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# Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court

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# MATURING JUSTICE: INTEGRATING THE CONVENTION ON THE RIGHTS OF THE CHILD INTO THE JUDGMENTS AND PROCESSES OF THE INTERNATIONAL CRIMINAL COURT

*Linda A. Malone\**

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## I. INTRODUCTION

Meaningful global protection of the rights of the child during peace and conflict implicates not only human rights law, but also humanitarian law, comparative juvenile justice, and international criminal law. Human rights law and humanitarian law are not exclusive, despite controversies regarding whether they are different, separate bodies or interrelated bodies. Essentially, most human rights treaties have “clauses of derogation” that permit departures from some rights in times of war or other public emergencies.<sup>1</sup>

There are notable exceptions to acceptable derogation, of course, and there can be no derogation from the most fundamental of prohibitions, such as the prohibition on torture and genocide. For the purposes of this discussion on the Convention on the Rights of the Child, it should be noted at the outset that there is generally no derogation clause in the Convention on the Rights of the Child (CRC) (as it should be).<sup>2</sup> Derogation from the general requirements for special safeguards for children in most instances would not only violate the CRC but also the Fourth Geneva Convention,<sup>3</sup> the 1977 General Protocols,<sup>4</sup> the International Covenant on Civil and Political Rights,<sup>5</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>6</sup> In war or peace children deserve special protection and safeguards.

The CRC itself, created in 1989, is quite an extraordinary instance of universal acceptance of a treaty.<sup>7</sup> It went into effect in 1990, in a very short period of time—a lightning-quick period of time in terms of international law development. As of 2015 there are over 190 States that are parties to the CRC with the notable exceptions of South Sudan, Somalia, and the United

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<sup>1</sup> See, e.g., Jordan J. Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT'L L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2563329](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563329).

<sup>2</sup> See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>3</sup> Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>7</sup> See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS, <http://indicators.ohchr.org/> (last visited Jan. 15, 2015).

States.<sup>8</sup> The global community recognized that protections for the most vulnerable members in any civil society were long overdue and in need of immediate implementation. With such universal acceptance the next question that necessarily arises is which provisions of the treaty there can be no exception, as customary international law, and perhaps even *jus cogens*. In addition, there is, first, the Optional Protocol on the Involvement of Children in Armed Conflict<sup>9</sup> and, second, the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography.<sup>10</sup> Both were adopted in 2000 and ratified by more than 150 States. Finally, there is a third optional protocol, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted in 2012, and entered into force in April 2014.<sup>11</sup> This third protocol allows for filing of individual complaints before the Committee on the Rights of the Child by children or their representatives.<sup>12</sup>

There are a number of CRC provisions that mandate special recognition for the purposes of the International Criminal Court's (ICC) work. The preamble of the CRC starts with the proposition that there must be special safeguards for the care of children.<sup>13</sup> This language was taken from the 1959 U.N. Declaration on the Rights of the Child.<sup>14</sup> Under Article 1 of the CRC, a child is an individual under the age of eighteen, unless under the applicable law the age of majority is attained earlier.<sup>15</sup> This difference has mostly been criticized for creating a loophole for the national determination of the age or

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<sup>8</sup> *Id.*

<sup>9</sup> *See generally* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222 [hereinafter *Optional Protocol on the Involvement of Children in Armed Conflict*].

<sup>10</sup> *See generally* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 [hereinafter *Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography*].

<sup>11</sup> *See generally* Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res. 66/138, 66th Sess., U.N. Doc. A/RES/66/138 (Dec. 19, 2011).

<sup>12</sup> *See id.*

<sup>13</sup> *See* Convention on the Rights of the Child, *supra* note 2, pmbl.

<sup>14</sup> *See* The Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959).

<sup>15</sup> *See* Convention on the Rights of the Child, *supra* note 2, art. 1.

majority.<sup>16</sup> Article 2 says that the rights of the CRC are to be accorded to every child, without discrimination on any grounds.<sup>17</sup> There is an exhaustive list of what grounds cannot be used as the basis of discrimination. This list includes gender, which is not included in the non-discrimination clauses of earlier human rights treaties such as the International Covenant on Civil and Political Rights.<sup>18</sup> Article 3 states the best interest of the child must be the primary consideration for all actions taken by any State, including its organs or entities. In essence, the norm of “in the best interest of the child,”<sup>19</sup> common in U.S. domestic family law,<sup>20</sup> has become an international norm guiding all state actions.<sup>21</sup> Finally, Article 4 says that States must take all appropriate actions to implement these rights, and must do so to the maximum capability of the resources available for economic, social and cultural rights.<sup>22</sup>

There are three baskets of rights for children under the CRC. First, they have to be provided with adequate nutrients, shelter, family environment, education, healthcare and recreation.<sup>23</sup> Second, they should be protected from abuse and exploitation.<sup>24</sup> Third, they should participate in decision making for themselves and in social, economic, religious, and political life.<sup>25</sup> The influence of the convention is clearly evident in the Rome Statute<sup>26</sup> and

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<sup>16</sup> See Howard Davidson, *Does the U.N. Convention on the Rights of the Child Make a Difference?*, 22 MICH. ST. INT'L L. REV. 497 (2014); Hillary V. Kistenbrocker, *Implementing Article 32 of the Convention on the Rights of the Child as a Domestic Statute: Protecting Children from Abusive Labor Practices*, 44 CASE W. RES. J. INT'L L. 921 (2012) (discussing that the median age of criminal responsibility has been reported at twelve years); DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 108 (2009).

<sup>17</sup> See Convention on the Rights of the Child, *supra* note 2, art. 2.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* art. 3.

<sup>20</sup> See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.02 (2002) (defining best interests of the child).

<sup>21</sup> See U.N. HIGH COMM'R FOR REFUGEES, *Guidelines on Determining the Best Interests of the Child* (2008), available at <http://www.unhcr.org/4566b16b2.pdf> (describing the best interests principle internationally).

<sup>22</sup> See Convention on the Rights of the Child, *supra* note 2, art. 4.

