



Universiteit
Leiden
The Netherlands

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>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/24891>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/24891> holds various files of this Leiden University dissertation

Author: Chamberlain Bolaños, Cynthia

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

Issue Date: 2014-03-25

2 | Children and ICC's structure

This Chapter introduces the different organs of the Court and their role in the interaction of children with the ICC. It is aimed to those readers that may not be familiar with the ICC structure and its main distinctions with other international tribunals and courts. Although for the more knowledgeable reader the following Chapter may seem obvious at a first glance, it is still of significance, as it analyses the ICC structure and proceedings from the perspective of child victims and witnesses. It proposes how each organ of the ICC has responsibilities in order to guarantee the protection and participation of child victims and witnesses pursuant to Article 68 of the Rome Statute and address the harms suffered by children through reparations in accordance with Article 75 of the Rome Statute.

The present Chapter introduces the ICC, its history and its current structure.¹ In the first section on the establishment of the ICC, it will show how children's rights and a child-centred perspective were discussed and implemented in the adoption of the Rome Statute. The discussions of the Rome Conference and other preparatory meetings may be important when interpreting ICC provisions, as ICC judges have repeatedly referred to the drafting history of provisions in their decisions.²

Moreover, section two gives a general introduction to the structure of the ICC, which has developed into a complex organisation, with seat in The Hague, but also with field offices in the different African countries where the ICC is

1 This chapter very generally synthesises the main aspects of the ICC's establishment and structure from a children's rights perspective. However, for further in-depth analysis on the general establishment and structure of the ICC, the reader is referred to the following literature: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 15-127 and 931-1063; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 1-27; Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Transnational Publishers 2005) Volumes 1, 2, and 3; Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010), 5-66.

2 For example, in its decision confirming the charges against Thomas Lubanga Dyilo, Pre-Trial Chamber I referred to the "Zutphen Draft", which was a discussion paper adopted in a PrepCom. See *Lubanga case* 'Decision on the confirmation of charges' (29 January 2007) ICC-01/04-01/06-803-tEN para. 267. See also *Kenya Situation*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' (31 March 2010) ICC-01/09-19-Corr, paras 17-19.

currently investigating and prosecuting cases. The Chapter focuses on how the different organs of the ICC may play a role in the protection of child victims and witnesses and particularly, in ensuring the ICC's mandate under Article 68 of the Rome Statute and Rule 86 of the RPE.

2.1 THE ESTABLISHMENT OF THE ICC

In 1995, the UNGA established an ad-hoc committee for the establishment of a permanent international criminal court. This ad-hoc committee, which later was called the Preparatory Commission (PrepCom), prepared a draft statute, which finally was discussed and adopted in 1998, in the Plenipotentiaries Conference convened by the UNGA in Rome, Italy.³

At the outset of the process, different organs of the UN that monitor and protect children's rights actively participated in the process for the creation of the ICC. For example, in 1998, the CRC Committee rendered a recommendation to the PrepCom on this matter. On this occasion the CRC Committee urged the PrepCom to consider the following when drafting the Rome Statute for the ICC: a) definition of war crimes; b) age of criminal responsibility; c) aggravating and mitigating circumstances of crimes; and d) protection of the rights of the child. Most importantly, the CRC Committee stated that "the provisions of the Rome Statute of the ICC (must) be in line with the principles and provisions of the CRC with respect to the various aspects of the protection of children's rights".⁴

During the drafting process, as well as during the discussions that took place in the Rome Conference, civil society played an important role that unquestionably influenced the final version of the Rome Statute. Through the NGO Coalition for an International Criminal Court (CICC), among other civil society groups, more than eight hundred non-governmental organisations (NGOs) from all corners of the world came to Rome, including women's groups, disabilities organisations, religious groups, and children's rights groups, among many others. Among the list of NGOs that participated in the Rome Conference, some children-specific organisations were: Children's Fund of Canada, Save the Children Fund, Union to Protect the Children of Lebanon, and Youth Approach for Development and Cooperation.⁵

The influence of civil society in the drafting of the Rome Statute is reflected in the Rome Statute's many provisions that include *inter alia* gender perspect-

3 UNGA, *Establishment of an International Criminal Court: Resolution adopted by the General Assembly* (28 January 1998) A/RES/52/160.

