

Anti-Impunity Tool:

Guidance for investigating and prosecuting serious violations against children in armed conflict

December 2015

Mission Statement

Conflict Dynamics International is an independent, not-for-profit organization founded to prevent and resolve violent conflict, and to alleviate human suffering resulting from conflicts and other crises around the world.

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1 Introduction

The *Anti-impunity Tool: Guidance for Investigating and Prosecuting Serious Violations against Children in Armed Conflict (CAC Anti-Impunity Tool)* is a practical guide to assist national judicial actors to investigate, prosecute, and try serious violations committed against children in armed conflict (CAC).¹ It is also a resource for child protection and child rights actors (CPAs) on how to support efforts to end impunity for these violations. Conflict Dynamics International has designed this Tool to support national efforts to investigate and prosecute CAC violations alongside the 2015 *Children in Armed Conflict Accountability Framework (CAC Accountability Framework)*,² which supports prevention and remedy of serious violations of international law committed against children in armed conflict.

Serious violations, such as genocide, crimes against humanity, and war crimes, continue to be committed against children in situations of armed conflict, with perpetrators rarely held to account for their actions. International laws and norms obligate States to investigate and prosecute those responsible. Yet, national efforts often face multiple obstacles to fighting impunity for CAC violations, such as shortfalls in resources and technical capacity, as well as the risk of threats and reprisals from perpetrators.

Technical expertise is vital when investigating and prosecuting CAC violations. Judicial accountability for CAC violations involves specialized techniques for working with CAC victims/survivors, as well as coordinating appropriate support and protection measures with CPAs. This Tool provides national judicial and other actors with concrete guidance and practical tips.

Consultations underpinning the development of this Tool were undertaken with CAC accountability actors, including judicial actors and CPAs, in the Democratic Republic of the Congo (DRC) in 2014 and 2015 to identify key needs for preventing and remedying CAC violations. Stakeholders interviewed for these consultations overwhelmingly called for the development of a tool to support the investigation and prosecution of CAC violations, which led to the design of this *CAC Anti-Impunity Tool*. While developed in response to specific needs in the DRC, the *CAC Anti-Impunity Tool* is globally applicable and can relate to any national jurisdiction.

1 This Tool provides guidance on investigations and prosecutions of CAC violations by dividing the judicial process across progressive stages: the investigations stage (the process of gathering evidence); the prosecutions stage (preparing the crimes with which an accused will be charged and preparing the evidence to be presented at trial); and finally, the trial (the process of hearing and judging evidence), and the post-trial stage. To view this tool and other related practical resources online, visit www.cacaccountability.org

2 Conflict Dynamics International, *Children in Armed Conflict Accountability Framework: A Framework for Advancing Accountability for Serious Violations against Children in Armed Conflict* (Cambridge: 2015).

1.1 About this Tool

The *CAC Anti-Impunity Tool* aims to ensure that perpetrators of CAC violations face legitimate consequences at the national level, in accordance with international laws and norms. This Tool also identifies ways in which CPAs can collaborate with judicial actors in the investigation and prosecution of CAC violations.

The primary objectives of this Tool are to:

- **realize respect of child protection practices and principles** by national judicial actors in the investigations and prosecutions of CAC violations;
- **increase the priority of, and attention accorded to,** investigating and prosecuting CAC violations at the national level;
- **strengthen the collaboration** between child protection actors and judicial actors;
- **empower children** by facilitating their involvement and participation in national efforts to fight impunity for CAC violations; and
- **promote institutional reforms** by strengthening national responses to impunity for CAC violations.

1.2 Audience

This Tool is designed to assist individuals and organizations involved with the investigation, prosecution, and trial of perpetrators of CAC violations at the national level. This extends to judicial actors such as the police, magistrates, prosecutors, judges, and lawyers representing victims, survivors, and witnesses of CAC violations. Child protection actors who work with conflict-affected children can use this Tool to explore how to safely and effectively collaborate with judicial actors.

1.3 Structure

This Tool has seven sections and two annexes:

- **Section 1** offers an introduction to this Tool.
- **Section 2** presents key terms and an overview of relevant international laws and norms.
- **Sections 3 and 4** address key considerations for conducting investigations and prosecutions for CAC violations at the national level.
- **Sections 5, 6, and 7** focus on aspects that require attention throughout the judicial process and beyond, such as involving CAC victims/survivors and other children and engaging child protection actors.
- **Annex A** features an example of a domestic legal and procedural framework, using the DRC as a case study.
- **Annex B** consists of two worksheets that present an approach to analytically organizing how to prove a CAC violation.

2 Underlying elements for CAC judicial accountability

2.1 Key terms and definitions

The following are key terms and definitions that apply to CAC judicial accountability efforts.

- **Child:** A human being under the age of 18 years.³
- **Children in armed conflict (CAC):** All individuals who, as children below the age of 18, have directly suffered serious violations of international law in the context of armed conflict. CAC can include individuals who have subsequently passed age 18; despite being adults, these survivors share certain vulnerabilities and needs that are inherent to their war-time experiences, including possibly having been exposed to physical and/or psychological abuse, having been separated from their families, and/or having been deprived of educational, health care, and other social and cultural opportunities that result from armed conflict.⁴

These children and adults are referred to as “**victims/survivors**” throughout this Tool. The term “victims” serves primarily as a technical term for judicial actors. The use of this term is not intended to degrade the capacities and resilience of the children who have survived CAC violations. This Tool, like the *CAC Accountability Framework*, promotes the meaningful involvement of children and communities who have survived CAC violations in accountability processes and policy decisions.

- **CAC violations:** All serious violations amounting to crimes under relevant bodies of international law, including international humanitarian law, international human rights law, and international criminal law, as well as national law, that are committed against children in armed conflict. This includes, among others, killing, maiming and other forms of physical violence, recruitment and/or use of children, rape and other forms of sexual violence, attacks on schools and hospitals, abductions, torture and inhumane treatment.
- **The best interests of the child:**⁵ A standard that refers to the deliberation undertaken when deciding which types of services, actions, and orders will best serve a child. For example, under this principle, judicial proceedings should give primary consideration to the best interests of the child who is participating, while safeguarding the rights of the accused, as prescribed by the *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*.⁶ The best interests standard also extends to ensuring the protection and harmonious development of children. In this respect, the child has the right to be shielded from any form of hardship, abuse, or neglect, including physical, psychological, mental, and emotional abuse and neglect. In particular, children who have been traumatized are accorded every step to enable them to enjoy a healthy development.

³ United Nations, *Convention on the Rights of the Child* (“CRC”) (1989), art. 1.

⁴ For a detailed discussion, see “In Focus: Practical challenges of defining ‘children affected by armed conflict’” in Conflict Dynamics International, *Children in Armed Conflict Accountability Framework* (2015), pg. 6.

⁵ See *CRC* (1989), art. 3. (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”)

⁶ UN Economic and Social Council (ECOSOC), *Resolution 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, E/RES/2005/20 (22 July 2005).

2.2 International laws and norms for CAC judicial accountability

CAC violations are largely defined by international laws and norms, although national laws may also exist to criminalize specific violations. For ease of reference, this Tool refers to crimes under international law as “international crimes,” and, crimes that originate under national law as “domestic crimes” (mindful that once crimes under international law are domesticated, they also become part of national law). International laws and norms also place specific obligations on States to provide a remedy for victims of CAC violations, which can include investigations, prosecutions, and reparations, among other measures. A comprehensive summary of the international legal framework that is applicable to CAC violations is available in the *CAC Accountability Framework*.

In addition to the principle of complementarity under the *Rome Statute of the International Criminal Court* (“Rome Statute”) (1998), States have obligations under international law to provide a remedy to victims of serious crimes, including investigation and prosecution thereof. The domestication of international treaties that include serious crimes relevant for CAC accountability is an important step in building the national legal framework that can enable investigation and prosecution of these crimes by national jurisdictions.

Annex A to this Tool summarizes the national legal framework in the DRC, including the international legal sources of CAC violations that amount to crimes incurring individual criminal responsibility and their jurisprudence in the context of the DRC.

IN FOCUS

Judicial accountability for sexual violence

Cases of rape and other forms of sexual violence committed in the context of armed conflict require specialized expertise for successful investigation and prosecution. A number of useful tools are available to assist in investigations and prosecutions of these crimes, which include specific considerations when working with child victims/survivors. Examples of relevant resources include:

- *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practices on the Documentation of Sexual Violence as a Crime under International Law*⁷
- *Prosecution of Sexual Violence. Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions, Lessons learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda.*⁸

7 Government of the United Kingdom, Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practices on the Documentation of Sexual Violence as a Crime under International Law*, (London: 2014).

8 International Criminal Tribunal for Rwanda, *Prosecution of Sexual Violence. Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions, Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, (The Hague: 2014).

