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

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3 Application of children's rights to the ICC's legal framework

3.1 INTRODUCTION

This Chapter firstly analyses Article 21 of the Rome Statute, which lists the ICC's applicable sources of law, evaluating the different points of views of commentators in relation to this pivotal provision as well as the developing ICC case law in this regard. Taking Article 21 of the Rome Statute as a starting point, the Chapter then refers to other sources of law that could be applied or used as guidance in judicial proceedings pertaining to children, namely the CRC and its Optional Protocols, the Geneva Conventions and their Additional Protocols, as well as other "soft law" instruments, including the Paris Principles and UN Resolutions. The Chapter will then assess applicability of the case law of other international tribunals in the ICC's legal framework. Taking into consideration their relevance as regards children in judicial proceedings, this Chapter will mainly analyse the case law of the SCSL as well as the regional human rights courts (primarily the Inter-American and European Courts of Human Rights).

This Chapter is not intended to exhaust all possible applicable instruments or case law regarding children's rights in ICC proceedings. However, it endeavours to provide the reader with the basic legal tools to mainstream a children's rights perspective through the application and interpretation of ICC provisions in accordance with internationally recognised children's rights. As stated by the IACtHR and the European Court of Human Rights (ECtHR), human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions.[1] Although the Rome Statute can be seen as a "criminal code", it is also an international human rights and humanitarian law treaty. Thus, whoever interprets the ICC provisions (whether a judge, prosecutor, legal representative or an ICC staff member) must also constantly revise and update the list of "applicable law" referring to internationally recognised human rights, pursuant to Article 21(3) of the Statute.

While the ICC is a criminal court, its human rights and international humanitarian law foundations are undeniable. As noted by Werle, international

1 ECtHR, *Tyrer v the United Kingdom* 25 April 1978 Series A no 26, para. 31; IACtHR, Case of the Mapiripán Massacre v Colombia (*Mapiripán Case*) Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 106.

criminal law is an instrument for the protection of human rights, as it complements other human rights instruments and thus aims to their protection.[2] Additionally, the same author states that the duty to protect human rights is not fulfilled with the application of international criminal law by convicting and sentencing perpetrators. In his view, it is important to apply the law in order to protect victims and to determine reparations to victims within international criminal proceedings.[3] Moreover, as stated by Cryer, international criminal law developed in response to mass abuses of international humanitarian law and human rights law.[4] In fact, Article 36 of the Statute clearly states that ICC judges "shall" either have established competence in criminal law and procedure or international law, such as international humanitarian law and law of human rights. The requirement to have judges specialised in these two areas of law evidences that human rights and humanitarian law are intrinsic to the ICC.

Ohlin also identifies "standard setting" as a more specific goal of international criminal procedure, stating that international trials provide an exemplar against which domestic legal systems can measure their own criminal procedure and make necessary improvements.[5] Thus, the interpretation and application of ICC provisions should not only meet internationally recognised human rights standards for the sake of international criminal proceedings, but also bearing in mind that the ICC case law and practice will have resonance in domestic proceedings.

Nonetheless, one could argue that the ICC, as an international organisation, is not bound by international human rights treaties, which are signed and ratified by States and which refer specifically to State responsibility. The ICC is not a party to international human rights treaties and thus it may be considered that it is not formally bound by their provisions or the case law of human rights courts.[6] However, as stated by Gradoni, although an inter-

2 Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 98-100.

3 Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 100.

4 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 9-10. See also Jen David Ohlin in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013), 55 and 66. The author states that there are two identifiable and overlapping objectives of international criminal law: a) restoring international peace and security; and b) strengthening human rights and international humanitarian law prospectively. Some, like Triffterer, go even beyond, as he believes that international criminal justice could be used in the future "to abolish starvation, hunger, poverty and similar intolerable forms of social injustice in the world", which in his view are caused by international terrorism, drug offences and abuse of power. See: Otto Triffterer, *The Object of Review Mechanisms: Statute's Provisions, Elements of Crimes and Rules of Procedure and Evidence*, in: Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 381.

5 Jen David Ohlin in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013), 66.

6 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 353-354.

national organisation is not a party to any human rights treaty, it is nevertheless bound by norms similar or identical in content of international customary law or general principles of law.[7] This consideration is in fact reflected and made explicit in Article 21(3) of the Rome Statute, which, as will be analysed further below, requires that the application and interpretation of the law be made pursuant to internationally recognised human rights.

Gradoni has identified four manners in which human rights shape international criminal proceedings. Firstly, the statutes and other provisions of international tribunals refer to human rights or related concepts. In the case of the ICC, as noted earlier, this is evidenced in provisions such as Article 67 of the Statute on the rights of the accused. Secondly, the practice of international criminal tribunals demonstrates the place of human rights norms within their legal systems. In the case of the ICC, contrary to other international tribunals, Article 21(3) of the Statute distinctly places human rights in a paramount position within the ICC legal framework. Thirdly, the practice of international tribunals extracts the content of relevant human rights standards from human rights instruments of various sorts (including "soft law" and regional instruments), as well as from case law of human rights courts or bodies. In the case of the ICC, as will be studied in this Chapter, the ICC case law has referred to international human rights treaties (such as the CRC), soft law human rights instruments (such as the Paris Principles), as well as regional human rights case law. Lastly, international criminal practice may use statutory human rights norms (such as Article 67 of the Statute) to interpret ICC provisions, override hierarchically inferior ones, and derive power-conferring norms.[8]

In light of the above, it is but expected that the ICC refers to human rights law in their interpretation of substantive and procedural international criminal law.[9] As noted by Gradoni, although human rights are not strictly speaking rules of international criminal procedure, they have nonetheless a considerable impact on the way in which those rules are defined, interpreted and applied.[10] Article 67 of the Statute on the rights of the accused is the clearest example of the relationship between human rights standards and international criminal proceedings. It would be contrary to the ICC's goals (among them, and pur-

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7 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 80-81. The author also refers to the International Court of Justice (ICJ), Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt (20 December 1980), para 27, in which the ICJ found that international organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law.

8 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 74.

9 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 10.

10 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 74.

suant to the Statute's Preamble, to guarantee international justice) if the ICC would not apply international human rights standards in its criminal proceedings, including not only in the determination of guilt or innocence of the accused, but also when deciding on victims and witnesses protection pursuant to Article 68(1) of the Statute, victims' participation as enshrined in Article 68(3) of the Statute, and victims' reparations in accordance with Article 75 of the Statute.

3.2 Introduction to Article 21 of the Rome Statute

Article 21 of the Statute is the core provision dealing with applicable law before the ICC. As pointed out by McAuliffe de Guzman, this Article is the first codification of sources in international criminal law.[11] It reads as follows:

> '1. The ICC shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its RPE;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
> 2. The ICC may apply principles and rules of law as interpreted in its previous decisions.
> 3. 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.'

Accordingly, all legal arguments submitted by participants before the ICC and all ICC decisions should be based on the sources of law stipulated in the provision above.

As explained by Bitti, there are three interesting aspects in this provision of the Rome Statute. In the first place, its existence is an innovation because there is no provision on applicable law in any of the Statutes of other international criminal tribunals (Nuremberg, International Criminal Tribunal for Former Yugoslavia (ICTY), ICTR, SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Lebanon), as they all rely on

11 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 703.

Article 38 of the Statute of the International Court of Justice in this regard.[12] In the second place, the specificity of its content is also a novelty since, pursuant to this provision, the sources of law of the ICC are: a) the Rome Statute, the Elements of Crimes and the RPE; b) applicable treaties and principles and rules of international law; and c) general principles deriving from national legal systems. Finally, Bitti recognises that Article 21 of the Rome Statute is innovative as it creates a hierarchy between all these sources of law, which is unique to the ICC, and does not follow the hierarchy of sources of law provided for in Article 38 of the Rome Statute of the International Court of Justice. Thus, although at first glance it appears that the Rome Statute, Elements of Crimes and RPE all have the same hierarchical level as ICC's legal texts, in light of the Rome Statute's Articles 9(3) (the Elements shall be consistent with the Rome Statute) and 51(5) (in the event of conflict between the RPE and the Rome Statute, the Rome Statute shall prevail), it is clear that the Rome Statute has a superior hierarchy over the Elements of Crimes and RPE. This has been confirmed by the Pre-Trial and Appeals Chambers, which have determined that the RPE and the RoC are subordinated to the Rome Statute.[13] Furthermore, during the first ten years of the ICC's existence, other internal sources of law have been adopted, that although not included in Article 21 of the Rome Statute, are without a doubt internal sources of law that have been regularly applied by ICC's Chambers (they are: the RoC, the RoR, the Code of Professional Conduct for Counsel, and the RTFV).

