitals).

the Children and the Oxford Programme on International Peace and Security at the Blavatnik School of Government's Institute for Ethics, Law, and Armed Conflict (ELAC) agreed to a partnership grounded in pillar two of Save the Children's new strategy, **holding perpetrators of violations and crimes affecting children to account**. The partnership aimed to generate the insight and analysis required to leverage much-needed change in the way this question is addressed by international criminal justice.

Drawing on extensive desk research and the insights of practitioners, academics, and activists working on these issues, we have sought to identify barriers which prevent perpetrators being held to account and meaningful and practical strategies and solutions to overcome or mitigate those barriers. **This Research Paper focuses on the investigation and documentation of violations and crimes affecting children, and on the decision to indict.**<sup>3</sup>

Section I of this Research Paper addresses the **most commonly identified barriers** to the effective investigation, documentation, and indictment of violations and crimes affecting children. Part A briefly addresses the importance of pursuing accountability for crimes and violations affecting children, as well as the **need for intersectional approaches** – and specifically gender and age-disaggregated analyses – in collecting and evaluating information and evidence for the purposes of investigation, documentation and criminal accountability. It is essential to **ensure that children are not rendered invisible by adult-centric approaches to accountability; that they are not 'un-situated';<sup>4</sup> and that they are not seen as a homogenous group**. Capturing the full breadth of their experiences is crucial, in order to understand the reasons why targeting children may be of strategic importance to perpetrators, as well as the intensity and severity of the harm children may suffer. Part B sets out the principal barriers to accountability identified by key experts and through our independent research, which are **attitudinal, financial and structural** and, in many cases, **mutually reinforcing**. An analysis of the approach taken by UN fact-finding and investigative bodies, and by international criminal courts and tribunals (hereafter referred to as 'accountability mechanisms') to these issues is contained at Annex I.

#### AMONG THE MAIN BARRIERS IDENTIFIED ARE:

##### Overarching and attitudinal barriers, such as:

- **The 'invisibilisation' of children** both in situations of war/protracted armed violence and in accountability processes; including a level of indifference pertaining to children's issues, linked in part to the conceptualisation of children as passive objects, lacking in agency and requiring protection;
- **The relative disempowerment of children, compounded by their legal disenfranchisement** and their lack of representation in political entities and civil society organisations;

<sup>3</sup> While the charges on which an accused will stand trial are subject to judicial confirmation, for ease of reference the term "to indict" is used in this Research Paper to denote a decision to prosecute. This paper does not address other relevant aspects of accountability such as trial proceedings, truth commissions, reparations, and domestic remedies and institutional reforms. Further, the specific situation of children as *perpetrators* of international crimes and other serious violations of international human rights and humanitarian law are also not discussed in this paper.

<sup>4</sup> Throughout this Research Paper, by 'un-situated' we mean not placed in the context of other identifiers (urban/rural; gender; ability; class; age) that inform the analysis and understanding of the experience of particular children in the particular context that is being documented.

- **Conditions on the ground**, which cannot, however, be solely remedied through the adoption of a child-competent approach;
- **The degree of discretion enjoyed by prosecutors** in deciding which charges to pursue, coupled with a **lack of prioritisation of the investigation and prosecution** of violations and crimes affecting children; and,
- **Limited access to the most probative evidence**, which is often quite limited for 'conduct' violations as compared to 'treatment' violations.

##### Structural barriers, such as:

- **Lack of buy-in by States**, compounded by a **lack of UN and civil society accountability-focussed constituency**, which results in a lack of sustained engagement and prioritisation of accountability for crimes against/affecting children in international fora, and inconsistent funding being provided to build and sustain the expertise needed to deliver such accountability;
- **Failure to sustainably and effectively mainstream child-competent approaches in investigation, documentation, and prosecution strategies** both by non-judicial and judicial accountability mechanisms, resulting in a tendency to see such accountability as something warranting additional, thus separate, consideration;
- **Conflation of investigating violations and crimes affecting children with interviewing children**, which is something accountability mechanisms often shy away from, for a range of reasons we identify;
- **Resource and bureaucratic constraints, and lack of timely and effective support**, which are not exclusive to accountability for crimes and violations affecting children, but rather linked to the design and operationalisation of *ad hoc* mechanisms (including, among others, drawn-out recruitment processes and other challenges in the 'start-up' phase of mandates, and the lack of standardised methodological and operational tools for information collection);
- **Lack of proper child-competent expertise**, or the fact that, where expertise is available, it is rarely specific to children or structurally ingrained within accountability mechanisms;
- **Silos and limited cooperation among actors**, including among accountability mechanisms, and between accountability mechanisms and other actors and groups conducting documentation on the ground; and,
- **Lack of outreach and engagement with families and communities**, which seriously limits the ability to relate and build trust with communities on the ground, and affects the information collection process.

In Section II, we analyse which lessons and solutions can be drawn from the pursuit of **accountability for sexual and gender-based violence** ('SGBV'). Like violations and crimes affecting children, accountability for SGBV has, historically, also been marginalised in international criminal law. However, its investigation has now become an important pillar of international justice. Of course, the documentation, investigation, and prosecution of violations and crimes affecting children raise particular challenges, not all of which are common to the documentation, investigation, and prosecution of SGBV. Further, accountability for SGBV has benefited from the support of a constituency which has yet to be fully formed when it comes to accountability for crimes/violations affecting children. In Part A of Section II, we trace the developments that, in recent years, allowed for SGBV crimes to become more of a focus for international justice. In Part B, we highlight which **common barriers** exist (or have existed) between accountability for SGBV and accountability for violations and crimes affecting children, and which **lessons could be**

**learned** from the halting progress towards SGBV justice. We also highlight **important differences** between SGBV crimes, and violations and crimes affecting children that ought to be considered, including, for example, the nature and strength of the forces and actors behind these changes.

In Section III, we turn to discussing potential strategies and solutions to overcoming the identified barriers to accountability for crimes and violations affecting children. In particular, in Part A of Section III, we analyse:

- **The need to build political backing** at the state and diplomatic levels to maintain focus on the issues, and open and sustain dedicated funding streams;
- **The need to create structures within the Office of the High Commissioner for Human Rights (OHCHR) to better support** the documentation and investigation of violations and crimes affecting children by non-judicial accountability mechanisms, including: by providing methodological and operational guidance to accountability mechanisms; by supporting the **development of a pool of expertise** in support of mechanisms; by creating a structure for the **fast deployment** of experts, including experts seconded from domestic jurisdictions; and by further enhancing cooperation with the International Criminal Court's Special Adviser on Children in and affected by Armed Conflict;
- The need, on the part of mandates themselves (both judicial and non-judicial), to **adopt specific policies/strategies**, including with regard to cooperation with relevant accountability actors, and to monitor and evaluate their implementation; and,
- The **need for better and more sustained outreach, witness protection, and psycho-social support** to enhance communication and cooperation with local actors and affected communities.

In Part B of Section III, we draw from the successes of domestic prosecutions in the Democratic Republic of the Congo (DRC), and particularly the *Kavumu* case, which we believe can inform our analysis and discussion on innovative strategies at the international level. In particular, we note:

- **The development of multidisciplinary partnerships with complementary expertise** to address the specific needs and rights of child victims, including but not limited to victims of sexual violence;
- **The building on training provided in a particular case through long-term mentoring**, which can have positive ripple effects on other cases in the jurisdiction;
- **The focus on ensuring that victims and their families remain central to the process** (including through effective outreach programmes), and that their informed consent is obtained at every stage;
- **Investment in building or participating in coalitions** that can collaborate and coordinate in relation to focused advocacy designed to draw attention and elicit sustained funding to support accountability for crimes against children;
- The building of partnerships and coalitions, whether engaged in on-the-ground work or higher-level advocacy, the centring of the problem, **a strong willingness to collaborate among stakeholders**, both national and international; and,
- **The building of relationships of trust** (including through, for example, the training and mentoring of those charged with investigations and prosecutions, together with informational empathetic outreach to victims and their families), which gave innovative strategies for tackling structural barriers a greater likelihood of success.

In light of the above analysis, in the final part of this Research Paper (Section IV), we set out **our recommendations** to States; UN bodies empowered to establish judicial

and non-judicial accountability mechanisms; all accountability mechanisms; entities (such as OHCHR and UN Women/Justice Rapid Response) which support accountability mechanisms through the provision of staff; and non-governmental and civil society organisations. In particular, we recommend:

- 1** That **States:**
  - a) **Invest political capital** in placing accountability for violations and crimes affecting children securely on the international agenda, including through consistently raising the need to strengthen such accountability in political and diplomatic fora, most prominently at the UN Security Council, and through ensuring that specific emphasis on addressing crimes against children (and related expertise) is included in the mandates of accountability mechanisms.
  - b) **Allocate funds, and advocate with other states, to support the consistent building and provision of expertise** in the investigation and documentation of conflict-related violations and crimes against children, including through the establishment/ backing of structures through which such expertise can be efficiently provided to judicial and non-judicial accountability mechanisms. This could include **dedicated funding for the creation of a roster or nexus of expertise** on the investigation of violations and crimes affecting children to be deployed into non-judicial and judicial accountability mechanisms;
  - c) **Advocate for an analytical review of UN entities** which have mandates relating in some manner to addressing violations and crimes against children, with the objective of determining how such mandates can best support the building and provision of relevant expertise and information beneficial to judicial and non-judicial accountability mechanisms;
  - d) **Make available domestic expertise** in the investigation and documentation of violations and crimes affecting children, including through secondments and loans to judicial and non-judicial accountability mechanisms;
  - e) **Enforce domestically incorporated international law** in relation to children's rights, and act to ensure domestic accountability for child rights violations, at all times ensuring that all internationally recognised fair trial rights are respected;
  - f) **Ratify the Convention on the Rights of the Child, the Optional Protocol on the Involvement of Children in Armed Conflict, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol of the Convention of the Rights of the Child on a Communication Procedure**, as measures to improve accountability for child rights under domestic and international human rights law.
- 2** That **UN bodies empowered to establish judicial and non-judicial accountability mechanisms**, such as the UN Security Council, UN Human Rights Council, and UN General Assembly:
  - a) Clearly **prioritise the investigation and documentation of violations and crimes affecting children** in accountability mechanism mandates and resolutions, including by adopting deliberate strategies, policies, and operational guidance to this end;
  - b) **Authorise budgets with dedicated funds for the provision of expertise** in the investigation and documentation of violations and crimes affecting children;
  - c) **Request specific reporting**, including through oral presentations, on mandates' progress in the investigation and documentation of violations and crimes affecting children.

### 3 That all **accountability mechanisms**, whether judicial or non-judicial in nature:

- a) **Develop and/or enhance staff capacity and competency** as a key means of ensuring that investigations are child-competent; that lessons learned and best practices stemming from local and international accountability efforts are efficiently and systematically compiled and shared; and that a child-centred analysis of crimes and violations is systematically integrated into accountability efforts;
- b) **Improve the recruitment of investigators with specific expertise on how to investigate crimes against children**, including engaging in active efforts to recruit from national jurisdictions, in order to capitalise on domestic criminal investigators' formal training and up-to-date experience interviewing children and ensure that they are all equipped with the relevant legal and investigative skillset, including skills to document and investigate of violations and crimes affecting children, and ensure that this expertise translates in child-competent approaches across all operational aspect of their work, including by requiring trainings by such experts for mechanisms staff;
- c) With specific reference to non-judicial accountability mechanisms, **ensure that staff have the necessary capacity in international human rights and criminal law**;
- d) **Ensure there are dedicated staff with specialist expertise** – whether in the form of a specific unit, in the general office structure, or as a Special Adviser – **embedded in the operational aspects of investigation** and documentation, including a greater involvement in periodic reviews of investigation plans and strategies and the related legal analysis, and to facilitate and promote a broad-based competence on addressing crimes against children throughout institutions;
- e) **Underscore that the ICC's Policy on Children, where relevant, can and should inform the approach** of the accountability mechanisms in respect of developing a child-competent approach to the investigation and analysis of international crimes affecting them;
- f) **Adopt thematic policies, accompanied by operational guidelines**, imposing stringent requirements on investigators and prosecutors with regard to the prioritisation of the investigation and documentation of violations and crimes against children;
- g) **Invest in effective outreach strategies** so that the mandates and activities of the mechanisms are understood at the local level;
- h) **Advocate for funds for (and where funds are available, ensure) adequate witness protection and psycho-social structures** as an integral component in ensuring a good understanding by the affected communities of the mandate and activities of accountability mechanisms and of the protection structures available to them;
- i) **Develop knowledge sharing channels among accountability mechanisms** including the creation of dedicated focal points to secure periodic meetings, foster exchange of knowledge and best practices between in-house experts, and ultimately capitalise on the lessons learned from the new strategies and policies developed by these bodies;
- j) Similarly, that **information and data that could assist the work of accountability mechanisms be shared by other UN actors and entities**, within the constraints imposed upon the latter by their own mandates.

### 4 That entities (such as OHCHR and UN Women /Justice Rapid Response) - which support accountability mechanisms through the provision of staff:

- a) **Continue to actively seek funding and support to enable the consistent building roster of individuals/staff with specific expertise** in the investigation and documentation of violations and crimes affecting children, with the objective that rostered individuals be immediately operational once a mandate is activated;
- b) Actively seek to **recruit relevant experts from national jurisdictions** on to the roster;
- c) **Develop or adopt internal child-competent standard operating procedures, methods**

**and operational guidelines that reflect best practices** for the investigation and documentation of violations and crimes affecting children;

- d) **Develop knowledge sharing channels among rostered experts** (and in the case of OHCHR between non-judicial accountability mechanisms for which OHCHR staff serve as the Secretariat).

### 5 That **non-governmental and civil society organisations**:

- a) **Support advocacy efforts for (and advocating with States to) provide sustainable funding streams** for the building and provision of expertise in the investigation and documentation of conflict-related violations and crimes affecting children, including through expert rosters;
- b) **Consistently raise the need to strengthen accountability** for violations and crimes affecting children in political and diplomatic fora, including but not limited to the UN Security Council, the UN General Assembly, and UN Human Rights Council, as well as in bilateral and multilateral meetings with States;
- c) **Work with States to ensure that UN entities** empowered to establish accountability mechanisms **explicitly prioritise the investigation and documentation** of violations and crimes affecting children in the accountability mechanisms' mandate and legal frameworks;
- d) **Support mechanisms' outreach strategies**, so that their mandates and activities are understood at the local level.

## ABBREVIATIONS USED IN THIS REPORT

Cols	Commissions of Inquiry
CDF	Civil Defence Force (Sierra Leone)
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
ELAC	Oxford Institute for Ethics, Law and Armed Conflict
FFM	Fact-finding Mission
Gaza Commission	United Nations Independent Commission of Inquiry on the 2014 Gaza conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IICI	Institute for International Criminal Investigations
IIIM	International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011
IIMM	Independent Investigative Mechanism for Myanmar
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
INGO	International non-governmental organisation
JRR	Justice Rapid Response
METS	Methodology Education and Training Section of the OHCHR
MRM	Monitoring and Reporting Mechanism on grave violations against children
Myanmar FFM	Independent International Fact-Finding Mission on Myanmar
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights

OTP	Office of The Prosecutor, International Criminal Court
PHR	Physicians for Human Rights
PTC	Pre-Trial Chamber, International Criminal Court
RRU	Rapid Response Unit of the Office of the High Commissioner for Human Rights
SCSL	Special Court for Sierra Leone
SGBCCU	Sexual and Gender-Based Violence & Crimes against Children Unit, UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant
SGBV	Sexual and Gender-Based Violence
SNHR	Syrian Network for Human Rights
South Sudan Commission	Commission on Human Rights in South Sudan
SRSR CAAC	Special Representative of the Secretary-General for Children and Armed Conflict
SRSR SVAC	Special Representative of the Secretary-General on Sexual Violence in Armed Conflict
Syria Commission	Independent International Commission of Inquiry on the Syrian Arab Republic
UN	United Nations
UNICEF	UN International Children's Emergency Fund
UNITAD	UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant
UNSC	UN Security Council



A portrait of Victoire\*, 10, in a camp in Ituri Province, Democratic Republic of Congo (DRC)  
Photograph: Hugh Kinsella Cunningham / Save the Children

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## BACKGROUND

In 2019, its centenary year, Save the Children launched its Stop the War on Children campaign to reassert the norms, standards, policy, practice, and rules relating to the protection of children in conflict.<sup>5</sup> The three pillars of this campaign are centred around upholding standards and norms for the protection of children in conflict, holding perpetrators of violations of international human rights law and international humanitarian law affecting children to account, including those amounting to core international crimes under international law,<sup>6</sup> and taking practical action to protect conflict-affected children, and to enable their recovery.

Against this background, Save the Children and the Oxford Programme on International Peace and Security at the Blavatnik School of Government's Institute for Ethics, Law, and Armed Conflict (ELAC) agreed to a partnership grounded in pillar two of Save the Children's new strategy – holding perpetrators of violations and crimes affecting children to account – to generate the insight and analysis required to leverage much-needed change in the way this question is addressed by international criminal justice.

ELAC is an interdisciplinary research Institute at Oxford University seeking to strengthen the laws, norms, and institutions that restrain, regulate, and prevent armed conflict. As part of this mission, ELAC has established a Programme on International Peace and Security to provide a space for research on the critical challenges facing the laws, norms, and institutions affecting the maintenance and enforcement of international peace and global security.

Both atrocity prevention and international justice are priority research topics for ELAC and the Programme. In particular, the Programme is spearheading new, ground-breaking research centred on the improvement of international investigations aimed at supporting criminal accountability for atrocity crimes. This report, which dovetails

<sup>5</sup> Save the Children, '[Stop the War on Children: Protecting children in 21st century conflict](#)', 2019.

<sup>6</sup> For ease of reference, the term "crimes affecting children" is used throughout this paper to denote both crimes against children that are constituted if the victim is a child (e.g. recruitment and use) and generic crimes against the civilian population that disproportionately affect children (e.g. attacks on hospitals).

this latter strand of research, focuses on the work of UN fact-finding and investigative bodies and international criminal courts and tribunals ('accountability mechanisms'). Specifically, we sought to **identify strategies and solutions to overcome barriers to the investigation, documentation, and indictment of violations and crimes affecting children in conflict and other situations of protracted armed violence, including war crimes, crimes against humanity and genocide.**<sup>7</sup> This report does not address other relevant aspects of accountability such as trial proceedings, truth commissions, reparations, and domestic remedies and institutional reforms. Further, the specific situation of children as *perpetrators* of international crimes and other serious violations of international human rights and humanitarian law will not be addressed in this report.

## FUNDING

This research was funded by Save the Children and supported with resources from the Oxford Programme on International Peace and Security and the Oxford Blavatnik School of Government.

## METHODOLOGY

### Research objectives

Against the background laid out in the introduction, our research objectives were to:

- 1) **Analyse the approach of select UN fact-finding and investigative bodies to the investigation and documentation of violations and crimes affecting children;**<sup>8</sup>
- 2) **Analyse the approach of prosecutors in international criminal courts and tribunals to the investigation and indictment of crimes affecting children;**<sup>9</sup>
- 3) **Map and analyse the common barriers to the effective investigation and documentation of violations and crimes affecting children for the purposes of accountability, including criminal investigations up to the indictment phase of trial;**
- 4) **Identify innovative solutions and strategies to overcome these barriers.**

### Research methods

This was a qualitative study with a mixed methods approach involving expert interviews, extensive desk research, consultations, and an online expert workshop.

Twenty-one key experts were interviewed, including academics, lawyers, investigators, and prosecutors familiar with the workings of UN fact-finding and investigative entities and international criminal courts and tribunals. We also interviewed representatives of international and local civil society organisations engaged in the investigation and documentation of crimes affecting children.

<sup>7</sup> This Research Paper focuses on the investigation and documentation of violations and crimes affecting children, and on the decision to indict. While the charges on which an accused will stand trial are subject to judicial confirmation, for ease of reference the term "to indict" is used in this Research Paper to denote a decision to prosecute.

<sup>8</sup> See Annex I, pp. 96-128.

<sup>9</sup> See Annex I, pp. 96-128.

Experts were selected for interviews in light of their ability to provide a range of diverse perspectives, including international and local insight, and expertise in the various stages of documentation, investigation, and indictment or confirmation of charges. Some, though not all, expert responses reflect their own views and not those of any institutions to which they may be affiliated. The sampling of key experts was not intended to be a comprehensive representation of *all* possible perspectives, but rather an overview of the main issues arising at the operational, structural, and strategic levels, as well as strategies and solutions to overcome them.

Interviews were conducted between 21 February and 29 April 2020. Interviews were audio-recorded, with interviewees' consent, and automatically transcribed using Otter Artificial Intelligence software.<sup>10</sup> Interviews were based on a semi-structured questionnaire, agreed by the University of Oxford and Save the Children.

Information was sought on a broad range of topics, including:

- Contextual information on the prevalence of violations and crimes affecting children in experts' countries or regions of focus;
- The scope and quality of investigation/documentation and/or prosecutorial efforts, and respondents' own role within such efforts, where relevant;
- Structural, attitudinal, and other barriers to the investigation/documentation of violations and crimes affecting children, as well as factors that bolstered or supported efforts to investigate and/or prosecute;
- Strategies or practices adopted to overcome or mitigate barriers and challenges to investigating and/or prosecuting violations and crimes affecting children;
- The link, if any, between investigation/documentation efforts and criminal investigations up to the indictment phase of trial, or the confirmation of charges;
- Lessons that could be learned from the halting progress towards accountability for sexual and gender-based violence and crimes;
- Recommendations for further areas of research.

Extensive desk research was also conducted. All of the reports of the selected UN mechanisms were analysed, together with relevant reports of the UN Secretary-General and of the Special Representatives of the Secretary General on Children and Armed Conflict (SRSG CAAC) and on Sexual Violence in Armed Conflict (SRSG SVAC), alongside applicable UN policy documents and guidelines, including on human rights investigations and monitoring. Various academic textbooks and articles related to violations and crimes affecting children were also consulted. Relevant indictments and cases of international criminal courts and tribunals were also analysed, together with any available policies concerning children. For a full list of the sources considered, see the Bibliography at Annex II.

In addition, the University of Oxford and Save the Children organised a technical workshop on 28 and 29 September 2020, with the participation of additional experts. At the workshop, which was held online and under Chatham House rules, experts provided input on the current landscape of accountability for crimes and violations affecting children in armed conflicts, including existing barriers; as well as on good practices and positive examples of accountability, both current and past. Experts also contributed to brainstorming on: the changes that would need to occur at the operational, strategic, and institutional levels to ensure that child-centred policies are included in investigative and accountability mandates; the development and strengthening of child-sensitive procedural

<sup>10</sup> Automatically generated transcripts then went through a process of manual verification and corrections, where errors had been made, for example, due to software being challenged by accents.

frameworks *within* accountability mechanisms (including relevant tools, resources, skills, and sensitivity to engage with children); and better strategies to bolster and energise the child rights constituency around issues of accountability for crimes and violations affecting children.

Experts invited to the workshop were subsequently given the opportunity to provide written feedback on the interim report, which has been taken into account by the authors. Finally, all experts who had consented to be identified and quoted had the opportunity to review and approve the quotes they provided, for accuracy and also how they were being contextualised in the report. The list of experts that contributed to this research, whether at the workshop, in writing, or via interviews, can be found on page 21.

## Research ethics approval

This research project was considered by the Blavatnik School of Government's Departmental Research Ethics Committee, in accordance with the procedures laid down by the University of Oxford for ethical approval of all research involving human participants. It received Research Ethics Approval on 21 February 2020, (Reference number: SSD/CUREC1A/BSG\_C1A-20-07).

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The key experts consulted for this research are listed below. The experts provided their views in a personal capacity, and these do not necessarily represent the views of their respective organisations.

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## INTRODUCTION

1. Children are among the principal victims of violations of international human rights law and international humanitarian law, including those amounting to core international crimes under international law, such as, *inter alia*, war crimes, crimes against humanity and genocide. They also constitute half of the world's forcibly displaced population.
2. The harm inflicted on children in armed conflict and other situations of mass violence is egregious; their suffering takes many forms. Children are killed and maimed in indiscriminate onslaughts against civilian populations and when civilian objects, in particular schools and hospitals, are destroyed. Owing to their unique vulnerability related to their age and capacity, countless children are targets of horrific acts of violence, including rape, sexual slavery, unlawful detention, abduction, disappearance and torture. Images of children used by parties to conflict as soldiers or in support functions have become ubiquitous in modern warfare. Longer-term, exposure to armed conflict, insecurity and violence may have a destructive impact on children's overall well-being, development, and mental health.
3. Children benefit from protections under international human rights, humanitarian, and criminal law, as laid out in the UN Convention on the Rights of the Child and a number of other international instruments. However, while preventing, monitoring and responding to violations of children's rights in conflict has formed part of the UN international peace and security agenda for over two decades, their plight has not received sustained attention from UN fact-finding and investigative bodies or from international criminal courts and tribunals. While the primary responsibility to investigate and prosecute violations and crimes affecting children lies with States,<sup>11</sup> in situations of armed conflict or other volatile environments experiencing protracted armed violence, national authorities might be unwilling or unable to prevent and remedy violations and crimes affecting children, and to hold perpetrators to account. This lack of accountability perpetuates impunity, weakens the rule of law, and

<sup>11</sup> For ease of reference, the term "crimes affecting children" is used throughout this paper to denote both crimes against children that are constituted if the victim is a child (e.g. recruitment and use) and generic crimes against the civilian population that disproportionately affect children (e.g. attacks on hospitals).

undermines the prospects of long-term peace and stability. Impunity negatively affects children's right to development and the well-being and stability of communities they live in, and risks influencing negatively the adults they will become. It further affects children's right to a judicial remedy and reparations and strips them of an opportunity to participate in the judicial process.

4. Despite the publication of Graça Machel's landmark 1996 study on the impact of war on children,<sup>12</sup> and considerable advocacy and campaigning efforts by civil society and international organisations, the urgent need to strengthen accountability for violations and crimes affecting children, and specifically to address the responsibility of perpetrators, has not yet been firmly or sufficiently seized by a State or States willing to push the issue forward. Consequently, there has been limited advocacy, coalition-building, or funding directed towards this issue. Additionally, most UN agencies and civil society organisations working on children's rights have a mixed or exclusively humanitarian mandate, the fulfilment of which depends on their continued ability to access affected communities. In turn, this means that there is no accountability-focused constituency driving to ensure that international documentation and investigation entities and international criminal courts and tribunals have the resources and expertise to effectively address violations and crimes affecting children.
5. International investigative or fact-finding missions or mechanisms, and international courts and tribunals (most often mandated and supported by the UN) constitute the first, and sometimes only, attempt to lay the foundations for justice for children. Through this research, we seek to identify the efforts undertaken by these accountability mechanisms to respond to violations and crimes affecting children. We shed light on the many barriers to the effective investigation, documentation, and indictment of such violations and crimes. These are attitudinal, financial, and structural, and, in many cases, mutually reinforcing.
6. In addition, we analyse the innovative strategies underpinning advances to reduce the impunity gap for violations and crimes of sexual and gender-based violence and consider what lessons can be learned from the gender justice movement.
7. Finally, we highlight best practices stemming from the domestic efforts in the Democratic Republic of the Congo, a country that has become the epicentre of innovative approaches to the investigation and prosecutions of international crimes in national courts, particularly with regard to conflict-related sexual violence against children.
8. While there are no easy answers, this Research Paper seeks to highlight potential solutions – particularly for States, accountability mechanisms,<sup>13</sup> the UN system, and non-governmental organisations – and makes recommendations on how to overcome and navigate some of these barriers and improve the prospects for accountability and justice.

<sup>12</sup> UN General Assembly, *'Impact of Armed Conflict on Children, United Nations: Report of the Secretary General, Ms Graça Machel submitted pursuant to General Assembly resolution 48/157'*, 26 August 1996, UNGAOR 51st Session UN DOC A/51/306/Add.1 (the Machel Report).

<sup>13</sup> While this Research Paper does not address the challenges faced, and solutions developed, by *all* actors of the accountability chain (e.g. the judiciary, outreach staff) issues affecting the activities and operations of these actors will be highlighted, where relevant.

## SECTION I.

### COMMONLY IDENTIFIED BARRIERS TO THE INVESTIGATION, DOCUMENTATION AND INDICTMENT OF VIOLATIONS AND CRIMES AFFECTING CHILDREN

9. This Section addresses the most commonly identified barriers to the effective investigation, documentation and indictment of violations and crimes affecting children. It is divided into two parts. Part A briefly addresses the importance of pursuing accountability for crimes and violations affecting children, as well as the need for intersectional approaches to collecting and evaluating information and evidence for the purposes of investigation/documentation and criminal accountability, and the need for specifically gender- and age-disaggregated analyses. Part B sets out the principal barriers to accountability identified by key experts and through our independent research, which are **attitudinal, financial and structural** and, in many cases, **mutually reinforcing**. An analysis of the approach taken by UN fact-finding and investigative bodies, and international criminal courts and tribunals (hereafter referred to as 'accountability mechanisms') to these issues is contained at Annex I.

### PART A. CONTEXT

#### Violations and crimes affecting children

10. Children are disproportionately affected by war and other situations of mass violence. At the time of writing, 415 million of the world's children, one in six, are living in the midst of armed conflict. Of these, 149 million live in 'high intensity' conflict zones, that is conflict zones with more than 1,000 battle-related deaths per year.<sup>14</sup>
11. Preventing, monitoring, and responding to violations of children's rights, during armed conflict in particular, has formed part of the UN Security Council's international peace and security agenda for over two decades,<sup>15</sup> since the publication of Graça Machel's ground-breaking 1996 study on the impact of armed conflict on children.<sup>16</sup> The Machel Report addressed the enforcement of standards and the mechanisms for monitoring conflict-related violations against children, noting that "an effective international system for the protection of children must be based on the accountability of governments and other actors. This, in turn, requires prompt, efficient, and objective monitoring".<sup>17</sup> One of the key steps taken by the Security Council in that regard was the creation, in 2005, of a Monitoring and Reporting Mechanism (MRM) to gather information on 'grave violations' against children during armed conflict.<sup>18</sup>

<sup>14</sup> Save the Children, *Stop the War on Children 2020: Gender Matters*, 2020, p. 10.

<sup>15</sup> UN Security Council *S/RES/1261 (1999)* 30 August 1999; see also: *S/RES/1314 (2000)*, 11 August 2000; *S/RES/1539 (2004)*, 22 April 2004; *S/RES/1998 (2011)*, 12 July 2011.

<sup>16</sup> *Supra* note 12.

<sup>17</sup> Machel Report, *supra* note 4, para. 235.

<sup>18</sup> See UN Security Council *S/RES/1539 (2004)*, *S/RES/1612 (2005)*, 26 July 2005.

12. The **six grave violations**, identified by the UN Secretary General on the basis of their particularly egregious nature, the severity of their consequences for children, and their suitability for monitoring and reporting are: (i) killing and maiming; (ii) the recruitment or use of children; (iii) attacks on schools or hospitals; (iv) rape or other forms of sexual violence; (v) child abduction; and (vi) the denial of humanitarian access. Each of the six grave violations can constitute breaches of international human rights and humanitarian law, and may, under certain circumstances, attract individual criminal responsibility.<sup>19</sup> In 2019, more than 25,000 grave violations were verified by the MRM in 19 country situations.<sup>20</sup>

13. As underlined by Graça Machel:

War violates the rights of every child: the right to life, the right to be with family and community, the right to health, the right to development of personality and the right to be nurtured and protected. Many of today's conflicts last the length of a "childhood", meaning that from birth to early adulthood, children will experience multiple and accumulative assaults. Disrupting the social networks and primary relationships that support children's physical, emotional, moral, cognitive and social development in this way, and for this duration, can have profound physical and psychological implications.<sup>21</sup>

14. The Security Council has underscored "the responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children", and the need "for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity".<sup>22</sup> The UN Secretary General has recommended that post-conflict justice and truth-seeking mechanisms "pay systematic attention to the full range of children's war-time experiences".<sup>23</sup>

15. However, and despite their magnitude, frequency, and devastating impact, violations and crimes affecting children have not received comprehensive attention from UN fact-finding and investigative bodies or from most international criminal courts and tribunals.<sup>24</sup> This lack of attention weakens the rule of law; children, like

**Violations and crimes affecting children have not received comprehensive attention from UN fact-finding and investigative bodies or from most international criminal courts and tribunals**

<sup>19</sup> See generally, Office of the Special Representative for Children and Armed Conflict, *'Working Paper No.1- The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation'*, November 2013.

<sup>20</sup> UN General Assembly, UN Security Council, *'Children and armed conflict, Report of the Secretary General'*, A/74/845-S/2020/525, 9 June 2020.

<sup>21</sup> Machel report, para. 30.

<sup>22</sup> UN Security Council, S/RES/1998 (2011), 12 July 2011; see also, S/RES/1882 (2009), 4 August 2009, S/RES/1379 (2001), 20 November 2001, para. 9.

<sup>23</sup> UN Security Council, UN General Assembly, *'Children and armed conflict- Report of the Secretary General'*, A/56/342-S/2001/852, 7 September 2001, action point 20, p. 15.

<sup>24</sup> Dr Alison Bisset, *'Children in transitional justice processes - still sidelined?'* in 'Gender and War, International and Transitional Justice Perspectives', Solange Mouthan and Olga Jurasz (eds.), (Intersentia, 2019); Cécile Aptel, *'International Criminal Justice and Child Protection'* in 'Children and Transitional Justice, Truth-Telling, Accountability and Reconciliation, Sharanjeet Parmar, Mindy Jane Roseman et al (eds), (UNICEF, 2010).

adults, have the right to an effective remedy<sup>25</sup> in respect of gross violations of international human rights law and/or international humanitarian law.<sup>26</sup> Children also have a right to be heard in matters affecting them, and for their views to be given due weight in accordance with their age and maturity.<sup>27</sup> States bear primary responsibility to ensure the right to an effective remedy, but accountability mechanisms can and should do more to raise the visibility of these violations and crimes, especially since these mechanisms often provide the first and only opportunity for effective documentation and investigation. Further, in addressing violations and crimes affecting children, accountability mechanisms should take stock of best practices and lessons learned in terms of child participation in order to ensure that where children are taking part in proceedings, they are doing so in the safest way possible, and in accordance with their best interests.

16. Failing to address violations and crimes affecting children undermines long-term peace and stability,<sup>28</sup> both of which are essential to the safety and development of children. In many conflict-affected and post-conflict countries, children and young people make up over half of the population.<sup>29</sup> **Along with adult members of society, they will have suffered violence; however, children's exposure to war and violence is more likely to have far-reaching and long-term adverse consequences on their ability to access their rights, and on their overall development. In particular, the conditions they experience as children will heavily affect their physical, mental, and psychological development.**<sup>30</sup>

17. Children's development may also be negatively affected if they lack effective access to remedies. More so than adults, children, as the future generation, will inherit post-conflict agreements and initiatives. They must therefore not be excluded from the process of developing those initiatives:

If you exclude children [...] you're only documenting part of the truth. And if you have a population where a massive percentage of that population is made up of what are essentially children, then you are really losing

<sup>25</sup> Provisions on the right to a remedy for victims of violations of international human rights law are found, *inter alia*, in Article 8 of the 1948 Universal Declaration of Human Rights, Article 2 of the 1966 International Covenant on Civil and Political Rights; Article 14 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 39 of the 1989 Convention on the Rights of the Child. The obligation to make reparation in case of violations of international humanitarian law is reflected in Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and article 91 Protocol I, and is part of customary international law applicable to non-international armed conflict. Article 75 of the Rome Statute for the International Criminal Court (Rome Statute) also incorporates the right to reparation of victims of crimes under the jurisdiction of the Court; see also UN General Assembly, A/RES/60/147, 21 March 2006 (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law).

<sup>26</sup> Sources of the legal protection of children in conflict include: UN Convention on the Rights of the Child (1989), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000); Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. For an overview of the legal framework, see International Committee of the Red Cross, Advisory Service on International Humanitarian Law, *'Legal Protection of Children in Armed Conflict'*, 2003; Shaheed Fatima QC, *'Legal Sources, Structure and Accountability Mechanisms'*, in *Protecting Children in Armed Conflict* (Hart, 2018).

<sup>27</sup> Art. 12 of the CRC.

<sup>28</sup> No Peace Without Justice, UNICEF Innocenti Research Centre, *'International Criminal Justice and Children'*, 2002, p. 32; UN Security Council, *'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'*, Report of the Secretary General, S/2004/616, 23 August 2004.

<sup>29</sup> Dr Alison Bisset, *'Children in transitional justice processes- still sidelined?'* p. 262.

<sup>30</sup> No Peace Without Justice, UNICEF Innocenti Research Centre, *'International Criminal Justice and Children'*, p.31; Dr Alison Bisset, *'Children in transitional justice processes- still sidelined?'* p. 264; International Centre for Transitional Justice, Cécile Aptel and Virginie Ladisch, *'Through a new lens: a child-sensitive approach to transitional justice'*, August 2011. Save the Children, *'Stop the War on Children'*, 2019, pp. 22-27.

a significant component of the truth, that is lost from the account of the past. So, you are essentially building an incomplete account. [...] If children are excluded from that initial truth-telling, truth-seeking process, then that aspect of the truth is not fed forward. Consequently, they become excluded from reparations packages, which are often built around what is found in truth-seeking, and from legislative reform.<sup>31</sup>

18. Children should therefore be a central focus of international efforts to investigate, document, and indict international crimes and violations in order to give effect to the legal standards designed for their protection, to combat impunity, and to enhance the prospects of long-term peace and a stability for all. However, and as described in Annex I, **in practice accountability mechanisms have hitherto been adult-centric, and have largely failed to prioritise child-competent approaches to investigations and documentation.** Consequently, perpetrators have rarely been brought to justice, and children's experiences of war and armed violence have either been eclipsed or reduced to child soldiering and sexual violence.

## Approaches to investigation and documentation: the importance of an intersectional analysis<sup>32</sup>

19. Children, like all other social groups, differ from each other in terms of age, gender, race, socio-economic status, and other conditions. While all children suffer in war and will be harmed by virtually any violation of their rights (whether it is being denied access to healthcare, humanitarian assistance or education, or being forcibly recruited into an armed group, abducted or subjected to sexual violence),<sup>33</sup> it is important to recognise the diversity of children's lived experiences, and the differential impact of armed violence based on their personal characteristics, including their gender and age.<sup>34</sup> Such an analysis is necessary in order to meaningfully **understand the intersectional and multi-dimensional reasons why targeting children may be of strategic importance to perpetrators, as well as the intensity and severity of the harm children may suffer.**<sup>35</sup>
20. Further, acknowledging that children are not a homogenous group is key in order to develop appropriate and safe avenues of engagement with them. For example, the particular characteristics of a potential child victim or witness will inform decisions around whether and how to interview them, and how the informed consent of their parent or legal guardian should be secured; these characteristics will also be relevant to the assessment of a child's ability to recall events, as well as the reliability and weight of the information and evidence the child provides.

<sup>31</sup> Interview with Dr Alison Bisset, 27 February 2020.

<sup>32</sup> Intersectional approaches to investigation and documentation are described by OHCHR as follows: *The intensity or severity of discrimination that individuals may face depends on the number and interplay of their personal characteristics that generate discrimination against them. The interplay of identities linked to gender, ethnicity, religion, race, sexual orientation, disability, national origin, age, etc. results in experiences of exclusion and disadvantage that are unique to those with multiple identities. This is known as multiple discrimination. The interplay of different grounds of discrimination is analysed by intersectional analysis, which acknowledges that human rights violations rarely occur merely on the grounds of gender but are often the result of the intersection of age, ethnicity, national origin, sexual orientation, class, health status, etc. with gender* (OHCHR, 'Chapter 15: Integrating Gender into Human Rights Monitoring', *Manual on Human Rights Monitoring*, 2011, p. 6). This section addresses gender and age only.

<sup>33</sup> OHCHR, *Chapter XII: Children's Rights*, Training Manual for Human Rights Monitoring, 2001.

<sup>34</sup> Save the Children, 'Stop the War on Children', 2019, pp. 22, 27.