4 UNGA, *Recommendation adopted by the CRC Committee* (2 April 1998) A/AC.249/1998/L.18.

5 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Non-Governmental Organisations Accredited to Participate in the Conference* (5 June 1998) A/CONF.183/INF/3.

ive, protective measures for victims of sexual violence, and special measures for child victims. Undoubtedly, the ICC's present system, which provides for the participation of victims in the proceedings, as well as for reparations for the crimes they suffered, are a consequence of the participation of civil society groups in the adoption of the Rome Statute.

After five weeks of intensive discussions, amongst more than two thousand delegates from around the world, the Rome Statute was adopted on July 17th, 1998, with 120 votes in favour, 7 against and 2 abstentions.

Unlike the ad-hoc tribunals, which derive from the mandate of the United Nations Security Council (UNSC), the ICC originates from the UNGA. This explains the democratic values of this international organisation, which endeavours to have equitable geographical representation and gender balance in its human resources, from judges to general staff. Likewise, this egalitarian nature is reflected in the diversity of its provisions, which include procedural institutions both of common law and civil law systems.

Participation of children's NGOs and UN agencies, such as UNICEF, in the Rome Conference is reflected in provisions such as Article 26 of the Rome Statute that excludes criminal responsibility for children under 18, or Articles 36(8)(b) and 42(9), which call for expertise in violence against children among judges, and the Office of the Prosecutor (OTP). Likewise, the inclusion of child-specific crimes, such as forcible transfer of children (Article 6(e)), war crimes for intentionally attacking a school (Articles 8(2)(b)(ix) and 8(2)(e)(iv)), and conscripting, enlisting or using children under 15 to actively participate in hostilities (Article 8(2)(b)(xxvi) and 8(2)(e)(vii)) are unquestionably the result of the efforts made by children's rights organisations in the preparatory discussions prior to the adoption of the Rome Statute. Already in the Rome Conference UNICEF called upon States to use the CRC as "guiding reference and framework for the work of the (International) Criminal Court whenever the situation of children is at stake". It also affirmed that the CRC should inform the drafting process of the Rome Statute, considering the "virtual universal ratification" of the CRC and the consensus built around it.⁶

The efforts to include children's rights in the ICC went beyond Rome, with the drafting and adoption of the RPE and the Elements of Crimes. For example, in 1999, the PrepCom held a "Seminar on victims' access to the ICC",⁷ with the participation of sixty experts from different parts of the world that spoke on a personal basis and made recommendations on how to include effective victims' rights in the ICC's RPE. In this Seminar important discussions took place

6 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 7 August 2013) pp. 1-2.

7 UN Preparatory Commission for the International Criminal Court (PrepCom) *Report on the International Seminar on Victims' Access to the ICC* (6 July 1999) PCNICC/1999/WGRPE/INF/2.

that resulted, for example, in the Rules related to Victims and Witnesses Unit (VWU), which should have staff with expertise amongst others, in traumatised children.

In 2000, another seminar was held by the PrepCom to discuss protection of victims, in particular of special groups of victims, such as children and disabled persons. In its report, the PrepCom brought to the attention of State Parties to the Rome Statute the importance of: a) adopting special techniques to preserve the credibility and to protect a child witness; b) training investigation personnel in order to avoid re-traumatisation of child witnesses; and c) putting in place alternative means to obtain and admit children's evidence (*i.e.* video testimony).⁸

Clearly, as a result of these and many other discussions, children's rights are protected in various provisions of the Rome Statute and the RPE. For example, Rules 16 to 19 of the RPE regulate the functioning of the VWU and include many of the recommendations made by the PrepComs, such as the expertise in violence against children (Rule 19(f)), and the possibility to assign a child-support person to assist a child witness or victim through all stages of the proceedings (Rule 17(3)).

