Children witnessing atrocities against parents or caregivers, a human rights perspective

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Introduction

"They shot my father right in front of me… They came to our house and told him they had orders to kill him because he allowed me to go to school …" (15-year-old girl, Kabul)[1]

The incident described above is not as exceptional an occurrence as one may hope. In fact, cases of torture or murder of civilians in front of children are often reported. It is not clear, though, to what extent this is primarily done deliberately, for instance to initiate children as killers, demean a target population by humiliating parents, cause terror in the community, or as a reckless, though inadvertent, side effect of carrying out orders.

Studies undertaken in different conflict and post-conflict zones reveal the harmful effects of such experiences on children, especially if the crimes they witness are committed against their parents or caregivers. Research, resources and public attention in this area have mainly focused on the final stages of the problem: the *effects* of witnessing atrocities on children and adequate *rehabilitation* responses. This focus, especially insofar as it relates to the emphasis given to studying Post-Traumatic Disorders (PTSD) since the 1980s, has been among the awareness raising achievements after the adoption of the 1990 UN Convention of the Rights of the Child (CRC) and the recommendations of the global study led by Ms. Graca Machel on the Impact of Armed Conflict on Children.[2]

However, still, insufficient attention seems to be paid, in the ambit of human rights' monitoring and reporting, to whether children are forced or recklessly tolerated to witness the crimes or human rights violations being reported or investigated.[3] Yet, from a human rights perspective, there are a few questions regarding the issue of children witnessing atrocities that need to de addressed.[4] First, is the witnessing of crimes against parents by children an inevitable though regrettable aspect of war, or is it a deliberate or reckless act that could be prevented? Secondly, is forcing or recklessly

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1) Amnesty International (AI), ASSA 11/013/1999.

2) Impact of Armed Conflict on Children, A/51/306 26 Aug. 1996.

allowing children to watch crimes against their parents itself an unlawful act in relation to the child, i.e. is this conduct prohibited by existent law? Third, if such conduct is unlawful, who bears responsibility for the wrongful act and its effects? Is the individual perpetrator alone liable or is the responsibility of the State engaged? Finally, if such conduct itself is a human rights violation or a crime against the child, should remedies be made available to the child to obtain reparation?

It is through determining whether such conduct is unlawful and who bears responsibility that prevention and rehabilitation may be addressed more effectively. Surely a human society owes at least this much to both the current victims and its future generations of children. Yet, the issues of responsibility and reparation are accompanied by difficult questions, the most important of which is the adequate protection of children throughout any process of information gathering, reporting and eventually testifying at trial. Such obstacles though should not be relied upon to avoid addressing the issue; nevertheless, it is acknowledged that they can constitute a real challenge and thus any attempt to seek truth and justice about such abuses require finding appropriate ways of protecting children witnesses of crimes to the maximum extent possible.

The purpose of this paper is hence to study the act of making children witness crimes against their parents or caregivers from a human rights perspective and its consequences from the point of view of accountability and reparation. I will therefore examine whether making children witness crimes against parents or caregivers is a violation of children's rights and if so what could be done as deterrence to prevent such acts occurring in the future and to bring redress to child victims. It is beyond the scope of this paper to discuss in depth the psychosocial or other effects of witnessing crimes on children or their families.

The paper is thus structured as follows. I will present first the factual situation (Part A) providing some hints on the actual occurrence of forcing children to witness crimes against parents/caregivers in situations of armed conflict, internal strife or state repression (A.a). This part also in-

3) As an indication, in Skopjie, Macedonia, April/June 1999, the main international organisations taking statements from Kosovar refugees, namely UN, OHCHR, OSCE, Human Rights Watch, Amnesty International and the American Bar Association, some collaborating with the ICTY, did not include within the scope of their human rights' assessments the question of forced/reckless witnessing of atrocities by children. On the author's raising this issue with the above, they confirmed that they only took account of children being forced to watch crimes when this was occasionally spontaneously mentioned by the interviewees, but, even then, those acts were not highlighted or even reported as distinct specific abuses against children. Mental health teams at the time were assisting many children affected by witnessing crimes. Most testimonies of a child witnessing atrocities against parents found, some herein mentioned, were mainly retrieved in reports about "trauma" and adverse effects of conflict on children, or in descriptions of the circumstances in which other unlawful acts were reported. One notable exception is the case of reports on "child soldiers", where witnessing and committing crimes against parents was specifically examined as part of the recruitment process and the use of children by armed forces or groups.

4) Hereinafter when I refer to witnessing crimes, I refer to those committed against parents or caregivers (who can be siblings, family members, friends, neighbours). Children can also be highly affected by witnessing atrocities against strangers, but I will focus on the protection link; the child may feel especially endangered or destroyed when witnessing a parent or caregiver threatened, killed or degraded.

cludes a general overview of the possible effects on children of making them witness crimes against their parents/caregivers (A. b). I will then analyse the above facts from a human rights perspective (Part B). First, I will study whether making children witness crimes against parents/caregivers constitutes an unlawful act under international law (B.a). Then I will look at the consequences of such act if considered unlawful, with a focus on the question of accountability and reparation (B.b). Finally, I will explore some possible preventative actions. Given the limits of this paper, I will examine international norms and international caselaw applicable to the conduct under study. However, a comparative study of existing national laws, jurisprudence and policies addressing this subject would highly enrich the international law perspective.

A. The situation

A.a. Occurrence of children witnessing crimes against parents/caregivers

In 1998, Save the Children and Amnesty International claimed that at least ten million children had witnessed acts of war or brutality.[5] A well-known example is that of Rwanda. A UNICEF survey among 3,030 Rwandan children (1995)[6] revealed that nearly 80% of the children had lost immediate family members and more than one third of these had actually witnessed the murders.[7] The UN Special Rapporteur on Rwanda[8] confirmed that children "were doubly victimised, either as perpetrators used by the belligerents … or as innocent victims *witnessing atrocities against their parents*". Similar studies were undertaken in Angola and Mozambique,[9] the latter showing that one third of the children surveyed had seen close relatives being killed.

Forcing children to witness crimes seems to take place in a number of typical scenarios, this being too often deliberately sought with a specific purpose.

Children associated with armed forces or armed groups

Forcing children to witness crimes against their parents has been reported to be part of the initiation of children as combatants (sometimes as young as seven), such as in Sierra Leone, the Democratic Republic of Congo (DRC), Liberia and Uganda, where tens of thousands of girls and boys have been recruited into armed forces or groups. The recruitment process, which in most cases is done through abduction, manipulation or force, at times also includes forcing children to commit horrific acts, such as killing of family members. This is done with the idea that such acts will break their spirit, turn them into ruthless soldiers, cause them to be ostracized by their community and prevent them from returning home,[10] as illustrated below. Human Rights Watch (HRW)[11] reported that child combatants

5) Save the Children Fund, Children at War, 1998.

6) UNICEF, Exposure to war-related violence among Rwandan children and adolescents, Rwanda, Feb. 1996.

7) UNICEF, The State of the World's Children 1996.

8) E/CN.4/1997/61 20 Jan. 1997, par. 32.

9) See *Reaching Children in War, Sudan, Uganda and Mozambique,* Ed. Cole, P. Dodge & M. Raundalen, Sigma Forlag, Norvay, 1991, p.22.

