CHALLENGES TO THE PROTECTION OF CHILDREN’S HUMAN RIGHTS AND THE PERPETUATED MARGINALIZATION OF CHILDREN IN TRANSITIONAL JUSTICE

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ABSTRACT

The marginalization of children in transitional justice can be found at various levels, notably in the planning and designing of transitional justice solutions. Their marginalization is perpetuated when children play a role in transitional justice mechanisms; as the practice analyzed in this Article demonstrates, these mechanisms are, at times, unable to address the needs and interests of children. Children’s development rights are intrinsically linked to socioeconomic justice in post-conflict settings, and the lack of consideration of economic and social rights in all transitional justice mechanisms has created a myriad of challenges for the full implementation of children’s rights in transitional justice.

Drawing on the insights from transitional justice theories and human rights frameworks, this Article provides a critical reflection on how and why the rights of children are jeopardized by their interactions with transitional justice mechanisms. While this Article acknowledges the inevitable limitations resulting from the nature and goals of transitional justice mechanisms (in particular international criminal courts and truth commissions), transitional justice must nevertheless evolve to be more inclusive, both in terms of participation as well as in terms of socioeconomic justice, in order to address children’s marginalization.

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I. INTRODUCTION

While children are one of the most affected and vulnerable groups
involved in armed conflicts, transitional justice processes contending
with crimes committed during those conflicts have given limited attention
to children’s rights. Because of their age and social status,

1. Globally, an estimated 230 million children currently live in countries and areas affected by
   armed conflicts. Press Release, UNICEF, With 15 Million Children Caught Up in Major Conflicts,
   UNICEF Declares 2014 a Devastating Year for Children, UNICEF (Dec. 8, 2014), http://www.unicef-
   org/media/media_78058.html.

2. See, e.g., CéCILE APTEL & VIRGINIE LADISCH, INT’L CTR. FOR TRANSITIONAL JUSTICE, THROUGH
   A NEW LENS: A CHILD-SENSITIVE APPROACH TO TRANSITIONAL JUSTICE (2011); CLARA RAMÍREZ-

children are not always perceived as equal rights holders and are prone to being left out of transitional justice mechanisms. Despite children having specific needs and rights as victims, participants, and perpetrators, they have little voice in transitional justice mechanisms. Children are even more marginalized when it comes to the decision-making processes as they relate to what transitional justice mechanisms should be in place post-conflict. The top-down approach, prevalent in transitional justice practice, lacks perspectives from children whose views and interests are not represented, despite the role children are bound to play in a society’s future.

When children have played a role in transitional justice mechanisms, their experiences have been problematic in various ways, perpetuating the cycle of marginalization. For instance, in international criminal courts, the protection of children and youth victims and witnesses is often insufficient. Children’s testimonies have been deemed unreliable, indictments rarely include a wide range of crimes

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BARAT, INT’L CTR. FOR TRANSITIONAL JUSTICE, ENGAGING CHILDREN AND YOUTH IN TRANSITIONAL JUSTICE PROCESSES (2012).

3. See, e.g., RAMÍREZ-BARAT, supra note 2, at 3.

4. This failure is in part due to the relative disempowerment of children compounded by their lack of representation in and by political entities and civil society organizations. See, e.g., APTEL & LADISCH, supra note 2, at 5.


6. For the purpose of this research, the expressions “transitional justice processes/mechanisms” or “transitional justice” refer to post-conflict justice processes.

7. For example, at the International Criminal Court (ICC), in the Lubanga case, child and youth witnesses were subject to multiple interviews and long days in court, including intense cross-examinations. See Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, ¶ 479 (Apr. 4, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF; Rachel Irwin, Defense Finishes with Child Soldier, INT’L JUSTICE MONITOR (Feb. 24, 2009), https://www.ijmonitor.org/2009/02/defense-finishes-with-child-soldier/. At the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Kupreškić case, Witness H, a then thirteen-year-old girl, who was eighteen years old at the time of testimony, became the heart of heavy litigation throughout the case and appeal. See Prosecutor v. Kupreškić, IT-95-16-T, Trial Judgment, §§ 400-02, 405 (Jan. 14, 2000); Prosecutor v. Kupreškić, IT-95-16-A, Appeal Judgment, §§ 46-86 (Oct. 23, 2001).

8. For instance, at the ICC in the Lubanga case the testimonies of all child witnesses except for one were found unreliable by the Trial Chamber. In total, nine child soldier witnesses were disregarded. See Lubanga Trial Judgement, supra note 7, at §§ 479-82. See also CYNTHIA CHAMBERLAIN, CHILDREN AND THE INTERNATIONAL CRIMINAL COURT (2015); INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN (Karin Arts & Vesselin Popovski eds., 2006); CECILE APTEL, Unpunished Crimes: The Special Court for Sierra Leone and Children, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY (Charles Jalloh ed., 2014).
specifically affecting children, and legal frameworks lack the flexibility to reflect the diversity of children’s social roles during conflicts. To some extent, individual child victims involved with international or hybrid courts have been reduced to what Sara Kendall and Sarah Nouwen have identified as “juridified victimhood,” whereby victims are designated as a legal category within a specific case, but also in which one narrative is dominant so as to fit the international legal and political discourse. For instance, in the Lubanga case at the ICC, children recruited as child soldiers under the age of 15 years could be recognized as victims of enlistment and conscription, but because of the limited charges brought, they could not be acknowledged as victims of other crimes, such as gender-based crimes, despite overwhelming testimony supporting those facts. The other side of this issue is that transitional justice is not equipped to deal with juvenile offenders. This accountability gap has created misunderstandings and issues affecting children’s rights.

While the scholarship in the field of transitional justice has begun to acknowledge some challenges to the place of children in transitional justice mechanisms, there is little literature analyzing the underlying reasons for these challenges.