Ten years after the establishment of the ICC the participation of NGOs in the work of the ICC continues. As the OTP has stated, NGOs continue "to form a vital part of the Office's comprehensive strategy and fulfil various complementary roles within the scope of the ICC". For example, up until June 2006, the OTP had contact with over 300 NGOs.⁹ For example, in June 2003, three months after being sworn in, the Prosecutor had a first public hearing with State Parties, NGOs and academics in which he presented the OTP's policy. The prosecution later included all comments made into a "Paper on Some Policy Issues before the OTP".¹⁰ Likewise, NGOs continue to offer continuous support to the ICC but also monitor its work. For example, in preparation for the 2011 election of six new judges, a panel of experts made recommendations regarding the qualifications of the candidates.¹¹ It is to be noted that none of the candidates deemed unqualified by the panel were elected by the ASP.

NGOs also play a fundamental role in the field. For example, in the first Situation referred to the ICC, namely Uganda, both the OTP and the Registry

8 PrepCom, *Report of the Seminar of the Preparatory Commission for the ICC, Intersessional meeting, Istituto Superiore Internazionale di Scienze Criminali (ISISC), January 31 – February 5, 2000.*

9 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006) para. 93 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/report%20on%20the%20activities%20performed%20during%20the%20first%20three%20years%20%20june%202003%20%20june%202006.aspx> accessed 7 August 2013.

10 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006), para. 57.

11 *Independent Panel on International Criminal Court Judicial Elections* <<http://iccindependentpanel.org/>> accessed 7 August 2013.

held workshops with traditional leaders (150 leaders, 120 NGOs, 60 local government representatives and 50 religious leaders) in order to analyse the relationship between the ICC and the peace process in this country.¹² Likewise, the Director of the TFV held consultations with local and religious leaders, and representatives of victims organisations in the Democratic Republic of Congo (DRC) and Uganda, in order to make an "initial assessment of the assistance being provided to victims" and explain to key stakeholders in both countries the "foundations for funding of the first projects" of the TFV.¹³

Although the ICC has become a strong organisation in its first ten years of existence, it still requires the assistance and cooperation of NGOs. Although, as will be analysed in Chapter 5, the involvement of intermediaries, often members of NGOs, could have affected the fairness of proceedings in the first cases before the ICC, the ICC cannot work isolated from local and international NGOs involved in the countries where the ICC is currently involved. The involvement of NGOs during the entirety of ICC proceedings, from the initial stages of Article 15 authorisation to commence an investigation, to the final phase of reparations, is incontestable. However, this association of the ICC with NGOs must be organised, duly regulated, and most importantly, kept under careful judicial scrutiny. Beyond the effectiveness of proceedings, the number of convictions or the number of participating victims, ICC judges should remain vigilant in order to guarantee that NGOs that assist the ICC, for example, in investigations, in the victims' application process and in the reparations proceedings, are also knowledgeable and respectful of the ICC provisions, particularly the safety and well-being of victims and witnesses pursuant to Article 68 of the Rome Statute, but also of the rights of the accused to a fair trial, as enshrined in Article 67 of the Rome Statute.

12 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006) para. 34.

13 ICC Press and Media, 'Director of the Trust Fund met with victims' communities in Uganda' (Press release 13 June 2007) < http://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/outreach/uganda/press%20releases/Pages/director%20of%20the%20trust%20fund%20met%20with%20victims%20communities%20in%20uganda.aspx > accessed 7 August 2013; 'Première visite du Directeur exécutif du Fonds au Profit des victimes en RDC' (Press release 15 June 2007) < http://www.icc-cpi.int/fr_menus/icc/press%20and%20media/press%20releases/2007/Pages/première%20visite%20du%20directeur%20exécutif%20du%20fonds%20au%20profit%20des%20victimes%20en%20rdc.aspx > accessed 7 August 2013.