3

Key considerations for investigations

Evidence of CAC violations falls into two categories: primary and secondary evidence. Primary evidence consists of sources that are directly linked to the commission of the incident, such as accounts of survivors or eyewitnesses, police reports, or physical evidence such as munitions fragments following attacks on schools. Primary sources represent the most potentially reliable sources of evidence. Secondary evidence consists of documents that are prepared after the incident and provide second-hand accounts, which analyze and interpret primary information. Secondary sources require confirmation from independent sources and should be evaluated for reliability based on methodology and credibility of the sources used. Both primary and secondary evidence can be useful in investigating CAC violations.

Investigating CAC violations requires gathering evidence on their nature and scope, and identifying the individuals and/or parties to the conflict who may be responsible. While CAC violations may occur as separate incidents in a situation of armed conflict, they often occur as part of a larger series of serious violations of international law committed by armed forces and/or groups against civilians. For example, armed actors may target children alongside adults in an attack where multiple serious violations are committed. As a result, identifying CAC violations can be a difficult task, given the number of violations that may have been committed across numerous incidents.

In order to best determine clear investigative goals and objectives, undertaking investigations into CAC violations requires:

1. **selecting investigation targets:** Determining where and how to focus an investigation; and
2. **determining the best kinds of evidence:** Identifying evidence of CAC violations that demonstrate reliability *and* substance in terms of proof of the crimes committed.

3.1 Selecting investigation targets

Investigations must determine the geographic areas **where** CAC violations have been committed, **when** they were committed, the **types** of CAC violations that have been committed, and the **perpetrators** responsible for their commission, among other details. Secondary sources that document and report on CAC violations can help focus investigations and enable selection of areas for investigation (or “investigation targets”). These sources are also known as “open source intelligence.”

Open source intelligence consists of information that is available through public sources, such as media reports and government data. Many international, national, and local actors, as well as media outlets, publish reports on CAC violations that can provide investigators with background information on potential CAC violations. Investigators can use this information to focus investigations into CAC violations.

Examples of essential sources of documentation and reporting of CAC violations that can be referred to when initiating investigations into CAC violations include:

- **reports published by the United Nations:** UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict; UN-led Monitoring and Reporting Mechanism; country-specific group or panel of experts; UN peacekeeping missions; UN Office of the High Commissioner for Human Rights; UNICEF and others;
- **reports published by non-governmental organizations (NGOs) and academia:** international NGOs (e.g., Child Soldiers International; Watchlist on Children and Armed Conflict; Human Rights Watch); national and local NGOs and others;
- **radio, print, and televised footage published by media outlets:** BBC; Reuters; Radio France Internationale (RFI); Al Jazeera and others.

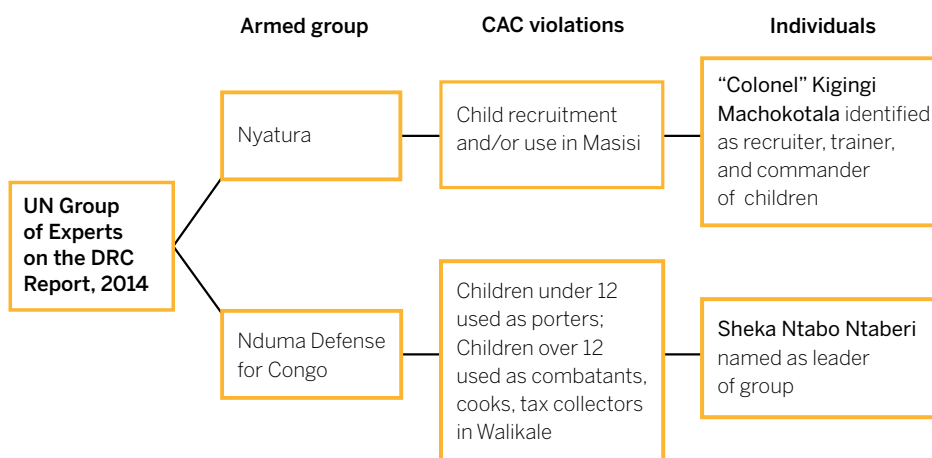
Open sources may provide the following examples of information on CAC violations:



IN FOCUS

Using open source intelligence related to CAC violations in the DRC

As explained above, judicial actors can use public sources to identify leads for their investigations. For example, the UN 2014 *Final report of the Group of Experts on the Democratic Republic of the Congo*⁹ presents detailed findings on CAC violations, including recruitment and use of children by four non-State armed groups in clearly identified regions and communities in eastern DRC. The report names specific individuals who were recruiting or commanding armed groups that used children, and details the nature through which children are recruited and/or used by these groups.



⁹ See Letter dated 12 January 2015 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council and the Final report of the Group of Experts on the Democratic Republic of the Congo, S/2015/19, starting at para. 118.

3.2 Collecting types of evidence

When collecting evidence of CAC violations, the nature of these violations and the vulnerabilities of CAC victims/survivors deserve special attention. To prevent further hardship and trauma that may result from participating in investigations and prosecutions, CAC victims/survivors require special protection and assistance that are appropriate to their age, maturity, and needs (see Section 5: Involving CAC victims/survivors as witnesses). For these reasons, it is generally preferable to secure multiple sources of evidence for investigations into CAC violations, rather than relying solely on testimony from CAC victims/survivors. It is also important to note that in some cases children's involvement in judicial proceedings can promote their physical and psychological recovery and social reintegration.

The following tables describe examples of the kinds of evidence that can be used to prove CAC violations, including direct evidence, overview evidence, documentary evidence, expert evidence, and physical evidence.¹⁰

CATEGORIES	DEFINITION	EXAMPLES OF EVIDENCE OF CAC VIOLATIONS
Direct Evidence	Testimony by individuals of discrete incidents or events that they personally saw, heard, or participated in.	<p>Example 1: A parent of a child describes how a member of an armed force or group, who was under the command of the accused, abducted and recruited his or her child.</p> <p>Example 2: A former member of an armed force or group describes orders given by a senior commander to attack a school to terrorize the local population.</p> <p>Example 3: A civilian describes the activities of children associated with armed forces or groups during an attack on his or her village.</p>
Overview Evidence	Testimony by individuals of a general or summary nature on particular facts in the case that is based on their personal knowledge. <i>Overview evidence can enable the use of one witness in lieu of relying on direct evidence from several individuals (such as CAC victims/survivors).</i>	<p>Example 1: A child protection officer provides evidence on the number of children he or she has assisted to demobilize from an armed actor over a period of time based on his or her actual experience.</p> <p>Example 2: A member of an armed force or group provides evidence on the participation of children in training camps.</p>
Documentary Evidence	Writing or other proof that is supplied in a document to establish the existence of a fact in the case. <i>To be admitted in court, the document has to be authenticated or proven as genuine, as per the applicable rules of the national jurisdiction.</i>	<p>Example 1: Medical forensic reports of cases of physical or sexual violence committed against children.</p> <p>Example 2: Radio logbooks and/or intercepts showing the command and/or control by an accused over the elements of an armed force or group.</p> <p>Example 3: News articles, radio or television broadcasts or broadsheets, or recordings of interviews. For example, press reporting can establish that commanders knew or ought to have known of the violations their armed forces or groups committed.</p> <p>Example 4: Video recordings of armed forces or groups using children in training exercises or attacks.</p> <p>Example 5: Human rights reports documenting CAC violations that armed forces or groups committed during the period under investigation.</p>

¹⁰ It is important to take note of "lead evidence" that may arise during investigations. "Lead evidence" consists of information that may direct investigators to proof of the commission of a CAC violation. While lead evidence may not always consist of evidence that is admissible at trial, it is a useful investigative tool. An example of lead evidence may be rumors in a village as to which armed actor may have been responsible for a particular attack.

CATEGORIES	DEFINITION	EXAMPLES OF EVIDENCE OF CAC VIOLATIONS
Expert Evidence	<p>An opinion based on expert knowledge and experience, which the court accepts based on the knowledge, experience, and/or education of a witness.</p> <p><i>The court must determine whether the expert testimony is appropriate, can be supported by the facts of the case, and will assist in understanding the evidence or in considering an issue of fact.</i></p>	<p>Example 1: Expert evidence on intimidation and threats by armed forces or groups to carry out enslavement and forced labor of children as part of their military operations.</p> <p>Example 2: Expert evidence on the command and control structure and operation of armed actors.</p> <p>Example 3: Expert evidence on the potential psychosocial impact of CAC violations on children; and, the identification of the specific risks and vulnerabilities of certain groups (e.g., children formerly associated with armed forces or groups, sexual violence survivors).</p>
Physical Evidence	<p>Items that can be seen and inspected by judicial actors, such as weapons.</p> <p><i>Known as real or material evidence, admissibility depends on having met the applicable domestic rules that govern the chain of custody.¹¹</i></p>	<p>Examples: Relinquished weapons or old military uniforms previously used by children, with insignia or markings unique to a particular armed force or group.</p>

3.3 Maintaining security for CAC victims/survivors during investigations

CAC victims/survivors may face considerable risk if associated with efforts related to investigations and prosecutions. The design and implementation of protective measures for these individuals apply at all phases of a judicial proceeding, including the investigations stage. It is critical that judicial authorities exercise utmost discretion and ensure that their actions do not cause harm to children and their families.¹² Working with local CPAs may mitigate some of these risks, whether by collaborating to move victims, survivors, and/or witnesses to a safe remote location for interviews or sharing intelligence on the security situation and movements of armed actors (see Section 7: Involving child protection actors). Careful and thorough supervision of intermediaries can avoid the potential of adversely affecting the integrity of judicial investigations and proceedings. For example, the Special Court for Sierra Leone relied upon national CPAs to act as intermediaries. Additionally, working protocols can ensure clear terms and conditions, transparency, and thus accountability for both parties in their interactions with CAC victims/survivors.