Drawing on the insights from transitional justice theories and human rights frameworks, including the theory of “intersectionality,” this Article provides a critical reflection on how and why the rights of children are jeopardized by their interactions with these transitional justice mechanisms.

11. See, e.g., Apfel, supra note 8.
justice mechanisms. Conceptualization of this discussion aims to contribute to scholars’ and practitioners’ ability to understand, explain, and implement children’s rights in transitional justice. As the most relevant transitional justice mechanisms dealing with children are international criminal courts and national truth commissions, this Article will focus on these for illustrations.

While it may be possible for transitional justice to fully implement the human rights of children, it is essential to, on the one hand, analyze why transitional justice mechanisms—in particular truth commissions and international criminal courts—have been at times unable to address the needs and interests of children and, on the other hand, acknowledge the inevitable limitations resulting from the nature and goals of those institutions. Some potential solutions or recommendations include: filling the gaps of knowledge on the impact of war on children, broken down by age, gender, and types of violations; embracing the multiple dimensions of children’s identities and roles in post-conflict settings; and mainstreaming children’s rights in transitional justice mechanisms.

The relevance of the transitional justice framework in examining the protection of children’s rights in post-conflict situations is multilayered. It enables us to explore the roots of children’s perpetuated marginalization as well the legal and practical challenges to children’s rights by combining a wide range of intertwined fields. This Article thus reflects the interdisciplinary nature of transitional justice and focuses on legal, social science, and victimology literature research. This will shed light on the social position of children and present a holistic analysis of the issues at stake in the perpetuated marginalization of children in transitional justice.

Part II will analyze and compare the underlying goals of transitional justice (including international criminal courts and truth commissions) and children’s rights and, thus, inform our analysis on the challenges to children’s rights in transitional justice mechanisms. Are the goals clashing? Are some human rights goals missing or rendered less important than transitional justice goals so as to challenge the protection of children? Part III will examine the roles of children and the integration of children’s rights in transitional justice through a taxonomy of legal influences, social interactions, and tools developed by transitional

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14. International criminal courts and truth commissions have specifically dealt with similar post-conflict situations involving children as perpetrators and victims of crimes but have faced different challenges. They have also taken different approaches based on the very nature of their goals. Here, we use the expression, “international criminal courts,” to cover international and hybrid judicial mechanisms that have been developed in the international criminal justice system.
justice practice. An analysis of this taxonomy, in light of the findings of Part II, will better enable us to understand the origins and nature of the challenges to the protection of children in those mechanisms. Finally, Part IV will offer some preliminary reflections on the path beyond the perpetuated marginalization of children and children’s rights.

II. THE FRONTIERS OF TRANSITIONAL JUSTICE AND CHILDREN’S RIGHTS: CLASHING, PRIORITIZED, OR MISSING GOALS?

An analysis of the stated goals of international transitional justice is informative on how transitional justice theories have been crafted and how transitional justice mechanisms fit in those theoretical concepts. This section offers a critical reflection on transitional justice goals taking into consideration their potential impact on children. It then presents children’s rights goals and how children’s rights address the multiple dimensions of children’s identities. Finally, a comparison of transitional justice and children’s rights goals is undertaken to highlight the differences between the goals, which may be the origin of the challenges to children’s protection in transitional justice practice.

A. Transitional Justice Theories and Goals

While international transitional justice crystallized in the late 1980s and early 1990s, it has no definitive legal frameworks. It is grounded in its goals, pillars, and developed practice, and also has a handful of founding documents, among which the most important contain only soft law. The four pillars of transitional justice (the right to know, the right to justice, the right to reparation and the guarantee of non-recurrence) were developed through the Louis Joinet principles.

For the United Nations, “transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” According to


Stephan Parmentier, this definition has obtained the status of ‘acquis’ in the field of international law and practice.\textsuperscript{18} The non-governmental organization, International Center for Transitional Justice (“ICTJ”), has defined transitional justice as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.”\textsuperscript{19} These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.\textsuperscript{20}

If both definitions seem to equate transitional justice with a set of tools or mechanisms to deal with human rights violations and the transition of society, scholarship understands it to be a more purposive concept and approach to achieving “justice.” Authors such as Parmentier and Theresa Clark focused on four goals: truth, accountability, reparation, and reconciliation as theorized in the TARR model.\textsuperscript{21} Others, such as Neil Kritz, described transitional justice’s objectives as truth, justice, “meaningful democratic reform,” and durable peace.\textsuperscript{22} Most scholars continue to associate transitional justice with democracy, rule of law, and liberal values.\textsuperscript{23} However, according to Ruti Teitel, transitional justice is now in a global phase characterized by an expansion to “broader purposes of promoting and maintaining peace and human security” and a “judicialization and tribunalization at the global level,” with an expectation that these mechanisms will form part of the response to post-conflict settings.\textsuperscript{24}

In light of this Article’s focus, it is particularly relevant to look more specifically at the right to justice and the related goals of rule of law and accountability. International criminal tribunals constitute a rather

\textsuperscript{18} Parmentier, \textit{supra} note 5, at 54.
\textsuperscript{20} Id.
formalized and individualized mechanism of criminal accountability.\textsuperscript{25} International criminal tribunals’ primary goals are a mixture of retributive and restorative justice, with a focus on the punishment of the most responsible perpetrators and the rights of victims of those respective crimes.\textsuperscript{26} Truth commissions adopt a completely different approach in that the primary aims are to “discover, clarify and formally acknowledge past abuses,”\textsuperscript{27} contributing to the “right to know” of victims and society.\textsuperscript{28} Truth commissions create the necessary space for victims and perpetrators to seek and tell their truth,\textsuperscript{29} which is not often possible in the context of criminal trials for various reasons, ranging from the specifics of the charges brought against accused persons to the creation of one mainstream narrative driven by the parties in the cases.\textsuperscript{30}