2.2 ORGANISATION OF THE ICC

2.2.1 The Assembly of State Parties

The deliberative organ of the ICC is the ASP. This democratic organ makes many of the fundamental decisions for the functioning of the ICC, including any amendment to the Rome Statute and the RPE and approval of the ICC's annual budget. For example, in 2010, the ASP adopted a definition for the crime of aggression in the Review Conference held in that year.¹⁴

The ASP also elects ICC judges, as well as the Prosecutor and Deputy Prosecutors, and the Board of Directors of the TFV, all of which are nominated by the State Parties. In reference to the above, the ASP has repeatedly reminded State Parties to "take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children".¹⁵ The ASP has also reminded the ICC of its obligation to recruit staff seeking expertise on issues such as violence against women and children.¹⁶

Since the ASP is the organ of the ICC that approves the yearly budget, it also provides management oversight to ICC organs. In this sense, the Presidency, Registry and the OTP yearly submit to the ASP their staffing and resources requirements. Consequently, the decisions of the ASP are fundamental in allocating resources and staff to the different sections of the ICC so they can meet their obligations as regards the protection of child victims and witnesses pursuant to the Rome Statute. Moreover, as will be analysed in Chapter 5 of this research, the ASP could amend the RPE in order to make participation for victims, particularly the application procedure, more collective and less burdensome for the victims, but ultimately for the accused persons who have the right to challenge such participation.

Another important aspect of the ASP, as an organ composed of all State Parties to the Rome Statute, is the necessary cooperation that must exist between the ICC and State Parties (*i.e.* for enforcement of sentences, relocation of witnesses, facilitating testimonies of witnesses, etc.).

14 On 11 June 2010 the ASP included Article 8*bis* to the Rome Statute, which defines the crime of aggression. This amendment was inserted by: ICC Review Conference Resolution, *The Crime of Aggression* (11 June 2010) RC/Res.6.

15 ICC Assembly of States Parties, *Procedure for the Election of the Judges for the International Criminal Court* (Resolution of 9 September 2002) ICC-ASP/1/Res.3, para. 2.

16 ICC Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties* (Resolution of 1 December 2006) ICC-ASP/5/Res. 3, para. 21. See also *Strengthening the International Criminal Court and the Assembly of States Parties* (Resolution of 5 of December 2005) ICC-ASP/4/Res.4, para. 23.

2.2.2 Presidency and Chambers

The *Presidency* of the ICC has three main functions: external relations, administrative and judicial. Although the OTP may negotiate and conclude agreements on its own, the Presidency is the organ of the ICC that principally endorses cooperation agreements with State Parties, non-State Parties, as well as with international organisations and NGOs. Since the ICC does not have a police force to execute its warrants of arrest, or prison facilities for the enforcement of sentences, it depends on these agreements to fulfil its mandate.¹⁷

This mandate is paramount to protect children's rights before the ICC, as the Presidency could negotiate agreements with international organisations and/or NGOs with expertise in children's rights. For example, the Presidency adopted a "Negotiated Relationship Agreement between the ICC and the United Nations", in which it is established that the "United Nations or its programmes, funds and offices" may provide cooperation and assistance to the ICC.¹⁸ Assistance and cooperation of UNICEF or other UN agencies or experts could prove essential for the ICC's work.¹⁹ In fact, as will be studied further in Chapter 5, the Special Representative of the Secretary-General for Children and Armed Conflict acted as *amicus curiae* and later as expert witness in the ICC's first trial. Cooperation with other organisations, such as the African Union and other international organs specialised in children's rights, is also important (*i.e.* the African Committee of Experts on the Rights and Welfare of the Child), particularly to gain support and outreach in the continent currently under the ICC's scrutiny.

The *Chambers* of the ICC consist of three Divisions to which judges have been assigned: the Pre-Trial Division, the Trial Division and the Appeals Division.

The *Pre-Trial Division* is composed of three Pre-Trial Chambers with three judges serving in each Chamber, although a single judge may exercise the functions of a Pre-Trial Chamber. The Pre-Trial Chamber monitors fairness of the proceedings from the initial investigation of a Situation by the Prosecutor to the confirmation of charges against a suspect.²⁰ Among its multiple functions, the Pre-Trial Chamber may authorise the Prosecutor, upon request,

17 ICC, *Structure of the Court, Presidency* < http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/presidency/Pages/the_presidency.aspx > accessed 7 August 2013.

18 ICC Assembly of States Parties and United Nations, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (October 2004) ICC-ASP/3/Res.1, article 15.

19 See for example: *Children and Armed Conflict: International Standards for Action*" (April 2003) <<http://www.unicef.org/emerg/files/HSNBook.pdf>> accessed 7 August 2013.