Article 21(1)(b) and (c) of the Rome Statute provide two subsidiary and external sources of law, namely sources of international law (second source) and sources of national laws (third source).

As a second source, Article 21(1)(b) identifies the following: applicable international treaties, and principles and rules of international law. As regards this second source (sources of international law under Article 21(1)(b), the Rome Statute makes no difference between applicability of either "applicable treaties" and "principles and rules of international law". Thus, as maintained by Sadat, subparagraph 1(b) "permit(s) judges considerable leeway in considering which sources of international law could be appropriately applied in a particular case".[14]

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12 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

13 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr para. 47; *Lubanga case*, 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' (13 February 2007) ICC-01/04-01/06-824 para. 43.

14 Leila Sadat '*The ICC and the Transformation of International Law: Justice for the New Millennium*' (Transnational, 2002) 177.

As a third source, Article 21(1)(c) identifies the following: general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. The third source of law derives from national systems, namely "general principles of law derived by the ICC from national laws of legal systems of the world, including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime". Commentators such as McAuliffe de Guzman, describe this part of Article 21 of the Rome Statute as being the most controversial. She considers that the less often the ICC considers these sources of law, the more likely it will be able to develop a cogent body of international law.[15] However, if one considers that these sources of law will be applicable as long as they are not inconsistent with the Rome Statute, contradictions and discrepancies may be diminished.[16]

The Appeals Chamber of the ICC has concluded that the application of the second and third sources of law is subject to a condition: the existence of a gap in the Rome Statute.[17] They are thus subsidiary sources of law and cannot be used just to "add" to the Rome Statute and the RPE other procedural remedies, but should act as sources of law only when there is a *lacuna* in the Rome Statute and the RPE.[18]

Bitti affirms that if the ICC case law maintains this current view, application of international law before the ICC will be more restrictive than its predecessors, the ad-hoc tribunals, and will be based more on the 128 Articles and 225 Rules of the ICC than on general sources of international and national laws.[19] However, since no legal system is deprived of such lacunae, these sources of law, deriving from national and international law, may be of great value for ICC judges.[20] Moreover, this "restriction" may only be apparent, since the Appeals Chamber has also stipulated that other sources of law, although not applicable *per se*, may act as "guidance" for the interpretation and application of the Rome

15 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 708-709.

16 Roy S Lee, *The International Criminal Court: The Making of the Rome Statute* (Kluwer International 1999) 215.

17 *Lubanga case* 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Rome Statute of 3 October 2006' (14 December 2006) ICC-01/04-01/06-772, para. 34.

18 *DRC Situation* 'Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal' (13 July 2006) ICC-01/04-168, paras 33-42.

19 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

20 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 701-712.

Statute and other ICC provisions.[21] Thus, although in appearance the ICC Appeals Chamber has been strict in applying sources under Article 21(1)b) and 21(1)(c), it has opened the door to refer in essence to any international instrument (including "soft law" instruments) as "guidance". For example, the Appeals Chamber concluded that "soft law" instruments such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) may be used as "guidance".[22] Therefore, documents that are far from being "internationally recognised human rights" or international customary law, may still be used by ICC judges as "guidance", or draw inspiration, when making their decisions, insofar as these "guiding" instruments are not contrary to the Rome Statute.[23]

The second paragraph of Article 21 of the Rome Statute gives the possibility to the ICC to apply case law from its previous decisions, but does not compel a Chamber to necessarily follow a previous ruling in a given matter (the provision uses the word *may* but not *shall*), including decisions of the Appeals Chamber. As such, the Rome Statute does not distinguish between case law of the Appeals Chamber and the other Chambers, and this has been reflected in the ICC's recent case law. For example, as identified by Bitti, the Pre-Trial Chambers and the Trial Chamber have made reference to their own case law and that of other Pre-Trial, Trial and Appeals Chambers, without giving any superior weight to the case law of the Appeals Chamber.[24]

As stated by Lee, this provision is a "soft approach" to case law, as it refers only to the applicability of principles and rules of law as interpreted in its previous decisions which the judges may or may not decide to apply under their discretionary powers.[25] Moreover, contrary to the subsidiary sources under paragraph 1(b) and (c) analysed above, applicability of the ICC case law is not subject to any *lacuna* under the ICC's Statute.

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21 *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, para. 33.

22 UNGA, *UN Basic Principles* (21 March 2006) A/RES/60/147.

23 Drumbl correctly states that the view of global civil society, child rights advocates and intergovernmental organisations (including UN agencies) do not constitute international law. However, he acknowledges that these actors currently shape the content of binding international law. See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 135. See also: Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 89.

24 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

25 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008) 215.

The jurisprudence of other international tribunals has also been referred to in ICC decisions. However, this source of law is nowhere to be found in Article 21 of the Rome Statute.[26] Accordingly, it appears that this jurisprudence could only be applicable if it has created "principles and rules of international law", including the "established principles of the international law of armed conflict", under Article 21(1)(b) of the Rome Statute. However, as explained above, application of this jurisprudence would be, according to the rulings of the Appeals Chamber, subject to a *lacuna* or gap in the Rome Statute and the RPE. Nevertheless, the application of this case law could be difficult, since, as noted by Bitti, in the diversity of case law of the international tribunals, it appears that "international criminal practice" has become as diverse as national criminal practice. Thus, it may be difficult, if not impossible, to identify principles and rules that could be of general application throughout all international criminal tribunals.[27] This in fact has been affirmed by Trial Chamber I of the ICC, which stated in a decision referring to the practice of "witness proofing" in the ad-hoc tribunals, that:

> '(…) while acknowledging the importance of considering practice and jurisprudence of the ad hoc tribunals, the Chamber is not persuaded that the application of the ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.'[28]

In fact, Trial Chamber I of the ICC adopted a completely different approach to that taken in the ad-hoc tribunals by prohibiting practice of witness proofing, despite the fact that this had been common practice in the ad-hoc tribunals. This issue, however, as will be analysed further in Chapter 5, raises a more serious question, since the practice of "witness proofing" prohibited in the Lubanga case, but also in the Katanga and Ngudjolo case and the Bemba case, has now been permitted (albeit with the different name of "witness preparation") in the two Kenya Situation cases.[29] Hence, this example reflects not only that the practice of international tribunals is diverse, but that the practice within the same ICC is just as varied (and sometimes contradictory).

Paragraph 3 of Article 21 of the Rome Statute, although located at the end of this provision, could be regarded in fact as a "chapeau", which provides

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26 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

27 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

28 *Lubanga case* 'Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial' (30 November 2007) ICC-01/04-01/06-1049, para. 45.

29 *Ruto and Sang case* 'Decision on witness preparation' (2 January 2013) ICC-01/09-01/11-524; *Kenyatta and Muthaura case* 'Decision on witness preparation (2 January 2013) ICC-01/09-02/11-588.

a general consistency test for the interpretation and application of the law, subject to internationally recognised human rights. This last paragraph of Article 21 also includes an express prohibition on adverse distinction of any sort, including age, race, colour, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth or other status. As noted above, neither the Nuremberg nor Tokyo Tribunals, the ad-hoc tribunals nor the SCSL has had any similar human rights related provision as Article 21(3) of the Rome Statute.