Several critiques have emerged on different aspects of transitional justice theories and the subsequent practice,\textsuperscript{31} but two critiques are particularly relevant to children, notably as they directly relate to the professed goals of children’s rights. First, socioeconomic justice played a marginal role in transitional justice in its first two decades, both at the theoretical and policy levels.\textsuperscript{32} Scholars and policymakers in the field focused more on violations of civil and political rights than on socioeconomic inequalities or “structural violence.”\textsuperscript{33} In 2006, Louise Arbour, the then UN High Commissioner for Human Rights, stated that transitional justice “must have the ambition of assisting the transformation of oppressed societies into free ones by exposing discriminatory practices

\begin{thebibliography}{99}
\bibitem{26} \textit{Laurel Fletcher, Refracted Justice, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 302, 320 (Christian De Vos et al. eds., 2015)}.
\bibitem{28} \textit{Ruti Teitel, TRANSITIONAL JUSTICE (New York: Oxford University Press, 2000)}.
\bibitem{29} \textit{Natalia Szablewska & Sascha-Dominik Bachmann, Current Issues and Future Challenges in Transitional Justice, in CURRENT ISSUES IN TRANSITIONAL JUSTICE: TOWARDS A MORE HOLISTIC APPROACH 339, 346 (Natalia Szablewska & Sascha-Dominik Bachmann eds., 2015)}.
\bibitem{30} \textit{Teitel, supra note 28, at 56}.
\bibitem{31} \textit{See, e.g., EVALUATING TRANSITIONAL JUSTICE (Kirsten Ainley, et al. eds., 2015); Parmentier, supra note 5, at 67-71}.
\bibitem{32} \textit{See Lisa Hecht & Sabine Michalowski, The Economic and Social Dimensions of Transitional Justice, https://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf}.
\bibitem{33} \textit{Padraig McAuliffe, Structural Causes of Conflict and the Superficiality of Transition in THEORIZING TRANSITIONAL JUSTICE 93 (Claudio Corradetti et al. eds., 2015). See also Hecht & Michalowski, supra note 32}.
\end{thebibliography}
and violations of economic, social and cultural rights before and during conflict.\textsuperscript{34}

The importance of socioeconomic justice has been gradually acknowledged since then.\textsuperscript{35} Empirical studies examining the needs of victims in post-conflict settings have revealed how reparations beneficiaries desire support with everyday necessities.\textsuperscript{36} Studies have established links between groups’ psychological changes and the need for real changes in the socioeconomic conditions of the said groups in society.\textsuperscript{37} Wendy Lambourne’s concept of transformative justice embodies this by extending the scope of transitional justice to include psychosocial processes and economic conditions.\textsuperscript{38}

When evaluating the truth and reconciliation commission in Sierra Leone, Chris Mahony and Yasmin Sooka highlighted the importance of socioeconomic justice by explaining that “[e]conomic transformation is desperately needed to address marginalised social groups’ grievance, especially youth, and to facilitate genuine reconciliation.”\textsuperscript{39}

Transitional justice is not equipped to address all of the inequalities in societies in transition. However, there is a need to include additional theory and practice regarding economic and social rights in all transitional justice mechanisms because conflicts often find roots in social inequalities. There are ways for transitional justice mechanisms to seek to incorporate socioeconomic justice more systematically, notably through the inclusion of violations of economic and social rights before international courts.\textsuperscript{40}

Second, the prevalent top-down approach of transitional justice lacks perspectives from affected populations and is often limited in effect if not combined with initiatives that address the needs and priorities

\textsuperscript{34} McAuliffe, supra note 33, at 94; see also Louise Arbour, Economic and Social Justice for Societies in Transition, 40 N.Y.U. J. INT’L L. & POL. 2, 3 (2007).

\textsuperscript{35} McAuliffe, supra note 33, at 93; Chris Mahony & Yasmin Sooka, The Truth about the Truth: Insider Reflections on the Sierra Leonean Truth and Reconciliation Commission, in Evaluating Transitional Justice 35, 50-52 (Kirsten Ainley et al. eds., 2015); Kirsten Ainley, Evaluating the Success of Transitional Justice in Sierra Leone and Beyond, in Evaluating Transitional Justice 241, 251-53 (Kirsten Ainley et al. eds., 2015).


\textsuperscript{37} Nevin Aiken, Rethinking Reconciliation and Divided Societies, in Transitional Justice Theories 40, 55 (Susanne Buckley-Zistel et al. eds., Routledge, 2014).

\textsuperscript{38} Wendy Lambourne, Transformative Justice, Reconciliation and Peacebuilding, in Transitional Justice Theories 19, 19-36 (Susanne Buckley-Zistel et al. eds., Routledge, 2014).

\textsuperscript{39} Mahony & Sooka, supra note 35, at 51.

\textsuperscript{40} See Aiken, supra note 37 at 56.
of the specific society in transition.\(^{41}\) The internationalization of transitional justice—notably through international and hybrid tribunals or peace agreements under the aegis of the international community—is intrinsically a top-down approach.\(^{42}\) It should nevertheless not result in the marginalization of local actors. In a way, the top-down approach must be informed by a bottom-up approach. The democratization of transitional justice processes is crucial and requires the involvement of children and children organizations’ representatives to be effective and legitimate. Local communities have to be involved in the design and development of transitional justice mechanisms to be more effective and legitimate as responding to specified needs.\(^{43}\)

This study considers transitional justice and its liberal and normative goals grounded in international law and human rights to be important cornerstones in the future of post-conflict settings. However, transitional justice needs to evolve to be more inclusive, both in terms of participation and socio-economic justice, in particular to address children’s marginalization.