<sup>23</sup> See generally *id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

in the establishment of the special court in Sierra Leone.<sup>27</sup> Both contain special provisions and safeguards for children.<sup>28</sup>

When focusing on the interrelationship between the CRC and the ICC's Rome Statute, much attention has been directed to the shift from prohibiting the mandatory recruitment and direct participation in hostilities below age fifteen (in Article 38 of the CRC and Article 8(2)(b)(xxvi) of the Rome Statute)<sup>29</sup> to eighteen (in the first optional protocol of the CRC).<sup>30</sup> Going forward, it is of more general importance to acknowledge that due to the CRC and its protocols—applicable in conflict, post-conflict, and peace—and their overwhelming acceptance by the global community, that failing to reflect the protective norms of this treaty would put party-states of the Rome Statute in potential violation of their CRC obligations, if the law and operations of the ICC failed to conform at least to the core principles and safeguards of the CRC.<sup>31</sup> Moreover, on a human security and juvenile justice level, the ICC's acknowledgment of the CRC is a compelling affirmation of ethical principles regarding the treatment of children. Finally, the innovative ways in which the ICC adopts and reflects the norms of the CRC, in its decisions and processes, will serve to create new—and still much needed—procedural protections for the global child.

Recognition by the ICC of the norm of non-discrimination and that of “the best interest of the child,”<sup>32</sup> is absolutely essential. The Article 12 right of the child to be heard,<sup>33</sup> the due process rights of the child in Articles 37<sup>34</sup> and 40,<sup>35</sup> and the overall requirement of providing special safeguards for children are necessary for the ICC in order to ensure “child friendly

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<sup>27</sup> THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (Charles Chernor Jalloh ed., 2013).

<sup>28</sup> See generally Convention on the Rights of the Child, *supra* note 2; see also Rome Statute, *supra* note 26, arts. 6–8, 36, 42, 54, 68, 84.

<sup>29</sup> Convention on the Rights of the Child, *supra* note 2, art. 38.

<sup>30</sup> See generally Optional Protocol on the Involvement of Children in Armed Conflict, *supra* note 9.

<sup>31</sup> See David Weissbrodt, Joseph C. Hansen & Nathaniel H. Nesbitt, *The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law*, 24 HARV. HUM. RTS. J. 115, 144–45 (2011).

<sup>32</sup> Convention on the Rights of the Child, *supra* note 2, art. 40.

<sup>33</sup> *Id.* art. 12.

<sup>34</sup> *Id.* art. 37.

<sup>35</sup> *Id.* art. 40.

justice.”<sup>36</sup> There is much to be gained in both legal regimes from mutual development. The minimum age for criminal accountability, now left to state determination under CRC Article 40(3)(a),<sup>37</sup> should define “the child” with a focus on maturity and evolving maturity rather than a mechanical age. This has already been done to some extent in the Article 12 provision on the right to be heard, which adjusts the right of the child to be heard based upon his or her evolving maturity.<sup>38</sup> There could also be mutual development of Articles 11, 21, and 35,<sup>39</sup> and in the Second Protocol Articles 19 and 34 in defining trafficking and other forms of exploitation of children.<sup>40</sup> Additionally, there can be mutual development in promoting the physical and psychological recovery of a child victim under Article 39.<sup>41</sup> In the best interests of the child, the most imperative need for the future of the global child is establishment of this affirmative duty of rehabilitation in addition to the focus on criminal accountability and punishment.

The good news—and there is often not much good news in this context—is that the Rome Statute (with its many references to children), the policy and planning initiatives in the ICC Office of the Prosecutor, and the ICC Prosecutor’s dedication to protecting women and children are all very positive steps down a very challenging, but invaluable path to child friendly justice.

## II. GENERAL RECOGNITION OF THE CHILD IN THE ROME STATUTE

Formal treaty recognition of the rights of children is a relatively recent development.<sup>42</sup> As with women, children were long viewed as the chattel of the parents subject to only the most rudimentary rights of physical survival at the hands of parents or other family members.<sup>43</sup> Children might be viewed as special on an emotional level, but on a legal level were special in the sense

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<sup>36</sup> See *Child-friendly Justice*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/standardsetting/childjustice/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp) (last visited Feb. 22, 2015).

<sup>37</sup> Convention on the Rights of the Child, *supra* note 2, art. 40(3)(a).

<sup>38</sup> *Id.* art. 12.

<sup>39</sup> See *id.* arts. 11, 21, 35.

<sup>40</sup> See Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, *supra* note 10, arts. 19, 34.

<sup>41</sup> See Convention on the Rights of the Child, *supra* note 2.

<sup>42</sup> See generally *id.*; see also Rome Statute, *supra* note 26, arts. 6–8, 36, 42, 54, 68, 84.

<sup>43</sup> See Linda A. Malone, *Protecting the Least Respected: The Girl Child and the Gender Bias of the Vienna Convention*, 3 WM. & MARY J. WOMEN & L. 1, 3–4 (1997).

of the rights of adults to treat them as they saw fit.<sup>44</sup> The danger to children was even greater whenever any strains were put on civil society, from economic difficulties to armed conflict.<sup>45</sup> Children of the “enemy” in conflict situations were specifically targeted for the future, long-term threat they seemingly posed in terms of upheaval or revenge.

There is no mention of the child in the Nuremberg Charter, the Tokyo Charter, or the United Nations Charter.<sup>46</sup> However, exploitation and abuse of children did not go totally unnoticed in legal charters. Children are notably included in some charters as early as the 1863. Then, the Lieber Code required removal of women and children from bombardment, and in 1920 the League of Nations Covenant included a prohibition on trafficking of children.<sup>47</sup> In striking contrast, the text of the Rome Statute contains numerous references to the child, beginning with the Preamble:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

. . . .

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, . . . .<sup>48</sup>

Child-specific provisions occur throughout the list of substantive offenses in Articles 6, 7, and 8.<sup>49</sup> For example, Article 6(e) on genocide includes “forcibly transferring children.”<sup>50</sup> For the first time in any international

<sup>44</sup> *Id.*

<sup>45</sup> UNITED NATIONS CHILDREN’S FUND, *Wars Against Children: UN Report Calls for Action to Protect Children from Armed Conflict*, IMPACT OF ARMED CONFLICT ON CHILDREN, <http://www.unicef.org/graca> (last visited Apr. 16, 2015).

<sup>46</sup> Charter of the Nuremberg Tribunal, Nov. 21, 1947, 82 U.N.T.S. 79; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946; T.I.A.S. No. 1589, 4 Bevens 20 (as amended Apr. 26, 1946, 4 Bevens 27); U.N. Charter.