Although the application of human rights law in these other tribunals was implicitly accepted, Article 21(3) of the Statute has, as described by Gradoni, made an explicit transformative *renvoi* to human rights law.[30] The same author believes that this provision has the advantage of giving in a few words the essence of current practices and it also reflects, through its relative vagueness, "the decentralized structure of authority of human rights law and jurisprudence". Along the same lines, Schabas has commented that this provision is rich with potential, as it governs the application and interpretation of all statutory provisions, as well as all of the other sources of applicable law. The author even goes to the extent of stating that Article 21(3) of the Rome Statute is analogous to constitutional provisions that authorise courts to interpret and even disallow legislated texts if they are incompatible with fundamental human rights or are discriminatory.[31]

In fact, in the *Katanga and Ngudjolo case*, the Trial Chamber concluded that it was unable to apply Article 93(7) of the Rome Statute in conditions, which were inconsistent with internationally recognised human rights law, as required by Article 21(3) of the Rome Statute.[32] Thus, although statutory provisions may be set aside when their application could be contrary to internationally recognised human rights law, they are not invalidated, but simply set aside on a case-by-case basis.[33]

The Appeals Chamber of the ICC has stated the following regarding the "constitutional" nature of paragraph 3 of Article 21:

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30 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 76, 82.

31 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 398. See also: Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

32 *Katanga and Ngudjolo case* 'Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute)'(9 June 2011) ICC-01/04-01/07-3003, para. 73.

33 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 83.

> 'More importantly, Article 21 (3) of the Rome Statute makes the interpretation as well as the application of the law applicable under the Rome Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the ICC in accordance with internationally recognised human rights norms.'[34]

In another judgment, the Appeals Chamber affirmed the following regarding Article 21(3):

> '(…) law applicable under the Rome Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Rome Statute; every aspect of it, including the exercise of the jurisdiction of the ICC. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Rome Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety. The Rome Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by Article 69(7) of the Rome Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.'[35]

In accordance with the above Appeals Chamber's case law, the Rome Statute compels the organs of the ICC to interpret and apply all applicable law, regardless of its hierarchy, in accordance with international human rights and abiding to the principle of non-discrimination. Accordingly, internationally recognised human rights (though external sources of law) are not subject to a *lacuna* or gap in the statutory rules, but are to be applied as guiding principles in the application and interpretation of any internal or external source of law. Thus, as affirmed by Arsanjani, the language of Article 21(3) of the Rome Statute "is a sweeping language" which, as drafted, could apply to all three categories of applicable law under Article 21 of the Statute.[36] Furthermore, Bitti considers that internationally recognised human rights could be an additional source

34 *Lubanga case* 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006' (14 December 2006) ICC-01/04 01/06-772, para. 38.

35 *Lubanga case* 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006' (14 December 2006) ICC-01/04 01/06-772, para. 37.

36 M Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) *American Journal of International Law*, para. 22.

of law as they could provide additional procedural remedies to participants in the proceedings that are not foreseen in the Rome Statute or the RPE.[37]

As to the definition of "internationally recognised human rights", it appears that ICC case law has given a broad meaning to Article 21(3) of the Rome Statute. In this regard, the ICC judges have included within this concept not only universally recognised human rights (*i.e.* CRC) but also regional human rights (*i.e.* referring to jurisprudence of the ECtHR and the IACtHR).[38] Hence, although international human rights treaties and case law (particularly from the ECtHR and the IACtHR) could fall under Article 21(1)(b) of the Rome Statute (treaties and principles and rules of international law), they could also be applied as "internationally recognised human rights" (under Article 21(3) of the Rome Statute).

This research will analyse all human rights instruments (including regional ones) under this scope, as this has significant impact in their applicability. While international treaties and principles in general apply subordinated to the statutory provisions and are only applicable when there is a *lacuna* in the Rome Statute, international human rights treaties and principles apply above all statutory provisions, acting as a *chapeau* to all provisions under the Rome Statute, the RPE and the Elements of Crime.

In conclusion, Article 21 of the Rome Statute grants judges the discretion (but also the obligation pursuant to paragraph 3 of this provision) to apply international children's rights instruments, established principles of international law, and international and regional case law related to children's rights in their judicial decisions. Accordingly, the ICC must adhere to internationally recognised human rights standards, particularly as regards the rights of the accused, but also in relation to the protection of victims and witnesses, pursuant to Articles 67 and 68 of the Rome Statute. If Article 21(3) of the Rome Statute is to be interpreted as a multiple *renvoi* giving rise to human rights obligations over and above customary ones, then the ICC is to be systematically bound by the highest among the relevant standards, as compliance with the latter would ensure that no internationally recognised human right is infringed.[39] As stated by Gradoni, such an obligation is a logical consequence of the *lex superior* status enjoyed by human rights standards within the legal system of the ICC. In fact, the author states that interpreting procedural rules

37 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the* International Criminal Court (Brill 2008).

38 Pre-Trial Chamber I of the ICC referred to jurisprudence of both regional courts of human rights in: *DRC Situation* 'Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (31 March 2006) ICC-01/04 135-tEN para. 115.

39 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 86.

in accordance with human rights law is, in essence, a conflict-avoidance technique.[40] In light of the diverse and sometimes conflicting case law among ICC Chambers, adherence to internationally recognised human rights should at least be the "common denominator" among all ICC decisions.[41]

However, since not all provisions children's rights treaties and particularly not all the findings of regional courts of human rights can be categorised under "internationally recognised human rights", they can still be of use for application and interpretation of the ICC provisions under the concept of "guidance" developed by the ICC Appeals Chamber analysed above.[42] Since the Appeals Chamber's criteria allows the use of other "soft law" human rights instruments under this condition of "guidance" for the interpretation and application of the law (insofar as they are not contrary to the Rome Statute), this research will thus refer to these soft law instruments in the present Chapter (*i.e.* the Paris Principles and the UN Guidelines on Child Victims and Witnesses of Crime (UN Guidelines)).[43]

Lastly, it is important to recognise that international human rights law and international criminal law, although intrinsically related, are not synonymous. As such, human rights instruments and the case law of human rights courts should be applied insofar as they do not violate fundamental principles of criminal law such as the principle of legality and the principle of non-retroactivity, enshrined in Articles 22, 23 and 24 of the Rome Statute. Although human rights law may be given a broad and liberal interpretation in order to achieve its objects and purposes, in international criminal law there are countervailing rights of the accused that are protected through principles strictly construed and ambiguity must be resolved in favour of the accused.[44]

40 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 93.

41 As noted by Cryer, although the ad-hoc tribunals have sometimes departed from strict adherence to human rights standards, the Rome Statute, on the other hand, contains provisions reflecting international human rights and directs that the Court must apply applicable treaties and the principles and rules of international law as sources of law. See: Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 354. Werle has also noted that the "limit" of international criminal law is given by human rights law, particularly as regards procedural rights of the accused. See: Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 101-102.

42 *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, para. 33.

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

44 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 10-11.

3.3 THE CRC

In relation to children's participation in ICC proceedings, the CRC is undoubtedly the starting point of any interpretation and application of the statutory provisions pursuant to internationally recognised children's human rights. Provisions such as Rule 86 of the RPE, which embraces the general principle on victims and witnesses before the ICC, should be read along with the CRC in order to properly identify and attend to the "needs" of child victims and witnesses before the ICC acknowledged in that Rule. After all, the CRC contains universally recognised human rights already included in the international covenants of human rights, but particularly referring to the specific needs and vulnerability of children not necessarily covered in these other general human rights treaties.[45] In the same manner, although the Rome Statute contains general provisions that apply equally to adults and children interacting with the ICC, the CRC is valuable when applying and interpreting these general ICC provisions to meet the specific needs of child witnesses and victims.

Moreover, the CRC is the most widely ratified United Nations treaty, with only the United States of America, Somalia and South Sudan not having ratified it. Therefore, all other member States of the UN have committed themselves to be bound by the CRC.[46] Likewise, for all but three UN State Parties, the CRC is binding and must be applied in good faith and these States have committed themselves to act pursuant to the CRC's objective and purpose.[47] As noted previously in this Chapter, although the ICC is an international organisation and thus not a State Party to the CRC, it is bound by internationally recognised human rights contained therein, pursuant to the unequivocal obligation provided in Article 21(3) of the Rome Statute.

However, not all provisions of the CRC may be automatically transposed to the ICC setting and others may be irrelevant for international criminal proceedings (*i.e.* Article 21 of the CRC related to adoptions). As regards other provisions that could be of relevance, they should still be interpreted and applied taking into consideration that they are to be used in international criminal proceedings, and with due regard to the rights of the accused. For example, Article 16 of the CRC related to a child's rights to privacy may be applicable when determining protective measures for a child witness (for example when ordering that his or her testimony be given in closed session so as to grant the witness anonymity vis-à-vis the public). However, this same

45 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 2-4.