10) Singer at 70-71 at Eduardo Arboleda, "UNHCR response to advisory opinion", September 2005.

in Liberia and Sierra Leone were forced to kill companions as an initiation process to "enter the group": "… boys from both factions have told us that there were initiation procedures when they joined… they were actually forced to witness the execution of family members or their friends. If they screamed or cried, they were killed. Boys have told us of being lined up to watch executions and being forced to applaud."[12] Sierra Leonean children have reported to the SL Truth and Reconciliation Commission having been forced to kill family members, for example: "One boy was abducted at the age of eight and forced to watch his parents mutilated and killed. Then he was drugged until he didn't know what he was doing and ordered to "wash", or kill, his remaining family members. He was taken as a fighter in the Revolutionary United Front until he was later captured by the Sierra Leonean army and again recruited by force into its ranks.[13] Similar acts have been reported as practised by Uganda's Lord Resistance Army[14] (LRA) or UNITA[15] in Angola. Children abducted by the LRA were made to carry out raids, loot and burn houses and kill civilians and other child soldiers. A boy who escaped the LRA reported: "One boy tried to escape but he was caught. His hands were tied and then they made us, the other new captives, kill him with a stick. I felt sick. I knew this boy from before; we were from the same village. I refused to do it and they told me they would shoot me. They pointed a gun at me, so I had to do it… I see him in my dreams and he is saying I killed him for nothing, and I am crying."[16]

Witnessing atrocities against their families can also be a leading factor for the children to join voluntarily opposing forces. In Burma, children witnessed "parents, relatives, and friends being tortured or killed. There were cases where boys as young as 12 joined rebel armies so they could avenge such atrocities."[17]

Children have been even forced to watch or commit cannibalism, to undo family ties and bond with the armed group. Examples from the DRC include a child associated to an ethnic based armed group being forced to mutilate his mother's breast for a ritual ceremony where body organs were eaten by the group.[18] In Sierra Leone, "… B saw

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11) In Sierra Leone it is estimated that between 10,000 and 30,000 children were recruited by all parties to the civil war. At times the vast majority of the Revolutionary United Front fighters were children, some as young as nine, most of which were abducted, joined by force or fear of reprisals. As with the RUF, in Liberia thousands of children under 15 were used by the NPFL led by Charles Taylor and some were forced to kill or torture family members. Enrique Restoy, "Sierra Leone - the Revolutionary United Front, trying to influence an army of children", July 2006. 9) See Reaching Children in War, Sudan, Uganda and Mozambique, Ed. Cole, P. Dodge & M. Raundalen, Sigma Forlag, Norway, 1991, p. 22.

12) AFRICANEWS-Issue 45, Dec. 1999, at www.reliefweb.int and Human Rights Watch, Easy Prey: Child soldiers in Liberia, 1994.

13) Sierra Leone Truth and Reconciliation Commission, Children's version website, http://www.trcsierraleone.org/children/chapterthree.htm.

14) See www.amnesty.org/ailib/intcam/children/kids99/kidreport.htm.

15) See World Vision "Position Paper on Children in Armed Conflict" June 1999, p. 6.

16) Coalition to Stop the Use of Child Soldiers, Global Report 2004, Uganda.

17) Aliran´s statement before the UN HR Commission, Press Release HR/CN/917.

18) Interview held by the author with an NGO officer working with demobilised children in DRC.

his father and brother beaten to death and their internal organs removed and given to his mother to prepare as a meal. The mother obeyed or else she would also have been killed. When the meal was ready, the rebels asked B and his mother to join them in eating the meal."[19]

Manipulation of children as witnesses, to surrender or humiliate parents

Manipulating children as witnesses appears to be used as a tool to degrade and morally undermine a target population by weakening its fundamental social cell, the family. A head of family is demeaned by becoming powerless to protect his/her family and being unable to spare them from watching his/her suffering or humiliation. This also appears to be done in order to terrorize families and thus force them to subdue or to flee. For instance, a clear strategy used by Serbian forces in Kosovo in 1999 was to threaten or attack civilians in front of their families. Various human rights organisations confirmed that it was part of the systematic abuses on the civilian population to take Kosovar children as hostages or threaten them with death until the parents produced money or jewels. The parent would be beaten or killed in front of the children if they failed to do so.[20] Médécins Sans Frontières (MSF), describing the forced deportation process from Kosovo, specified: "those who do not hand over their money or car quickly enough, or those who do not have any more money to give, are executed in front of the others."[21]

It is not uncommon to force family members to watch atrocities or to commit crimes deliberately in front of them to show the community what can occur to them if they resist or collaborate with the enemy. In Sierra Leone, children watched amputations, infanticide and killings of family members, as this girl's account illustrates: "While I was being raped, the rebels found my three male relatives who were hiding under their beds. They stabbed them with their bayonets and then shot them. They raped me in my bedroom and then brought me into the living room. Three men and three women were also brought into the room. They were put in line and then the rebels gave them the choice between their life or their money. The rebels strip searched each one and then killed them on the spot. The group was forced to watch as each was killed."[22]

As gender-based violence

In her global study on the impact of armed conflict on children, Graca Machel maintains that children affected by gender-based violence also include those who have *witnessed the rape* of a family member and those who are ostracised because of a mother's assault.[23]

Forcing children to watch their mothers or other family members being (gang) raped has been a common tool to inflict maximum humiliation on the victim, the family

19) Nick Heeren, "Sierra Leone, and civil war, neglected trauma and forgotten children", 2004, Handicap International, article available at www.child-soldiers.org/resources.

20) OSCE, Report on the Human Rights Situation in Kosovo, June-October 1999. at www.osce.org.

21) MSF, "Kosovo: Accounts of a deportation", Apr 1999, at www.reliefweb.int.

22) Human Rights Watch interview, Freetown, May 25, 2000. See http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm.

23) Supra n.1 as n. 92.

and the whole community. For instance, the widespread and systematic use of rape and other sexual violence on thousands of girls and women in ten year long conflict in Sierra Leone has been well documented, including cases where children were forced to watch such abuses. A Sierra Leonean witness reported: "In the evening, M.S. was locked in the guardroom at the CDF office with nine other women and her young child: Twenty CDF came to the guardroom and told us, the women, that we could choose between [being] raped or killed. I was raped by a young CDF on the ground of the guardroom. I told him that I was a suckling mother but he did not care. My baby was in the room when he raped me. He made me stoop like an animal. He said, 'I am a government man so no one will ask me anything about this.'"[24] "M.F., the thirteen-year-old who was raped by five rebels, witnessed how her stepmother's mother was beaten by the RUF with a long pestle in Momoria village in Koinadugu district in 1998. The rebels then shoved the pestle into her anus. M.F. said that her stepmother's mother was still alive when they left her with the pestle in her anus, which was bleeding"[25].

UNICEF has also reported that widespread rapes and other sexual violence inflicted on women and girls in the Democratic Republic of Congo are committed in front of the husbands, fathers and children of the victims.[26] For instance, during the uprising of rebel forces in Bukavu, in Eastern DRC, in June 2004, Human Rights Watch reported that "international and local sources reported dissident forces going from house-to-house raping and looting. In Bukavu, soldiers raped a mother and her three-year-old daughter on June 3 in the center of town. The mother was gang raped by six soldiers in front of her husband and other children …"[27]

HRW also reported that Serbian forces in Kosovo "entered women's homes and raped them either in the garden, in an adjoining room, or in front of family members". MSF confirmed this, reporting cases of women being raped in their own homes where their families were forced to watch.[28] Likewise during the conflict in Haiti the Inter-American Human Rights Commission (I-AHRC) reported that "… often, a violation occurred in the home of the victim, in front of the children and other family members, and thus not only the woman, but the entire family was terrorised… mothers were raped in the presence of their children.[29] Hundreds of women and girls have been abducted and raped during the conflict in Darfur, Sudan. For example, "on 20 June 2006, X armed with a J3 gun and riding a camel attacked a woman, her daughter aged three and her uncle whilst they were collecting firewood outside Doumma IDP camp. X threatened the uncle with death and then proceeded to flog the woman and her child

24) Human Rights Watch, Sexual violence against women and girls during the civil war, at http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm.

25) Human Rights Watch interview, Kabala, March 7, 2002.

26) UNICEF press release on systematic rape in DRC.

27) "D.R. Congo: War Crimes in Bukavu", Human Rights Watch Briefing Paper, June 2004.

28) HRM, "Kosovo: rape as a weapon of 'ethnic cleansing'", at www.hrw.org/hrw/reports/200/fry/Kosov.