B. Children’s Rights: Toward a Holistic Approach to the Protection of Children

Human rights law specifically relevant to the protection of children led to the Convention on the Rights of the Child (“CRC”) adopted by the UN General Assembly in 1989.\(^{44}\) The CRC is a comprehensive human rights treaty uniting international humanitarian law, human rights law, and juvenile law in one document, covering economic, social, and cultural rights, as well as political and civil rights.\(^{45}\) It reflects a new vision of the child in which children are agents of their own rights.\(^{46}\)

\(^{41}\) Szablewska & Bachmann, supra note 29, at 339-361.

\(^{42}\) See the analysis of the approaches taken by the international community in Lambourne, supra note 38, at 19-36.

\(^{43}\) See generally the democratization of transitional justice, Lambourne, supra note 38, at 19-36.


The main underlying goals of children’s rights in the preamble of the CRC are equal dignity, special protection, development, and social progress through the participation of children in society. It is worth noting that the preamble also mentions that those rights are “the foundation of freedom, justice and peace in the world.”

To understand the challenges to children’s rights in transitional justice, it is essential to grasp the following aspects of children’s rights: 1) the four cornerstone principles (non-discrimination, best interest of the child, right to life, and the respect of the views of children) that guide the human rights framework of children, 2) the different categories of rights, and 3) the needs and priorities of children that inform children’s rights.

1. Four Cornerstone Principles

The four cornerstone principles for a child rights-based approach can be found in Articles 2, 3, 6 and 12 of the CRC. They correspond to the “cross-cutting principles” of the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. The right to nondiscrimination is not only a passive obligation prohibiting all forms of discrimination but also a positive duty to ensure effective equal...
opportunities.\textsuperscript{54} The best interests of the child are a principle that should guide “all actions concerning children.”\textsuperscript{55} According to the Committee on the Rights of the Child (“CRC Committee”), the concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized by the CRC and a holistic development of the child.\textsuperscript{56} Every child also has an inherent right to life, and to the maximum extent possible to survival and development.\textsuperscript{57} Finally, the respect for the views of children or right to participation\textsuperscript{58} is the right of the individual child and of groups of children to be heard.\textsuperscript{59} It is a unique provision as it addresses the legal and societal status of children who lack the full autonomy of adults, but who are holders of rights.\textsuperscript{60} The CRC Committee held that the principle of participation should be considered in the interpretation and implementation of other rights.\textsuperscript{61}

2. The Different Categories of Rights

There are three categories of rights: survival and development rights, protection rights, and participation rights.\textsuperscript{62} Survival and development rights provide for the conditions supporting the survival and full development of the child and notably include rights to adequate food, shelter, formal education, primary health care, and information about

\begin{itemize}
\item \textsuperscript{54} Committee on the Rights of the Child General Comment No. 14, U.N. Doc. CRC/C/GC/14, ¶ 41 (May 29, 2013).
\item \textsuperscript{56} Committee on the Rights of Children General Comment No. 14, U.N. Doc. CRC/C/GC/14, ¶¶ 4-5 (May 29, 2013).
\item \textsuperscript{58} Article 12 reads as follows: “1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” \textit{Id.} art. 12.
\item \textsuperscript{59} Committee on the Rights of Children General Comment No. 12, U.N. Doc. CRC/C/GC/12, ¶ 9 (July 20, 2009).
\item \textsuperscript{60} \textit{Id.} at ¶ 1.
\item \textsuperscript{61} \textit{Id.} at ¶ 3.
\end{itemize}
their rights. Protection rights provide for the protection from all forms of abuse, neglect, exploitation, and cruelty. Participation rights entitle children to the freedom to express opinions and to have a say in matters affecting their social, economic, religious, cultural, and political life. The CRC Committee stated the following in that regard:

[C]hildren are fully recognised as rights holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders. This implies, in the long term, changes in political, social, institutional and cultural structures.

These categories echo the goals and pillars of children’s rights found in the preamble and cross-cutting principles. It is worth noting for the purposes of this analysis that the CRC puts on an equal footing civil, political, and socioeconomic rights.

3. The Needs and Priorities of Children to Inform Children’s Rights

The legal framework of the human rights of children—which includes the CRC, the Additional Protocols, the General Comments to the CRC and the CRC Committee’s recommendations—is informed by other fields related to children’s needs and specificities, notably victimology and forensic psychology.

Children differ from adults in their physical and psychological development, as well as their emotional and educational needs. Children have their own views and interests and they tend to prioritize concerns

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67. There are three Optional Protocols to the Convention: i) on the Involvement of Children in Armed Conflict, ii) on the Sale of Children, Child Prostitution and Child Pornography; and iii) on a Communication Procedure.
68. And to some extent the IHL’s protection of the child.
and challenges grounded in their day-to-day reality over more distant fears and worries.\textsuperscript{70} The CRC Committee has considered the concept of “evolving capacities” as an “enabling principle,”\textsuperscript{71} but it also means that their level of vulnerability is evolving, their age making “them more vulnerable to physical violence and psychological manipulation.”\textsuperscript{72} One peculiar characteristic is the condition of dependency of children and the vulnerability it creates, sometimes resulting in additional victimization, for instance, by physical neglect.\textsuperscript{73} Although their level of resilience depends on a number of factors, there are particular sources of vulnerability that give diminished protection to children. Some vulnerability factors are displacement, separation, disability, child labor, sexual exploitation, minority status, and the status as child soldiers.\textsuperscript{74}

Children’s needs should be differentiated from those of adults, but children’s rights are also informed by the multiple dimensions of children’s identities. Post-conflict settings combine diverse groups of children with different needs and interests. Juvenile victimization scholarship, although lacking data, has demonstrated that children should not be considered as one group but as several and sometimes overlapping groups at the intersections of different identities and social roles.\textsuperscript{75} These include, for instance, boys versus girls, various age groups, different roles in conflict (victims/perpetrators/secondary victims/participants), and various types of victimization (nature of crimes, direct or indirect victimization, mass or individual victimization, multiple victimizations, etc.), as well as different roles in transitional justice mechanisms.\textsuperscript{76} There are also hidden and forgotten groups, such as female child soldiers and children born in wartime following rape.\textsuperscript{77} Finally, the above groups are not static, as children and youth can for instance

\textsuperscript{70} Claire O’Kane et al., \textit{The active role of children and young people in post-conflict peacebuilding, in Escaping Victimhood: Children, Youth and Post-Conflict Peacebuilding} 32, 32-66 (Albrecht Schnabel & Anara Tabyshalieva eds., 2013).