46 Pursuant to the Vienna Convention the "ratification" is the international act whereby a State accepts to be bound by a treaty, United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969) UN *Treaty Series*, vol 1155 p 331 (Vienna Convention) articles 2(1)(b) and 11.

47 Vienna Convention, article 18 and article 26 contain the principle of "*pacta sunt servanda*".

CRC provision should be balanced with other "competing" human rights of the accused, including his or her right to a public hearing.

Although one could argue that not all of the provisions in the CRC are "internationally recognised human rights",[48] this research will interpret children's rights enshrined in the CRC as indivisible, interrelated and of equal importance.[49] As noted by Detrick, each individual right contained in the CRC is fundamental to the dignity of the child and implementation of each right should take into account the implementation of or respect for all other rights.[50] Hence, it can be concluded that the CRC, in its entirety, as an almost universally ratified treaty, is to be considered as "internationally recognised human rights" pursuant to Article 21(3) of the Rome Statute. Nonetheless, this Chapter will refer to the most relevant provisions of the CRC vis-á-vis ICC proceedings.

The Rome Statute contains no definition of "child". The only provision that refers to age is Article 26 of the Rome Statute, which limits the jurisdiction of the ICC to persons who are 18 years old. On the other hand, Articles 8(2)(b)(xxvi) and (e)(vii) define the crime of child recruitment and establishes an age limit of 15 years. In this sense, *Article 1 of the CRC* provides a clear definition of the child that should be applicable when interpreting ICC provisions that refer to child victims or witnesses before the ICC. In this sense, a child should mean "every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

However, the age of 18 should not be set in stone. As noted by Drumbl, one should not overlook other articles of the CRC, such as Article 5, which recognises the "evolving capacities" of children, or Article 12 of the CRC, which establishes that the view of children should be considered in accordance with the child's "age and maturity".[51] In this sense, although a "child" strictly applying the CRC means a person under the age of 18, the end of childhood could also correspond to the relevant social and cultural conditions of a child

48 For example, those CRC provisions that have been subject of reservations by many State Parties to the CRC, such as the duty to respect the right of the child to freedom of thought, conscience and religion (article 14 of the CRC).

49 UNGA, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23, para. 5. See also: Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 22.

50 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 22.

51 For a critique as to the "universal childhood" established by the law of the CRC see Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 44-50. See also: Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, p. 70-106.

(as long as the age of majority is not set unreasonably low or contrary to the provisions, aims and objectives of the CRC).[52]

Thus far, the ICC Chambers have established that victims under 18 years of age are to be considered children. However, applicant victims who were not yet 18 but were close thereto were allowed to participate in proceedings without parental authorisation.[53] Likewise, as will be analysed in Chapter 5 of this research, witnesses who were already 18 when they appear in court but were under 18 at the time of the crimes could still be considered as "child witnesses" at the time of their testimony.

Articles 2, 3, 6 and 12 of the CRC are the core and basic general principles that should be read in combination with other CRC provisions and in general any other applicable law in cases involving children.[54] Any international criminal procedure in which children are either participating as witnesses or victims is bound by these four basic principles: non-discrimination, best interests of the child, child's right to life, survival and development, and the child's right to participate in matters concerning him/her.[55]

Article 2 of the CRC provides a definition of the principle of non-discrimination particularly relevant to children. Although the principle of non-discrimination is provided for in Article 21(3) of the Rome Statute, the CRC's definition could be helpful in order to apply the Rome Statute's principle to the particular conditions of children appearing before the ICC. In this regard, in addition to the grounds of discrimination included in the Rome Statute, grounds such as the "parent's or legal guardian's race" and "disability", included in Article 2 of the CRC, could be referred to in ICC proceedings.

Article 3 of the CRC is without a doubt the guiding principle of all interpretation and application of law involving a child, and thus is applicable to situations in which a child is a victim or witness before the ICC. Article 3(1) of the CRC recognises the following:

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52 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 52 and 60.

53 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (16 December 2008) ICC-01/04-01/06-1556, para. 78.

54 It is important to observe that many CRC State Parties have made reservations to Article 2 of the CRC. However, considering that article 21(3) of the Rome Statute already contains the principle of non-discrimination, the use of Article 2 of the CRC could be limited in the ICC context. As for articles 3 and 6 of the CRC, a very limited number of States have made reservations. Luxemburg has made a reservation in relation to article 3 of the CRC and China, Luxembourg and Tunisia have made reservations to article 6 of the CRC. No State Party to the CRC has made any reservation vis-à-vis article 12 of the CRC. Information available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> accessed 8 August 2013.

55 CRC Committee, *General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child* (27 November 2003) CRC/GC/2003/5, para. 12.

> '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'.

In light of this provision, the judges, prosecutors, investigators and other members of the ICC should take into consideration the best interests of the child when fulfilling their mandate as regards child witnesses or victims appearing before the ICC, as well as children that could be indirectly affected by ICC proceedings (*i.e.* as a result of the testimony of a parent that needs to be relocated).

Though this principle has been broadly applied both nationally and internationally, it is difficult to define its concrete content because it is an open provision left to the interpretation of the judge, investigator or other Court official applying it. Some commentators to the CRC have stated that the child's best interests is not a single and definite concept, but that it should be defined taking into consideration the child's own views, thus including other rights of the child enshrined in the CRC, such as the right to be heard (Article 12 of the CRC). Others have referred to the child's best interests as a principle that must be defined with due regard to the cultural and social situation of the child.[56] This must be done, however, balancing cultural sensitivity with the child's basic rights. In other words, cultural, traditional or religious practices cannot override children's fundamental human rights.

The CRC Committee has stated that the child's best interests is a threefold concept. Firstly, it is a substantive right of the child to have his or her best interests assessed and taken as primary consideration when different interests are at stake. It is also a fundamental interpretative legal principle, meaning that if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. Thirdly, it is a rule of procedure that establishes that whenever a decision is to be made that will affect a specific child or a group of children or children in general,, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned.[57]

Though Freeman has affirmed that the concept of best interests of the child is indeterminate, he quotes the following definition by Eekelaar as one of the best attempts to define it:

56 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 89.

57 CRC Committee, *General comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration* (29 May 2013) CRC/C/GC/14, para. 6.

> 'Basic interests, for example to physical, emotional and intellectual care development interests, to enter adulthood as far as possible without disadvantage and autonomy interests, especially the freedom to choose a lifestyle of their own.'[58]

In light of the ICC's international character, and the diversity of children that will come before it, it seems logical to adopt an approach that takes into account that different societies and different historical periods will give a different definition to this principle. However, no interpretation shall ever be contrary to the purpose and objective of the CRC and the Rome Statute (including the rights of the accused).

Alston and Parker have distinguished three objectives within Article 3 of the CRC.[59] These objectives could be applicable to the ICC's objectives in regards to child victims or witnesses before the ICC.

The first role for Article 3 of the CRC is identified as one of supporting, justifying and clarifying a particular approach to issues arising in regards to children's rights. Applied to the ICC's scenario, the best interests of the child could be applicable when a Trial Chamber decides, for example, on a reparations order. In application of the principle of best interests of the child, the Chamber should take children into account when ordering reparations, because reparation measures could have a long-time effect in their future development (*i.e.* rehabilitation and reintegration programmes aimed for child victims vis-à-vis pecuniary compensation for the parents).[60]

The second role of Article 3 of the CRC is to act as a mediating principle that can assist in resolving conflicts between rights where these arise within the overall framework of the CRC (or the Rome Statute). For example, the principle of the child's best interests could justify anonymity of a child victim (right to protection) vis-à-vis the rights of the accused to know the victim's identity in an ICC trial.

Thirdly, Article 3 of the CRC is the basis for evaluating the laws and practices where the matter is not governed by positive rights in the CRC (or the Rome Statute for ICC purposes). For example, the Rome Statute has a *lacuna* regarding the concept of children, and leaves somewhat unprotected child soldiers above the age of 15, who are neither regarded as victims or as perpetrators under the Rome Statute. Under the principle of the child's best interests, although an accused cannot be charged with the crime of child recruitment of children above the age of 15, these children could still be considered beneficiaries of reparation programmes implemented by the TFV in the broader scope of "victims of a situation" although not victims of a given

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58 Michael Freeman, *Article 3: The Best Interests of the Child* (Vol. 3 Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, 2007) 27.