29) I-AHRC, Report on the situation of Human Rights in Haiti, at http://www.cidh.oas.org/countryrep/enha95/eh95p1.htm, para. 122.

all over their bodies before abducting them. X took the woman and her child to a nearby forest where he repeatedly raped her."[30]

Breaking cultural norms, for instance by forcing children not only to watch but to actually rape their mothers, or hold them while they are being raped, or the rape of old women in front of their sons and husbands, has been used in many cases to degrade and create terror in the community. In Sierra Leone, men have been forced to rape members of their own family under threat of being mutilated by having their "hands or arms cut off."[31] Rebels also forced children into incestuous practices, one of the biggest taboos in any society: "They witnessed sons forced at gun point to rape their own mothers."[32] "One survivor witnessed the RUF trying to force a brother to rape his sister in Sambanya village in Koinadugu district. When the brother refused to do so, the rebels shot him. Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa."[33] This was also part of the recruitment process into the rebel forces. Children themselves report: "Many of us were forced to kill or rape our own family members, in order to ruin our moral sense and destroy our identity and our family ties."[34] Forced incest has been documented in other conflicts as well, such as Bosnia Herzegovina, Rwanda and Haiti. Testimonies were collected from Bosnian "young children who watched from hiding as chetniks raped their mothers and sisters, or forced men to rape their own family members"[35], particularly men being forced to rape their own sons[36] and daughters. In Haiti, "in many cases, the woman was forced to witness the rape or murder of her daughter or other family member before being herself raped. In one case of which the IACHR was informed, a 15 year-old was forced to rape his own mother."[37]

Upon perpetration of enforced disappearances

The Inter American Human Rights Commission[38] found, based on numerous cases, that during the perpetration of disappearances in Peru, "generally, the soldiers or police paid little attention to the witnesses and proceeded to do what they came to do anyway. Arrest in people's home was usually carried out in front of whoever happened to be there: wives, children …". In Argentina, the truth and reconciliation Commission (CONADEP) gathered consistent testimonies of kidnapping and torture conducted by the military in front of the children of the

30) UNMIS Child Protection report, June 2006.

31) Reported by Amnesty International.

32) See Speech delivered by the Vice President Berewa at the conference on "the Rule of Law and the Legacy of Conflict" at Gabarone, Botswana from 16th-19th January 2003.

33) Human Rights Watch, Sexual violence against women and girls during the civil war, available at http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm.

34) http://www.trcsierraleone.org/children/chapterthree.htm.

35) "Mass Rape in Bosnia Breaking the Wall of Silence" an interview with Seada Vranic.

36) Comment by Kate Mose on novel by Slavenka Drakulic, Witness for the persecution.

37) Inter-American Commission on Human Rights, Chapter V, Human Rights Situation in Haiti, available at http://www.cidh.oas.org/women/Haiti95women.htm.

38) Report N°54/99, Peru, April 13, 1999, para. 81.

victims. The Commission's report indicates that "parents were taken from their homes and put in cars to unknown destinations in front of their children".

A survivor reports the following: "… we had an electric fan that they used as a 'picana', but to make the electric blow more effective they opened mineral water bottles to throw water on my mother, who had been tied to a chair. While conducting this savage act, another one flagged her with a belt to the point of making her body bleed and deform her face. After a long while they decided to take us all, except for Viviana who was 6 months old and who was left at home with my 13 year old sister"[39]

Watching torture during interrogation and detention

It has been argued that "generally speaking, torture already starts in the home at the time of arrest. Brutal policemen or soldiers break into the home and smash the furniture, beat up and perhaps rape the wife in front of the husband and children …"[40] In Argentina, testimonies of survivors and witnesses of torture indeed indicate that "the interrogation of victims started in the victims' own residence, without waiting to take them to the Clandestine Detention Centres, in presence of their family members, who were thus victims too of the cruel treatment". In many cases children are kept in detention together with their parents.[41] Family groups are often tortured together, sometimes separately but in view of one another, or in different cells, while one is aware of the other being tortured.[42] In Argentina sometimes the children were also driven to the "Clandestine Detention Center", a torture center, where they were present while their parents were being tortured, or else the children themselves were tortured in front of their parents. Some people reported that while being interrogated they could hear the screaming of their family members being tortured. A survivor reported: "Many times we were threatened to witness the torture upon family members and in some occasions this happened. In my case, I had to watch how they tortured my husband. Another detainee, named X, was forced to witness the torture of her son who was 12 years old …"[43]

The situations just described provide indications on the circumstances in which children are forced to watch atrocities against parents or family members and why. These circumstances are not uncommon. It must be borne in mind that at least 300,000 children under 18 are estimated to be serving in armed forces or rebel groups in approximately 30 countries, and that torture is reportedly practised in at least in 92 countries.[44]

A.b. Effects on children of witnessing crimes against parents or caregivers

The wide range of symptoms of PTSD and therapeutic responses, are beyond the scope of this study, which focuses on the legal as-

39) Nunca Mas, Informe de la Comisión Nacional sobre la Desaparición de Personas, Testimony of C.A.C (Legajo N° 1806).

40) I. Genefke, I. Lunde, J. Ortman, B. Sorensen, "Rehabilitation of Torture Victim" in Torture, Supp. No. 1, 1992.

41) Supra. n. 18.

42) J. Timerman, Prisoner without a Name: Cell without a Number, Weidenfield & Nicholson, London, 1981. p.148.

43) Nunca Mas, Informe de la Comisión Nacional sobre la Desaparición de Personas, in "Secuestros en presencia de los niños".

44) D. Summerfield, ibid at 392-401.

pects of making children witness crimes.[45] Yet, the legal qualification of such conduct and the reparation obligations towards the victims are very much linked to the suffering and potential prejudice caused to children by the conduct.

UNICEF revealed the conclusions from a 1997 study on Kabul Afghan children, where almost all of the children interviewed had witnessed acts of violence. Most children surveyed were suffering from nightmares, anxiety and concentration problems, which also affected their appetite and their ability to play. MSF in Sierra Leone reported that witnessing events such as torture, execution, (attempted) amputations and public rape often results in traumatic stress or even PTSD. Traumatic stress associated with physical complaints like headaches and body pains was reported more frequently.[46]

Similar results are found in studies on Vietnamese, Lebanese,[47] Palestinian, Israeli, Irish, Afghan, Pakistani, Sri Lankan, Ugandan,[48] Rwandan, Colombian, Angolan,[49] Liberian and Mozambican children. Some of the PTSD symptoms often reported are difficulty in sleeping, pessimism about the future, depression, aggression, low self-esteem and shame and guilt at not having intervened more effectively.[50]

In particular, there is increasing evidence among psychiatrists that children witnessing severe violence inflicted on a family member show signs of PTSD,[51] most gravely in cases of forced separation from parents and witnessing violence against parents.[52] It is argued that it can be even highly traumatic for a child if 'soldiers' only threaten to kill his/her mother and the child believes that they will do so, since "it is the child's subjective experiences, the meaning that the child gives to the event, that is important"[53].

An analogy can be drawn with situations of children witnessing violence in the ambit of the private sphere (domestic violence), which has often been addressed by domestic courts (e.g. deciding on parent contact) and by social welfare systems. In such cases, research[54] and surveys have revealed adverse behavioural, psychological, social and emotional effects on children who witness violence within the family. Actually, observance of serious and sustained domestic violence has been argued as producing, in some cases, an emotional state on children

45) See Wilson, J.P & Raphael, B. Eds, International Handbook of Traumatic Stress Syndromes, Plenum Press, New York, 1993.

46) Medecins Sans Frontieres, "Assessing Trauma in Sierra Leone", 11 Jan. 2000, at www.relief.org.

47) See study "The Grapes of Wrath", at www.unicef.org/lebanon.

48) Amnesty International, Uganda, "Breaking God's commands", 18 Sept.1997, AI Index: ASA 04/01/98.

49) See UNICEF, "The Trauma of the War" in The State of the World's Children 1996.

50) See D. Black and M. Newman, "The Effects on Children of Witnessing Violence Perpetrated Against their Parents or Siblings" in Childhood Abuse, Ed. G. Van Bueren, Darthmouth Publishing Ltd., 1998, pp. 211-215.

51) D. Fish, "Domestic Violence and Children", in Fam. Law, Feb (1995), pp. 82-84.

52) M. Snipstad and Dr. L. Williamson, UNICEF, Skopje (March-June 1999).

53) See M. Raundalen supra, n. 9 at p. 29.

54) See D. Wolfe, "other forms of Child Maltreatment", Child Maltreatment, CL, Mille-Perrin & R.D., Perrin, Sage Pub. London, 1997, p. 197-212.

indicative of actual *psychological abuse of the child.*[55]

It should be noted though that the actual impact of traumatic experiences on children depends on various factors, such us age, developmental stage, religious beliefs and the different cultural and family/community coping mechanisms.[56] It should be also noted that "some children show signs of traumatisation only in the short-term and not in the long-term, some children show few signs immediately but have delayed reactions, and some children are traumatised in both the long and short-term. Furthermore, some children may never be traumatised by events that have profound pathological effects on other children."[57]

Bearing in mind the above cultural and individual differences, it cannot be ignored or dismissed though, that exposure to cruel violence against parents/caregivers is proved to cause stress or mental suffering that may result in adverse consequences on children's immediate or longer-term health, intellectual, psychological and social development.