<sup>47</sup> See General Orders No. 100: The Lieber Code (April 24, 1863); League of Nations Covenant art. 22.

<sup>48</sup> Rome Statute, *supra* note 26, pmb1.

<sup>49</sup> See *id.* arts. 6–8.

<sup>50</sup> *Id.* art. 6(e).

tribunal charter, Article 7(2)(c) identifies “trafficking . . . in children” as a crime against humanity.<sup>51</sup> The CRC goes even further and in Article 8 subsections (2)(b)(ix) and 8(2)(e)(iv) encompasses attacks on schools as a war crime.<sup>52</sup> The ICC’s most often utilized provision, however, is the prohibition in Article 8 subsections (2)(b)(xxvi) and (2)(e)(vii) against “conscripting or enlisting” or “using” children under fifteen<sup>53</sup> (eighteen under the First Optional Protocol).<sup>54</sup> These provisions for “child soldiers” (although encompassing much more than just “soldiers”) owe much of their recognition to the innovative provisions developed in the Special Court for Sierra Leone when it confronted the notorious and tragic involvement of children in the commission of atrocities, both by children and against children. The Special Court for Sierra Leone (SCSL) was the first tribunal to punish conduct delineated in the CRC, convicting three of five rebel leaders and the former Liberian President for recruitment of child soldiers.<sup>55</sup> The ICC maintained these precedents, prosecuting for the exploitation of child soldiers in the *Lubanga*,<sup>56</sup> *Ngudjolo*,<sup>57</sup> and *Katanga*<sup>58</sup> cases (arising from conflicts in the Democratic Republic of the Congo), and in prosecutions involving the conflicts in Uganda<sup>59</sup> and the Central African Republic.<sup>60</sup> The first three cases, however, took a narrow approach to the harm encompassed within the charged offense, disregarding the sexual violence inflicted on boys

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<sup>51</sup> *Id.* art. 7(2)(c).

<sup>52</sup> Convention on the Rights of the Child, *supra* note 2, arts. 8(2)(e)(ix), (e)(iv).

<sup>53</sup> *Id.* arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

<sup>54</sup> *See generally* Optional Protocol on the Involvement of Children in Armed Conflict, *supra* note 9.

<sup>55</sup> Prosecutor of The Special Court v. Charles Ghankay Taylor, Case No. SCSL-03-01-A, (Special Court of Sierra Leone, Sept. 26, 2013); Prosecutor of the Special Court v. Issa Sesay, Morris Kallon, Augustine Gbao, Case No. SCSL-04-15-T (Special Court of Sierra Leone, Feb. 25, 2009); Prosecutor of The Special Court v. Foday Saybana Sankoh, Case No. SCSL-2003-02-PT (Special Court of Sierra Leone, Dec. 8, 2003) (indictment withdrawn due to death); Prosecutor of The Special Court v. Sam Bockarie, Case No. SCSL-2003-04-I (Special Court of Sierra Leone, Dec. 8, 2003) (indictment withdrawn due to death).

<sup>56</sup> *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (Mar. 14, 2012).

<sup>57</sup> *See* Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12 (Dec. 18, 2012).

<sup>58</sup> *See* Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 (Mar. 7, 2012).

<sup>59</sup> *See* Prosecutor v. Joseph Kony, Vincent Ottie and Okot Odhiambo, Case No. ICC-02/04-01/05 (ongoing); The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15 (ongoing).

<sup>60</sup> *See* Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13, (ongoing); Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08 (ongoing).

and girls by the DRC rebel forces.<sup>61</sup> Similarly, the SCSL did not prosecute anyone under its provision for “offenses relating to the abuse of girls.”

After the 1990 World Summit for Children, the United Nations used its influence to raise awareness of the damage to children from armed conflict, not just as participants but also as a result of being victims and observers. In 1996 Ms. Graca Machel, appointed by the Secretary-General as an independent expert on children in armed conflict, issued a report<sup>62</sup> which led to General Assembly Resolution A/RES/51/77. This resolution established the mandate of the Special Representative to the Secretary-General on Children and Armed Conflict.<sup>63</sup> By 2009 the Security Council had identified six “grave violations” against children in armed conflict, modeled on the “grave violations” provisions of Article 147 of the Geneva Conventions.<sup>64</sup> The violations included killing or maiming of children, recruitment or use of children as soldiers, sexual violence against children, attacks against schools or hospitals, denial of humanitarian access for children, and abduction.<sup>65</sup> By including attacks on schools and hospitals, as well as places of worship and cultural property, the six grave violations provisions open to the Prosecutor a new realm of crimes that affect children without being child-specific, or which target children as symbols. In 2013, the Draft *Lucens Guidelines for Protection of Schools and Universities from Military Use during Armed Conflict* addressed, among other issues, the problem of educational institutions being used by armed forces, precisely because of their protected status from bombardment and attack.<sup>66</sup> Special safeguards for children have

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<sup>61</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (Mar. 14, 2012); *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12 (Dec. 18, 2012); *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (Mar. 7, 2012).

<sup>62</sup> See generally U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996).

<sup>63</sup> G.A. Res. 51/615 ¶ 35, U.N. Doc. A/RES/51/615 (Feb. 20, 1997).

<sup>64</sup> See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation* (Working Paper No. 1, October 2009 (Updated Nov. 2013)).