59 Michael Freeman, *Article 3: The Best Interests of the Child* (Vol. 3 Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, 2007) 32.

60 Reparations for child victims are analysed further in Chapter 5.

case covering crimes of child recruitment. This could be possible since the Trust for Victims has a more general assistance mandate that is not limited to specific charges brought against an accused person, but may address the broader needs of victims of other crimes not included in specific charges in Situations referred to the ICC.[61] However, such an interpretation would be contrary to the rights of the accused if reparations would be ordered against a convicted person (strictly bound by the charges and the subsequent conviction). Thus, a balance must be struck between existing (and sometimes conflicting) rights of child victims and witnesses and the accused person.

Article 6 provides for the child's inherent right to life and the subsequent obligation to ensure to the maximum extent possible survival and development of the child. The CRC Committee has interpreted "development" in a broader sense, including the child's physical, mental, spiritual, moral, psychological and social development.[62] This provision, although very general in scope, could still serve as guidance when deciding on protective measures for a child victim or witness, including his or her relocation to a place where the child victim or witness can develop (*i.e.* for example, taking into consideration language and schooling possibilities).

Another provision that is fundamental in the practice of the ICC is *Article 12 of the CRC*, which establishes the right of children to present their views in matters that affect them. Regarding the ICC, Article 12 could be applicable in order to give children the opportunity to express their views and concerns as victims under Article 68(3) of the Rome Statute, and thus participate in ICC proceedings. Rule 87 of the RPE, which states that when deciding on protective measures for witnesses or victims the Chamber shall seek to obtain the consent of the person concerned, should also be read in unison with Article 12 of the CRC, when such measures concern children. Hence, when the victim wishing to express his or her views and concerns (pursuant to Article 68(3) of the Rome Statute) is a child, or when the witness or victim for whom protective or special measures are sought is a child (pursuant to Article 68(1) of the Statute and Rules 87 and 88 of the RPE), Article 12 of the CRC should offer guidance in the interpretation of the relevant ICC provisions.

The CRC Committee has stated that although the term "participation" does not appear in the CRC, it has evolved and is now widely used to describe "on-going processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of the adults are taken into account and shape the

61 ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims* (3 December 2005) ICC-ASP/4/Res.3 (RTFV) Regulations 47 and 48.

62 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 12.

outcome of such processes".[63] Considering that criminal proceedings before the ICC are a process that lasts several years, not only for the conviction of those responsible, but also to achieve reparations for victims, the above definition of "participation" could be adopted for ICC proceedings as regards child victims and witnesses. It is important to note that in light of the duration and complexity of ICC proceedings, participation of children should not be regarded as a one-time event, but should be seen as a process. Although the ICC is limited to its jurisdiction and the charges brought against an accused person, other areas of the ICC proceedings (i.e. reparations) could be seen as a more elaborate process in which an exchange between child victims and the ICC to develop reparations that are relevant to the children's lives.[64] In this sense, the CRC Committee affirmed that Article 12 is not only about listening to children, but also about seriously considering their views.[65] As it will be further analysed in Chapter 5, it is not only about granting children the status to participate as victims in trial proceedings before the ICC, but in actually making their participation an effective and significant one in which their views and concerns will be heard and taken into account, not only for the determination of guilt or innocence of accused persons, but also for sentencing purposes and reparation measures.

As already stated in Chapter 1 of this research, child victims or witnesses participating in ICC proceedings could have a level of maturity superior to that of children their age given their experiences in an armed conflict or in situations where crimes against humanity and genocide are committed. In this sense, Article 12 of the CRC, read with the interpretation of the age of children analysed above, establishes that the views of the child shall be given due weight in accordance with age and maturity of the child, and therefore no strict age limit must be imposed to determine whether a child is old enough to participate in ICC proceedings.[66] For example, even though a child may still be subject to parental guardianship for reasons of age, he or she could be in a position to express his or her own views and concerns, sometimes even contrary to that of his/her parents or guardian, given, for example, that the child lived without parental supervision for a number of years, or even was subject to "marriage" while in recruitment as a child soldier. The CRC Committee stated that capacity of children must be presumed and thus children

63 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 3.

64 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 13.

65 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 28.

66 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 21 and 29-30.

wishing to participate should not have the burden to prove their capacity.[67] As will be analysed in Chapter 5 below, the ICC case law has been inconsistent in this regard, with some ICC decisions imposing strict 18 years of age limits to victims' participation without parental or guardian authorisation, while other decisions have authorised children to participate without adult authorisation.

Pursuant to Article 12 of the CRC, the child shall be provided the right to be heard, either directly or indirectly, or through a representative or an appropriate body. This is of particular importance regarding children, since organs of the ICC will have to verify on a case-by-case basis, whether it is appropriate for a child to appear directly before the ICC or through a representative. This, as will be analysed further in Chapter 5, is of relevance when the ICC judges decide on common legal representation for child victims or when the ICC needs to appoint a counsel for child witnesses that could give self-incriminatory testimony.

A balance must be struck when applying Article 12 of the CRC, between the empowerment of children on one hand (allowing their participation in judicial proceedings) and their vulnerability on the other (guaranteeing their protection against re-victimisation).[68] Often, a child appearing before the ICC will be both a vulnerable person but also an empowered individual. The ICC, including its judges, prosecutors and lawyers, as well as support staff of the VWU, will have to guarantee that the child's voice is heard, while at the same time protecting the child's well-being and dignity. Importantly, measures should be taken by the ICC under Rule 86 of the RPE in order to assure that the judicial environment in which children participate is not intimidating, hostile, insensitive or inappropriate for them, with child-friendly information, support and staff, as well as courtrooms, judges and lawyers.[69] For example, as will be analysed further in Chapter 5 of this research, the testimony of child witnesses could be recorded to be presented in trial *in lieu* of live testimony or judges could adopt protocols to safeguard the rights of child witnesses during examination and cross-examination, while still guaranteeing the rights of a fair trial for the accused.

Article 12 of the CRC should also be read taking into account the child's consent. In this sense, the ICC should involve children in their proceedings as long as they wish to do so, particularly since contrary to other criminal

67 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 20.

68 Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review,* 75.

69 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 34.

tribunals, the ICC does not have the power to *subpoena* witnesses, but can only call witnesses as long as they wish to cooperate with the ICC.[70]

In accordance with Detrick, Article 12 of the CRC encompasses the obligation to assure the child the right to freedom of expressing his or her views and the right to say what he or she pleases without interference and to choose whether to express his or her views or not.[71] Within the context of the ICC, it is important for the ICC's organs to verify the child's consent, for example when deciding upon an application for victim's participation submitted by a parent or guardian acting on behalf of a child victim. As stated by the CRC Committee, a child has the right not to exercise his or her right to be heard, as this is a choice, not an obligation.[72] Likewise, consent of a child has to be informed and free of any coercion or manipulation.[73] This is particularly important since children could be "used" by adults wishing to gain something from their participation in the ICC (*i.e.* funding as intermediaries or legal representatives or reparations as parents of victims). Although the ICC cannot compel anyone, be it a child or an adult, to testify in court, other external factors (*i.e.* protection or financial assistance) could compel a child to testify before the ICC or to submit an application to participate as victim in ICC proceedings. As already mentioned in the Introduction of this research, and as will be further studied in Chapter 5, this lack of information or proper consent could have been an issue as regards former child soldier witnesses who allegedly were corrupted by intermediaries.

The CRC Committee identified five steps that need to be taken in order to implement a child's right to be heard. These five steps could very well be adapted to ICC proceedings. Firstly, there needs to be preparation, meaning that the child needs to be informed of his or her rights in the judicial proceedings, including the right to have a legal representative, in a language and manner that he or she understands.[74] Second, if the child wishes to participate

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70 See: *Ruto and Sang case* 'Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony' (25 April 2013) ICC-01/09-01/11-704-Anx, para. 10. This protocol indicates that: "The VWU will only be able to arrange the witness' availability for testimony as long as the individual consents to appear as a witness". See also: Goran Sluiter, *Appearance of Witnesses and Unavailability of Subpoena Powers for the Court*, in Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010), 459-472.