20 See Hall 1133-1145 and Schabas and Shibahara 1171-1181 in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008).

to commence an investigation *proprio motu* and may review the Prosecutor's decisions not to investigate or not to prosecute.²¹

The powers of the Pre-Trial Chamber are also significant in relation to the preservation of evidence, especially when there is a unique investigative opportunity, in accordance with Article 56 of the Rome Statute, or when the Prosecutor needs to take investigative steps in the territory of a State Party, as provided for in Article 57 of the Rome Statute.²² For example, in investigations involving child witnesses, these powers of the pre-trial judges allow the Prosecutor to take the statement of child witnesses in a timely manner for their future use in pre-trial or trial proceedings. This possibility could prove helpful to take a statement or testimony from child witnesses only once, during the investigation stage, thus avoiding multiple contacts of the child witness with the ICC.²³

Likewise, the Pre-Trial Chamber may issue orders for the protection of victims and witnesses from an early stage of the proceedings. Such measures, as will be analysed further in Chapter 5, may not only serve to protect the well-being and security of a child witness, but may also preserve the probative value of his or her testimony in trial, preserving its integrity, reliability and trustworthiness. Moreover, the Pre-Trial Chamber may decide on the participation of victims during this initial stage.²⁴

In the *Trial Division*, judges are assigned to Trial Chambers of three judges each. Unlike the Pre-Trial Chamber's functions, which may be exercised by a single judge, the functions of the Trial Chamber must be carried mostly by the three judges of the said Chamber.²⁵ However, recently Rule 132 *bis* was adopted, allowing for a Single Judge to act alone for the preparation of trial.²⁶

During the trial proceedings the Trial Chamber hears the evidence and submissions of parties and participants. Additionally, according to Article 69(3) of the Rome Statute, the Trial Chamber may request the submission of evidence

21 ICC, *Structure of the Court, Chambers, Trial Division* <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/trial%20division/Pages/trial%20division.aspx> accessed 7 August 2013. See also Guariglia and Hochmayr in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1117-1131.

22 See Guariglia and Hochmayr in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1107-1115.

23 Rome Statute, Article 56.

24 See for example, *Lubanga case* 'Decision on the applications for participation in the proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and the investigation in the Democratic Republic of Congo' (28 July 2006) ICC-01/04-01/06-228-tEN.

25 See Bititi in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1199-1218.

26 ICC, *Structure of the Court, Chambers, Trial Division* <<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB>> accessed 31 August 2012.

necessary for the determination of the truth, and may, according to Rule 103 of the RPE, invite or grant leave to *amicus curiae* to give an observation on any issue that the Chamber considers appropriate. As will be hereinafter further analysed, in the *Lubanga case*, the Trial Chamber called four expert witnesses, among them, the UN Secretary General Representative for Children and Armed Conflict, and an expert on children with trauma.²⁷

The Trial Chamber also decides on applications of victims to participate in the trial proceedings and the manner in which they will do so. Most importantly, the Trial Chamber judges decide on the acquittal or conviction (Article 74 of the Rome Statute) and sentence (Article 76 of the Rome Statute) of an accused person, as well as on reparations orders (Article 75 of the Rome Statute).

Finally, judges may form part of the *Appeals Division*, which is formed by 5 judges, all of them serving as an Appeals Chamber. Pursuant to Article 81 of the Rome Statute, the Appeals Chamber has the power to decide on the appeals against final decisions, such as acquittal, conviction or sentence against an accused. The Appeals Chamber may also decide on interlocutory appeals of pre-trial and trial decisions. Finally, the Appeals Chamber may revise a final judgment of conviction or sentence, if the requirements established in Article 84 of the Rome Statute are met.

Although, as will be analysed in Chapter 3, the decisions of the Appeals Chamber are not binding, its criteria are often referred to by other ICC Chambers and thus they are due to influence the moulding of the ICC's case law. As many of the provisions under the Rome Statute are open to interpretation, the decisions and judgments of the Appeals Chamber are important, particularly in the ICC's first cases. For example, the Appeals Chamber has set principles regarding victims' participation and has also established principles for the interpretation and application of the Rome Statute pursuant to international human rights law.²⁸ However, more guidance is still required, for example as regards the victims' application process, which as will be further analysed in Chapter 5, is different amongst the various ICC Chambers.