<sup>65</sup> *Id.*

<sup>66</sup> See GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, *Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (Oct. 22, 2014), available at [http://www.protectingeducation.org/sites/default/files/documents/draft\\_lucens\\_guidelines.pdf](http://www.protectingeducation.org/sites/default/files/documents/draft_lucens_guidelines.pdf).

become more necessary than ever, as groups from ISIS to Boko Haram have devised special evils to be imposed on children.<sup>67</sup>

Aside from the substantive provisions on the elements of crime referring to children, eight of the Rome Statute's procedural provisions refer to children.<sup>68</sup> Article 21 requires that the application and interpretation of law by the Court must be made without any "adverse distinction" on grounds of "gender . . . , age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth, or other status."<sup>69</sup> Article 26 excludes from the Court's jurisdiction any person under the age of eighteen at the time of commission of an alleged crime, avoiding any conflict of interest in the Court's primary role as a guardian of children's interests.<sup>70</sup> Selection of judges under Article 36 is based in part on legal expertise in violence against women and children<sup>71</sup> (ten of the eighteen judges are women),<sup>72</sup> as is the Prosecutor's appointment of advisers under Article 42.<sup>73</sup> The age of an alleged perpetrator is also a factor in determining whether there is a sufficient basis for prosecution under Article 53,<sup>74</sup> with investigations under Article 54 to be undertaken with respect for "the interests and personal circumstances of victims and witnesses, including age . . . and tak[ing] into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children."<sup>75</sup>

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<sup>67</sup> See, e.g., Charlotte Florance, *First Boko Haram Kidnaps Little Girls, Now They Use them as Suicide Bombers*, DAILY SIGNAL (Jan. 20, 2015), <http://dailysignal.com/2015/01/20/first-boko-haram-kidnaps-little-girls-now-use-suicide-bombers/>; U.N. SCOR, 69th Sess., 7259th mtg. at 13, 40, 45, 47, 53, U.N. Doc. S/PV.7259 (Sept. 8, 2014) [hereinafter Security Council Meeting].

<sup>68</sup> See generally Rome Statute, *supra* note 26.

<sup>69</sup> *Id.* art. 21(3) (emphasis added).

<sup>70</sup> *Id.* art. 26.

<sup>71</sup> *Id.* art. 36(8)(b).

<sup>72</sup> See *Appeals Division*, INT'L CRIM. CT., available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/chambers/appeals%20division/Pages/appeals%20division.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/appeals%20division/Pages/appeals%20division.aspx) (last visited Feb. 21, 2015); *Trial Division*, INT'L CRIM. CT., available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/chambers/trial%20division/Pages/trial%20division.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/trial%20division/Pages/trial%20division.aspx) (last visited Feb. 21, 2015); *Pre-Trial Division*, INT'L CRIM. CT., available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/Pages/pre%20trial%20division.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/Pages/pre%20trial%20division.aspx) (last visited Feb. 21, 2015).

<sup>73</sup> Rome Statute, *supra* note 26, art. 42(9).

<sup>74</sup> *Id.* art. 53(2)(c) ("A prosecution is not in the interests of justice, taking into account all the circumstances, including . . . the age . . . of the alleged perpetrator. . . .").

<sup>75</sup> *Id.* art. 54(1)(b).

Of crucial importance is Article 68 on the protection of victims and witnesses and their participation in proceedings, which states:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.<sup>76</sup>

In addition, Article 84 allows the children of a convicted person, after that person's death, to bring a claim for revision of a conviction or sentence, based on newly discovered evidence or certain flaws in the proceedings.<sup>77</sup>

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<sup>76</sup> *Id.* art. 68(1)–(2).

<sup>77</sup> *Id.* art. 84(1).

### III. RECOGNITION OF THE CRC IN THE PRACTICE AND PROCEDURES OF THE ICC

The extensive and thoughtful legal scholarship on the role of children as participants in armed conflict provides a stark contrast to the absolute lack of law review scholarship on procedural protection of children in the ICC.<sup>78</sup> These protections are expressly in the Rules of Procedure and Evidence of the ICC.<sup>79</sup> As mentioned above, Prosecutor Fatou Bensouda has personally dedicated herself to evaluating how the ICC might protect the best interests of the child in terms of not just international precedent, but in safeguarding the individual children involved in some manner in the Court's processes.<sup>80</sup> Just as Justice Richard Goldstone as the first prosecutor of the International Criminal Tribunal for Yugoslavia brought gender-related crimes within his mission and created much needed legal precedent,<sup>81</sup> Prosecutor Bensouda has boldly done the same for children in the ICC, both substantively and procedurally.<sup>82</sup>

Given the global community's virtually unanimous adoption of the CRC,<sup>83</sup> the approach and interpretation of the Prosecutor's office toward the

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<sup>78</sup> See, e.g., MARK DRUMBL, *REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY* (2012); Diane Amann, *Children and the First Verdict of the International Criminal Court*, 12 WASH. U. GLOB. STUD. L. REV. 411 (2013); see also Security Council Meeting, *supra* note 67.

<sup>79</sup> See, e.g., International Criminal Court, *Rules of Procedure and Evidence*, Rule 17(3), ICC-ASP/1/3 (allowing for a child-support person to assist children during proceedings of the ICC) [hereinafter ICC Rules of Procedure]; *id.* art. 86 (requiring the Chamber and other organs of the Court to take children's needs into account).

<sup>80</sup> See, e.g., *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, On the International Day against the Use of Child Soldiers: No Child Should be Made to Suffer Such Horrors*, OFF. PROSECUTOR (Feb. 12, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-12-02-2015.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-12-02-2015.aspx) [hereinafter *No Child Should be Made to Suffer*].

<sup>81</sup> See, e.g., The Honorable Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE. W. RES. J. INT'L L. 277, 277 (2002).

<sup>82</sup> See, e.g., *No Child Should be Made to Suffer*, *supra* note 80; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Appeals Chamber Decision on the Verdict and Sentence in the Lubanga Case: Protecting Children Means Preserving the Future*, OFF. PROSECUTOR (Dec. 2, 2014), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Statement-02-12-2014.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Statement-02-12-2014.aspx).

<sup>83</sup> See *Committee on the Rights of the Child*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (last visited Feb. 21, 2015) (highlighting that the

procedural requirements of the Rome Statute may positively impact juvenile justice processes domestically. First, to whatever extent those procedural requirements or processes of investigation of the ICC are identified as required by the CRC, any state which deviates from such requirement or practice is deviating from the ultimate international legal authority on criminal justice in its standards. Regardless of the legal niceties or the extent to which a state domestically incorporates or does not incorporate the CRC procedural requirements, any and all signatory states are bound by their publicly proclaimed commitments to children. Even the United States, which is not a party to the CRC or Rome Statute,<sup>84</sup> would be an outlier to the requirements of customary international law to claim the prerogative of ignoring the fundamental safeguards for children incorporated in both treaties.<sup>85</sup> For those more invested in international politics than law, the scenario of the United States aligning itself with Southern Sudan and Somalia in failing to provide protections deemed mandatory by the international criminal court for children,<sup>86</sup> based on the minority view of the persistent objector justification for ignoring customary international law, is not a politically viable position.<sup>87</sup> Experientially, as more people in the United States and other more developed countries have harbored children from traumatic backgrounds, recognition of the need to safeguard such children globally may grow regardless of political ideology.