71 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 221.

72 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 16.

73 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 22.

74 It is to be observed that the ICC's Chambers had prohibited witness proofing in the Lubanga, Bemba and Katanga and Ngudjolo cases. However, recently in the Kenya Situation cases, the Trial Chamber has allowed once again this practice. This is analysed further in Chapter 5.

in person in a hearing, this should be an enabling and encouraging experience, which should have a more informal format and should be done under conditions of confidentiality. In this regard, it is important to balance the child's rights with the rights of the accused person, particularly taking into consideration that Article 68(3) of the Rome Statute states that victims' participation should be appropriate and with due regard to the rights of the accused and a fair trial. Thirdly, the child's views must be given due weight in accordance with his or her capacity, on a case-by-case basis. In this sense, as noted above, the child's maturity should be determined individually and general age limitations should be avoided. Fourth, the child has to be informed of the outcome of the process and explain how his or her views were considered. Considering the different phases of the ICC proceedings and their duration, information should be adapted to the child's development and age, throughout the length of the proceedings. Finally, children must have at their disposition procedures to present complaints and remedies when their right to be heard is disregarded or violated.[75] In the ICC there are currently no complaints systems in place. Moreover, the ECtHR recently dismissed an application by an ICC witness, alleging that his rights had been violated in The Netherlands as a result of his participation as a witness in ICC proceedings. The ECtHR determined that although in Dutch territory, the witness was subject to ICC jurisdiction.[76] Consequently, an ICC internal complaint system for victims and witnesses could be put in place. Moreover, Article 70 investigations could be open and individuals charged and convicted, when crimes against the administration are committed (*i.e.* inducing a child witness to give false testimony).

The CRC Committee has enumerated nine requirements for all processes in which a child or children are heard and participate.[77] These also could be applicable to ICC proceedings and have been taken into consideration in the analysis in Chapter 5 of this research. Taking into consideration the recommendations of the CRC Committee,[78] participation of children in the ICC, either as victims or witnesses should aim to be:

a) *Transparent and informative*: children must be provided with full, accessible information. Outreach carried out by the ICC as well as the information given to child victims by legal representatives, ICC investigators and

75 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 40-47.

76 ECtHR, *Bede Djokaba Lambi Longa v Netherlands,* Application no 33917/12, Admissibility Decision, (9 October 2012). See also: International Bar Association, *Witnesses before the International Criminal Cour*t, July 2013, pages 51-54.

77 The application of Article 12 of the CRC to ICC proceedings in which child victims and witnesses participate is analysed in-depth in Chapter 5 below.

78 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 134.

Registry staff should consider the need to inform children in a language and manner they understand.[79]

b) *Voluntary*: children must never be coerced to present their views. The voluntariness needs to be ascertained beyond a simple "yes" or "no", in order to disregard any undue pressure that could be exercised upon the child to participate in ICC proceedings (including by parents and legal guardians).
c) *Respectful*: children's views must be treated with respect, understanding the context of each child's life. In this regard, child witnesses should not be subject to strenuous examination and cross-examination (albeit with due regard to the rights of the accused) and their "views and concerns" pursuant to Article 68(3) of the Rome Statute should be taken into consideration (albeit not for purposes of a conviction, they could be considered for sentencing and reparations purposes).
d) *Relevant*: issues must be of real relevance for the lives of children. As noted above, particularly as regards reparations, these should be relevant and adequate to the child's needs (see also Rule 86 of the RPE).
e) *Child-friendly*: judicial proceedings must be adapted to children's capacity and need for support. Although general decisions and policies could be taken as regards the general obligation of the ICC to protect child victims and witnesses, support should be tailored and adapted to the needs of a particular Situation or case before the ICC and the particular needs of a child (*i.e.* when deciding on witness relocation, language and cultural needs of children should be taken into consideration).
f) *Inclusive*: participation must avoid discrimination and encourage opportunities for different groups of children. In situation countries where certain types of children may be discriminated (*i.e.* girls or indigenous children), the ICC may have to adopt affirmative action mechanisms to have these groups of children represented, when this is possible within the ICC's jurisdiction and in due regard to other competing objectives of the ICC (*i.e.* expeditiousness of proceedings).[80]

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79 Article 17 of the CRC, on the rights of children to access information, is also relevant. The ICC should make an effort to reach child victims and witnesses through dissemination of information that is child-friendly so that children can take an informed decision as to their participation in ICC proceedings. As stated in this provision, this dissemination of information should be done taking into account different cultural and linguistic needs of children participating as victims and witnesses before the ICC.

80 Article 23 and Article 30 of the CRC, which refer to the rights of children with disabilities and children of ethnic, religious and linguistic minorities, should also be taken into consideration. In accordance with these two provisions, when implementing child-sensitive measures, the organs of the ICC should not only take into consideration children as a group that needs special protection, but also take into account the particular needs and condition of children with disabilities and children coming from different ethnic or cultural backgrounds. In fact, in accordance with the principle of non-discrimination, these guarantees should not only apply to children, but to all witnesses and victims before the ICC.

g) *Supported by training*: adults working with children need preparation, skills and support. From ICC judges to intermediaries working in the field, adults working with child victims and witnesses in ICC proceedings should be trained in order to meet the ICC's obligations pursuant to Rule 86 of the RPE.
h) *Safe and sensitive to risk*: precautions to minimize risks to violence and exploitation must be taken. This is intrinsically related to requirement b) above on voluntariness. The ICC should adopt safeguards to guarantee that children's decision to participate in ICC proceedings is voluntary and also duly informed of possible risks.
i) *Accountable*: provide feedback to children, monitoring and evaluation of their participation needs to be undertaken. As noted above, a monitoring and even a complaint system could be put in place to make sure that the ICC meets these international children's rights standards.

Other CRC provisions are also relevant to ICC proceedings. For example, as will be further analysed in Chapter 4 of this research, *Article 38 of the CRC*, which prohibits child recruitment under the age of fifteen, could be seen as the predecessor of the crimes of child recruitment as provided for in Article 8 of the Rome Statute. As a result, the discussions around the adoption of this provision of the CRC and its interpretation by the CRC Committee could be useful tools for judges of the ICC when interpreting the Rome Statute's definition of child recruitment. However, it is important to take notice that the Rome Statute's concept of child recruitment goes beyond the CRC. While the CRC prohibits the use of children to take direct part in hostilities, the Rome Statute provides a broader concept of actively participating in hostilities, thus lowering the threshold of the crime to both direct and indirect participation in combat.

Another relevant provision is *Article 39 of the CRC*, on the recovery and social reintegration of victims of child recruitment. It is thus a valuable that could be considered when judges decide on reparations orders for child victims of crimes.[81]

The CRC thus gives the general framework on "internationally recognised human rights" as regards children in ICC proceedings. However, because of its general scope, sometimes its provisions may lack real guidance to particular cases in which child victims and witnesses are involved in ICC proceedings.

81 In accordance with the CRC Committee, measures under this provision include, *inter alia*: a) policies and programmes, including at family and community levels, to address physical and psychological effects of conflicts on children and to promote their reintegration in society; b) demobilisation of child soldiers and to prepare them to actively and responsibly participate and in society; c) education and vocational training; and d) surveys and research on the matter. See: CRC Committee, *General Guidelines regarding the Form and Contents of Periodic Reports to be Submitted by State Parties under Article 44, para. 1(b) of the Convention* (Adopted by the Committee at its 343rd meeting, 11 October 1996) CRC/C758 para. 130.

Thus, the CRC Committee's General Comments or other more specific international children's rights instruments (*i.e.* such as the UN Guidelines analysed below) may have a more practical use in ICC proceedings. However, for the determination of principles in which the ICC practice is to be founded, the CRC is undoubtedly the starting point when dealing with child victims and witnesses in the ICC.