Moreover, it has been shown that in fact children often witness crimes not just accidentally, but as part of a deliberate plan or pattern of abuse with a purpose, such as demeaning or humiliating families and communities, or initiating children as combatants. What are the implications in international law of the above findings; what can be done about it under international law?

B. The human rights aspect of forcing children to witness crimes

The practical interest of defining the act of making children witness crimes against parents as a human rights violation or a crime against the child, and of arguing the need for accountability and reparation to children as victims of a crime distinct from the one they witness, can be questioned. This is legitimate since, regardless of legal definitions, children who have been exposed to witnessing atrocities, in general or specifically against close family members or friends, often receive some assistance through community support or from health, psychosocial or rehabilitation programmes. This support implies an acknowledgement of the suffering and the adverse effects caused on children's lives by making them watch such crimes. And at the same time they do not expose children to potential re-traumatising effects or to security risks by participating in human rights' reporting or justice processes. However, it can also be argued that unless forcing children to watch crimes is acknowledged itself as an abuse against the child and those responsible for stopping or punishing it are made aware, it is less likely that such abuses will be stopped or prevented in the future.

B.a. Is making children witness crimes unlawful under international law?

It seems clear, especially during armed conflicts, that children witnessing crimes can be the consequence of a deliberate act or a reckless omission, which results in, or is in-

55) H. Conway, "Emotional Abuse in Domestic Violence Cases", in Fam. Law, Sept. 1996, p. 570-72.

56) Summerfield, in Rethinking the Trauma of War, Ed. Patrick J. Bracken, C. Petty and SCF, Free Association Books, London, 1998, p. 9-38.

57) S. Eldebour, R.t. Bensel and D.T. Bastien, "Ecological Integrated Model of Children of War: Individual and Social Psychology", in Child Abuse and Neglect, Vol.17, 1993, pp. 805-819.

tended to produce, suffering distress on children. Can such act or omission constitute torture or inhuman treatment against the child? Indeed, forcing parents to watch cruel treatment inflicted on their children has been used as a form of torture against the parents. Likewise, and even more so given the special vulnerability of children, it could be argued that it amounts to torture to force children to watch the torture inflicted on their parents. Even if the intention, by doing so, were not to torture the child but the parents, it could be implied the intention to cause suffering on the children by making them watch their parents being tortured and through that, cause greater pain to the parents who are aware of the child's suffering and cannot prevent it. Yet, to sustain this conclusion, I will first analyse the definition of torture and inhuman treatment according to international law, and examine whether the conduct under study falls under such definition.

Since torture is understood as constituting "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment",[58] I will first examine the concept of inhuman treatment (which comprises degrading and ill treatment). However, it must be noted that in several cases certain regional and international human rights bodies, namely the UN Human Rights Committee (HRC) and the European Court on Human Rights (ECHR), refer to torture and or inhuman treatment without distinguishing in which circumstances it was one or the other. Making this distinction is difficult in practice and may not be necessary from a practical point of view.[59]

According to the ECHR, for treatment to be inhuman it must be intended to cause "*severe* suffering, *mental* or physical, which in the particular circumstances is unjustifiable"[60]. These distinctive elements, have been interpreted as follows:

- *It may cause mental suffering* "by creating a state of anguish and stress by means other than bodily assault".[61] The prohibition of torture and inhuman treatment has been actually interpreted by the HRC as "relating not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."[62]
- *The suffering must be severe*. The term severe leaves scope for interpretation, as for instance, the pain of a child can be, under equal circumstances, higher than the suffering of an adult. In particular, the difficulty with mental suffering is that the degree of suffering is not susceptible to precise gradation, as opposed to physical suffering.[63] The ECRH's caselaw consistently maintains that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention on Human Rights which prohibits inhuman treatment. But it also maintains that the assessments of this minimum are relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical

58) Declaration on Torture (1975), Art.1(2).

59) Human Rights Committee, General Comment No.7, para. 2(1982).

60) 12 Yearbook, The Greek Case 504 (1969), at 186.

61) 12 Yearbook, The Greek Case 461 (1967).
62) General Comment No. 20 (1992).

63) See N. Rodley, The treatment of prisoners under International Law, Clarendon Press, Oxford, 1999, p. 94.

and/or mental effects, and in same cases, the sex, *age* …[64]

- *Causing suffering must be deliberate*. This intentional element may be often difficult to prove. Can negligence, though, suffice to allege inhuman treatment? The International Criminal Tribunal for the former Yugoslavia (ICTY) defined cruel treatment as "an intentional act or omission […] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,"[65] and the International Criminal Tribunal for Rwanda has alleged responsibility for mental suffering caused by deliberate negligence[66]. Also the Special Rapporteur on Torture maintains that "negligent behaviour leading to severe suffering […] might well incur condemnation as inhuman and/or degrading treatment"[67].

We can conclude from the above that for violent or abusive behaviour to be considered inhuman treatment, the conduct should be intended to cause severe mental (or physical) suffering. It is not necessary, hence, that the conduct results in actual injuries, impairment or mental disorders, as proof of the suffering sought. Therefore, children subjected to watching crimes against parents can be victims of inhuman treatment because of the mental suffering intended by such conduct, regardless of whether the children present or not post traumatic stress disorders or other symptoms of emotional suffering.

As to whether certain ill treatment amounts to torture, I depart from the definition of torture under International Human Rights Law stated in the Torture Convention[68] since there is evidence that there is now general acceptance of its main elements.[69] The latter defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pains or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…"

The intentional element of torture deserves particular consideration. The EHRC[70] has judged that the purpose is a constitutive element of torture, in particular to obtain information or confessions or punishment. The UN Convention Against Torture (CAT) adds amongst the possible purposes of torture "any reason based on discrimination of any kind" (Art.1). The Inter-American Torture Convention (Art.2) goes even further defining torture "as a means of intimidation" or "for any other purpose", and the ICTY stated that "humiliation" can be a purpose

64) Northern Ireland v. UK, Series A, No. 25,41, para. 162.

65) Celebici Judgement 16 Nov. 1998, para. 552.

66) ICTR, Kayishema & Ruzindana, Case No. ICTR-95-1-T, 1995, para. 151.

67) Rodley, supra n. 46, p. 78.

68) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT), entered into force June 26, 1987, Art.1 (1).

69) Sustained by the ICTY in Furundzija, Judgement of 10 Dec. 1998, para. 160-161.

70) See supra n. 43.

of torture.[71] Other broader interpretations include that of Judge Matscher, in his separate opinion in the *Northern Ireland* case, suggesting that purpose may include "other reasons" such as "sadism". In particular, the intentional element of torture has been interpreted more broadly when it applies to suffering inflicted on children. Referring to torture of Filipino children, the World Organisation Against Torture (OMCT) alleged the purpose was "to sow fear in the community".[72] And it argues that "to the extent to which torture is applied to children it is necessary to take into consideration not only intention, but also what is clearly gross negligence".[73]

Further, for the particular case of making children witness crimes against their parents or caregivers, two specific elements need closer analysis in light of the above constitutive elements of inhuman treatment and torture: the act of *making someone watch* ill treatment inflicted upon a third person and secondly, the relevance of the *family* or *care link* between the witness and the person whose ill treatment is being witnessed.

As of the first element, the act of making someone witness a crime, it was addressed by the ICTY in the *Furundizja* case.[74] "Witness D was then forced to watch Accused B's sexual attacks on Witness A. The physical attacks upon witness D, as well as the fact that he was *forced to watch sexual attacks on a woman,* in particular a woman whom he knew as a friend, cause him severe physical and mental suffering". It adds: "in this regard both witnesses were *humiliated*"[75] The Court failed though to distinguish whether the act of forced witnessing was itself inhuman treatment.

The Torture Convention's definition of torture actually does appear to be applicable in cases of *forced witnessing of crimes,* as follows: torture is "any act by which severe pain or suffering (as the one caused to the child witness by forcing him/her to watch ill treatment upon a third person, e.g. family member) whether physical or mental, is intentionally inflicted on a person (in this case the child witness) for such purposes as obtaining from him or a third person (in this case the third person whose ill treatment the child is witnessing) information." Indeed, the need for flexibility in the interpretation of human rights norms has been invoked by the EHRC in the *Selmouni case,* referring to torture and inhuman treatment. The Court said that the Convention is a "living instrument, which must be interpreted in the light of present-day conditions".[76]

As for the second element, the family link, it has been manipulated to make both the witness and the person being tortured suffer.