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Convention on the Rights of the Child had been ratified by 194 nations as of 2014, with two signatories and only one country that took no action).

<sup>84</sup> The United States is only a signatory to both the CRC and the Rome Statute and has not ratified either document. See *Status of Ratification Interactive Dashboard*, *supra* note 7.

<sup>85</sup> See *id.* Specifically, 194 countries, compared to just three (including the United States) that are only signatories or took no action, ratified the CRC, highlighting the global support for protecting children. By not affording children similar protections, the U.S. is a clear outlier to global policy.

<sup>86</sup> Neither Southern Sudan nor Somalia has ratified either document. See *Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 3; *Rome Statute*, *supra* note 84. Furthermore, both countries have been deemed to commit violations against children. See U.N. Secretary-General, *Report of the Secretary General on the children and armed conflict in South Sudan*, U.N. Doc. S/2014/844 (Dec. 11, 2014), available at <http://www.un.org/en/ga/search/view/doc.asp?symbol=S/2014/844>; see also U.N. Secretary General, *Report of the Secretary-General on Somalia*, U.N. Doc. S/2013/709 (Dec. 2, 2013), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2013/709](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2013/709).

<sup>87</sup> See generally Linda Malone, *The Effect of U.S. Ratifications as "Self-Executing" or as a "Non-Self-Executing" Treaty*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* (Jonathan Todres et al. eds., 2006).

## IV. ICC RULES OF PROCEDURE AND EVIDENCE RELATING TO CHILDREN

Unlike the usual academic exercise, the more meaningful starting point for an analysis of the ICC rules is not a narrative of the Rules themselves, but what the Prosecutor has chosen to do in her Strategic Plan for June 2012–2015 to incorporate the CRC into those Rules.<sup>88</sup> In the six strategic goals, the third goal of the Office of the Prosecutor is to “enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender based crimes and crimes against children.”<sup>89</sup> The Strategic Plan further explains this goal, which includes six priorities.<sup>90</sup> First, despite underreporting of crimes against children, the OTP has prioritized these crimes and will continue to do so by “pay[ing] special attention to them from the stage of preliminary examinations, through to its case selection.”<sup>91</sup> For emphasis, the Strategic Plan states unequivocally that such crimes are considered in determining the gravity of cases.<sup>92</sup> In order to do so, given the many “challenges” presented by the investigation and prosecution of sexual and gender based crimes and crimes against children, the Office commits to being “innovative” in its evidence collection and prosecution.<sup>93</sup> In its processes, the OTP will give “special attention” to training its investigators, performing psychosocial assessments to determine if the witness can be interviewed “without the risk of re-traumatization,” and implementing “an appropriate specialization model for the interviewing of children.”<sup>94</sup> In pursuit of these goals, the OTP says it will also draw from the experiences of the other tribunals.<sup>95</sup> In 2014, the OTP finalized its Children Policy and its policy to avoid re-traumatization or secondary traumatization, with training and a budget set through 2015 for specialized training of investigators.<sup>96</sup>

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<sup>88</sup> See generally *Strategic Plan June 2012–2015*, INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR (Oct. 11, 2013), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf).

<sup>89</sup> *Id.* at 3, 27.

<sup>90</sup> *Id.* ¶¶ 58–63.

<sup>91</sup> *Id.* ¶ 58.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* ¶ 59.

<sup>94</sup> *Id.* ¶ 60.

<sup>95</sup> *Id.* ¶ 61.

<sup>96</sup> *Id.* ¶ 63.

That said, here is what the Rules of Procedure and Evidence themselves provide. Rule 17 goes into great detail about the functions of the Victims and Witnesses Unit.<sup>97</sup> Specifically, there is reference to “due regard” given to the particular needs of children, particularly in reference to children as witnesses who may be provided, with the agreement of the parents or legal guardian, a child-support person to assist the child throughout the proceedings.<sup>98</sup> In addition, the Victim and Witnesses Unit may include assistance for children navigating the ICC process. In particular, the Unit provides “traumatized children” with “persons with expertise.”<sup>99</sup> This begs the inevitable question of which children subject to such experiences might not qualify. Under Rule 66, the oath required of witnesses may not be required of a person under eighteen “whose judgment has been impaired and who, in the opinion of the Chamber, does not understand the nature” of the oath if that person is “able to describe matters of which he or she has knowledge and the person understands the meaning of the duty to speak the truth.”<sup>100</sup>

Under Rule 75, a child witness is not required to make any statement that might incriminate a family member.<sup>101</sup> Additionally, a person acting on behalf of a child victim, or with the child’s consent may apply to participate in proceedings.<sup>102</sup> More generally, a Chamber must take into account the needs of children, “in particular,” when making any direction or order.<sup>103</sup>

With a specific reference to children, Article 88 provides that upon numerous types of motions a Chamber may order “special measures” to facilitate the testimony of a child.<sup>104</sup> Whatever the rights of any defendant, this provision might allow a level of intimidation by a powerful defendant against victims, in addition to whatever local or regional vindication might occur. This provision is very problematic under the provisions of the CRC, as, among other legal issues, it does not address other avenues of evidence. Rule 112 for recording of questioning in certain situations, may be utilized if the Prosecutor chooses to reduce traumatization of a victim of sexual or

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<sup>97</sup> See ICC Rules of Procedure, *supra* note 79.

<sup>98</sup> *Id.* art. 17(3).

<sup>99</sup> *Id.* art. 19(f).

<sup>100</sup> *Id.* art. 66(2).

<sup>101</sup> *Id.* art. 75(1).

<sup>102</sup> *Id.* art. 89(3).

<sup>103</sup> *Id.* art. 86.

