

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

AURÉLIE ROCHE-MAIR*

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.

I.	INTRODUCTION	136
II.	THE FRONTIERS OF TRANSITIONAL JUSTICE AND CHILDREN'S RIGHTS: CLASHING, PRIORITIZED, OR MISSING GOALS?	140
	A. <i>Transitional Justice Theories and Goals</i>	140
	B. <i>Children's Rights: Toward a Holistic Approach to the Protection of Children</i>	144
	1. Four Cornerstone Principles	145
	2. The Different Categories of Rights	146

* International Bar Association (Programme Director, International Criminal Justice) & Utrecht University (PhD candidate at the Netherlands Institute of Human Rights). The opinions expressed in this Article are those of the author and do not necessarily reflect those of the IBA. The author would like to thank Antoine Buyse, Brianne McGonigle Leyh, and Chad Mair for their invaluable input and encouragement. Ms. Roche-Mair can be contacted at rochemair@gmail.com. © 2018, Aurélie Roche-Mair.

3.	The Needs and Priorities of Children to Inform Children’s Rights	147
C.	<i>Clashing Goals, Prioritization of Goals, or Missing Goals?</i> . . .	149
III.	ROLES FOR CHILDREN AND CHILDREN’S RIGHTS IN TRANSITIONAL JUSTICE MECHANISMS	151
A.	<i>Taxonomy of the Roles of Children and the Integration of Children’s Rights in Transitional Justice</i>	151
1.	The Codification and Criminalization of Abuses against Children in the Legal Frameworks of Truth Commissions and International Criminal Courts	152
2.	The Procedural Rights for Children Involved in International Criminal Tribunals and Truth Commissions	154
3.	A Child-Friendly Justice Approach as a Policy Framework	154
4.	Children Witnesses and Children as Participating Victims in Truth Commissions, Hearings, and Proceedings before International Criminal Courts	155
5.	The Place of Perpetrator-Children in Transitional Justice Mechanisms	156
6.	Reparations Programs	156
7.	Outreach Programs	158
B.	<i>Analysis</i>	158
IV.	REFLECTIONS ON THE WAY BEYOND THE PERPETUATED MARGINALIZATION OF CHILDREN’S RIGHTS IN TRANSITIONAL JUSTICE MECHANISMS	160

I. INTRODUCTION

While children are one of the most affected and vulnerable groups involved in armed conflicts,¹ transitional justice processes contending with crimes committed during those conflicts have given limited attention to children’s rights.² 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 APEL & 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.³ Despite children having specific needs and rights as victims, participants, and perpetrators, they have little voice in transitional justice mechanisms.⁴ 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,⁵ 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,⁶ 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.⁷ Children's testimonies have been deemed unreliable,⁸ indictments rarely include a wide range of crimes

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.

5. For a discussion of the top-down approach, see Stephan Parmentier, *Transitional Justice*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW* 52, 69-71 (William Schabas ed., 2016).

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); CÉCILE 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.⁹ 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.¹⁰ 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.¹¹

While the scholarship in the field of transitional justice has begun to acknowledge some challenges to the place of children in transitional justice mechanisms,¹² 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,"¹³ this Article provides a critical reflection on how and why the rights of children are jeopardized by their interactions with these transitional

9. See Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 235 (2014).

10. See Brigid Inder, *Reflection: Gender Issues and Child Soldiers—The Case of Prosecutor v Thomas Lubanga Dyilo*, INT'L JUST. MONITOR (Aug. 31, 2011), <https://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/>.

11. See, e.g., APTEL, *supra* note 8.

12. See UNICEF, CHILDREN AND TRANSITIONAL JUSTICE (Sharanjeet Parmar et al. eds., 2010), https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf; Diane Marie Amann, *Children*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 253 (William Schabas ed., 2016).

