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Children and the International Criminal Court : analysis of the Rome Statute through a children's rights perspective

Chamberlain Bolaños, C.

Citation

Chamberlain Bolaños, C. (2014, March 25). *Children and the International Criminal Court : analysis of the Rome Statute through a children's rights perspective*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/24891>

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Author: Chamberlain Bolaños, Cynthia

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Issue Date: 2014-03-25

Introduction

1 NECESSITY AND LEGAL BASIS FOR THE INCLUSION OF A CHILDREN'S RIGHTS PERSPECTIVE IN ICC PROCEEDINGS

The International Criminal Court (ICC) is the world's first international permanent court with jurisdiction to judge individuals for crimes of genocide, crimes against humanity, war crimes and aggression.

The Rome Statute¹ is a pioneering international treaty as it also provides for the participation of victims throughout the proceedings, not only as witnesses of the defence or the prosecution, but also as participants in judicial proceedings. Article 68(3) of the Rome Statute is the central provision related to victims' participation.² It states

"(...) where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (...)" (emphasis added).

Another novelty from this international tribunal is that victims of crimes within its jurisdiction are entitled to receive reparations, either individually or collectively. Pursuant to Article 75(2) of the Rome Statute, the "Court may make an order directly against a convicted person (...) or in respect of victims, including restitution, compensation and rehabilitation".

Moreover, pursuant to Article 68(1) of the Statute, the "Court *shall* take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" having regard to all relevant factors, including "age, gender (...) health, and the nature of the crime,

1 *Rome Statute of the International Criminal Court* (Rome Statute), original document is A/CONF.183/9 of 17 July 1998, UN Treaty Series, vol. 2187, No. 38544, p. 3. The treaty was corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Amendments to article 8 reproduce the text contained in depositary notification C.N.651.2010 Treaties-6, while the amendments regarding articles 8 *bis*, 15 *bis* and 15 *ter* replicate the text contained in depositary notification C.N.651.2010 Treaties-8; both depositary communications are dated 29 November 2010. The Rome Statute is available at: < <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> > accessed 2 April 2013.

2 See also Articles 15(3) and 19(3) of the Rome Statute, which refer to other manners of victims' participation in the initial stages of ICC proceedings (authorisation to open an investigation and jurisdiction and admissibility proceedings).

in particular...where the crime involves sexual or gender violence or violence against children” (emphasis added).

These provisions are innovative and an advance in international criminal law, which goes, unlike the predecessors of the ICC, beyond the purely retributive nature of judicial proceedings, and includes a restorative mandate, that encompasses the possibility for victims to express their views in international criminal trials as well as the possibility to receive reparations for the harms suffered. However, the advances made with the adoption of the Rome Statute need to be applied to concrete situations currently investigated by the ICC’s Prosecutor and in particular cases against accused persons.

In order to fulfil this pioneering mandate of the ICC, relevant expertise in these innovative features is required within the ICC.³ Accordingly, Articles 36(8)(b), 42(9) and 44(2) of the Rome Statute provide that the ICC should have judges, advisers and staff members with legal expertise on specific issues, including among others, violence against children.

As regards child victims and witnesses, the Rome Statute’s legal framework clearly compels the ICC to consider their needs in international criminal proceedings. The Preamble of the Rome Statute explicitly refers to children as victims of the most serious crimes within the ICC’s jurisdiction and calls to end impunity for these crimes. Article 68(3) of the Rome Statute provides that in order to protect victims and witnesses, their age and also whether the crime involves violence against children, should be, among other factors, considered. Rule 86 of the Rules of Procedure and Evidence (RPE), which directly relates to Article 68 of the Statute, provides:

“A Chamber in making *any direction or order*, and other organs of the Court *in performing their functions* under the Statute or the Rules, *shall* take into account the needs of all victims and witnesses in accordance with article 68, in particular, *children, elderly persons, persons with disabilities and victims of sexual or gender violence.*” (emphasis added)

These legal provisions reflect that, although a criminal court with clear penal mandate, the ICC also has the obligation to respect, as a minimum, the safety and well-being of victims and witnesses, particularly those who are most vulnerable, such as children. It also reflects the developments in human rights law to focus on children in judicial proceedings, both at the international and national level.⁴

3 See the *Statement by Ms Eva Boenders, Caucus on Children’s Rights in the ICC*, 16 June 1998, ICC Preparatory Works, available at < <http://www.legal-tools.org/en/doc/61113c/> > (accessed 4 April 2013).