<sup>104</sup> *Id.* art. 88.

gender violence, or a child witness.<sup>105</sup> Age is also a factor listed in the determination of sentence,<sup>106</sup> although, as noted earlier, no one under the age of eighteen at the time of commission of the alleged crime may sit as a defendant before the ICC.<sup>107</sup>

#### V. MOVING FORWARD: THE ICC OFFICE OF THE PROSECUTOR POLICY PAPER ON CHILDREN

As Prosecutor Bensouda moves forward with the drafting of her office's Policy Paper on Children, there are myriad issues to be resolved in how to implement the Children's Convention, as well as other "soft law" sources, into the law, prosecutorial decision-making, and processes of the ICC. Thus far, the decisions of the Court and legal developments through those decisions and prosecutorial priorities have revolved around children as participants in hostilities.<sup>108</sup> The discordance between Additional Protocol I to the Geneva Conventions prohibition on allowing children to "take a direct part in hostilities"<sup>109</sup> and Protocol II's broader prohibition on allowing children to "take part in hostilities"<sup>110</sup> hopefully has been resolved in the Rome Statute in favor of a broad prohibition ("participate actively in hostilities") to encompass children used as spies, cooks, porters, sex slaves, and in other forced labor capacities.<sup>111</sup> The *Lubanga* decision, for all its advancement of accountability for forced recruitment of child soldiers, did little to advance the criminalization of forced labor of children used to support conflict initiatives beyond the use of arms.<sup>112</sup> Given the relative dearth of academic literature and judicial precedent outside this context of child soldiers, the focus of the following analysis will be on other areas for much needed development, including some of the most basic and fundamental problems in formulating the Prosecutorial Policy Paper.

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<sup>105</sup> *Id.* art. 112.

<sup>106</sup> *Id.* art. 145(c).

<sup>107</sup> See Rome Statute, *supra* note 26, art. 26.

<sup>108</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012).

<sup>109</sup> See generally Optional Protocol on the Involvement of Children in Armed Conflict, *supra* note 9.

<sup>110</sup> See generally Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, *supra* note 10.

<sup>111</sup> Rome Statute, *supra* note 26, art. 8.

<sup>112</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (Mar. 14, 2012).

*A. Who is a Child?*

The Rome Statute and ICC Rules, despite their groundbreaking inclusion of children in many substantive and procedural provisions, contain no definition of “child.”<sup>113</sup> This omission, however, is beneficial to the Court’s mission. For purposes of international law, eighteen appears to be the upper age limit when defining a “child,” despite the CRC’s qualification that an “adult” may be younger if a state specifies a lower age of responsibility.<sup>114</sup> Aside from the aforementioned criticisms of this qualification given the egregiously low minimum age of criminal responsibility in some states,<sup>115</sup> the CRC provision is premised on a fundamental age of eighteen.<sup>116</sup> This age limitation has been reinforced by the Optional Protocol, which raises the permissible age for use of child soldiers from fifteen to eighteen.<sup>117</sup>

The Rome Statute specifies that the Court will not prosecute anyone whose crimes were committed before the age of eighteen,<sup>118</sup> appropriately limiting the Court’s resources to those who cross a basic threshold of accountability for their crimes and precluding any possibility of making an example of a young offender. The omission of a definition of “child” leaves the Prosecutor free to provide more safeguards for individuals who merit consideration as a child. For example, someone who is indoctrinated well before reaching eighteen and commits crimes for several years after reaching the purported age of “adulthood.”<sup>119</sup> Conversely, it also leaves open the possibility that a perpetrator indoctrinated as a child could not claim absolute immunity from prosecution for crimes committed years after the indoctrination and seemingly independent of it. The Prosecutor thereby retains her discretion to consider age not just in recommending a sentence, but in procedural protections for the individual as a witness and in refusing to prosecute the individual for being a participant. Article 12 of the CRC supports such flexibility by acknowledging the right of the child to express views freely “given due weight in accordance with the age and maturity of the child,” even while recognizing an eighteen

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<sup>113</sup> See generally Rome Statute, *supra* note 26; see also ICC Rules of Procedure, *supra* note 79.

<sup>114</sup> Convention on the Rights of the Child, *supra* note 2, art. 1.

<sup>115</sup> See *supra* text accompanying notes 15–16.

<sup>116</sup> Convention on the Rights of the Child, *supra* note 2, art. 1.

<sup>117</sup> Optional Protocol on the Involvement of Children in Armed Conflict, art. 1, *supra* note 9.

<sup>118</sup> Rome Statute, *supra* note 26, art. 26.

<sup>119</sup> *Expert Workshop Session: Regulatory Framework*, 43 GA. J. INT’L & COMP. L. 639, 640 (2015).

year old age limitation for childhood.<sup>120</sup> Although Article 12 could conceivably limit the child's freedom of expression, it also allows for greater freedom of expression than might otherwise be provided, should the individual child's situation merit it.<sup>121</sup>

Prohibiting prosecution for crimes committed under the age of eighteen, while not specifying a numerical limit to childhood, allows for greater protection of children, more flexible recognition of children as rights-holders, and better allocation of the resources of the OTP to impose accountability on those legally and morally responsible for their actions. Recent neurological studies of brain development, cited in recent U.S. Supreme Court decisions on the death penalty and life without parole for juveniles, lend a scientific basis to a more holistic assessment of age and maturity.<sup>122</sup> A separate justification for the Policy Paper not to adopt a "bright-line" age limit on childhood is the practical difficulty in many contexts of determining the age of an individual. Many states do not have, even in the most stable of times, the recording of medical records and birth certificates that lend themselves to definite age determination.<sup>123</sup> In times of conflict or transitional justice the availability of such documentation is even less likely, and medical approaches to determination of age remain controversial.<sup>124</sup> The UNICEF recommendations on how to determine the age of a child are helpful guidance for the Policy Paper, but they do not go to the point of legitimizing eighteen as a mandatory cut-off of childhood.<sup>125</sup>

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<sup>120</sup> The Convention on the Rights of the Child, art. 12, *supra* note 2.

<sup>121</sup> *Id.*

<sup>122</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); see also Brief for J. Lawrence Aber et al. as Amici Curiae Supporting Petitioner, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

<sup>123</sup> *Workshop Session: Child Witnesses: Testimony, Evidence, and Witness Protection*, 43 GA. J. INT'L & COMP. L. 649, 653 (2015).

<sup>124</sup> *Id.*

<sup>125</sup> See generally Terry Smith & Laura Brownlees, *Age Assessment Practices: A Literature Review & Annotated Bibliography* (UNICEF 2011).