<sup>35</sup> Moreover, in some circumstances, age is also material to determining whether a criminal offence has been disclosed, given that certain international crimes (e.g. forcible recruitment) are only constituted when the victim is a minor. See ICC OTP Policy on Children, [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF), e.g.: pp. 14 [24], 16 [30], 19 [37], 24 [51].

21. However, and despite the fact that the foundational instruments of accountability mechanisms increasingly explicitly refer to children,<sup>36</sup> and that a child's age and vulnerability may be taken into account by investigators, prosecutors and trial judges, in practice these mechanisms have largely failed to capture the breadth of children's experiences in war and mass atrocity settings based on their evolving capacities and competencies, and the specific and differentiated ways in which they are victimised. As a result, **children are frequently 'un-situated'<sup>37</sup> and with their age not identified, their intersecting identities unspecified, and their voices erased:**

In an attack against the civilian population, not understanding what has happened to children is almost inadvertently not recognising the existence of a large part of the attack. [...] **It's not about adding children back in. We have to enter with the mentality that children are there.** [...] You could tell any of these past stories through the eyes of a child, and it would be a valid 'crimes against humanity' case or a valid 'genocide' case. You could almost drop all the adults. That would be a radical way of looking at it. Evidentiary wise, if you had good witnesses, the case could be told just from what happened to the children. [To prove] an attack against the civilian population, [investigating] merely what happened to the children would almost suffice [...] But we never look at it that way. **We look at that [as if] the children are invisible.**<sup>38</sup> (Emphasis ours).

22. Without an effective **gender- and age-disaggregated analysis**, the experiences of children risk being made invisible, or being reduced to instances of victimisation which, in turn, perpetuate narratives that downplay their agency and cast children as wholly passive agents in need of protection.<sup>39</sup>
23. Whilst it is beyond the scope of this paper to exhaustively detail the gendered impacts of conflict on children, the following examples are illustrative. First, boys are killed and maimed in greater numbers than girls, comprising 44% of the 12,125 verified cases of children being killed or maimed reported by the MRM in 2018, compared to 17% which were recorded as girls (for 39% the sex was not documented).<sup>40</sup> This is because boys are often allowed greater freedom of movement than girls, and spend more time outside in the community, which increases their exposure to cross-fire, unexploded ordnance, and explosive remnants of war.<sup>41</sup> Adolescent boys, in particular, are more likely to be perceived as posing a security threat, and are at higher risk of detention and torture or ill-treatment, or of being targeted for recruitment.<sup>42</sup> Second, while attacks on education are devastating for all children, boys and girls often face different, gendered risks. Girl students and female educators may be specifically targeted by groups who oppose girls' education on ideological grounds. Many girls

<sup>36</sup> See Annex I, pp. 96-128.

<sup>37</sup> By 'un-situated', we mean not placed in the context of other identifiers (urban/ rural; gender; ability; class; age) that inform the analysis and understanding of the experience of particular children in the particular context that is being documented.

<sup>38</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>39</sup> See generally, OHCHR, '*Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice*', 2018; '*A Human Rights-Based Approach to Data: Leaving No One Behind in the 2030 Agenda for Sustainable Development*', 'Chapter 15: Integrating Gender into Human Rights Monitoring', *Manual on Human Rights Monitoring*, 2011; Geneva Academy, '*Disability and Armed Conflict*', Academic Briefing No. 14, 2019, p. 74; UN Committee on the Rights of the Child, '*General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*', 27 November 2003, CRC/GC/2003/5, para. 48.

<sup>40</sup> Save the Children, '*Stop the War on Children 2020: Gender Matters*', p. 20.

<sup>41</sup> Save the Children, '*Stop the War on Children 2020: Gender Matters*', p. 20.

<sup>42</sup> E.g. in Syria, Human Rights Council, '*"They have erased the dreams of my children": children's rights in the Syrian Arab Republic*', A/HRC/43/CRP.6, 13 January 2020.

who are forced to interrupt or end their education prematurely are at risk of forced early marriage, often framed by the family as a way of 'protecting' the child.<sup>43</sup>

24. Moreover, in many armed conflicts and situations of protracted armed violence across the world, children are often deliberately targeted.<sup>44</sup> As such, an age and gender-disaggregated analysis can be key to evincing and understanding the motivations of perpetrators and ensure justice for the victims. Recounting her experiences as a prosecutor at the Special Court for Sierra Leone (SCSL), Shyamala Alagendra explained how, in one case, investigators and prosecutors failed to expressly consider the potential nexus between the age of rape victims (who were 13 and 14), and the intent of those who had targeted them, potentially resulting in an incomplete picture of the narrative, and an overly narrow indictment:

I did not really specifically focus on them [children] as a distinct category, but now when I look back, I feel that **it was a lost opportunity to actually understand that children were not really incidental victims of crimes, but they were in fact targeted.** We lost the chance to recognise that, and beyond that to ask why were they targeted. [...] Was there an impact, that of committing a crime against the child in front of her parents in a particular community? Was that a separate act of terrorising them? What were the perpetrators trying to achieve? Why were they targeted? Why were children being raped or killed in front of his or her parents? **We lost that opportunity to understand some of the policies behind crimes** that were committed. And secondly, I also feel that because we did not give them that distinct category of being a group of victims of their own, we **did not address the special harm that was caused to them** by the crimes that were committed and how they had been impacted.<sup>45</sup> **(Emphasis ours).**

25. Owing to some of the barriers identified below, these factors are not always fully captured by accountability efforts, even when violations and crimes affecting children are documented and investigated.

## PART B. BARRIERS

26. There are **multiple barriers** to the documentation, investigation, and indictment of violations and crimes affecting children. These barriers are **attitudinal, financial and structural** and, in many cases, **mutually reinforcing**. These include, among others, the absence of a State and/or UN and/or civil society driven constituency focused on accountability; the failure to mainstream child-competent approaches to investigation and documentation; the complexities and ethical dilemmas around interviewing children and corresponding lack of expertise at the international level; resource constraints; and challenges to effective knowledge and expertise sharing, cooperation and coordination, among key stakeholders.
27. Nevertheless, three critical considerations must be borne in mind, when evaluating the track record of accountability mechanisms.

<sup>43</sup> See generally, Global Coalition to Protect Education from Attack, *'It is very painful to talk about – Impact of attacks on education on women and girls'*, November 2019; Solange Mouthaan, 'Children and Armed Conflict- the Pitfalls of a 'One Size Fits All' approach', p. 130.

<sup>44</sup> Cecilia Jacob, 'R2P and the Prevention of Mass Atrocities: A child-centric approach', in *Children and the Responsibility to Protect*, Bina D'Costa and Luke Glanville (eds), (Brill Nijhoff, 2019), pp. 78-83.

<sup>45</sup> Interview with Shyamala Alagendra, 13 March 2020.

## Overarching barriers

28. Investigating and **prosecuting international crimes is an exceptionally challenging task**, regardless of the age of the victim. Some obstacles are due to a lack of personal<sup>46</sup> or territorial jurisdiction;<sup>47</sup> others arise out of **structural conditions on the ground**, and cannot be solely remedied through the adoption of a child-competent approach. For example, in order to prosecute the recruitment and use of child soldiers, it is necessary to obtain evidence of the age of an alleged victim. That evidence is not always available. In the DRC investigations at the International Criminal Court, for example:

[It was very difficult] to prove the age of children in a context where there is absolutely **no documentation about age, any sort of documentation.** I am not talking about an ID, even schools ledger, civil registry documents, parents' documents. In a certain context, age was not being celebrated. Your birthday is not as important as in other places. So, there's no opportunity for parents to obtain any reliable document about the age of their children [...] In terms of also where those documents could be obtained (schools, churches, hospitals, civil registry) there was absolutely nothing. What we found most often was that the data was completely inconsistent. There were 15 different data sources [concerning children's age]. Not off by one day but also in terms of years, which, for [charging] conscription is critical. Even a year can make a huge difference. Not for other types of crimes, but in terms of that particular crime we were pursuing in the Lubanga case, it became very complicated over time. No one really could provide any reliable data. Then, we resorted to forensic examination but it was too late. **We never found a solution, to be honest, to that. We cannot fix such structural problems.**<sup>48</sup> **(Emphasis ours)**

29. Age-disaggregated analyses, meaning the analyses of crimes and their effect on children based on their age, require a significant investment of time and resources. It has been pointed out that in light of the duration of the mandates of non-judicial accountability mechanisms, and the investment needed to undertake such an analysis, the 'return on investment' – should these bodies include such analysis in their reports – may be limited, unless underlying data can subsequently be shared with judicial accountability mechanisms susceptible of relying on the reports.<sup>49</sup>

<sup>46</sup> For example, Rule 28 of the ICTY's Rules of Procedure and Evidence (as amended) assigned judges the responsibility to ascertain whether "the indictment, *prima facie*, concentrates on *the most senior leaders* suspected of being *most responsible* for crimes within the jurisdiction of the Tribunal", failing which the indictment would not be confirmed (ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015). This amendment was introduced in the wake of UN Security Council Resolution 1503 (S/RES/1503/2003, 28 August 2003) and Resolution 1534 (S/RES/1534/2004, 26 March 2004), which concerned the ICTY's completion strategy.

<sup>47</sup> For example, Syria, Myanmar, Iraq and South Sudan are not, at the time of writing, parties to the Rome Statute.

<sup>48</sup> Interview with Alice Zago, 28 February 2020. The Myanmar Fact-finding Mission faced a similar issue: '*I do remember that it was a bit arbitrary in the camps, because 18 didn't really mean anything. And 'children' is a much more fluid concept among that population. And also, there wasn't great documentation. And they weren't allowed to have birth certificates; none of them had IDs. A lot of people didn't know how old they were.*' (Interview with Kate Gibson, 2 March 2020).

<sup>49</sup> Interview with Alice Zago, 21 April 2020.

30. **International prosecutors<sup>50</sup> enjoy varying degrees of discretion in choosing whether or not to initiate investigations and, thereafter, even if the evidence collected discloses a *prima facie* case, on whether to prosecute and on what charges.<sup>51</sup>** The exercise of prosecutorial discretion is both necessary and desirable for a number of reasons including, amongst others, the vast number of crimes and suspects potentially falling within their jurisdiction, and the finite resources at their disposal, as well as the limitations placed upon prosecutors by their governing frameworks, and the exercise of judicial oversight over decisions to prosecute.<sup>52</sup>
31. For example, with regard to the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR),<sup>53</sup> in 2004, the UN Security Council passed a resolution calling on the tribunals to indict only “the most senior leaders suspected of being the most responsible”.<sup>54</sup> The Office of the Prosecutor (OTP) at the ICTR<sup>55</sup> reviewed its caseload and adopted a policy for selecting cases by reference, among other things, to the nature of the crime (with specific crimes being singled out for prosecution, including SGBV crimes), the role played by each perpetrator, and with a view to ensuring accountability for crimes perpetrated across the geographic spread of the country, or in specific locations.<sup>56</sup> The impact of crimes on – and the age of – victims were not among the expressly identified criteria. The Statute of the SCSL specifically limited the personal jurisdiction of the Court – and thus the power of the Prosecutor – to the investigation and prosecution of persons who bore “the greatest responsibility” for crimes.<sup>57</sup>

32. At the ICC, the Prosecutor, in conducting preliminary examinations and deciding whether or not to open a formal investigation,<sup>58</sup> is statutorily required to consider whether: there is a “reasonable basis” to believe that a crime has been or is being committed; the crime falls within the jurisdiction of the court; the case is admissible under Article 17 of the Rome Statute based on the gravity of the crime, including its nature and impact;<sup>59</sup> the interests of victims; and whether proceeding with an investigation “would not serve the interests of justice”.<sup>60</sup> If, on investigation, the Prosecutor decides to select one or more cases for prosecution, application may be made to the Pre-Trial Chamber (PTC) for a warrant of arrest or summons to appear. In either case, the prosecution must satisfy the Chamber that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.<sup>61</sup> The charges which the Prosecutor intends to pursue must also be approved by judges. In order for the charges to be confirmed, and the case to proceed to trial, the PTC must be satisfied that “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.<sup>62</sup>
33. The ICC OTP issued a Policy Paper in 2016 which identified considerations guiding the exercise of prosecutorial discretion in the selection and prioritisation of cases for investigation and prosecution. Key factors identified for the selection of cases are: the gravity of crimes, including assessments of their nature and impact on victims; the degree of responsibility of alleged perpetrators; and the representativeness of charges, **with a focus on under-prosecuted crimes such as crimes against or affecting children.**<sup>63</sup> With regard to the prioritisation of cases, a number of factors are taken into account “to ensure that the Office focuses on cases in which it appears that it can conduct an effective and successful investigation **leading to a prosecution with a reasonable prospect of conviction**”.<sup>64</sup> These factors include the quantity and quality of the available incriminating and exonerating evidence; the prospects of obtaining additional evidence, and any risks to its degradation; the OTP’s capacity to effectively conduct the necessary investigations within a reasonable period of time, in light of the security situation; the Court’s ability to protect persons from risks that might arise from their cooperation with the Office; and the potential to secure the appearance of suspects before the Court, either by arrest and surrender, or pursuant to a summons.<sup>65</sup>
34. In light of the foregoing, even where an investigation reveals *prima facie* evidence of crimes affecting children, prosecutors retain a discretion in deciding whether to select a case for prosecution and proffer charges.

50 It is noted however that the Charters of the Nuremberg and Tokyo Tribunals afforded no formal independence to their prosecutors, who were appointed by, and acted in, the name of their states. While the Nuremberg Charter required prosecutors to “settle the final designation of major war criminals to be tried by the Tribunal” (Article 14(b), no criteria were stipulated for determining who to indict.

51 See e.g. ICTY Statute Article 18(1) (“The Prosecutor shall initiate investigations ex officio on the basis of information obtained from any source [...] [and] assess the information received or obtained and decide whether there is a sufficient basis to proceed”), Article 18(4) (“Upon determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment [...] The indictment shall be transmitted to a judge of the Trial Chamber.”), and Article 19 “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. *If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment.*”; ICTY Statute Articles 17(1), 17(4) and 18 contain equivalent provisions.

52 See e.g. ICTY, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, (IT-96-21), Appeals Chamber, 20 February 2001, para. 602: “In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. *It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.*”

53 In contrast to the Nuremberg Statute, which provided for the indictment of “major war criminals” only (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the [Charter of the International Military Tribunal](#), 8 August 1945, Art. 1; [Charter of the International Military Tribunal for the Far East at Tokyo](#), 19 January 1946, Art. 1), the Statutes of the *ad hoc* tribunals were broader and allowed for the investigation and prosecution of “persons responsible for serious violations of international humanitarian law” without further qualifications, which quickly led to major delays. ([Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#), September 2009, Art. 1-5; [Statute of the International Criminal Tribunal for Rwanda](#), Art. 1-4.)

54 See UNSC Resolution 1503 (S/RES/1503/2003, 28 August 2003) and Resolution 1534 (S/RES/1534/2004, 26 March 2004)

55 At the ICTY, in 1995, the Office of the Prosecutor adopted a formal set of criteria, with a view to enabling an effective allocation of resources and the fulfilment of the Tribunal’s mandate. Five criteria were developed: person (e.g. position in hierarchy under investigation, availability of witnesses and evidence); serious violation (e.g. number of victims and nature of acts); policy considerations (e.g. advancement of international jurisprudence, willingness and ability of national courts to prosecute; potential symbolic or deterrent value of prosecution); and other relevant considerations (e.g. potential defences and legal impediments to prosecution). However, it has been maintained that these criteria, which were not ranked by order of importance “merely provided a catalogue of considerations to be considered as whole when deciding to pursue an investigation and prosecution” and that “a *focused case selection policy* was not consistently pursued”. Instead, the OTP’s filtering process occurred principally by reference to the procedural changes described herein, once these were implemented. See Claudia Angermaier ‘Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia’ (pp. 27-43), in [Criteria for Prioritizing and Selecting Core International Crimes Cases](#), Morten Bergsmo (ed.), Forum for International Criminal and Humanitarian Law, Publication Series (2010).

56 Alex Obote-Odora ‘Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for Rwanda’ (pp. 45-67), in [Criteria for Prioritizing and Selecting Core International Crimes Cases](#), Morten Bergsmo (ed.), Forum for International Criminal and Humanitarian Law, Publication Series (2010).

57 Article 1 [Statute of the Special Court for Sierra Leone](#), 2002 (SCSL Statute).

58 The Prosecutor has the power to initiate a formal investigation pursuant to a State Party referral or a Chapter VII referral by the UN Security Council. The Prosecutor may also initiate investigations *proprio motu*, subject to being granted prior authorisation by the Pre-Trial Chamber (see Articles 13 and 15 Rome Statute).

59 OTP [Policy Paper on Preliminary Examinations](#), November 2013 at paragraph 63 provides that “the nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction” and at paragraph 65 that “the impact of crimes may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities”.

60 Article 53(1) Rome Statute.

61 Article 58(1) Rome Statute.

62 Article 61(7) Rome Statute.

63 OTP, [Policy Paper on Case Selection and Prioritisation, September 2016](#), pp. 12-15. The operationalisation of the ICC’s Policy on Children will be further analysed in Section III Part A.

64 *Ibid*, p.16

65 *Ibid*, p.17.

35. **Finally, when it comes to war crimes prosecutions, some cases are easier to build than others.** Violations of international humanitarian law encompass both violations against rules concerning the treatment of civilians and those who are *hors de combat*,<sup>66</sup> and violations of rules concerning the conduct of hostilities. ‘Conduct of hostilities’ violations centre on the means and methods of warfare and include, for example, indiscriminate attacks; attacks directed towards or military use of civilian objects (such as schools and playgrounds); attacks directed towards, or the military use of, specifically protected persons and objects (such as medical staff and facilities). A cursory look at the indictments of international criminal tribunals, or indeed universal jurisdiction cases of international crimes, indicates that the majority of war crimes prosecutions concern ‘treatment’ violations. This is largely because access to the most probative evidence is often quite limited for ‘conduct’ violations as compared to ‘treatment’ violations.

36. For example, building a case in relation to torture and killings in a detention centre – itself a challenging exercise – would usually require, *de minimis*, accounts of survivors and witnesses concerning the crimes and those involved in the criminal conduct; medical records detailing injuries and/or cause of death; photographs of injuries and/or bodies; and/or satellite imagery of mass grave sites. In contrast, building a case related to the aerial bombardment of a school would require not only confirmation that the school (and anyone inside it) were not military objectives, but also, at a minimum, the location and value of any military targets in the vicinity; an identification of which forces conducted the bombing (where multiple parties have the capacity for aerial attacks); the effective command structures through which the orders to bomb emanated; the information that fed into the decision to launch such an attack; and whether there was a good-faith assessment of that evidence. Often, there is little to no information provided by the military forces involved, making a proportionality assessment and the pinpointing of individuals responsible within complex command structures immensely difficult. Consequently, building a case dossier in relation to such an attack often requires investigations involving specialist expertise, including military and ballistic experts, specialists on the structure and capacity of particular units or groups, as well as access to insiders or defectors. These latter would need to hold, if not information about the specific attack, at least information concerning military strategies, and the processes of effective decision-making surrounding such attacks in the area of control at that time.

37. **For these reasons, greater openings exist for criminal accountability for war crimes arising from treatment violations, and only a much narrower path to accountability exists for war crimes relating to conduct of hostilities violations, including those that tend to disproportionately affect children.**

38. In addition to the above-mentioned general challenges to investigating, documenting, and indicting international crimes, there are also attitudinal and structural barriers – each with financial implications, that are more specific to the investigation, documentation, and indictment of crimes affecting children, as addressed below.

**Access to the most probative evidence is often quite limited for ‘conduct’ violations as compared to ‘treatment’ violations**

<sup>66</sup> E.g. torture, sexual violence, and unlawful killings.

## Attitudinal barriers

### Invisibilisation of children

39. While the experiences of children in war and other situations of protracted armed violence are increasingly captured by accountability mechanisms, in practice, the focus of these institutions has largely been on adult perpetrators, and on the experiences of adult victims and survivors.<sup>67</sup> As described in Annex I, atrocities affecting children are often addressed as part of the broader crimes committed against the civilian population, and/or in the sentencing process, with limited age-disaggregated analyses of how children of varying ages are affected by the violence. Where children are explicitly considered, the experiences of boys have hitherto generally been reduced to recruitment and use of children in hostilities, and those of girls to sexual and gender-based violence.
40. It has been said that the lack of sustained focus on children by accountability mechanisms is reflective of a broader, historical **indifference to children’s issues**, linked in part to their conceptualisation as passive objects, lacking in agency and requiring protection.<sup>68</sup> The adoption of the Convention on the Rights of the Child (CRC) in 1989, in which children’s rights organisations played an instrumental role, and its near universal ratification, have marked a landmark shift in that regard, as States recognised that children are rights-holders, whose voices need to be heard and perspectives understood.<sup>69</sup>
41. However, the **agency of children does not negate their vulnerability and need for special protection**. Children are not identical to adults, and differentiated treatment of them is justified; there is a role for specific protection in society’s – and the law’s – treatment of children. The CRC seeks to strike a meaningful balance between these competing interests by ensuring that children’s needs for protection and support are met, while maximising their autonomy and capacity for self-determination by requiring their participation and consultation in decisions affecting them.<sup>70</sup>
42. Notwithstanding this paradigm shift, childhood as a social status is still conceived by many as inferior to adulthood:<sup>71</sup>

[The] prevailing idea is that children are incomplete, that they are becoming, and that adulthood, particularly male adulthood, is the goal; instead of seeing children as competent, capable social actors in their own right, with valid observations and experiences to bring to the table.<sup>72</sup>

43. As further discussed in this paper, the persisting invisibilisation of children is an

<sup>67</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>68</sup> Dr Alison Bisset, ‘Children in Transitional Justice Processes- Still sidelined’, in *Gender and War: International and Transitional Justice Perspectives* (eds. S. Mouthan and O.Jurasz), Intersentia (2019), p. 270; Mark Drumbl, *Reimagining Child Soldiers in International Law* (OUP 2012).

<sup>69</sup> Ton Liefwaard, ‘Access to justice for children: towards a specific research and implementation agenda’ (2019) 27 *International Journal of Children’s Rights*, p. 196.

<sup>70</sup> Aoife Nolan, ‘Children and Socioeconomic rights’, *Children’s Socio-Economic Rights, Democracy and the Courts*, (Hart 2011).

<sup>71</sup> *Ibid.*

<sup>72</sup> Interview with Dr Alison Bisset, 27 February 2020.

overarching issue that affects all the other barriers discussed below.

## Structural barriers

### Lack of buy-in from States

44. The foundational barrier identified in this report is the **lack of buy-in from States, and the lack of sustained, high-level advocacy** on the issue of accountability for violations and crimes affecting children.<sup>73</sup>
45. As examples of the potential significance of State support, one expert noted the attention paid by Liechtenstein to the crime of aggression, and of the United Kingdom to issues of conflict-related sexual and gender-based violence.<sup>74</sup>
46. This lack of buy-in from States is not specific to the issue of children rights, and reflects a broader reluctance on the part of States to include specific expertise in resolutions establishing accountability mechanisms.<sup>75</sup> In the discussions surrounding the scope of the mechanisms' mandates, States have tended to refrain from engaging on specific contentious issues, such as crimes against children, to focus instead on general issues pertaining to the overall scope of mandates, and issues on which agreement could be secured during mandates' negotiations. As discussed in Section II, the increased attention paid by States to SGBV issues results from years of influencing efforts undertaken by women, victims and advocates, as well as experts, to bring those issues to the forefront of the international agenda.<sup>76</sup> To date, children and experts on crimes against children have yet to achieve the same influencing capacity.
47. Without such progress, there is a risk that children will remain invisible to the foundational instruments of judicial and non-judicial accountability mechanisms, as well as in their case selection strategies and criteria.

### Lack of UN and civil society accountability-focused constituency

48. Protecting conflict-affected children requires the engagement of the UN system as a whole. The Special Representative of the Secretary-General for Children and Armed Conflict (SRSG CAAC) serves as the leading UN advocate for the protection and well-being of conflict-affected children. The Special Representative acts as a convener, and facilitates collaboration on child protection among UN entities. The role of the SRSG CAAC is, among others, to assess progress achieved and steps taken by States to overcome challenges in strengthening the protection of children in situations of armed conflict; to raise awareness and promote the collection of such information; and to foster international cooperation to ensure respect for children's rights. The Special Representative leads the drafting of the UN Secretary General's annual report on Children and Armed Conflict,<sup>77</sup> and submits annual reports to the UN General Assembly and the UN Human Rights Council.

<sup>73</sup> Interview with expert.

<sup>74</sup> Interview with expert.

<sup>75</sup> See *infra* p. 42.

<sup>76</sup> See *infra* p. 52.

<sup>77</sup> [Resolution A/RES/51/77](#).

49. UNICEF, the Department of Peace Operations, and the Department of Political and Peacebuilding Affairs are accountable to the Security Council concerning the implementation of protection mandates in countries affected by conflict, and work closely with the SRSG CAAC office at UN headquarters. In countries where parties to conflict are listed,<sup>78</sup> the Country Task Force on Monitoring and Reporting (the task force) is co-chaired by UNICEF and the highest UN representative in the country (typically the Special Representative of the Secretary General or Resident/Humanitarian Coordinator). The task force is responsible for operationalising the MRM. All relevant UN entities in the country are usually represented in the task force, which is responsible for, among other things, monitoring and reporting on grave violations against children, and developing concrete, time-bound, and verifiable agreements with the parties to the conflict (Action Plans),<sup>79</sup> in order to enhance the accountability of responsible parties, and to respond to and prevent future grave violations against children affected by conflict.<sup>80</sup>
50. The MRM was established by the Security Council to foster accountability and compliance with international law and child protection standards. A key objective of the MRM is to enhance the accountability of states and non-state armed groups of grave violations against children in order to end and prevent grave violations. Accountability includes, *inter alia*, identifying parties to conflict committing grave violations, and engaging with said parties to prevent and end grave violations against children. The recommendations of the Secretary-General's Report and the Security Council's Working Group on Children and Armed Conflict provide important tools for country task forces to advocate, monitor and ensure implementation by parties to the conflict. They can serve as a first step in accountability efforts. Action Plans are another tool to enhance accountability of responsible parties and include a set of measures geared towards that end, such as requests to criminalise the six grave violations against children,<sup>81</sup> as well as to investigate and prosecute those that commit such violations nationally.
51. It is important to note that the MRM is not a mechanism for criminal accountability or investigations, nor for truth and reconciliation processes. However, information provided through public Reports of the Secretary General has drawn the attention of – and triggered action by – competent judicial organs in the past.

<sup>78</sup> Since 2000, the UN Secretary General has reported annually to the Security Council on the global situation of children and armed conflict. As of 2002, the Secretary General's reports have included a list of parties who commit serious violations of the rights of children in war, either in situations that are on the Security Council's agenda ("Annex I") or in situations that may be brought to the attention of the Security Council pursuant to Article 99 UN Charter ("Annex II"). The MRM is implemented at country level and is automatically triggered in all situations covered in Annex I to the Secretary General's annual report on children and armed conflict. In situations falling under Annex II, the UN is required to consult with the national authorities before implementing the formal MRM process (SRSG and UNICEF, *'Guidelines-Monitoring and Reporting Mechanism on Grave Violations against Children in Situations of Armed Conflict'*, June 2014, pp.5-7).

<sup>79</sup> Action Plans are designed to end and prevent grave violations against children. The Working Group on Children and Armed Conflict, which comprises all 15 members of the Security Council, reviews the reports of in-country MRMs on violations perpetrated by parties listed in Annex I and II and the implementation of Action Plans, and recommends measures to improve the protection of conflict-affected children.

<sup>80</sup> UNICEF (2014) *Field Manual: Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict*.

<sup>81</sup> Recruitment and use, killing and maiming, rape and other forms of sexual violence, abductions, attacks on schools and hospitals, denial of humanitarian assistance.

52. On a practical level, unlike the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, the Office of the SRSG CAAC does not have a UN team of experts to assist national authorities in strengthening the rule of law, with the aim of ensuring criminal accountability for perpetrators of, in that case, conflict-related sexual violence.
53. Moreover, the mandate of the SRSG CAAC is currently limited to monitoring and reporting on the six grave violations against children in conflict situations. As such, she is not in a position to support the investigation of these or other violations against children, and does not have the ability to support mandates that are geared towards criminal law-based investigations and criminal prosecutions.<sup>82</sup>
54. For its part, UNICEF, as a primary implementer of the MRM at country-level, must balance its child rights monitoring mandate with its humanitarian and operational mandates, which include preventing and responding to grave violations. While UNICEF is well placed to support the documentation of grave violations, and engage with parties to conflict in order to end and prevent grave violations, its humanitarian principles prevent it from engaging in criminal accountability efforts. UNICEF believes strongly in the need for accountability for child rights violations. However, its unique role in the MRM, and its operational imperatives, make it challenging for UNICEF to directly support accountability efforts outside the scope of the MRM. In the view of practitioners, while UNICEF remains a strong voice advocating for criminal accountability, it does not have the mandate to engage in criminal or other accountability mechanisms.<sup>83</sup>
55. A similar challenge arises with regard to civil society organisations, and international and local non-governmental organisations (INGOs) working on children's issues. The vast majority of large NGOs have primarily an operational mandate, a broad advocacy focus, or a mix of both. As a result, they rarely document violations and crimes affecting children for accountability purposes. At the local level, it is true that NGOs are increasingly alert to, and focused on, the documentation of violations and crimes affecting children. However, in both cases, the information is not always collected in accordance with the standards of proof required by criminal accountability.
56. These three factors combined – the **lack of sustained and comprehensive focus by States, UN leadership, and civil society** – have profound implications, and **are the overarching barrier** to meaningful accountability for violations and crimes affecting children because, it means that:
- There is a **limited drive to ensure that violations and crimes affecting children are addressed in the design, composition, or implementation of mandates** (e.g. a failure to systematically mention children in establishing resolutions, and to staff mandates with child-specific expertise, in contrast to SGBV) and, consequently, little incentive to mainstream child-competent approaches to accountability.<sup>84</sup>
  - The **funding** that would be required to overcome some of the principal barriers to accountability (e.g. by deploying expertise directly into mechanisms, and by training local documentation entities on the importance of documenting crimes affecting children, and of adopting child-competent approaches to investigations) is not available.<sup>85</sup>
  - In turn, this **dearth of focused advocacy by States and (I)NGOs, and the consequent impact on funding, filter down very quickly** into the messages and resources that local documentation groups receive when working on the ground. Fadel Abdul-Ghani, Executive Director of the Syrian Network for Human Rights (SNHR), recalled that his investigators had multiple opportunities to strengthen their skills on documentation of SGBV crimes, but no resources had been suggested or provided to do the same when it comes to documenting crimes against children:
 

I'm nine years with the [Syria] conflict and I can see easily the focus on gender violence or sexual violence or violence against woman is ten times the focus or speaking about abuses against children. Lots of organisations are focusing on this. But few organisations are reporting on children.<sup>86</sup>
57. As highlighted, children have become increasingly visible in the work of accountability mechanisms. However, the fact remains that investigating and documenting **violations and crimes affecting children is rarely understood as forming part of a mainstream human rights and/or criminal investigation, but as something warranting additional and separate consideration**. This belief is linked to the tendency, described above, to view children as invisible:
- I think the problem is not one of lack of information but the lack of attention to these crimes. I really see a parallel to the lack of attention to crimes against women for many, many, years. And when, finally, the tribunals looked at crimes against women, they only looked at it for sexual crimes. While many women suffered from sexual crimes, women were targeted in many other ways, and suffered many other crimes, beside sexual crimes. This narrow focus – only looking at the sexual crimes committed against women and not other crimes suffered by women – makes me believe that the challenges are many, not only in investigating these sorts of crimes, but also because certain categories of victims, stakeholders, and crimes are simply overlooked.<sup>87</sup>

<sup>82</sup> Interview with SRSG CAAC staff.

<sup>83</sup> Interviews with two distinct experts.

<sup>84</sup> Interview with expert (“Other than child soldiers, other than the concern about vulnerable witnesses, that [academic community] does not yet exist [...] This is a space where there's neither [a] State nor [a] civil society constituency that is trying to amplify and echo the work of the Prosecutor. Even if you look at the advances from the Ntaganda conviction, honestly most of the commentary [...] was about sexual violence [...] There just isn't that community [...] to say 'pathbreaking decision on crimes affecting children'”).

<sup>85</sup> Interview with Patricia Viseur Sellers, 22 February 2020 (“The international structures have not accessed or made that a funding priority. So, we have impunity gaps that continue to exist. And we don't have some of the political will or the financial ability or commitment, and the internal structures to make all of these divisions talk to each other.”)

<sup>86</sup> Interview with Fadel Abdul-Ghani, Syrian Network for Human Rights, 29 February 2020.

<sup>87</sup> Interview with Cécile Aptel, 5 March 2020.

58. Additionally, because the conception of what children suffer in war is often reduced to child-specific crimes such as recruitment and use of child-soldiers, or to sexual violence, attempts are rarely made to proactively collect evidence of other crimes affecting children. For example, in the Lubanga case:

Certainly, we knew that the charges did not reflect the type of crimes committed against children in Ituri. [...] I think [that is] because the investigation plan included [only] recruitment, conscription and use of child soldiers. So, **people's minds were focused on this, regardless of whether they had other evidence.** It was just geared towards whether the evidence was meeting what we had selected, and this is what we had selected.<sup>88</sup> **(Emphasis ours)**

59. Even where children are explicitly referred to in the establishing resolutions of non-judicial accountability mechanisms, they may still be overlooked in practice.<sup>89</sup>
60. While it has been noted that, even in the absence of a concerted strategy, information and evidence regarding children may nonetheless come to light,<sup>90</sup> in practice, this invisibilisation can lead to a **failure to adopt deliberate strategies for collecting information and evidence of violations and crimes affecting children**<sup>91</sup> and, consequently, to fully capture the ways in which they are victimised.

## Interviewing children

61. Investigating violations and crimes affecting children is generally conflated with interviewing children, and whether or not it is appropriate to interview children remains a highly divisive question in the judicial and non-judicial community of experts working on international accountability issues. Among the challenges often cited are the ethical dilemmas posed by the risk of retraumatising a child witness, and concerns that children may not be seen as sufficiently reliable witnesses. One expert highlighted that the necessary involvement of parents or legal guardians (and, in some instances, intermediaries) in the process can also negatively affect the reliability of the evidence collected, given the influence they are likely to have on the child.<sup>92</sup> By contrast, many continue to see adult victims and witnesses as more articulate and more reliable, in addition to the fact that the consent of a third party (i.e. parent or legal guardian) is not required for them to be interviewed. Interviewing adults is thus perceived by many to be an easier and less risky task.<sup>93</sup> In domestic criminal investigations, these **risks are mitigated by the fact that interviews of children are conducted by experienced and specially trained practitioners.**<sup>94</sup> In contrast, similar expertise is **often lacking at the international level.** Moreover, in non-judicial accountability mechanisms in particular, the absence of witness protection and

## Investigating violations and crimes affecting children is generally conflated with interviewing children

psychosocial support structures may explain the reluctance of investigators to engage directly with children, given the potential risk to of retraumatisation.<sup>95</sup> These challenges, combined with an absence of appropriate technical expertise, and of internationally agreed standards and best practices on when and how to interview children, can **translate into a reluctance to investigate violations and crimes affecting children.**

62. At the same time, it is possible to investigate violations and crimes affecting children. Mainstreaming child-competent methods and strategies within investigations supports **actively seeking alternative sources of information and evidence** that can corroborate children's own testimony (where this can be taken safely), or replacing it entirely (where children cannot be interviewed). This can be done, for example, by **collecting and analysing open-source reporting**,<sup>96</sup> and by **interviewing adults** (such as parents or other relatives, or medical/psychosocial professionals) who can speak to the alleged crime or violation affecting the child.<sup>97</sup> It might also entail the **integration of a child-competent focus in the review of documentary evidence**, to ascertain the specific ways in which children might have been victimised. For example, the 2020 thematic report on children produced by the Independent International Commission of Inquiry on the Syrian Arab Republic relied on many sources of information, including family members, medical professionals and legal actors.<sup>98</sup> Similarly, the **Independent Commission of Inquiry on the 2014 Gaza conflict** was able to investigate and document the impact of the conflict on children by interviewing representatives of local and international NGOs, UN agencies working on child rights in Gaza, Israel and the West Bank and medical doctors who worked in hospitals in Gaza and the West Bank.<sup>99</sup>
63. Moreover, **contrary to what is generally assumed,**<sup>100</sup> **it will not always be traumatic for all children to have to recount their experiences**, and a child's ability and willingness to be interviewed will vary **depending *inter alia* on their age and level of maturity** (which further underscores why an intersectional approach is crucial). Yet, this is the assumption that often prevails. It is partly rooted in persisting power dynamics, linked to the invisibilisation of children and/or the tendency to view them as a homogenous group, which overlook the agency of the individual child who may wish to recall his/her experience. In turn, this can undermine accountability efforts, particularly in respect of criminal prosecutions:

I think it is where we are hitting a bit of a dead end, because there is somewhat a certain trepidation of conducting investigations where you need to interview children and get their story of the crimes that were committed against them, or what they saw. And, for **as long as you are not willing to interview children, that is a great disservice to them.** The general attitude is always that interviewing children is a matter of last resort. [...] There is a certain belief that the 'do no harm' principle means

<sup>88</sup> Interview with Lina Biscaia, 26 February 2020.

<sup>89</sup> Interview with expert.

<sup>90</sup> Interview with expert.

<sup>91</sup> Interview with expert.

<sup>92</sup> Interview with expert. See also, Cécile Aptel, '*Children and accountability for international crimes: the contribution of international criminal courts*', UNICEF Innocenti Research Centre, August 2010, pp. 30-31.

<sup>93</sup> Interview with Erin Gallagher, 28 February 2020. ICC OTP Policy dealt with these issues at length, setting forth a framework designed to allow participation of children according to these evolving capacities. See ICC OTP (2016) *Policy on Children*, [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF).

<sup>94</sup> Interview with expert.

<sup>95</sup> Interview with expert.

<sup>96</sup> Taking into account, however, that such information is often prone to sensationalising certain types of crimes, such as the recruitment of child soldiers, or crimes of a sexual nature, and that open-source information might not always duly protect the safety, well-being, and identity of child victims.

<sup>97</sup> Generally speaking, this cannot be done in a screening interview and requires an in-depth interview with a skilled investigator.

<sup>98</sup> Human Rights Council, '*They have erased the dreams of my children: children's rights in the Syrian Arab Republic*', A/HRC/43/CRP.6, para. 7.

<sup>99</sup> Human Rights Council, '*Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict*', A/HRC/29/CRP.4, 24 June 2015, para. 11.

<sup>100</sup> Interview with expert.

“don’t talk to the child”. As long as you don’t talk to the child, it is very difficult for investigators or prosecutors to first even relate to crimes against children, when you don’t even have that connection to them. Secondly, **we will never understand the real gravity and impact, and all of what we talked about will remain in the abstract if you don’t hear it from the children themselves.** [...] Domestically, you can’t charge child rape without talking to a child. So, if all domestic countries are doing it, why aren’t the international courts? <sup>101</sup> **(Emphasis ours).**

64. There is no doubt that an abundance of caution is necessary when engaging children directly. Indeed, numerous studies have found that **interviews conducted in multiple locations and/or by practitioners who may not have the requisite training can contribute to retraumatising children.**<sup>102</sup> However, children may also be safely interviewed, and giving an account will not necessarily be a retraumatising experience, or be against a child’s best interests,<sup>103</sup> provided that adequate safeguards are in place. These include assessing at the outset whether an interview is contrary to the best interests of the child; ensuring that appropriate psychosocial support is available; conducting the interview in a child-friendly setting; having an accompanying adult present; and ensuring the interviewer has the relevant child-specific expertise and experience.