4 For example UNICEF affirmed in a preparatory document for the Rome Conference that the “legal safeguards recognized in international human rights law, particularly the CRC, should be effectively secured” in the ICC. UNICEF then stated that child witnesses and victims should benefit from “legal and other appropriate assistance” and that consideration

In spite of these innovations, the ICC has faced immense challenges when implementing these legal provisions in its initial cases during its first ten years of existence. The first case before the ICC, the Prosecutor v. Thomas Lubanga Dyilo (*Lubanga case*),⁵ involves exclusively charges of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities. This case faced unimaginable difficulties, which could explain why it is still ongoing after more than seven years since Mr Lubanga's first appearance before the judges at The Hague.⁶ Although the ICC's Trial Chamber I rendered a conviction and a sentence in 2012 against Mr Lubanga (after more than three years since the trial had started),⁷ to date, appeals on these two decisions are still pending and reparations for victims of crimes included in the charges are also still waiting a resolution of the Appeals Chamber and implementation by the Trust Fund for Victims (TFV).

Within this complex first ICC case, children were at the centre of ICC proceedings, and thus its achievements and failures are a vivid example of the advances and drawbacks of the ICC's mandate vis-à-vis children. The prosecution's "key witnesses" included ten alleged former child soldiers.⁸ The victims authorised to participate in the proceedings, 129 in total, were mainly former child soldiers and their relatives.⁹ This case was undoubtedly ground-breaking as it was the first time that victims of crimes (and particularly child victims) actively participated in ICC proceedings and had the possibility to request reparations. However, the experience of this first trial may not be at all positive as regards the ICC's fulfilment of its mandate as regards children. Child witnesses in the Lubanga case were subject to multiple interviews and

should be given to the "special needs of the child", particularly making reference to the need to secure a "child-friendly" environment. See: *UNICEF and the Establishment of the International Criminal Court* (17 March 1998) ICC Preparatory Works, available at < <http://www.legal-tools.org/en/doc/f0fa26/> > (accessed 4 April 2013) p. 5. Likewise, in the Rome Conference the Special Representative of the United Nation's Secretary General on Children and Armed Conflict at the time also appealed that ICC provisions should be consistent with international standards, including, among others, the CRC. See: *Message from Olara A. Otunnu, Special Representative of the Secretary-General for Children and Armed Conflict to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (17 June 1998), ICC Preparatory Works, available at < <http://www.legal-tools.org/en/doc/ed4ff7/> > (accessed 4 April 2013).

5 ICC-01/04-01/06.

6 A timeline of the Lubanga case can be found at: < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx > accessed 2 April 2013.

7 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842; *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901.

8 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 480-481.

9 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 15-17.

strenuous cross-examinations.¹⁰ The first witness to testify in trial, an alleged former child soldier, recanted and stated in court that he had lied to prosecution investigators and ICC judges.¹¹ The defence case was based mostly on credibility issues surrounding the child witnesses brought by the prosecution.¹² In its conviction decision, the Trial Chamber ultimately found that all child witnesses in the Lubanga case, except for one, were unreliable.¹³ For those child witnesses who were also victims participating in the proceedings, their participatory status was removed as a consequence of their contradictory testimonies.¹⁴ The Trial Chamber also found that intermediaries had most likely manipulated these children and possibly committed offences against the administration of justice.¹⁵

Consequently, the Lubanga case demonstrates that the current ICC practice does not adequately protect the safety, physical and psychological well-being, dignity and privacy of children interacting with the ICC, either as witnesses or victims of crimes within the ICC's jurisdiction, pursuant to Article 68 of the Rome Statute. It also raises the issue of whether children should at all testify in international trials (particularly *viva voce* in The Hague) and whether the current victims' participation system is suitable for child victims who may want to present their "views and concerns" to ICC judges pursuant to Article 68(3) of the Rome Statute.