¹¹ The chain of custody involves the documentation of the seizure, custody, control, transfer, and analysis of physical or electronic evidence in chronological order.

¹² See, e.g., UNICEF, "UNICEF's Humanitarian Principles," A Principled Approach to Humanitarian Action (PATH) Training Programme, Session 4, last modified July 2003, <http://www.unicef.org/pathtraining/Documents/Session%204%20Humanitarian%20Principles/Participant%20Manual/4.2%20UNICEF%20Humanitarian%20Principles.doc> [accessed 23 November 2015].

4 Key considerations for prosecutions

4.1 Pursuing crimes under domestic or international law

Many national jurisdictions have adopted crimes under international law into their domestic laws. CAC violations may also constitute domestic crimes when they violate the national criminal code, national child protection laws, or laws governing recruitment to national security forces. National prosecutors may thus be in a position to decide to charge CAC violations as crimes under international law or, alternatively, as crimes under domestic laws. National prosecutors can consider the following questions when deciding whether to pursue CAC violations as crimes under international or domestic law:

	QUESTIONS FOR CONSIDERATION
CRIMES UNDER INTERNATIONAL LAW	<ul style="list-style-type: none"> • Have these crimes under international law been adopted nationally? • Does the national jurisdiction have the technical capacity and resources to meet the burden of proof required for international charges? • Does the case warrant pursuing theories of individual criminal responsibility under international criminal law, such as indirect forms of liability (see Section 4.3: Proving “individual criminal responsibility”)? For example, what are the potential limitations under domestic law?
CRIMES UNDER DOMESTIC LAW	<ul style="list-style-type: none"> • What provisions exist under national laws that could make pursuit of a case more straightforward than initiating a prosecution for a crime under international law? For example, what is the burden of proof for national crimes? How does it compare with the process of having to prove both general and specific elements of international crimes? • What benefits could arise out of cumulative charging? For example, could charging murder several times arrive at the same degree of severity of the crime as having to prove the general and specific elements of crimes against humanity, as required under international crimes? • What modes of liability are available to prove individual criminal responsibility? Is it possible to employ direct liability alone? How does this compare to requirements for international crimes that have been used to establish command responsibility for both military and civilian actors?

4.2 Charging CAC violations

Prosecutions of crimes often center on a “theory of the case.” This theory represents the prosecutor’s position around which the evidence is presented, organized, and supported. In developing and organizing a strategy for prosecuting CAC violations, it is useful for prosecutors to understand and depict why CAC violations are committed by armed actors and how they may serve military purposes, as well as the consequences of these violations for affected children and communities.

A credible theory of the case may be useful in organizing and presenting evidence to prove a specific CAC violation, including its essential legal elements¹³ (see Annex B: Worksheets: Collection and analysis of evidence of specific violations). For example, an important element of the crime of use of children by armed actors involves proving that this use constituted “active participation in hostilities.” A theory of the case can describe how the accused and his or her armed force or group terrorized the civilian population to gain territorial control and how abducting and using children figured as part of those operations in this overall strategy. By illustrating how children associated with armed forces or groups supported these military operations, the theory of the case can establish the link between the “**use**” of children and their “**active** participation in hostilities.”

¹³ The “elements of a crime” are the individual components that, when proven together, constitute a crime that an accused has allegedly committed. An important element of a crime is “intent,” also known as *mens rea* or “guilty mind.” Intent demonstrates that the accused intended to commit the crime and had the mental capacity to possess such intent.

Prosecutors can consider the following examples of ways in which CAC violations are generally committed that may be relevant to developing a strong “theory of the case”:

- **Part of a broader campaign:** Violations against children, such as killing and maiming, recruitment and use, and sexual violence, may be committed as part of a broader campaign to terrorize the civilian population and/or invoke collective punishments against specific groups or communities, including those of a particular ethnic or religious background. Children can also be targets of extreme violence intended to inflict maximum casualties against the civilian population.
- **Abduction and forced labor:** Children may be initially abducted and eventually subject to further violations, including recruitment and use by armed actors or sexual slavery. Armed forces or groups may commit violations against children that extend to forced labor and other uses of children for support functions, as well as sexual violence, arbitrary detention, and torture. These support functions demonstrate how the violations were part of military operations, and thus link crimes against children to an armed conflict. It may also be relevant to demonstrate how these violations persist in climates of impunity for armed actors.
- **Military objectives:** Conscription, enlistment, and/or use of children by armed actors¹⁴ may be committed for military purposes to bolster numbers of fighting soldiers; use of children may extend to forced labor such as porters, cooks, and scouts as part of operational support for armed forces or groups, as well as forced labor in other illicit activities, such as natural resource exploitation. A theory of the case can describe this broader strategy and demonstrate how recruitment and use of children was undertaken to support military operations. It is also important to note that leaders of armed forces or groups that lack clear recruitment procedures, including age verification procedures, remain potentially liable for this violation.
- **Attacks on and military use of schools and hospitals:** Armed actors may commit attacks on schools and hospitals, as well as using these facilities as military installations.¹⁵ A theory of the case can organize evidence of this crime to demonstrate how these attacks were part of a broader strategy to terrorize the civilian population and/or destabilize communities initiating a prosecution for a crime under international law.
- **Denial or obstruction of humanitarian access:** Armed actors may deny or obstruct humanitarian access to conflict-affected communities and/or access of communities to humanitarian goods and services. As in the case of attacks on schools, a theory of the case can organize evidence of this crime as part of other crimes that were committed to collectively punish civilian populations and/or terrorize communities.¹⁶

Prosecutors can pursue cases of CAC violations in different ways. Specifically, a prosecutor can consider whether the violations were directed specifically against children or were part of a violation that was committed against both children and adults, or whether a case involves a combination of child-specific and other violations against the civilian population. The following table offers some examples for each of these possibilities.

14 Under international law, it is prohibited for children under the age of 15 to be recruited into armed forces or groups, or to voluntarily join and/or be associated with them. For States that have ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, this prohibition applies also to children under the age of 18, unless a reservation has been entered.

15 For more information, see Global Coalition to Protect Education from Attack (GCPEA), *Lessons in War 2015, Military Use of Schools and Universities during Armed Conflict* (New York: 2015).

16 For more information, see Conflict Dynamics International, *Humanitarian Access in Situations of Armed Conflict: Practitioners' Manual, Version 2* (Cambridge, MA: 2014).

IMPACTED POPULATION	VIOLATIONS	EXAMPLES OF CHARGES
1. Violations directly and uniquely committed against children¹⁷	Sexual violence against children, recruitment and use of children, abductions of children, etc.	Thomas Lubanga Dyilo, a former commander of an armed group in the DRC, was accused and convicted of one count of the war crime of recruitment and use of children in active hostilities before the International Criminal Court (ICC).
2. Violations committed against both children and adults	Killings, torture, pillage, forced labor, etc.	Parts of the prosecutor’s indictment of Charles Taylor, the former President of Liberia, before the Special Court for Sierra Leone listed both children <i>and</i> adults as victims under a broad set of violations. ¹⁸
3. A combination of 1 and 2: violations committed directly against children, and violations where children were victims alongside adults		Charles Taylor’s indictment before the Special Court for Sierra Leone included crimes against humanity (abductions and forced labor) committed against both children and adults, <i>and</i> the specific crime of recruitment and use of children.

4.3 Proving “individual criminal responsibility”

Successfully prosecuting an accused of CAC violations requires proving that the violations were committed, and proving that the accused was criminally responsible for them. Proving individual criminal responsibility may include direct or indirect criminal responsibility.

Among others, proving **direct liability** includes **direct, personal responsibility for the commission of the crime by having:**

- **committed**
- **ordered**
- **solicited**
- **induced**
- **facilitated**
- **aided**, or
- **abetted** the crime.¹⁹

Proving these forms of liability for CAC violations requires evidence that the accused was personally involved in their commission. For example, in the case of the CAC violation of recruitment and use of children, the prosecution would need evidence to prove that the accused was directly involved in the recruitment or use of children through one of the modes of liability listed above.

17 Of note, the ICC does not have jurisdiction over anyone under the age of 18 at the time of the alleged commission of the crime. While the SCSL had jurisdiction over people over the age of 15, nobody under the age of 18 at the time of the alleged commission of the crime was prosecuted before the SCSL. This reflects the practice to treat child perpetrators primarily as victims, which is also highlighted in the “Paris Principles”: UNICEF, *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (February 2007).