13. Concept discussed by Kimberle Crenshaw in the context of African American women's rights in order to highlight the multidimensionality of people's identities. In particular, this theory can be of interest when studying children in the context of transitional justice. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). More specifically when dealing with transitional justice, see Fionnuala Ní Aoláin and Eilish Rooney, *Under-enforcement and Intersectionality: Gendered Aspects of Transition for Women*, 1 INT'L J. OF TRANSITIONAL JUST. 338, 338-354 (2007); Eilish Rooney, *Intersectionality in Transition: Lessons from Northern Ireland*, 5 WEB J. CURRENT LEGAL ISSUES 1 (2007).

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,¹⁴ 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

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.¹⁵ 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.¹⁶

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."¹⁷ According to

15. See Susanne Buckley-Zistel et al., *Transitional Justice Theories: An Introduction*, in TRANSITIONAL JUSTICE THEORIES 1, 1-16 (Susanne Buckley-Zistel et al. eds., Routledge, 2014); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004); TRANSITIONAL JUST. INST., *Belfast Guidelines on Amnesty and Accountability*, U. OF ULSTER (2013).

16. Economic and Social Council, Final report prepared by Mr. Joinet pursuant to Sub-commission decision, Commission on Human Rights forty-ninth session, U.N. Doc. E/CN.4/Sub.2/1997/20 (June 26, 1997).

17. U.N. Secretary-General, *supra* note 15, at ¶ 8; U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634 (Oct. 12, 2011).

Stephan Parmentier, this definition has obtained the status of 'acquis' in the field of international law and practice.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."¹⁹ These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.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.²¹ Others, such as Neil Kritz, described transitional justice's objectives as truth, justice, "meaningful democratic reform," and durable peace.²² Most scholars continue to associate transitional justice with democracy, rule of law, and liberal values.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.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

18. Parmentier, *supra* note 5, at 54.

19. See *ICTJ: About us*, www.ictj.org/about (last visited Jan. 6, 2018).

20. *Id.*

21. Theresa Clark, *Assessing the Special Court's Contribution to Achieving Transitional Justice*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY* 749 (Charles Jalloh ed., 2014); Stephan Parmentier, *Global Justice in the Aftermath of Mass Violence: The Role of the ICC in Dealing with Political Crimes*, 41 *INT'L ANNALS OF CRIMINOLOGY* 203, 203-09 (2003); See also Jens Iverson, *Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics*, 7 *THE INT'L J. OF TRANSITIONAL JUST.* 413-33 (2013).

22. Neil Kritz, *Policy Implications of Empirical Research on Transitional Justice*, in *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE* 13 (Hugo Van der Merwe, et al. eds., 2009).

23. Ruti Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 69-94 (2003); Ruti Teitel, *GLOBALIZING TRANSITIONAL JUSTICE* (Ruti Teitel ed., 2014); Anja Mihr ed., *Transitional Justice: Between Criminal Justice, Atonement and Democracy* (Anja Mihr ed., SIM Special Ed. 37, 2012); Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,' 9 *INT'L J. OF TRANSITIONAL JUST.* 150, 150-69 (2014).

24. Ruti Teitel, *Transitional Justice Globalized*, in *GLOBALIZING TRANSITIONAL JUSTICE* 3, 3-8 (Ruti Teitel ed., 2014).

formalized and individualized mechanism of criminal accountability.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.²⁶ Truth commissions adopt a completely different approach in that the primary aims are to "discover, clarify and formally acknowledge past abuses,"²⁷ contributing to the "right to know" of victims and society.²⁸ Truth commissions create the necessary space for victims and perpetrators to seek and tell their truth,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.³⁰

Several critiques have emerged on different aspects of transitional justice theories and the subsequent practice,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.³² Scholars and policymakers in the field focused more on violations of civil and political rights than on socioeconomic inequalities or "structural violence."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

25. David Koller, *The Global as Local: The Limits and Possibilities of Integrating International and Transitional Justice*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS, 85, 87 (Christian De Vos et al. eds., 2015).

26. 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).

27. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (New York: Routledge ed., 2d ed. 2011); Ruti Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, in GLOBALIZING TRANSITIONAL JUSTICE 49, 49-67 (Ruti Teitel ed., 2014).