However, not investigating crimes committed against children (particularly when the Prosecutor has received information or evidence that this has occurred) or excluding children from ICC proceedings (when this is not contrary to their best interests) is not a legitimate course of action, particularly in light of Articles 68 and 75 of the Rome Statute and Rule 86 of the RPE mentioned above, read in unison with Article 21(3) of the Rome Statute, which enshrines the principle of non-discrimination.¹⁶ These legal provisions in fact give the

10 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 479; 'Separate and Dissenting Opinion of Judge Odio Benito', para. 32.

11 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 430.

12 *Lubanga case* 'Requête de la Défense aux fins d'arrêt définitif des procédures' (12 August 2011) ICC-01/04-01/06-2657-tENG-Red.

13 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 479-480.

14 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 484.

15 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 482-483.

16 Article 21(3) of the Rome Statute provides as follows: The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, *age*, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status (emphasis added).

legal basis to focus on children as a group requiring special attention by the ICC, particularly when fulfilling the ICC's mandate to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" pursuant to Article 68 of the Rome Statute.¹⁷ As noted by De Brouwer and Heikkila, even though victims of crime may not have special rights granted by international human rights treaties, they do have "general rights" such as the right to privacy and the right to an effective remedy.¹⁸

Nonetheless, these provisions are general and "all-purpose", and enclose within the same protection umbrella groups as varied and distinct as children, elderly persons, persons with disabilities and victims of gender and sexual violence, all of them requiring special protection vis-à-vis their particular needs. Rule 86 of the RPE refers to the "needs" of victims and witnesses, but does not set down what these are. However, read together with Article 68 of the Rome Statute, one can conclude that the "needs" of children should be those related to the protection of their "safety, physical and psychological well-being, dignity and privacy", and not other needs that may be unrelated to the judicial process.¹⁹

While other provisions in the ICC Statute (such as Article 67 on the rights of the accused) are much clearer and their contents defined more in-depth,²⁰

17 It is important to note, however, that children are not a uniform group, and that within a children's rights perspective, other groups should also be taken into consideration (*i.e.* girl-child, children with disabilities, indigenous children, etc.). Hence, various perspectives interrelate, depending on the needs of victims and witnesses, which ultimately are to be determined on case-by-case basis by the ICC. Only if judges and other organs of the ICC take into consideration these different, yet intersected needs of victims and witnesses, will the ICC fulfill its mandate pursuant to Rule 86 of the RPE above and the principle of non-discrimination enshrined in Article 21(3) of the Rome Statute. See for example, Coalition on Women's Human Rights in Conflict Situations 'Concerns Regarding the Rights of the Girl-Child in Armed Conflict Situations' submissions to the ICC Preparatory Commission Inter-Sessional Meeting, Siracusa, Italy, 31 January to 4 February 2000, available at < <http://www.legal-tools.org/en/doc/e5389c/> > (accessed 4 April 2013).

18 Anne-Marie De Brouwer and Mikaela Heikkila, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rules* (Oxford University Press 2013) 1338.

19 As noted by Donat-Cattin, the Rome Statute sets a high standard of protection for victims and witnesses in Article 68 of the Rome Statute and includes children within the group of vulnerable survivors who are always at risk of re-victimisation. See David Donat-Cattin in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn), Nomos Verlagsgesellschaft 2008), p. 1281-1282.