There are various examples where courts or quasi-judicial bodies have acknowledged the suffering inflicted on individuals by making them watch or listen to their children or relatives being tortured. For instance, in the *Akayesu case* a witness said "her mother begged the men… to kill her daughters rather than rape them in front of her…"[77]

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71) See supra n. 40 at p. 162.

72) Supra n. 47.

73) Eric Sottas, OMCT Bulletin No. 62&63, September 1997, p. 67.

74) Supra. n. 40 para. 267 (ii).

75) Ibid. Para. 127.

76) Selmouni v France, Judgement of 28 September 1999, para. 101.

77) Akayesu, Judgement 2 Sept. 1998, at para. 5.5

In the *Estrella case,*[78] the alleged psychological torture consisted"… in threats of torture or violence to relatives or friends or… in threats of making us witness the torture of friends…"

In the *Celebici case,* the ICTY seems to sustain that the manipulation of the family link in the commission of the crime aggravates the crime, amounting to cruel and inhuman treatment. The Trial Chamber, based on the findings that the defendant forced two brothers to commit *fellatio* with each other and ordered a father and son to beat one other, stressed "the heinous nature of the acts involved and the depravity of mind necessary to conceive of and inflict such forms of suffering". It especially found that "...the deliberate act of forcing them, *father and son,* to beat one other repeatedly over a period of at least ten minutes constitutes inhuman treatment under Art. 2 of the Statute and cruel treatment under Art. 3 of the Statute."[79]

The relevance of the family link has been particularly emphasised by the HRC in cases of enforced disappearances. Close family members of disappeared persons have been recognised as victims of inhuman treatment by the government responsible, for the "anguish and stress" caused by "the continuing uncertainty concerning (his) her fate and whereabouts… *The mother is a victim of the violations suffered by her daughter*" (emphasis added).[80] The Inter American Human Rights Court has consistently granted compensation to the families of disappeared on similar grounds. Also, the EHR Court has found violation of Art. 3 (inhuman treatment), against the families of the disappeared. In the *Caciki case,* the Court specified that whether a family member of the disappeared is a victim of inhuman treatment will depend on the existence of special relevant factors, such as "the proximity of the family tie- in that context, a certain weight will attach to the parent-child bond – (and) ... *the extent to which the family member witnessed the events* in question ..." (emphasis added).[81]

The UN Special Rapporteur on Torture has also acknowledged the importance of the family link by including among examples of psychological torture as "…most powerful of all in many cases, the threat that physical abuses will be extended to *persons close to the prisoner*" (emphasis added).[82] It can be argued that *forcing* someone to witness physical abuse against persons close to him/her would cause as much or even greater suffering than *threatening* the person with committing such physical abuse. In that sense, forcing a person to watch physical abuse against a family member can certainly be psychological torture.

Finally, with regard to the specific situation under study, the I-AHRC has set a clear standard by specifically qualifying the witnessing by children of crimes against parents as torture. It stated: "... The two women ... were beaten and decapitated in front of the three children. The victimisers then opened the stomachs of the victims, from the waist to the neck ... These actions obviously constitute acts of physical torture

78) Estrella v Uruguay (74/1980), GAOR, HRC 38th session, Supplement No. 40 (1983), Annex XII.

79) Celebici, Judgement of 16 November 1998. para.1276 and 1070.

80) Quinteros v Uruguay (107/1981), HRC Report, GAOR, 38th session, Supp No.40 (1983), Annex XXII, pp.119-120.

81) Cakici v Turkey, Judgement of 8 July 1999, para.98.

82) Supra n.46, at p. 10.

against those who are killed *as well as psychological torture against those who are forced to witness these events...*"[83]

Summing up, it can be argued that deliberately or recklessly (gross negligence) committing crimes in front of a child, so as to inflict severe mental suffering on the child, for any purpose (such as humiliation, intimidation or even sadism), is *inhuman treatment* against the child. In most severe cases, for instance when a child is forced to watch cruel treatment inflicted on his/her parent, such behaviour would amount to *torture*, since mental torture can involve "the infliction of severe pain or suffering through threats or the compelling of the victim to watch his or her family being tortured."[84]

The recognition of certain acts considered inhuman treatment as amounting to torture can have significant implications in terms of individual and state responsibility, as we will see later. In this light, then, it is worth emphasizing that forcing children to witness crimes against their parents can be considered torture against the child.

Each type of conduct, inhuman treatment and torture, is certainly unlawful: each is prohibited by most national legal systems, and as an absolute prohibition – i.e. even in state of war or public emergency[85] under International Human Rights Law.[86] Torture, in particular, is prohibited under general international law, as a peremptory norm allowing no derogation by other norms (i.e. by treaty law and even by "ordinary" customary law), unless by those with the same customary force – i.e. *ius cogens*).[87]

In times of armed conflict, inhuman treatment and torture are also expressly prohibited under International Humanitarian Law. All four 1949 Geneva Conventions (GC) prohibit torture and other ill treatment of persons protected by them. In particular, some especially heinous acts are defined as "grave breaches" of the Conventions,[88] and these grave breaches include "torture or inhuman treatment" and "wilfully causing great suffering or serious injury". But the GC apply in international armed conflicts, while in most cases children witness crimes in internal conflicts, which comprise most of today's armed conflicts. Protocol I (PI) to the GC actually provides that internal wars of national liberation should also be considered as international conflicts (Art. 1(4)), and therefore the grave breaches' regime would be applicable. Moreover, in any non-international armed conflict, Common Art. 3 to the Geneva Conventions applies as a minimum standard, and it expressly prohibits "cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment" against those who do not take part in hostilities. Common Art. 3 is now well established as belonging to the corpus of customary

83) I-AHRC, Third Report on the HR Situation in Colombia, http://www.cidh.oas.org/countryrep/colom99en/chapter-4htm, para. 303.

84) L. Sunga, The Emerging System of International Criminal Law, Ed. Cluewer Law Int., 1997 p. 1333.

85) Included as non-derogable rights in ICCPR, Art. 4 and EUCHR, Art. 15, also in CAT, Art. 2 (2).

86) See UDHR, Art. 5, ICCPR, Art. 7, EUCHR, Art.3, IACHR, Art. 5(2), ACHR, Art. 5, I-A Convention for the Prevention of Torture (1987), European Convention for the Prevention of Torture (1989), Torture Declaration (1975) and CAT (1987).

87) See Rodley, Supra n. 46, at p. 62-74.

88) Arts.49, GCI; 50;GCII;129;GCIII;146;GCIV and Art. 85, PI

international law, and is moreover applicable both to state and non-state actors.[89]

Having concluded that making children witness crimes against parents or caregivers is unlawful as it constitutes inhuman treatment, or in severe cases torture, against the child, I will now examine the implications of this unlawful conduct in terms of accountability for the state concerned and the individual perpetrators.

B.b. The question of accountability

B.b.1. State responsibility

State responsibility arises from the breach of an international obligation. In practice, the acts herein studied are often perpetrated by members of armed forces, paramilitary or law enforcement officials. Since the state acts through its representatives, their conduct is imputable to the state. Furthermore, the state would be responsible even if it did not specifically order the wrongful conduct concerned and even if its servants acted in ways beyond their orders, or beyond their powers (*ultra vires*), or in violation of national/international law.

What about state responsibility if such unlawful acts are committed by private individuals (e.g. rebels)? The state would also be held responsible for their acts if it encouraged them or endorsed them as its own. For the cases of armed conflict, the ICTY has expressly declared that "…under current international humanitarian law, in addition to individual criminal liability, state responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torture".[90] It is now well established that state responsibility will also arise if it failed to exercise the *due diligence* which could reasonably have prevented such conduct by private individuals.[91] The I-AHRC confirmed that state responsibility is engaged in the case of its lack of diligence to prevent, investigate and punish abuses[92] by private individuals, either by its complicity, support and acquiescence of unlawful acts or by its failure to prevent and punish them. In this light, some have even defined domestic violence as "domestic torture", seeking to underline the state responsibility in the so-called "private sphere" when it fails to stop, punish or prevent abuses perpetrated in the home (e.g. wife beating, which in some cases has been assimilated by its clear analogies to political torture in cells).[93]

Children witness crimes in situations of internal or international armed conflict, during internal disturbances and in peacetime. I will thus examine the state's obligations to protect children from torture and other ill treatment in such situations.