\textsuperscript{71} CRC Report, \textit{supra} note 66, at ¶ 987.


\textsuperscript{74} Kathleen Kostelny & Michael Wessells, \textit{Youth in Conflict and Post-Conflict Societies, in Escaping Victimhood: Children, Youth and Post-Conflict Peacebuilding}, 69 (Albrecht Schnabel & Anara Tabyshalieva eds., 2013).

\textsuperscript{75} See Finkelhor, \textit{supra} note 73.

\textsuperscript{76} Id.

\textsuperscript{77} See, e.g., \textit{I Am Not Who They Think I Am}, 2017 ICTJ Film on the Stigma Facing Children Born of War.
go from victims to perpetrators if they are not given proper attention in the aftermath of armed conflicts. Intersectionality theory has posed useful theoretical and empirical questions for enlightening gendered dimensions of transitions in particular when dealing with group-based structural inequalities which tend to go unnoticed. By analogy, the multiple dimensions of children’s identities echo some of the challenges identified in intersectionality theory, and to that extent the application of intersectionality theory to the experiences of children in post-conflict settings may support the understanding of the perpetuated marginalization of children in transitional justice.

C. Clashing Goals, Prioritization of Goals, or Missing Goals?

Keeping in mind the more detailed analysis discussed previously, the goals of transitional justice can be summed up in broad terms as truth, justice/accountability, reparation, reconciliation, non-repetition, human security, rule of law, and transformative justice. The goals of children’s rights can be summarized as special protection and assistance, participation, truth, agency, development, and the right to life.

The nature of those goals does not show any apparent conflict, and to some extent transitional justice has taken some human rights norms to further its goals. For instance, both international criminal courts and national truth commissions aim to pursue human rights goals but differ in how to achieve those goals with judicial and non-judicial mechanisms and in the balance between the components of the transitional justice goals of truth, accountability, reconciliation and reparation.

Nevertheless, in the practice of transitional justice, human rights goals and norms are diluted while there is limited understanding of children rights’ goals. Generally speaking, children’s rights goals are not well echoed or thought of in transitional justice goals. In fact, the core principle of the best interests of the child is foreign to transitional justice theories and goals, and the two critical goals of special protection and participation for children are not crucial components of transitional justice frameworks. In addition, while traditional transitional justice adopted a categorization of human rights prioritizing political

78. See, e.g., UNICEF 2010 Report, supra note 72, at 65. (“Young people who feel marginalized by a peace process that failed to consult them may be a source of renewed violence and unrest.”).
79. Rooney, supra note 13; Aoláin & Rooney, supra note 13, at 338-54.
80. See also Szablewska & Bachmann, supra note 29, at 352.
and civil rights, the human rights of children have been construed to be integrated and indivisible. The two key critiques highlighted above regarding the lack of socioeconomic rights and participation in transitional justice theories and policies are key aspects of children’s rights.

The political interests that surround transitional justice mechanisms also play a role in how goals are prioritized. International criminal tribunals for instance are evolving in a field of political interests. Although international criminal tribunals have been dedicated to exemplifying the universality of human rights and norms, states have limited interest in having international criminal courts play a broad transitional justice role. The challenges related to the implementation of reparations programs after international criminal tribunals’ judgements and truth commissions’ reports highlight this. According to a 2010 UNICEF Report, “there are few examples of successful implementation,” in part because of a lack of funding and political will of relevant authorities. To some extent, the nature of transitional justice, in particular its lack of an embedded conceptual framework and heavy reliance on developed practices, makes it more subject to the influence of political interests. The inherent limitations of one transitional justice mechanism’s ability to achieve a broad range of goals reinforce the influence of politics in that it prioritizes certain goals. To illustrate, while the International Criminal Tribunal for the former Yugoslavia (“ICTY”) embraced a project of transformative justice that would apply universal human norms through the former Yugoslavia, the reality of selective prosecutions accentuated its limited ability to implement a broad human rights agenda. International criminal tribunals in that

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82. Arbour, supra note 34, at 7.
85. Koller, supra note 25, at 101-105.
86. UNICEF 2010 Report, supra note 72, at 52-53.
88. See notably, Buckley-Zistel et al., supra note 15, at 1-16.
89. See, e.g., the political and resources challenges to the implementation of the Transitional Justice Policy in Uganda, ICTJ Paper, supra note 87.
sense usually lack the supportive national structures that are mandatory for the true realization of the rule of law.91

Transitional justice mechanisms and frameworks aim to pursue numerous goals. While children’s rights goals are not in contradiction with those, the prioritization of goals in transitional justice practice diminishes the importance of children rights’ goals. In practice, this inequality of goals is reinforced by the absence of socioeconomic rights and limited participation of children in transitional justice frameworks. As the next section explores, children participate in transitional justice mechanisms in a number of different ways, but this participation is often insufficient to ensure full respect for children’s rights.