### *B. Children's Rights*

As one conference participant pointed out,<sup>126</sup> the Article 3 provision of the CRC is the “umbrella provision” and overriding substantive mandate of the CRC to protect the best interests of the child.<sup>127</sup> Article 2 is the “accessory” or “derivative” right which insures that all other rights within the CRC are provided without discrimination.<sup>128</sup> In those instances which might arise when two or more rights are in apparent conflict, the best interests of the child is the guiding consideration.<sup>129</sup> Making this determination may involve a number of parties beyond the child and the child’s parents or family guardian (if the child is fortunate to have surviving family members).<sup>130</sup> Ultimately, even assuming the consent by the child and the child’s parents or family guardian to participate in a proceeding, the OTP may perceive that the best interests of the child are not served by participation or are best served by limited participation or informational support without being a witness.<sup>131</sup> In this regard, the input of NGOs and other experts from civil society would be valuable to the Prosecutor. Providing psychologists who work with witnesses throughout the process, through The Victims and Witnesses Unit, is a costly, yet vital, safeguard to prevent re-traumatization.<sup>132</sup> In 2005 the UN Economic and Social Council adopted a resolution 2005/20 and the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime which also incorporated in Subparagraph 8 the guiding principle of the best interests of the child.<sup>133</sup> In 2010 UNICEF and Harvard Law School published *Key Principles for Children and Transitional Justice* addressing a number of topics including

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<sup>126</sup> See generally *Expert Workshop Session: Child Witnesses: Testimony Evidence, and Witness Protection*, *supra* note 123.

<sup>127</sup> See Convention on the Rights of the Child, *supra* note 2.

<sup>128</sup> *Id.* art. 2.

<sup>129</sup> *Id.* arts. 3, 9, 18, 21 (citing the best interests of the child in each article, specifically the reference in Article 3).

<sup>130</sup> See generally *id.*; see also *Expert Workshop Session: Child Witnesses: Testimony, Evidence, and Witness Protection*, *supra* note 123, at 651.

<sup>131</sup> *Expert Workshop Session: Child Witnesses: Testimony, Evidence, and Witness Protection*, *supra* note 123, at 651.

<sup>132</sup> *Victims and Witnesses Unit*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx); see also *Witnesses Before the International Criminal Court*, INT’L BAR ASSOC. (July 2013).

<sup>133</sup> ECOSOC, Res. 2005/20, art. III ¶ 8 (July 22, 2005).

child participation.<sup>134</sup> Those individuals in NGOs or civil society experienced in incorporating children in transitional justice processes, formal and informal, in Sierra Leone and Liberia, are a resource to be utilized. Children's rights of participation represent new legal territory, and will require the OTP to draw upon personal experiences of experts in the field, exemplary domestic processes, and expert formulation of "soft law" in the absence of "hard law."

### *C. Children with Disabilities*

The Convention on the Rights of the Child is the broadest convention with implications for the law and processes of the ICC, but it is vital to specifically mention and discuss Article 7 of the Convention on the Rights of Persons with Disabilities, which reads as follows:

#### Children with Disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.<sup>135</sup>

Many children who may potentially be involved in proceedings before the ICC, in any capacity, may suffer from a range of disabilities. Article 7 echoes the right of expression for these children and the overriding standard of the best interests of the child.<sup>136</sup> Article 7 does require additional measures to

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<sup>134</sup> CHILDREN AND TRANSITIONAL JUSTICE: TRUTH-TELLING, ACCOUNTABILITY AND RECONCILIATION 404–17 (Sharanjeet Parmar et al. eds., 2010), available at <http://www.unicef-inc.org/publications/587/#pdf>.

<sup>135</sup> Convention on the Rights of Persons with Disabilities, art. 7, Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>136</sup> *Id.*

ensure that these children may realize their rights on an equal basis with other children.<sup>137</sup> This provision alone could be the basis for another realm of issues to be addressed by the Policy Paper. Given that children with pre-existing disabilities are often targeted for criminal abuse, or suffer from disabilities due to such atrocities, the heightened obligation of Article 7 must be superimposed on the other obligations imposed by the CRC.<sup>138</sup>

#### *D. Attacks on Schools and Education*

Just when it appears that human beings have exhausted the possibilities of new atrocities, new forms of human devastation and evil challenge the parameters of international criminal law. An unfortunate example in the past decade is the growing number of attacks on schools housing children, and more generally attempts to curtail and punish educational opportunities for children, particularly female children. The Education Under Attack reports of the Global Coalition to Protect Education from Attack and its predecessor, the United Nations Educational, Scientific and Cultural Organization, from 2007–2014 have shown an alarming growth in the use of such attacks to terrorize and destroy entire societies.<sup>139</sup> The Rome Statute is deficient in this regard because it inadequately criminalizes both the denial of the right to an education and survival of children under the CRC, and the many other international criminal offenses such as enslavement, systematic rape, enforced disappearance, and torture that often accompany attacks on schools and other educational facilities.<sup>140</sup>

Article 8(2)(b)(ix) of the Rome Statute includes, among the more serious war crimes, acts that are “intentionally direct[ed] against buildings dedicated to religion, [and] education . . . provided they are not military objectives.”<sup>141</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, *Education Under Attack* (2007), available at <http://www.ungei.org/resources/files/educationunderattack.pdf>; UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, *Education Under Attack* (2014), available at <http://unesdoc.unesco.org/images/0018/001868/186809e.pdf>; GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, *Education Under Attack* (2014), available at [http://www.protectingeducation.org/sites/default/files/documents/eua\\_2014\\_full\\_0.pdf](http://www.protectingeducation.org/sites/default/files/documents/eua_2014_full_0.pdf); see also AMIR JONES & RUTH NAYLOR THE QUANTITATIVE IMPACT OF ARMED CONFLICT ON EDUCATION: COUNTING THE HUMAN AND FINANCIAL COST (2014).

<sup>140</sup> See, e.g., Rome Statute, *supra* note 26, art. 7.

<sup>141</sup> *Id.* art. 8.