Under International Human Rights Law[94]

I will examine states' obligations to protect children specifically under the UN Conven-

89) Nicaragua v U.S.A. (Merits), 1986 I.C.J Reports 14, pp.113-114, para.218. Further, Protocol II to the GC (PII), which develops and supports Common Art.3, prohibits "violence to the life, health and physical or mental well being of persons" in internal armed conflicts (Art.4). However, PII sets a high threshold for its applicability, such as requiring a certain level of territorial control by rebel forces (Art. 1).

90) Furundijza, Supra.40, para. 142.

91) See R. Higgins, Problems and Process, Clarendon Press, Oxford,1999, pp. Also see T. Meron, Human Rights, Humanitarian Norms and Customary Law, Clarendon Press, Oxford 1989, p. 170-171.

92) Velazquez Rodriguez, 21 July 1989, Ser C No. 7, para. 172-73.

93) See Claudia Hasanbegovic, "Cruel but not unusual" in Trouble and Strife, No. 39, 1999.

tion on the Rights of the Child (CRC), due to its to virtually universal standing (ratified by 191 states) and its comprehensive protection of children. It will be shown that the protection obligations under the CRC implicitly include the state obligation to protect children from being made deliberately or recklessly witness atrocities.

Article 6(2) of the CRC says: "States Parties shall ensure to the maximum extent possible the survival and development of the child". This introduces a dynamic[95] aspect to the right to life, including preventative action and refers not only to physical but also to mental, emotional, psychological, social and cultural development.[96] Art. 24 recognises the child's right "to the enjoyment of the highest attainable standard of health". Health has also been widely interpreted broadly as both physical and *mental* well being. Moreover, states parties shall "ensure that no child shall be subjected to torture or other cruel or degrading treatment or punishment" (Art. 37), and shall…"protect the child from *all forms* of physical or *mental violence,* injury or abuse, neglect or negligent treatment, maltreatment…"(Art. 19). This provision thus includes protection not only from physical but also from psychological violence. Finally, states are obliged, "in accordance with their obligations under international humanitarian law, to ensure the protection and care of children who are affected by an armed conflict" (Art. 38(4)).[97] This would include protecting children from being targeted during conflict such as forcing them to watch atrocities upon parents/ caregivers.

The above provisions imply various positive obligations, grounded on Art. 2 which obliges states parties to "*respect*" and "*ensure*" the rights guaranteed in the Convention. From the premise that making children witness atrocities violates children's rights, particularly to be protected from inhuman treatment, torture and all forms of violence including in armed conflict, states have hence a positive obligation to ensure that those violations don't occur. Such positive obligations, says the CRC Committee, include "taking preventive measures to ensure the health and full development of children, making complaint procedures and remedies available to the child, awareness campaigns, education and training to prevent torture, and establishing an independent monitoring system".[98] Further, the HER Commission said in the *Costello case* that states parties to the EUCHR "do have an obligation under Art.1 of the Convention to *secure* that children within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment contrary to Art.3 of the Convention". In 1998, in *A v UK,*[99] the HER Court went further, holding that the states' obligation rising from Art.1 extended to treatment administered by *private individuals.*

95) General Guidelines Regarding the Form and Contents of Periodic Reports to be submitted by States Parties under article 44, paragraph 1 (b) of the Convention, 11 Oct. 1996.

96) See D. Reichenberg, S. Friedman in International Responses to Traumatic Stress Ed. By Y. Danieli, N. Rodley and Lars Weisaeth, Bayswood Pub., New York, 1996, p. 315.

97) Note that the African Charter on the Rights and Welfare of the Child (Art. 22(3)) goes further, providing for the special protection of children caught up in "tension and strife".

98) Recommendations on the implementation of Art.19, CRC/C/58, para. 61.

99) A v UK, Judgement of 23 Sep. 1998, Preports 1998-VI, no. 90.

Also, as to inhuman treatment in general, under International Human Rights Law states are obliged to investigate complaints, establish responsibility of the individual perpetrators and provide effective remedies to victims. Moreover, in the specific case of torture, it implies bringing perpetrators to justice, compensating the victims and adopting measures to prevent recurrence.[100]

In short, International Law intends to bar not only actual breaches but also potential breaches by prohibiting "not only torture but also the failure to adopt the national measures necessary for implementing the prohibition."[101]

Under International Humanitarian Law

Beyond the above examined obligations under the Geneva Conventions and the additional Protocols prohibiting inhuman treatment and torture, a customary principle of the law and customs of war, is that of sparing combatants and civilians from *unnecessary suffering.*[102] This is reflected, *inter alia,* in the norms ruling lawful targeting[103] during attacks and the choice of means and methods of warfare[104]. This principle to avoid unnecessary suffering underlies certain special measures protecting children, such as their evacuation from conflict areas[105] and the creation of hospital or safety areas for the most vulnerable, including young children.[106] Such provision for "safe zones" developed into the concept of *children as "zones of peace"* (initially for vaccination/aid access purposes), promoting the idea of protecting children from attacks. Most specifically, PI. Art. 77(1) expressly provides that "children shall be the object of *special respect* and shall be protected from any incident assault" (emphasis added).

The above norms specifically protecting children reveal that the parties to the Geneva Conventions and Protocols are bound both by *positive* and *negative* obligations, respectively to *protect* and *respect* children.[107] As of children witnessing atrocities, states would be hence positively obligated to take preventive measures, such as military training on the above applicable laws so as to prevent forcing children to watch violent acts or cruel treatment against parents or caregivers. Parties to the conflict also have a negative obligation to refrain from inflicting inhuman treatment on children, this including refraining from forcing children to witness crimes.

B.b.2. Individual criminal liability

A second question, beyond the state responsibility, is whether the authors of crimes committed deliberately or recklessly in front of the children of the victim can also be held criminally responsible for forcing the children to watch those crimes.

It has been concluded above that making children witness crimes against their parents/caregivers constitutes itself inhuman treatment and even torture against the child. Under domestic laws, torture and other forms

100) Rodley, supra n. 46.

101) ICTY, supra n. 40 para. 148.

102) Hague Convention IV, Art. 23; PI, Art. 35.

103) PI, Arts. 51,52,54 and 56.

104) PI, Art. 35.

105) Art. 78 PI, Art. 4 (3)(e), PII.

106) Art. 14, GCIV.

107) Positive obligations are such as to provide food and health (PI, Art. 70.1). Negative obligations include, for example, refraining from recruiting children under 15 years of age into armed forces (PI, Art. 77(2); PII, Art. 4, para.142).

of ill treatment against children often constitute criminal offences entailing individual liability. Under Humanitarian Law, the GC expressly[108] establish that any state should either try or extradite to stand trial the perpetrator of grave breaches[109] of the Conventions and its additional Protocols (i.e. mandatory universal jurisdiction). Special attention should be paid to the individual liability in internal armed conflicts, where children witnessing crimes seems to most often occur. A number of developments indicate that violations of Common Art. 3 (applicable in internal armed conflicts) are war crimes.[110] Moreover, the ICTY sustained in the *Tadic case* that even "*customary international law* (emphasis added) imposes criminal liability for breaches of Common Art. 3."[111] Therefore, grave breaches of the laws of war, which include inhuman treatment and torture, both in international and internal armed conflicts, are crimes under international law and allow for universal jurisdiction. Further, if forcing children to witness crimes can amount to torture, due to the inherently universal character of its prohibition, CAT recognises mandatory universal jurisdiction and thus States are obligated to extradite or prosecute the perpetrators of torture, both if it was committed in conflict or peacetime.[112]

Moreover, the Statutes of the ICTY, ICTR and the Sierra Leone Court, have expressly included torture and inhuman treatment within grave breaches of the Geneva Conventions, violations of Common Art. 3 and crimes against humanity under their jurisdictions. The Statute of the International Criminal Court (ICC) has further confirmed this recognition of torture and inhuman treatment as war crimes and crimes against humanity under the Court's jurisdiction[113] (this with a virtually universal application, i.e. not limited only to crimes committed in specific countries and over specific periods of time as the above tribunals).