28. RUTI TEITEL, TRANSITIONAL JUSTICE (New York: Oxford University Press, 2000).

29. 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).

30. TEITEL, *supra* note 28, at 56.

31. *See, e.g.*, EVALUATING TRANSITIONAL JUSTICE (Kirsten Ainley, et al. eds., 2015); PARMENTIER, *supra* note 5, at 67-71.

32. *See* Lisa Hecht & Sabine Michalowski, *The Economic and Social Dimensions of Transitional Justice*, <https://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf>.

33. Pádraig 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.

and violations of economic, social and cultural rights before and during conflict.”³⁴

The importance of socioeconomic justice has been gradually acknowledged since then.³⁵ Empirical studies examining the needs of victims in post-conflict settings have revealed how reparations beneficiaries desire support with everyday necessities.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.³⁷ Wendy Lambourne's concept of transformative justice embodies this by extending the scope of transitional justice to include psychosocial processes and economic conditions.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.”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.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

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).

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).

36. Lisa Laplante, *The Plural Justice Aims of Reparations*, in *TRANSITIONAL JUSTICE THEORIES* 66, 78 (Susanne Buckley-Zistel et al. eds., Routledge, 2014).

37. Nevin Aiken, *Rethinking Reconciliation and Divided Societies*, in *TRANSITIONAL JUSTICE THEORIES* 40, 55 (Susanne Buckley-Zistel et al. eds., Routledge, 2014).

38. Wendy Lambourne, *Transformative Justice, Reconciliation and Peacebuilding*, in *TRANSITIONAL JUSTICE THEORIES* 19, 19-36 (Susanne Buckley-Zistel et al. eds., Routledge, 2014).

39. Mahony & Sooka, *supra* note 35, at 51.

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.

44. The CRC has been ratified by more nations than any other UN convention: 196 States are parties to the CRC in 2017. See *Status: Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en (last updated Feb. 19, 2018).

45. Vesselin Popovski, *Protection and participation of children in post-conflict peacebuilding: international law and evolving practice*, in ESCAPING VICTIMHOOD: CHILDREN, YOUTH AND POST-CONFLICT PEACEBUILDING 113, 124 (Albrecht Schnabel & Anara Tabyshlieva eds., 2013).

46. A child is defined as a person who is below eighteen years of age. United Nations Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

The main underlying goals of children's rights in the preamble of the CRC are equal dignity,⁴⁷ special protection,⁴⁸ development,⁴⁹ and social progress through the participation of children in society.⁵⁰ It is worth noting that the preamble also mentions that those rights are "the foundation of freedom, justice and peace in the world."⁵¹

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,⁵² 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.⁵³ The right to nondiscrimination is not only a passive obligation prohibiting all forms of discrimination but also a positive duty to ensure effective equal

47. The CRC preamble provides: "inherent dignity and of the equal and inalienable rights of all members of the human family," "everyone is entitled to all the rights and freedoms set forth." United Nations Convention on the Rights of the Child preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

48. The CRC preamble reads: "childhood is entitled to special care and assistance," "the need to extend particular care to the child," "special safeguards and care, including appropriate legal protection, before as well as after birth," "there are children living in exceptionally difficult conditions, and that such children need special consideration." *Id.*

49. The CRC preamble provides "for the full and harmonious development of his or her personality," "cultural values of each people for the protection and harmonious development of the child." *Id.*

50. The CRC preamble reads: "have determined to promote social progress," "the necessary protection and assistance so that it can fully assume its responsibilities within the community," "the child should be fully prepared to live an individual life in society." *Id.*

51. *Id.*

52. *See, e.g.*, Economic and Social Council Res. 2005/20 (July 22, 2005); EU Guidelines for the Promotion and Protection of the Rights of the Child: Leave No Child Behind, 7-9 (Mar. 2017), https://eeas.europa.eu/sites/eeas/files/eu_guidelines_rights_of_child_0.pdf; Popovski, *supra* note 45, at 113-32.