The proviso reiterates an unacceptable loophole to the protection that must be accorded schools (and hospitals, as discussed below).<sup>142</sup> A school should never be considered a legitimate military objective if it is functioning as a school and housing children. The possibility, even likelihood, that schools in some conflict zones may require military protection does not render those schools a military target. Whatever factual determinations might have to be made as to whether a school is a functioning school that requires military protection, or a sham used to insulate military forces does not provide justification for recognizing a “school” as a potential “military objective.” Despite the apparent logic, moral legitimacy, and consistency with general laws of war that a school cannot be a military target, international criminal law on attacks against schools, other educational facilities, and anyone using such facilities is nascent (and essentially unexplored with respect to higher education).<sup>143</sup> Criteria must be developed, but such criteria should not solely focus on when “schools” can be attacked. Criteria must be developed to determine when a facility is no longer a school, but a military fortification, to not only prevent such attacks but to preclude forces from using schools as a “shield” under the laws of war. The non-binding 2013 Lucens Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict (developed by the Global Coalition to Protect Education from Attack) are a much needed basis for binding standards, although they do not go far enough in changing the law.<sup>144</sup> The Guidelines fall short and merely reflect the law and its failure to unequivocally condemn “military” use of educational facilities in conflicts.<sup>145</sup>

The OTP can provide invaluable development of international law in preventing and criminalizing such attacks by exercising discretion in prosecuting cases. The current law condemns attacks on “schools” as if the buildings themselves were the victims.<sup>146</sup> That such attacks are intentionally aimed at the most vulnerable in those schools, and the accompanying

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<sup>142</sup> *Id.*

<sup>143</sup> See *Expert Workshop Session Regulatory Framework*, *supra* note 119, at 643.

<sup>144</sup> See GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, *Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (2014), available at [http://www.protectingeducation.org/sites/default/files/documents/draft\\_lucens\\_guidelines.pdf](http://www.protectingeducation.org/sites/default/files/documents/draft_lucens_guidelines.pdf).

<sup>145</sup> *Id.*

<sup>146</sup> See Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 94, 6 U.S.T. 3517, 75 U.N.T.S. 287; Rome Statute, *supra* note 26.

atrocities which are inevitably a consequence, desperately needs public recognition and prosecution. For example, on December 16, 2014, the Taliban attacked a school in Peshawar, Pakistan, killing 148 people, most of them children.<sup>147</sup> A Taliban spokesperson said the attack was in retaliation for military operations in Northern Pakistan.<sup>148</sup> On April 15, 2014, Boko Haram kidnapped 276 girls from a school, and several escapee reports indicate 219 of the girls were subjected to enslavement, forced “marriages,” and systematic rape.<sup>149</sup> A comprehensive indictment of the responsible perpetrators, utilizing existing law with an encompassing interpretation, could advance the law prohibiting such atrocities, much as the prosecution of systematic rape as an international crime by Sir Richard Goldstone did before the International Criminal Tribunal for the former Yugoslavia.<sup>150</sup> Few, if any, countries would step forward to condemn prosecutorial overreaching in such circumstances (and hopefully, no overly cautious ICC judges either), and optimistically, a number of countries might engage in renewed or increased cooperation in bringing those indicted before the ICC. As the rapporteur’s report notes, prosecutions intentionally directed at individuals based on gender or belief may someday lead to elaboration in international law, in and outside of the ICC, on when practices with a disparate impact on women or children (or persons with disabilities in the case of health care facilities) are actionable violations of international criminal or human rights law, regardless of intent.<sup>151</sup>

## VI. CONCLUSION

This daunting litany of challenges for the Prosecutor and the OTP in implementing the Convention on the Rights of the Child also presents an opportunity to elevate the profile of the ICC and significantly advance the best interests of the global child in the formulation and affirmation of norms

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<sup>147</sup> Riaz Khan, *Taliban Attack on Pakistan School Leaves 148 Dead, Mostly Children*, ASSOCIATED PRESS (Dec. 19, 2014), <http://globalnews.ca/news/1729000/at-least-84-dead-in-taliban-attack-at-pakistani-school-official/>.

<sup>148</sup> *Id.*

<sup>149</sup> Charlotte Alter, *Girls Who Escaped Boko Haram Tell of Horrors in Captivity*, TIME (Oct. 27, 2014), <http://time.com/3540263/girls-boko-haram-escape/>.

<sup>150</sup> Richard Goldstone, *The Development of International Criminal Justice* 8–9 (Middlebury College, Rohatyn Center for International Affairs, Working Paper No. 21, 2005), available at <http://www.middlebury.edu/media/view/206991/original/GoldstonePaper.pdf>.

<sup>151</sup> See generally *Expert Workshop Session: Regulatory Framework*, *supra* note 119.

in the CRC. The ICC must act consistently with the CRC or risk putting the numerous state-parties to the CRC in conflict over their international obligations. Well within the appropriate parameters of prosecutorial discretion, indictments may be brought consolidating existing yet unexplored or unenforced law in a context—protection of children—that is politically difficult to oppose openly. This Article has focused on areas of substantive reconciliation of the CRC and the Rome Statute. There remains any number of areas in the criminal process for the OTP to lead the effort to provide “child-friendly” justice. The ICC only has jurisdiction when a state is unable or unwilling to prosecute.<sup>152</sup> In safeguarding children from harm and providing them with the necessary opportunity to develop individually, the ICC may be opening the door to new avenues of cooperation with states less inclined to elevate politics over the welfare of children than might otherwise be the case, however atrocious the crimes. There are certainly some crimes that the ICC will not have the jurisdiction to prosecute on a wide basis. Human trafficking, for example, which the ICC can only prosecute when “part of a widespread or systematic attack directed against a civilian population.”<sup>153</sup> Its auspices and expertise can lend support, however, to other initiatives such as the filing of complaints before the Committee on the Rights of the Child under the Third Optional Protocol.<sup>154</sup>

The processes and reparations the ICC adopts through the OTP or specifically the Victim and Witnesses’ Unit can benefit from domestic processes, counseling, and remedies which NGOs, individual experts, and civil society provide. If the Prosecutor can make headway on just a few of these challenges, with the admirable force of her commitment to the future of our children, the ripple effects in the law will benefit many generations to come.

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<sup>152</sup> Rome Statute, *supra* note 26, art. 17.

<sup>153</sup> *What are Crimes Against Humanity*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx) (last visited Mar. 25, 2015).

<sup>154</sup> See G.A. Res. 66/138, Optional Protocol to the Convention on the Rights on the Child on a Communications Procedure (Dec. 19, 2011).