20 For example, the rights of the accused person are clearly spelled out in Article 67 of the Rome Statute, literally duplicating the rights provided for in the ICCPR and other human rights instruments. This also is a clear example of the inherent interaction between international criminal law and international human rights law. See the *International Covenant on Civil and Political Rights*, UNGA Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entry into force 23 March 1976, article 14; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14* (4 November 1950) ETS No 5, article 6; Organisation of American States, *American Convention on Human Rights ("Pact of San Jose", Costa Rica)* (22 November 1969), article 8.

the concept of “needs” of Rule 86 of the RPE needs to be determined by ICC judges and other organs of the ICC in performing their functions.

In light of this general provisions as regards witnesses and victims, it is necessary to resort to other applicable law pursuant to Article 21 of the Rome Statute in order to give more specific substance to the term “needs of witnesses and victims” and their “safety, physical and psychological well-being, dignity and privacy”, and for the purpose of this research, children, as provided for in Rule 86 of the RPE. Hence, a comprehensive study of the ICC’s legal framework from a children’s rights perspective is necessary so that interaction of children as witnesses and victims in ICC proceedings does not compromise their “safety, physical and psychological well-being, dignity and privacy” pursuant to Article 68 of the Rome Statute. For example, when the ICC takes a decision pertaining to a child witness’s relocation, it could refer to Article 9 of the UN Convention on the Rights of the Child (CRC) as regards the child’s separation from his or her parents, Article 12 of the CRC in order to take into consideration the child witness’s views, among CRC other provisions.

Moreover, as demonstrated in the *Lubanga case*, measures to protect children interacting with the ICC, and particularly child witnesses, are not necessarily in disagreement with the rights of the accused or the right to a fair trial. In fact, pursuant to Article 68 of the Rome Statute, these measures should not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. Additionally, these measures may be necessary to protect the integrity of a fair trial against the accused person and also to prevent crimes against the administration of justice that may be committed taking advantage of the age of young victims and witnesses. As will be further analysed in this research, measures such as an improved method for screening child witnesses and measures to preserve their testimonies through time, are not only necessary pursuant to Article 68 of the Rome Statute, but also in order to safeguard the rights of the accused to a fair trial pursuant to Article 67 of the Rome Statute.²¹

2 AIM OF THE RESEARCH AND STATEMENT OF THE PROBLEM

Although, as noted above, the legal framework of the ICC contains child-specific rules, which provide the legal basis for the adoption of child-sensitive measures

21 While victims of crime are only granted indirect protection in human rights conventions, accused persons are given a prominent place therein. However, the rights of victims to participate in ICC proceedings and the rights of victims and witnesses to protection do not violate *per se* the rights of the accused person. As noted by De Brouwer and Heikkila, victims’ rights do not justify violations of the accused person’s rights. This is in fact expressly provided for in Article 68(3) of the Rome Statute. See: Anne-Marie De Brouwer and Mikaela Heikkila, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rules* (Oxford University Press 2013) 1339-1340.

throughout the entirety of the judicial proceedings, these provisions only offer a very general legal context. Given their broad spectrum, their implementation in ICC proceedings may be challenging, especially considering the particularities of all situations in which the ICC is currently involved and the individual situation of a child victim or witness interacting with the ICC.²²

Consequently, the general ICC provisions (*lex generalis*) should be applied and interpreted using other existing international instruments related to children (*lex specialis*). This research project identifies these other applicable sources of law that could be useful in the implementation of children's rights within the ICC's work and gives more specific content to the general ICC provisions using international instruments that have been adopted in recent years for the development of children's rights. It thus intends to progress the ICC's practice vis-à-vis child victims and witnesses applying and interpreting the general ICC provisions taking into account international children's rights standards. As will be further analysed in Chapter 3 of this research, pursuant to Article 21(3) of the Rome Statute, interpretation and application of the Rome Statute and other ICC provisions in light of human rights standards is compulsory.

The main research question is:

How should ICC proceedings address the needs of children in accordance with Rule 86 of the RPE, in order to: a) protect the safety, physical and psychological well-being, dignity and privacy of child victims and witnesses pursuant to Article 68(1) of the Rome Statute; b) guarantee that the views and concerns of child victims are taken into consideration as provided for in Article 68(3) of the Rome Statute; and c) provide reparations to child victims pursuant to Article 75 of the Rome Statute?