### Resource and bureaucratic constraints, and lack of timely and effective support

65. A number of barriers linked to the **design and operation of ad hoc UN fact-finding and investigative mechanisms** were also identified.
66. First, *ad hoc* non-judicial accountability mechanisms are generally set up on an urgent basis, in response to allegations of serious violations of international human rights and/or humanitarian law and/or international crimes. In most cases, they are directed to complete their investigations and report back to the mandating body in a relatively short period of time, such as six months to one year from the date of establishment, meaning that there is often limited time to conduct field investigations.<sup>104</sup> In addition, uncertainty and delays around resources affect the ability to recruit experts with the necessary expertise, and to secure an adequate allocation of funds to field investigations. **Given that violations and crimes affecting children are not perceived as forming a mainstream part of the information planning and gathering process, even where they are expressly alluded to in the foundational documents of these bodies, they are often not prioritised by investigators on the ground.**

<sup>101</sup> Interview with Shyamala Alagendra, 13 March 2020.

<sup>102</sup> Olivia Lind Haldorsson, *Barnahus Quality Standards Summary: guidance for multidisciplinary and interagency response to child victims and witnesses of violence*, Council of the Baltic Sea States Secretariat and Child Circle, The PROMISE Project series, pp. 4, 33.

<sup>103</sup> See for instance, Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, Second edition, March 2017, p. 239.

<sup>104</sup> OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, p. 30.

67. Second, the current structures within OHCHR do not provide a sufficient level of effective support to *ad hoc* entities.<sup>105</sup> OHCHR (through its Rapid Response Unit, RRU) generally internally recruits and deploys staff, and provides secretariat functions as well as logistical and security support.<sup>106</sup> The RRU has developed an internal roster of staff who can be deployed, through a contingency fund, in human rights and humanitarian emergencies, and that can provide surge capacity to UN field offices.<sup>107</sup> Within OHCHR, there is also the Methodology Education and Training Section, which develops policy, methodological tools, manuals, guidelines, training materials, and other resources in key areas of human rights work and applicable international law, and also provides training.
68. In practice, however, it was reported that the start-up phase of every new mechanism is a challenge.<sup>108</sup> One particular area of concern is the **lack of guidance and training on crimes affecting children provided by OHCHR pre-deployment and in the initial phase of the mandate.**
69. For example, as outlined in Annex I, in August 2019, the **Independent International Fact-Finding Mission on Myanmar**<sup>109</sup> (Myanmar FFM) issued a thematic report on the commission of sexual and gender-based violence (SGBV) during the course of the 2017 military ‘clearance’ operations.<sup>110</sup> Although the report does not contain a specific section on SGBV crimes perpetrated against children, it does include findings on the ways in which girls and boys were targeted throughout.<sup>111</sup>
70. **Whilst the Myanmar FFM was able to investigate and document certain SGBV crimes against girls and boys for the purposes of this report, there was no specific consideration of the way these particular crimes were committed against and affected girls and boys of different ages.** That level of nuance and analysis was missed, and could potentially have been captured with adequate training and tools.

### Lack of dedicated expertise

71. In contrast to SGBV, it is **rare for ad hoc non-judicial accountability mechanisms to have a dedicated focal point on children on staff.**<sup>112</sup> In most instances, gender experts that are deployed usually have a dual function and are in charge of investigating and documenting both gender-based violations and crimes and those against or affecting children. This can be explained, first, by the lack of expertise generally, at the international level, on investigating and documenting violations and

<sup>105</sup> Sareta Ashraph and Federica D’Alessandra, ‘Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff (Part I)’ *Opinio Juris*, October, 2020. See also: *Anchoring Accountability for Mass Atrocities*: a Project to Advise on the Permanent Support Needed to Fulfil International Investigative Mandates’, Oxford Programme on International Peace and Security, 2020.

<sup>106</sup> OHCHR, *Responding to pressing human rights issues*, September 2009.

<sup>107</sup> OHCHR, *OHCHR in the World: making human rights a reality on the ground*.

<sup>108</sup> Interviews with two distinct experts. Also see *supra*, 105.

<sup>109</sup> Established by the Human Rights Council in March 2017 *inter alia* to establish the facts and circumstances of human rights violations and abuses at the hands of military and security forces in Myanmar and particularly in Rakhine State, with a view to “ensuring full accountability for perpetrators and justice for victims”. Human Rights Council, *A/HRC/RES/34/22*, 24 March 2017.

<sup>110</sup> Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, *A/HRC/42/CRP.4*, 22 August 2019.

<sup>111</sup> Human Rights Council, *A/HRC/42/CRP.4*, see e.g. paras. 69-83, 154-167.

<sup>112</sup> Commissions of Inquiry and Fact-finding Missions are required to devote specific attention to gender issues and to the gendered impacts of violations in their reports and recommendations and, since 2009, have had dedicated SGBV Investigators/Gender advisors on staff.

crimes affecting children.<sup>113</sup> Second, the context and time constraints under which mission planning and design occur, the evolution of the scope of the mechanisms' mandate, and the uncertainties over the length of mandates, combined with the lack of adequate budget allocations for specific expertise, can limit mandates' ability to recruit and deploy qualified staff at short notice.<sup>114</sup> Because of these challenges, **staff are generally deployed from within OHCHR**. However, they do not always necessarily have the requisite legal expertise, in terms of human rights law and criminal law, with consequences for investigations, as described below.<sup>115</sup>

72. Without the requisite child-specific expertise, there is a risk both that information collection plans will not adequately cover violations and crimes affecting children, and/or that these will not be analysed and reported in a manner that fully reflects children's experiences, having regard to their age, gender, and other intersecting identities.<sup>116</sup> Moreover, unlike international criminal courts and tribunals, *ad hoc*, non-judicial accountability mechanisms are not governed by a Statute with enumerated crimes, but their operations are guided by foundational documents which evolve to reflect changes in the scope of their respective mandates. If investigators and analysts lack the specific expertise and skills required to address violations and crimes affecting children, their **ability to fully consider and analyse the information collected**, susceptible of falling within the scope of their mandates, **may be limited**. As one expert put it:

When an investigator hears that a child was made to be a fighter in a militia, because of all the developments of the last 20 years, the investigator immediately knows to investigate child soldiers. But **the recruitment might encompass a whole host of other violations**, including enslavement as child trafficking etc., **[These are] separate crimes that should be investigated [as such]**. Unless someone is able to pinpoint that, it will not get that.<sup>117</sup> **(Emphasis ours)**.

73. With regard to the **Independent International Commission of Inquiry on the Syrian Arab Republic** (Syria Commission),<sup>118</sup> for example, at the onset of its mandate, the narrative of the conflict overwhelmingly reflected the experiences of adult victims, even though children make up a substantial part of the civilian population, and have been disproportionately affected by the violence. According to a former staff member, who served before the recruitment by the Commission of a child rights expert, "we hardly had anything on children. So, you go through interview after interview trying to find this one line you could take to put it. Maybe because we didn't have these experts".<sup>119</sup>

<sup>113</sup> Interviews with three distinct experts.

<sup>114</sup> Interviews with two distinct experts. Also see, *supra* note 105.

<sup>115</sup> *Supra* note 105.

<sup>116</sup> It is emphasised that even with pre-deployment training and support, it is important to have child-specific expertise on teams. The short-term nature of the mandates inevitably restricts staff's ability to fully absorb and apply any training provided: "[Y]ou need to have a fuller commitment for people to learn, to undertake training, and to put layers on top of that training via the experience. And then, you know, the little institutional memory that's there walks out the door in a while. Then you start *ad hoc*'ing everything." (Interview with Patricia Sellers, 22 February 2020).

<sup>117</sup> Interview with expert.

<sup>118</sup> Established by the Human Rights Council on 22 August 2011 to investigate all alleged violations of international law committed in Syria since March 2011; establish the facts and circumstances that may amount to such violations and of the crimes perpetrated; and where possible, identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable. UN Human Rights Council [Resolution S-17/1](#), 23 August 2011.

<sup>119</sup> Interview with Lina Biscaia, 26 February 2020.

74. While there was a growing awareness of the impact of the Syrian conflict on children, **no deliberate strategy, inclusive of a child-competent approach, was put in place to collect information about violations and crimes affecting children**.<sup>120</sup> Where such violations or crimes were documented, in the case of targeted killings, for example, specific information about the age, sex, and gender of the children involved was not systematically captured. Similarly, when documenting indiscriminate attacks, the experiences of children were not always brought to light:

I remember during the siege of Aleppo, one man at some point said, "Oh and my wife does not have milk to feed the child, no breast milk". Has anyone ever asked him, "can you pass the phone, is she okay with that?" [...] Even if you just investigate attacks on hospitals, we know that there are patients, women, doctors and nurses. We know that there are patients who are children. **They could try to get information from these women or about these children**. But [investigators] never did try [...] Even when they would say "nine children died", and we would ask "age? gender?", they wouldn't know. They didn't ask those sort of follow-ups. Just because they are children.<sup>121</sup> **(Emphasis ours)**.

75. This was also the case with the UN **Commission on Human Rights in South Sudan** (South Sudan Commission),<sup>122</sup> as a former staff member observed:

I think **having a focal point for children in the team would have informed some of the conversations about engaging with children**, especially in South Sudan, where a lot of them don't have legal guardians. I think there were some people within the team who felt uncertain about the appropriate ways to engage with children. I guess the equivalent comparison is that the Commission did have a specific gender advisor, and I think that that helped to [...] bring focus on [SGBV].<sup>123</sup> **(Emphasis ours)**.

76. This **lack of prioritisation of child-competent approaches can diminish the prospects for future accountability before judicial bodies**. However, with regard to the ICC, one expert noted that since the development of the 2016 ICC policy on children, violations and crimes against children are systematically investigated.<sup>124</sup> Further, with regard to the Myanmar international accountability efforts, much of the evidence that the International Court of Justice (ICJ), the ICC and Independent Investigative Mechanism for Myanmar (IIMM) relied on stemmed from the reports of the Myanmar FFM.<sup>125</sup> The focus of the FFM reports on group dynamics, discriminatory laws against the Rohingya, and alleged clearance operations is likely to shape to a great extent the focus of the investigations to be conducted by new accountability mechanisms and judicial accountability mechanisms working on the case.

<sup>120</sup> Interview with expert.

<sup>121</sup> Interview with Lina Biscaia, 26 February 2020.

<sup>122</sup> Established by the Human Rights Council in 23 March 2016 *inter alia* to monitor and report on the situation of human rights in South Sudan; provide guidance on transitional justice and accountability, as appropriate; and determine and report the facts and circumstances of, collect and preserve evidence of, and clarify responsibility for, alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence. [A/HRC/RES/31/20](#), 21 April 2016.

<sup>123</sup> Interview with Rosalind Sipos, 3 March 2020.

<sup>124</sup> Interview with expert.

<sup>125</sup> Interview with expert.

77. In addition to the lack of child-specific expertise, or the adoption of child-competent approaches to investigations, another reported barrier to effective investigation and documentation of crimes affecting children is the **lack of the appropriate legal expertise within teams**. Many staff recruited into *ad hoc*, non-judicial accountability mechanisms are from OHCHR and most of them have a background in human rights reporting rather than human rights law and/or criminal law.<sup>126</sup> As highlighted above, OHCHR does not seem to provide specific training on violations and crimes affecting children or any general legal training. **This means that investigators do not always know what to look for, or that the information collected does not always disclose violations of applicable legal standards.**<sup>127</sup>

### Where expertise is available, it is rarely structurally ingrained within the mechanisms

78. The mandates and terms of reference of the newer mechanisms – **the IIMM,<sup>128</sup> IIMM<sup>129</sup> and UNITAD<sup>130</sup> – recognise the need<sup>131</sup> to have child-specific and criminal law expertise**. In practice, with the exception of the IIMM, the **specialist units that have been established by these mechanisms cover both SGBV and children.**<sup>132</sup>

79. The risk of having a single unit as the focal point for both SGBV and children is that **teams might lose sight of children in practice, given the greater levels of awareness around SGBV.**<sup>133</sup> Moreover, if **these specialist units are not structurally ingrained within core investigations**, as was the case at UNITAD in the early days of its creation, this can reinforce the perception that violations and crimes affecting children are not mainstream but separate from ‘ordinary’ core crimes investigations. As one former UNITAD staff member notes:

Because there was a specific advisor to deal with gender, it raised the question in investigation planning of whether it should be mainstreamed into general planning or should be left to have a separate freestanding gender investigation plan by the gender advisors? And so, there’s almost a question about whether, if you have a separate specialised focal point or advisor, does it almost work against mainstreaming into the main investigation? The same applies to the question of having a specific focal point or advisor on children.<sup>134</sup>

<sup>126</sup> Interview with expert; also *Supra* note 104.

<sup>127</sup> Interview with expert.

<sup>128</sup> Independent Investigative Mechanism for Myanmar (UN Human Rights Council, [A/HRC/RES/39/2](#), 3 October 2018).

<sup>129</sup> International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (UN General Assembly, [A/RES/71/248](#), 11 January 2017).

<sup>130</sup> United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UN Security Council, [S/RES/2379 \(2017\)](#), 22 September 2017).

<sup>131</sup> UN General Assembly, Letter dated 16 January 2019 from the Secretary-General addressed to the President of the General Assembly, Annex, Independent Investigative Mechanism for Myanmar-Terms of Reference, [A/73/716](#), 21 January 2019, para.25; UN Security Council, [Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold ISIL \(Da’esh\) Accountable of Acts that May Amount to War Crimes and Crimes against Humanity and Genocide Committed in Iraq, established pursuant to Security Council resolution 2](#), 9 February 2018, para.15; IIMM, [Terms of Reference](#), para. 32.

<sup>132</sup> UNITAD has a Sexual and Gender-Based Violence & Children Unit charged with working alongside the Field Investigation Units to investigate acts committed by ISIL involving sexual and gender-based violence and violence against children; The IIMM has focal points on addressing crimes against children embedded throughout all relevant professional categories in its organisational structure. These focal points comprise a working group which develops and oversees the implementation of the IIMM’s dedicated strategy on accountability for crimes against children.

<sup>133</sup> For example, it was observed that the ICC’s Gender and Children Unit, in its early stages, was “95% gender, 5% children”. (Interview with expert).

<sup>134</sup> Interview with Rosalind Sipos, 3 March 2020.

80. As for the ICC, the Gender and Children Unit, established in 2003, and comprised of staff with legal and psychosocial expertise, has focused in its early stages of operation on psychological assessments of vulnerable witnesses (including all children), to determine their fitness for interview by investigators, rather than the investigation of crimes affecting children themselves.<sup>135</sup> Since the adoption of the Policy on Children in 2016, addressed in detail in Section III,<sup>136</sup> the role of the unit has reportedly evolved, and its views are increasingly sought during the investigation plans, peer review, and evidence review, and to assist with the conduct of interviews of children. However, to date, the unit does not specifically advise on the **development of investigation strategies around crimes affecting children.**<sup>137</sup>

81. In the context of international criminal courts and tribunals, one key expert observed that the degree of integration of individual experts on children appeared, in practice, to depend on the discretion of senior staff members, and related to the importance given to such crimes: “Each trial team is a kingdom [...] The structure may recognise the need for an expert on crimes against children but, in practice, it wouldn’t necessarily be seen as important by the head of the trial team.”<sup>138</sup>

82. The IIMM has adopted a different approach, by appointing focal points on addressing crimes against children, who are then embedded throughout all relevant categories of the organisational structure (including information and evidence management; information collection and investigations; and analysis and case-file building). These focal points have expertise in crimes against children, and are employed as investigators, analysts or lawyers, among others. A working group on accountability for crimes against children, comprised of the focal points, oversees the implementation of the IIMM’s strategy on children, including by developing practical tools. The mechanism has also developed a bespoke training programme on accountability for crimes against children, which seeks to strengthen the integration of a focus on children by staff into their day-to-day work, and to encourage cross-sectional collaboration and alignment.

### Limited cooperation between actors

83. Actors involved in documentation and accountability processes, including non-judicial and judicial mechanisms and local and international NGOs, are reportedly **working in silos**. An expert pointed out the need for better coordination and understanding between specialists involved in accountability efforts.<sup>139</sup>

84. As detailed below, this state of affairs is the result, among other things, of a failure of various actors to effectively share their expertise, and to agree on collaboration strategies. **It can constitute a significant barrier to accountability, insofar as mechanisms may be reluctant, for ethical reasons, to seek information from victims, including children, who have already been the subject of multiple investigation and documentation processes.**

<sup>135</sup> Interview with expert.

<sup>136</sup> Office of the Prosecutor, [Policy on Children](#), November 2016.

<sup>137</sup> Interview with expert. Members of the unit, particularly psychologists, have delivered training on interviewing children.

<sup>138</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>139</sup> Interview with expert. The issue is not exclusive to groups working around accountability for crimes against or affecting children. See: International Bar Association War Crimes Committee, [Analysis of overcrowded and under-examined areas, following a mapping of organisations’ work on ameliorating domestic capacity to try serious international crimes](#) (July 2018).

## Failure to share expertise on lessons learned and best practices

85. **Lessons learned and best practices are not systematically shared between actors.** According to one expert, the South Sudan Commission did not draw from the ICC's Policy on Children when designing its information-gathering strategy, and analysing evidence of the reported violations and crimes in South Sudan.<sup>140</sup> Further, although Physicians for Human Rights (PHR) are active in Syria and Iraq, and have specific expertise on child-competent approaches to international crimes, they have to date not been approached either by the Syria Commission or UNITAD on best practices.<sup>141</sup>

## Cooperation with and training of first responders

86. Local and international NGOs can play a key role in bridging the gap between accountability mechanisms and local communities. They are often the 'first responders' to international crimes, arriving at the scene long before international investigators, and are well positioned to document violations and, crucially, to preserve evidence of crimes that may fall within the mandate of non-judicial accountability mechanisms, and/or subject-matter jurisdiction of the ICC.<sup>142</sup> Once international investigators are *in situ*, local actors can potentially contribute critical information to support investigations, provide leads on potential evidence, and assist investigators to identify and access reliable and secure in-country contacts.<sup>143</sup>

**Local and international NGOs can play a key role in bridging the gap between accountability mechanisms and local communities.**

87. Two substantial barriers to effective NGO participation and cooperation were identified. First, many NGOs have mandates that may not intersect with those of judicial and non-judicial mechanisms, e.g. because they are **focused on humanitarian assistance and/or child protection, and are, as a result, reluctant to cooperate, or unaware of how to do so effectively and without compromising their mandate.**

88. This was identified as a barrier in South Sudan:

'[W]hen we were trying to engage with some of the NGOs in South Sudan, who document a lot of things related to children, in the course of them trying to provide support and humanitarian assistance, they were very reticent about engaging with us, and providing information, even statistical information, about children in general.<sup>144</sup>

89. Second, where **local NGOs are focused on accountability, they often lack specific expertise and training on the documentation of violations and crimes affecting children.** This can be a barrier to future criminal investigations and prosecutions, given that violations and crimes documented by NGOs can heavily influence which incidents get selected and prioritised. The Syrian Network for Human Rights (SNHR)

has been investigating conflict-related violations since 2011. One of its priority areas has been documenting the impact of the war on the country's children through a dedicated team of investigators and analysts ("simultaneously with other crimes we are following the crimes against children [...] because highlighting the crimes against the children shows the intense violence of the conflict itself. The percentage of killing children is telling how much the attackers are [targeting] the civilians"). Although the SNHR has produced a number of thematic reports on children, they have highlighted the **need for further training from specialist organisations and experts, particularly on how to conduct interviews with children:**

I think we need more training. We already got general training and, on some specifics. There are many specialised organizations doing this work [...] but I think we can share experiences with regards to the documentation of crimes affecting children... [...] I think it is required to have further training from specialised organizations and experts on [...] how to be more sensitive when we present questions [to children]. It is needed for us to enhance our capacity, [...] yet, no one has offered this.<sup>145</sup>

90. As one expert explained, judicial accountability mechanisms should increase their efforts to develop and strengthen the information-sharing process with NGOs and the UN, while preserving the impartiality of these key partners.<sup>146</sup>

## Engagement with families and communities on the ground

91. The availability and strength of witness protection and psychosocial structures are essential to guide and delineate the scope of the mechanisms' engagement with families and communities on the ground, and to ensure that investigations are conducted in a safe environment, conducive to trust, and result in solid information-sharing dynamics. However, witness protection and psychosocial structures are at times lacking, or face serious challenges within accountability mechanisms. The absence of such structures within some of the mechanisms raises serious doubts about the protection of witnesses, and can have a negative impact on the decisions of investigators and/or prosecutors to pursue accountability efforts.<sup>147</sup>

92. Partly due to their restricted mandate, and the sensitivities surrounding the negotiation process pertaining to their establishment, UN non-judicial accountability mechanisms **do not always have the resources or infrastructure to effectively protect and support individuals who provide information, including children and their families.**

A final point about the ability of [Commissions of Inquiry] to effectively investigate and document crimes against children relates to their lack of resources to provide witness protection and psychological support, etc. There are none of those resources available, which raises the question of whether COIs should even be engaging directly with children, since they

<sup>140</sup> Interview with expert.

<sup>141</sup> Interview with Karen Naimer, 2 March 2020.

<sup>142</sup> D'Alessandra, F., 2017. 'The Accountability Turn in Third Wave Human Rights Fact-Finding', *Utrecht Journal of International and European Law*, 33(84), pp. 59–76; D'Alessandra, F., S. Couch, et al. *Handbook on Civil Society Documentation of Serious Human Rights Violations*, Public International Law & Policy Group, 2016.

<sup>143</sup> UC Berkeley School of Law, Human Rights Centre, 'First Responders- An International Workshop on Collecting and Analyzing Evidence of International Crimes', September 2014, p.4.

<sup>144</sup> Interview with Rosalind Sipos, 3 March 2020.

<sup>145</sup> Interview with Fadel Abdul-Ghani, Syrian Network for Human Rights, 29 February 2020. Resources collecting best-practices for civil society documentation of international crimes, in fact, advise against interviewing children unless prior training and expertise is acquired on how such interviews can be carried out safely. See: D'Alessandra, F., S. Couch, et al. *Handbook on Civil Society Documentation of Serious Human Rights Violations*, supra note 143.

<sup>146</sup> Interview with expert. For potential solutions, see also Individualisation of War Project, Oxford Institute for Ethics, Law, and Armed Conflict and European Institute Florence, 'Humanitarian actors' engagement with accountability mechanisms in situations of armed conflict', 21 January 2016.

<sup>147</sup> On the paramount importance of witness protection, see Cécile Aptel, 'Children and accountability for international crimes: the contribution of international criminal courts', UNICEF Innocenti Research Centre, August 2010, p. 38.

do not have a full set of tools to follow a proper victim-centred approach. While this is also true for adults, this is more easily addressed through having identified referral pathways. Though in a place like South Sudan there is limited availability, and identifying appropriate referral pathways takes time, something that is in short supply given the short timeframes within which COIs operate. But this issue is even more stark as it relates to children, where a higher duty of care would apply.<sup>148</sup>

93. By contrast, international criminal courts and tribunals are equipped with witness protection and psych-social support structures.<sup>149</sup> However, it was also reported that the effective protection and support of individuals providing information and evidence remains challenging in practice. Investigators can encounter challenges in building a sufficient level of trust with families and communities, owing to fear and stigma from victims and survivors, a related lack of awareness around the availability of protection measures, and the short duration of field missions limiting their ability to efficiently connect with the community or families.<sup>150</sup>
94. Due to the aforementioned barriers, the **information-collection process can be affected by the unwillingness of families and communities, including parents of affected children, to disclose crucial information** (e.g. SGBV crimes are notoriously under-reported because of stigma, for example).
95. Before turning to possible solutions to overcome these barriers, the next section will identify applicable lessons learned from the documentation, investigation, and indictment of sexual and gender-based violence crimes, which has witnessed considerable, if halting, progress in the past decades.

<sup>148</sup> Interview with Rosalind Sipos, 3 March 2020.

<sup>149</sup> Interview with expert. See also, An Michels, "As if it was happening again": supporting especially vulnerable witnesses, in particular women and children, at the Special Court for Sierra Leone', in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (The Hague: Hague Academic Press, 2006), pp. 133-145.

<sup>150</sup> Interview with expert. See Cécile Aptel, '*Children and accountability for international crimes: the contribution of international criminal courts*', UNICEF Innocenti Research Centre, August 2010, pp. 30-31.



## SECTION II.

### ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED VIOLENCE CRIMES: A MODEL TO BE REPLICATED?

96. Historically, SGBV crimes, like violations and crimes affecting children, have been marginalised in international criminal law. Their investigation has now become an important pillar of international justice. The documentation, investigation, and prosecution of violations and crimes against children raise particular challenges, not all of which are common to the documentation, investigation, and prosecution of sexual and gender-based crimes.<sup>151</sup> This is particularly the case when it comes to the interviewing of child survivors and child witnesses.<sup>152</sup> The differences in access to information about these crimes also affects accountability – while there was little awareness of the scale and scope of sexual violence in conflict in the early days of documentation and investigation, current technology and efforts by local actors to raise awareness and report ongoing violations and crimes ease the access and exposure to information about crimes and violations against/affecting children. Nevertheless, the progress made in the pursuit of accountability for sexual and gender-based crimes illuminates innovative solutions on which attempts to strengthen accountability for violations and crimes affecting children may draw.
97. This section is divided in two parts. Part A traces the developments that, in recent years, allowed investigation and prosecution of SGBV crimes to become mainstreamed within international justice. Part B highlights lessons learned from this mainstreaming, as well as important differences between the issues of SGBV crimes and crimes affecting children, such as the nature and strength of the forces and actors working to raise their profile in the international justice system.
98. In the last two decades, significant progress has been made in ingraining the need to investigate, analyse, and prosecute crimes of sexual and gender-based violence, particularly against women and girls. This is due to a confluence of different factors, including the influencing efforts of civil society and of powerful female advocates; the widespread reporting on sexual violence committed in the Balkans conflict and during the Rwandan genocide; the writing and advocacy of jurists; contributions to jurisprudence made, in particular, by judges and lawyers in international and hybrid criminal tribunals; and an emphasis on accountability for SGBV by UN entities, including UN Women and the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict.<sup>153</sup> With it has come relatively greater attention

<sup>151</sup> One of the key challenges with regard to the investigation, documentation and prosecution of crimes affecting children is interviewing child victims and witnesses, as discussed in Section I. In addition to the need to obtain the informed consent of a child's parent or legal guardian, there are specific protocols which govern the conduct of interviews of children. These issues were addressed by the ICC OTP Policy on Children, see: ICC OTP Policy on Children, [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF).

<sup>152</sup> As highlighted in Section I, it is emphasised, however, that crimes affecting children can be effectively documented and investigated without interviewing child survivors and witnesses.

<sup>153</sup> On the developments in the jurisprudence of the *ad hoc* tribunals, see Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21

to crimes of sexual and gender-based violence against men and boys; the wide range of other crimes directed against women and girls; and the need for intersectional gender expertise in approaches to collecting and analysing information and evidence for the purpose of criminal accountability.

99. In the interviews conducted for this Research Paper, multiple interviewees referred to the lessons that could be learned from the efforts and approaches of those who sought, and continued to seek, to strengthen accountability for crimes of sexual and gender-based violence, and with it, a more gender-sensitive analysis of the planning and commission of international crimes. Patricia Viseur Sellers, the ICC Prosecutor's Special Advisor on Gender, advised:

[I]n relation to accountability for crimes committed against children, make sure you learn from what worked and didn't work – and doesn't work and will not work – when it comes to the efforts of jurists, practitioners, and activists working to strengthen accountability for sexual and gender-based violence, as well as the broader movement advocating for gender justice.<sup>154</sup>

### PART A. TRACING THE HALTING PROGRESS TOWARDS ACCOUNTABILITY FOR CRIMES OF SEXUAL AND GENDER-BASED VIOLENCE

#### The ad hoc tribunals

100. During the very early stages of the *ad hoc* tribunals, if a commitment was there to investigate and prosecute sexual violence, this was often undercut by a combination of factors, including attitudinal factors, and reluctance to prioritise the issue on the tribunals' operational and strategic agendas. In 1994, the Chief Prosecutor – at the time of both the ICTY and ICTR – appointed a Legal Advisor for Gender Issues to “address the prevalence of sexual assault allegations committed in the former Yugoslavia and Rwanda”.<sup>155</sup> The Advisor was tasked to: (i) provide advice on gender-related crimes and internal women's policy issues; (ii) formulate legal strategies with the Prosecution Section; and (iii) assist the Investigations Unit in developing a strategy to pursue evidence of sexual assaults.<sup>156</sup> Patricia Viseur Sellers served in that capacity from 1994 to 2001.<sup>157</sup> The role, however, had severe limitations insofar as the Advisor was **not integrated into specific investigations, and had no power to enforce the proposed policies** among senior management, or through the investigation and trial teams, rendering her impact contingent on the willingness of the leadership and staff

*Berkeley International Law Journal* 288, 317.

<sup>154</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>155</sup> Patricia Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalised Criminal Courts' (2009) 17(2) *AJIL Gender Soc Pol & L* 301, 307; UNSC, 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991' (23 August 1995) UN Doc A/50/365-S/1995/728 (Report to the UNSC 1995), para. 44.

<sup>156</sup> Michelle Jarvis and Najwa Nabti, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Serge Brammertz and Michelle Jarvis (eds), (Oxford, UK: Oxford University Press, 2016), pp. 74-75.

<sup>157</sup> Harriette Saloway was appointed Gender Advisor in 2001 and served till 2004. Subsequently, the Tribunals began to form internal committees to address SGBV.

members to enforce it.<sup>158</sup> Although not formally abolished, the Advisor was ultimately assigned to work on trials, and the role became 'diluted' through assignments to other core functions.<sup>159</sup> The lack of resources, the broadness of the Advisor's mandate, and perceptions that SGBV crimes did not need to be the focus of attention of staff members were clear and concerning drawbacks.<sup>160</sup>

101. The deepening understanding of the importance of documenting sexual violence was crystallised in the [1998 Trial Judgment in \*The Prosecutor v. Akayesu\*](#), before the ICTR.<sup>161</sup> The [landmark judgment defined the crime of rape in international law](#), and determined that targeting members of a protected group for rape and other acts of sexual violence constituted "causing seriously bodily or mental harm",<sup>162</sup> a constitutive act of genocide. That this judgment came out of the ICTR was fitting: the statistics (inherently approximate) of sexual violence committed during and as part of the Rwandan genocide remain shocking. Estimates range from 250,000 to 500,000 rape victims during the short period of the genocide, from April to June 1994 – a statistic that does not account for the number of multiple rapes and gang rapes suffered.<sup>163</sup>

102. The original indictment in *Akayesu*, confirmed on 16 February 1996, did not contain charges of sexual violence. However, as witnesses – the majority of whom were women, these being more likely to have survived the genocide – testified, evidence of a campaign of sexual violence was entered into the court record. This led the Judges to invite the Prosecution to amend the indictment to include charges of sexual violence.<sup>164</sup> The Prosecutor eventually amended the charges,<sup>165</sup> allowing the judgment of the Tribunal to make findings on crimes of sexual violence, and hold the accused accountable for those crimes. However, the Prosecution's initial failure to link acts of rape and sexual violence to the charges have been identified as a significant barrier

<sup>158</sup> Michelle Jarvis and Najwa Nabti, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Serge Brammertz and Michelle Jarvis (eds), (Oxford UK: Oxford University Press, 2016), p. 75.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.* Another short-lived effort was the setting-up at the ICTY of a multi-disciplinary sexual-assault investigation team with a specific geographical focus, tasked to collect evidence to establish patterns of sexual violence and identify strategies to attribute responsibility for these crimes. No specific expertise was required for assignment to this team, though it did contain staff with SGBV expertise. One of the reasons leading to the team's dissolution was the concern that the 'specialised team model' would conflict with the mainstreaming of SGBV investigations by all teams. *Ibid.*, p. 76.

<sup>161</sup> *The Prosecutor v. Jean-Paul Akayesu*, (Case No. ICTR 96-4-T), [Judgment](#), Trial Chamber I, 2 September 1998. While there was evidence of sexual violence, no directly related prosecutions took place at the International Military Tribunal at Nuremberg (IMT) and the International Tribunal for the Far East. See Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 5-8. See also Hilly Moodrick-Even Khen and Alona Hagay-Frey, 'Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust' (2013) 35 *Women's Rights Law Reporter* 43.

<sup>162</sup> *The Prosecutor v. Jean-Paul Akayesu*, (Case No. ICTR 96-4-T), [Judgment](#), Trial Chamber I, 2 September 1998, para. 731.

<sup>163</sup> Stephanie K Wood, '[A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious Crime in the International Criminal Tribunal for Rwanda](#)' (2004) 13 *Columbia Journal of Gender and Law* 274, 299-301. See also, UN Economic and Social Council [ECOSOC], Commission on Human Rights, [Report on the Situation of Human Rights in Rwanda](#), E/CN.4/1996/68, 29 January 1996, paragraph 16 (discussing the methodology and difficulties in estimating the number of rapes during hostilities). It is notable, however, that the ICTR did not prosecute any sexual violence cases in which men were victims, though there was evidence to suggest that acts of sexual violence had been committed against Tutsi men and boys as part of the genocide. Testifying in the ICTR *Bagosora* case, Lieutenant-General Roméo Dallaire, Force Commander of the UN Peace-Keeping Mission in Rwanda at the time of the Rwandan genocide, described seeing public displays of mutilated male genitalia. *The Prosecutor v. Bagosora et al.* (Case No. ICTR-98-41) Transcript of Proceedings, Trial Chamber I, 20 January 2004. See also Doris Buss, '[Making Sense of Genocide, Making Sense of Law: International Criminal Prosecutions of Large-Scale Sexual Violence](#)' in Amy E Randall (ed.), *Genocide and Gender in the Twentieth Century: A Comparative Study* (London, UK: Bloomsbury, 2015), p. 288.

<sup>164</sup> See, for example, Akshan de Alwis, '[Interview with Navi Pillay](#)' (*Diplomatic Courier*, 6 October 2016); Madhu Mehra, '[An Interview with Navi Pillay](#)' (*Lacuna*, 1 November 2016).

<sup>165</sup> *The Prosecutor v. Jean-Paul Akayesu* (Case No. ICTR 96-4-T), [Amended Indictment](#), 17 June 1997. See in particular count 15. See also, footnote 14 of Beth Van Schaack's 2008 article 'Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda', which states that: "Viseur Sellers indicated that various amended indictments were drafted during April and May, but that these remained confidential at the time."

to evidence collection, which resulted in the exclusion of sexual violence charges from the original indictment.<sup>166</sup>

103. These ground-breaking developments in the *Akayesu* trial were the result of the [convergence of four factors](#). First, the [enduring willingness of victims of sexual violence to come forward and give evidence](#).<sup>167</sup> Second, the [legal activism of civil society](#), and in particular the Coalition for Women's Human Rights in Conflict Situations, formed by feminist activists who, in 1996, mobilised around the ICTR's failure to investigate and prosecute sexual violence. The Coalition submitted an *amicus curiae* brief, successfully calling upon the Trial Chamber to use its inherent authority to invite the Prosecution to amend the indictment.<sup>168</sup> Third, following witness testimony concerning the commission of sexual violence, the Prosecution's decision to request a continuance to investigate crimes of sexual violence, which resulted in the Prosecution's own amended indictments.<sup>169</sup> And fourth, and more frequently acknowledged, is [the work of the Judges](#) who invited the Prosecution to amend their original indictment to include sexual violence in its charges.<sup>170</sup>

104. Yet, the legal avenues opened by *Akayesu* were, for a long time, not seized upon by international prosecutors.<sup>171</sup> In the cases of *Serushago*,<sup>172</sup> *Ndindabahizi*,<sup>173</sup> *Bisengimana*,<sup>174</sup> and *Nzabirinda*,<sup>175</sup> the ICTR Prosecutor withdrew the charges of sexual violence.<sup>176</sup> While the Prosecution is not required to set out the reasons for its decision not to charge certain crimes, the decision to indict rests on having evidence upon which a conviction against the named accused can be founded. Where acquittals for rape were handed down, in the *Niyitegeka*, *Muvunyi*, and *Kamuhanda* cases, the ICTR Prosecution failed to appeal the grounds for those acquittals.<sup>177</sup> The Prosecution provides no public reasoning for decisions not to appeal.

**The decision to indict rests on having evidence upon which a conviction against the named accused can be founded**

105. The most remarked-upon cases concerned the crimes committed at Cyangugu, a city and region in western Rwanda, in the *Ntagerura* case.<sup>178</sup> Three military and government officials (André Ntagerura, Emmanuel Bagambiki and Samuel

<sup>166</sup> Usta Kaitesi, '*Genocidal gender and sexual violence – the legacy of the ICTR, Rwanda's ordinary courts and gacaca courts*', Dissertation, University of Utrecht, pp. 137-138.

<sup>167</sup> *Supra* note 165.

<sup>168</sup> *The Prosecutor v. Jean-Paul Akayesu* (Case No. ICTR 96-4-T), Coalition for Women's Human Rights in Conflict Situations, [Amicus Brief Respecting Amendment of the Indictment and Supplementation of Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal](#).

<sup>169</sup> Email from Patricia Sellers, 14 November 2020. Also *Supra* note 164.

<sup>170</sup> See, for example, note 163 and note 164.

<sup>171</sup> For a detailed critique of the legacy of the Akayesu Trial Judgment, see Beth Van Schaack, '[Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda](#)' (2008) *Human Rights Advocacy Stories*, Foundation Press, Santa Clara University Legal Studies Research Paper No. 08-55 ('Van Schaack – Engendering Genocide').

<sup>172</sup> *The Prosecutor v. Serushago* (Case No. ICTR-98-39), [Sentence](#), Trial Chamber I, 5 February 1999, para. 4.

<sup>173</sup> *The Prosecutor v. Ndindabahizi* (Case No. ICTR-01-71), [Judgment and Sentence](#), Trial Chamber I, 15 July 2004, para. 13.

<sup>174</sup> *The Prosecutor v. Bisengimana* (Case No. ICTR-00-60), [Judgment and Sentence](#), Trial Chamber II, 13 April 2006, paras. 7, 12.

<sup>175</sup> *The Prosecutor v. Nzabirinda* (Case No. ICTR-01-77), [Sentencing Judgment](#), Trial Chamber II, 23 February 2007, paras. 3, 4, 34.

<sup>176</sup> Maryann Gallagher, Zoe Li and Deepa Prakash, 'Engendering Justice: Women and the Prosecution of Sexual Violence in International Criminal Courts' (2019) 22(2) *International Feminist Journal of Politics* 227-249.

<sup>177</sup> UNRSO, Binaifer Nowrojee, '["Your Justice is too Slow": Will the ICTR fail Rwanda's rape victims?](#)' November 2005 ('Nowrojee – Your Justice is too Slow'), pp. 14-17.

<sup>178</sup> *The Prosecutor v. Ntagerura et al. (Cyangugu)* (ICTR-99-46. See Nowrojee – *Your Justice is too Slow*, pp. 14-17; Beth Van Schaack – *Engendering Genocide*, pp. 22-23. See also, Beth Van Schaack, '[Obstacles On The Road To Gender Justice: The International Criminal Tribunal for Rwanda As Object Lesson](#)' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 361, pp. 355-400.

Imanishimwe) were indicted but no charges of sexual violence were included.<sup>179</sup> Following pressure from Rwandan civil society, led by the Association of Widows of the Genocide of April 1994, the Prosecution announced it would amend the indictment against the three accused as soon as possible to include charges of rape. Months later, the Prosecution filed the motion to amend the indictment, but the then-Chief Prosecutor Carla del Ponte withdrew the motion.<sup>180</sup> When Prosecution witnesses gave evidence at trial concerning sexual violence, the Coalition for Women's Human Rights in Conflict Situations submitted an *amicus curiae* brief (as it had done in *Akayesu* when the same situation occurred), urging the Trial Chamber to call on the Prosecution to amend the indictment to include sexual violence charges. The Prosecution opposed the Coalition's motion, arguing that the matter of what to charge was within their sole discretion. The Chamber denied the Coalition motion,<sup>181</sup> and following a Defence motion, excluded from the trial all evidence of uncharged crimes.