2.2.3 The Registry

The Registry is the main administrative organ of the ICC and is, unlike the OTP, under the authority of ICC's Presidency (Article 43(2) of the Rome Statute). Though both the Presidency and the OTP can sign agreements with States and other international actors, the Registrar is the main focal point between the

²⁷ The testimony of these two expert witnesses is analysed in depth in Chapters 4 and 5 below.

²⁸ This is further analysed in Chapters 3 and 5 below.

ICC and the ASP, other States and international organisations and NGOs. The Registrar is also the focal point between the TFV and the ICC.²⁹

The Registry is composed of multiple sections and divisions, which have been set up to fulfil the mandate provided for in the Rome Statute and the RPE. All of them play a role in the fulfilment of children's rights before the ICC.

As will be studied in Chapter 5, the outreach work of the Public Information and Documentation Section (PIDS) is crucial so that child victims and witnesses understand the nature of the ICC in a way and manner that is comprehensible according to their age, maturity and level of education (*i.e.* its jurisdiction, the possibility of victims to participate in proceedings, the right to reparations, etc.).³⁰

In accordance with Article 43(6) of the Rome Statute, the VWU provides protective and security measures, counselling, and support for victims and witnesses, their family members and any other person at risk. Although this vast role of the VWU is further explained in Chapter 5, it is important to state at the outset that the main purpose of the VWU should be to prevent the re-victimisation of victims and witnesses as a result of their participation before the ICC. Victims and witnesses of the current situations before the ICC travel to a foreign country and appear before a foreign court. They participate in unfamiliar proceedings, in a language that often is not their own, face the perpetrators, testify about horrendous experiences, encounter cross-examination, and possibly also place themselves and others at risk.³¹ The VWU must thus assist victims and witnesses so that such interaction is made in a manner that protects their well-being and security, but also with due regard to the rights of the accused and the integrity of the judicial proceedings. In order to fulfil this mandate, and pursuant to the Rome Statute, the VWU shall include staff members with expertise in trauma, children and disabled victims and victims of sexual violence.

In order to ensure that victims receive support in the application process to request participation or reparations before the ICC, there is a *Victims Participation and Reparations Section* (VPRS) within the Registry. In relation to victims' participation, the VPRS supports victims in their initial organisation to participate before the ICC, including in the selection of their common or individual legal representative. In relation with victims' reparations, the VPRS is responsible for assisting victims in obtaining reparations, including giving publicity to reparations proceedings before the ICC as well as assisting victims

29 ICC, *Structure of the Court, Registry* <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry>> accessed 31 August 2012.

30 UNGA, CRC (20 November 1989) UN *Treaty Series* vol 1577 p 3 (CRC) article 12.

31 Thordis Ingadottir and others *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute): A discussion paper* (Project on International Courts and Tribunals (PICT) March 2000).

in submitting applications for protective measures and for the purposes of confiscating property from the suspect or accused persons. Most importantly, as the ICC may decide to grant reparations through the TFV, the VPRS may assist victims in their dealings with this entity. The role of the VPRS will also be analysed in more detail in Chapter 5.

Another autonomous organ of the ICC that deals with victims is the *Office of Public Counsel for Victims (OPCV)*. This office has the mandate to support and assist legal representatives and victims in their participation in ICC proceedings as well as in their requests for reparations. In accordance with Regulation 81 of the RoC, the OPCV may also conduct legal research and advice and may appear in hearings in respect of issues relevant to victims. In this sense, the OPCV could conduct research on the particular situation of child victims of international crimes or the impact of armed conflict on children (*i.e.* for reparations matters). As the OPCV is an impartial and independent office, which is part of the Registry only for administrative purposes, their legal opinion could be of great assistance to the Chamber, as it could avoid or solve conflicts of interests between victims (*i.e.* regarding common legal representation). In the past, the OPCV has represented victims during the application process and during their participation in ICC proceedings. The OPCV has also been granted leave to make submissions on issues concerning victims.³² In the first reparations proceedings before the ICC, the OPCV was granted leave to represent the interests of victims who had not applied for reparations but eventually may be beneficiaries of collective reparations.³³ Moreover, recently in the *Gbagbo case*, the OPCV has been assigned as common legal representative of victims participating in the confirmation of charges hearing.³⁴ Likewise, in the Kenya cases the OPCV has been given a prominent role to act together with the common legal representatives for victims.³⁵