53. The only two semantic differences are that the CRC principle, "Life, Survival and Development," is considered part of the cross-cutting principle, "Best Interests of the Child," with two sub-principles: "Protection" and "Harmonious Development" and the CRC principle, "Respect for the Views of the Child," called the "Right to Participation" in the UN Guidelines.

opportunities.⁵⁴ The best interests of the child are a principle that should guide “all actions concerning children.”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.⁵⁶ Every child also has an inherent right to life, and to the maximum extent possible to survival and development.⁵⁷ Finally, the respect for the views of children or right to participation⁵⁸ is the right of the individual child and of groups of children to be heard.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.⁶⁰ The CRC Committee held that the principle of participation should be considered in the interpretation and implementation of other rights.⁶¹

2. The Different Categories of Rights

There are three categories of rights: survival and development rights, protection rights, and participation rights.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

54. Committee on the Rights of the Child General Comment No. 14, U.N. Doc. CRC/C/GC/14, ¶ 41 (May 29, 2013).

55. United Nations Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

56. Committee on the Rights of Children General Comment No. 14, U.N. Doc. CRC/C/GC/14, ¶¶ 4-5 (May 29, 2013).

57. United Nations Convention on the Rights of the Child, art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3.

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.” *Id.* art. 12.

59. Committee on the Rights of Children General Comment No. 12, U.N. Doc. CRC/C/GC/12, ¶ 9 (July 20, 2009).

60. *Id.* at ¶ 1.

61. *Id.* at ¶ 3.

62. See *Rights under the Convention on the Rights of the Child*, UNICEF, https://www.unicef.org/crc/index_30177.html (last visited Jan. 17, 2018) [hereinafter UNICEF].

their rights.⁶³ Protection rights provide for the protection from all forms of abuse, neglect, exploitation, and cruelty.⁶⁴ 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.⁶⁵ 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.⁶⁶

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,⁶⁷ the General Comments to the CRC and the CRC Committee's recommendations⁶⁸—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.⁶⁹ Children have their own views and interests and they tend to prioritize concerns

63. *Id.* See also *Survival and development rights: the basic rights to life, survival and development of one's full potential*, UNICEF, https://www.unicef.org/crc/files/Survival_Development.pdf (last visited Jan. 17, 2018).

64. UNICEF, *supra* note 62; *Protection Rights: keeping safe from harm*, UNICEF, https://www.unicef.org/crc/files/Protection_list.pdf (last visited Jan. 17, 2018).

65. UNICEF, *supra* note 62; *Participation Rights: having an active voice*, UNICEF, <https://www.unicef.org/crc/files/Participation.pdf> (last visited Jan. 17, 2018).

66. Comm. on the Rights of the Child, Rep. on the Forty-Third Session, U.N. Doc. CRC/C/43/3, ¶ 988 (2006) [hereinafter CRC Report].

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.

69. Committee on the Rights of the Child General Comment No. 10, U.N. Doc. CRC/C/GC/10, ¶ 10 (April 25, 2007).

and challenges grounded in their day-to-day reality over more distant fears and worries.⁷⁰ The CRC Committee has considered the concept of “evolving capacities” as an “enabling principle,”⁷¹ but it also means that their level of vulnerability is evolving, their age making “them more vulnerable to physical violence and psychological manipulation.”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.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.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.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.⁷⁶ There are also hidden and forgotten groups, such as female child soldiers and children born in wartime following rape.⁷⁷ Finally, the above groups are not static, as children and youth can for instance

70. Claire O’Kane et al., *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).

71. CRC Report, *supra* note 66, at ¶ 987.

72. Children and Truth Commissions, UNICEF INNOCENTI RESEARCH CENTRE 3, https://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf [hereinafter UNICEF 2010 Report].

73. David Finkelhor, *Developmental Victimology: the Comprehensive Study of Childhood Victimization*, in VICTIMS OF CRIME 75-106 (Robert C. Davis et al. eds., 4th ed. 2013).