106. The absence of charges of sexual violence, occurring consistently across a span of cases at the ICTR, gave rise to **criticisms about the Prosecution's failure to develop a comprehensive strategy or precise work plan that could overcome barriers encountered to the effective investigation of these crimes, and bring the evidence of sexual violence into the courtroom.**

107. In a review of ICTR jurisprudence conducted by UN Research Institute for Social Development in 2004, it was determined that no rape charges had been brought by the Prosecutor's Office in 70% of the 21 then-adjudicated cases.<sup>182</sup> Of those 21 completed cases, there were 18 convictions and three acquittals.<sup>183</sup> Of the convictions, 90% of those judgments contained no convictions for rape.<sup>184</sup> Combined with the attitudinal barriers highlighted above, these statistics suggest a **reluctance to pursue evidence of sexual violence** by the ICTR Prosecution up until 2005.

108. The 2004 report further observed:

Over the past decade, **sexual violence crimes at the ICTR have never been fully and consistently incorporated into the investigative and prosecution strategy** of the Prosecutor's Office. [...]

Investigators receive no training on interviewing methodology for rape victims, and the majority of the investigators are male. Often investigators come from backgrounds where they have not had any experience with this issue, or they believe this is not a crime that deserves serious attention.<sup>185</sup> **(Emphasis ours).**

109. Later ICTR indictments, such as those in the case against *Semanza, Gacumbitsi, Muhimana, and Muvunyi* would include charges of sexual violence, with the Trial and Appeals Chamber contributing to international criminal jurisprudence by grappling with the issues of consent and coercion. The April 2005 *Muhimana* Trial

<sup>179</sup> *The Prosecutor v. Ntagerura et al.* (Case No. ICTR-99-46), Amended Indictment, 26 January 1998; *The Prosecutor v. Bagambiki* (Case No. ICTR-99-46), *Indictment*, 9 October 1997.

<sup>180</sup> When questioned about this, del Ponte is reported to have said, "I can do this because I am a woman. If I were a man, there would be a fuss." Nowrojee – *Your Justice is too Slow*, p. 15.

<sup>181</sup> *The Prosecutor v. Ntagerura, Bagambiki, and Imanishwe* (Case No. ICTR-99-46), *Decision on the Application to File an Amicus Curiae Brief According to Rules 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations*, Trial Chamber III, 24 May 2001.

<sup>182</sup> Nowrojee *Supra* note 176, p. iv.

<sup>183</sup> Nowrojee *Supra* note 176, p. iv.

<sup>184</sup> Nowrojee *Supra* note 176, p. iv.

<sup>185</sup> *Supra* note 176.

Chamber Judgment held that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape. Further, this Chamber concurs with the opinion that circumstances prevailing in most cases charged under international law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent".<sup>186</sup> This followed jurisprudence coming out of the ICTY's *Kunarac* and *Furundžija* cases, and would be strengthened by later finding in the *Muvunyi* case.<sup>187</sup>

110. A landmark in the prosecution of gender-based violence was the ICTR's *Prosecutor v. Nahimana et al.*, a trial of three media leaders charged in relation to their roles in promoting extremist Hutu ideology, inciting hatred, and exhorting listeners and readers to murder Tutsis during the 1994 genocide in Rwanda, often described as the 'media case'. Its 2003 Trial Judgment characterised hateful, sexual, and gendered language as methods to execute the direct and public incitement elements of genocide. The Trial Judgment in *Nahimana* also examined calls to kill children as part of the targeted language of direct and public incitement to commit genocide.<sup>188</sup> Additional sentences for SGBV were handed down by the ICTR in *Bagosora*, '*Butare*', *Gacumbitsi*, and *Karemara*.<sup>189</sup>

111. In the years that followed *Akayesu*, there was greater emphasis on properly investigating and charging crimes of sexual violence at the ICTY as well. One notable example is the investigation by female lawyers and prosecutors at the ICTY of the sexual violence perpetrated during the massacres in Foča, a small Bosnian city south-east of Sarajevo. The team led the development of evidence of sexual violence, and focused on building a case that reflected the organised way in which rape was used by the accused as part of a campaign of ethnic cleansing.<sup>190</sup> The investigation, and subsequent prosecution, culminated in the *Kunarac et al.* judgment, the first convictions by the ICTY of rape as a crime against humanity, and the first convictions by an international criminal tribunal of enslavement as a crime against humanity.<sup>191</sup> Other landmark cases included *The Prosecutor v. Anto Furundžija*, and *The Prosecutor v. Zdravko Mucić*.<sup>192</sup> Rape, in particular, was recognised as a powerful weapon of war, used to intimidate, persecute, and terrorise the civilian population.<sup>193</sup> As of September 2016, 78 of the 161, or 48% of the accused before the ICTY, had been indicted on

<sup>186</sup> *The Prosecutor v. Mikaeli Muhimana* (Case No. ICTR-95-1B-T), *Judgment and Sentence*, 28 April 2005, p. 100, para. 546.

<sup>187</sup> *The Prosecutor v. Dragoljub Kunarac et al.* (Case No. IT-96-23-T& IT-96-23/1-T), *Judgment*, Trial Chamber, 22 February 2001; (Case No. IT-96-23& IT-96-23/1-A), *Judgment*, Appeals Chamber, 12 June 2002; *The Prosecutor v. Anto Furundžija* (Case No. IT-95-17/1), *Judgment*, Trial Chamber, 10 December 1998; *Tharisse Muvunyi v. The Prosecutor*, (Case No. ICTR-2000-55 A-A), *Appeals Judgment*, 1 April 2011.

<sup>188</sup> *The Prosecutor v. Nahimana et al.* (Case No. ICTR-99-52-T), *Judgment and Sentence*, 3 December 2003.

<sup>189</sup> *The Prosecutor v. Bagosora et al.* (Case No. ICTR-98-41-T), *Judgment and Sentence*, 18 December 2008; *The Prosecutor v. Nyiramasuhuko et al (Butare)* (Case No. ICTR-98-42-A), *Judgment*, 14 December 2015; *Karemara and Ndirumpatse v. The Prosecutor* (Case No. ICTR-98-44-A), *Judgment*, 29 September 2014. *Bagosora* and *Karemara* stand out for breaking the practice of never convicting for sexual violence at a distance.

<sup>190</sup> John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, (2003: University of Chicago Press), p. 176-178.

<sup>191</sup> *The Prosecutor v. Dragoljub Kunarac et al.* (Case No. IT-96-23-T& IT-96-23/1-T), *Judgment*, Trial Chamber, 22 February 2001; (Case No. IT-96-23& IT-96-23/1-A), *Judgment*, Appeals Chamber, 12 June 2002.

<sup>192</sup> As early as 1998, the Trial Chamber seized on the Mucić case as a precedent in the jurisprudence of international criminal tribunals, qualifying rape as a form of torture (See *The Prosecutor v. Zdravko Mucić et al.* (Case No. IT-96-21-T), *Judgment*, Trial Chamber, 16 November 1998; (Case No. IT-96-21-A), *Judgment*, Appeals Chamber, 20 February 2001). In the *Furundžija* case, the Trial Chamber made crucial remarks on the qualification of rape in the context of international crimes, holding that rape may also be prosecuted as a grave breach of the Geneva Conventions, as a violation of the laws and customs of war, and that it may be used as a tool for genocide (See *The Prosecutor v. Anto Furundžija* (Case No. IT-95-17/1), *Judgment*, Trial Chamber, 10 December 1998, para. 172). In this case, the sexual violence convictions were upheld by the Appeals Chamber ((Case No. IT-95-17/1-A), *Judgment*, Appeals Chamber, 21 July 2000, paras 80-127, Chapter VIII).

<sup>193</sup> *Ibid.*

sexual violence charges. Of these, 36 were ultimately convicted.<sup>194</sup> In other cases, evidence of sexual violence was not charged but adduced at trial as part of the overall prosecution case, and subsequently recorded in trial judgments.<sup>195</sup>

112. Notwithstanding this increased attention and focus on SGBV in the aftermath of *Akayesu* and *Kunarac*,<sup>196</sup> a certain reluctance persisted in the *ad hoc* tribunals to fully grapple with sexual and gender-based violence crimes, alongside **doubts about how to most effectively document and investigate crimes of this nature**.<sup>197</sup>

## The Special Court for Sierra Leone

113. All of the Special Court for Sierra Leone's Chief Prosecutors stated that the investigation and prosecution of SGBV was a key priority for their Office.<sup>198</sup> Consequently, and in line with Article 15(4) SCSL Statute, the Prosecution recruited a number of SGBV advisors, as well as investigators with expertise in gender-sensitive investigations and analysis,<sup>199</sup> and, with in the case of local staff, a solid knowledge and cultural understanding of Sierra Leone.<sup>200</sup> The aim was to **establish integrated multi-disciplinary investigation teams**, composed of national and international staff with complementary expertise, able to conduct multifaceted, contextualised, and gender-sensitive investigations.<sup>201</sup> In addition, the first Prosecutor committed to step up outreach efforts to vulnerable communities through the organisation of town hall meetings with affected communities to build trust, explain the court's mandate, and to inform communities about the Office of the Prosecutor's interest in looking at a variety of crimes, including SGBV. These efforts strengthened the exchange of

<sup>194</sup> UN-ICTY, [Crimes of sexual violence- in numbers](#).

<sup>195</sup> While no specific charges of sexual violence were included in the Indictment against Radislav Krstić, evidence was adduced in relation to the rape of Bosnian women in Potočari. The Trial Chamber recognised a link between rape and ethnic cleansing – qualifying rapes in Potočari as “natural and foreseeable consequences of the ethnic cleansing campaign”, *The Prosecutor v. Radislav Krstić* (Case No. IT-98-33-T), [Judgment](#), Trial Chamber, 2 August 2001; *The Prosecutor v. Radislav Krstić* (Case No. IT-98-33-A), [Judgment](#), Appeals Chamber, 19 April 2004, paras 145-151. See also: Oosterveld, ‘The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence’ (Chapter 8) in Sterio and Scharf (eds.) *The Legacy of Ad Hoc Tribunals in International Criminal Law* (CUP 2019). Not all ICTY cases, however, marked a success with regard to accountability for sexual crimes. For example, in the Lukić case, sexual and gender-based violence was originally missed out of indictments; this had serious consequences when judges refused to grant permission to amend the indictment. Conversely, in the Šainović et al., and Đorđević cases, trial judges failed to recognise sexual violence as a foreseeable consequence of ethnic cleansing campaigns, and to accept that it was committed with the same discriminatory intent as other crimes forming part of the same campaign. The prosecution appealed the decision, and the precedents were overturned, leading to the emergence of some of the ICTY's most progressive jurisprudence on conflict-related sexual violence. This strengthened record for the ICTY was engendered thanks to strong advocacy by a network of lawyers inside the Office of the Prosecutor, and meaningful expertise on gender being embedded in different parts of the Office. In addition, the ICTY legacy project, which was under way at the time, also helped heighten the level of the awareness of these issues within the Prosecution's office and among senior management ranks. *Lukić Milan & Lukić Sredoje* (IT-98-32/1), [Judgment](#), 20 July 2009; *Šainović et al.* (IT-05-87), [Appeal Judgment](#), 23 January 2014; *Đorđević* (IT-05-87/1), [Judgment](#), 23 February 2001.

<sup>196</sup> For a detailed analysis of the ICTY's contribution to SGBV-based crimes, see Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford, UK: Oxford University Press, 2016).

<sup>197</sup> Jarvis and Brammertz (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (CUP 2018).

<sup>198</sup> Valerie Oosterveld, ‘[Prosecuting Sexual Violence at the Special Court for Sierra Leone](#)’, *IntLawGrrls*, 18 December 2017; Valerie Oosterveld, ‘The Special Court for Sierra Leone: initial structural and procedural decisions on sexual and gender-based violence’, *The Cambrian Law Review, Women in and at war*, 46 (2015-2016), p. 141.

<sup>199</sup> Quoting David Crane, first Prosecutor of the SCSL, attention was paid to ensure that “most of those hired into the OTP had ‘at least some, if not solid, experience in gender crimes at the domestic level, so everybody understood’ the importance of focusing on SGBV”. Oosterveld, ‘The Special Court for Sierra Leone: initial structural and procedural decisions on sexual and gender-based violence’, *The Cambrian Law Review, Women in and at war*, 46 (2015-2016), p. 139.

<sup>200</sup> *Supra* note 198. Other positive developments were highlighted in the article such as the adoption of ‘gender-sensitive agreed terminology’ at the Court to provide clarity on SGBV and the setting up of consultations on forced marriage between the OTP and victims and community members, *Ibid*, pp. 142-148.

<sup>201</sup> Valerie Oosterveld, ‘[Prosecuting Sexual Violence at the Special Court for Sierra Leone](#)’, *IntLawGrrls*, 18 December 2017; Valerie Oosterveld, ‘The Special Court for Sierra Leone: initial structural and procedural decisions on sexual and gender-based violence’, *The Cambrian Law Review, Women in and at war*, 46 (2015-2016), pp. 133-136, 138, 149.

knowledge on gender-sensitive outreach amongst the OTP staff and encouraged female victims to share their experiences with the OTP, but also introduced confusion within the affected communities between outreach, information-sharing, and requests for evidence.<sup>202</sup>

114. Yet, in the 2004-2008 trials of the head and two senior commanders of the Civil Defence Forces (CDF), a government-backed armed group, **crimes of sexual violence were rendered invisible**. The Prosecution had failed to charge rape and other crimes of sexual violence, as well as forced marriage, as another inhumane act in its 2003 indictment, claiming that their early investigations had not uncovered enough evidence to support sexual violence counts against members of the CDF.<sup>203</sup> In this case, investigators encountered difficulties in collecting evidence, particularly obstacles in building trust with women and girls within the CDF-held territory. These were caused by persisting cultural beliefs casting doubts on the involvement of the CDF in the crimes, and social norms preventing women from accusing members of their own community of SGBV crimes.<sup>204</sup> Investigators ultimately found a suitable intermediary to build trust and collect evidence, including by female investigators.<sup>205</sup> Four months before the start of trial, the Prosecution attempted to amend its indictment to include charges of rape, sexual slavery, forced marriage, and other forms of sexual violence.<sup>206</sup> Their motion was denied in a majority decision of the Trial Chamber, because it was brought too late in the process.<sup>207</sup> The Prosecution then sought leave to appeal the decision,<sup>208</sup> and when leave to appeal was also denied,<sup>209</sup> it appealed directly to the Appeals Chamber, which found that it did not have jurisdiction over the matter. The consequence was that **any evidence that directly or even remotely related to an act of sexual violence or forced marriage was deemed inadmissible**. All witnesses, including survivors, who sought to testify about sexual violence or forced marriage were not permitted to do so, and all references to sexual violence and forced marriage were expunged from the transcripts. Later, the War Crimes Studies Center at the University of California at Berkeley, which monitored the trials, would state, ‘[i]n the CDF case, sexual violence has effectively become an invisible war crime.’<sup>210</sup>

<sup>202</sup> Valerie Oosterveld, ‘The Special Court for Sierra Leone: initial structural and procedural decisions on sexual and gender-based violence’, *The Cambrian Law Review, Women in and at war*, 46 (2015-2016), pp. 142-143.

<sup>203</sup> Sara Kendall and Michelle Staggs, ‘Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone’ (2005) *War Crimes Study Center*, p. 5.

<sup>204</sup> *Supra* note 202, pp. 139-140.

<sup>205</sup> *Ibid* p. 140.

<sup>206</sup> In its request, the Prosecution argued that “[F]ears expressed by potential witnesses if they come forward to testify meant that the Prosecutor could not have easy access to the newly acquired evidence at the time that the Indictments were approved. In some instances, it was the existence of the Indictment and the subsequent incarceration of the Accused that created the conditions for these potential witnesses to come forward [...]”. The Prosecutor v. Samuel Hinga Norman et al. (Case No. SCSL-04-14), Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa (SCSL-04-14-PT-005), 9 February 2004, paras. 20-21.

<sup>207</sup> The Trial Chamber (Judge Boutet dissenting) held that it would be prejudicial to the fair trial rights of the accused to be tried without ‘undue delay’ if the prosecution was allowed to add four new counts to the indictment at this stage of the proceedings, particularly in circumstances where evidence upon which those counts were founded was available at least by June 2003. *The Prosecutor v. Samuel Hinga Norman et al.* (Case No. SCSL-04-14), [Decision on Prosecution Request for Leave to Amend the Indictment](#), Trial Chamber, 20 May 2004, paras. 35, 55, 62, 64.

<sup>208</sup> *The Prosecutor v. Samuel Hinga Norman et al.* (Case No. SCSL-04-14), [Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa](#) (SCSL-04-14-PT), 4 June 2004.

<sup>209</sup> *The Prosecutor v. Samuel Hinga Norman et al.* (Case No. SCSL-04-14), [Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa](#), Trial Chamber, 2 August 2004.

<sup>210</sup> Kendall and Staggs *supra* note 202

115. Nevertheless, the prioritisation of SGBV crimes by the prosecution in other cases resulted in 10 of the 13 accused being charged with the crimes against humanity of rape and sexual slavery, and the war crime of outrages upon personal dignity.<sup>211</sup> Six of the accused were also charged with forced marriage under the heading of the crime against humanity of 'other inhumane acts', underscoring that seemingly gender-neutral crimes may be strongly gendered. All in all, and notwithstanding the absence of charges of sexual violence in the CDF case, the SCSL jurisprudence, with regard to the crimes of forced marriage as an 'other inhumane act', and the crime of sexual slavery, marked a step forward.<sup>212</sup>

## The International Criminal Court

116. Similar to the *ad hoc* tribunals, the founding documents of the International Criminal Court (ICC) included a commitment to the investigation and prosecution of crimes of sexual and gender-based violence. In 2003, consistent with Article 54 of the Rome Statute, the Gender and Children Unit was established within the Investigation Division. Comprised of staff with legal and psychosocial expertise, it was set up to support the investigation and prosecution of SGBV crimes and crimes affecting children. The unit was expected to advise the Prosecutor, and provide support to all divisions within OTP dealing with victims and witnesses of such crimes at all stages of operations.<sup>213</sup> Unfortunately, and similar to the limitations of the Legal Advisor role in the early years of the ICTY and ICTR, the Unit's expertise was directed towards advising on, and supporting, trauma-informed interactions with survivors and witnesses. **It was not integrated or embedded into specific investigations, and had no power to shape investigation strategies** or influence the work of the trial teams during the term of the first ICC Prosecutor.<sup>214</sup> As highlighted in Section I, however, the Unit's role has evolved over the years, and it **now plays a more active role in investigations.**<sup>215</sup>

117. For the ICC's first case, *The Prosecutor v. Lubanga*, then-Prosecutor Luis Moreno Ocampo decided to focus on one specific set of crimes: the war crimes of enlisting, conscripting, and using child soldiers. In an August 2006 pre-trial brief, in which prosecutors detailed the charges against Lubanga, sexual violence suffered by girl soldiers was noticeably absent from references to the crime of 'using children to participate actively in hostilities'.<sup>216</sup> This was despite the fact that there was evidence attesting that girl child soldiers were subjected to sexual slavery and rape as an

<sup>211</sup> Valerie Oosterveld, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes', *American Journal of Gender, Social Policy & the Law*, 17, no.2 (2009), p. 408.

<sup>212</sup> On the developments regarding the interpretation of the crime of sexual slavery and the adoption of gender-sensitive approaches, see Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: progress in the Revolutionary United Front Judgments', *Cornell International Law Journal*, 44 (2011), pp. 49-74. For a more nuanced view of SCSL jurisprudence on SGBV issues see Valerie Oosterveld, 'The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice', *Human Rights Review*, 10(1), March 2009, pp. 73-98.

<sup>213</sup> Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, 2014.

<sup>214</sup> Interview with Lina Biscaia, 26 February 2020.

<sup>215</sup> Yet, as one expert pointed out: "The position for the head of the Unit has [only recently] been advertised. Similar, to the ICTY/ICTR, neither the legal officer's position, nor that of an incoming head have equivalent status as investigative team leaders or senior trial officers. Neither SCSL nor the Extraordinary Chambers in the Courts of Cambodia had/have designated Gender Advisors. CAAC initiatives should be aware of this pattern of insufficiently resourced graded post for Legal Advisor for Gender. This is not a norm at international judicial mechanisms." Input by expert, October 4, 2020.

<sup>216</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-2901), *Annex 2: Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)*, 28 August 2006.

integral part of their becoming and being used as child soldiers.<sup>217</sup>

118. Evidence of sexual and gender-based violence against girl soldiers emerged throughout the trial. In the Trial Judgment, the majority found that girl soldiers were subjected to violence and rape, but were left without an avenue to convict due to the **failure to charge these crimes on the indictment**. This was recognised as a serious failure by the prosecution, and in its July 2012 Sentencing Decision, the Chamber went as far as stating that it "strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence."<sup>218</sup>

119. Patricia Viseur Sellers, in a later interview, would remark:

Given the evidence or information on sexual violence that came out in court, it appears to me that there was the potential for even greater probative evidence, **had it been thoroughly investigated and included initially in the charges or even amended into the charges**. So, this takes us back to the beginning, to the conception of the initial investigation and prosecution strategies. **The development of gender and sexual violence strategies in a case must start at the beginning.**<sup>219</sup> (Emphasis ours).

120. The failure to properly investigate and indict sexual violence in the *Lubanga* case had implications for the unrecognised victims of sexual violence, and set off a 'cascade of injustice' that extended to the reparations phase.<sup>220</sup> As the ICC's reparations framework linked the conviction to the measures of repair, and as there were no charges or convictions for sexual and gender-based crimes, these crimes fell outside the reach of reparations. In March 2015, the Appeals Chamber confirmed that although reparations would be available for the former child soldiers, there would be no specific reparations for sexual and gender-based crimes.<sup>221</sup>

121. After Fatou Bensouda took office as Prosecutor in 2012, she took a **more proactive approach to SGBV crimes**. Brigid Inder was the Special Advisor for Gender to the OTP between 2012 and 2016. Patricia Viseur Sellers, who was Special Advisor for Prosecution Strategies during that period, was appointed Special Advisor on Gender in 2017. In June 2014, the Office of the Prosecutor published a Policy Paper on Sexual and Gender-Based Crimes.<sup>222</sup> Introducing the policy, Bensouda emphasised: "The message to perpetrators [...] must be clear: sexual violence and gender-based crimes in conflict will neither be tolerated nor ignored at the ICC."<sup>223</sup>

122. Since *Lubanga*, and more visibly since the implementation of the SGBV policy, there has been **progress when it comes to the investigation and indictment of SGBV crimes** (though not necessarily reflected in ultimate convictions). In 2009, Jean-Pierre Bemba was charged with the rape of men, women, and children during the non-

<sup>217</sup> Katy Glassborow, 'Call for Lubanga Charges to Cover Rape' *Institute for War & Peace Reporting*, 12 May 2008).

<sup>218</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-2901), *Decision on Sentence pursuant to Article 76 of the Statute*, Trial Chamber I, 13 July 2012.

<sup>219</sup> FIDH Press Release, 'Crimes of sexual violence and the Lubanga Case: Interview with Patricia Viseur Sellers', 16 March 2013.

<sup>220</sup> Louise Chappell, 'A chance for the International Criminal Court to fix sex crimes injustice' (*The Conversation*, 18 December 2017).

<sup>221</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-3129), *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*, Appeals Chamber, 3 March 2015.

<sup>222</sup> Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, 2014.

<sup>223</sup> Coalition for the ICC, *Eliminating sexual violence in conflict through the ICC*, 20 June 2017.

international armed conflict in the Central African Republic.<sup>224</sup> In March 2016, Bemba was convicted of rape as a war crime and a crime against humanity.<sup>225</sup> This decision was, however, reversed on 8 June 2018, when the Appeals Chamber acquitted Bemba of all charges.<sup>226</sup> In 2014, the Prosecution filed new charges against Bosco Ntaganda, which included charges of sexual violence committed against child soldiers during the conflict in the DRC.<sup>227</sup> This contrasted with the first indictment against him, issued in 2006, which did not contain any crimes of sexual violence.<sup>228</sup> In July 2018, the Trial Chamber found Ntaganda guilty of 18 counts of war crimes and crimes against humanity, including charges of rape, sexual slavery (against civilians and against children within his own armed group), and conscripting and enlisting children under the age of 15 years into an armed group, and using them to participate actively in hostilities. He was sentenced to 30 years imprisonment.<sup>229</sup> The *Ntaganda* case is now on appeal.

## Hardwiring lessons learned: Justice Rapid Response

123. *Akayesu* marked the beginning of key developments in the SGBV jurisprudence, and notably of gendered legal analysis, of *ad hoc* and hybrid tribunals.<sup>230</sup> As mentioned, these developments can be attributed to an increasing recognition of the gendered dimension of international crimes by the judiciary, the legal activism of civil society organisations, and, in some instances, the gradual prioritisation of SGBV in investigative and prosecutorial strategies, the allocation of related expertise, and structural changes in investigative teams.

124. However, despite this increased focus, examples of failures or resistance to fully investigate, prosecute and adjudicate sexual violence persist. A lack of inclusion of SGBV crimes in investigative and prosecutorial strategies, stemming from difficulties in collecting evidence, or a lack of available or embedded gender expertise, and a judicial resistance to recognising the gendered nature of international crimes still constitute significant barriers to the full, consistent, and successful investigation and prosecution of SGBV.

125. One lesson that was learned from the *Akayesu* case, and bolstered by the failures to fully and consistently investigate and prosecute sexual violence at the ICTR and SCSL, was that jurisprudential findings **recognising crimes** of sexual violence, or the gendered dimensions of international crimes, **was not sufficient to infuse gender justice** into all stages of investigatory and prosecutorial strategies. Rather, an

understanding of sex and gender, including the surfacing of under-investigated crimes against women and girls, **had to seep into the more mechanical and structural aspects of pursuing justice**. This required **recruiting people with relevant expertise, having dedicated funding for that expertise, and setting up internal structures to evaluate the extent to which a broader span of crimes was being documented**, notably against communities to which less attention is paid.

126. Another relevant development, with direct impact on the documentation and investigation of SGBV by accountability mechanisms, was the **setting up of the Justice Rapid Response (JRR) roster of expertise on SGBV**. JRR's partnership, first with UNIFEM, and then with its successor, UN Women, to provide SGBV and gender expertise to national and international accountability mechanisms, including OHCHR-backed documentation entities (the majority of which are Fact-Finding Missions and Commissions of Inquiry), demonstrates the increased interest in mainstreaming SGBV and gender in investigation strategies.<sup>231</sup>

127. JRR is a standby mechanism for the recruitment and rapid deployment of expertise in support of the investigation and prosecution of war crimes, crimes against humanity, genocide, and other serious human rights violations.<sup>232</sup> There are currently around 700 experts on the JRR roster,<sup>233</sup> including criminal and human rights investigators, human rights monitors, prosecutors, military and legal analysts, forensic experts, and psychosocial counsellors. The majority have a mix of domestic and international experience.<sup>234</sup> JRR experts are recruited onto the roster through a competitive vetting and training programme, delivered by the Hague-based Institute for International Criminal Investigations (IICI).<sup>235</sup> Once recruited, experts may be deployed to international and regional accountability mechanisms (e.g. the UN *ad hoc* entities, international criminal courts and tribunals, regional Commissions of Inquiry); national transitional justice mechanisms (e.g. truth and reconciliation commissions); or civil society organisations engaged in the documentation of international crimes and human rights abuses.<sup>236</sup>

128. In 2009, in partnership with the IICI and UN Women, JRR created a dedicated SGBV Justice Experts Roster, which is a sub-roster of the broader JRR Roster. This partnership was born out of the recognition that justice for SGBV crimes had long been neglected by international law, and that there was a need to enhance accountability for conflict-related SGBV. Under this scheme, **experts are equipped with the specialist knowledge and training to be able to effectively investigate, analyse, and prosecute sexual and gender-based violence crimes, and subsequently seconded to accountability mechanisms** by UN Women.<sup>237</sup>

129. One expert pointed out that the persistence of UN Women was instrumental in convincing OHCHR of the merits of such deployments. Cécile Aptel, while recognising the consistent efforts of UN Women, also drew attention to the advocacy efforts of States, such as Canada.<sup>238</sup>

<sup>224</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo* (Case No. ICC-01/05-01/08), [Public Redacted Version of the Amended Document Containing the Charges](#), Pre-Trial Chamber II, 30 March 2009, para 39.

<sup>225</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo* (Case No. ICC-01/05-01/08), [Judgment pursuant to Article 74 of the Statute](#), Trial Chamber III, 21 March 2016.

<sup>226</sup> The Appeals Chamber held *inter alia* that the criminal acts, including rape, added by the Prosecutor after the Confirmation Decision, by means of disclosure and inclusion in auxiliary documents, did not fall "within the facts and circumstances described in the charges" in terms of Article 74(3) of the Statute. *The Prosecutor v. Jean-Pierre Bemba Gombo* (Case No. ICC-01/05-01/08 A), [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'](#), Appeals Chamber, 8 June 2018, paras 101-119.

<sup>227</sup> *The Prosecutor v. Bosco Ntaganda* (Case No. ICC-01/04-02/06), [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), Pre-Trial Chamber II, 9 June 2014.

<sup>228</sup> *The Prosecutor v. Bosco Ntaganda* (Case No. ICC-01/04-02/06), [Warrant of Arrest](#), Pre-Trial Chamber I, 22 August 2006.

<sup>229</sup> *The Prosecutor v. Bosco Ntaganda* (Case No. ICC-01/04-02/06), [Judgment](#), Trial Chamber VI, 8 July 2019.

<sup>230</sup> The ICTY case *Prosecutor v. Duško Tadić* was the first international war crimes trial involving evidence of sexual violence. The charges concerned sexual mutilation in the Omarska Camp, and resulted in convictions for the war crime of cruel treatment and the crime against humanity of other inhumane acts. Sexual violence was not, however, specifically charged on the indictment. *Prosecutor v. Duško Tadić*, ([Opinion and Judgment](#)), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia, 7 May 1997.

<sup>231</sup> Interview with expert.

<sup>232</sup> Interview with expert. See also, [official website](#) of Justice Rapid Response.

<sup>233</sup> This comprises 54% women, 42% from the Global South, speaking more than 90 languages and representing more than 100 nationalities. See, [official website](#) of Justice Rapid Response.

<sup>234</sup> Interview with expert.

<sup>235</sup> Justice Rapid Response, [Annual Report 2018](#) ('JRR Annual Report 2018'), p. 4 (emphasis added).

<sup>236</sup> Interview with expert.

<sup>237</sup> Interview with Federica Tronchin, 17 March 2020.

<sup>238</sup> Interview with Cécile Aptel, 5 March 2020.

130. In 2012, the UN Secretary General's Report to the Security Council on Women, Peace and Security delivered a mandate to UN Women to ensure that every Commission of Inquiry had a dedicated gender expert on it.<sup>239</sup> There are currently 240 experts on the specialist roster,<sup>240</sup> a fact which has facilitated significantly the "raising of standards for the investigation of SGBV".<sup>241</sup>

131. Since 2012, JRR and UN Women have deployed experts to every Commission of Inquiry and most Fact-Finding Missions, as well as the Syria IIM.<sup>242</sup> In some cases, such as the Commission of Inquiry on Syria, they deploy multiple experts at the same time, covering an range of roles, including gender advisors, SGBV investigators, and dedicated interpreters on SGBV.<sup>243</sup> In particular:

a. **Syria Commission:** 15 JRR experts have been deployed to the Syria Commission of Inquiry (CoI), including SGBV investigators and gender advisors.<sup>244</sup> This expertise helped to bring the prominent role of SGBV in the Syrian conflict to the surface and was key to the Commission's first report on the issue (*"I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic*).<sup>245</sup> The report, which was the first of its kind, detailed SGBV against women, girls, men, and boys committed in Syria since the uprising in 2011, and highlighted that parties to the conflict resorted to sexual violence as a tool to instil fear, humiliate and punish, or, in the case of terrorist groups, as part of their enforced social order.<sup>246</sup>

b. **Myanmar FFM:** Two gender advisors/SGBV investigators and a forensic psychologist specialised in SGBV contributed to the FFM's September 2018 report, in which sexual violence was documented.<sup>247</sup> According to one former FFM lawyer, the SGBV advisors and investigators interviewed victims and ensured that their experiences were adequately captured in the FFM report on the issue. This was a context in which SGBV was so prevalent that it would, in any event, have been a focus for the FFM. However, having an expert's sign off was reassuring to the Commissioners. A similar expertise in respect of children would have been useful.<sup>248</sup>

132. In the intervening years, and as a result of the momentum generated by these developments, the investigation and documentation of SGBV has received sustained attention and support from UN Member States, notably Canada, the United Kingdom, and Sweden. This has provided **engines of advocacy at the highest political and diplomatic levels**, political support to – and concomitant pressure on – entities linked to criminal accountability. This ensured, in some cases, a prominent role for the documentation and investigation of SGBV in the mandates and investigative priorities

<sup>239</sup> UN Security Council, [Report of the Secretary-General on women, peace and security](#), S/2012/732, 2 October 2012.

<sup>240</sup> Interview with expert.

<sup>241</sup> JRR Annual Report 2018, p. 4.

<sup>242</sup> The attention paid to SGBV by CoIs/FFMs is strongly linked to the JRR roster being put in place.

<sup>243</sup> Interview with expert.

<sup>244</sup> JRR Annual Report 2018, p. 7. Other experts included a forensic image expert, forensic pathologists, an interpreter and military experts.

<sup>245</sup> Human Rights Council, [A/HRC/37/CRP.3](#), 8 March 2018.

<sup>246</sup> In early 2018, Justice Rapid Response and UN Women provided one Sexual and Gender Based Crimes (SGBC) analyst, one SGBC investigator and one SGBC legal advisor to provide legal analysis and advise the IIM on the collection of evidence. JRR has also contributed crucial expertise in support of criminal prosecutions, including in the cases of Hissène Habré before the Extraordinary African Chambers, Khieu Samphan and Nuon Chea at the Extraordinary Chambers in the Courts of Cambodia, and Bosco Ntaganda at the ICC.

<sup>247</sup> Human Rights Council, [Report of the independent fact-finding mission on Myanmar](#), A/HRC/39/64, 12 September 2018; JRR Annual Report 2018, p. 4 (other JRR experts included a child psychologist to mentor the Fact-Finding Mission team on interviewing child victims and survivors, and a military analyst).

<sup>248</sup> Interview with expert.

of non-judicial accountability mechanisms,<sup>249</sup> and a **steady stream of funding**, either directly to the entity itself, in the case, for example, of UNITAD, or to JRR and UN Women to facilitate their deployment of experts.

133. Moreover, the support of UN Member States has also enabled the **development of national initiatives on SGBV** which aspire to a global reach, such as the United Kingdom's Preventing Sexual Violence Initiative', which was launched in 2012.<sup>250</sup> The expert consultations that took place under this initiative resulted in the development of an **authoritative international protocol and best practice guide on the documentation of SGBV**.<sup>251</sup>

134. More recent is the ongoing development of the Murad Code,<sup>252</sup> named after, and supported by, 2018 Nobel Peace Prize Winner Nadia Murad. The Murad Code is a global consultative initiative aimed at building and supporting a community of better practice for, with, and concerning survivors of conflict-related sexual violence. Its key objective is to respect and support survivors' rights, and to ensure work with survivors to investigate, document, and record their experiences is safer, more ethical, and more effective in upholding their human rights. The Code is due to be finalised in 2021.

135. In conclusion, progress remains to be made to improve the reductive understanding of gendered expertise as pertaining to crimes against/affecting women; the conflation of crimes against/affecting women, with crimes of sexual violence; the tendency to exclude men and boys from the community of victims and survivors of sexual violence; and the failure to adequately document crimes committed on the basis of sexual orientation or gender identity.<sup>253</sup> At the same time it is **now deeply ingrained** in those charged with pursuing accountability for international crime that **investigating, documenting, and prosecuting crimes of sexual and gender-based violence is essential**.<sup>254</sup>

## PART B. LESSONS LEARNED

### Similar barriers for justice for marginalised groups

136. Those working to close the impunity gap when it comes to violations and crimes affecting children face many of the initial attitudinal and structural barriers faced by those seeking to strengthen understandings of gender in the investigation, analysis, and prosecution of international crimes.

<sup>249</sup> Human Rights Council, [A/HRC/RES/34/22](#), 24 March 2017, paras. 11, 13; Human Rights Council, [Report of the Independent Investigative Mechanism for Myanmar](#), A/HRC/42/66, 7 August 2019, para. 13.

<sup>250</sup> Foreign, Commonwealth & Development Office, *Preventing Sexual Violence in Conflict Initiative* (2020) <https://www.gov.uk/government/organisations/preventing-sexual-violence-in-conflict-initiative>.

<sup>251</sup> Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, Second edition, March 2017.

<sup>252</sup> The draft *Murad Code* is available at <<https://www.muradcode.com>>.

<sup>253</sup> As of 2014, national laws worldwide deny 90% of men in conflict-affected countries legal recourse if they become a victim of sexual violence; 70 countries allow for the arrest and prosecution of men who report sexual victimisation due to homophobic laws and policies. See Chris Dolan, *'Into the mainstream: Addressing sexual violence against men and boys in conflict'*, Briefing paper prepared for workshop held at the Overseas Development Institute, London, 2014.

<sup>254</sup> *"I think there has been great professional growth in the area. It probably punches above its weight, because no one can dare say that they're against it. Not publicly."* Interview with Patricia Viseur Sellers, 22 February 2020.

## Attitudinal barriers

137. There has been a **lack of systematic prioritisation** of SGBV crimes by the prosecutorial leadership. With regard to non-judicial accountability mechanisms, and more particularly within OHCHR, there was an initial reluctance to incorporate SGBV experts, even where the positions came funded.

138. That some crimes are more likely to be investigated and indicted is a direct reflection of the fact that society considers some victims to hold greater intrinsic value than others. Patricia Viseur Sellers stated:

That's very much the way it was with sexual violence in the first 10 years. It is not quite that now, but it always seems like an extra. "It is too long to be out in the field to talk to the kids, it takes too long to get that person to talk about sexual violence." Well, those are defensive strategies. No one would say, "How long did it take to dig up that mass grave?" Whatever it takes to do it. "You don't have any forensic experts? Well, we'll get a group from around the world. But, wait a second, we don't have a laboratory set up! Well, we'll ask France if we can use its laboratory. Who's going to refrigerate the remains? We'll ask someone". **It's a question of political will.**<sup>255</sup> (Emphasis ours).

139. **Some communities of victims and survivors are more visible than others**; some are vested with fuller notions of humanity, making it seemingly more incumbent that the crimes against them be recorded and punished.<sup>256</sup> This invisibilisation of 'groups', such as women and children, stems from persisting power dynamics which contribute to perpetuating gender or generational inequalities.

140. The marginalisation of certain 'groups' of victims and survivors has an impact on the accountability process. The general underreporting of SGBV crimes, and crimes and violations affecting children, is reflected in the general paucity of evidence available for collection by investigators dealing with social taboos.<sup>257</sup> Moreover, concerns over risks of retraumatisation of vulnerable victims and witnesses have also affected the collection of evidence on SGBV crimes, and of violations and crimes affecting children,<sup>258</sup> as well as the analysis of the impact of such violations and crimes. **What starts as an attitudinal barrier grows into significant structural obstacles** (which in turn reinforces harmful attitudes) paralysing the accountability process.

141. As a result, for many years, sexual violence against women and girls was ignored by investigators and prosecutors, sometimes in circumstances where maintaining such blindness could perhaps be considered wilful.

142. **Documentation, both as a recognition of the crimes and as a path to accountability, is therefore particularly important for crimes committed against or directly affecting marginalised groups.** Impunity for these crimes acts to reinforce, rather than challenge, pre-existing norms and patterns of discrimination, both inside and outside the context of unrest or war. With documentation, **the intersectional nature**

<sup>255</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>256</sup> For a discussion of the impact of intersecting marginalised identities on people's access to justice, see Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, which updated general recommendation No. 19, *CEDAW/C/GC/35*, 14 July 2017.

<sup>257</sup> *Nowrojee – Your Justice is too Slow*, p. 10, fn. 8

<sup>258</sup> Interview with expert.