The next sub-questions are answered in the following chapters:

Chapter 1:

- What is the role of children in current armed conflicts and in situations that fall under the jurisdiction of the ICC?
- How do international crimes affect children (as victims and as perpetrators)?

22 The ICC is currently dealing with 8 situations: Uganda, Democratic Republic of Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Cote d'Ivoire and Mali. Within these situations, the ICC has 18 pending cases in pre-trial, trial and appeal. For an updated overview of the cases: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 27 February 2013. On 14 May 2013, the Prosecutor of the ICC received a referral from the Union of the Comoros, "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip". See: <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr926.aspx> accessed 7 August 2013.

Chapter 2:

- Which are the ICC's main organs and what are their fundamental functions, powers and duties and how can they guarantee children's adequate interaction as victims and witnesses with the ICC?

Chapter 3:

- What is the legal framework applicable to the ICC pursuant to Article 21 of the Rome Statute in order to fulfil the ICC's mandate to address the needs of children and protect the safety, physical and psychological well-being, dignity and privacy?
- What other international instruments, not applicable pursuant to Article 21 of the Rome Statute, could still serve as guidance when dealing with children's protection in ICC proceedings?

Chapter 4:

- Which crimes within the jurisdiction of the ICC are child-specific or disproportionately affect children and how have these crimes been defined in the Rome Statute and international jurisprudence developed thus far?
- How can the definition of these crimes affect the procedural status of children at the ICC, including their victim's status pursuant to Rule 85 of the RPE?

Chapter 5:

- Which are the existing legal framework, practice and jurisprudence of the ICC as regards victims' participation, witnesses' protection and victims' reparations vis-à-vis internationally recognised children's rights?
- What challenges does the ICC face in the implementation of internationally recognised children's rights in its judicial proceedings and what measures could be taken to improve or adapt the ICC practice from a children's rights perspective?

Chapter 6:

- What are the main conclusions regarding advances, drawbacks and challenges of the ICC as regards children's rights?
- Which guidelines could be proposed to the ICC in order to transversally include a children's rights perspective in ICC proceedings?

3 THE CONCEPT OF "CHILD VICTIMS AND WITNESSES"

It is important to clarify that throughout this research the concept of "child victims and witnesses" is used to denote a wide category of individuals who interact differently with the ICC.

As will be further analysed in Chapter 3, the CRC gives a clear indication as to the concept of child, namely someone below the age of 18.²³ Thus, pursuant to Rule 85 of the RPE, the CRC and the ICC case law, a child victim is “someone who experienced (when he or she was under the age of 18) personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss” as a result of the commission of a crime within the jurisdiction of the ICC.²⁴ Recently, Trial Chamber V has defined “victims” for the purposes of protection, as “a victim whose identity has been disclosed to the parties following the Chamber’s preliminary review of his or her application and submission of that application to the parties for comments”.²⁵

As will be analysed further in Chapter 5, a victim or witness should be considered a child at the time of the relevant crimes, and not in relation to his or her age at the time of his or her interaction with the ICC.

Within the concept of “child victim” there are however different categories or ways in which children may interact with the ICC. It is important to refer to them at the outset, in order to clarify the concept of “child victim” in ICC proceedings.

Firstly, the term “child victims” include individuals who participate in proceedings pursuant to Article 68(3) of the Rome Statute.²⁶ As will be further analysed in Chapter 5, in order to become a victim under this provision, individuals should apply for participation pursuant to Rule 89(1) of the RPE. This concept of victims is not limited to direct victims or even immediate family members.²⁷ Moreover, the latest ICC case law has also opened the possibility for a collective approach to victims’ participation, and thus the concept of “child victims” could also include groups of victims, either exclusively made of individuals who were under the age of 18 at the time of

23 The Elements of the Crimes also establish that a “child”, for the purposes of Article 6(e) is a person under the age of 18 years.