74. Kathleen Kostelny & Michael Wessells, *Youth in Conflict and Post-Conflict Societies*, in ESCAPING VICTIMHOOD: CHILDREN, YOUTH AND POST-CONFLICT PEACEBUILDING, 69 (Albrecht Schnabel & Anara Tabyshalieva eds., 2013).

75. See Finkelhor, *supra* note 73.

76. *Id.*

77. See, e.g., *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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹

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.

81. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (2008); Tricia Olsen et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUMAN RIGHTS Q. 980, 980-1007 (Nov. 2010).

and civil rights, the human rights of children have been construed to be integrated and indivisible.⁸² 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.⁸³ Although international criminal tribunals have been dedicated to exemplifying the universality of human rights and norms,⁸⁴ states have limited interest in having international criminal courts play a broad transitional justice role.⁸⁵ 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,"⁸⁶ in part because of a lack of funding and political will of relevant authorities.⁸⁷ To some extent, the nature of transitional justice, in particular its lack of an embedded conceptual framework and heavy reliance on developed practices,⁸⁸ makes it more subject to the influence of political interests.⁸⁹ 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.⁹⁰ International criminal tribunals in that

82. Arbour, *supra* note 34, at 7.

83. Jaya Rami-Nogales, *Bespoke Transitional Justice at the International Criminal Court*, in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 106, 108 (Christian De Vos et al. eds., 2015); Koller, *supra* note 25, at 85-105.

84. Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, in *GLOBALIZING TRANSITIONAL JUSTICE* 11-27 (Ruti Teitel ed., 2014).

85. Koller, *supra* note 25, at 101-105.

86. UNICEF 2010 Report, *supra* note 72, at 52-53.

87. UNICEF 2010 Report, *supra* note 72, at 56; *see also* the example of the Transitional Justice Policy implementation challenges in Uganda, *ICTJ Paper Calls on Government of Uganda to Urgently Adopt Transitional Justice Policy*, ICTJ (June 16, 2015), <https://www.ictj.org/news/uganda-adopt-transitional-justice-policy> [hereinafter *ICTJ Paper*].

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.

90. Ruti Teitel, *Bringing the Messiah Through the Law*, in *GLOBALIZING TRANSITIONAL JUSTICE* 81, 88 (Ruti Teitel ed., 2014).

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

91. *See id.* at 91.

92. Including the General Assembly, Security Council, Secretary-General, Special representative for children in armed conflict, UNICEF.

93. *See* EU Guidelines for the Promotion and Protection of the Rights of the Child - Leave no Child Behind, March 2017.

94. *See, e.g.*, G.A. Res. 51/77 (1997), S27/2 (2002), 63/241 (2008), 64/146 (2010), 68/148 (2013); S.C. Res. 1314 (2000), 1612 (2005), 1998 (2011), 2068 (2012).

95. S.C. Res. 1379, ¶ 9(a), 8(e) (Nov. 20, 2001).

violations against children and the protection of children involved in those processes.⁹⁶ 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.⁹⁷

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).⁹⁸

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

96. UNICEF, THE PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS ¶ 3.5-3.8 (2007), <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

97. UNICEF, KEY PRINCIPLES FOR CHILDREN AND TRANSITIONAL JUSTICE: INVOLVEMENT OF CHILDREN AND CONSIDERATIONS OF CHILDREN’S RIGHTS IN TRUTH, JUSTICE AND RECONCILIATION PROCESSES, <https://www.unicef-irc.org/files/documents/d-3727-Key-principles-document-f.pdf> (last visited Jan. 25, 2018).

98. Because this study is looking at the protection of children when interacting with specific transitional justice mechanisms, the scope of this study does not cover the impact children have on the transitional mechanisms themselves when playing a role and does not specifically address the limited role children play in the design of what transitional justice mechanisms should be in place.

criminal law.⁹⁹ 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,¹⁰⁰ 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 1996,¹⁰¹ 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 1996.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.