**of the invisibility** should also be recognised: "The young female child is the one who is probably most lost, then when we try and find the voice of children in post-conflict situations. That's the person that disappears".<sup>259</sup>

143. It is equally true that **when violations and crimes affecting members of 'groups' routinely rendered less visible in justice processes begin slowly to be seen, they are often understood reductively.** The entry point for making women and girls visible in the international criminal sphere has come through the crime of sexual violence. The entry points for understanding the crimes that children, and particularly boys, suffer in conflict is the war crime of recruitment and use of children under fifteen years of age in hostilities:

I see this enormous focus on child soldiers – the recruitment and use of children. And of course, that is shocking and ought to be prosecuted. But I see, in the practice of international and internationalised courts, what I would call an almost **over-focus on that particular issue.** If you look at their practice, it almost seems like this is the only thing that happens to children in conflict is that they are recruited as soldiers and then brutalised, essentially. And if you are a girl soldier, then you'll be used for sexual purposes. And I find that to be, well, just **not an accurate reflection of what happens to children in conflict.**<sup>260</sup> (Emphasis ours).

## Structural barriers

113. Similar **structural barriers, bolstered by (and in turn bolstering) attitudinal barriers,** also abound. Initially, there was little State support for ensuring accountability for SGBV crimes, no recognised or curated pool of experts in this field, and no structure into which to convey that expertise into court, tribunals, or UN-mandated documentation entities, such as the Commissions of Inquiry or Fact-Finding Missions. In addition, the efforts of the tribunals to integrate SGBV expertise revealed tensions around the identification of the most adequate investigative model: SGBV expertise was either perceived as requiring separate attention and structures or, in some instances, mainstreamed in core investigations. As pointed out by Patricia Viseur Sellers:

One of the things that we can learn from the past judicial mechanisms is that sexual violence usually falls out when it is isolated [...] We understand better now that it's not the errant soldier who ran off and did something in the midst of this widespread and systematic attack, but that sexual violence fits right into that attack.<sup>261</sup>

114. On the ground, there was both **little funding for, and,** with a few exceptions as previously discussed, **little recognition of the need for outreach to communities** who had suffered crimes of SGBV, and a failure to understand that the social cost of speaking to investigators was often too high for the victims and their families to pay. Initially, there was also very little funding for psychosocial support for victims of sexual violence, a state of affairs which continues for child victims of mass atrocity even today.<sup>262</sup> According to an expert, many of the challenges in the field of

<sup>259</sup> Interview with Dr Alison Bisset, 27 February 2020.

<sup>260</sup> Interview with Dr Alison Bisset, 27 February 2020.

<sup>261</sup> Interview with Patricia Viseur Sellers, 22 February 2020.

<sup>262</sup> Col Syria, *"They Came To Destroy": ISIS Crimes Against the Yazidis*, A/HRC/32/CRP.2, 15 June 2016, para. 89: "The violations specifically suffered by Yazidi children who were held and sold with their mothers are not often recognised."

child rights documentation mirror the one encountered a decade ago with regard to the documentation of SGBV, but can nevertheless, as experience has shown, be overcome by all stakeholders involved.<sup>263</sup>

## Important differences

115. There are important, instructive differences between the situation of those seeking to strengthen accountability for SGBV crimes and advance gender-sensitive approaches and those seeking to strengthen accountability for violations and crimes against or affecting children.

116. First and foremost are the **often-unrecognised political complexities surrounding accountability for violations and crimes affecting children**. While there is now more consensus on the need to end impunity for SGBV, States are more reluctant to centre advocacy on accountability for crimes and violations affecting children. The pursuit of accountability for these crimes or violations can give rise to other kinds of accountability concerns. The legitimacy of military operations and measures taken in the name of national security, such as the detention of children on national security grounds, can be uncovered and called into question when documenting or investigating crimes and violations affecting children. This can shed light on the record of those States which might be implicated in the commission of crimes affecting children and might wish to shield such information from scrutiny.<sup>264</sup>

117. This has created a significant structural barrier, and resulted in a lack of sustained and comprehensive attention to violations and crimes against or affecting children in the foundational instruments of accountability mechanisms. It is through the support of States in high-profile forums, such as the UN Security Council, or of States' high-profile initiatives, such as the United Kingdom's Preventing Sexual Violence Initiative, that the issue remains in public view. **States also provide a significant source of funding, and pressure for results**. Cécile Aptel, who headed the IJIM's start-up team, remembered several states speaking about the importance of documenting SGBV crimes, and being willing to provide dedicated funding, but she could not recall a State speaking to her about ensuring that evidence about crimes against children would be collected: "Without the **support of key donor governments that made funding conditional** on taking on sexual crimes, it would probably not have really happened. That's what makes the big difference between sexual crimes and crimes against women or crimes against children."<sup>265</sup> **(Emphasis ours)**.

118. Second, and as described in Section I, there is **no natural home inside the UN** for an entity which is willing to be the nexus for accountability for crimes affecting children, for raising funds, and to assist in building and disseminating knowledge.

Third, as highlighted, many **civil society organisations, and more particularly large NGOs working on children's issues, have a mixed or exclusively humanitarian mandate, which requires access to affected communities**. This is not the case with SGBV, where the numerous organisations working on advocacy for sexual crimes are, with some exceptions, not those engaged in providing health treatment or relief aid to

survivors.<sup>266</sup> The existence of an accountability-focused constituency has been a significant factor in achieving justice for SGBV crimes. This includes NGOs which pursue a gendered approach to accountability, such as the Women's International League for Peace and Freedom in London; advance a progressive gendered interpretation to international law, such as the Global Justice Center in New York; and focus on gender justice, such as Women's Initiatives for Gender Justice, to name but a very few. An expert noted that a similar constituency is lacking for children rights, attributing this to children's rights NGOs' focus on humanitarian assistance and service delivery, rather than accountability or advocacy.<sup>267</sup>

119. That there are more organisations working on gender justice within the sphere of international and local criminal accountability is a result, *inter alia*, of the fact that **strong women advocates are increasingly establishing and leading these organisations, as well as the fact that women are moving into greater positions of diplomatic and political power** in their countries. While it is not the exclusive role of women to introduce matters of sex and gender into investigation strategies, charging decisions, or judicial deliberations, the impact of activist female voices has motivated progress in recognising sexual and gender-based violence as international crimes (as mentioned above, in the *Akayesu* case, for example). Similarly, those taking up relevant posts at JRR and UN Women have, to date, mostly been women.

120. It is becoming increasingly common for children to enter the public sphere to advocate for their rights.<sup>268</sup> However, the number of child advocates remains marginal, and too often their voices are channelled through interactive segments or performative advocacy. While civil society organisations, such as Terre des Hommes and Defence for Children International, have undertaken capacity-building efforts at the international and local levels, to promote and drive children's participation and advocacy in local and international fora,<sup>269</sup> children are often not fully included in strategic and policy discussions, nor do they contribute directly to recommendations addressed to decision-makers.<sup>270</sup>

121. **Consequently, children are still largely dependent on adults to advocate for them, and to prioritise their rights to, and interests in, accountability**. Despite an increased influence and, in some instances, a role in decision-making processes, economic, legal, cultural, and social structures mean that, ultimately, decisions will be taken by adults, to which the ultimate decision-making power is entrusted. While there have been occasions for momentum, such as the publication of Graça Machel's report,<sup>271</sup> there has not been sustained focus, or consistent funding, from governmental or non-governmental actors on strengthening accountability for crimes against children.

<sup>266</sup> Interview with expert.

<sup>267</sup> Interview with expert.

<sup>268</sup> See examples of good practice in children's and young people's participation in events in UNICEF, *Children as Advocates: Strengthening Child and Young People's Participation in Advocacy Fora*, June 2010, pp. 36-46.

<sup>269</sup> Save the Children, *It's all about children: seven good examples and ten steps to meaningful children's participation in reporting to the Committee on the Rights of the Child*, 2011.

<sup>270</sup> See for instance interventions of child advocates during the interactive segment preceding discussions commemorating the adoption of the CRC General Assembly, Plenary, 74th session, 31<sup>st</sup> & 32<sup>nd</sup> meetings, GA/1225, 20 November 2019, <https://www.un.org/press/en/2019/ga12215.doc.htm>.

<sup>271</sup> *Supra* note 12.

*Consequently, there is limited psychosocial support available that is directly targeted at the needs of these children.*"

<sup>263</sup> Interview with expert.

<sup>264</sup> Interview with expert.

<sup>265</sup> Interview with Cécile Aptel, 5 March 2020.

## SECTION III.

### INNOVATION, STRATEGIES, AND SOLUTIONS TO OVERCOMING BARRIERS TO ACCOUNTABILITY FOR VIOLATIONS AND CRIMES AFFECTING CHILDREN

144. In this section of the Research Paper, we lay out potential strategies and solutions that have emerged from our work and research. In Part A, we set out possible strategies and solutions to overcome some of the barriers to accountability for violations and crimes affecting children described in Section I. Part B describes the approach adopted in the case of Kavumu in the DRC, which resulted in the 2017 prosecution, and conviction, of 11 individuals for the rape of young girls living in eastern DRC. From this case, we draw lessons that could have wider application beyond the individual context of the case.

#### PART A. STRATEGIES AND SOLUTIONS

##### Build political backing at the state and diplomatic levels to maintain focus on the issues, and open and sustain dedicated funding streams

145. **Political willingness** to put accountability for violations and crimes affecting children securely on the international agenda can bring about increased visibility of these violations and crimes at the political and diplomatic levels and in the foundational instruments of accountability mechanisms; the allocation of dedicated funding streams for the building and provision of expertise; and prioritisation of the issue in investigation strategies. As noted by one expert, combating specific impunities around crimes and violations affecting children needs to be viewed as a stand-alone issue of importance, **in order to generate funding**.<sup>272</sup>

146. **Increased dialogue and cooperation of key accountability actors** is essential to ensure that accountability for crimes and violations against children stays high on the political agenda. A lack of actors solely focused on accountability has been highlighted as one of the numerous challenges faced by leading organisations engaged in influencing efforts on the issue. In this context, and taking stock of the significant impact of UN Women on accountability for SGBV, the establishment of a UN entity tasked *inter alia* to advocate for accountability for violations and crimes affecting children, and raising funds, has been suggested as a way to mobilise stakeholders, and to generate greater political awareness and willingness to address this issue.

<sup>272</sup> Interview with expert.

##### Create structures within OHCHR to better support the documentation and investigation of violations and crimes affecting children by non-judicial accountability mechanisms

147. Experts have suggested that a **unit should be created within OHCHR to provide substantive legal and operational guidance, support and training to staff, especially during mandates' start-up phase**, including on but not limited to, investigating and providing the adequate legal qualifications to crimes and violations affecting children and other subjects.<sup>273</sup> This would encompass training on applicable law and disseminating practical methodological tools, which would include child-competent information-collection, such as checklists (e.g. on intersectional approaches to documentation) and templates (e.g. on informed consent, confidentiality declarations for interpreters, etc.) that each mission could tailor to its specific situation. The provision of training, pre-deployment or in the initial phases of the mission, would enhance the quality of information collection and analysis and minimise the risk that important data is disregarded. For longer-term mandates, once the start-up phase is complete, such expertise should be available within the general office structure, with a view to promoting broad-based competence on addressing crimes against children throughout the mandate or mechanism.

148. One expert recommended that this unit be established *within* OHCHR; according to this interviewee, if an external body were to be created, there would be a risk that mandates would not systematically have recourse to it.<sup>274</sup> Moreover, having an internal mechanism would **contribute to attitudinal change** within OHCHR by ensuring that these issues are mainstreamed, enhance internal capacity, and **preserve institutional memory** on these issues. Such a dedicated unit would create a specific focus point for the support of Cols, FFMs and the start-up phases of Human Rights Council-mandated entities such as the IIMM, and even Geneva-based entities mandated by other UN bodies, such as the IIIM.

149. There is a strong argument that this is needed, given the proliferation of such documentation entities over the last decade, without a corresponding increase in staffing and resources within OHCHR to support them.<sup>275</sup> Currently, support for Cols and FFMs is divided between different offices, noticeably the Rapid Reporting Unit (RRU) and the Methodology Education and Training Section (METS). RRU supports the recruitment into the Cols and FFMs, while METS supports training, formation of guidelines and best practices, and oversees the lessons learned processes. Neither RRU nor METS are dedicated to Cols, FFMs or other *ad hoc* documentation entities. Rather, their support to these entities runs alongside their OHCHR-directed work.

##### Build a pool of expertise

150. **Developing and enhancing staff capacity**, within all accountability mechanisms, is key to ensuring that investigations are child-competent, that lessons learned and best practices stemming from local and international accountability efforts are efficiently and systematically shared, and that a child-centred analysis of crimes and violations

<sup>273</sup> Federica D'Alessandra, Sareta Ashraph and Stephen Rapp, 'Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff (Part III)'. *Opinio Juris*, October, 2020. Also see: 'Recommendations of the Group of Practitioners on Fact-Finding and Accountability' January, 2017.

<sup>274</sup> Interview with expert.

<sup>275</sup> *Supra*, note 273.

is **systematically integrated** into accountability efforts. In turn, this will create an expectation that violence affecting children must be considered systematically, as is presently the case with SGBV.<sup>276</sup>

### Create a structure focused on building and disseminating expertise

151. Adequately staffing non-judicial accountability mechanisms is particularly challenging given the severe time and resource constraints under which mission design and planning usually occur. Building a substantial pool of investigators is critical, particularly because once a mandate is activated, staff must be immediately operational and put their skills into practice. In the case of judicial accountability mechanisms, the deployment of experts offers a solution to overcome skills shortage, and thus strengthen the capacity of teams of analysts and investigators. One solution could be the **creation of a roster or nexus of expertise on the investigation of violations and crimes affecting children** that can be deployed into non-judicial and judicial accountability mechanisms, a model **currently being explored by Justice Rapid Response**.
152. Through its deployment of SGBV experts, JRR identified a skills gap in the documentation, investigation, and prosecution of violations and crimes affecting children; as a result, it is currently building a similar model in respect of these crimes. One expert noted that through the deployment of child rights experts who can investigate crimes against children and apply child-sensitive approaches in human rights investigations, those investigations will set higher and concrete expectations of what a victim-centred and child-rights sensitive investigation looks like and provide solid impact stories that can be collected and influence other entities doing advocacy.<sup>277</sup>
153. JRR has facilitated workshops on the exchange of best practices between experts and organised IICI-led recruitment courses with a focus on investigation of violations and crimes affecting children.<sup>278</sup> JRR has also recruited around 40 child rights experts to its specialist roster. These include, for human rights focused investigations, child protection officers with experience in investigations or monitoring, and NGO staff with investigation expertise. In each case, a legal background is preferred. For criminal investigations, criminal investigators from national jurisdictions who are trained in interviewing children are also recruited. In line with the process for compiling JRR's other rosters, the focus of the specialist children's roster is on candidates' existing expertise, with the IICI training programme used to observe participants' approaches to work, rather than to equip them with core skills.<sup>279</sup>
154. According to one expert, the deployment of child rights advisors can bolster the capacity of mandates to develop strategies for the investigation of violations and crimes affecting children (which may include interviewing children),<sup>280</sup> to the development of specific Standard Operating Procedures, and the production of reports that are child-focused.<sup>281</sup> An expert from the roster has been deployed as a Child Rights Advisor to the Syria Commission of Inquiry. He played a key role in the documentation and analysis of violations and crimes affecting children, culminating

<sup>276</sup> Interview with expert.  
<sup>277</sup> Interview with expert.  
<sup>278</sup> Interview with expert.  
<sup>279</sup> Interview with expert.  
<sup>280</sup> Interview with expert.  
<sup>281</sup> Interview with expert.

in the well-received 2020 report, "They have erased the dreams of my children": children's rights in the Syrian Arab Republic.<sup>282</sup> Several others have been involved in human rights monitoring, particularly in the Middle East. Another expert has been deployed to the Commission of Inquiry on Burundi.<sup>283</sup>

155. When deployed to non-judicial accountability mechanisms, experts have strengthened the capacity of investigators to develop strategies for the investigation of violations and crimes affecting children (which may include but is not limited to interviewing children).<sup>284</sup> Test cases are still being identified – and experts deployed – to collect solid impact stories, influence actors with an accountability constituency, and secure partnerships.<sup>285</sup> As more experts are embedded into these mechanisms' teams, their added value will, it is hoped, be recognised, and result in an ingrained acknowledgement that dedicated investigations of violations and crimes affecting children are essential, and the need for expertise to support this.
156. The success and sustainability of such deployments depend on the cooperation of accountability mechanisms. One of the key challenges is to ensure the **embeddedness of deployed experts in the different layers of management** in order to secure the support of senior staff in the mainstreaming of child rights approaches, and to hold the host mechanisms accountable over their use. The identification of clear lines of reporting and the inclusion of monitoring and evaluation indicators in the experts' terms of reference have been suggested as ways to clarify the mechanisms' needs and expectations from the outset, and to guarantee accountability with regard to the experts' engagement, and deliverables.<sup>286</sup>
157. Another key challenge to the sustainability of the model is resources. To date, no entity within the UN nor any UN Member State has committed to consistently funding this expertise, in contrast to SGBV experts who are recruited and then seconded by UN Women. As highlighted in Section I, neither UNICEF nor the SRSG CAAC are suitable focal points. To date JRR has been funded by a coalition of States.<sup>287</sup>
158. **Sustainable funding for child rights expertise, both at the investigative and analytical phases, would have to flow from States** – whether it goes to JRR, UN Women, or directly to the entities recruiting for a position requiring child rights expertise. In interviews for this report, various States known to be generally supportive of advancing international criminal accountability were identified as potential sources of financial support and advocacy.<sup>288</sup>
159. Other key recommendations on the operation of the roster were:
- IICI-led training should **develop a strong and primary focus on strategies and avenues to investigate violations and crimes against or affecting children without interviewing children**, that encompass age-disaggregated and intersectional analysis,<sup>289</sup> as well as the application of relevant legal standards and analysis to information collection;

<sup>282</sup> Human Rights Council, "*They have erased the dreams of my children*": children's rights in the Syrian Arab Republic A/HRC/43/CRP.6, 13 January 2020.

<sup>283</sup> Interview with expert. <https://www.ohchr.org/EN/HRBodies/HRC/ColBurundi/Pages/ColBurundi.aspx>.

<sup>284</sup> Interview with expert.

<sup>285</sup> Interview with expert.

<sup>286</sup> Interview with expert.

<sup>287</sup> Interview with expert.

<sup>288</sup> Interviews with Cécile Aptel, 5 March 2020; Patricia Viseur Sellers, 22 February 2020; and two more experts.

<sup>289</sup> Interview with expert.

- Experts should include individuals from national jurisdictions who are skilled in interviewing children (e.g. investigators working in child abuse units), and with providing mental health and psychological support to children during investigations;<sup>290</sup> **such experts may return to their jurisdictions at the end** of their deployment (rather than transitioning into international mechanisms) to keep building their skills.<sup>291</sup>
- **Experts should provide training and mentoring to other members of staff** to ensure widespread dissemination of knowledge and enhance office-wide capacity, beyond the individual investigation or case.<sup>292</sup>
- **Terms of reference should include: a reporting line to senior management** within accountability mechanisms, as this may make it more likely that they receive additional support when seeking to mainstream a child-competent analysis and approach; and monitoring and evaluation indicators that allow accountability of the mechanisms over the use of experts.<sup>293</sup>

160. While JRR deployments can be particularly valuable, they do not always provide a sustainable solution for longer term mandates (e.g. the IIMM or IIIM). In such cases, it is preferable for the expertise to form part of the core and ongoing structure of the organisation rather than to be available on an *ad hoc* or temporary basis. This is particularly the case given that the success of the work is heavily dependent on building and sustaining relationships of trust with a wide variety of interlocutors, and developing institutional knowledge, which is incompatible with frequent turnover of staff on short-term contracts.

#### Draw from national jurisdictions: the experience of the 2014 United Nations Independent Commission of Inquiry on the 2014 Gaza conflict ('Gaza Commission')

161. Accountability mechanisms would benefit from **recruiting from national jurisdictions**, either directly or through a child-specific roster as described above, as many domestic criminal investigators possess formal training and up-to-date experience interviewing children.<sup>294</sup> As one expert states:

The police I've worked with from various jurisdictions, **they just know how to do this**. They know how to ask the right follow ups, they know how to be sensitive, they have this innate protocol as to how to manage a difficult situation. And that is not taught. [...] That is years of being investigators in

<sup>290</sup> The importance of recruiting domestic criminal investigators to the roster was also highlighted by Erin Gallagher: "They are truly the ones that are much more cutting edge, that are doing it every single day. And they're seeing how it plays out in the courts [...] I would reach out to [...] the law enforcement agencies and some of the affiliated organisations that work with children and partner with law enforcement agencies. I would go after those investigators in the child abuse units. Of course there's a learning curve from doing that to interviewing children about bombings, let's say, but they're going to have the fundamental skills and they will have done so many of them and they're going to have such a comfort level [...] I would mix them with [...] the internationals that are working with children in conflict situations, UNICEF, Save the Children, as well as those national or local organisations regularly working with children in conflict settings, camps, and who understand the culture and local context. Together they can make sure that people are doing the interviewing in a way that's going to benefit a case and, of course, in a way that is good for a child." (Interview with Erin Gallagher, 28 February 2020).

<sup>291</sup> Interview with expert.

<sup>292</sup> Interview with expert.

<sup>293</sup> Interview with expert. Another expert was similarly of the view that a reporting line to senior management positively affected the expert's ability to work within an existing team, and ensured they received explicit support for their work and their area of focus from within the entity.

<sup>294</sup> Interview with expert.

really difficult situations. [...] I think the money should be spent to recruit people who have spent their careers doing this, investigating crime. I think that is much more important than International Criminal Law knowledge or geographical spread.<sup>295</sup> **(Emphasis ours).**

162. The experience of the Gaza Commission illustrates the benefits of recruiting experts with such background. The Commission was established by the UN Human Rights Council on 23 July 2014 to investigate violations of international human rights and humanitarian law in the occupied Palestinian territory, and particularly in Gaza.<sup>296</sup> The investigation focused on what the Commission described as "an ongoing military campaign launched by Israeli forces in June 2014", which had reportedly involved the intensive bombing and shelling of residential neighbourhoods, schools and hospitals, "resulting in scores of civilian casualties, including 551 children".<sup>297</sup>

163. The Commission formally began work in September 2014, and reported to the Human Rights Council in June 2015.<sup>298</sup> Unusually for a Col, a child protection adviser was specifically recruited from the national system. Because the Commission was under-resourced, the adviser investigated both crimes affecting children and crimes against the adult population. Nonetheless, according to one expert then serving on the commission, the adviser's presence was beneficial, and ensured that the impact on children was documented:

She spoke with everyone who had information on crimes against children, whether they were victims, whether they were witnesses, whether they were from NGOs. She spoke with everyone. She pushed, in the good sense, very hard for this to be in the report [...] She left no stone unturned. If we wanted to speak about killing – because, in reality, that was also the major alleged crime against children – not only did she investigate every incident that involved a substantial number of children, if it was just one, she also investigated the impact, psychological impact, educational impact, the whole range.<sup>299</sup>

164. While the presence of the expert meant that the perspectives of children were not ignored in the documentation process, concerns were expressed that the advisor's presence and work did not generate a broader attitudinal change, insofar as crimes against children were still not perceived as a core component of their work.<sup>300</sup> This suggests that **exposure to expertise may not be enough; attitudinal change and training**, in this case within OHCHR, **is also required**.

<sup>295</sup> Interview with Kate Gibson, 2 March 2020.

<sup>296</sup> Human Rights Council, [A/HRC/RES/S-21/1](#), 24 July 2014. The Commission was mandated to: "investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, and on ways and means to protect civilians against any further assaults, and to report to the Council at its twenty-eighth session.", para. 13.

<sup>297</sup> Human Rights Council, [Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict](#), A/HRC/29/CRP.4, 24 June 2015, para. 574.

<sup>298</sup> The Commission conducted more than 280 interviews with victims and witnesses (in Jordan and in Geneva), and received more than 500 written submissions, Human Rights Council, [Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict](#), para. 14.

<sup>299</sup> Interview with Lina Biscaia, 26 February 2020.

<sup>300</sup> Interview with Lina Biscaia, 26 February 2020.

### Improved staffing of non-judicial accountability mechanisms

165. In addition to having specialists embedded within teams, there is a need to improve the recruitment of investigators within non-judicial accountability mechanisms, in order to ensure that they are all equipped with the relevant legal and investigative knowledge, including skills to document and investigate violations and crimes affecting children.

166. On a practical level, it is not feasible for a single individual to bear sole responsibility for investigating violations and crimes against or affecting children in a given context. Moreover, allocating this task to one team member, irrespective of that team member's capacity as investigator or adviser, reinforces the perception that such crimes are an "extra, rather than a mainstream, component of the investigation that should be addressed by all those involved".<sup>301</sup> According to an expert, investigators should be able to investigate the wide range of patterns of violations reported as they are often interlinked.<sup>302</sup>

167. The **need for enhanced capacity in human rights and criminal law** was also highlighted. At present, a number of staff have a background in human rights reporting, but not in human rights law, international humanitarian law or international criminal law, with the consequence that the information that they collect does not always disclose violations of applicable legal standards.<sup>303</sup> It is particularly important for OHCHR to raise the standards of its staff in respect of international criminal law, given that the newer mechanisms are expressly focused on establishing criminal liability.

**There is a need to improve the recruitment of investigators within non-judicial accountability mechanisms**

### The role of the ICC Prosecutor's Special Adviser on Children in and affected by Armed Conflict

167. In December 2012, ICC Prosecutor Fatou Bensouda appointed Professor Diane Marie Amann as her Special Adviser on Children in and affected by Armed Conflict (Special Adviser on Children). Two other Special Advisers were appointed in 2012, Patricia Viseur Sellers (Special Adviser on International Criminal Law Prosecution Strategies, subsequently became Special Adviser on Gender), and Professor Leila Nadya Sadat (Special Adviser on Crimes Against Humanity).<sup>304</sup> These are three among several Special Advisers, appointed pursuant to Article 42(9) of the Rome Statute of the ICC.

<sup>301</sup> Interview with Lina Biscaia, 26 February 2020. The required competencies and expertise discussed in this section to meet the objective of mainstreaming are separate from the specific skills required to conduct certain steps of investigations, such as the process of interviewing children. See *supra* note 97).

<sup>302</sup> Interview with expert.

<sup>303</sup> Interview with Lina Biscaia, 26 February 2020: "A lot of people who come from the human rights world haven't studied human rights law [...] and then they come to the Cols where they have to apply not just human rights law, but the Geneva Conventions and maybe ICL too." The same issue was reflected in a 2020 anonymous survey of 103 OHCHR staff conducted by Oxford University, discussed in Sareta Ashraph and Federica D'Alessandra, 'Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff (Part I)' *Opinio Juris*, October, 2020. See also: *Anchoring Accountability for Mass Atrocities: a Project to Advise on the Permanent Support Needed to Fulfil International Investigative Mandates*, Oxford Programme on International Peace and Security, 2020

<sup>304</sup> *Ibid.*

168. Special Advisers are recognised independent legal experts who advise the Office of the Prosecutor on training, policies, and legal submissions.<sup>305</sup> They work on a *pro bono* basis and provide advice to the Office at the request of the Prosecutor, or on their own initiative. They are periodically *in situ* and can consult with all teams. They are also available to teams to provide advice on a need-basis during investigations.<sup>306</sup>

169. The role of the Special Adviser on Children has included assisting in the research, drafting, and publication of the ICC OTP's Policy on Children (described below).<sup>307</sup> By contrast, the Special Adviser on Gender has made key contributions to the shaping of the charges and the case narratives, and provided regular training to staff on the SGBV policy.<sup>308</sup>

170. In order to reflect and improve the type of assistance provided by Special Advisers, an internal review of their role and limitations would clarify the duration and scope of their appointments, and their level of inclusion in the Office.<sup>309</sup> **The Special Adviser on Children, for instance, could play a more active role in the operational aspects of situations and cases, including a greater involvement in periodic reviews** of investigation plans and strategies.<sup>310</sup> However, it is important to recognise that the extent of this involvement can be limited by the *pro bono* nature of the position. Another model is for Special Advisers, who are generally academics, to designate, through their universities, a J.D. or Ph.D. student, or other researcher, to work directly at the Court, and serve as their *in loco* representatives for a set period. These representatives would be embedded in the Office and serve as bridges between the teams and the Special Advisers. This approach has been adopted by the current Special Advisers on Crimes Against Humanity (Leila Sadat) and on International Humanitarian Law (Tim McCormack).<sup>311</sup> Ensuring that all Special Advisers are assisted by *in loco* representatives could, for instance, contribute to developing and strengthening the exchanges with the Office to best tailor the assistance, without infringing on their independence.

### Adopt specific policies/strategies, including with regard to cooperation with relevant accountability actors, and monitor and evaluate their implementation

#### Judicial accountability mechanisms

171. As discussed in Annex I, references to child-specific crimes or generic international crimes affecting children in the foundational instruments of international judicial accountability mechanisms contribute to ensuring an increased attention to crimes against children in investigative and prosecutorial strategies. However, references alone to such crimes in these instruments do not systematically translate into a prioritisation of these crimes. The **adoption of thematic policies, accompanied by operational guidelines** imposing stringent requirements on investigators and prosecutors, are additional indicators of the importance of an issue on the

<sup>305</sup> OTP, *ICC Prosecutor Fatou Bensouda appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers*, 12 December 2012.

<sup>306</sup> Interview with expert.

<sup>307</sup> Interview with expert.

<sup>308</sup> Interview with expert.

<sup>309</sup> Interview with expert.

<sup>310</sup> Interview with expert.

<sup>311</sup> Interview with expert.

investigative and prosecutorial agenda, and an important lever in delivering such an agenda.

172. The ICC is the first international judicial accountability mechanism to have adopted a public and comprehensive policy on what it called “crimes against and affecting children”. Prior to this, the SCSL adopted a policy on children, albeit focusing on the identification, and psychosocial support of child witnesses.<sup>312</sup> It does not appear to be publicly available and the extent to which it was incorporated into investigations and prosecutions is unclear. For these reasons, it is only briefly mentioned here.
173. The Principles and Procedures for the Protection of Children in the Special Court for Sierra Leone was adopted by the SCSL Prosecutor in consultation with UNICEF, NGOs, and Sierra Leonean child protection agencies. The objectives of the policy were: to (a) adopt guiding principles that would secure the collaboration of child protection agencies in the provision of psychosocial support to children in all stages before the Court; and (b) ensure the support of those agencies in the identification and support of child witnesses during investigations.
174. This instrument provided for a procedure to be used when identifying and interviewing potential child witnesses.<sup>313</sup> A protocol for identifying child witnesses was adopted, which provided for a vulnerability assessment before selection was made by the Prosecutor, and confidentiality and security measures. In this way, over a one-year period, a number of potential child witnesses were interviewed by a specialised investigator, in the presence of a parent or guardian, of whom approximately 20 were called to give evidence at trial (by which time most were over 18).<sup>314</sup>
175. As for the ICC, Prosecutor Fatou Bensouda commissioned her Special Adviser on Children to assist in the research, drafting, and publication of a specific policy on children, in line with the OTP’s commitment to pay greater attention to crimes affecting children. After a four-year consultation process, involving academics, national authorities, representatives of international organisations and civil society organisations, as well as children and young people who had been affected by conflict, the OTP published its Policy on Children in November 2016.<sup>315</sup> One expert noted, “the whole process [...] really enabled a lot of questioning within the Office of the Prosecutor of the ICC and further reflection on how they do their work and what they prioritise”.<sup>316</sup>
176. The Policy on Children follows the Office’s previous thematic policies on the Interests of Justice, Victims’ Participation, Preliminary Examinations, Case Selection and Prioritisation, and Sexual and Gender-Based Crimes.<sup>317</sup> It is the first policy produced by an international court or tribunal that seeks to comprehensively articulate what it terms “a child-sensitive approach” to accountability for international crimes.<sup>318</sup> It

applies to all preliminary investigations, investigations, and prosecutions carried out by the OTP and, in the event of a conviction, to sentencing and reparations. Its implementation is overseen by the Gender and Children Unit.<sup>319</sup>

177. The following points are particularly relevant:

- The OTP recognises that children do not constitute a homogenous group, and that they may be affected differently by crimes based on their sex, gender, or other status or identities. The Office will, in order to capture the full extent of the harm suffered, seek to **highlight the multi-faceted impact** of the crimes on children, at all stages of its work (para. 27);
- The OTP commits to adopting a ‘child-competent’ approach (i.e. where children’s best interests are a primary consideration but do not necessarily prevail over other interests) in the conduct of its preliminary examination and investigations, and in the selection of charges and evidence. The **best interests of the child** will be assessed having regard to the individual profile of the child (by reference e.g. to age, sex, gender) and the child’s social and cultural context (para. 30);<sup>320</sup>
- In conducting preliminary investigations, the OTP will “pay particular attention to information received on crimes against or affecting children” and analyse in particular the general context within which these alleged crimes have occurred (paras 53-54). With respect to gravity, the OTP regards **crimes against or affecting children as “particularly grave”** given “the commitment made to children in the Statute”,<sup>321</sup> and “the fact that children enjoy special recognition and protection under international law”. An **assessment of the impact of the alleged crimes on children and their communities** will be incorporated into the Office’s assessment and analysis of gravity. Moreover, there is a “strong presumption” that **investigation and prosecution of crimes affecting children are in the interests of justice** (paras 57- 59);
- In conducting investigations, the OTP will, from the initial stage, carefully consider crimes against or affecting children and **proactively include specific lines of inquiry** to determine whether such crimes were committed in the situations under investigation. Applying a child-competent approach to investigations means that OTP staff must ensure that ‘particular consideration’ is given to crimes against or affecting children throughout the investigation (paras 62-63);
- When deciding whether to interview or take evidence from a child, the OTP will give careful consideration to the age, development, capabilities, and level of maturity of the child. **Recognising that children are capable of giving credible evidence,**

**An assessment of the impact of the alleged crimes on children and their communities**

<sup>312</sup> Interview with expert.

<sup>313</sup> Julie McBride, *The War Crime of Child Soldier Recruitment* (Amsterdam: Springer/Asser Press, 2014), p. 91.

<sup>314</sup> Luc Côté ‘*Prosecuting Child Related Crimes at the Special Court for Sierra Leone: a mid-term assessment*’, p. 27.

<sup>315</sup> For background on this process, see generally, Diane Marie Amann, ‘*The Policy on Children of the ICC Office of the Prosecutor: Toward greater accountability for crimes against and affecting children*’, *International Review of the Red Cross* (2020).

<sup>316</sup> Interview with Cécile Aptel, 5 March 2020.

<sup>317</sup> OTP, [Policy Paper on Case Selection and Prioritisation](#), September 2016; [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014; [Policy Paper on Preliminary Examinations](#), November 2013; [Policy Paper on Victims’ Participation](#), April 2020; [Policy Paper Interests of Justice](#), November 2007.

<sup>318</sup> Interview with Diane Marie Amann 28 February 2020 “*The challenge of the policy on children was, there was very little outside the context of child soldiers, with the slight exception of a fair bit of writing about how witnesses ought to be treated. But nobody had really conceptualised what it means to speak of crimes against and affecting children at the ICC.*”

<sup>319</sup> Interview with expert.

<sup>320</sup> Also see: Linda A. Malone, *Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court*, (2015) 43 *Ga. J. Int’l & Comp. L.* 599, available at: <https://digitalcommons.law.uga.edu/gjicl/vol43/iss3/4>; Diane Marie Amann, “[The Child Rights Convention and International Criminal Justice](#),” 84 (2015) *Nordic Journal of International Law* 248; Diane Marie Amann, “[Children](#),” in William A. Schabas, ed., *The Cambridge Companion to International Criminal Law* 253 (CUP 2016).

<sup>321</sup> The Policy on Children states that: “Commitment to addressing crimes against or affecting children can be found in various provisions of the Statute, including in its enumerations of child-specific crimes, such as enlistment, conscription and use of children under the age of fifteen years to participate actively in hostilities (“child recruitment or use”), forcible transfer of children, and child trafficking, and also of crimes that disproportionately affect children, such as attacks on buildings dedicated to education. Children are also particularly vulnerable to sexual and gender-based crimes, which are proscribed by the Statute, a fact made explicit in the Elements.” para. 2.

the Office will also consider the availability of alternate evidence, such as adult witnesses, physical and documentary items, and scientific or expert evidence (para. 68);

- In selecting charges, the OTP will make full use of the regulatory framework to address the various ways in which children are affected by crimes within the jurisdiction of the Court. In order to capture the totality of the evidence perpetrated against children, the Office will consider appropriate charges wherever the evidence permits (para. 88);
- The OTP will seek to support the work and **strengthen cooperation with relevant actors, including early responders** (paras 109, 112-113).<sup>322</sup> At the preliminary examination stage, the Office will assess the existence of relevant actors as potential sources of information and/or support for victims (para. 54) and engage with them to verify information on alleged crimes (para. 61). At the investigation stage, the establishment of contacts and networks within the community will be prioritised to support operational activities (para. 65).

178. While the policy is less than five years old, it has reportedly resulted in a significant attitudinal change within the OTP, and equipped analysts, investigators, and prosecutors with the tools to **approach evidence gathering and analysis in a more holistic, and intersectional, manner**.<sup>323</sup> An expert explained that both the Policy Paper on Sexual and Gender-Based Crimes and the Policy on Children require investigators and prosecutors to take a step back and consider whether all possible charges arising from the evidence have been explored. This constitutes significant progress, as it illustrates an increased awareness of what needs to be taken into account during the investigation:

I think we've made huge progress [...] we've certainly learned our lessons and I think that now [...] we're much more aware of the requirements and what we need to take into consideration.<sup>324</sup>

179. A number of internal mechanisms have been put in place to **monitor the implementation of the Policy**, including training and testing of staff members on its application;<sup>325</sup> and ensuring that teams' periodic reports to senior management on the progress of investigations and prosecutions include explicit consideration of the steps taken to comply with the Policy, and how any gaps will be addressed.<sup>326</sup> It was recommended that monitoring of the Policy could be strengthened by systematically involving the Special Adviser on Children in the periodic review process.<sup>327</sup>
180. Beyond the OTP, it is clear that the **ICC's Policy on Children can and should inform the approach of other judicial and the non-judicial accountability mechanisms** with respect to developing a child-competent approach to the investigation and analysis of

international crimes. Accordingly, OHCHR may raise awareness around the Policy, and the mechanisms would benefit from considering the areas it includes as part of their work, in order to address some of the barriers identified in Section I.<sup>328</sup>

### The new 'accountability focused' mechanisms

181. The work of the new mechanisms – IIM (Syria), UNITAD (ISIL/Daesh), and IIMM (Myanmar) – is largely confidential. Nonetheless, it is possible to glean some insights into their approach to violations and crimes affecting children from their periodic reports to the UN, in which their investigative strategies and operational priorities are set out. In particular, the IIM highlighted lessons learned from other bodies to effectively address overlooked crimes, such as crimes against children, and indicated that it will draw on these “valuable insights” in its work.<sup>329</sup>

182. **The IIM has articulated a commitment to pay particular attention to crimes against children.** Its first periodic report (February 2018) identified that good practices for ensuring an effective approach to such crimes includes recruiting the relevant expertise, developing policies and operational guidelines and ensuring their ongoing implementation and revision, as well as regular training for all staff members.<sup>330</sup> The report also underscored the need for cooperation “with other UN bodies whose mandates intersect with the Mechanism’s work, including those with expertise on gender issues and issues concerning children”.<sup>331</sup>

183. In August 2018, the IIM reported that it had begun to acquire material collected by third parties, and underscored the importance of determining whether existing documentation accurately records the harms experienced by certain categories of victims at risk of being overlooked, including boys and girls.<sup>332</sup> In its third periodic report (February 2019), the IIM further stated that its victim-centred approach was being designed:

To bring to the surface perspectives and experiences that have tended to be overlooked or misunderstood in the past. In line with its terms of reference, the Mechanism is giving specific attention [...] to crimes against children as a core part of its work, recognizing that, historically, these categories of crimes have not always been effectively addressed. [...] In the coming period, it will accelerate its focus on strategies for other categories of harm at risk of being insufficiently addressed, including crimes against children[...].<sup>333</sup>

184. In August 2019, the IIM reported that it had been progressing its strategy to incorporate gender perspectives. It further indicated that it would, during the next

<sup>328</sup> Interview with expert.

<sup>329</sup> UN General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, A/72/764\*, 28 February 2018, para. 23.