Hence, if making children witness crimes against parents/caregivers constitutes inhuman treatment or torture and/or "wilfully causing great suffering or serious injury to body or health", in conflict situations it constitutes a *war crime*. Further, torture and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" when committed as part of a widespread or systematic attack directed against any civilian population,[114] in war, internal strife or in peacetime, have been recognised as *crimes against humanity*. This is particularly relevant for the case under study, since forcing children to witness crimes against parents in many situations has been a pattern of abuse and part of systematic attacks

108) See Arts.50, GCI;51. GCII; 130, GCIII; 147, GCIV; Art. 85, PI.

109) See supra. n. 69.

110) See Art. 3, ICTY Statute, Art. 4, ICTR Statute, Art. 5, ICC. Also T Meron, "International Criminalization of Internal Atrocities", 89 AJIL, 544(1995).

111) Tadic, 2 Oct. 1995, para. 134.

112) CAT, Arts. 5 (2) and 7. See Rodley, supra n. 46, p. 130.

113) Article 8 of the Rome Statute of the International Criminal Court stipulates: "the Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes". The acts subsequently listed as constituting war crimes include torture or inhuman treatment.

114) Cf. article 7.1 of the Statute of the International Criminal Court.

against a civilian population. Torture can also amount to genocide if the constitutive intentional element of genocide (to destroy a group) is present.[115]

This has obvious implications for national and international courts or transitional justice mechanisms with jurisdiction over war crimes, crimes against humanity and genocide, particularly those currently dealing with situations where forcing children to watch crimes against parents has been consistently reported and to a certain extent documented. The issue of making children witness crimes is thus particularly relevant to the ICC, for crimes being investigated in the DRC and Uganda, the ICTR, ICTY and the Special Court of Sierra Leone. Moreover, the fact that enlisting or conscripting children into armed forces or groups has been expressly recognised as a war crime under the Statute of the International Criminal Court, and that the Court's first indictment in the DRC has actually been on charges of child conscription, can have a positive impact on addressing impunity for forcible child witnessing of atrocities against parents/family as part of the recruitment process and use of children by armed forces/groups in DRC. Likewise for the Special Court in Sierra Leone which has prosecuted individuals for child recruitment.

Finally, for the specific situation of criminal liability for making children witness crimes, the questions of proof of intention, negligence, command responsibility and superior orders need to be raised. First, is whether a public official or an insurgent commits an atrocity in front of the victim's children *intentionally*. The intention, by so doing, to inflict suffering *on the children* should be proved, which may be difficult. Yet, I would argue that if the purpose sought by making the child watch a crime against the parent was proved to be actually inflicting pain on or humiliating the parent (not the child) by making the child watch, it is implied the perpetrator's intention to make the child suffer by forcing him/her to watch, and by causing such suffering to the child further humiliate or punish the parent. Second, on the question of negligence, the public official or insurgent may *recklessly* commit atrocities, in disregard of the fact that the victim's children are watching and of the obvious or foreseeable impact of such conduct on the children. In this case, we may ask whether it was foreseeable that the children would be present, whether the perpetrator could anticipate the suffering and potential harm caused to the child by witnessing a crime against her/his parent, and whether the perpetrator could have done something to prevent it. Finally, whether the latter knew or should have known that making children witness was an unlawful act.

It appears that, by common sense, brutally murdering or raping a mother or father in front of their children would cause significant mental suffering to the children. Yet, inflicting this pain on the child witness may not necessarily be perceived as manifestly illegal or a crime itself against the child. Could the perpetrator invoke superior orders? In order to bear criminal responsibility, the superior order must be obviously criminal. If the soldier was ordered to force children to witness crimes, as a means of *torture* against the child or the parent, superior orders would certainly not be a defence;

115) Acts of genocide include "causing serious bodily or mental harm to members of the group" committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", cf. art. 2 of the Convention on the Prevention and Punishment of the crime of genocide, entered into force Jan. 12, 1951.

superior orders is no defence to any form of torture.[116]

Could the commander be held accountable for his failure to act? Commanders have a duty to act if they know or should have known that the soldiers under their charge commit unlawful acts, and are responsible if they fail to do something about it.[117] If soldiers recklessly or intentionally committed atrocities in front of children, and the commander knew or, under reasonable diligence, should have known this, her/his omission to intervene would constitute culpable negligence, based on her/his duty to ensure that troops under his command observe the law.

In conclusion, under International Human Rights Law and International Humanitarian Law, the individual who makes children witness atrocities, can be held criminally liable for torture or inhuman treatment against the children, as an ordinary crime of torture, a war crime or a crime against humanity, depending on the situation. The state can also be held responsible if it endorsed such conduct by its forces or by private individuals and failed to prevent, investigate or punish it.

B.c. The question of reparation[118]

From the above arguments it is clear that children forced to watch serious crimes against their parents/ caregivers have been subjected to inhuman treatment or torture and (regardless of their resilience) they are thus victims of a crime or human rights violation. According to the so called "Victims' Declaration", "victim means persons who, individually or collectively, have suffered harm, including physical or *mental injury, emotional suffering,* economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of national criminal laws and of international human rights norms." Such victims are entitled to redress.[119]

The child witness, as a victim of a crime or a human rights violation is entitled hence to seek and obtain reparation.[120] Reparation, in practice, may include access to justice, physical and psychological rehabilitation, financial compensation and other means of moral reparation. Some of these means of reparation are discussed below.

Acknowledgment of the truth

Recognition of the victim's suffering plays an important role in the victim's coming to term with his/her experience.[121] "The victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what happened to them".[122]

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116) CAT, Art. 2(3).

117) Commanders should prevent, suppress, report, raise awareness and initiate penal or disciplinary action (PI, Art.87). See Green, L.C., "War Crimes, Crimes against Humanity and Command Responsibility" in Essays on Modern Law of War, Transnat. Publishers, New York, 19.

118) It is acknowledged that the examination of the victim's rights deserves a more comprehensive treatment. The purpose sought in this section is just to raise the issue of the child witness of crimes against parents or caregivers being him/herself too a victim of human rights' violation and or/a crime.

119) Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, G.A.40/34, annex, 40, a/40/53 (1985).

120) See Redress, "The need for Redress, Why seek a remedy?", Torture, Vol. 6, No. 1, 1996.

121) Welsh, James, supra n.74 at p. 150.

122) D. Becker, E. Lira, M.I. Castillo, E. Gomez and J. Kovalskys, "Therapy with victims of Political Repressions in Chile", Journal of Social Issues, 1990, 40; 3, pp. 133-149.

From the individual victim's perspective, documenting the abuses is thought by many to already go a long way towards addressing the consequential traumatic-stress, and testimony can thus become an individual cathartic process. It must be stressed, though, that despite the fact that testifying may have in itself a healing/rehabilitation power for children, in some cases (as in less verbal cultures) retelling/sharing past experiences are not as therapeutic, or can even be counterproductive.

From the public interest perspective, ultimately, it is through public awareness of the occurrence, extent and circumstances of human rights violations that necessary changes in legislation, policies and practices may occur. This then leads to the prevention of further abuses and addresses the perpetuation of impunity for certain acts.

Justice and aggravation of the sentence

"…Justice, even if long delayed is reparative"[123]

Some argue that the potential prejudices for the individual children concerned, and for children in general, of denouncing having been forced to watch crimes against parents outweigh its potential benefits. They sustain that if actual or potential human rights violators were made aware of the fact that forcing children to witness crimes against their parents is unlawful, and that if such acts were reported, documented, denounced and punished, child witnesses might well get killed, disappeared, punished or threatened in order to eliminate potential witnesses in court. Such argument is legitimate insofar as any denunciation of crimes or human rights violations can put the victims and witnesses in real danger or at risk. With the same token, though, authors of crimes and human rights violations may decide to get rid of any other person who witnessed the crimes, not just the victim's children. This witness protection argument is legitimate and must be addressed but should not prevent raising general awareness, not only of the damaging effects on children of making them watch atrocities, but also of the unlawful and even criminal character of such behaviour towards the child. By raising awareness of this legal aspect, some children may be able to get reparation. Certain authors may be actually charged for inhuman treatment or torture as an independent offence against the child witness, this having a potential deterrent and reparative effect (even if by just acknowledging the truth). At least the sentences against such author may be aggravated for having forced children to watch the crimes being judged.