101. Prosecutor v. Sam Hinga Norman, SCSL-2004-14-AR-72, Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶¶ 17, 20 (May 31, 2004).

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).

104. Rome Statute of the International Criminal Court, art. 8, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

105. Lubanga, *supra* note 7, at ¶ 569.

106. See Lubanga Trial Judgment, *supra* note 7, at 273-87; Prosecutor v. Ngudjolo, ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, 190-97 (Dec. 18, 2012), https://www.icc-cpi.int/CourtRecords/CR2013_02993.PDF; Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 386-411 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

3. A Child-Friendly Justice Approach as a Policy Framework

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."¹¹⁰ 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 rights of children" within the OTP.¹¹¹ In the context of the Sierra Leone Truth Commission's work, child-friendly versions of the final report were

107. See UNICEF 2010 Report, *supra* note 72, at 11.

108. Rome Statute, *supra* note 104, at art. 64(2), art. 68(1), art. 68(3).

109. See Luke Moffet, *Justice for Victims in Lubanga case?*, JUSTICE HUB (Mar. 4, 2015), <https://justicehub.org/article/justice-victims-lubanga-case>. For a summary of the case *Katanga & Ngudjolo*, see Germain Katanga, COALITION FOR THE INT'L CRIM. CT., <http://www.coalitionfortheicc.org/cases/germain-katanga> (last visited May 25, 2017).

110. *Child-Friendly Justice and Children's Rights*, CHILD RIGHTS INTERNATIONAL NETWORK 2 (2011), https://www.crin.org/en/docs/FileManager/Child-Friendly_Justice_and_Childrens_Rights_Revised.pdf (last visited Jan. 6, 2018).

111. ICC OFFICE OF THE PROSECUTOR, POLICY ON CHILDREN ¶ 9 (Nov. 2016), https://www.icc-mpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

published in partnership with UNICEF.¹¹² The adoption of child-friendly justice policy frameworks, already mainstreamed in the context of the Council of Europe,¹¹³ 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.

4. Children Witnesses and Children as Participating Victims in Truth Commissions, Hearings, and Proceedings before International Criminal Courts

Several truth commissions and international criminal tribunals have envisaged the participation of children, in particular truth commissions, which are participatory in nature.¹¹⁴ The Sierra Leone Truth Commission was the first one to explicitly mention children in its mandate.¹¹⁵ Children gave statements and participated in closed thematic hearings.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ It also worked to improve the protection of children involved in statement-taking as well as in hearings of the Commission.¹¹⁹ While at the ICTY, International Criminal Tribunal for Rwanda and SCSL children were confined to the role of witnesses in the proceedings, at the ICC children can be witnesses and participating victims in the course of

112. UNICEF 2010 Report, *supra* note 72, at 11; Mahony & Sooka, *supra* note 36, at 50; RAMÍREZ-BARAT, *supra* note 2. See also *Truth and Reconciliation Commission Report for the Children of Sierra Leone*, SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, http://www.sierraleonetr.com/index.php/view-the-final-report/popular-reports/item/truth-and-reconciliation-commission-report-for-the-children-of-sierra-leone?category_id=16 (last visited Jan. 20, 2018).

113. *Child Friendly Justice*, COUNCIL OF EUROPE PORTAL, <http://www.coe.int/en/web/children/child-friendly-justice> (last visited May 25, 2017).

114. UNICEF 2010 Report, *supra* note 72, at 7.

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.

118. UNICEF, CHILDREN AND TRANSITIONAL JUSTICE 19 (Mar. 2010), https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf; UNICEF 2010 Report, *supra* note 72, at 11.

119. UNICEF 2010 Report, *supra* note 72, at 11.

proceedings as provisioned in the Rome Statute.¹²⁰ 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.¹²¹

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

While children are, and should, primarily be perceived as victims,¹²² 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.¹²³ A 2010 UN Report identified some crucial challenges related to child perpetrators and the appropriate form of accountability of children.¹²⁴ 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.¹²⁵ 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.¹²⁶ Reparations can take various forms, the most fundamental distinctions being between material and symbolic benefits,

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).