24 *Lubanga case* ‘Judgment pursuant to Article 74 of the Rome Statute’ (14 March 2012) ICC-01/04-01/06-2842, para. 14; *Lubanga case* ‘Decision on victims’ participation’ (18 January 2008) ICC-01/04-01/06-1119, paras 90-92; *Lubanga case* ‘Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008’ (11 July 2008) ICC-01/04-01/06-1432, paras 31-39.

25 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (*Ruto and Sang case*) ‘Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims’ (12 November 2012) ICC-01/09-01/11-472, para. 5.

26 As noted by McGonigle Leyh, this is the concept of “victim participant”. See Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 235.

27 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 233-234.

the crimes, or including both adults and children within the same “collective” approach.²⁸

Secondly, the term child victim also includes victims who make representations in accordance with Articles 15(3) and 19(3) of the Rome Statute. As will be further studied in Chapter 5, these representations are not much regulated, and thus can include individual and collective approaches, as varied and diverse as an e-mail communication, a video to a fully filled-in application form.²⁹

Thirdly, the concept of child victim also includes victims who benefit from reparations, either individually or collectively, as ordered by a Chamber or implemented by the TFV pursuant to an order of the Chamber or within the TFV’s assistance mandate.

As regards the concept of “child witness”, it denotes individuals who witnessed a crime within the jurisdiction of the ICC when they were under the age of 18 (at the time of the events), regardless of the age they have when they testify in court.

The definition of “witness” given by Trial Chamber V in the two cases pending in the Situation in the Republic of Kenya (*Kenya situation*) could be helpful to determine this concept for the purposes of the present research:

“(...) a witness is a person whom a party or participant intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its filed witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party’s witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto.”³⁰

The term thus includes witnesses of the prosecution, the defence, the legal representatives of victims and the Chamber, as these are all capable to present evidence in ICC proceedings.

However, for the purpose of protection pursuant to Article 68(1) of the Statute, and pursuant to Article 54 of the Rome Statute, the interests of “witnesses” shall be respected from the preliminary proceedings, during the

28 *Kenyatta and Muthaura case* ‘Decision on victims’ representation and participation’ (3 October 2012) ICC-01/09-02/11-498. An identical decision was issued in the other case in the *Ruto and Sang case*: ‘Decision on victims’ representation and participation’ (3 October 2012) ICC-01/09-01/11-460. For the ease of reference, this research will refer solely to the decision filed in the *Kenyatta and Muthaura case*. This decision will be further analysed in Chapter 5.

29 As noted by McGonigle Leyh, this is the concept of “victim claimant”. See Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 235.

30 *Ruto and Sang case*, ‘Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call’ (24 August 2012) ICC-01/09-01/11-449, Annex 1, para. 1.

investigation phase. Thus, the term “witness” also includes individuals who are approached by the ICC from the initial stages of the investigation, even if these individuals do not eventually become “trial witnesses”.

Likewise, “other persons at risk”, which encompasses an even broader concept that “victims” and “witnesses” are also entitled to protection. Trial Chamber V of the ICC has also defined this term to include persons at risk on account of their activities for the Court or on account of the testimony / statements given by others.³¹ The same Chamber has recently emphasised that protection is not only due vis-à-vis victims and witnesses, but also as regards “other persons who might be at risk as a result of the activities of the Court”.³² It further determined that “potential witnesses” should be considered as “other persons at risk”, until they become witnesses in proceedings.³³ Family members of witnesses are also considered within this broad category of “other persons at risk”.³⁴

In many instances children will be both victims and witnesses and thus have a “dual status”. As will be further analysed in Chapter 5, the rights and the protection afforded to an individual child may vary depending on his or her interaction with the ICC. For example, although the ICC judges have thus far allowed the participation of anonymous victims, there have not been any anonymous witnesses vis-à-vis the accused persons.