<sup>330</sup> UN General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, A/72/764, 28 February 2018, para. 24.

<sup>331</sup> UN General Assembly, A/72/764, 22 February 2018, para. 59.

<sup>332</sup> UN General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, A/73/295, 3 August 2018, para.10

<sup>333</sup> UN General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, A/73/741, February 2019, para. 38.

reporting period, build engagement with relevant sources focused on crimes against children, enhance its in-house expertise, and apply some of the relevant insights from the first phase of its strategy on sexual and gender-based violence.<sup>334</sup>

185. In 2020, the IIIM expressed a commitment to allocate additional resources to insufficiently documented crimes such as SGBV and crimes against children. This commitment “has informed the selection of strategic lines of inquiry, the identification of analytical blocks, and the conceptualisation of specific analytical projects”.<sup>335</sup> As a result, categories of crimes and victims often overlooked in accountability efforts, such as crimes against children, are taken into account in the development of a strategy on a victim-and-survivor-centred approach to justice.<sup>336</sup> The Mechanism stated that it is currently developing a strategy to capture more of the crimes affecting children, and the impact on children of the conflict.<sup>337</sup> So far, investigation teams have been set up to ensure that expertise on specific crimes is embedded in the work of the team. Each team is, for instance, equipped with a focal point, tasked to ensure that the focus on crimes affecting children is integrated in the overarching collection plan.<sup>338</sup>

186. **UNITAD has developed standard operating procedures and best practices with respect to engagement with children as part of its investigations.** Based on its periodic reports to the Security Council, as of November 2019, dedicated field investigation units had been designated to undertake investigative work in each of the priority areas. Field-based activities are prioritised to fill identified gaps, and to build an evidence base capable of supporting prosecutions for war crimes, crimes against humanity, and genocide.<sup>339</sup> Expert thematic support is being provided internally to facilitate and strengthen the Investigative Team’s operations. In particular, “in line with the focus of the Investigative Team on supporting accountability for widespread sexual and gender-based violence perpetrated by ISIL, the dedicated Sexual and Gender-Based Violence Unit has continued to provide support with respect to the engagement of the Team with victims of such crimes.”<sup>340</sup>

187. The full name of this dedicated unit, which is part of the Office of Field Investigations, is the Sexual and Gender-Based Violence & Crimes against Children Unit (known by its acronym, SGBCCU). It is specifically charged with working alongside the Field Investigation Units to investigate acts committed by ISIL involving sexual and gender-based violence and crimes affecting children. UNITAD reports that it has developed specific standard operating procedures and best practices with respect to its engagement with victims of sexual and gender based-violence,<sup>341</sup> and with children.<sup>342</sup> SGBCCU staff include individuals with expertise in interviewing children, including

<sup>334</sup> UN General Assembly, [International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011](#), A/74/313, 22 August 2019, para. 60.

<sup>335</sup> [International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011](#), A/74/699, 13 February 2020, para. 22.

<sup>336</sup> [International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011](#), A/74/699, 13 February 2020, para. 42.

<sup>337</sup> Interview with expert.

<sup>338</sup> Interview with expert.

<sup>339</sup> UN Security Council, [Third report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, S/2019/878](#), 13 November 2019, para. 7.

<sup>340</sup>

<sup>341</sup> Ibid, para. 42.

<sup>342</sup> Interview with Veronic Wright, 20 March 2020.

experts drawn from national jurisdictions.<sup>343</sup> It is intended that these experts be embedded in investigation teams, to provide support and expertise at all stages of the process, so as to ensure that the investigation of SGBV crimes and crimes affecting children is in accordance with international best practice.<sup>344</sup> Further, UNITAD has indicated that it is committed to exchange lessons learned and best practices with the other accountability mechanisms such as the IIIM and IIMM to improve processes, and ensure greater successes in bringing justice for crimes affecting children and SGBV.<sup>345</sup> Finally, UNITAD has undertaken to cooperate *inter alia* with the OSRSG for Children and Armed Conflict over the provision of: technical advice on international best practice; information relevant to UNITAD’s investigations; the delivery of thematic briefings between the Investigative Team and the Office with respect to issues within their respective mandates; and the establishment of effective liaison mechanisms between the field-based staff of the Offices and the personnel of the Investigative Team.<sup>346</sup>

188. The IIMM has, to date, submitted a single periodic report, in September 2019, to the Human Rights Council, detailing its strategy and priorities. Factors it identified as relevant to case selection include the number of perpetrators or victims and whether the crimes were against displaced Rohingya now living in Bangladesh. Crimes of sexual violence will also be prioritised (paras. 10-13), and expert internal capacity to investigate SGBV violence will be built. (para. 42). While the document expressly recognises the need for accountability for SGBV, no equivalent statement is made in respect of crimes against children. However, in February 2020, the IIMM **recruited a Gender and Child Rights Adviser**, with a background as a prosecutor in national jurisdictions and international courts, and significant expertise in prosecuting cases involving crimes affecting children, which suggests that the mechanism intends to bring specific focus on these crimes in its investigations and analysis.<sup>347</sup>

189. Taking stock of these developments, and of the commitment of the mechanisms to develop knowledge-sharing channels, an expert has suggested **creating a focal point to secure periodic meetings, foster exchange of knowledge and best practices between these experts, as well as with the staff of the ICC Gender and Children Unit**,<sup>348</sup> and ultimately to capitalise on the lessons learned from the new strategies and policies developed by these bodies.

## Outreach, witness protection and psychosocial support to enhance communication and cooperation with local actors and affected communities

190. In order to reach those NGOs that are willing to cooperate with international accountability actors, but that lack information about how this can best be achieved, it is **essential that effective outreach strategies are put in place so that the mandates and activities of non-judicial and judicial accountability mechanisms are understood at the local level.** Improved communication and cooperation would lead to better understanding among all relevant local stakeholders of the importance of

<sup>343</sup> Interview with Veronic Wright, 20 March 2020.

<sup>344</sup> Interview with Veronic Wright, 20 March 2020.

<sup>345</sup> Interview with Veronic Wright, 20 March 2020.

<sup>346</sup> UN Security Council, [First report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, S/2018/1031](#), paras. 73-74.

<sup>347</sup> Interview with Veronic Wright, 20 March 2020.

<sup>348</sup> Interview with expert.

information-sharing with these mechanisms, and would ensure that the views of local stakeholders are taken into consideration by accountability mechanisms.<sup>349</sup> The newer accountability mechanisms, such as the IIIM, IIMM, and UNITAD, have emphasised the importance of outreach to local stakeholders in public reports and documents.<sup>350</sup> In April 2018, the IIIM and several Syrian NGOs signed a protocol outlining principles guiding the engagement between them.<sup>351</sup> These are welcome developments. However, it remains too early to assess whether these arrangements have resulted in meaningful improvements on the grounds.

191. **Adequate witness protection and psychosocial structures, and sustained communication efforts**, are also key to ensuring the affected communities understand the mandate and activities of accountability mechanisms, and the protection structures available to them. The Myanmar FFM, for instance, has engaged in sustained and tailored advocacy efforts with the affected communities to share information about their mandate and activities.<sup>352</sup> Efficient outreach on that front is essential to build trust at community level, and to foster the information-collection process.

## PART B. INVESTIGATING AND PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AGAINST CHILDREN IN THE DRC: THE KAVUMU CASE

### Introduction

192. The importance of national trials to the international criminal justice experiment continues to deepen. National trials are a near-inevitability for situations of mass atrocity and mass violence where the jurisdiction of the ICC is not engaged, such is the case currently in respect of Syria and Iraq, amongst others. The importance of domestic prosecutions is, also, built into the framework of ICC: the complementarity principle, derived from paragraph 10 of the Rome Statute preamble, and Articles 17, 18, 19, 20, and 53, recognise and promote the primary role of national jurisdictions in the investigation and prosecution of international crimes.<sup>353</sup>

193. Although most national jurisdictions face similar barriers to investigating and prosecuting crimes and violations against or affecting children as those encountered by accountability mechanisms, some national justice systems, in collaboration with local and international partners, have endeavoured to develop creative approaches to overcoming these barriers.

194. In the last decade, national prosecutions in the eastern Democratic Republic of the

<sup>349</sup> Interview with expert.

<sup>350</sup> See for instance Principle 2: Fostering collective support in Iraq, *UNITAD Principles*.

<sup>351</sup> *Protocol of Cooperation between the International Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform*, 3 April 2018.

<sup>352</sup> Human Rights Council, *A/HRC/42/50*, 8 August 2019, paras 10-13.

<sup>353</sup> This is widely recognised in international law. See, Rome Statute of the International Criminal Court; the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; the four Geneva Conventions of 1949 and the three Additional Protocols; the Hague Convention from 1954 and its Second Additional Protocol; the International Convention for the Suppression and Punishment of Apartheid of 1976; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; and the International Convention for the Protection of all Persons from Enforced Disappearances of 2006.

Congo (DRC), notably in respect of crimes against children the *Kavumu* case, have underscored how effective domestic prosecutions are a key part of a sustained struggle against impunity, empower local justice actors, and serve to uphold the rule of law – the absence of which is a significant driver of violence and conflict.

195. The Congolese justice system (bolstered by clinicians, law enforcement bodies, civil society organisations, international NGOs, and the UN) has become the site of innovative approaches to the investigation and prosecution of international crimes in national courts. This is, particularly so with regard to crimes of sexual violence where female children make up a predominantly large subset of the recorded victims. An **analysis of these approaches and particularly the barriers encountered – and of the innovative solutions adopted to overcome these barriers – can inform analysis and discussion on innovative strategies in the investigation and prosecution of crimes affecting children at the international level.**

### Background to the case

196. Between January 2009 and December 2014, Congolese judicial authorities opened 39 cases on indictments containing international crimes that had occurred between 2002 and 2014 during non-international armed conflict in the provinces of Ituri, North Kivu, and South Kivu in the eastern DRC.<sup>354</sup> This included the creation and use of mobile gender courts to try cases of rape and other forms of sexual violence. Their impact has been significant. Between October 2009 and October 2012, for example, a mobile gender court operating in South Kivu heard 382 cases, with 204 convictions for rape, 82 convictions for other offences, and 67 acquittals.<sup>355</sup>

197. This section focuses on, and seeks to draw insight from, one of the most successful investigations and prosecutions of conflict-related sexual violence committed against children: the prosecution of Congolese militia members in a mobile court in the village of Kavumu, in South Kivu. In July 2018, a military court in the DRC upheld the conviction of 11 men, including a sitting lawmaker, for **rape as a crime against humanity perpetrated against young girls** in Kavumu over a three-year period.<sup>356</sup>

198. Between 2013 and 2016, at least 42 girls, aged between 18 months and 11 years, were abducted from their homes in the middle of the night, taken to a nearby field, raped, and subsequently abandoned. The perpetrators, members of a local militia group, targeted these girls for their virginal hymen blood, in the belief that it would protect them from battlefield injuries in the conflict with State security forces. The decision to target pre-verbal children, some of whom were as young as 18 months old at the time of the alleged crime, reveals an awareness on the part of the perpetrators of potential accountability. These were children who would never be in position to identify the perpetrators or to disclose what had happened to them.<sup>357</sup>

199. The child victims sustained extensive physical and psychological injuries and were referred to the Panzi General Reference Hospital, where they received specialist care. Their injuries were documented by clinicians who had been trained by Physicians for Human Rights (PHR) in how to capture forensic medical evidence of sexual violence.<sup>358</sup>

<sup>354</sup> International Center for Transitional Justice, *The Accountability Landscape in Eastern DRC*, July 2015.

<sup>355</sup> Open Society Foundations, *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, January 2013.

<sup>356</sup> *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, p. 2651.

<sup>357</sup> *Ibid.* Interview with Karen Naimer, 2 March 2020.

<sup>358</sup> Interview with Karen Naimer, 2 March 2020.

Despite the availability of this evidence, efforts by Panzi's affiliated legal clinic, and considerable national and international media and advocacy efforts, local civilian prosecutors refused to initiate an investigation.<sup>359</sup> In response to this inaction, the victims' legal representatives successfully filed the complaints before the military courts on the basis that there was *prima facie* evidence that the crimes alleged amounted to crimes against humanity. As will be explored below, the *Kavumu* case, as it is commonly referred to, stands as an **example of domestic judicial authorities, working alongside international and other local partners, to tackle complex legal and social issues in order to achieve accountability for some of the worst conflict-related crimes committed against children.**<sup>360</sup>

## Attitudinal and structural barriers to accountability for crimes affecting children in the DRC

200. The DRC's self-referral to the ICC in 2002 was a catalyst for domestic accountability efforts.<sup>361</sup> The first investigations and prosecutions (predominantly in respect of crimes involving adult victims)<sup>362</sup> began in 2006, but were reportedly weak owing to a lack of expertise, experience and resources. Since then, there has been a positive evolution in terms of the quantity and quality of investigations, prosecutions, and judicial determinations, due to increased international involvement and funding, better coordination among stakeholders, and enhanced capacity of national actors.<sup>363</sup>
201. Progress has been much slower in respect to crimes against and affecting children, which in the DRC include recruitment and use of child soldiers; killing and maiming; rape and sexual slavery; and forced labour, typically against children aged 10-12 and upwards.<sup>364</sup>
202. Child victims in the DRC face both attitudinal and structural barriers to accountability. Attitudinally, in respect of recruitment crimes specifically, these include a perception that child soldiers are not victims but perpetrators, and therefore less deserving of justice and, more broadly, that children in general are less important than adults, so that crimes perpetrated against them tend to receive less attention. Where child recruitment cases are investigated, prosecutors have failed to bring separate charges in respect of the other violations committed during the recruitment process (e.g. torture, other inhumane acts, sexual violence or enslavement).<sup>365</sup>
203. At the structural level, there is a lack of expertise from all the different actors (documentation NGOs, prosecutors, and judges):

There has been a lot of attention from donors for [...] conflict-related sexual violence. But all of these commitments and all of this expertise [has not been] replicated when it comes to crimes against children in general. And so, when we have to work on cases like *Kavumu* (which of

course would present challenges for everyone, even the best experts), we were really faced with the fact that we are not experts. We had some psychologists come from Europe, from Senegal. [...] We had to craft our own solution on the spot and *ad hoc* and it is not generalised. And, I would say that, in general, the Congolese system is not up to the task of investigating and prosecuting crimes against children.<sup>366</sup>

204. Additional challenges in the *Kavumu* case included gathering complete and accurate information, in light of the very young age of some of the victims and survivors, and ensuring their safety and security – as well as that of their families, who were afraid of retaliatory violence.<sup>367</sup>

## Overcoming barriers: a three-pronged approach

### Training

205. PHR established a programme on Sexual Violence in Conflict Zones in 2011, with the aim of enhancing the technical capacity of medical actors, legal experts, and law enforcement to collect, document, analyse, preserve and share forensic evidence of sexual violence in order to support local prosecutions of these crimes, in a way that is survivor-centred and trauma-informed. By bringing together these various professionals, the programme also seeks to build trust, and to **develop multi-sectoral collaboration** in the provision of medical care and services for victims and survivors, and in the pursuit of accountability.<sup>368</sup>
206. In the DRC, training provided by PHR was instrumental in enabling Panzi clinicians to adequately document the physical injuries and ongoing mental trauma of the child victims/survivors. Clinicians relied on a standardised forensic medical intake form, developed with the assistance of PHR, which was based on international best practice and adapted to the local context. The documentation process included interviewing the child survivors, a process which was overseen by an expert sexual violence clinician brought in by PHR.<sup>369</sup>
207. The forensic evidence gathered by clinicians at Panzi hospital was subsequently shared with the police, and proved crucial to eventual investigations and prosecutions, as it helped to demonstrate that the rapes, which occurred over a three-year period, were not isolated, but formed part of a broader systematic campaign.<sup>370</sup>

### Multi-sectoral collaboration and mentoring

208. In addition to effective documentation, the **existence of a network of engagement** between medical actors and local police **made collaboration and information-sharing**

<sup>359</sup> Interview with Karen Naimer, 2 March 2020; Interview with Daniele Perissi, 28 February 2020; OHCHR, 'Strategic Litigation for sexual and gender-based violence: Lessons learned. Workshop report', 2019, p. 10; *Lancet*, 'Supra', note 356.

<sup>360</sup> OHCHR, 'Strategic Litigation for sexual and gender-based violence: Lessons learned. Workshop report', 2019, p.6.

<sup>361</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>362</sup> According to TRIAL International, investigations and prosecutions largely focused on the killing and maiming of men, sexual violence against women, and child recruitment and use. Interview with Daniele Perissi, 28 February 2020.

<sup>363</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>364</sup> Interview with Daniele Perissi, 28 February 2020. See also, *Children and armed conflict in the Democratic Republic of the Congo*, Report of the Secretary General, S/2018/502, 25 May 2018.

<sup>365</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>366</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>367</sup> Interview with Karen Naimer, 2 March 2020.

<sup>368</sup> Interview with Karen Naimer, 2 March 2020; *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpelliier, Denis Mukwege, Vol 393, 29 June 2019, 2651.

<sup>369</sup> Interview with Karen Naimer, 2 March 2020.

<sup>370</sup> Interview with Karen Naimer, 2 March 2020 "I think this helped a lot to standardise the process, to be able to ascertain patterns [...] and modes of perpetration, the *modus operandi* of those who, at that time, were alleged to be perpetrating these crimes [...] In many contexts of mass crimes [...] these crimes generally can take place over a short period of time [...] In this instance [...] one case would surface, and then another, and then another [...] it was really over the course of three years that we saw upwards of 42 cases similarly situated. The documentation was critical to be able to establish the kind of pattern that showed a systematic approach to these crimes."

possible, and built trust and a shared sense of purpose and drive between the two sectors. This was particularly key, given that local prosecutors refused to open an investigation, and that it would take a further three years before the military courts assumed jurisdiction over the case.<sup>371</sup>

209. In 2014, PHR mobilised a multidisciplinary task force which included clinicians, lawyers, police officers, prosecutors, judges, community activists from Kavumu, local NGOs, and MONUSCO, the UN Organisation Stabilisation Mission in DRC. In 2016, the taskforce was joined by TRIAL International, a Swiss-based legal NGO working on accountability for international crimes, including in the DRC. Members of the task force met on a monthly basis to strategise on advancing the criminal investigation, protecting the security and safety of the victims/survivors and their families, and to discuss advocacy.<sup>372</sup>
210. According to TRIAL International: “The multidisciplinary expertise that is offered through the collaboration of different actors is key [...] These different actors, each of them with peculiar expertise, bringing that expertise to gather and try to [...] overcome the sometimes selfishness of their own agendas, and try to put their expertise at the disposal of the whole system [...] that was one key ingredient”.<sup>373</sup>
211. This level of strategic engagement and mentoring was critical to the success of the *Kavumu* investigation, as building capacity through training alone would have been insufficient:

The mentoring and working together with experts on specific cases [...] sit together and talk about what kind of evidence do we have for this case, what kind of additional evidence do we need to have a solid case to bring forward the charges, how to prepare a trial for international crimes, which are the kind of measures that you have to put in place in terms of protection, security, psychological care and so on. [...] This is something at TRIAL that we have been doing for the last few years. [...] **You have to have long-term or at least mid-term engagement,** [...] you cannot mentor for a couple of months and then think that you have equipped the participants with something durable, with something sustainable, especially because you have to consider that these judicial procedures take a lot of time. [...] You have to have an approach that is [...] rooted in the country. **Me being in Geneva will not make the difference. My colleagues being there and being also Congolese lawyers, human rights defenders, that is what makes the difference.**<sup>374</sup> (Emphasis ours).

212. In addition to training and mentoring lawyers and local documentation entities, the **importance of involving judges** was highlighted: “It’s necessary that the magistrates are sensitised and really trained on how to deal in the investigation phase with crimes against children and then in the trial phase”.<sup>375</sup>
213. Another critical aspect was the deep engagement between the families of the children and the wider community, and the legal and medical professionals. They

<sup>371</sup> Interview with Karen Naimer, 2 March 2020.

<sup>372</sup> *Lancet*, ‘The case of Kavumu: a model of medicolegal collaboration’, Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2652.

<sup>373</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>374</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>375</sup> Interview with Daniele Perissi, 28 February 2020. of the recommendation about involving judges applies mostly to proceedings in inquisitorial systems.

were kept informed at each stage of the legal process and frank conversations were held around security concerns, which were particularly acute in this case. Their feedback was integrated into the monthly meetings and mitigating measures were taken by partners, including providing training and support on how to enhance their protection.<sup>376</sup>

### Pre-recorded video interviews by paediatric forensic experts

214. Investigators and prosecutors working on the case did not have expertise on how to interview child victims and witnesses and did not initially consider that this was necessary (“These policemen wanted to interrogate these children as if they were adults, because they don’t have any training on that”).<sup>377</sup> TRIAL International was able to persuade them that specialist psychologists should be brought in to assist with the evidence collection:

It was challenging to have the national system accept that and go along with that. And that was possible only because we already had a working relationship with them. We were implanted in the country, we wouldn’t just come from some other place and say “we have the solution”.<sup>378</sup>

215. In December 2016, PHR, Panzi Hospital, and TRIAL International collected video interviews of each of the child survivors over the course of six days. The interviews were conducted in a safe location by a specialist paediatric forensic psychologist, and a local Panzi psychologist. A closed-circuit TV allowed police to assess the children’s responses and behaviour in real time, and to feed questions to the psychologists who then re-framed them in a child-competent way. The interviews were **followed by a physical examination**. Strict procedures were adopted to ensure that international protocols were followed and that the children were not retraumatised. Informed consent was obtained at every stage, including for forensic photography and the preparation of medico-legal reports. In this way, the team was able to gather, in a child-centred way, credible evidence of both the mental and physical impact of the crimes that would have been very difficult for the victims to articulate had they been questioned by police.<sup>379</sup>
216. In court, prosecutors successfully applied for the pre-recorded videos to stand as the evidence in place of the child survivors. It is emphasised that in this case, the video testimony was used by investigators to glean more information, and, subsequently, was relied on by prosecutors in court to demonstrate the physical and psychological impact of the crimes on the victims.<sup>380</sup> In other words, it was **not used as evidence of**

**The interviews were conducted in a safe location by a specialist paediatric forensic psychologist, and a local Panzi psychologist**

<sup>376</sup> Interview with Karen Naimer, 2 March 2020; OHCHR, ‘Strategic Litigation for sexual and gender-based violence: Lessons learned, Workshop report’, 2019, p. 14.

<sup>377</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>378</sup> Interview with Daniele Perissi, 28 February 2020.

<sup>379</sup> Interview with Daniele Perissi, 28 February 2020; Interview with Karen Naimer, 2 March 2020; *Lancet*, ‘The case of Kavumu: a model of medicolegal collaboration’, Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2652.

<sup>380</sup> Interview with Daniele Perissi, 28 February 2020. “Some of them, in the discussion with a psychologist used some language, some adjectives, that allowed the police and allowed all of us to understand that this was a particular militia, because there was the recurrent image of red shirts, and this militia was called the Red Army. And then there was the specific use of language, of certain words, that linked to these mystical beliefs of that particular witchcraft that the local experts knew was related to this militia. So [...] very simple information, because they couldn’t really recognise or identify the individual perpetrators, but that could basically launch the prosecutor into

**the acts or conduct of the accused**, as the general rule is that there is a right to cross-examination in respect of evidence relied on to establish the criminal responsibility of an accused.<sup>381</sup> **Whether prior recorded testimony will be admissible in a given case, therefore, depends on the material facts at issue, and on what such evidence seeks to prove.**

In addition, some of the adult witnesses (family members) were allowed to give evidence on camera. Those that testified in public hearings were granted special measures to protect their identities (e.g. fully veiled, behind screen walls, and using voice-altering technology).<sup>382</sup>

## Lessons learned

217. The *Kavumu* case illustrates the benefits of **investing in targeted long-term capacity development interventions to strengthen the technical knowledge of multi-sectoral actors and foster their collaboration**.<sup>383</sup> The technical and financial support of national and international stakeholders, and the attention from international media, were crucial determinants of the successful prosecution of the case.<sup>384</sup> TRIAL's assessment is that sustainable funding for international organisations involved in the process is also vital, in order to replicate and streamline the *Kavumu* approach: "As it stands now, [the systematisation of sharing expertise cannot be replicated] if we don't have an approach by donors and then down the line, all actors working on this in order to systematise this knowledge and the sharing of expertise and the lessons learned in that case".<sup>385</sup>

218. The view of PHR is that the local medical, legal and law enforcement actors involved in this particular case could apply the tools and lessons learned (e.g. in respect of standardised documentation of evidence, informed consent, long-term engagement with the local community) to other cases involving child survivors in the DRC, with less external support. Beyond the DRC, PHR is currently strategising with its partners in Kenya and the Central African Republic on how to best **deploy the *Kavumu* model, and strengthen the capacity of relevant actors, having regard to the rules of evidence and socio-cultural context of those particular jurisdictions**.<sup>386</sup>

219. The *Kavumu* case offers the following lessons:

- **Develop multidisciplinary partnerships with complementary expertise** to address the specific needs and rights of child victims, including but not limited to victims of sexual violence;

- **Build on training provided through long-term mentoring;**
- **Ensure that victims and their families remain central to the process** (including through an effective outreach programme), and that their informed consent is obtained at every stage;
- **Invest in building or participating in coalitions** that can collaborate and coordinate on focused advocacy to draw attention and elicit sustained funding to support accountability for crimes against children;
- Both TRIAL and PHR attribute the success of the coalition which supported the building of the *Kavumu* case to a **centring of the problem, a strong willingness to collaborate, and a lack of ego** on the part of the actors, both national and international.
- **Building relationships of trust** (including through, for example, the training and mentoring of those charged with investigations and prosecutions, together with informational empathetic outreach to victims and their families) gives innovative strategies for tackling structural barriers a greater likelihood of success.

*a better understanding of the contextual element that then were used to confront some of the defendants that had been arrested, and, from that, understand more about the role of the different persons involved.*"

381 See e.g. Article 67(1), Rome Statute and Rule 68, ICC Rules of Procedure and Evidence.

382 Interview with Daniele Perissi, 28 February 2020; *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2652.

383 *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2653.

384 *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2653.

385 Interview with Daniele Perissi, 28 February 2020.

386 Interview with Karen Naimer, 2 March 2020; *Lancet*, 'The case of Kavumu: a model of medicolegal collaboration', Karen Naimer, Muriel Volpellier, Denis Mukwege, Vol 393, 29 June 2019, 2652-2653.



## SECTION IV.

### CONCLUSIONS AND RECOMMENDATIONS

220. Despite their magnitude, frequency, and devastating impact, children’s experiences of war and armed violence are not yet systematically captured by accountability mechanisms. Looking back across efforts to secure accountability, it is apparent that accountability-driven mechanisms have been, and largely remain, adult-centric in their approach to the investigation, documentation, and indictment of crimes. Children’s experiences of mass atrocity often go unrecorded in the reports, case files, and transcripts of bodies charged with pursuing criminal accountability. When they do appear, children are frequently un-situated and ageless; their experience is presented as homogenous, and often reduced to specific sets of crimes, such as child soldiering and sexual and gender-based violence. As a result, perpetrators of crimes affecting children have rarely been brought to justice, and crimes affecting children have remained in the shadow of other crimes.
221. This Research Paper has examined the attitudinal, structural, and financial barriers that prevent or slow progress in achieving accountability for crimes and violations affecting children in conflict. Many of these are mutually reinforcing, and caused by persisting power dynamics influencing the decision-making processes of key stakeholders, the lack of an accountability-focused child rights constituency committed to join forces, and a lack of investment in the capacity-building efforts required to develop and efficiently include child rights expertise within accountability mechanisms. Amid slow progress, it appears that the lack of systematic inclusion of children in the work of accountability-driven mechanisms mirrors a reluctance to directly engage with vulnerable victims and witnesses, such as children, and what appears to be a form of disregard for the impact of crimes on children, as well as persisting obstacles to seeing children as rights-holders, whose voices need to be heard and perspectives understood.
222. States have not consistently championed justice for crimes affecting children, and there is no accountability-focused coalition persistently calling attention to the issue. This means there is little to no impetus for ensuring that crimes affecting children are addressed or mainstreamed in the design, composition, or implementation of mandates and approaches of those charged with seeking accountability. This has an impact on the funding available to create, build, and provide expertise, particularly in relation to interviewing children, and other resources to those engaged in the investigation of crimes and the building of cases against alleged perpetrators.
223. Drawing on extensive desk research, and the insights of practitioners, academics, and activists working on these issues, this paper has sought to identify meaningful and practical strategies and solutions to overcome or mitigate those barriers.
224. Attention was paid to the ways in which accountability mechanisms are designed and

staffed, including the way in which strategic goals and approaches are set by their leadership to mainstream child-competency into investigations of the crimes and violations that affect children. Attention was also paid to the operational challenges and methodological guidance these mechanisms encounter, and which strategies and solutions can be implemented to overcome these challenges, including: creating an investigation support unit within the Office of the High Commissioner for Human Rights;<sup>387</sup> creating a structure focused on building and disseminating the necessary expertise within UN documentation bodies and international criminal courts and tribunals or bolstering the initial work done by Justice Rapid Response and UN Women in this regard; and ensuring that these bodies adopt, and implement, specific policies and strategies on investigating and prosecuting violations and crimes affecting children.

In addition, we considered what lessons could be learned from the gender justice movement, and from successful domestic accountability efforts in the DRC, including mainstreaming expertise and devising effective modes of cooperation and expertise-sharing among key actors within the accountability chain. However, questions remain about the sustainability of these efforts and the setting-up of appropriate fora to facilitate the exchange of knowledge and lessons learned.

225. In light of the above, we set out below specific recommendations to each of the following: States; UN bodies empowered to establish judicial and non-judicial accountability mechanisms; all accountability mechanisms; entities which support accountability mechanisms through the provision of staff; and non-governmental and civil society organisations.

226. This paper's objectives were to: identify the changes that would need to occur at the operational, strategic, and institutional levels to ensure that child-centred and child-competent policies are included in investigative and accountability mandates; assist the development and strengthening of child-sensitive procedural frameworks *within* accountability mechanisms (including relevant tools, resources, skills, and sensitivity to engage with children); and considering strategies to bolster and energise the child rights constituency around issues of accountability from crimes and violations affecting them. To achieve these objectives, it is recommended:

That **States:**

- a) **Invest political capital** in placing accountability for violations and crimes affecting children securely on the international agenda, including by consistently raising the need to strengthen such accountability in political and diplomatic fora, most prominently at the UN Security Council, and by ensuring that specific emphasis on addressing crimes against children (and related expertise) is included in the mandates of accountability mechanisms;
- b) **Allocate funds, and advocate with other states to support the consistent building and provision of expertise** in the investigation and documentation of conflict-related violations and crimes against children, including through the establishment and backing of structures through which such expertise can be efficiently provided to judicial and non-judicial accountability mechanisms. This could include **dedicated funding for the creation of a roster or nexus of expertise** on the investigation of violations and crimes affecting children to be deployed into

non-judicial and judicial accountability mechanisms;

- c) **Advocate for an analytical review of UN entities** which have mandates relating in some manner to addressing violations and crimes against children, with the objective of determining how such mandates can best support the building and provision of relevant expertise and information beneficial to judicial and non-judicial accountability mechanisms;
- d) **Make available domestic expertise** in the investigation and documentation of violations and crimes affecting children, including through secondments and loans to judicial and non-judicial accountability mechanisms;
- e) **Enforce domestically incorporated international law** in relation to children's rights, and act to ensure domestic accountability for child rights violations, at all times ensuring that all internationally recognised fair trial rights are respected;
- f) **Ratify the Convention on the Rights of the Child, the Optional Protocol on the Involvement of Children in Armed Conflict, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure**, as measures to improve accountability for child rights under domestic and international human rights law.

That **UN bodies empowered to establish judicial and non-judicial accountability mechanisms**, such as the UN Security Council, UN Human Rights Council, and UN General Assembly:

- a) Clearly **prioritise the investigation and documentation of violations and crimes affecting children** in mandates and resolutions, including by encouraging the adoption of deliberate strategies, policies, and operational guidance to this end;
- b) **Authorise budgets with dedicated funds for the provision of expertise** in the investigation and documentation of violations and crimes affecting children;
- c) **Request specific reporting**, including through oral presentations, on mandates' progress in the investigation and documentation of violations and crimes affecting children.

That **all accountability mechanisms**, whether judicial or non-judicial in nature:

- a) **Develop and/or enhance staff capacity and competency** as a key means of ensuring that investigations are child-competent; that lessons learned and best practices stemming from local and international accountability efforts are efficiently and systematically compiled and shared; and that a child-centred analysis of crimes and violations is systematically integrated into accountability efforts;
- b) **Improve the recruitment of investigators with specific expertise on how to investigate crimes against children**, including engaging in active efforts to recruit from national jurisdictions, in order to capitalise on domestic criminal investigators' formal training and up-to-date experience interviewing children and ensure that this expertise translates into child-competent approaches across all operational aspects of their work, including by requiring training by such experts for mechanisms' staff. For longer-term mandates, in particular, where the work is heavily dependent on building and sustaining relationships of trust with a wide variety of interlocutors, and developing institutional knowledge, **emphasis should be put in recruiting investigators, analysts, and lawyers with suitable expertise who are not deployed in a temporary or ad hoc way, but rather form part of the core and ongoing structure of the mandate.**
- c) In non-judicial accountability mechanisms, **ensure that staff have the necessary capacity in international human rights and criminal law;**
- d) **Ensure there are dedicated staff with specialist expertise** – whether in the form of

<sup>387</sup> In articulating this recommendation, this Research Paper draws from the work of the Oxford University team, [Anchoring Accountability for Mass Atrocities: a project to advise on the permanent support needed to fulfil international investigative mandates.](#)

a specific unit, in the general office structure, or as a Special Adviser – **embedded in the operational aspects of investigation** and documentation, and that these staff have a greater involvement in periodic reviews of investigation plans and strategies and the related legal analysis, and in facilitating and promoting a broad-based competence on addressing crimes against children throughout the institution;

- e) **Underscore that the ICC's Policy on Children, where relevant, can and should inform the approach** of the accountability mechanisms in respect of developing a child-competent approach to the investigation and analysis of international crimes affecting them;
- f) **Adopt thematic policies, accompanied by operational guidelines**, imposing stringent requirements on investigators and prosecutors with regard to the prioritisation of the investigation and documentation of violations and crimes against children;
- g) **Invest in effective outreach strategies**, so that the mandates and activities of the mechanisms are understood at the local level;
- h) **Advocate for funds for (and where funds are available, ensure) adequate witness protection and psychosocial structures** as an integral component in ensuring a good understanding by the affected communities of the mandate and activities of accountability mechanisms, and of the protection structures available to them;
- i) **Develop knowledge-sharing channels among accountability mechanisms**, including the creation of dedicated focal points to secure periodic meetings, foster exchange of knowledge and best practices between in-house experts, and ultimately capitalise on the lessons learned from the new strategies and policies developed by these bodies;
- j) Ensure that **information and data that could assist the work of accountability mechanisms is shared by other UN actors and entities**, within the constraints imposed upon the latter by their own mandates.

That **entities which support accountability mechanisms through the provision of staff** (such as OHCHR, UN Women and Justice Rapid Response):

- a) **Continue to actively seek funding and support to enable the building of a roster of individuals and staff with specific expertise** in the investigation and documentation of violations and crimes affecting children, with the objective that rostered individuals be immediately operational once a mandate is activated;
- b) Actively seek to **recruit relevant experts from national jurisdictions** onto the roster;
- c) **Develop or adopt internal child-competent standard operating procedures, methods and operational guidelines that reflect best practices** for the investigation and documentation of violations and crimes affecting children;
- d) **Develop knowledge sharing channels among rostered experts** (and, in the case of OHCHR, between non-judicial accountability mechanisms for which OHCHR staff serve as the Secretariat).

That **non-governmental and civil society organisations**:

- a) **Support advocacy efforts for (and advocate with States for) sustainable funding streams** for the building and provision of expertise in the investigation and documentation of conflict-related violations and crimes affecting children, including through expert rosters;
- b) **Consistently raise the need to strengthen accountability** for violations and crimes affecting children in political and diplomatic fora, including but not limited to presentations before the UN Security Council, UN General Assembly, and UN Human Rights Council, as well as in bilateral and multilateral meetings with States;

- c) **Partner with States on ensuring that UN entities** empowered to establish accountability mechanisms **explicitly prioritise the investigation and documentation** of violations and crimes affecting children in their mandate and legal frameworks;
- d) **Support mechanisms' outreach strategies**, so that their mandates and activities are understood at the local level.

## ANNEX I:

### REVIEWING THE APPROACH OF ACCOUNTABILITY MECHANISMS TO VIOLATIONS AND CRIMES AFFECTING CHILDREN

1. This Annex summarises the approach of UN fact-finding and investigative bodies and international criminal courts and tribunals ('accountability mechanisms') to the documentation, investigation and indictment of violations and crimes affecting children.

#### PART A. THE UN *AD HOC* MECHANISMS

##### Traditional fact-finding bodies

2. UN *ad hoc* mechanisms can play a key role in establishing an accurate record of the facts and recognising and documenting the harm suffered by victims.<sup>388</sup> In investigating and documenting violations, they apply a 'reasonable grounds to believe' standard, which is lower than the 'beyond reasonable doubt' standard of proof used in the context of criminal proceedings.<sup>389</sup> Increasingly, they are also directed by mandating bodies to identify suspected perpetrators and recommend measures to ensure accountability,<sup>390</sup> and/or to evaluate transitional justice initiatives in the country under investigation.<sup>391</sup>
3. This section focuses on the work of the **Independent International Commission of Inquiry on the Syrian Arab Republic** ('Syria Commission'), **Commission on Human Rights in South Sudan** ('South Sudan Commission) and **Independent International Fact-Finding Mission on Myanmar** ('Myanmar FFM').<sup>392</sup> As will be explored below, each of these mandates has attempted to investigate and document violations and crimes against children. Owing to some of the barriers identified in Section I, however, these efforts have been limited.<sup>393</sup>

<sup>388</sup> See Catherine Harwood, '*Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability*', Grotius Centre Working Paper 2015/043-ICL, pp.9-10.

<sup>389</sup> OHCHR, '*Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law- Guidance and Practice*', pp. 62-63.

<sup>390</sup> E.g. Independent International Commission of Inquiry on the Syrian Arab Republic ('Syria Commission'). For an overview, see note 142 pp.59-76.

<sup>391</sup> E.g. Commission on Human Rights in South Sudan ('South Sudan Commission').

<sup>392</sup> Documentary efforts have been in place in Iraq and the DRC as well. However, these efforts have taken shape through the UN field mission on the ground, as opposed to via independent inquiries set up for this specific purpose. The three mechanisms discussed here have been selected because they all have received an *express* mandate "to identify suspected perpetrators and recommend measures to ensure accountability". In other words, they have been directly affected by the 'accountability turn' in UN human rights fact-finding, see D'Alessandra, F., 2017. '*The Accountability Turn*', *supra* note 142.

<sup>393</sup> This section does not exhaustively detail each of the violations documented by these mechanisms, rather, for each context, it gives examples of some of the crimes affecting children which were documented.