The TFV is administered by the Registry but is supervised by an independent Board of Directors, elected by the ASP. The mission of the TFV is to grant reparations to victims, either with its own funds (grants from governments, individuals or international organisations) or through funds deposited by the ICC resulting from payment of fines or forfeitures of a convicted person. According to the RTFV, other resources of the TFV (other than

32 See: *Lubanga case* 'Order on the Office of Public Counsel for Victims' request filed on 21 November 2007' (27 November 2007) ICC-01/04-01/06-1046 para. 2; The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (*Katanga and Ngudjolo case*) 'Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)' (12 June 2009) ICC-01/0401/07-1205.

33 *Lubanga case* 'Decision on OPCV's request to participate in reparations proceedings' (5 April 2012) ICC-01/04-01/06-2858 para. 12.

34 The Prosecutor v Laurent Gbagbo (*Gbagbo case*) 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/1101/11-138, paras 42-44.

35 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498.

those obtained by fines and forfeitures) may be used to benefit victims and their families “who have suffered physical, psychological and/or material damage as a result of these crimes”, even before the Trial Chamber renders a conviction judgment.³⁶ This possibility is essential for child victims, as rehabilitation programmes could be initiated promptly, without having to wait for a final judgment from a Chamber.

Although the mandates of the Registry (PIDS, VPRS, VWU), the OPCV and the TFV are further analysed in Chapter 5 of this research, it is important to observe that all these sections of the ICC, in one way or another, facilitate the participation of victims in ICC proceedings, provide support and protection to victims and witnesses, and facilitate and grant victims’ access to reparations. The aforementioned sections, along with the OTP, will most likely be the first point of contact between child victims and witnesses and the ICC. Accordingly, they must work in unison, avoiding overlapping or inconsistent approaches to the interpretation and application of the Rome Statute and other ICC legal instruments, in order to guarantee the protection of child victims and witnesses pursuant to Article 68(1) of the Rome Statute, enable them to present their views and concerns in judicial proceedings pursuant to Article 68(3) of the Rome Statute, and facilitate reparations for the harms they could have suffered as a result of crimes within the ICC jurisdiction pursuant to Article 75 of the Rome Statute.

2.2.4 The OTP

As provided for in Article 41, paragraph 1 of the Rome Statute, the OTP is an independent and separate organ of the ICC responsible for the investigation and prosecution of crimes within the ICC’s jurisdiction, as a result of referrals received from State Parties or the UN Security Council or on the basis of *proprio motu* investigations.

In light of its independence, in 2003 the OTP adopted a “Paper on some policy issues before the OTP”, which delineated since the beginning the general strategy of this organ of the ICC.³⁷ From the outset the Prosecutor established that due to its limited resources, as a general rule, his office would “initiate prosecutions of the leaders who bear most responsibility for crimes” and would “encourage national prosecutions for the lower-ranking perpetrators, or work with the international community to ensure that offenders are brought to justice by some other means”.³⁸

36 ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims* (3 December 2005) ICC-ASP/4/Res.3 (RTFV) paras 48-50.

37 ICC, OTP, *Paper on Some Policy Issues Before the OTP* (September 2003) <http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf> accessed 31 August 2012.

38 Ibid 3.

It is important to notice that this prosecution policy, limited to the most serious crimes and against those who bear the most responsibility, classified crimes committed against children as major international crimes and its first two cases included charges for enlistment, conscription and use of children to actively participate in hostilities.³⁹

The role of the OTP, particularly its obligation to protect the security, safety and well-being of child victims and witnesses pursuant to Article 68(1) of the Rome Statute, will be further analysed in Chapter 5 of this research. In this sense, this research will address the obligation of the OTP to safeguard the probative value of witnesses' testimonies (including children), and hence preserve the fairness of proceedings by putting in place mechanisms to prevent false testimonies and improper practices by intermediaries and investigators that not only affect the evidence of witnesses as such, but may also lead to their re-victimisation.