18 See Prosecutor v. Charles Ghankay Taylor, Judgement, Case No.: SCSL-03-01-A, Special Court for Sierra Leone, 26 September 2013.

19 Direct liability can also involve the accused contributing to the commission of the crime by a group of people acting as part of a common plan, which is known as the joint criminal enterprise theory (See *Rome Statute* (1998), art. 25). This is a complex area of international criminal justice, whose application remains evolving.

Armed actors or survivors who may have witnessed the accused acting in such a capacity may be able to provide testimony to this effect. However, it is important to note that it can be challenging for victims/survivors of CAC violations, such as children associated with armed forces or groups, to testify directly against their perpetrator, and may risk further traumatization. A broad base of reliable evidence to prove direct modes of liability of the accused is thus essential (see Section 3: Key considerations for investigations).

The prosecution can also establish individual criminal liability by virtue of command or superior responsibility (known as **indirect liability**). In this case, an individual **with a military command position or a superior position that holds effective authority or control over subordinates** can be found criminally responsible for the actions of those subordinates where:

1. the individual knew or should have known that his or her subordinates were committing or about to commit crimes, and
2. failed to prevent or punish those subordinates for such crimes.

It is important to note that a situation where a commander gave orders to commit crimes would constitute **direct** liability, as discussed above.

It is important that prosecutions of CAC violations target senior-level military commanders and other actors enjoying a superior relationship (or relationship of command or with authority) over other individuals who commit CAC violations. Doing so can ensure that those most responsible for CAC violations are held accountable and deter others from committing similar crimes in the future.

Establishing command or superior responsibility often requires evidence from “insider” witnesses, which usually involves actors who worked alongside the accused and can testify to his or her authority, knowledge, and failure to act in the face of CAC violations being committed by his or her subordinates. Children associated with armed forces or groups who were assigned to commanders may figure as insider witnesses. Care must be taken, however, to ensure that such insiders are accorded adequate protective measures if requested to testify directly against an accused.

4.4 Maintaining security for CAC victims/survivors during prosecutions

Protective measures used during the investigations stage continue to apply during the prosecutorial stage while prosecutors develop the case and prepare for trial. It is important to re-evaluate these measures once accused individuals have been charged and detained because the prosecution outcomes can raise additional security issues that are relevant for CAC witnesses. Protective measures require constant evaluation and surveillance of the security environment that is applicable to witnesses and their well-being.

5 Involving CAC victims/survivors as witnesses

CAC victims/survivors may be required to directly participate as witnesses in judicial proceedings by providing statements and testifying about their experiences. Children who may not have directly experienced CAC violations may also be required to testify. CAC victims/survivors and other child witnesses require special considerations to address their vulnerabilities and protection needs. This section relates to the involvement of CAC victims/survivors and other children as witnesses in the investigation and prosecution of CAC crimes.

5.1 Obtaining consent

It is important to obtain **voluntary and informed consent** for the participation of CAC victims/survivors in giving statements during the investigation phase, as well as participating as witnesses during the trial phase, and in the case of individuals under the age of 18, both from the child and their parents or guardians. In cases where children were separated from their families or their parents are missing or deceased, consent should be obtained from guardians who possess custodial responsibility for the child. In some cases, such as for children living on the street, a referral may be made to CPAs to conduct family tracing and reunification.

The following are key elements of voluntary and informed consent:

- Secure consent from the CAC victim/survivor. When the individual is a child, obtain consent from the child AND his or her parent or guardian.
- Use native languages in discussions.
- Describe the justice process and explain clearly all steps and any potential consequences involved in providing a statement and/or participating in the judicial process.
- Ask questions to ensure that both children and their parents understand and are comfortable with their respective roles in the judicial process.
- Explain the nature and scope of witness protection measures during the investigation process, including measures for confidentiality.
- Explain the nature and scope of protective measures that have been ordered by the Court during trial testimony.
- Explain any protection measures that are still subject to judicial approval.
- Explain any post-trial protection measures that will be undertaken.

5.2 Determining witness participation

Testimony from CAC victims/survivors and other children may be necessary in certain cases where evidence sought from the child is not reasonably available by any other means. However, care is needed in determining whether a CAC victim/survivor could in fact provide witness testimony. In particular those individuals who are under the age of 18 at the time of testifying may have high levels of anxiety before providing testimony. Moreover, in certain jurisdictions, the fair trial rights of the defense may impede on the welfare and well-being of a child witness. For example, a child may be asked to testify in court in order to respect the right of an accused to confront his or her accuser, without considering the potential risk of harm for the child (see Section 5.3: Working with CAC victims/survivors as witnesses). In general, it is advised that child witnesses be selected carefully and employed sparingly. This approach *may* also apply to those CAC victims/survivors who are now adults but continue to have the same or similar vulnerabilities as children.

The Guidance for Determining Child Witness Participation below provides guidance on the kinds of questions to be considered when evaluating whether a child should participate as a witness in a judicial proceeding related to CAC violations.

Guidance for determining child witness participation

I. Competence as a witness

1. Can the child receive and relay information accurately?
 - The child’s mental capacity permits an accurate impression of events when they happened.
 - The child’s memory is sufficient to retain an independent recollection of the events.
 - The child has the capacity to express in words his or her memory of the events.
 - The child has the capacity to understand simple questions about the events.
2. Does the child know the difference between telling the truth and telling a lie?
 - A child’s ability to distinguish truth from falsehood can be established through the use of hypotheticals. Specifically, the child is asked a series of questions in which he or she identifies which of two story characters “told the truth” or “told a lie.” Alternatively, the child is asked to identify which of a series of statements that correspond to reality and fail to correspond to reality are truth or lies, respectively.²⁰
3. Does the child understand the need to tell the truth in court?
 - The child understands the obligation to speak the truth on the witness stand.
 - The child has the capacity to speak in the formal courtroom setting.

II. “Best interests of the child”

- Consider the child’s health, safety, and protection, particularly threats of reprisals from armed forces and/or groups or other community members or the accused.
- Consider whether the experience will exacerbate the child’s feelings of victimization and stigmatization, particularly given the nature of CAC violations that have been experienced by the child.
- Consider whether participation of the child poses any risk of re-traumatization, particularly if the child must confront an accused who has directly committed violations against the child.

III. Availability of protective and support measures

- Consider the heightened vulnerability of child or CAC witnesses, and evaluate whether the following kinds of specific support and protective measures can be provided during all stages of the judicial process:
 - ensuring that social workers, other child protection professionals, and lawyers are available to minimize stress, offer guidance and support, and provide additional solutions to protect the child and ensure his or her well-being;
 - establishing a mental health referral to support the child during any periods of stress and adjustment, including psychosocial counseling before, during, and after testifying;
 - appointing a lawyer to represent the child during trial and protect his or her interests.

²⁰ For detailed guidance and examples of hypotheticals, see Thomas D. Lyon and Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (Los Angeles: University of Southern California Law School, Rev. ed. 2000).

5.3 Working with CAC victims/survivors as witnesses

When witnesses are still below age 18, every stage of a judicial process should be governed by the detailed measures that are outlined in the UN *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*.²¹ These include the “best interests” standard and the principle of non-discrimination. Under these principles, the respect and protection of a child’s dignity extends to meeting his or her special needs, interests, and privacy. For CAC victims/survivors who are no longer children, the principles of dignity and non-discrimination remain applicable. This section highlights considerations when working with both CAC victims/survivors who are children and those who have since reached adulthood but continue to possess vulnerabilities inherent to their past experiences.

Special measures and approaches can ensure that these principles are respected when CAC victims/survivors participate as witnesses in judicial proceedings, including investigation, prosecutions, and trial. They include:

- Interpreters, investigators, and prosecutors who work with CAC victims/survivors receive training in child rights and child-friendly interviewing techniques.
- Investigations and trial proceedings are conducted in the person’s native language.
- Investigators build trust with survivors of CAC violations through repeat visits, which involves flexibility in terms of time and resources for investigative field missions.
- Investigators, prosecutors, and judges take measures to respect confidentiality of CAC victims/survivors:
 - CAC victims/survivors travel to alternate locations for interviews to ensure adequate confidentiality.
 - To the extent possible, personal information of CAC victims/survivors, including psychosocial and medical files in possession of CPAs and social workers, is safeguarded from public access.
- CAC witnesses receive support in a manner that ensures their well-being. Referral pathways are implemented that include access to local actors who can provide physical, psychosocial, and legal support and protection where available.
- For children (see Section 5.3: Working with CAC victims/survivors as witnesses, particularly children):
 - Every effort is made to minimize disruption to the life and well-being of the child.
 - Legal procedures are adapted to the needs and capacities of the individual child.
 - At the time of testimony, the child understands the aims and objectives of the trial process, as well as the potential consequences of participation.