## Syria

4. The Syria Commission was established by the Human Rights Council on 22 August 2011 to investigate all alleged violations of international human rights law committed in Syria since March 2011; establish the facts and circumstances that may amount to such violations and of the crimes perpetrated; and, where possible, identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.<sup>394</sup> While the Commission's mandate does not expressly refer to crimes against children, since its establishment the Human Rights Council has issued a number of resolutions condemning conflict-related violence against children in Syria.<sup>395</sup>
5. The Syria Commission has to date produced more than 30 public reports and thematic papers documenting patterns of violations of human rights and humanitarian law, as well as the perpetration, since 2011, of international crimes by the government, pro-government forces, anti-government armed groups, and terrorist organisations, in particular ISIL. Most of these documents contain references to, or specific sub-sections on, children. 12 of the 17 periodic reports contain a stand-alone section documenting the impact of the conflict on children, including the six grave violations, as well as the detention of children associated with ISIL and the impact of siege warfare on pregnant women and children.<sup>396</sup>
6. A report published in January 2020, *They have erased the dreams of my children*, focuses exclusively on the impact of the conflict on children between 2011 and 2019. The report outlines the multitude and scale of children's rights violations since the start of the conflict as documented by the Commission and presents findings, *inter alia*, on the **killing and maiming** of children. According to this report, during the reporting period, children were killed and maimed during protests and home raids conducted by government forces against civilians and civilian areas who supported or were perceived to support opposition forces. Other children died during indiscriminate or disproportionate attacks, including in urban areas, a number of which involved the use of barrel bombs, cluster munitions and chemical weapons. A rapid increase in large-scale aerial and ground campaigns damaged key civilian infrastructure, including **schools** and **hospitals**, resulting in high numbers of child casualties. Another devastating tactic was the use of siege warfare by most parties to the conflict. Towns and villages were besieged, accompanied by near-constant shelling and aerial bombardment, causing scores of civilian casualties, including children. Such tactics prevented the flow of food and medicine into affected areas. Instances of children dying from malnutrition, dehydration or other preventable deaths linked to the **denial of humanitarian assistance** were also documented.<sup>397</sup>

<sup>394</sup> UN Human Rights Council [Resolution S-17/1](#), 23 August 2011; Human Rights Council, [A/HRC/RES/S-19/1](#), 1 June 2012; Human Rights Council, [A/HRC/RES/21/26](#), 17 October 2012; Human Rights Council, [A/HRC/RES/31/17](#), 8 April 2016.

<sup>395</sup> Human Rights Council [Resolution S-17/1](#), 23 August 2011, para. 1; Human Rights Council, [A/HRC/RES/S-19/1](#), 1 June 2012; Human Rights Council, [A/HRC/RES/21/26](#), 17 October 2012, para. 4; Human Rights Council, [A/HRC/RES/31/17](#), 8 April 2016, para. 10.

<sup>396</sup> <https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/pages/independentinternationalcommission.aspx>

<sup>397</sup> Human Rights Council, "*They have erased the dreams of my children": children's rights in the Syrian Arab Republic*" paras. 21-30.

## South Sudan

7. The South Sudan Commission was established by the Human Rights Council on 23 March 2016. It was initially mandated to "monitor and report" on the human rights situation in South Sudan, and to provide guidance on transitional justice and accountability, as appropriate.<sup>398</sup> In 2017, it was further mandated to determine and report the facts and circumstances of, collect and preserve evidence of, and clarify responsibility for, alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence.<sup>399</sup> The resolutions delineating the scope of the Commission's mandate specifically condemn violations of international human rights law and international humanitarian law against children, including the recruitment and use of children and attacks on schools.<sup>400</sup>
8. The South Sudan Commission has, to date, issued four periodic reports, which contain limited findings on children.<sup>401</sup> One of the violations documented by the Commission is the **recruitment and use of children**. As of July 2019, approximately 19,000 children, including children under the age of 15, were still in the ranks of the South Sudanese armed forces and armed opposition groups. While some of these children were used as cooks, guards and couriers, others actively participated in hostilities. Children were recruited through abductions, recruitment drives and the extortion of their family members; in other instances, they 'voluntarily' joined armed groups due to lack of financial means to support themselves.<sup>402</sup> The Commission has also reported on **sexual and gender-based violence** against girls and boys; **killing and maiming**; attacks on **education**; and **forcible displacement**.<sup>403</sup>

## Myanmar

9. The Myanmar FFM was established by the Human Rights Council in March 2017, *inter alia*, to establish the facts and circumstances of human rights violations and abuses at the hands of military and security forces in Myanmar and particularly in Rakhine State, with a view to "ensuring full accountability for perpetrators and justice for victims".<sup>404</sup> The resolution establishing the FFM does not expressly refer to investigating and documenting violations and crimes against children, however it does "encourage" the Government of Myanmar to take measures to address discrimination and prejudice against children.<sup>405</sup>
10. The Myanmar FFM produced two thematic reports *Sexual and gender-based violence*

<sup>398</sup> Human Rights Council, [A/HRC/RES/31/20](#), 21 April 2016. In its first report to the HRC, the Commission emphasised that its original mandate did not extend to conducting its own investigations and fact-finding, but to monitor and report; accordingly, the methodology adopted was based on OHCHR and international standards for human rights monitoring (Human Rights Council, [A/HRC/RES/34/25](#), 5 April 2017, para. 9).

<sup>399</sup> Human Rights Council, [A/HRC/RES/34/25](#), 5 April 2017; Human Rights Council, [A/HRC/RES/37/31](#), 12 April 2018; Human Rights Council, [A/HRC/RES/40/19](#), 8 April 2019. In its first report, the Commission explained that The Commission was initially mandated to monitor and report on the situation of human rights in South Sudan

<sup>400</sup> Human Rights Council, [A/HRC/RES/31/20](#), 21 April 2016, paras. 1, 13; Human Rights Council, [A/HRC/RES/34/25](#), 5 April 2017, paras. 1, 10; Human Rights Council, [A/HRC/RES/37/31](#), 12 April 2018, paras. 1, 10; Human Rights Council, [A/HRC/RES/40/19](#), 8 April 2019, paras. 1, 9.

<sup>401</sup> Human Rights Council, *Commission on Human Rights in South Sudan* <https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx>.

<sup>402</sup> Human Rights Council, 'Report of the Commission on Human Rights in South Sudan', [A/HRC/43/56](#), 31 January 2020, paras. 45-57.

<sup>403</sup> Human Rights Council, 'Report of the Commission on Human Rights in South Sudan', [A/HRC/34/63](#), 6 March 2017, paras. 42-44; 'Report of the Commission on Human Rights in South Sudan', [A/HRC/37/71](#), 13 March 2018, paras. 28-33; 'Report of the Commission on Human Rights in South Sudan', [A/HRC/40/69](#), 12 March 2019, paras. 40, 45, 48-53.

<sup>404</sup> Human Rights Council, [A/HRC/RES/34/22](#), 24 March 2017.

<sup>405</sup> Human Rights Council, [A/HRC/RES/34/22](#), 24 March 2017, para. 14.

in Myanmar and the gendered impact of its ethnic conflicts (August 2019)<sup>406</sup> and *Economic Interests of the Myanmar military* (September 2019),<sup>407</sup> as well as two periodic reports between 2017 and 2019.<sup>408</sup> In its August 2019 report, the FFM indicated that it “strictly avoided interviewing children”, unless it could do so with the appropriate safeguards in place.<sup>409</sup> Save for the report concerning the economic interests of the military, all of the FFM’s reports refer to violations of children’s rights and crimes against children, including **killing and maiming, recruitment and use, torture, arbitrary detention, forcible displacement and denial of humanitarian access**.<sup>410</sup> The most detailed documentation of crimes against children is in the thematic report on **sexual and gender-based violence**, which finds, *inter alia*, that during the 2017 military ‘clearance’ operations, Rohingya girls and young women were gang raped and sexually mutilated by the Tatmadaw on a massive scale, including in public spaces and in detention. Many were killed after being raped, with some girls reportedly ‘raped to death’.<sup>411</sup> Several instances of sexual violence against Rohingya boys held in government detention, which amount to torture and crimes against humanity, are also documented, including rape, gang rape, genital mutilation and forced nudity.<sup>412</sup>

## The new ‘accountability focused’ mechanisms

11. Three of the most recently created bodies: the **International, Impartial and Independent Mechanism** to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM); the **United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL** (UNITAD, which works in Iraq); and the **Independent Investigative Mechanism for Myanmar** (IIMM) have an express nexus to criminal accountability. As well as identifying suspected perpetrators, they are mandated to collect, preserve and analyse relevant information and evidence of international crimes and to prepare criminal case files that may be used by different jurisdictions as a basis for prosecutions. As a result, when collecting evidence, they are bound to apply more stringent standards of proof than traditional fact-finding bodies.<sup>413</sup>
12. The IIIM is mandated to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses in Syria since March 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.<sup>414</sup> The IIIM and its related fact-finding body, the Syria Commission, are complementary. The IIIM is expected to work in close collaboration with the Commission, and in particular to collect, consolidate and preserve evidence and information gathered by the Commission, where relevant.<sup>415</sup>

<sup>406</sup> Human Rights Council, [A/HRC/42/CRP.4](#), 22 August 2019.

<sup>407</sup> Human Rights Council, [A/HRC/42/CRP.3](#), 16 September 2019.

<sup>408</sup> Human Rights Council, [A/HRC/39/CRP.2](#), 12 September 2018; [A/HRC/42/CRP.5](#), 8 August 2019.

<sup>409</sup> Human Rights Council, [A/HRC/42/CRP.4](#), 22 August 2019, para. 22.

<sup>410</sup> See e.g. Human Rights Council, [A/HRC/39/CRP.2](#), 12 September 2018, paras. 39, 61, 63-64; [A/HRC/42/50](#), 8 August 2019, paras 30, 57-62;

<sup>411</sup> Human Rights Council, [A/HRC/42/CRP.4](#), paras. 69-83.

<sup>412</sup> Human Rights Council, [A/HRC/42/CRP.4](#), paras. 154-167.

<sup>413</sup> See for instance, UN General Assembly [A/RES/71/755](#), 19 January 2017, para. 23.

<sup>414</sup> UN General Assembly [A/RES/71/248](#), 11 January 2017.

<sup>415</sup> UN General Assembly, [A/RES/71/248](#), 21 December 2016; UN General Assembly [A/RES/71/755](#), 19 January 2017, para. 32, paras 30-32, Annex, para. 30.

13. UNITAD is mandated to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence of acts that may amount to war crimes, crimes against humanity and genocide committed by ISIL (Da’esh) in Iraq, to the highest possible standards, for eventual use in fair and independent criminal proceedings, consistent with applicable international law, conducted by competent national courts, with the relevant Iraqi authorities as the primary intended recipients and with any other uses to be determined in agreement with the Government of Iraq on a case-by-case basis. UNITAD is further mandated to ‘complement’ the investigations being carried out by Iraqi authorities, or in third countries, at their request. UNITAD does not currently have a mandate to collect, preserve or store evidence of crimes that may have been committed by governmental forces, pro-government militias or international forces.<sup>416</sup> UNITAD’s initial investigative priorities, per its second periodic report to the Security Council (July 2019), include attacks committed by ISIL against the Yazidi community in Sinjar since August 2014 and crimes committed by ISIL in Mosul between 2014 and 2016, including crimes against children.<sup>417</sup>

14. The IIMM is mandated to collect, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files focusing on the criminal conduct of persons responsible for such crimes in order to “facilitate and expedite fair and independent criminal proceedings in national, regional or international courts and tribunals that have or may in the future have jurisdiction over these crimes”.<sup>418</sup> The IIMM’s establishing resolution contains an explicit reference to the Convention on the Rights of the Child, as an instrument applicable to the work of the mechanism, and highlights concerns over violations of international human rights law and international humanitarian law committed against children.<sup>419</sup> Similarly to the IIIM, the IIMM is expected to collaborate with its related fact-finding body and in particular to seek access to and make use of the information collected by the fact-finding mission on Myanmar.<sup>420</sup>
15. It is not possible at this stage to meaningfully assess how the newer mechanisms have addressed crimes against children, given that they have only been operational for a few years<sup>421</sup> and that their investigations are confidential.<sup>422</sup> Nonetheless, it appears that some **efforts have been made in the structure and design of** the IIIM and IIMM to ensure that due consideration is given to the evidence and information collected by their related fact-finding bodies (which, as highlighted, includes crimes and violations against children); and that **the position of children is explicitly**

<sup>416</sup> UN Security Council, [S/RES/2379 \(2017\)](#), 22 September 2017.

<sup>417</sup> A third investigation relates to the mass killing of unarmed Iraqi air force cadets from Tikrit Air Academy in June 2014 (Second report, para. 13). As of November 2019, UNITAD had expanded the scope of its investigative priorities to include crimes committed against Christian, Kaka’i, Shabak, Sunni and Turkmen communities. (UN Security Council, [Third report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, S/2019/878](#), 13 November 2019, para. 8).

<sup>418</sup> UN Human Rights Council, [A/HRC/RES/39/2](#), 3 October 2018.

<sup>419</sup> UN Human Rights Council, [A/HRC/RES/39/2](#), 3 October 2018, para. 1.

<sup>420</sup> UN Human Rights Council, [A/HRC/RES/39/2](#), 3 October 2018, para. 23(a); UN General Assembly, Terms of Reference of the Myanmar Mechanism [A/73/716](#), 16 January 2019, paras 8(a), 45-46.

<sup>421</sup>

<sup>422</sup>

considered in their investigations. Most notably, the IIM highlighted in both its reports its intent to develop effective approaches with regard to crimes against children, in accordance with its mandate.<sup>423</sup> These efforts are discussed in the body of the report but, in brief summary, include: recruiting staff with child-specific expertise; adopting policies and operational guidelines on addressing crimes affecting children; ensuring that referral pathways are in place for child witnesses; and undertaking to cooperate with other actors working on these issues.

## PART B. INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

16. Individual States bear the primary responsibility for prosecuting core international crimes.<sup>424</sup> Where domestic jurisdictions are either unwilling or unable to provide redress, international criminal courts and tribunals have played a key role in ensuring accountability for serious violations of human rights and humanitarian law.<sup>425</sup>
17. To remedy an urgent need for accountability in times of conflict in the past decades, *ad hoc* and hybrid tribunals have been set up to prosecute core international crimes when domestic jurisdictions were unwilling or unable to do so.<sup>426</sup> Although these tribunals had concurrent jurisdiction with national courts over crimes falling within the scope of their mandate, a number of them were also endowed with primacy over national jurisdictions and could request the transfer of investigations or proceedings, in the interests of justice.<sup>427</sup>

<sup>423</sup> General Assembly, [Report of the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, A/72/764](#), 28 February 2018, para. 23; General Assembly, [Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/74/313](#), 22 August 2019, para. 23. On the recruitment of children's rights experts, see Terms of Reference appended as an Annex to UN General Assembly [A/RES/71/755](#), para. 32.

<sup>424</sup> The main international conventions that include an explicit obligation for States to prosecute are: 1948 Convention on the Prevention and Punishment of Genocide (Genocide Convention), Article VI; 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Article 49(1); 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Article 50(1); 1949 Convention Relative to the Treatment of Prisoners (Third Geneva Convention), Article 129(1); Fourth Geneva Convention, Article 146(1); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5(1); 2006 International Convention for the Protection of All Persons from Enforced Disappearance, Article 9(1).

<sup>425</sup> UN Security Council, ['The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'](#); see also, UN Security Council, [S/RES/1998 \(2011\)](#), 12 July 2011 ("Recalling the responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against children; Stressing the need for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity.")

<sup>426</sup> UN Security Council, [S/RES/827](#), 25 May 1993; UN Security Council, [S/RES/955 \(1994\)](#), 8 November 1994; [Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone](#), 16 January 2002.

<sup>427</sup> [Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#), September 2009, Art. 9; [Statute of the International Criminal Tribunal for Rwanda](#), January 2010, Art. 8; [Statute of the Special Court for Sierra Leone](#), August 2000, Art. 8. The foundational documents of the IMT and IMTFE did not contain explicit concurrent jurisdiction provisions. However, the applicability of this regime can be derived from other provisions of their foundational documents, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Aug. 8 1945, Art. 6; Charter of the International Military Tribunal for the Far East at Tokyo, 1946, Art. 2; Goran Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (OUP, 2013), pp. 117-118.

18. The International Criminal Court (ICC) differs in so far as its jurisdiction is complementary to that of national courts.<sup>428</sup> This regime, which distinguishes the court from *ad hoc* and hybrid tribunals, aims to encourage States to comply with their primary responsibility to investigate and prosecute core international crimes.<sup>429</sup>
19. This section will analyse, albeit not exhaustively, the approach of the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the ICC, to crimes committed against children in their investigations and judgments.
20. The focus of these institutions has largely been on adult perpetrators and on the experiences of adult victims and survivors.<sup>430</sup> Where children have explicitly been addressed, in the course of investigations, during trial, or in judgments, the experiences of boys have generally been reduced to recruitment and use in hostilities, and those of girls to sexual and gender-based violence.

### The Nuremberg and Tokyo Tribunals

21. Following the Second World War, the Allied Governments established the IMT and IMTFE to try alleged "major war criminals" of the European Axis and Far East, respectively.<sup>431</sup> Both tribunals had jurisdiction over crimes against peace, war crimes, and crimes against humanity.<sup>432</sup>
22. Scores of children were victimised by Axis forces during the Second World War yet they are not mentioned in the founding instruments of the IMT or the IMTFE nor are child-specific crimes (i.e. crimes that are only constituted if the victim is a child).<sup>433</sup> None of the defendants were indicted specifically in respect of crimes against children; where children are expressly considered, this is in the context of the broader attack against the civilian population.<sup>434</sup> Prosecutors at Nuremberg adduced evidence of children, too young to work, being systematically sent to gas chambers to be killed on their arrival at extermination camps. Yet no specific charges were brought in that regard and the Tribunal considered this evidence as part of the broader war crimes and crimes against humanity perpetrated against the Jewish population as a whole.

<sup>428</sup> The ICC is a court of last resort and is statutorily barred from exercising jurisdiction over a case *inter alia* if it is being investigated or prosecuted by a State which has jurisdiction over it (unless it determines that the State is unwilling or unable to genuinely conduct the investigation or prosecution) or the case is of insufficient gravity to justify further action by the Court (Article 17 Rome Statute). Gravity turns on quantitative and qualitative considerations, including whether the crimes were committed against, or affected, children (see [Policy Paper on Case Selection and Prioritisation](#), September 2016).

<sup>429</sup> Informal expert paper, ICC-OTP, ['The principle of complementarity in practice'](#), 2003, p. 3.

<sup>430</sup> Interview with expert.

<sup>431</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the [Charter of the International Military Tribunal](#), 8 August 1945, Art. 1; [Charter of the International Military Tribunal for the Far East at Tokyo](#), 19 January 1946, Art. 1.

<sup>432</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Charter of the International Military Tribunal, 8 August 1945, Art. 6;

<sup>433</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Aug. 8 1945, 59 Stat. 1544, 82 U.N.T.S 279; Control Council Law No.10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Ambslatt of the Control Council in Germany, No. 3, 31 Jan. 1946, at 50; Charter of the International Military Tribunal for the Far East at Tokyo, 19 January 1946.

<sup>434</sup> For an overview, see: Cécile Aptel, *'International Criminal Justice and Child Protection'* pp.88 et al.

The judgment of the Tokyo Tribunal similarly refers to the indiscriminate killing of Chinese children and the mass rape of young girls during the Japanese occupation of China, but as part of the wider attack against civilians.<sup>435</sup>

## The *ad hoc* Tribunals

23. The International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>436</sup> and the International Criminal Tribunal for Rwanda (ICTR),<sup>437</sup> were *ad hoc* tribunals established by the UN Security Council in 1993 and 1994, respectively, in response to large-scale atrocities in Yugoslavia and Rwanda.
24. Both tribunals had jurisdiction over grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed on the territories and in the timeframes specified in their respective Statutes.<sup>438</sup> Unlike the IMT and IMTFE, a child-specific crime was enshrined in the *ad hoc* tribunals' Statutes, namely the forcible transfer of children from a national, ethnic, racial or religious group to another, constitutive of the crime of genocide if committed with the intent to destroy, in whole or in part, the group of origin of these children.<sup>439</sup> The Tribunals also had jurisdiction over attacks against buildings dedicated to education,<sup>440</sup> a crime which disproportionately affects children.
25. Despite the existence of these provisions, and the evidence that children were victimised in both conflicts,<sup>441</sup> and explicit references to child-specific crimes in the foundational documents of these tribunals, those specific provisions have not been litigated. According to Cécile Aptel, no strategies were put in place to gather evidence on crimes against children, and no child-specific crimes were charged by either tribunal.
26. Although no case before either Tribunal focused specifically on children, the experiences, status, and vulnerability of children were, in some cases, addressed, as

part of the broader crimes committed against the civilian population.<sup>442</sup> Both Tribunals adjudicated on generic international crimes affecting children and heard testimonies of crimes involving child victims, including sexual violence, torture, persecution, forcible transfer, murder and extermination, and highlighted the age and vulnerability of children in their judgments<sup>443</sup> as aggravating factors in legal findings or sentencing.

27. At the ICTY for example, in *The Prosecutor v. Ratko Mladić*, the Indictment, under the charge of terror and unlawful attack against civilians, contained a number of scheduled sniping and shelling incidents in which children were alleged to have been targeted while in school, playing or walking outside their house or on the street.<sup>444</sup> In its legal findings on sniping and shelling incidents in Sarajevo, the Trial Chamber specified the total number and ages of the child victims of these incidents.<sup>445</sup> The Trial Chamber explicitly noted that the age of the victims was one of the factors taken into account to determine their status as civilians.<sup>446</sup> In other judgments, children's age and vulnerability were recognised as aggravating factors in the determination of sentences.<sup>447</sup> In *The Prosecutor v. Blaškić*, the Trial Chamber highlighted that the effect of the crimes on the victims, and more particularly the targeting of women and children within the civilian population, constituted an aggravating circumstance.<sup>448</sup> In the case of *The Prosecutor v. Kunarać et al.*, the accused was specifically charged with (and ultimately convicted of) torture, sexual slavery and rape as a crime against humanity against a number of girls, some of whom were identified in the indictment as being as young as twelve and fifteen years.<sup>449</sup> In sentencing the accused, the Trial Chamber considered that the status of children as victims, referring in particular to

<sup>435</sup> *Ibid.* For another view, see: Diane Marie Amann, "Children," in William A. Schabas, (ed.), *The Cambridge Companion to International Criminal Law* 253 (Cambridge University Press 2016).

<sup>436</sup> The International Criminal Tribunal for the Former Yugoslavia was established by the UN Security Council in 1993 (see [S/RES/827\(1993\)](#)). The ICTY had jurisdiction over individuals responsible for grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity, committed on the territory of the former Yugoslavia since 1991 (Articles 1-6 Statute of the International Criminal Tribunal for the Former Yugoslavia).

<sup>437</sup> The International Criminal Tribunal for Rwanda was established by the UN Security Council in 1994 (see [S/RES/955\(1994\)](#)). The ICTR had jurisdiction over individuals responsible for genocide, crimes against humanity, and serious violations of international humanitarian law perpetrated in Rwanda between 1 January and 31 December 1994; and over Rwandan nationals responsible for such crimes in neighbouring countries during the same period (Articles 1-4 Statute of the International Tribunal for Rwanda). In 2010, the UN Security Council established the Mechanism for the International Criminal Tribunals to continue the jurisdiction, rights, obligations and essential functions of the ICTY and ICTR (<http://unscr.com/en/resolutions/1966>). The ICTY and ICTR closed in December 2017 and December 2015 respectively.

<sup>438</sup> [Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#), September 2009, Art. 1-5; [Statute of the International Criminal Tribunal for Rwanda](#), Art. 1-4.

<sup>439</sup> [Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#), September 2009, Art. 4.2(e); [Statute of the International Criminal Tribunal for Rwanda](#), Art. 2.2(e).

<sup>440</sup> [Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#), September 2009, Art. 3(d).

<sup>441</sup> In relation to the former Yugoslavia see [Final Report of the Commission of Experts established pursuant to Security Council Resolution 780](#) (1992) e.g para 7 ("The Commission has information indicating that girls as young as 7 years old [...] have been raped while in captivity."); Human Rights Watch, *The Fall of Srebrenica and the Failure of UN Peacekeeping- Bosnia and Herzegovina*, Volume 7, No. 13, October 1995; David Tolbert, 'Children and international criminal law: the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY)', in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (Hague Academic Press, 2006), p. 152. In relation to Rwanda, see Human Rights Watch, *Rwanda Lasting Wounds: Consequences of Genocide and War for Rwanda's Children*, Volume 15, No.5 (A), E. Ruvugiro, *Rwanda: The gruesome plight of children during the Tutsi genocide*, 11 October 2017, Justiceinfo.net.

<sup>442</sup> See e.g. *The Prosecutor v. Stanislav Galić* (ICTY). The accused was charged with the war crime of unlawfully inflicting terror "upon the civilian population" of Sarajevo through a protracted campaign of shelling and sniping. The Trial Chamber in its Judgment noted that at least 295 children had been killed and a further 1,251 wounded during the indictment period and that they, along with women, were the predominant target of the violence. ([Judgment and Opinion](#), Trial Chamber, 5 December 2003, paras. 579, 592).

<sup>443</sup> David Tolbert, 'Children and international criminal law: the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY)', in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (The Hague: Hague Academic Press, 2006), pp. 152-153; Jenny Kuper, *Bridging the gap: military training and international accountability regarding children*, in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (Hague Academic Press, 2006), pp. 155-159. Regarding the testimonies, see for instance ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Public transcript of Hearing of 6 May 2002, pp. 7955-7965 ("We were sledding and then we suddenly heard that shells were falling. We knew that it was nearby because of the loud noise, the explosion, and then we got very scared and started to run away. But before we managed to get to the entrance of the building, a shell landed behind us. Daniel Juranic was killed. I was injured in my head, leg and arm, and then Admir and Elvir were also injured."); ICTR, *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR- 95-1B-T, Public transcript of Hearing of 6 April 2004, p. 41 ("Q. How old were you in 1994, 16 April 1994, when this was happening to you? A. I was 15 years of age. Q. When you were ordered to undress and Mika also undressed, what did Mika do to you? [...] A. He took his penis and introduced it into my sexual parts. I asked him to be merciful to me. He didn't want to listen. [...] Q. When Mika was taking advantage of you, what were the other persons who were in his company doing? A. Those who had come with him seized the other young girls who were with me, that is Murekatete and Mukasine. Q. When they seized Murekatete and Mukasine, did you see what they did to Murekatete and Mukasine? A. They also had to undergo the same fate as myself. [...] Q. Madam Witness, can you also tell the Court how you felt when Mika Muhimana had sexual intercourse with you? A. I felt pain."). See generally: International Residual Mechanism for Criminal Tribunals (IRMCT), 'Children in Conflict Evidence from the Archives of the International Criminal Tribunals, available at: <https://www.irmct.org/specials/children-in-conflict/index.htm>).

<sup>444</sup> ICTY, *The Prosecutor v. Ratko Mladić* (Case No. IT-09-92-T), [Fourth Amended Indictment and Schedules of Incidents](#), Schedule F, 16 December 2011. See in particular Scheduled Incidents F.1, F.12, F.16, G.6, G.7. In its Trial Judgment, the Trial Chamber made factual and legal findings on unscheduled sniping incidents for which it had received evidence. Some involved children as victims, see in particular, Unscheduled sniping incidents of 5 August 1993 and 24 October 1994, ICTY, *The Prosecutor v. Ratko Mladić* (Case No. IT-09-92-T), [Judgment](#), Trial Chamber, 22 November 2017, paras 1988, 2003, 3190, 3206.

<sup>445</sup> ICTY, *The Prosecutor v. Ratko Mladić* (Case No. IT-09-92-T), [Judgment](#), Trial Chamber, 22 November 2017, paras. 3190-3191, 3194.

<sup>446</sup> ICTY, *The Prosecutor v. Ratko Mladić* (Case No. IT-09-92-T), [Judgment](#), Trial Chamber, 22 November 2017, para. 3194.

<sup>447</sup> IRMCT, 'Children in Conflict- Evidence from the Archives of the International Criminal Tribunals, available at: <https://www.irmct.org/specials/children-in-conflict/index.htm>).

<sup>448</sup> ICTY, *The Prosecutor v. Tihomir Blaškić* (Case No. IT-95-14-T), [Judgment](#), Trial Chamber, 3 March 2000, para. 786.

<sup>449</sup> ICTY, *The Prosecutor v. Dragoljub Kunarać et al.* (Case No. IT-96-23-PT), Counts 14-17, [Third Amended Indictment](#), 8 November 1999.

their vulnerability and age, was an aggravating factor, a finding which was upheld on appeal: “young and elderly women need special protection in order to prevent them from becoming easy targets”.<sup>450</sup> At the ICTR, in *The Prosecutor v Kambanda*, the accused pleaded guilty to genocide and conspiracy to commit genocide, through killing and causing serious bodily harm to “members of the Tutsi population”, direct and public incitement to commit genocide and the murder and extermination ‘of civilians’ as crimes against humanity. Children do not appear in the indictment however, in passing sentence, the Trial Chamber referred to the killing of children and noted that Kambanda had acknowledged that “he failed in his duty to ensure the safety of the children and the population of Rwanda.”<sup>451</sup>

28. The ICC and the Special Court for Sierra Leone (SCSL), established in 1998 and 2002 respectively, have been the catalyst for major advances in the pursuit of accountability for crimes against children, albeit hitherto in respect of child recruitment, and sexual and gender-based violence against girls only.

## The Special Court for Sierra Leone

29. The SCSL is considered the first ‘international’<sup>452</sup> criminal tribunal to have expressly addressed conflict-related crimes affecting children.<sup>453</sup> Based in Freetown, the SCSL was established in January 2002 following a request by the Government of Sierra Leone to the United Nations to create an independent special court to prosecute those most responsible for the commission of crimes against humanity, war crimes and other serious violations of humanitarian law, as well as crimes under applicable Sierra Leonean law, committed on the territory of Sierra Leone since 30 November 1996.<sup>454</sup>
30. Children played a prominent role in the Sierra Leonean civil war, both as victims and perpetrators. All armed groups in Sierra Leone pursued a strategy of deliberately targeting children. Children were killed, tortured, and subjected to amputation and forced labour. Girls between the ages of 10-14 were targeted for abuse and subjected to rape, sexual slavery and other forms of sexual violence. Other children were abducted and forcibly recruited into the same groups that had murdered their parents, often in front of them. Child soldiers were sexually abused, enslaved and trained, often under the influence of drugs and alcohol, to commit crimes. Many, if not all, were subjected to a process of psychological and physical abuse which continually blurred the link between victims and perpetrators.<sup>455</sup>
31. The Sierra Leonean conflict was the first time that international criminal law was directly confronted with the question of jurisdiction over juvenile offenders.<sup>456</sup> The SCSL Statute did not exclude criminal responsibility for 15-18 year olds; the decision

450 ICTY, *The Prosecutor v. Kunarac et al.* (Case No. IT-96-23-T& IT-96-23/1-T), *Judgment*, Trial Chamber, 22 February 2001, paras. 864, 867, 874-875; *Judgment*, Appeals Chamber, 12 June 2002, para. 355; see also, ICTR, *The Prosecutor v. Jean-Paul Akayesu*, (Case No. ICTR 96-4-T), *Judgment*, Appeals Chamber, 1 June 2001, para. 421.

451 ICTR, Case No. ICTR 97-23-S, *Judgment and Sentence*, 4 September 1998.

452 The SCSL was a ‘mixed’ or ‘hybrid’ criminal tribunal by jurisdiction and composition. Located on the territory of Sierra Leone but structurally independent from the domestic justice system, the SCSL had a mix of international and national judges and applied both international and domestic criminal law.

453 UNICEF, *‘Machel Study 10 year Strategic Review: Children and Armed Conflict in a Changing World’*, 2009, p. 67.

454 Article 1 *Statute of the Special Court for Sierra Leone*, 2002 (SCSL Statute). The Court closed in 2013, after which the Residual Special Court for Sierra Leone was established to oversee its continuing legal obligations (see: <http://www.rscsl.org/>).

455 Sierra Leone Truth and Reconciliation Report, Findings, paras. 465-469. (2004)

456 Luc Côté ‘Prosecuting Child Related Crimes at the Special Court for Sierra Leone: a mid-term assessment’, in Expert Discussion on Transitional Justice and Children, UNICEF Innocenti Research Centre, November 2005, p. 23.

as to whether to indict former child soldiers was left to the decision of the Prosecutor, who made an early policy choice not to prosecute juveniles.<sup>457</sup> In 2003, the Prosecutor declared that “two of the most egregious uses of children are sexual slavery and conscription of children into armed conflicts. Sierra Leone’s conflict was characterised by both, and we hope to establish a strong precedent that these crimes must end.”<sup>458</sup>

32. The SCSL Statute contained a number of provisions relevant to child-specific crimes and generic international crimes affecting children, including the war crimes of conscripting or enlisting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities; outrages upon personal dignity; sexual violence and enslavement as crimes against humanity; and abusing girls under the age of 14 or abducting girls for ‘immoral purposes’ under Sierra Leonean law.<sup>459</sup> None of the indictments included charges under Sierra Leonean law, however.
33. The SCSL indicted a total of thirteen individuals, namely leaders of the Revolutionary United Front (RUF),<sup>460</sup> Civil Defence Forces (CDF),<sup>461</sup> Armed Forces Revolutionary Council (AFRC),<sup>462</sup> as well as former Liberian president, Charles Taylor;<sup>463</sup> **in each of these cases, counts relating to the recruitment and use of child soldiers were included.**
34. The indictments issued in three of the four cases – AFRC, RUF, and Taylor – **also included counts of rape and sexual slavery** as a crime against humanity and outrages upon personal dignity as a war crime. These charges were largely based on evidence of sexual violence against civilian women and girls<sup>464</sup> and, to a lesser extent, on evidence of sexual violence against girl soldiers forcibly abducted by armed groups.<sup>465</sup> According to a former SCSL prosecutor, this was a deliberate charging strategy “in order to allow a more complete picture of the fate of child soldiers, and especially girl soldiers, to emerge”.<sup>466</sup> In reality, however, the bulk of the evidence concerning sexual violence (and of forced marriage as an ‘other inhumane act’, see below) focused on the treatment of civilian women and girls by the RUF and AFRC.<sup>467</sup> With respect to the CDF case, the prosecution did not, however, include any sexual violence offences in

457 See Articles 7(1) and 15(5) SCSL Statute; SCSL, Public Affairs Office, ‘Special Prosecutor Says He Will Not Prosecute Children’, 2 November 2002.

458 SCSL, The Office of the Prosecutor, ‘Honouring the Inaugural World Day Against Child Labour’, 12 June 2003.

459 Articles 2(g), 4(c) and 5 SCSL Statute.

460 Five leaders of the RUF were indicted: Foday Sankoh, Sam Bockarie, Issa Hassan Sesay (*Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-03-05-I, *Indictment*, 3 March 2003), Morris Kallon (*Prosecutor v. Morris Kallon*, Case No. SCSL-03-07-I, *Indictment*, 3 March 2003), Augustine Gbao (*Prosecutor v. Augustine Gbao*, Case No. SCSL-03-09-I, *Indictment*, 16 April 2003). The charges against Sakoh and Bockarie were withdrawn following their deaths in 2003. (<http://www.rscsl.org/RUF.html>).

461 Three leaders of the CDF were indicted: Allieu Kondewa (*Prosecutor v. Allieu Kondewa*, Case No. SCSL-03-12-I, *Indictment*, 24 June 2003), Samuel Hinga Norman (*Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-03, *Indictment*, 3 March 2003) and Moinina Fofana (*Prosecutor v. Moinina Fofana*, Case No. SCSL-03-11-I, *Indictment*, 24 June 2003).

462 Three leaders of the AFRC were indicted: Alex Tamba Brima (*Prosecutor v. Alex Tamba Brima*, Case No. SCSL-03-06-I, *Indictment*, 3 March 2003), Ibrahim Bazy Kamara (*Prosecutor v. Ibrahim Bazy Kamara*, Case No. SCSL-03-10-I, *Indictment*, 26 May 2003) and Santigie Borbor Kanu (*Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-I, *Indictment*, 15 September 2003). A fourth, Johnny Paul Koroma, was also indicted but never apprehended, having fled Sierra Leone. (<http://www.rscsl.org/AFRC.html>).

463 *Prosecutor v. Charles Ghankay Taylor*, Case No. 03-01-I, *Indictment*, 3 March 2003.

464 *Prosecutor v. Charles Ghankay Taylor* (Case No. SCSL-03-01-T), *Judgment*, Trial Chamber III, 18 May 2012, paras 871-1207; *Prosecutor v. Alex Tamba Brima et al* (Case No. SCSL-04-16-T), *Judgment*, Trial Chamber II, 20 June 2007, paras. 966-1188; *Prosecutor v. Issa Hassan Sesay et al* (Case No. SCSL-04-15-T), *Judgment*, Trial Chamber I, 2 March 2009, paras. 801, 950 and 956.

465 E.g. *Prosecutor v. Charles Ghankay Taylor*, Trial Chamber Judgment, para. 145.

466 Nina Jorgensen, ‘Child Soldiers and the Parameters of International Criminal Law’, Chinese Journal of International Law 11 (4): 657-688.

467 Rosemary Grey, ‘Sexual Violence against Child Soldiers- The Limits and Potential of International Criminal Law’, International Journal of Feminist Politics, 2014, Volume 16, No. 4, 601-621 See in particular p. 608: “The approach used by the SCSL has not specifically highlighted the issue of sexual violence against girl soldiers, as such [...] the victims [...] were identified predominantly as ‘civilians’, ‘women and girls’, or ‘bush wives’ rather than as child soldiers, combatants, or members of armed groups.”

the original indictments. As discussed in Section II part A, the prosecution sought leave to amend the original indictment in order to include sexual violence charges; this request was rejected by the Trial Chamber on the basis that the application had been made too close to the start of the trial and that adding new counts at such a late stage would prejudice the fair trial rights of the accused.<sup>468</sup>

35. Finally, charges were brought, for the very first time in an international criminal tribunal, in respect of the widespread and systematic abduction of civilian women and girls and their forcible ‘marriage’ to rebel fighters and subsequent exposure to enslavement, rape, forced labour and forced pregnancy. These crimes were charged in the AFRC and RUF cases, as a crime against humanity under the residual category of ‘other inhumane acts’,<sup>469</sup> a decision which was affirmed by the Appeals Chamber.<sup>470</sup>

## The International Criminal Court

36. This **focus on the recruitment and use of child soldiers and on sexual and gender-based violence, has largely continued before the ICC.**
37. The ICC was established in 2002 following the entry into force of the 1998 Rome Statute. It is the first and only permanent international criminal court and has subject-matter jurisdiction over war crimes, crimes against humanity and genocide, committed on or after 1 July 2002, by a State Party; or in the territory of a State Party; or on the territory of a State that has accepted the jurisdiction of the Court; or where such crimes are referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.<sup>471</sup> As of July 2018, the Court has subject-matter jurisdiction over the crime of aggression, provided that certain conditions and procedures are satisfied.<sup>472</sup>
38. **Most crimes within the subject-matter jurisdiction of the ICC affect children.**<sup>473</sup> Of these, three are child-specific: enlisting or conscripting children under the age of 15 or using them to participate in hostilities as a war crime;<sup>474</sup> forcible transfer of children belonging to a national, ethnical, racial or religious group to another group

<sup>468</sup> *Prosecutor v. Sam Hinga Norman et al.* (Case No. SCSL-04-14-PT) [Decision on Prosecution Request for Leave to Amend the Indictment](#), Trial Chamber, 20 May 2004, paras. 35, 55, 62, 64.

<sup>470</sup> The key contested issue in these cases was whether ‘forced marriage’ could be framed as a separate crime against humanity or whether it was a predominantly sexual crime which could be wholly subsumed by the existing charges of sexual slavery. The Trial Chamber in *Prosecutor v. Alex Tamba Brima* dismissed this charge, on the grounds that the evidence presented was not capable of establishing a crime of forced marriage *distinct* from sexual slavery; the relationship between victim and perpetrator was one of ownership – a constituent element of sexual slavery – and the use of the term ‘wife’ merely indicated the perpetrator’s intent to exercise proprietary rights over his victim (paras.703-714). This decision was overturned on appeal, the Appeals Chamber holding that the practice of forced marriage in Sierra Leone amounted to more than sexual slavery, both in terms of the conduct itself and resulting harm. Perpetrators “intended to impose a forced conjugal association upon the victims rather than exercise an ownership and interest”; this marital relationship entailed mutual obligations for both parties, with the ‘wives’ being forced to perform domestic duties and sexual intercourse, among others, in exchange for ‘protection; the imposition of this arrangement resulted in long-term suffering, arising from the sexual aspect of the crime and long-term social stigmatisation and ostracisation of victims and their children (*Prosecutor v. Alex Tamba Brima et al.*, [Judgment](#), Appeals Chamber, 22 February 2008, paras. 187-203).

<sup>471</sup> Articles 5, 11 and 12, Rome Statute.