Indeed, forcing children to witness crimes can be a qualitative aggravating factor of the crime witnessed. Acknowledging this in sentence and in the determination of "just satisfaction" can bring indirect reparation to the child (included in the compensation). For instance, in *State v Kindem,*[124] the Court decided that the cruelty to the victim, as well as the fact that a *person close to the victim was forced to witness the attack*, were aggravating factors in the sentencing. In *State v Gaines,* where the applicant was robbed, beaten and forced to witness his wife being raped, one of the aggravating factors was "treating the victim with particular cruelty during the offence…"[125]

123) D. Summerfield, Addressing human response to war and atrocity: major themes for health workers, Medical Foundation for the Care and Victims of Torture, London, 1993.

124) 313 N.W.2d 6,7(Minn. 1981).

125) No. CX 87-160 Court of Appeals of Minnesota, 408 N.W. 2d 914; 1987.

Having said that, the risks for children's safety and of re-traumatisation by making them provide information or even participate in a trial may be very high, if victim/witness protection is not ensured before, during and after the proceedings. Specific protective and support measures for children have been hence established within national and international victims and witness protection programmes and standards.[126]

Compensation

It has been shown that making children witness atrocities against their parents/caregivers can adversely affect children's health and development. These children should hence be entitled to receive compensation for the prejudices caused. Even where children display strong resilience,[127] they should be able to seek compensation for the emotional distress caused, as "non-pecuniary" or "moral damage"[128], perhaps even as a symbolic remedy for a state or individual wrong. Compensation aims not only at the survivor's regaining a better or normal life (e.g. costs for medical or other necessary assistance), but also at the state's assuming responsibility for its act/omission as a penalising element. In this regard, the Special Rapporteur on Extra judicial, Summary or Arbitrary Executions has stated clearly that compensation "is a recognition of the state's responsibility for the acts committed by its personnel…" and "the right of the victim is important not as an instrument of revenge, but in order to ensure respect for the rule of law".[129]

In particular, the entitlement to compensation has been consistently recognised to victims of torture.[130] In relation to forced witnessing of crimes, it is particularly relevant to mention certain decisions by national courts in civil proceedings where compensation has been granted specifically *to witnesses of death or severe pain of family-members.* For example, in the UK, civil liability has been recognised for damages caused to "secondary victims", which were interpreted to be those meeting the requirement of proximity to the primary victim by links of love and affection and proximity to the incident in time and space.[131] Yet, as shown above, it can be argued that children negligently or forcibly exposed to witness atrocities are not just secondary victims but also *primary victims* of inhuman treatment or torture. Likewise, certain USA Courts have ordered civil compensation for witnesses of family-members' death on grounds of "*negligent infliction of emotional distress*". In the leading case *Thing*,[132] the Court said that a "plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if … said plaintiff: (1) is closely related to the injured victim;

126) See UN Guidelines on child victims and witnesses of crime, see Social Council resolution 2005/20 of 22 July 2005.

127) See Recovering from 30 years of war: Refuge Women and Children in Angola, WCRWC, Dec. 1996.

128) This was recognised by the EUHR Court in Aksoy v Turkey, Judgement of 19 Dec. 1996, para.113, also I-AHR Court in Velazquez Rodriguez, 21 July 1989, Ser. C No. 7, para. 39.

129) E/CN.4/1999/39, 6 Jan. 1999.

130) See Art.14 CAT and Estrella case, supra n. 59.

131) See notes on the Alcok case, "Health & Safety Bulletin" 242, Feb. 1996.

132) Thing v La Chusa (1989) 48 Cal. 3d 644, 257Cal. Rptr. 865, 771.

(2) is present at the scene of the injury-producing event at the time it occurs and is aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress".

However, often compensation is not (fully) available from insolvent offenders. For that reason the establishment, strengthening and expansion of national compensation funds has been promoted[133] and various states have compensation schemes for victims of torture or other serious crimes.[134] The European Convention on the Compensation of Victims of Violent Crimes (1983) indeed "encourages the development of compensation schemes, specially when the offender has not been identified, cannot be prosecuted or punished or is without resources." It must be noted though that poor states or states ravaged by conflict are frequently unable or unwilling to set up compensation schemes. The setting up of voluntary funds, like the UN Fund for Victims of Torture, could allow compensation for children witnesses of crimes in cases of insolvent or non-identified perpetrators and of unable/unwilling states. Also, reparative measures for children victims of atrocities, including those forced to watch them, could be inserted in peace agreements.

It must be noted though that compensation schemes can be too expensive or counter productive, for example causing the loss of interest by the victim to engage/continue in the prosecution of the offender, or impeding a better use of those funds for prevention purposes, or leading to children's manipulation by their families to claim being witnesses and thus get compensation in order to obtain some economic relief.

Conclusions

Making children witness atrocities committed against their parents or caregivers, deliberately or recklessly, is generally considered as a particularly cruel behaviour towards the children. It has been shown moreover that such cruel behaviour can have adverse consequences on children, such as increased anxiety, developmental delays, sleep disturbance and nightmares, lack of appetite, withdrawn behaviour, learning difficulties, and aggressive behaviour. Further, it has been shown, that thus causing mental suffering for children can constitute inhuman treatment and, in some cases, amount to torture against the child. Parting from that premise, making children witness atrocities against parents/caregivers can constitute a war crime or a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. Apart from thus leading to individual criminal liability, the responsibility of the state is also engaged when its officials or private individuals commit such acts and the state is complicit, endorses or tolerates them or fails to investigate, bring perpetrators to justice, or take possible steps to prevent them. Finally, as victims of crimes and/or human rights violations, children forced to watch atrocities against parents/caregivers are entitled to seek and obtain prompt redress, such as compensation.

These conclusions are relevant not only to governments, courts and transitional justice mechanisms but also to organisms and individuals responsible for protecting children, given the range of necessary responses to the phenomenon of making children witness crimes. In this light, the measures

133) Supra n.99, para. 12 and 13.

134) Such as in Germany, for holocaust survivors, Chile or Argentina. See R.B. Lillich, "Damages for gross violations of international human rights by US Courts", in Torture Vol. 6, Nov. 1996.

described below seem to be little applied while appearing to be particularly needed to help diminish the occurrence of the conduct under study.

Training and education

The question of the unlawfulness and potential effects of forcing children to witness atrocities should be included in awareness raising initiatives targeting relevant authorities and civil society. In particular, training on the lawful use of force, human rights and humanitarian law to the military, police, law enforcement officials, all state security forces and UN peacekeepers, should include awareness and understanding of all obligations implied in the duty of "special respect" and "protection" owed to children during conflict, of the implications of the customary principle of avoiding unnecessary suffering during conflict and of relevant child protection provisions under national and international law. Awareness should also extend to armed opposition groups' members, legally bound to respect civilians under international humanitarian law.[135] Those specifically working with children (e.g. humanitarian and medical staff, educators, social workers) should be also reminded of the unlawful nature of making children witness atrocities and its implications, given their possible important contribution to advocacy and rehabilitation initiatives.

Monitoring and reporting

Awareness among human rights and child rights organisations on the state obligations and the criminal aspect of forcing children to witness atrocities is particularly needed. Human rights workers could thus include within the scope of their human rights monitoring, investigation, documentation and reporting work, the question of whether children were made witness the abuses reported. Also within their advocacy work, they could promote the implementation of prevention, rehabilitation and, if appropriate for justice, responses. It is therefore crucial to establish effective exchange and co-operation in this matter between human rights and humanitarian organisations who work with victims of human rights abuses.

The underlying objective of including forced child witnessing of crimes in the above human rights monitoring, reporting, and justice seeking work, is ultimately to afford children the maximum protection possible from abuse. With the same purpose, the best interest of the children should be the primary consideration while weighing the risks and benefits of such human rights undertakings. Finally, children themselves should be listened to, as much as possible, when trying to determine what is in their best interest.

135) N. Rodley, "Can Armed Opposition groups Violate Human Rights?", in Human Rights in the 21st century, Mahoney & Mahoney, London, 1992.

List of acronyms

CAT: UN Convention Against Torture
CRC: UN Convention on the Rights of the Child
ECHR: European Court on Human Rights
I-ACHR: Inter American Commission on Human Rights
ICC: International Criminal Court
ICTY: International Criminal Tribunal for the Former Yugoslavia
ICTR: International Criminal Tribunal for Rwanda
HRC: UN Human Rights Committee
GC: Geneva Conventions of 1949 regarding protection in armed conflict
PI: Protocol I addition to the Geneva Conventions of 1949
PII: Protocol II addition to the Geneva Conventions of 1949
UDH: Universal Declaration of Human Rights.

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