III. ROLES FOR CHILDREN AND CHILDREN’S RIGHTS IN TRANSITIONAL JUSTICE MECHANISMS

To further the analysis on the perpetuated marginalization of children in transitional justice, this Article explores the roles of children in truth commissions and international criminal courts, as well as the extent to which children’s rights have been integrated in those transitional justice mechanisms. The practice of international criminal courts and truth commissions has involved children in different ways. As such, international criminal courts and truth commissions constitute related but different illustrations which are of particular significance for this discussion.

A. Taxonomy of the Roles of Children and the Integration of Children’s Rights in Transitional Justice

Various UN92 and regional entities93 have had child-oriented agendas and policies since the late 1990s.94 In 2001, the UN Security Council more specifically emphasized the importance of including violations and abuses against children in prosecutions and truth commissions as well as the inclusion, when possible, of children’s views in those post-conflict processes.95 In 2007, the Paris principles developed by UNICEF stressed the role of transitional justice mechanisms in addressing
violations against children and the protection of children involved in those processes. In 2009, the UNICEF Innocenti Research Centre developed key Principles for Children and Transitional Justice, laying out some general principles and recommendations for the protection of the rights of children involved in transitional justice processes.

Examining the practice of transitional justice, there are various ways in which children have played or can play a role in transitional justice mechanisms and how, as a consequence, their rights can be impacted by these roles and mechanisms. There are also different ways in which the bodies of law—mainly children’s rights law, international criminal law, and public international law—interact, which can also impact how children’s rights are protected in transitional justice mechanisms. The eight main categories of interactions selected here come from both practice and literature. They are classified below as legal influences (substantive laws, procedural laws, child-friendly policy frameworks), social roles (witnesses, participating victims and perpetrators), and the tools transitional justice mechanisms have developed in order to engage children (reparations and outreach programs).

1. The Codification and Criminalization of Abuses against Children in the Legal Frameworks of Truth Commissions and International Criminal Courts

The codification and criminalization of violence against children and the subsequent jurisprudence show the integration of children rights’ law in the legal frameworks of international criminal tribunals and truth commissions. Looking at the progressive inclusion of child recruitment in statutes and jurisprudence of international criminal tribunals is an interesting illustration of that legal integration and influence between two fields of law, children’s rights law and international law.
criminal law. At the Special Court for Sierra Leone ("SCSL"), following the incorporation in the Statute of the war crime of conscription, enlistment, and use of children in armed forces, in its Decision issued on May 31, 2004, the Appeals Chamber found that the prohibition on child recruitment had crystallized as customary international law before November 1996, notably because 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, and all but six states had ratified the CRC by 1996. The subsequent jurisprudence of the SCSL on child recruitment established the elements of the crime of conscripting or enlisting children under the age of fifteen years into armed forces or groups, or using children under the age of fifteen years to actively participate in hostilities. At the ICC, Article 8 (war crimes) prohibits the conscripting or enlisting of children under the age of fifteen years or using them to participate actively in hostilities. As the Trial Chamber noted in the Lubanga Judgement, the Rome Statute is the first treaty to include those offences as war crimes, noting that the Statute of the SCSL was not a treaty. Jurisprudence of the ICC on this crime has grown rapidly, with direct charges for child recruitment discussed in the Judgements against Thomas Lubanga, Matthieu Ngudjolo and Germain Katanga. This example of both codification and developed jurisprudence is exceptional on many levels. It is the only crime against children developed in the jurisprudence of several international criminal courts. In practice, indictments before international criminal courts rarely include a wide

99. See Amann, supra note 12.
100. Statute of the Special Court for Sierra Leone, art. 4.
102. Id. at ¶ 19.
103. “i. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to actively participate in hostilities; ii. Such person or persons were under the age of 15 years; iii. The perpetrator knew or should have known that such person or persons were under the age of 15 years.” AFRC (Armed Forces Revolutionary Council), SCSL-04-16-T, Judgement, ¶ 729 (June 20, 2007); Prosecutor v. Charles Taylor, SCSL-03-01-T, Judgement, ¶ 439 (May 18, 2012).
105. Lubanga, supra note 7, at ¶ 569.
range of crimes specifically affecting children. Few truth commissions (those for Sierra Leone, Timor-Leste and Liberia) have included in their mandate violations of children’s rights.  

2. The Procedural Rights for Children Involved in International Criminal Tribunals and Truth Commissions

The integration of procedural rights for children involved in international criminal tribunals and truth commissions also illustrates an influence of children’s rights law into transitional justice mechanisms legal frameworks. At the ICC in particular, the right to protection is provided for in Articles 64(2) and 68(1) of the Rome Statute; and the right to participation as a “participating victim” is laid out in Article 68(3) of the Rome Statute. If those procedural provisions are not specific to children and do not offer special protection, they nevertheless reflect the core human rights of “protection” and “participation” discussed above. In the Lubanga and Katanga & Ngudjolo cases for instance, some groups of participating victims were constituted of former child soldiers.


A “child-friendly justice” approach aims at providing a “range of strategies that can be used to adapt a legal proceeding to the particular circumstances of the child or children involved.” Child-friendly justice approaches in the context of transitional justice mechanisms are developing in specific contexts. At the ICC for instance the Office of the Prosecutor (“OTP”) developed a children’s policy that aims to “advance a culture of good practices in relation to the protection of children” within the OTP. In the context of the Sierra Leone Truth Commission’s work, child-friendly versions of the final report were

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108. Rome Statute, supra note 104, at art. 64(2), art. 68(1), art. 68(3).
published in partnership with UNICEF. The adoption of child-friendly justice policy frameworks, already mainstreamed in the context of the Council of Europe, show the legal influence of children’s rights law in transitional justice mechanisms. Those policy frameworks nevertheless remain too rare and/or too narrow in the context of transitional justice mechanisms.