4 RESEARCH METHODOLOGY

The main point of departure of this study is the Rome Statute, and pursuant to Article 21 of this treaty, other applicable law, including ICC provisions found in the Elements of Crimes, the RPE, the Regulations of the Court (RoC), the Regulations of the Registry (RoR), and the Regulations of the Trust Fund for Victims (RTFV). Pursuant to Article 21 of the Rome Statute, other international instruments on children’s rights, particularly the CRC, are applied in order to provide child-specific contents to the ICC provisions. Other international legal sources have been consulted, particularly UN resolutions, regional human rights case law, as well as other “soft law” instruments, which could be significant to ICC proceedings.³⁵

31 *Ruto and Sang case*, ‘Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call’ (24 August 2012) ICC-01/09-01/11-449, Annex 1, para 2.

32 *Ruto and Sang case* ‘Decision on the protocol establishing a redaction regime’ (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para. 44.

33 *Ruto and Sang case* ‘Decision on the protocol establishing a redaction regime’ (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para. 1.

34 *Ruto and Sang case* ‘Decision on the protocol establishing a redaction regime’ (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para.56.

35 The Appeals Chamber at the ICC concluded that “soft law” instruments may be used as “guidance”. See *Lubanga case* ‘Judgment on the appeals of The Prosecutor and The Defence

This research also thoroughly analyses the ICC's practice and jurisprudence in relation to participation of victims, protection of victims and witnesses and reparations to victims of crimes within the jurisdiction of the ICC. The date of 1 April 2013 has been used as cut-off date for consulted ICC case law.

This research does not aim to recapitulate on the extensive and innumerable sources that are widely available regarding the ICC's jurisdiction or the situation of children in armed conflict, particularly the phenomenon of child soldiers. Although this research does not intend in any way to be an academic research which comprehensively analyses the social, economical and political effects of armed conflict on children around the world, it refers to the general situation of children in armed conflict in Chapter 1 in order to contextualise the circumstances in which crimes against children are committed and the role children play in modern armed conflicts.

This research is based mainly on international legal instruments and international case law. Thus, it does not refer, albeit for some few exceptions, to legal instruments or practices of national jurisdictions. The legal and jurisprudential sources on which this study is based were obtained through extensive and thorough research of legal instruments and digital research of case law of the international tribunals (namely the ICC, the Special Court for Sierra Leone (SCSL) and to an extent, the ad-hoc tribunals). The author, as a staff member of the ICC, has also applied her own personal experience in ICC proceedings in the development of this research.³⁶ Furthermore, this study solely refers to information that is publicly available through the ICC's website or other public sources.

This research follows classic legal methodology and is thus limited to the use of legal texts and case law. It has not thoroughly analysed the wider impact that ICC proceedings may have according to studies of other disciplines such as psychology, sociology or anthropology. This, however, is an interesting field of study that could be developed in the future by a multi-disciplinary group of researchers and that would undoubtedly contribute to the understanding of ICC proceedings beyond the legal perspective.

5 STRUCTURE OF THE THESIS

This research is divided into 6 chapters.

Chapter 1 gives a general introduction to the role of children in current armed conflicts, which sets the general context of the situation of children who

against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, para. 33. The legal status of these "soft law" instruments is further analysed in Chapter 3.

³⁶ The views expressed in this research are those of the author and in no way reflect those of the ICC.

will come to the ICC either as victims or witnesses of crimes within its jurisdiction. It first describes how violence against children has become a weapon of war in many current armed conflicts. It then analyses the impact that crimes against children have on their lives and those of their families and communities. However, it goes beyond the role of children as victims of armed conflict and analyses the complicated reality of many children that are also perpetrators of crimes within the context of an armed conflict, particularly the situation of child soldiers. Finally, this chapter focuses on the significant role that children could play as participants in the peace and reconciliation process, including their participation in international justice as well as non-judicial mechanisms. Chapter 1 thus illustrates that child victims and witnesses are not simply “vulnerable” individuals. Children appearing before the ICC include children who may be perpetrators of crimes (albeit not within the ICC’s jurisdiction). Likewise, as a result of armed conflict, children appearing before the ICC could also be more empowered, mature and independent than children in other situations. This analysis is important since these multifaceted aspects of children in armed conflict should be taken into consideration when dealing with children’s interaction with the ICC in Chapters 5 and 6 of this research.