Children who suffered CAC violations can be competent witnesses, though older children tend to possess stronger memory than younger ones.²² Child-appropriate interviewing techniques are essential to ensuring reliable testimony.²³ Child-friendly interviewing techniques can also be used for CAC victims/survivors who are no longer children but share similar vulnerabilities. All CAC

21 ECOSOC, E/RES/2005/20 (2005).

22 Indeed, children as young as 3 or 4 years old possess an excellent ability to recall major events, while less important information is less well remembered. See Dr. Barry Nurcombe, “The child as witness: competency and credibility,” *Journal of the American Academy of Child*, Vol. 25, Issue 4 (July 1986), pp. 473-480; Dr. Gail Goodman and Dr. Bette Bottoms, eds. “Child victims, child witnesses,” in *Understanding and Improving Testimony* (New York: The Guilford Press, 1993).

23 When children show a lack of accuracy while remembering an event, it may be due to factors such as: 1) poor recall of an event or sequences in an event, 2) misinterpretation or confusion about an event, 3) suggestibility, 4) delusion or other mental disorder, 5) intellectual disabilities, and 6) intentional deception initiated by the child or resulting from adult coercion. Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, “The Child in Court: A Subject Review,” *Pediatrics*, Vol. 104, Issue 5 (Part 1) (November 1999), pp. 1145-1148.

victims/survivors require an environment in which they are comfortable and able to express themselves. The guidance provided below can be applied during the investigations and prosecutions stage, as well as during witness testimony in court.

Child-friendly and age-appropriate interviewing approaches²⁴

CHARACTERISTICS	INTERVIEW METHODS
Memory that is susceptible to suggestion	<ul style="list-style-type: none"> • Ask open-ended questions that allow children to frame their own experiences. • Follow up with more specific questions. • Avoid the use of repeated questions.
Difficulty understanding complex sentences	<ul style="list-style-type: none"> • Keep questions short. • Avoid the use of double negatives in questions. • Continually make sure that the child understands your questions.
Limited cognitive development	<ul style="list-style-type: none"> • Avoid asking for exact dates, times, or distances, as children and CAC victims/survivors often have trouble estimating distances, size, and time periods. • Frame questions differently. For example, ask what season an event took place or when it took place in relation to a particular holiday or an event that is significant in the child’s life.
Difficulty understanding causal relationships	<ul style="list-style-type: none"> • Avoid asking questions that require extensive analysis by the child in one answer as it may be difficult for children to describe someone’s motivations or the reason why something happened.
Limited vocabulary	<ul style="list-style-type: none"> • Avoid legal terms as well as vague or sophisticated vocabulary.

TIMING	INTERVIEW METHODS
Before the interview	<ul style="list-style-type: none"> • Pick an appropriate setting that takes into account confidentiality concerns and makes the child comfortable. Child-friendly interview rooms can include items to play with, pictures on the walls, etc. • Obtain voluntary and informed consent (see Section 5.1: Obtaining consent). • Explain the purpose of the interview; discuss what it means to tell “the truth” and inform the child that it is all right if he or she does not know the answer.
During the interview	<ul style="list-style-type: none"> • Do not force the child to answer questions. Do not be argumentative. Do not make comments of approval or disapproval. • Avoid negative connotations regarding the child’s narrative. Recall that inconsistencies do not mean a child is lying. • Ask more precise questions to avoid confusion or misunderstandings. • Consider using drawings or props. Children can use dolls to describe violations that they experienced, such as sexual or physical violence. • Allow the child to take a break from the interview. Pay attention to body language, eye contact, and the overall responsiveness of the child to the questions being asked to ensure that there is no risk of further traumatization. • After questioning, give the child an opportunity to speak freely about the subject. • Where available, social workers can be assigned to the case by the court and be present to provide support to the child, ensuring the presence of more than one actor can avoid attachment by a child to a single caseworker.
After the interview	<ul style="list-style-type: none"> • End the interview with something positive. • Allow the child an opportunity to ask questions. • Make available referral pathways for follow-up with the child.

²⁴ Adapted from the International Human Rights Clinic, Human Rights Program, Harvard Law School, “Child Interviewing Checklist and Handbook,” 2006, Internal document.

5.4 Maintaining security for CAC victims/survivors as witnesses

Protective measures can help maximize the psychological well-being of CAC witnesses and protect their security and privacy. Protective measures can also minimize the likelihood of post-traumatic stress disorder or any potential for traumatization.²⁵ In so doing, protective measures can enhance the reliability of CAC testimony. Moreover, the privacy of CAC victims/survivors is essential to avoid stigma and protect witness security.

Prosecutors and/or lawyers representing the victim can make an application to the court for protective measures for CAC survivors. Where possible, a mental health professional or social worker can conduct an assessment and make recommendations to judicial actors for protective measures that are best suited for the victim/survivor.

Protective measures can include but are not limited to the following:

- protection of witness identity:
 - pseudonyms in court proceedings and records;
 - use of a screen, facial, and/or voice distortion to shield the witness from public view;
- testimony via video that is broadcast into the courtroom to avoid face-to-face confrontation with the accused (and shielded from public view);
- pre-recorded video testimony, where the prosecution and defense pose questions to the witness separately, which is later shared with the court (and shielded from public view);
- reduction of the number of people in the courtroom;
- private/closed sessions (also known as *in camera* sessions);
- availability of culturally appropriate witness-support persons, including psychosocial counselor, social worker, or psychologist, prior to, during, and after testimony;
- adoption of child-friendly interviewing techniques (described above);
- adoption of measures to create a comfortable atmosphere in the courtroom, such as removal of judicial robes and military uniforms, adjusting the seating of the courtroom, restriction of note taking, use of child-friendly oath-taking process (see Section 5.2: Determining witness participation), providing the names of persons named in the witness's statement and asking the witness to confirm their accuracy, and the use of courtroom familiarization visits.

²⁵ The *Rome Statute* includes a presumption for the use of specific protective measures for children and survivors of sexual violence under art. 68.

Evaluating 18- to 25-year-olds can assist in determining whether they possess vulnerabilities and needs that warrant protection measures. Two considerations key to this evaluation process, which can also be applied to children, are:

1. **Factors related to the person's capacities and stage of development**

This means taking into consideration the capacity and maturity of the survivor, which will vary based on the age and experiences, as well as other factors. It is important to consider the stage of development for survivors who are under the age of 18 and for those who are over the age of 18 but were children when they suffered the violation.

2. **Risk of further traumatization**

To prevent further trauma, protective measures are particularly important when CAC victims/survivors testify against an accused who directly committed violations against him or her. For example, at the Special Court for Sierra Leone, a witness who had turned 18 over the course of the court proceedings testified remotely via video-conference to prevent further traumatization from having to see the accused and be in the same room.

5.5 Post-trial follow-up, sentencing, and reparations

The provision of support to CAC and other child witnesses once they have testified, including monitoring to detect and address any negative reactions from testimony, can ensure that the post-trial stage continues to meet their needs. (It is important that this support is provided regardless of whether the child participates in sentencing or reparations proceedings.) CAC witnesses and other children can participate in sentencing proceedings through victim impact statements. This is an opportunity for survivors to describe in writing or orally to the court how a crime has affected them. For example, in national jurisdictions, prosecutors may request victims/survivors draw a picture or write a letter to the court. Judicial actors can work with CPAs to inform CAC victims/survivors of the final judgment in a child-friendly version once the trial is over. Finally, CAC victims/survivors can participate in reparations proceedings by providing statements on the impact of the violations on their lives, and their current needs and priorities.

6

Outreach to affected children and communities

6.1 Outreach to CAC victims/survivors and other affected children

Judicial actors can benefit from reaching out to survivors of CAC violations and children living in conflict-affected communities to inform them about judicial proceedings and explore options for potential involvement. When handled appropriately, participation of CAC victims/survivors and other affected children in judicial processes can provide them with opportunities of acknowledgement and recourse, and can promote the prevention of future CAC violations.

Judicial actors can conduct these awareness-raising and consultation activities with CAC victims/survivors and other affected children through schools, children's clubs, and religious and faith-based groups; in some cases, community leaders and parents may also be involved in the process. It is important to encourage the participation of both girls and boys, as well as children from a range of ethnic, racial, religious, and other groups, including children with disabilities, in these consultations. CPAs can play a critical role in setting up and implementing these sessions to ensure adequate support to and protection of the participating children. Moreover, CPAs and judicial actors can work together to manage local expectations and explain the potential limitations of court proceedings.

Some examples of awareness-raising and consultation activities with CAC victims/survivors and other affected children are:²⁶

- producing, distributing, and raising awareness on “child-friendly” versions of updates of court proceedings, final court judgements, and, where applicable, reparations proceedings;
- conducting consultation exercises with CAC victims/survivors that focus on their experiences (e.g., the impact of armed conflict on children and their communities), preferences (e.g., for specific judicial outcomes or forms of reparations), and/or expectations (e.g., broader views of judicial accountability measures and other potential forms of CAC accountability);
- holding interactive information sessions through youth forums, which involve expert facilitators who present information on judicial accountability processes and answer questions from children.