Several truth commissions and international criminal tribunals have envisaged the participation of children, in particular truth commissions, which are participatory in nature. The Sierra Leone Truth Commission was the first one to explicitly mention children in its mandate. Children gave statements and participated in closed thematic hearings. The Truth Commission in Timor-Leste used the CRC as part of its legal framework, organized a public hearing on children, and the Commission’s report included a chapter on children rights violations. The Truth Commission in Liberia went further than the Sierra Leone Commission by systematically involving children in all its activities, such as regional and national thematic hearings. It also worked to improve the protection of children involved in statement-taking as well as in hearings of the Commission.

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115. CHILDREN AND TRANSITIONAL JUSTICE, supra note 12, at 161.
116. UNICEF 2010 Report, supra note 72, at 11; Mahony & Sooka, supra note 36, at 50.
117. UNICEF 2010 Report, supra note 72, at 11.
119. UNICEF 2010 Report, supra note 72, at 11.
proceedings as provisioned in the Rome Statute. Pursuant to Article 68(3) of the Rome Statute, a participating victim can present their views and concerns to the judges in relation to the charges of the case.

5. The Place of Perpetrator-Children in Transitional Justice Mechanisms

While children are, and should, primarily be perceived as victims, the reality is that children are regularly involved in the commission of crimes in the midst of conflicts. For instance, in Sierra Leone, more than 5,000 children under the age of eighteen participated as child soldiers with half of them reported as having killed during the conflict. A 2010 UN Report identified some crucial challenges related to child perpetrators and the appropriate form of accountability of children. Those tensions are particularly interesting when considering the complexities of the implications for victims and the place of those perpetrator-children in society. It is also a particular challenge in the context of the prosecution of former child soldiers before international criminal courts when transitioning to adulthood. The traditional moral narratives of “victims versus perpetrators” in international criminal law cause serious challenges to an area at the crossroads of transitional justice and children’s rights.

6. Reparations Programs

Reparations programs for children in the context of international criminal tribunals and truth commissions represent a new area of work in transitional justice. Reparations can take various forms, the most fundamental distinctions being between material and symbolic benefits,

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120. For the different role of victims before international criminal tribunals, see Brianne McGonigle Leyh, Procedural Justice? Victim Participation in International Criminal Proceedings, 140, 234-35 (Intersentia 2011).

121. Rome Statute, supra note 104, at art. 68 (3).


123. See Avril Haines, Accountability in Sierra Leone: Role of the Special Court, in Accountability for Atrocities — National and International Responses 222 (Jane Stromseth ed., 2003), and sources cited therein in footnotes 226 and 227.

124. 4 August 2010 GA Report, supra note 122.


126. UNICEF 2010 Report, supra note 72, at 52.
and between individual and collective distribution. Material and symbolic reparations can be distributed individually or collectively. Material reparations for individuals can be, for instance, medical treatment or a scholarship, or collectively the construction of a school. At the ICC, the Trust Fund for Victims (“TFV”) has a twofold mandate: 1) to provide assistance independently of trial procedures, and 2) to provide reparations following judgements on the criminal liability of specific accused. Children, more specifically former child combatants and abducted children, have been at the core of some TFV assistance program projects in the Democratic Republic of the Congo and of the reparation procedure in the Lubanga case. In that case where most participating victims are former child soldiers, the long-lasting reparations process and the approach taken regarding the nature and form of reparations have been rather challenging. Numerous critiques have pointed to the fact that little in the reparations processes at the ICC is in fact attuned to the actual needs and priorities of victims.

In the context of truth commissions, several truth commissions’ reports specifically recommended reparations for children, notably in Latin America, South Africa and Sierra Leone, but implementation has been limited.

127. UNICEF 2010 Report, supra note 72, at 51.


130. See, for example, the litigation regarding the community-based approach initially suggested by the TFV rejected by the victims’ groups, Moffet, supra note 109. See also the varied needs of former child soldiers that are not addressed through the reparation program, ICC Makes Progress on Reparations for Victims in Lubanga Case 27 INTERNATIONAL JUSTICE MONITOR (Oct. 27, 2016), https://www.ijmonitor.org/2016/10/icc-makes-progress-on-reparations-for-victims-in-lubanga-case/.


132. UNICEF 2010 Report, supra note 72, at 52-56.
7. Outreach Programs

The first generation of transitional justice mechanisms did not create an adequate space for children in outreach programs. The children’s rights framework and policy-focus from the late 1990s changed that, and outreach programs—defined as “public engagement platforms between transitional justice mechanisms and the general public”—started to mold their activities to adapt to children audiences.\footnote{133} Those programs may “contribute to building children and youth’s knowledge of human rights as well as their capacity for active citizenship.”\footnote{134} In reality, however, international criminal tribunals’ outreach is often more focused on explaining the courts’ goals and work than on a two-way communication with communities and children,\footnote{135} thus challenging the participatory nature of this tool.

B. Analysis

This taxonomy first shows that children have gradually acquired legitimate roles in transitional justice mechanisms, except for the planning and designing of transitional justice solutions (where they are overlooked) and when dealing with perpetrator-children whose role remains rather problematic on many levels.

The recent recognition of the importance of paying attention to the rights of children in transitional justice mechanisms has resulted in a combination of legal influences, social roles, and tools that are aimed to include children in transitional justice. Those evidently represent an improvement as they show channels for the integration of children’s rights in transitional justice mechanisms.

This exploratory analysis also shows, though, that children’s rights are not fully and systematically applied in transitional justice mechanisms. The reality of these legal influences, social roles and tools is that they are limited, selective, and even somewhat exceptional in practice. The inconsistent implementation of the human rights of children may be the result of the prioritization of goals in transitional justice mechanisms, but also of the absence of a holistic approach to children’s rights and more generally a lack of understanding of children’s rights.