As regards the *Optional Protocol to the CRC on the involvement of children in armed conflict*,[82] this international instrument has limited applicability regarding the ICC's jurisdiction because the Rome Statute prohibits child recruitment under the age of 15, while the Optional Protocol to the CRC rises the age of prohibition of child recruitment to 18 years. Though the ICC has no jurisdiction to prosecute an individual for recruiting children under 18, the fact that a State is prosecuting under this higher standard could be important in application of the principle of complementarity.[83]

The *Optional Protocol to the CRC on the sale of children, child prostitution and child pornography*,[84] could be of use to define existing crimes under the Rome Statute. For example, the concept of "child prostitution" could be used to define the crime against humanity of "enforced prostitution" (Article 7(1)(g) of the Rome Statute) when committed particularly against children. Likewise, under Article 7(1)(g) of the Rome Statute the concept of "child pornography" could encompass a crime against humanity under the wider conduct of "any other form of sexual violence of comparable gravity". Finally, the concept of "sale of children" could be of use to define the crime of enslavement and sexual slavery included in Article 7(1)(c) and 7(1)(g) of the Rome Statute. Furthermore, in accordance with Article 8 of the Optional Protocol on the sale of children, child prostitution and child pornography, the ICC could adopt measures included therein, which aim to protect the rights and interests of child victims at all stages of the criminal justice process and could be applied in ICC proceedings.

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82 UNGA, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (25 May 2000, entry into force on 12 February 2002) A/RES/54/263.

83 The Optional Protocol on children and armed conflict, which has also been ratified by some State Parties to the Rome Statute, goes beyond the Rome Statute's standard of protection, including within the scope of the prohibition of child recruitment, any person under 18 years of age. Thus, the State Parties to the Rome Statute that have also ratified the Optional Protocol on children and armed conflict could investigate and prosecute within their jurisdiction the recruitment of children between 15 and 18 years of age or include these children in national reparation or reintegration programmes. For example demobilisation efforts of children in a State Party to the ICC who has also ratified the Optional Protocol on children and armed conflict could include all children under 18, thus corresponding to the Optional Protocol's standard of 18 years and by doing so, close the gap of the Rome Statute as regards children older than 15 and younger than 18 years.

84 UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children: Child Prostitution and Child Pornography* (25 May 2000, entry into force on 18 January 2002) A/RES/54/263.

Finally, the *Optional Protocol to the CRC on a Communications Procedure*,[85] which creates a procedure by which individuals or groups of individuals may submit complaints before the CRC Committee, could complement the ICC's jurisdiction, since it could address State responsibility for violations of human rights encompassing crimes committed against children. This mechanism could also complement ICC's jurisdiction when judicial proceedings may not be possible (*i.e.* due to lack of evidence connecting crimes to specific individuals) or when the ICC lacks jurisdiction (*i.e.* crimes occur in the territory of a non-State party).

3.4 Applicability of other international instruments

Apart from the CRC, other international instruments may also be applied in ICC proceedings, pursuant to Article 21 of the Rome Statute. Some of these instruments, analysed in the present section, may be applicable pursuant to Article 21(3) of the Rome Statute as internationally recognised human rights,[86] whereas other instruments may only be applicable if a *lacuna* exists in the Statute, as subsidiary sources of law analysed above. Moreover, other "soft law" instruments, although no applicable *per se*, could serve of "guidance" to interpret existing ICC provisions.

3.4.1 International Humanitarian Law Instruments

As noted above, international criminal law developed as a response to violations of international humanitarian law and international human rights law. Evidently thus, instruments of international humanitarian law are helpful sources of law for the interpretation of crimes within ICC's jurisdiction that are violations to it, namely war crimes.

As regards children in armed conflict, although international humanitarian law provides for their protection, it mainly focuses on their position as civilians and non-combatants and does not address protection and rehabilitation of

85 UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution adopted by the Human Rights Council* (14 July 2011) A/HRC/RES/17/18, opened for signature on 28 February 2012.

86 A relevant international instrument, which has been ratified by 161 countries, is the International Labour Organisation (ILO) Convention 182. The ILO Convention 182 could be a helpful tool when considering not only child recruitment to participate in armed conflict, but also other crimes committed against children, often within the broader context of child recruitment (*i.e.* sexual slavery).

children participating in armed conflict.[87] However, while the Geneva Conventions refer only to children as civilians and do not include in their provisions any reference to children as participants in armed conflict, the Optional Protocols prohibit recruitment of child soldiers and thus crystallised for the first time in history the principle of international humanitarian law that prohibits participation of children in armed conflict. However, the Optional Protocols rule out actual child recruitment (as it only refers to its prohibition and prevention), and therefore do not offer any guidance regarding the protection and rehabilitation of children that ultimately become victims of child recruitment in international and non-international armed conflicts. In other words, the Optional Protocols assume that State Parties will not recruit children, and thus omit any reference as to possible solutions when child recruitment ultimately occurs, including the investigation, prosecution and punishment of those responsible for recruiting children in armed groups or forces.

Notwithstanding its limitations, in accordance with Article 21(1)(b) of the Rome Statute, international humanitarian law could still be useful to define the elements of war crimes under Article 8 of the Rome Statute. Since many of the crimes included in Article 8 derive from international humanitarian law instruments, the definition of terms such as "civilian population", "military necessity", "civilian objects" could be found in international humanitarian law instruments. Moreover, as will be studied in Chapter 4 below, international humanitarian law is useful to interpret the crimes of enlistment, conscription and use of children under the age of fifteen to participate actively in the hostilities.

3.4.2 The Paris Principles

In 1997, the Cape Town Principles were adopted during a symposium organised by UNICEF and the NGO Working Group on the CRC.[88] As a result of this global review initiated by UNICEF, ten years after the adoption of the Cape Town Principles, the Paris Principles were adopted.[89] This instrument consolidated the accumulated knowledge of a decade-long experience, particularly taking into consideration advances in international law regarding child recruitment, among them the adoption of the Rome Statute and the juris-

87 Alison Dundes Renteln, 'The Child Soldier: The Challenge of Enforcing International Standards' Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium" (Fall 1999) *Whittier Law Review*, 193.

88 Paris Principles, 4.

89 Drumbl states that the Cape Town and Paris Principles, along with the 1996 Machel Report, are the "most influential among formally non-binding documents concerned with the legal permissible age of association with armed forces or groups", Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 140.

prudence of the first cases in the SCSL. Most importantly, States endorsed the Paris Principles in a ministerial meeting held in Paris in February 2007.[90] Thus, as noted by Drumbl, although a soft law and hence non-binding instrument, the Paris Principles have obtained widespread professional, operation and political currency.[91]

Even if the Paris Principles are not considered as "internationally recognised human rights", and therefore not applicable law in accordance with the strict sense of Article 21(3) of the Rome Statute, these principles could serve as "guidance" for the Chambers and other organs of the ICC in the interpretation and application of relevant provisions of the Rome Statute. In this sense, as will be analysed further in Chapter 4, the Paris Principles could for instance provide guidance in defining the concept of children "used to participate actively in hostilities" under Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute so as to guarantee the maximum degree of protection.

Given that the Paris Principles also provide a course of action in the implementation of strategies to prevent child recruitment, protect children from recruitment and facilitate their reintegration and rehabilitation, they may well be useful in fulfilling the objectives and purposes of the ICC as regards children, not only in respect of the ICC's mandate to investigate and prosecute those responsible for these crimes, but also the ICC's objective to provide reparations to victims of these crimes. The applicability of the Paris Principles in this regard is further analysed in Chapter 5 below.

The fact that the Paris Principles are based on "lessons learned" in the decade after the adoption of the Cape Town Principles, should be of significance when the ICC deals with child victims and witnesses of crimes of child recruitment, but could also be useful when dealing in general with children in armed conflict situations in which the ICC has jurisdiction.[92] The Paris Principles must nevertheless be understood within the limited scope and

90 Paris Principles, 5. As of September 2010, the number of states endorsing the Paris Principles had reached 95. See: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 111.

91 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 3.