6.2 Outreach to affected communities

Community outreach is important to inform the public on the nature and progress of CAC accountability efforts at all stages of the judicial process. This outreach can help prevent misinformation and manage expectations. Outreach can also contribute to building trust and encouraging individuals to collaborate with investigation efforts by providing leads or serving as witnesses. Similarly, during the trial phase, outreach and media communications can educate the local population on the impact of conflict on children, their specific vulnerabilities and rights, and the community's role and responsibility in protecting them. It can also help promote the perception of children primarily as victims/survivors of serious violations, rather than perpetrators. Finally, upon a conviction and judgment, outreach can inform the population and other armed actors that CAC violations are prohibited and that perpetrators will be punished, thereby promoting deterrence.

²⁶ International Center for Transitional Justice, *Engaging Children and Youth in Transitional Justice Processes: Guidance for Outreach Programs* (New York: 2012).

7

Involving Child Protection Actors

7.1 Defining the roles of CPAs in judicial processes

CPAs are often well positioned to advise and support judicial actors on how to work with child victims/survivors and their families. They may also understand the nature of CAC violations that have been committed. For this reason, strong working relationships between CPAs and judicial actors are often helpful. Following the identification of local CPAs, judicial actors can contact credible CPAs to discuss what kind of assistance or support can be provided to judicial accountability efforts.

CPAs can provide support to judicial actors throughout the judicial process.

- Potential ways in which CPAs can support **preliminary research and investigations** may include:
 - assist investigation teams with age verification techniques;
 - support the identification, vetting, and training of translators;
 - act as intermediaries between investigators and CAC victims/survivors;
 - give survivors an opportunity to air concerns to a trusted party, thus injecting external accountability to judicial investigations;
 - act as potential overview or expert witnesses;
 - confirm and provide inputs on investigation targets, such as the identification of events where CAC violations have been committed and potential sources of evidence.
- Potential ways in which CPAs can support the **protection of victims/survivors of CAC violations who are involved in judicial processes** may include:
 - facilitate communications with, and monitor the well-being of CAC victims/survivors, (particularly important for those child and CAC victims and witnesses who live in remote locations or areas that are insecure);
 - establish and participate in referral pathways for child or CAC victims and witnesses; these pathways comprise providers of health, psychosocial, legal, and protection services;
 - assist with unaccompanied children who participate in judicial processes.
- Potential ways in which CPAs can support **outreach activities and consultations during judicial processes** may include:
 - assist in organizing outreach activities;
 - accompany CAC victims/survivors to explain judicial accountability processes to the public or other audiences, while ensuring the inclusion of adequate protection measures;
 - raise awareness among local communities to prevent misconceptions that children themselves are being prosecuted or at risk thereof, and encourage survivors to cooperate with investigations.

- Potential roles of CPAs may also involve **training of judicial actors** such as judges, clerks, bailiffs, prosecutors, and defense attorneys on a number of issues related to CAC victims/survivors, including:
 - key provisions of the UN *Guidelines for Action on Children in the Criminal Justice System*, including the avoidance of direct contact between child survivor and offender where possible, and the protection of the privacy of the child, as well as other standards;²⁷
 - developmental stages of the child and his or her ability to recall experiences. (In so doing, CPAs can raise awareness that traumatic stress does not inherently render a child's testimony unreliable);
 - child-friendly techniques on age verification and guidance on how to prevent traumatization when interviewing children or obtaining testimony from them.

7.2 Developing protocols for collaboration

Evaluating whether to engage with judicial actors in the pursuit of accountability for CAC violations may raise a host of considerations for CPAs. The maintenance of neutrality plays a key role in the ability of humanitarian actors to access and meet the needs of beneficiaries, and ensures the protection of their staff. Collaborating on investigations and prosecutions with judicial actors, who may be perceived as political actors, therefore may pose or appear to pose risks to the operations, staff, and beneficiaries of CPAs. As explained in this Tool, there remains a range of measures through which CPAs can support CAC victims/survivors in judicial processes, without risking their adherence to the core humanitarian principles of humanity, impartiality, neutrality, and independence.

To address these and other considerations, CPAs and judicial actors can develop a “memorandum of understanding” or “operational protocol” guiding their collaboration, such as in the case of Sierra Leone mentioned in Section 3.3: Maintaining security for CAC victims/survivors during investigations. This may include the following factors:

- Confidentiality:
 - What are the rules governing information that is shared between CPAs and judicial actors?
 - What are the disclosure obligations of the prosecution to the accused/defense and vice versa?
 - What are the parameters that govern confidentiality? (e.g., if information is provided for investigative purposes, does it enjoy confidentiality?)
- Protection of victims and other witnesses:
 - What kinds of protection measures have investigators and prosecutors secured for victims and other witnesses of CAC violations?
 - Can these measures be realistically implemented in the local context?
- Protection of CPA staff:
 - Are accountability efforts being undertaken in a situation of ongoing armed conflict?
 - Have armed actors signed action plans or other commitments that signal openness to CAC accountability efforts?
 - To what extent can the nature of assistance from CPA staff be kept confidential?
 - What protection measures have prosecutors secured for child protection workers who provide evidence and testify?

²⁷ ECOSOC, *Resolution 1997/30: Guidelines for Action on Children in the Criminal Justice System*, E/RES/1997/30 (21 July 1997), paras. 49-50.

ANNEXES

ANNEX A: Democratic Republic of the Congo case study: Domestic legal and procedural framework

ANNEX B: Worksheets: Collection and analysis of evidence of specific violations

ANNEX A

Democratic Republic of the Congo case study: Domestic legal and procedural framework

Judicial accountability for CAC violations in the DRC is a priority for national judicial policy and practice. Despite widespread evidence of recruitment and use of children, rape and sexual violence of children, attacks against schools, and other violations committed by armed forces and groups, few judicial cases have led to the punishment of individuals responsible for these crimes. In addition to nationally led efforts to fight impunity for cases of conflict-related sexual violence against women and girls, military and civilian justice actors are now looking to implement the 2009 Child Protection Law, which prohibits the recruitment and use of children under the age of 18.²⁸

In support of these and other national-level judicial efforts, this annex presents an overview of the sources of law and procedures available under the Congolese legal framework that support trying and convicting perpetrators for serious crimes against children.

The annex is divided into three parts:

- **Parts 1 and 2** outline the sources of law and jurisprudence related to serious crimes against children.
- **Part 3** highlights the rules governing the investigation of crimes and the implications for confidentiality for victims and witnesses, as well as potential informants.
- **Part 4** lists the means through which protective measures can be implemented for victims and witnesses.

1. Sources of law

The DRC has signed and ratified a number of important international treaties that serve as sources of law for investigating and prosecuting international crimes committed against children in armed conflict. Under Article 215 of the Congolese Constitution, treaties and international agreements become part of national law once they are published in the official gazette, known as the *Journal Officiel*. Moreover, treaties and international agreements prevail over existing Congolese law in case of conflict between the two.

Key international treaties that have become part of Congolese national law and therefore provide sources of law for addressing crimes against children in the DRC, include:

- Rome Statute of the International Criminal Court, 1998;
- Geneva Conventions I–IV, 1949;
- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;
- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977;
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000.

²⁸ Loi n° 09/001 du 10 janvier 2009 portant protection de l'enfant, 10 January 2009.

National laws that also provide relevant sources of law for the prosecution of crimes against children in armed conflict in the DRC include:

- 2009 Child Protection Law (Chapter IV, including article 187(2) prohibiting recruitment and use of children under the age of 18);²⁹
- 2006 Sexual Violence Law;³⁰
- Criminal Code;
- Military Criminal Code.

2. National jurisprudence

As of December 2015, there have been very few national cases where perpetrators have been tried and found guilty for crimes committed against children in armed conflict in the DRC.³¹ Specifically, there are only two cases where crimes against CAC victims/survivors have figured in the evidence presented against the accused:

Kharhanga Biyoyo, Jean Pierre (KBJ)

In 2006, a military tribunal in Bukavu convicted Jean-Pierre Biyoyo, a former leader of a Mai Mai militia faction in South Kivu known for abducting and using children, of the crime of “abduction by deceit under Congolese law.” In relying on Congolese law and omitting to apply the Rome Statute, the Tribunal did not technically achieve a conviction for the war crime of recruitment and/or use of children despite evidence that was presented in support of this crime:³²

*The Comd KBJ had transformed the said mission by also recruiting demobilized child soldiers [...] the Comd KBJ would use trickery to take the demobilized child soldiers from Kadutu [...] take them and so many other demobilized child soldiers back by force and move them to MULLU for retraining [...] 407 demobilized child soldiers were brought together [...] and the Comd KB would oppose any inspection of this site by non-governmental organizations for the protection of children.*³³

²⁹ Article 187(2) reads, “The recruitment or use of children under the age of eighteen years by armed forces and groups and the police are punishable by ten to twenty years of imprisonment.”

³⁰ Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais, 20 July 2006.

³¹ For a comprehensive discussion, see J. Kazadi Mpiana, “La position du droit international dans l’ordre juridique congolais et l’application de ses normes” (PhD Diss., University La Sapienza, 2011-2012), pp. 543-547; and “Réponses écrites soumises” by the DRC government to the Committee on the Rights of the Child, 59th session, 16 January - 3 February 2012, para. 29.