\footnotetext{133}{RAMÍREZ-BARAT, supra note 2 at 3.}
\footnotetext{134}{Id. See ICC Outreach Unit Facilitates Children’s Dialogue in Uganda, INT’L CRIM. CT. (June 17, 2010), https://reliefweb.int/report/uganda/icc-outreach-unit-facilitates-childrens-dialogue-uganda.}
Based on what matters for children’s development and on the core principle of individual and group participation in children’s rights, the lack of socioeconomic justice and participation of children in transitional justice practice is consequential. In that sense, a narrow approach to children’s rights has perverse effects on the protection of children when playing a role in transitional justice mechanisms because it does not address their needs and priorities. A 2010 UN Report, for instance, identified “the urgency of creating economic opportunities for children and young people” as a crucial challenge for children in transitional justice mechanisms. A child sensitive transitional justice mechanism needs to consider the full spectrum of children’s human rights as indivisible and interdependent rights.

The lack of understanding of both children’s special developmental vulnerability and their overlapping identities and social roles constitutes another challenge for transitional justice. Academia and practice have failed to recognize and deal with the sub-groups or categories of children in transitional justice settings. Transitional justice mechanisms and narratives, particularly international criminal tribunals’ judgements and truth commissions’ reports, have overused the phrases “women and children” or “children.” These categories, used as a way to refer to helpless victims, may have some legitimacy in the sense that women and children share common challenges in conflict settings. Such generalization, however, prevents a proper understanding of the needs and dimensions of social identities and, as such, inherently challenges the human rights of children. Kendall and Nouwen’s “juridified victimhood” illustrates the issues of generalization and homogenization of children. The intersectionality theory deals with the analysis of social categories or identities, notably, how gendered forms of exclusion are related to other social categories such as age, ethnicity, and how this influences the marginalization of certain groups of people in transitional justice contexts. Intersectionality theory is a way to highlight the hidden marginalization of groups, which is highly relevant when it comes to children. That diversity should also be reflected in the roles children play, recognizing that children’s rights can only be protected if all those roles are acknowledged and put in practice post-conflict.

136. 4 August 2010 GA Report, supra note 123, ¶ 49.
137. UNICEF 2010 report, supra note 72, at 55.
138. Szablewska & Bachmann, supra note 29, at 347-348; Rami-Nogales, supra note 83 at 114.
IV. REFLECTIONS ON THE WAY BEYOND THE PERPETUATED MARGINALIZATION OF CHILDREN’S RIGHTS IN TRANSITIONAL JUSTICE MECHANISMS

Transitional justice mechanisms, in particular truth commissions and international criminal courts, have been at times unable to address the needs and interests of children. This study explored the goals of international transitional justice and children’s rights and found that human rights goals are diluted in the context of a prioritization of goals in the practice of transitional justice. It further explored the lack of socioeconomic justice and of participation of children, notably as they are left out of the planning and design of responses.

On many levels, there is a lack of awareness and acknowledgement of the potential role of children and youth among practitioners and donors because children are “trapped in a state of protracted victimhood.” It is essential to recognize children and young people as social actors as well as to have adults willing to engage with and support children as active partners and agents of transition. Children themselves can and should be involved in the production of materials as part of consultations or contributions of letters, drawings, and recommendations. On the other hand, children should not be “overburdened with highly demanding participatory tasks.” The role of child witnesses before international criminal courts may be one of those over demanding tasks that needs further analysis as to whether or not it fulfills any transitional justice and children’s rights goals. The experience of Save the Children in Sierra Leone, where they organized children’s clubs in which children could play and express themselves, may serve as examples on how to engage children appropriately, by “giv[ing] children confidence and knowledge of their rights, and empower[ing] them to become equal members of society.”

The human rights framework remains highly relevant to ensure the human rights of children in transitional justice. If the above analysis highlights some challenges to the place of human rights goals in transitional justice as well as conceptual challenges within transitional justice

142. RAMIREZ-BARAT, supra note 2, at 9-14.
143. Popovski, supra note 45, at 217-37.
144. Id.
and children rights’ frameworks, this Article argues that those are ones that can be overcome, notably in the following ways.

The integration and implementation of a holistic approach to children’s rights would allow children to play the roles they are meant to play in transitional justice and would ensure a better protection of their rights. For that to happen, scholars and practitioners need to embrace the multiple dimensions of children’s identities, children’s rights and children’s roles in post-conflict situations. A focus on children’s agency, including in the design process of establishing transitional justice mechanisms, is crucial.145

The holistic approach to children’s rights also includes considering violations against socio-economic rights more systematically in both truth commissions and international criminal courts. A helpful reference for the analysis of violations against children is the guidelines for reporting to the CRC Committee,146 as they cover the full spectrum of children’s rights and could be the starting point to the integration of children’s rights in transitional justice mechanisms.

The mainstreaming of children’s rights in transitional justice mechanisms would consist of systematically integrating the rights of the child in all actions and mechanisms. This involves the systematization of all the legal influences, tools, and social roles laid out in the above taxonomy, including avenues to deal with children’s accountability as perpetrators. This also involves increasing the understanding of all transitional justice mechanisms actors on children’s rights, for instance through training and court-wide policies to raise awareness to children’s rights principles as well as issues such as children’s special developmental vulnerability to victimization.

More research is needed in a number of areas. Better data is needed on the impact of war on children broken down by age, gender, and types of violations against children so as to better identify specific vulnerability groups and patterns of crimes, notably using intersectionality theory. It would also inform the necessary responses and the level of participation that are in the best interests of the child. Empirical and comparative research is also crucial regarding the impact of participation in transitional justice mechanisms on children. More specific areas of analysis include how effectively children use the reparations they receive, and how child witnesses before international criminal courts and truth commissions have been impacted by their interactions with these institutions.

145. Tabyshlieva & Schnabel, supra note 140, at 217.