122. See, e.g., APTL, *supra* note 8, at 348-53; GAOR, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 50, U.N. Doc. A/65/219 (Aug. 4, 2010) [hereinafter *4 August 2010 GA Report*].

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.

125. See Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen (Mar. 23, 2016).

126. UNICEF 2010 Report, *supra* note 72, at 52.

and between individual and collective distribution.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³²

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

128. See generally, *Two mandates*, THE TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/about/two-mandates-tfv> (last visited Jan. 20, 2018) and *Reports*, THE TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/reports> (last visited Jan. 20, 2018). See also REDRESS, JUSTICE FOR VICTIMS: THE ICC’S REPARATIONS MANDATE (May 20, 2011), <http://www.refworld.org/pdfid/4def341618.pdf>; REDRESS, COMMENTS TO THE TRUST FUND FOR VICTIMS IN LIGHT OF THE COURT’S FIRST REPARATIONS DECISION (Mar. 2013).

129. See, e.g., TRUST FUND FOR VICTIMS, LEARNING FROM THE TFV’S SECOND MANDATE: FROM IMPLEMENTING REHABILITATION ASSISTANCE TO REPARATIONS, FALL 2010 PROGRAMME PROGRESS REPORT 12-14 (2010), <https://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf>; TRUST FUND FOR VICTIMS, ASSISTANCE AND REPARATIONS: ACHIEVEMENTS, LESSONS LEARNED, AND TRANSITIONING, PROGRAMME PROGRESS REPORT 2015 23-37, 49-50 (2010), <https://www.legal-tools.org/doc/370265/pdf/>.

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/>.

131. See, e.g., REDRESS, MOVING REPARATION FORWARD AT THE ICC: RECOMMENDATIONS (Nov. 2016), https://redress.org/wp-content/uploads/2017/12/1611REDRESS_ICCReparationPaper.pdf; REDRESS, SUMMARY REPORT OF THE EXPERTS’ CONFERENCE ON REPARATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT: ISSUES AND CHALLENGES (May 12, 2011).

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.¹³³ Those programs may “contribute to building children and youth’s knowledge of human rights as well as their capacity for active citizenship.”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,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.

133. RAMÍREZ-BARAT, *supra* note 2 at 3.

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>.

135. See, e.g., Sarah Nouwen, *International Criminal Law: Theory All Over the Place*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 738, 759-61 (Anne Orford & Florian Hoffman eds., Oxford Univ. Press 2016).

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"¹³⁶ 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.¹³⁷

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.¹³⁸ 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.¹³⁹ 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.

139. Kendall & Nouwen, *supra* note 9.

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."¹⁴⁰ 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.¹⁴¹ Children themselves can and should be involved in the production of materials as part of consultations or contributions of letters, drawings, and recommendations.¹⁴² On the other hand, children should not be "overburdened with highly demanding participatory tasks."¹⁴³ 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."¹⁴⁴

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

140. Anara Tabyshlieva & Albrecht Schnabel, *Escaping and Moving Beyond Victimhood: Children and Youth as Peacebuilders*, in *ESCAPING VICTIMHOOD: CHILDREN, YOUTH AND POST-CONFLICT PEACEBUILDING 4* (Albrecht Schnabel & Anara Tabyshlieva eds., 2013).

141. O'Kane et al., *supra* note 70, at 44-47. See also JASON HART, *THE PARTICIPATION OF CONFLICT-AFFECTED CHILDREN IN HUMANITARIAN ACTION: LEARNING FROM ZONES OF ARMED CONFLICT* (Oxford: Oxford Refugees Studies Centre, 2004).

142. RAMÍREZ-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.

146. U.N. Committee on the Rights of the Child, *Overview of the Reporting Procedures*, CRC/3/33 (Oct. 24, 1994), <http://hrlibrary.umn.edu/crc/CRC-PROC.htm>.