³² See *Avocats Sans Frontières, The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo* (Brussels: 2009). For more information, see also *Judgment of Biyoyo case*, DRC National Ministry of Defense, Military Justice, Tribunal Militaire de Garnison (TMG) de Bukavu, Pro-Justicia, Jugement R.P. 096/2006 and RP 101/2006, RMP 292/KMC/06 and RMP 206/KMC/06, 17 March 2006; Child Soldiers International, *Briefing on the recruitment and use of children in the Democratic Republic of the Congo (DRC) to the UN Security Council Working Group on Children and Armed Conflict* (London: 2014), pg. 5.

³³ *Judgment of Biyoyo case*, Tribunal Militaire de Garnison de Bukavu, 2006, pg. 7.

Mutanga, Gédéon Kyungu (“Gédéon”)

Between 2003 and 2006, Gédéon commanded a large Mai Mai group that committed serious violations in Katanga. Among the offenses charged against Gédéon was the recruitment of children under the age of 15 in an armed movement. Specifically, Gédéon was accused of “having enlisted in his movement approximately 300 children under the age of 15, among whom 270 were identified and demobilised by CONADER [...] and amongst them were: KNR, recruited at 14 years, [...]”³⁴ Despite the presentation of evidence that Gédéon had recruited and used children associated with fighting forces in violation of crimes under the Rome Statute, the Military Tribunal convicted Gédéon of violations of the Military Code of Justice, specifically “war crimes, crimes against humanity, rebel movement, and terrorism.”³⁵ Gédéon has since escaped from prison and remains at large.

3. Rules and practice governing confidentiality during investigations

Criminal investigations can be initiated by three judicial bodies in the DRC: the judicial police (*police judiciaire*); the prosecution (*parquet*); and by an examining magistrate (*instruction juridictionnelle*). These actors may undertake investigations: i) of their own initiative (when unlawful acts come to their attention); ii) by individual complaint (when the victims of unlawful acts or their representatives bring these facts forward); and iii) by way of third-party denunciations (when persons other than the victims bring forward information of an unlawful act).

Investigations undertaken by the judicial police and the prosecution are confidential (those undertaken by an examining magistrate are public.) Thus, while the prosecutor produces allegations and evidence in court to which the accused is able to respond, the prosecution is not obliged to indicate the mode in which the facts of the case have been received. This rule does not preclude the accused from exercising the right to confront his or her accuser.

By working with CPAs, police officers, prosecutors, and lawyers can mitigate the risks to children and CPAs when collaborating with investigations. Likewise, confidential medical or other psychological information requires safeguarding by medical professionals and CPAs.

4. Rules and practice governing the protection of witnesses during trial

According to the DRC’s international, regional, and national obligations to protect the rights of children, in particular to respect the “best interests of the child” standard, judicial actors are obligated to take measures that are most favorable to the interests of child victims and witnesses. While the Code of Criminal Procedure provides some potential measures, the protection needs of victims and witnesses in cases alleging crimes against children in armed conflict have been met in practice through judicial actors relying on international rules and practice.³⁶

34 Military prosecutor at the Tribunal Militaire de Garnison de Haut-Katanga, *Affaire Gédéon*, RMP No. 0468/ MAK/2007, 10 July 2007, pg. 5.

35 See *Avocats Sans Frontières, The Application of the Rome Statute* (2009), pg. 103.

36 Of note, the Congolese Coalition for Transitional Justice has drafted a proposed law for the protection of victims and witnesses. For a detailed discussion on the challenges of protecting child victims and witnesses in the Congolese justice system, see Human Rights Watch, “Protecting Child Victims in Sexual Violence Trials in the DR Congo: Suggestions for the Way Forward,” 24 November 2009.

The following provides some examples of key rules and practices governing the protection of witnesses and victims/survivors during trial in the DRC.

1. In camera proceedings

The Code of Criminal Procedure provides for the use of *in camera* proceedings, where the public can be excluded from the courtroom. In the case of children, however, the use of *in camera* proceedings is obligatory: Article 33 of the 2009 Child Protection Law provides “the discerning child who is asked to provide information in judicial proceedings can testify *in camera* in the presence of his/her legal counsel.”

2. Special provisions for cases involving sexual violence

The public prosecutor or judges can provide protective measures for survivors of sexual violence, including children, under Article 74 *bis* of the Code of Criminal Procedure:

The office of the public prosecutor or the judge in cases of sexual violence shall take the necessary measures to safeguard the security, physical and psychological well-being, dignity and respect for the privacy of victims or any others involved in the case. In such circumstances, in camera proceedings shall be undertaken at the request of the victim or the Crown.³⁷

Special measures have been used in cases alleging conflict-related sexual violence, where survivors and witnesses routinely face physical violence, death threats, and multiple forms of stigma in their communities. Military tribunals have employed measures to protect the identity of survivors of sexual violence who testify in judicial proceedings, such as voice distortion and covering the witness with a robe and a cap that covers his or her face. In many other cases, survivors appear and give testimony in court with their family members whose identity is not hidden, making identification of the victim/survivor easy.

National practice in cases involving civilian rape is particularly instructive. Specifically, national jurisprudence has ruled that it is not necessary to require the sexual violence victim/survivor to testify since he or she had already been heard during the investigation phase and that precluding victim/survivor testimony does not violate the rights of the defense.³⁸ This practice may serve as precedent for cases involving child witnesses, including in cases of CAC violations.

3. Measures available under the Rome Statute

National jurisprudence has relied upon provisions under the Rome Statute to justify protective measures for victims of serious violations. For example, in the case of Jérôme Kakwavu Bukande, who was charged with rape, the judgement considered a request from survivors for protective measures and deletion of personal information made available in court documents in light of threats they had received. The judge of the Military High Court found:

The protection of victims of sexual violence and witnesses is a necessity as well as a legal requirement. Indeed, the protection of victims of sexual violence and witnesses is not only prescribed by the Rome Statute of the International Criminal Court, specifically in Article 68(1) and (2), but also by the new Congolese law on sexual violence, specifically Article 1 of Law No. 06/019 of 20 July 2006 amending and supplementing the Decree of 6 August 1959 of the Code of Criminal Procedure. One notes that the new Congolese law on sexual violence and the Rome Statute are consistent with respect to the principle of protection of victims of crime.

³⁷ Conseil supérieur de la magistrature, *Code judiciaire congolais. Textes compilés et actualisés jusqu'au 28 février 2013* (Kinshasa: 2013), pg. 154.

³⁸ Avocats Sans Frontières, *La justice face à la banalisation du viol en République démocratique du Congo. Etude de jurisprudence en matière des violences sexuelles de droit commun* (Bruxelles: 2012), pp. 72-74.

Furthermore, recall that Article 68(1) of the ICC's Rome Statute also provides that measures to protect the safety, physical, and psychological well-being, dignity and respect for privacy of victims and witnesses should not be prejudicial to, or inconsistent with the rights of the accused to a fair and impartial trial.

In the case under examination, the defense requests the attendance of the victims in open court.

The Military High Court considers that for the proper investigation of the case, a public hearing of the testimonies of victims and witnesses before this Court is in fact necessary.

For these reasons, the Court grants the request of the civil parties and proposes that appropriate measures be taken to safeguard the security of victims and witnesses, which are neither detrimental nor contrary to the rights of the accused to a fair trial.³⁹

Article 68 of the Rome Statute establishes a presumption in favor of the use of specific protective measures for children and survivors of sexual violence. In particular, the Court has allowed for *in camera* proceedings and the presentation of evidence by electronic or other special means. In the latter case, child witnesses can provide testimony via video link or other means that is necessary to protect their psychological well-being, dignity, and privacy.

³⁹ Haute Cour Militaire, 15 avril 2011, *Bulletin des arrêts de la Haute cour militaire*, 3ème édition, RP 004/2010, 14 May 2013, pg. 9.

ANNEX B

Worksheets: Collection and analysis of evidence of specific violations

These worksheets are designed to assist judicial actors in the preparation and analysis of evidence that is being collected to prove specific CAC violations during prosecution and trial. These worksheets use two CAC violations as examples. However, the format can be applied to any CAC violation. The two examples are:

1. Recruitment and use of children by armed forces or groups
2. Attacks on schools.

Each worksheet is divided into two parts that present an approach to analytically organizing how to prove a CAC violation:

- **Part 1** lists the **potential sources of law** that establish the violation as a crime under international law. National laws may also be considered when charging CAC violations as crimes. The worksheets can also be used to analyze constitutive elements of national crimes.
- **Part 2** selects one of the crimes listed under Part 1 and breaks down the **general and specific elements of the crime**. Investigators and prosecutors can use this worksheet to track the collection of evidence for each general and specific element of the crime.

The selection of the two examples of CAC violations and the further selection of a specific crime under each violation are intended to illustrate how to undertake elements' analysis. Selection of the CAC violation and its corresponding crime will depend on local priorities and circumstances.