Chapter 2 is a brief introduction to the ICC, its establishment and its main organs. This introduction is made through a children’s rights perspective, thus focusing on how the different organs of the ICC should work in order to fulfil the ICC’s mandate pursuant to Rule 86 of the RPE. It is also an important Chapter to introduce the organisation and structure of the ICC, particularly since different organs and sections of the ICC are later mentioned and referred to in Chapters 5 and 6 of this research. Although this Chapter may be superfluous for readers with knowledge on the ICC, it could be of value for readers who, although knowledgeable in children’s rights, may not be acquainted to the ICC’s structure and functioning.

Chapter 3 focuses on the relevance of other international instruments for the interpretation and application of ICC provisions in proceedings related to child victims and witnesses. This Chapter takes as initial point Article 21 of the Rome Statute, and mainly paragraph 3, which requires ICC judges to interpret and apply the law in accordance with internationally recognised human rights. As regards children, the logical point of departure is the CRC. The Chapter also refers to other sources of law that, although not applicable law *per se* pursuant to Article 21 of the Rome Statute, could serve as guidance for ICC judges when interpreting the law. Finally, this Chapter analyses international case law that may be relevant and applicable for child victims and witnesses before the ICC. In particular, the jurisprudence of the SCSL is analysed regarding crimes of enlistment, conscription and use of children to participate actively in the hostilities and crimes of sexual violence. Furthermore, the case law of the regional human rights courts is studied. Of great significance is the case law of the Inter-American Court of Human Rights (IACtHR), particularly in

relation to reparations. The analysis contained in Chapter 3 thus gives the legal basis for the use of other international instruments in the following chapters.

Chapter 4 focuses on the substantive law of the ICC. It describes very briefly the ICC's jurisdiction. The Chapter then thoroughly describes crimes committed exclusively against children but also crimes that, although committed against the general population, have disproportionate effects on child victims. This analysis is of significance, since children will interact with the ICC when they are victims or witnesses of crimes within its jurisdiction. Thus, the analysis of the elements of crimes is necessary to identify who are the child victims and witnesses at the ICC. For example, in order to establish whether a child is a victim within the jurisdiction of the ICC pursuant to Rule 85 of the RPE, an analysis of the elements of the relevant crimes is required. Likewise, in order to establish the harms suffered in reparations proceedings, an analysis of the crimes committed against children and the effects that these crimes have upon them is fundamental. This Chapter is also important to understand the particular circumstances of child victims and witnesses addressing the ICC, who may need protective or special measures as a result of the crimes (*i.e.* a child witness with a post-traumatic stress disorder as a consequence of sexual violence). Thus, although this Chapter analyses the substantive law of the ICC, it ultimately has significant bearing on the procedural issues discussed in Chapters 5 and 6 of this research.

Chapter 5 is the *pièce de résistance* of this research, as it focuses on the three manners in which children can interact with the ICC: as participating victims, as witnesses and as beneficiaries of reparations. It analyses the existing legal framework and practice at the ICC, but also provides examples of how other applicable law related to children's rights could be of use in proceedings in which children interact with the ICC. This Chapter proposes different methods, standards and good practices that could be adopted in ICC proceedings in order to take into consideration the needs of child victims and witnesses pursuant to Rule 86 of the RPE.

Chapter 6 proposes a series of recommendations that could be adopted in order to guarantee the active participation and reparations of child victims in ICC proceedings in accordance with international standards in children's rights and also pursuant to Rule 86 of the RPE. The Chapter also proposes measures that could be taken when children appear as witnesses in proceedings before the ICC, in order to make their experience non-traumatic, but also in order to guarantee the rights of the accused and a fair trial. The final chapter also proposes a series of guidelines, which provide specific parameters in order to fulfil the mandate of the ICC as provided for in Article 68 of the Rome Statute and Rule 86 of the RPE and pursuant to international children's rights standards.