<sup>472</sup> Articles 8bis and 15bis and 15ter, Rome Statute. The Prosecutor has the power to initiate a formal investigation pursuant to a State Party referral or a Chapter VII referral by the UN Security Council. The Prosecutor may also initiate investigations *proprio motu*, subject to being granted prior authorisation by the Pre-Trial Chamber. In each case, in deciding whether to initiate an investigation, the Prosecutor is required to have regard to whether: there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; the cause is or would be admissible under Article 17, Rome Statute; there are substantial reasons to believe that an investigation would not serve the interests of justice (Articles 13 and 15, Rome Statute).

<sup>473</sup> The Rome Statute excludes criminal responsibility over minors, in contrast to the SCSL Statute (Article 26, Rome Statute).

<sup>474</sup> Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), Rome Statute.

as a constitutive act of genocide;<sup>475</sup> child trafficking as a form of the crime against humanity of enslavement.<sup>476</sup> Numerous others are generic international crimes that can disproportionately affect children, including torture and torture-related crimes; attacks against buildings dedicated to education and healthcare; persecution; and sexual and gender-based crimes.<sup>477</sup>

39. The **recruitment and use of child soldiers** was charged in the majority of the arrest warrants and indictments issued during Prosecutor Luis Moreno Ocampo’s tenure (2003-2012).<sup>478</sup> The Court’s first trial, *The Prosecutor v. Thomas Lubanga Dyilo*, opened in 2009 and was based exclusively on three counts of war crimes for enlisting and conscripting children under the age of 15 in the DRC and using them to participate actively in hostilities.<sup>479</sup> In its 2012 landmark ruling, a Trial Chamber found the accused guilty of all three counts and sentenced him to 14 years of imprisonment.<sup>480</sup> On 1 December 2014, the Appeals Chamber confirmed the verdict and sentence.<sup>481</sup> Luis Moreno Ocampo’s decision to focus on child soldiers, and to indict Lubanga on such a narrow basis, was widely criticised by civil society organisations in light of the widespread allegations that Lubanga bore responsibility for many other ICC crimes against children in Ituri,<sup>482</sup> including crimes of sexual violence against the child soldiers themselves.<sup>483</sup> Further, the weaknesses of the protection framework for victims and witnesses, and the use by the Prosecution of intermediaries, drew criticisms. Evidentiary challenges pertaining to allegations of coaching of witnesses/victims by intermediaries were successfully brought by the Defence and resulted in the Trial Chamber disregarding in its judgment documentary evidence of child soldiers called by the Prosecution on the basis of its unreliability.<sup>484</sup>
40. In addition to crimes of recruitment and use, the Office of the Prosecutor (OTP) under Ocampo **investigated and charged sexual and gender-based violence (SGBV) against girls in a number of situations and cases.** Among others, two arrest warrants were authorised in 2007 in *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’) in respect of allegations of rape of

<sup>475</sup> Article 6(e), Rome Statute. See also Article 6(d), Rome Statute (imposition of measures aimed at the prevention of births with the group)

<sup>476</sup> Article 7(2)(c), Rome Statute.

<sup>477</sup> Office of the Prosecutor, [Policy on Children](#), November 2016, pp. 23-25.

<sup>478</sup> Dr Alison Bisset, ‘*Children in transitional justice processes- still sidelined?*’, p. 272. See e.g. in the Uganda investigation [Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005](#), (Case No. ICC-02/04-01/05), Pre Trial Chamber II, 27 September 2005; [Warrant of Arrest for Vincent Otti](#), (Case No. ICC-02/04), Pre-Trial Chamber II, July 2005; [Warrant of Arrest for Okot Odhiambo](#), (Case No. ICC-02/04), Pre-Trial Chamber II, 8 July 2005. ; in the DRC investigation: *Prosecutor v Ntaganda*, [Warrant of Arrest](#), (Case No. ICC-01/04-02/06), Pre-Trial Chamber I, 22 August 2006; *Prosecutor v Katanga and Ngodjulo Chui*, (Case No. ICC-01/04-01/07), [Amended Document Containing the Charges Pursuant to Article 61\(3\)\(a\) of the Statute](#), Pre-Trial Chamber I, 26 June 2008.

<sup>479</sup> *Prosecutor v Thomas Lubanga*, (Case No. ICC-01/04-01/06, [Document Containing the Charges](#), Pre-Trial Chamber I, ICC-01/04-01/06, 28 August 2006.

<sup>480</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), [Judgment](#), Trial Chamber, 14 March 2012; *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-2901), [Decision on Sentence pursuant to Article 76 of the Statute](#), 13 July 2012.

<sup>481</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06 A 5), [Judgment](#), Appeals Chamber, 1 December 2014.

<sup>482</sup> In March 2006, when the arrest warrant was made public, a number of NGOs, including Human Rights Watch, Women’s Initiatives for Gender Justice and the International Centre for Transitional Justice, wrote to the OTP to raise concerns over the scope of the indictment: DR Congo: [‘ICC Charges Raise Concern Joint letter to the Chief Prosecutor of the International Criminal Court’](#), 31 July 2006.

<sup>483</sup> See, Women’s Initiatives for Gender Justice, [‘Public redacted version of confidential letter to ICC Prosecutor’](#), August 2006; Rosemary Grey and Louise Chappell, ‘*Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*’, in Gender and War *supra* note 9 at pp. 215-221. (*The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), [Judgment](#), Trial Chamber, 14 March 2012, paras. 178-484; [Redacted Decision on Intermediaries](#), Public, 31 May 2010).

<sup>484</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), [Judgment](#), Trial Chamber, 14 March 2012, paras. 178-484.

civilian girls as a crime against humanity and war crime in Darfur;<sup>485</sup> in 2008 the accused in *The Prosecutor v. Germain Katanga and Mathieu Ngodjulo Chui* were charged, *inter alia*, with rape and sexual slavery of girls as war crimes and crimes against humanity in the DRC;<sup>486</sup> and the 2009 indictment in *The Prosecutor v. Jean-Pierre Bemba* (Central African Republic) included charges of rape of a 10-year-old girl.<sup>487</sup>

41. In June 2012, Fatou Bensouda, then Deputy Prosecutor to Ocampo, was elected Chief Prosecutor by the Assembly of State Parties. Days before her swearing in, Bensouda declared that “in the International Criminal Court, children, including girls, will not be invisible”.<sup>488</sup> In 2014 she reiterated this pledge, stating that, “in addition to focusing on children who are forced to carry arms, we must also address the issue of children who are affected by arms”.<sup>489</sup>
42. The OTP has since **implemented a number of structural changes designed to shift the attention of the Office away from the exclusive focus on child soldiers towards the full range of ways that children are affected by crimes** within the jurisdiction of the ICC.<sup>490</sup> Bensouda appointed, in 2012, the first Special Adviser on Children in and affected by Armed Conflict, Professor Diane Marie Amann.<sup>491</sup> The investigation and prosecution of crimes against children has been elevated to a strategic priority.<sup>492</sup> A Policy on Children was adopted in November 2016.<sup>493</sup>
43. Despite these changes, the **most visible shift appears to be the inclusion of a broader range of charges related to SGBV** against girls. Two indictments are particularly significant. In *The Prosecutor v. Ongwen*, charges of forced marriage and forced pregnancy were brought for the first time at the ICC, in respect of the abduction of girls in northern Uganda and their distribution to Lord’s Resistance Army fighters to serve as domestic servants, forced exclusive conjugal partners, and sex slaves.<sup>494</sup> And unlike in *Lubanga*, where the previous Prosecutor had sought to argue that sexual violence perpetrated against female child soldiers in the ranks of the Union des Patriotes Congolais (UPC), by members of the UPC, was captured by the charges of recruitment and use, the Prosecutor in *The Prosecutor v. Bosco Ntaganda* brought separate charges in respect of these allegations, for rape and sexual slavery.<sup>495</sup> The Defence challenged the indictment on the grounds that the war crimes of rape

and sexual slavery were not enforceable against members of one’s own forces; this argument was rejected by the Pre-Trial and Appeals Chambers, who confirmed the charges.<sup>496</sup>

## Conclusion

44. The *ad hoc* tribunals were set up when increased interest in children’s rights and accountability for crimes and violations committed against children in armed conflicts was emerging as an issue of interest in international law.<sup>497</sup> The entry into force of the Convention on the Rights of the Child on 2 September 1990 and the publication of Graça Machel’s seminal report, in 1996, mark the start of the increasing attention paid by the international community to children’s rights and the specific plight of children in the context of mass atrocity crimes,<sup>498</sup> and may explain why these tribunals paid less attention to crimes affecting children compared to more recent institutions.<sup>499</sup> That is not to say, however, that there was a total disregard for the plight of child victims. As analysed previously, the jurisprudence of the *ad hoc* tribunals shows that the age and vulnerability of children was taken into account at the investigation stage, as reflected in some Indictments, as well as in Chambers’ legal findings on crimes and as part of the sentencing process.
45. The ICC and the SCSL, set up later, have both been catalysts for major advances in the pursuit of accountability for crimes against children, mainly in respect of the recruitment and use of child soldiers, and of SGBV against girls, including girl soldiers.
46. However, this focus has also meant that **other indictable crimes, such as killing, maiming, persecution and deprivation of access to basic services, which affected large numbers of children, were either prosecuted through an adult-centric lens and based on adults’ testimony or not prosecuted at all**.<sup>500</sup> In particular, while adults and children alike are victimised by indiscriminate attacks against the civilian population and civilian objects, such crimes tend to disproportionately affect children in terms of their long-term consequences and traumatic impact.<sup>501</sup> For example, in light of their physical and developmental needs, the hardship caused by sieges, attacks on hospitals or the denial of humanitarian assistance is particularly devastating for children, exposing them to elevated risks of malnutrition and disease, with damaging

485 *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-al-Rahman (“Ali Kushayb”)*, (Case No. ICC-02/05-01/07) [Warrant of Arrest for Ali Kushayb](#), and [Warrant of Arrest of Ahmad Harun](#), Pre-Trial Chamber I, 27 April 2007.

486 *The Prosecutor v. Germain Katanga and Mathieu Ngodjulo Chui*, (Case No. ICC-01/04-01/07), [Decision on the Confirmation of Charges](#), Pre-Trial Chamber I, 30 September 2008 see e.g para 434.

487 ICC, *The Prosecutor v. Jean-Pierre Bemba*, (Case No. ICC-01/05-01/08), [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), Pre-Trial Chamber II, 15 June 2009, para. 174.

488 Fatou Bensouda, Prosecutor-elect of the International Criminal Court, Keynote Speech before the Eng Aja Eze Foundation in New York, [‘The Incidence of the Female Child Soldier and the International Criminal Court’](#), 4 June 2012.

489 Fatou Bensouda, *Children and International Criminal Justice*, 43 Georgia Journal of International and Comparative Law.

490 Interview with Diane Marie Amann, 28 February 2020.

491 Office of the Prosecutor, Press Release, [‘ICC Prosecutor Fatou Bensouda appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers’](#), 12 December 2012.

492 Office of the Prosecutor, [Strategic Plan June 2012-2015](#), October 2013, p. 27 Strategic goal 3 is to enhance the integration of a gender perspective in all areas of work and continue to pay particular attention to sexual and gender-based crimes and crimes against children.

493 *Supra* note 101.

494 *The Prosecutor v. Dominic Ongwen*, (Case No. ICC-02/04-01/15), [Decision on the Confirmation of Charges](#), Pre-Trial Chamber II, 23 March 2016, paras. 86-101.

495 *The Prosecutor v. Bosco Ntaganda*, (Case No. ICC-01/04-02/06), [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), Pre-Trial Chamber II, 9 June 2014, para.76.

496 *The Prosecutor v. Bosco Ntaganda*, (Case No. ICC-01/04-02/06 OA5), [Judgment on the appeal of Mr. Ntaganda against the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’](#), 15 June 2017.

497 David Tolbert, ‘Children and international criminal law: the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY)’, in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (The Hague: Hague Academic Press, 2006), p. 148.

498 Convention on the Rights of the Child, [UN GA Resolution 44/25](#), 20 November 1989. On the role played by the entry into force of the Convention on the Rights of the Child, see David Tolbert, ‘Children and international criminal law: the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY)’, in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (The Hague: Hague Academic Press, 2006), p. 148.

499 In addition, it has been suggested that other factors, such as the nature of conflicts under scrutiny, and the type of crimes falling within the scope of their mandates, in the case of the earlier institutions, may explain why these tribunals paid less attention to crimes against children at the investigation and prosecution stages in comparison to more recent tribunals. David Tolbert, ‘Children and international criminal law: the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY)’, in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children*, (The Hague: Hague Academic Press, 2006), pp. 148-149, 152-153.

500 Dr Alison Bisset, ‘Children in transitional justice processes- still side-lined?’, p. 272.

501 This has been expressly recognised by the OTP in its Policy on Children: “Among the war crimes that may have a disproportionate effect on children are attacks on buildings dedicated to education and health care, as enumerated in article 8(2)(b)(ix) and article 8(2)(e)(iv) of the Statute, when committed in the context of an armed conflict. Such attacks contribute to the multi-layered effect on the lives of children, and deprive them of the basic right to life, survival and development”, at para. 49.

effects on their growth and cognitive development.<sup>502</sup> With regards to the ICC specifically, studies conducted in Ituri in DRC reveal dissatisfaction with the OTP's emphasis on child recruitment and sexual violence, with many expressing concern that children who are killed or deprived of food, shelter or medical care during the conflict received no attention.<sup>503</sup>

47. The following Table summarises the mandate and composition of twelve UN investigative and fact-finding bodies. The mechanisms' foundational instruments were screened for: (a) language specific to violations or crimes affecting children; and (b) requirements or language about the need to incorporate child-specific expertise.

#### Venezuela – Fact-finding Mission<sup>504</sup>

##### Mechanism Mandate

“To investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims and present a report on its findings to the Council during an interactive dialogue at its forty-fifth session” (¶24).

##### Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

While the mandate itself is broad and not specific to crimes against children, the resolution underlines Venezuela's obligations under “the Convention on the Rights of the Child and the Optional Protocols thereto on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography” (Preamble, p.1). The resolution also “expresses particular concern at the disproportionate impact of the crisis on the rights of women and children” (Preamble, p.2).

##### Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

The resolution urges Venezuela “to take all measures necessary to ensure the availability and accessibility of food, water, essential medicines and health-care services to all those in need, including comprehensive preventive health-care programmes, with particular attention to children's and maternal services” (¶12). It further urges the international community to provide and scale up support “to respond to the growing needs of Venezuelans on the move, including the particular needs of women, children” (¶19).

<sup>502</sup> See e.g. the Syria Commission has documented that the “*lack of access to medical care, whether as a result of deliberate obstruction or the vagaries of war, has profoundly affected children. There is little care available to more vulnerable newborns and vaccination programmes continue to be affected negatively by the conflict. Injured children, like adults, suffer due to a lack of medical supplies. One interviewee witnessed a doctor operating on a 7-year-old child without anaesthesia in Jisr Al-Shughour in April. He described the child as being in such pain that ‘he was beyond crying’.*” (Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/30/48, August 2015, para. 77).

<sup>503</sup> Cécile Aptel and Virginie Ladisch, ‘*Through a new lens: a child-sensitive approach to transitional justice*’, p. 22.

<sup>504</sup> UN Human Rights Council Resolution 42/25 <https://undocs.org/A/HRC/RES/42/25>.

#### Myanmar: a) Myanmar – Independent Investigative Mechanism for Myanmar<sup>505</sup>

##### Mechanism Mandate

“To collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law” (¶22). “Be able to make use of the information collected by the fact-finding mission and continue to collect evidence; have the capacity to document and verify relevant information and evidence, including through field engagement and by cooperating with other entities, as appropriate; report on its main activities on an annual basis to the Human Rights Council as of its forty-second session and to the General Assembly as of its seventy-fourth session” (¶23).

##### Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

While the mandate itself is broad and not specific to crimes against children, the resolution reaffirms the Convention on the Right of the Child (Preamble, p.1). It expresses concern at the findings of the independent international fact-finding mission that “children were subjected to, and witnessed, serious human rights violations, including killing, maiming and sexual violence, as part of a widespread and systematic attack on a civilian population warranting criminal investigation and prosecution” (¶1). It also calls for cooperation between the independent commission of enquiry established by the Government of Myanmar and all United Nations bodies and mandates “to ensure that all those responsible for crimes involving violations of international law, including violations and abuses of international human rights law, such as conflict-related sexual and gender-based violence and the attacks on children perpetrated during the military “clearance” operations in northern Rakhine State, are held to account” (¶21).

##### Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

The resolution appeals to States, international agencies and other donors to step up support for victims, “possibly through the establishment of a trust fund to address their needs, including the needs of those who have been victims of sexual violence, as well as child victims and witnesses” (¶33). The Terms of Reference (ToRs)<sup>506</sup> also require that “The Head shall recruit a secretariat composed of impartial and experienced professional and administrative staff, with expertise in the following areas, inter alia: [...] children's rights: crimes against children” (¶25).

The ToRs also require that “The Independent Investigative Mechanism shall take appropriate measures to respect and ensure respect for the privacy, interests and personal circumstances of victims, in the light of their age, sex, sexual orientation, gender and health and taking into account the nature of the crime, in particular where it involves sexual and gender based violence or violence against children” (¶30).

<sup>505</sup> UN Human Rights Council Resolution 39/2 <https://daccess-ods.un.org/TMP/8271813.39263916.html>.

<sup>506</sup> Letter of the Secretary General to the President of the General Assembly, UN Doc. A/73/716 <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>

**b) Myanmar – Independent International Fact-Finding Mission on Myanmar<sup>507</sup>**

**Mechanism Mandate**

“To establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims, and to present to the Council an oral update at its thirty-sixth session and a full report at its thirty-seventh session” (¶11).

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, the resolution “strongly encourages the Government of Myanmar to take the measures necessary to address discrimination and prejudice against women, children and members of ethnic, religious and linguistic minorities across the country” (¶14). It also welcomes the steps taken by the Government of Myanmar “to end the recruitment of child soldiers and the release of 800 child soldiers and, abhorring their use in Myanmar, urges the Government to consolidate progress further towards a complete cessation of all recruitment and use of child soldiers; the identification of all children remaining in the ranks of government forces and their immediate release; an end to the arrest, harassment and imprisonment of children accused of desertion; continued efforts to bring perpetrators of child recruitment to justice and to criminalize the recruitment of child soldiers; increasing transparency, including by expanding access to birth registration services to children, including those vulnerable to recruitment; and ensuring the rehabilitation and reintegration of former child soldiers” (¶20).

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

No.

**Yemen – Group of Eminent Experts<sup>508</sup>**

**Mechanism Mandate**

“To monitor and report on the situation of human rights, to carry out a comprehensive examination of all alleged violations and abuses of international human rights and other appropriate and applicable fields of international law committed by all parties to the conflict since September 2014, including the possible gender dimensions of such violations, and to establish the facts and circumstances surrounding the alleged violations and abuses and, where possible, to identify those responsible; to make general recommendations on improving respect for and the protection and fulfilment of human rights, and to provide guidance on access to justice, accountability, reconciliation and healing, as appropriate; to engage with Yemeni authorities and all stakeholders, in particular relevant United Nations agencies, the field presence of the Office of the High Commissioner in Yemen, the authorities of the Gulf States and the League of Arab States, with a view to exchanging information and providing

<sup>507</sup> The Independent International Fact-Finding Mission on Myanmar, set up by the Human Rights Council in 2017 (resolution 34/22) handed over its evidence of serious crimes under international law to the IIMM. Its mandate ended in September 2019.

<sup>508</sup> The 2017 Resolution first established the Group of Eminent Experts on Yemen, and the 2018 and 2019 Resolutions renewed its mandate.

support for national, regional and international efforts to promote accountability for human rights violations and abuses in Yemen” (¶12, 2017 Resolution). “To submit a comprehensive written report to the High Commissioner, by the time of the thirty-ninth session of the Human Rights Council, to be followed by an interactive dialogue” (¶14, 2017 Resolution).

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, the 2017, 2018 and 2019 Resolutions express concerns about “the allegations of violations of international humanitarian law and violations and abuses of human rights law in Yemen, including those involving grave violations against children, attacks on humanitarian workers, civilians and civilian infrastructure, including medical facilities and missions and their personnel, as well as schools (Preamble, p.2 of all resolutions). They further condemn the “ongoing violations and abuses of human rights and violations of international humanitarian law in Yemen, including those involving the widespread recruitment and use of children by parties to the armed conflict... and attacks on civilians and civilian objects, including...schools” (¶1 of all resolutions). They also demand that “all parties to the armed conflict end the recruitment and use of children and release those who have already been recruited, and calls upon all parties to cooperate with the United Nations for their reintegration into their communities, taking into consideration the relevant recommendations made by the Secretary-General in his report on children and armed conflict” (¶4 of the 2017 and 2018 Resolutions, ¶5 of the 2019 Resolution). Lastly, it emphasises the commitments and obligations of Yemen under “the Convention on the Rights of the Child and the Optional Protocols thereto on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography thereto” (¶6 of the 2017 and 2018 Resolutions, ¶7 of the 2019 Resolution).

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

No.

**Burundi – Commission of Inquiry<sup>509</sup>**

**Mechanism Mandate**

“To conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015, including on their extent and whether they may constitute international crimes, with a view to contributing to the fight against impunity; to identify alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability; to formulate recommendations on steps to be taken with a view to guaranteeing that the authors of these violations and abuses, regardless of their affiliation, are held accountable for their acts; to engage with the Burundian authorities and all other stakeholders, in particular United Nations agencies, civil society, refugees, the field presence of the Office of the High Commissioner in Burundi, authorities of the African Union, and the African Commission on Human and Peoples’ Rights, in order to provide the support and expertise for the immediate improvement of the situation of human rights and the fight against impunity; to present an oral briefing to the Human Rights Council at its thirty-fourth and thirty-fifth sessions, and a final report during an interactive dialogue at its thirty-sixth session; to present its report to the General Assembly and other relevant international bodies” (¶23, 2016 Resolution).

<sup>509</sup> The 2016 Resolution first established the Commission of Inquiry, and the 2017 and 2018 Resolutions renewed its mandate.

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, the 2016 Resolution expresses concern about “the continuous and accelerated deterioration of the human rights, economic and humanitarian situation in Burundi, in particular the situation of women and children” (¶1). It also strongly condemns “all violations and abuses of human rights in Burundi by all actors, particularly those involving mass arbitrary arrests and detentions, including cases involving children” (¶2). The 2018 Resolution expresses concern at “the continuously worrying human rights and humanitarian situation in Burundi, which particularly affects women and children” (¶1).

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

No.

**Syria: a) Syria – Commission of Inquiry<sup>510</sup>**

**Mechanism Mandate**

“To investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable” (¶13 of Resolution S-17/1 and ¶4 of Resolution 31/17). “To urgently conduct a comprehensive, independent and unfettered special inquiry, consistent with international standards, into the events in El-Houleh and, if possible, to publicly identify those who appear responsible for these atrocities, and to preserve the evidence of crimes for possible future criminal prosecutions or a future justice process, with a view to hold to account those responsible, and also requests the commission to provide a full report of the findings of its special inquiry to the Human Rights Council at its twentieth session, and to coordinate, as appropriate, with relevant United Nations mechanisms” (¶8 of Resolution S-19/1). “To conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes” (¶10 of Resolution 21/26).

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, **Resolution S-17/1 (2011)** condemns “the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the killing and persecution of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including of children” (¶1).

**Resolution S-19/1 (2012)** condemns “the outrageous killing of forty-nine children, all under the age of 10” (¶2).

**Resolution 19/22 (2012)** condemns “the extensive violations of children’s rights committed by

<sup>510</sup> Resolution S-17/1 (2011) first established the Commission of Inquiry, and all subsequent resolutions renewed its mandate.

the Syrian authorities, including the killing of children during demonstrations and the widespread practice of arbitrary detention, torture and ill-treatment” and “the sexual violence committed by the Syrian authorities, including against male detainees and children” (¶2).

**Resolution 21/26 (2012)** condemns “the continued widespread and systematic gross violations of human rights and fundamental freedoms by the Syrian authorities and the Government-controlled militia Shabbiha, such as the use of heavy weapons and force against civilians, massacres, arbitrary executions, extrajudicial killings, the killing and persecution of protesters, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence and ill-treatment, including against children” (¶4).

**Resolution 25/23 (2014)** condemns “all violations and abuses committed against children, and urges all parties to comply with their obligations under international law” (¶7). It also demands the release of all persons arbitrarily detained, including children” (¶10).

**Resolutions 31/17 (2016) and 34/26 (2017)** condemn “the gross and systematic abuse of women’s and children’s rights by the so-called Islamic State in Iraq and the Levant (Daesh), in particular the enslavement and sexual abuse of women and girls, enforced disappearances and the forced recruitment and abduction of children” (¶9, 31/17 and ¶8, 34/26). The resolutions further condemn “all violations and abuses of international human rights law and all violations of international humanitarian law, including against women and children” (¶10, 31/17 and ¶9, 34/26).

**Resolution 37/29 (2018)** expresses concern at “the situation of women, children...especially those who are internally displaced, who remain among the most vulnerable to violence and abuse” (Preamble, p.1). It condemns the “the attacks against civilian objects, such as schools... and the negative effects of the ongoing conflict on the rights and welfare of children, including their access to medical care and other humanitarian assistance as well as to education, including schools, decries the violations and abuses of international human rights law and violations of international humanitarian law, as applicable, and deplores in particular the impact of the denial of humanitarian access on their lives and well-being” (¶10).

**Resolution 40/17 (2019)** expresses concern at “the situation of women, children... especially those who are internally displaced, who remain among the most vulnerable to violence and abuse” (Preamble, p.1). It condemns the “negative effects of the ongoing conflict on the rights and welfare of children, including their access to medical care and other humanitarian assistance as well as to education, including schools, decries the violations and abuses of international human rights law and violations of international humanitarian law, as applicable, and deplores in particular the impact of the denial of humanitarian access on their lives and well-being” (¶9). It expresses concern at “the suffering of children resulting from the escalation of violence, harsh weather conditions and lack of safe refuge, and calls upon all parties fighting in the Syrian Arab Republic to allow at all times humanitarian workers to reach children and families in need of life-saving assistance, and to prevent and protect children from all exploitation, violations and abuses, including sexual and gender-based violence and child, early and forced marriage, by, among other actions, ending and preventing the recruitment and use of children in the armed conflict, immediately, safely and unconditionally releasing children and handing them over to civilian child-protection actors and ensuring that such authorities have access to detained children associated with armed groups” (¶10). It expresses concern that “the hostilities have restricted access to or resulted in the loss of civil documentation, thereby limiting freedom of movement and access to essential services, particularly for women, children” (¶28). Lastly, it expresses concern about “the documented cases of civilians, including women and children, being taken hostage by the so-called Islamic State in Iraq and the Levant (Daesh)” (¶34).

**Resolutions 31/17 (2016), 34/26 (2017), 37/29 (2018) and 40/17 (2019)** also demand “the immediate release of all persons arbitrarily detained, including women, children” (¶12, 31/17; ¶23, 34/26; ¶19, 37/29; ¶23, 40/17).

Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

No.

#### b) Syria – International, Impartial and Independent Mechanism<sup>511</sup>

##### Mechanism Mandate

“To closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law” (¶4, 2017 Resolution).

Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

No.

Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

While the mandate itself is broad and not child-specific, the terms of reference<sup>512</sup> provide that the IIIM “will take appropriate measures to respect and ensure respect for the confidentiality, privacy, interests and personal circumstances of victims, including age, sex, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender-based violence or violence against children” (¶25, p.5 and ¶19, p.13). Further, the IIIM “will provide clear service referral pathways so that vulnerable victims, in particular child victims and victims of conflict-related sexual violence, who come forward to the IIIM are provided with appropriate medical and psychosocial support” (¶27, p.5 and ¶21, p.13). The terms also mentioned that “due consideration will be given to appointing women, experts in the areas of sexual and gender-based crimes and justice for children” (¶40, p.7). Further, the Head and Deputy Head of the IIIM “will be assisted in their work by a secretariat composed of impartial and experienced professional and administrative staff, with expertise in the following areas, among others: international criminal justice, human rights law, international humanitarian law, criminal investigation and prosecution, the military, forensic matters, including in particular digital forensics, forensic pathology and forensic imagery, witness and victim protection, sexual and gender-based crimes and violence, children’s rights and crimes against children” (¶41, p.8 and ¶32, p.15).

<sup>511</sup> The International, Impartial and Independent Mechanism (IIIM) is complementary to the Independent International Commission of Inquiry on the Syrian Arab Republic (Col). While the Col focuses on directly collecting information, publicly reporting recent broad patterns of violations, abuses and emblematic incidents and making recommendations, notably to Member States, the IIIM primarily builds on the information collected by others, in particular the Commission, by collecting, consolidating, preserving and analysing evidence and prepares files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals.

<sup>512</sup> IIIM, Terms of Reference <https://iiim.un.org/terms-of-reference-of-iiim/>.

#### South Sudan – Commission on Human Rights<sup>513</sup>

##### Mechanism Mandate

“To monitor and report on the situation of human rights in South Sudan and make recommendations for its improvement; to assess past reports on the situation of human rights since December 2013 in order to establish a factual basis for transitional justice and reconciliation; to provide guidance on transitional justice, accountability, reconciliation and healing, as appropriate, and – once the transitional Government of national unity is fully formed, operational and commits to ending the violence against the civilian population and to cooperating with the hybrid court for South Sudan – to make recommendations on technical assistance to the transitional Government of national unity to support transitional justice, accountability, reconciliation and healing; to engage with other international and regional mechanisms, including the United Nations, the United Nations Mission in South Sudan, the African Union and its African Commission on Human and Peoples’ Rights, the Joint Monitoring and Evaluation Commission Chair and civil society, with a view to providing support to national, regional and international efforts to promote accountability for human rights violations and abuses” (¶18, 2016 Resolution).

Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

While the mandate itself is broad and not specific to crimes against children, the 2016 Resolution condemns “the ongoing human rights violations and abuses and violations of international humanitarian law in South Sudan, including...the recruitment and use of children... attacks on schools” (¶1). It further urges “all parties to end and prevent human rights violations and abuses committed against children, and calls upon all parties to end immediately the unlawful recruitment of children and to release all children that have been unlawfully recruited to date” (¶13).

The 2017 Resolution repeats the above (¶1 and ¶10), and expresses concerns about the finding that there are serious and ongoing gross human rights violations and abuses and violations of international humanitarian law... that were perpetrated by all parties to the conflict, including the direct targeting of civilians along ethnic lines and the extreme violence against women and children” (Preamble, p.2).

The 2018 Resolution expresses alarm over the conflict and violence in South Sudan, which includes “violence against children, the recruitment or use of child soldiers, and attacks on schools and hospitals” (Preamble, p.1). It notes that the Peace and Security Council of the African Union *inter alia* “strongly condemned all acts of sexual and gender-based violence and the unlawful recruitment of children into military activities” (Preamble, p.2). It further condemns “the ongoing human rights violations and abuses and violations of international humanitarian law in South Sudan, including...the recurring recruitment and use of children... attacks on schools” (¶1). Lastly, it urges “all parties to end and prevent violations and abuses of human rights committed against children, and calls upon all parties to end immediately the unlawful recruitment of children to armed groups and to release all children that have been unlawfully recruited to date” (¶10).

The 2019 Resolution expresses alarm over the armed conflict and violence in South Sudan, which include “violence against children, the unlawful recruitment and use of children by armed groups, and attacks on schools and hospitals” (Preamble, p.1). It further condemns “the ongoing violations and abuses of human rights and violations of international humanitarian law in South Sudan, including...the recurring unlawful recruitment and use of children by armed groups... attacks on schools” (¶1). It urges “all parties to end and prevent violations and abuses of human rights committed against children, and calls upon all parties to end immediately the unlawful recruitment and use of children by armed groups and to release all children that have been unlawfully recruited to date” (¶9). Lastly, it urges the Government of South Sudan “to intensify efforts to halt violations and abuses, particularly against women and children” (¶17).

<sup>513</sup> The 2016 Resolution first established the Commission on Human Rights, and all subsequent resolutions renewed its mandate.

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

No.

**Kasaï Region, Democratic Republic of Congo – Expert Team<sup>514</sup>****Mechanism Mandate**

“Monitoring, evaluating, providing support and reporting on the implementation by the Democratic Republic of the Congo of the recommendations made by the previous team of international experts in its report, in particular with regard to the fight against impunity and the measures to promote reconciliation, and to make recommendations in this regard, as appropriate” (¶8). “To participate in an enhanced interactive dialogue at its fortieth session, and... to participate in an interactive dialogue at its forty-first session” (¶9).

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, the resolution notes with concern “the conclusions of the team of international experts, particularly on serious human rights violations and abuses, and on violations of international humanitarian law by all parties to the conflict, including...the recruitment and use of child soldiers... and the destruction of homes, schools, hospitals...” (Preamble, p.1). It takes note of the “statement of the Special Representative of the Secretary-General for Children and Armed Conflict, on 30 April 2018, in which she describes the disproportionate impact of violence on children in the Kasaï region in 2017, especially killings, maiming and burning children alive” (Preamble, p.2). It also condemns all acts of violence, incitement to hatred and ethnic violence, human rights violations and violations of international humanitarian law committed by all parties to the conflict in the Kasaï region since August 2016, including violence and abuse against women and children, the unlawful recruitment and use of child soldiers” (¶1). Further, it condemns “in particular violations and abuses committed against children, who were the first victims of the violence, and the conditions in which they were committed, including through the excessive use of force and the recruitment and use of children by the militias, calls upon all parties to put an immediate end to these serious human rights violations and abuses, and calls upon the Government of the Democratic Republic of the Congo to implement, with the support of relevant stakeholders, effective reintegration and rehabilitation programmes, taking into account gender-sensitive issues for children involved in armed conflict” (¶2). Lastly, it notes with concern the statement of the team of international experts on “the continuing recruitment and use of children by the Kamui-na Nsapu and Bana Mura militias” (¶4).

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

No.

<sup>514</sup> UN Human Rights Council, Resolution 38/20 <[https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/38/20](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/38/20)>.

**Iraq – UNITAD<sup>515</sup>****Mechanism Mandate**

“To support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards, which should be addressed by the Terms of Reference referred to in paragraph 4, to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request” (¶2, 2017 Resolution).

**Do the resolutions/statutory provisions contain language specific to violations or crimes against children?**

While the mandate itself is broad and not specific to crimes against children, the resolutions note that “the Islamic State in Iraq and the Levant constitutes a global threat to international peace and security through its terrorist acts, its violent extremist ideology, its continued gross, systematic and widespread attacks directed against civilians, its violations of international humanitarian law and abuses of human rights, particularly those committed against women and children, and including those motivated by religious or ethnic grounds, and its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States” (Preamble, p.1 of both the 2017 and 2019 Resolutions). It also condemns the commission of acts by ISIL involving murder, kidnapping, hostage-taking, suicide bombings, enslavement, sale into or otherwise forced marriage, trafficking in persons, rape, sexual slavery and other forms of sexual violence, recruitment and use of children, attacks on critical infrastructure, as well as its destruction of cultural heritage, including archaeological sites, and trafficking of cultural property, (Preamble, p.1 of both the 2017 and 2019 Resolutions).

**Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?**

While the mandate itself is broad and not child-specific, the terms of reference provide that “members of the Investigative Team shall be impartial and experienced professionals, with expertise in the following areas... witness and victim protection; sexual and gender-based crimes and violence; women and child rights; crimes against children; trafficking of persons; and protection of cultural heritage” (¶15). Further, “the Investigative Team shall take appropriate measures to respect and ensure respect of the privacy, interests and personal circumstances of victims, in light of their age, sex, sexual orientation, gender and health, and taking into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children” (¶21). Lastly, the terms also mention that “the Investigative Team shall assist in referring vulnerable victims, in particular child-victims, women and victims of conflict-related sexual violence, who come forward to the Investigative Team to relevant bodies so that they are provided with appropriate support” (¶23).

<sup>515</sup> The 2017 Resolution first established the UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant (UNITAD), and the 2019 Resolution renewed UNITAD’s mandate.

## Central African Republic – Commission of Inquiry

### Mechanism Mandate

“To investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in CAR by all parties since 1 January 2013, to compile information, to help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and to help ensure that those responsible are held accountable” (¶24).

### Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

While the mandate itself is broad and not specific to crimes against children, the resolution expresses concern over the “increasing violations of international humanitarian law and the widespread human rights violations and abuses, notably by former Seleka and militia groups, in particular those known as the “antibalaka”, including those involving... sexual violence against women and children, rape, recruitment and use of children” (Preamble, p.1). The resolution “urges transitional authorities to develop and implement disarmament, demobilization and resettlement programmes for... children associated with armed forces and groups” (¶11). It demands that “all armed groups, in particular former Seleka elements and anti-Balaka elements, prevent and end the recruitment and use of children, that all parties protect and consider as victims those children who have been released or otherwise separated from armed forces and armed groups, and emphasizes the need to pay particular attention to the protection, release and reintegration of all children associated with armed groups” (¶20). It calls upon “all parties to armed conflict in the CAR, including former Seleka elements and anti-Balaka elements, to issue clear orders prohibiting all violations and abuses committed against children in violation of applicable international law, such as their recruitment and use, killing and maiming, abductions and attacks on schools and hospitals and further calls upon Transitional Authorities to make and implement specific commitments on timely investigation of alleged abuses in order to hold perpetrators accountable and to ensure that those responsible for such violations and abuses are excluded from the security sector” (¶22). Lastly, it expresses its strong intent to swiftly consider imposing targeted measures, including travel bans and assets freezes, against individuals who act to undermine the peace, stability and security... including through violations of human rights and international humanitarian law, the recruitment and use of children in armed conflict in violation of applicable international law, sexual violence...” (¶56).

### Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

No.

## occupied Palestinian territory – Commission of Inquiry<sup>516</sup>

### Mechanism Mandate

“To investigate all alleged violations and abuses of international humanitarian law and international human rights law in the occupied Palestinian territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018, whether before, during or after; to establish the facts and circumstances, with assistance from relevant experts and special procedure mandate holders, of the alleged viola-

<sup>516</sup> The commission was dispatched as part of HRC resolution S-28/1, on 18<sup>th</sup> May 2018, <https://www.ohchr.org/EN/HRBodies/HRC/CoIOPT/Pages/OPT.aspx>

tions and abuses, including those that may amount to war crimes; to identify those responsible; to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations and abuses, and on protecting civilians against any further assaults; and to present an oral update thereon to the Council at its thirty-ninth session and a final, written report at its fortieth session” (¶5).

### Do the resolutions/statutory provisions contain language specific to violations or crimes against children?

While the mandate itself is broad and not specific to crimes against children, the resolution condemns “the disproportionate and indiscriminate use of force by the Israeli occupying forces against Palestinian civilians, including in the context of peaceful protests, particularly in the Gaza Strip, in violation of international humanitarian law, international human rights law and relevant United Nations resolutions, and expresses its grief at the extensive loss of life, including of children, women, health workers and journalists, and at the high number of injuries” (¶1).

### Do the resolutions/statutory provisions have requirements/ language about the need to incorporate child-specific expertise?

No.

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Rohingya refugee Sajida\*, 12, in Cox's Bazar, Bangladesh. In her own words: "We used to own about seven cows, five goats, 2.5 acres of land and many other things. I loved our life in Myanmar." "We suffered a lot while fleeing Myanmar. We were scared when they chased us. They shot a man before our very eyes. It took 10 days to reach Bangladesh." "For three days, we didn't eat. We spent eight days waiting by the sea, then we crossed the border by boat. Some people died in the heat. Some people were shot. We were so scared. Me and my three younger siblings were crying." "We feel happy in Bangladesh. We have support from Save the Children and we can learn reading and writing, and play. I like my new friends. We share our secrets with each other and play together." "Next year I want to study and be a teacher one day. In Myanmar, I had a sewing machine and I used to decorate dresses. I want to sew dresses here too and decorate them with rhinestone and crystals."

Photograph: Hanna Adcock - UK Stories Team

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innovations to strengthen accountability for violations  
and crimes affecting children in conflict

RESEARCH PAPER  
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