WORKSHEET 1

Recruitment and use of children by armed actors

Part 1: Potential sources of international law

CAC violations may constitute different kinds of crimes under international law. The following table lists the sources under international law where recruitment and use of children constitute a crime.

	CONTEXT	CRIME	SOURCE
As a war crime under the Geneva Conventions	<i>International armed conflict</i>	The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.	Art. 77(2) of Protocol I Additional to the Geneva Conventions, 1977 (API)
	<i>Non-international armed conflict</i>	Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.	Art. 4(3)(c) of Protocol II Additional to the Geneva Conventions, 1977(APII)
As a war crime under the Rome Statute of the International Criminal Court	<i>International armed conflict</i>	Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.	Art. 8(2)(b)(xxvi)
	<i>Non-international armed conflict</i>	Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.	Art. 8(2)(e)(vii)

Part 2: Elements of the crime

International crimes are composed of **general elements** and **specific elements**. General elements are also known as “contextual elements” and constitute the overarching circumstances that determine whether a crime constitutes a war crime or a crime against humanity. Specific elements constitute those elements that correspond with the underlying crime such as murder, rape, etc. (Note, national crimes normally do not require proof of general elements.) The general and specific elements for whichever crime is being prosecuted can be reproduced in the table below, and the corresponding evidence can be tracked as investigations progress. In some instances, the general elements can be proven by the same piece of evidence; however, some general elements may require different types of evidence to prove different parts of the same element.

Investigators and prosecutors can use the following table to track the evidence that is being collected to prove each element of a crime, as well as the sources or types of evidence that will be presented in a trial to prove the crime. Here, the crime selected as an example is recruitment and use as a war crime under the Rome Statute in a non-international armed conflict. Based on the circumstances of the case, other crimes under international or when relevant, national law may be selected.

Crime: War crime under the Rome Statute of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities (Article 8(2)(e)(vii))

GENERAL ELEMENTS	SOURCE OF EVIDENCE	INFORMATION PROVING THE ELEMENT
	<p><i>What is the type of evidence being used to prove the elements of the crime? (e.g., witness statement; physical evidence; documentary evidence)</i></p>	<p><i>What is the information being provided by the type of evidence that proves the elements of the crime?</i></p>
<p>The conduct took place in the context of and was associated with an armed conflict not of an international character.</p>		
<p>The perpetrator was aware of factual circumstances that established the existence of an armed conflict.</p>		

SPECIFIC ELEMENTS	SOURCE OF EVIDENCE	INFORMATION PROVING THE ELEMENT
	<p><i>What is the type of evidence being used to prove the elements of the crime? (e.g., witness statement; physical evidence; documentary evidence)</i></p>	<p><i>What is the information being provided by the type of evidence that proves the elements of the crime?</i></p>
<p>The perpetrator conscripted or enlisted,⁴⁰ one or more persons in an armed force or group, or used ⁴¹ one or more persons to participate actively in hostilities.⁴²</p>		
<p>Such person or persons were under the age of 15 years.</p>		
<p>The perpetrator knew or should have known that such person or persons were under the age of 15 years.</p>		

40 In the judgment issued in the Lubanga case, the International Criminal Court ruled that both voluntary and involuntary recruitment are illegal in the context of children who are associated with armed forces or armed groups in times of conflict. *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 14 March 2012, paras. 607, 612, 613 (hereinafter “*Lubanga Judgment*”).

The Special Court for Sierra Leone (SCSL) ruled that conscription also “encompasses acts of coercion, such as abductions and forced recruitment by an armed group against children, which are committed for the purpose of using them to participate actively in hostilities.” *Prosecutor v. Brima, Kamara, Kanu* (AFRC case), Case No. SCSL-2004-16-T, Judgment, 20 June 2007, para. 734. See also *Prosecutor v. Sam Hinga Norman*, Case Number SCSL-2003-14-AR72 (E), “Summary of Decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment),” 31 May 2004.

41 The Special Court for Sierra Leone ruled that “the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.” *Prosecutor v. Brima, Kamara, Kanu*, 2007, para. 737.

42 The ICC has interpreted the element “participate actively in hostilities” broadly, which extends to children who operate on the front line, to those who are involved in multiple roles supporting combatants. *Lubanga Judgment*, 2012, para. 628.

WORKSHEET 2

Attacks on schools

Part 1: Potential sources of international law

Schools are protected civilian objects under international law and thus subject to the principles of distinction and proportionality. Attacks or reprisals undertaken against civilian objects that are not related to military objectives are prohibited as war crimes. (Military objectives are defined as “objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁴³) The prohibition on attacking civilian objects constitutes a customary norm of international law applicable to all parties to conflict in all conflict situations.⁴⁴

	CONTEXT	CRIME	SOURCE
As a war crime under the Geneva Conventions⁴⁵	<i>International armed conflict</i>	Civilian objects shall not be the object of attack or of reprisals. ⁴⁶	Art. 52, Protocol I Additional to the Geneva Conventions, 1977 (API)
As a war crime under the Rome Statute of the International Criminal Court	<i>International armed conflict</i>	Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.	Art. 8(2)(b)(ix)
	<i>Non-international armed conflict</i>	Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.	Art. 8(2)(e)(iv)

Part 2: Elements of the crime

Investigators and prosecutors can use the following table to track the evidence that is being collected to prove each element of the crime, as well as the sources or types of evidence that will be presented in a trial to prove the crime. Note that international crimes are composed of general elements and specific elements. National crimes do not require proof of general elements.

43 *Additional Protocol (I) to the Geneva Conventions* (“AP (I)”) (1977), art. 52(2). See also Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross, Customary International Humanitarian Law*, Volume 1 (New York: ICRC and Cambridge University Press, 2009), Rule 8, pp. 29-32.

44 For a detailed discussion of the applicability of the prohibition on attacking civilian objects to non-international armed conflicts, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2009), Rule 7 (citing the International Court of Justice, *Nuclear Weapons case*, Advisory Opinion (§ 179)); *Kupreški case*, Judgment (§ 180) and *Kordić and Čerkez case*, Decision on the Joint Defence Motion and Judgment (§ 182), International Criminal Tribunal for the Former Yugoslavia (ICTY) (though, see also IT-95-14/2-A (Judgement December 17, 2004)), para. 92: “There is no doubt that the crime envisaged of destruction of educational buildings [is] part of international customary law.”), paras. 9 and 10; and, GCPEA, “Applicable Legal Framework,” *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (New York: 2014) (outlining other relevant rules and principles of the law of armed conflict).

45 Despite the absence of an explicit provision under Additional Protocol II, national judicial actors may prosecute attacks on schools as a war crime in situations of non-international armed conflict. Specifically, attacks on schools constitute a war crime in a non-international armed conflict based on the principle of distinction between civilian and military objects, which is a rule of customary international law, noting also the provisions governing protection of civilians and those specific to the protection of children. (The prohibition on attacking civilian objects, including schools does not apply when they are used as military objects and the damage is proportional to the military advantage obtained.)

46 AP (I) (1977), art. 52 adds, “In case of doubt whether an object which is normally dedicated to civilian purposes, such as ... a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

Crime: War crime under the Rome Statute of attacking protected objects (i.e. schools) in situations of non-international armed conflict (Article 8(2)(e)(iv))

GENERAL ELEMENTS	SOURCE OF EVIDENCE	INFORMATION PROVING THE ELEMENT
	<p><i>What is the type of evidence being used to prove the elements of the crime?(e.g., witness statement; physical evidence; documentary evidence)</i></p>	<p><i>What is the information being provided by the type of evidence that proves the elements of the crime?</i></p>
<p>Existence of an armed conflict not of international character⁴⁷</p>		
<p>The nexus or link between the underlying offense and the context of an armed conflict, i.e. the conduct took place in and was associated with an armed conflict not of an international character.</p>		

SPECIFIC ELEMENTS	SOURCE OF EVIDENCE	INFORMATION PROVING THE ELEMENT
	<p><i>What is the type of evidence being used to prove the elements of the crime?(e.g., witness statement; physical evidence; documents)</i></p>	<p><i>What is the information being provided by the type of evidence that proves the elements of the crime?</i></p>
<p>The perpetrator directed an attack.</p>		
<p>The object of the attack was one or more buildings dedicated to education.</p>		
<p>The perpetrator intended such building(s), which was not a military objective, to be the object of the attack.</p>		
<p>The perpetrator was aware of factual circumstances that established the existence of an armed conflict.</p>		

⁴⁷ See *Lubanga Judgment*, para. 536 (A non-international armed conflict “requires the existence of a “protracted” conflict between “organised armed groups” which “must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.”)

CAC Accountability Resource Database

For additional guidance on designing and implementing strategic options to advance CAC accountability in a specific context, please visit the Children and Armed Conflict Accountability Resource Database **www.cacaccountability.org/resources**. This database features a selection of practical resources, including tools, trainings, and manuals that are related to different aspects of CAC accountability. Practitioners and policy makers can use these resources to support the practical application of the CAC Accountability Framework in specific contexts.

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