2.3 CHILD-SENSITIVE READING OF THE ROME STATUTE AND OTHER ICC PROVISIONS

Children have interacted and will interact with the ICC as victims and witnesses. As stated in the document adopted in UNGA Special Session on Children in May 2002:

'(...) children are among the principal victims of war,(...) in the last decade, an estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict (...) 300,000 child soldiers (...) are exploited in armed conflicts in over 30 countries around the world.'⁴⁰

Consequently, as argued in the Introduction, a children's rights approach should be adopted throughout all the ICC organs and entities analysed above. As noted by the CRC Committee, such an approach requires a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection.⁴¹ As studied in Chapter 1 of this research, there are at least three different "images" of children that should be taken into consideration when adopting a children's rights approach at the

39 The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (*Kony and others case*) 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/0401/05-53; *Lubanga case* 'Warrant of Arrest' (10 February 2006) ICC-01/04-01/06-2-tEN.

40 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 12.

41 CRC Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13, para. 59.

ICC: the victim, the perpetrator and the peace-maker. Moreover, within these three general images, there are particular circumstances and realities that must also be taken into consideration (*i.e.* a boy child soldier must be distinguished from the girl child soldier who additionally suffered from sexual violence/forced marriage).

Within the current situations before the ICC, the OTP has investigated and brought charges for crimes committed against children.⁴² Consequently, child victims and witnesses have participated in the ICC's first trials. As noted in the Introduction and as will be further analysed in Chapters 5 and 6 of this research, a children's rights perspective was not only desirable in terms of achieving international standards, but in fact was necessary in order to avoid the unfortunate consequences of the *Lubanga case*, particularly *vis-à-vis* the rights of the accused, since child victims and witnesses were found unreliable and untrustworthy and investigators and intermediaries could have breached the statutory obligation to protect victims and witnesses, and to take into account the needs of victims and witnesses, particularly children.

In order to fulfil these obligations enshrined in Article 68 of the Rome Statute and Rule 86 of the RPE, child-friendly procedures need to be adopted and the ICC's staff must have adequate experience and training in a children's rights perspective.⁴³

As will be analysed in the following Chapter, a child-sensitive reading of the ICC provisions requires ICC practitioners to go beyond the Rome Statute and the RPE of the ICC, by applying other international instruments that could provide further guidance as to the interpretation and application of the ICC provisions from a children's rights perspective. In accordance with Article 21(3) of the Rome Statute, the application of the CRC and other international instruments on children's rights is not only essential, but mandatory to interpret and apply ICC provisions pursuant to internationally recognised human rights. As will be analysed in the following Chapter, the CRC is an international human rights instrument of almost universal ratification. As such, it should guide the ICC's work when dealing with child victims and witnesses. Its fundamental principles should also be guiding principles of the ICC when dealing with child victims and witnesses. As correctly noted by Mconigle Leyh, when an international criminal court deviates from minimum human rights standards, the court undermines existing human rights and minimum rights are the baseline under which a court cannot go without compromising fairness

42 *Kony and others case* 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/04 01/05-53; *Lubanga case* 'Warrant of Arrest' (10 February 2006) ICC-01/04 01/06-2-tEN; *The Prosecutor v Germain Katanga and The Prosecutor v Mathieu Ngudjolo (Katanga and Ngudjolo case)* 'Mandat d'arrêt à l'encontre de Germain Katanga' (18 October 2007) ICC-01/04-01/07-1; 'Mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chu' (7 February 2008) ICC-01/04-02/07-260.

43 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 15.

and effectiveness.⁴⁴ Insofar as children's rights standards do not compromise or diminish the rights of the accused person enshrined in Article 67 of the Rome Statute, they should be applied in order to interpret and apply ICC provisions from a children's rights perspective.

The following Chapter will analyse applicable law in depth, beyond statutory provisions, and particularly paying attention to international children's rights instruments that could be helpful to pursue the ICC's obligations as regards child victims and witnesses.

44 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 360.