92 For this purpose, the ICC could take into account the following concerns identified in the Paris Principles (Principle 1.7): The precise nature of the problem and the solution will vary according to the context. A situation analysis, including a gender analysis, should inform and guide all interventions; Any solution should address the needs of all children affected by armed conflict and incorporate activities to develop and support local capacity to provide a protective environment for children; The protective environment should incorporate measures to prevent discrimination against girls whose use in armed conflicts is pervasive yet often unrecognised and to promote their equal status in society; A long term commitment by all actors to prevent the unlawful recruitment or use of children, promote their release from armed forces or armed groups, protect them and support their reintegration is essential; The family including the extended family and clan and the community should be actively incorporated in the development and implementation of interventions and activities, and they in turn should participate in finding solutions.

jurisdiction of the ICC, and its interaction with other stakeholders in the broader concept of international justice and transitional justice. In this sense, the ICC must fulfil its mandate to investigate and prosecute crimes, and order reparations for victims of crimes, including those committed against children. However, many other goals of the Paris Principles should be fulfilled by other actors, such as States, NGOs, other international organisations (*i.e.* UN, African Union), and grass-roots organisations.

As already mentioned in Chapter 1 of this research, the Paris Principles provide a comprehensive and inclusive definition of child recruitment as "children associated with an armed force or group". This concept incorporates not only children that have been formally recruited, trained, and used as combatants, but also includes children that have been recruited in any capacity and are thus involved with the armed force or group in a way that he or she is in danger. Thus, as will be further analysed in Chapter 5, the Paris Principles definition is paramount in order to guarantee that certain groups of children (and particularly girls) recruited as cooks, porters, messengers, spies or for sexual purposes, are also able to participate as victims in ICC proceedings and receive reparation for the harms suffered.

The Paris Principles could also be useful to define other concepts of ICC provisions, within the scope of child recruitment. For example, Principles 3.2 and 3.3, read within the ICC context, and particularly in application of the principle of non-discrimination contained in Article 21(3) of the Rome Statute, provides for the involvement of girls in the justice process. Thus, this Principle could be of guidance in order respond to the needs of girls and their children, for example by adopting reparations that do not further stigmatise their involvement with an armed group or force and certainly preventing that their situation is worsened because of their participation in ICC proceedings.[93] Likewise, Principle 3.4 translates the principle of "best interests of the child" to the particular situation of former child soldiers, stating that any effort towards the prevention, release, protection and reintegration of child soldiers should include affected children. Additionally, Principle 3.14 is of significance to interpret Article 12 of the CRC as regards former child soldiers, as it establishes that children's views, but also those of their families and communities where the children will return, should always be taken into consideration.

The Paris Principles also include certain guidelines regarding persons working with former child soldiers, and thus could be helpful for ICC judges, prosecutors, lawyers and staff in their work with child victims, particularly victims of child recruitment. In this regard the Paris Principles contain

93 The Paris Principles also refer to the specific situation of girls, affirming that his group suffers from child recruitment and involvement in armed conflict differently from boys, and therefore should be addressed accordingly. Principle 4.1 states that girls are at risk to become "invisible" and encourages measures to ensure that they are included in reintegration, monitoring and follow-up programmes.

operational principles, which when implemented by the ICC, could provide helpful guidelines for its current and future work. For example, Principle 3.17 recommends adoption of a code of conduct for staff that includes protection of children (*i.e.* Guiding Principles of Unaccompanied and Separate Children of the International Red Cross Committee of 2004). In this sense, the ICC could adopt such a Code of Conduct for staff that includes these obligations towards children, particularly victims and witnesses or General Guidelines on Children and the ICC (as proposed in the final chapter of this research). Moreover, Principles 3.18 and 3.19 could be of guidance when the ICC Prosecutor adopts policies for the investigation and prosecution of crimes of child recruitment. For example, the said principles refer to strategies and programmes (*i.e.* investigations, prosecutions, protection programmes, reparation orders), which should be based on a comprehensive analysis of the political, social, economic and cultural context, informed by a gender analysis of the reasons, motivations and incentives of child recruitment and should encompass a thorough risk analysis to ensure that children, families and communities involved with ICC proceedings (*i.e.* as victims or witnesses) are not placed at greater risk for their participation. These principles could thus guide the ICC Prosecutor in her decision to initiate an investigation for crimes of child recruitment.

The Paris Principles also include guidelines regarding coordination, collaboration and cooperation in order to protect and reintegrate former child soldiers. Although this is not in essence the mandate of the ICC, it could be of guidance for ICC reparations and ICC's work in the field with other intergovernmental and non-governmental organisations in the field. It is essential for the ICC to work along with other key actors at international, regional and local levels. For example, Principle 3.26 establishes that coordination, communication, cooperation and information sharing and transparency are essential at all times. In this regard, the Paris Principles recommend creating interagency groups where *inter alia*: roles and responsibilities are agreed, communicated and respected, possible collaborative action is planned, policy and programme approaches are defined, and protocols for information sharing are developed. Accordingly, the ICC could develop such agreements with international, regional, national and local governmental organisations and NGOs in order to complement its investigations, prosecutions and reparation programmes with other efforts being done by other entities at the international level or in the field.

Principle 6 of the Paris Principles mentions the international standards referring to prevention of child recruitment, which particularly refers to the Rome Statute. Principle 6.6 refers to the verification of a child's age, which could be useful as guidance for judges in determining the *mens rea* of an individual in the commission of the crime of enlistment, conscription or use of children under Article 8 of the Rome Statute. In this regard it is provided that "where documentary evidence of the recruit's age is not available, other

means of verification – such as cross checking with other persons and medical screening – may be required".

The Paris Principles also provide valuable guidance on the treatment that should be given to former child soldiers. These could be applicable to victims and witnesses of child recruitment interacting with the ICC. For example, Principle 7.28 provides useful guidelines in relation to interviews of former child soldiers, which could be applicable to the interaction of the ICC with these children (*i.e.* investigators, trial lawyers, judges, etc.).[94] Moreover, Principle 7.75 refers to the psychosocial support to be provided to these children, which could be useful for ICC staff working with children (such as investigators, VWU's staff and judges).[95]

Another important aspect covered by the Paris Principles is that of "inclusive approach to reintegration", which could be taken into consideration, particularly in the implementation of reparation orders and reparation programmes. In this regard, Principle 7.30 states that programmes should support not only children who have been recruited or used, but also include other vulnerable children and thus benefit the wider community. Principles 7.31 and 7.32 could also be applicable when deciding on reparation measures for former child soldiers under Article 75 of the Rome Statute as they address the importance of rehabilitation programmes and material assistance that could

94 For example, the Paris Principles provide that interviews should be carried out by personnel who are trained in interviewing children; children should be interviewed by adults of the same sex wherever possible; multiple interviews should be avoided; sensitive issues should be raised with children only when essential and in their best interests; additional support should be provided as necessary to children during and after the interview; psychological support should be available to children before, during and after interviews; interviews should be conducted in private where they cannot be overheard and confidentiality should be respected at all times by the organisation collecting the information.

95 For example, it is provided that children should be allowed to work together to solve problems, develop social competencies appropriate to civilian life and define their roles and responsibilities in their community; that culturally appropriate approaches to assisting children with emotional and behavioural problems should be identified and assessed. It is also stated that it should not be assumed that all children associated with an armed force or armed group are traumatised although support should be available for children who have been severely affected. Importantly, the Paris Principles provide that the different experiences of girls and boys of different ages and level of responsibilities within the armed force or group should be taken into account.

be provided to former child soldiers.[96] These could be possible reparations schemes under the Rome Statute.

Principle 8 of the Paris Principles is of fundamental importance for ICC proceedings, as it refers to justice mechanisms. This Principle provides that: a) children's participation in international justice must be voluntary; b) under no circumstances should the provision of services or support be dependent on a child's full participation in justice mechanisms; c) information should be gathered from children only in a manner that respects their rights and protects against causing additional distress to the child and should be regarded as confidential; and d) specific information gathered from children should in general only be disclosed upon a court order and in responding to such an order all efforts should be made to secure a further court order ensuring that the information will be treated in a way that respects children's rights and does not cause distress to the child.[97]

As noted above, standards incorporated in the Paris Principles, as well as the child-centred and rights-based approach of this instrument, provide judges, prosecutors, lawyers and the ICC's staff with valuable lessons that could be incorporate in ICC proceedings insofar as they are compatible with the Rome Statute and particularly respectful of the rights of the accused.

96 Principles 7.31 and 7.32 state that rehabilitation programmes should: facilitate local and national reconciliation and should always be preceded by a risk assessment including a cultural and gender analysis addressing issues of discrimination and should be based on the child's best interests irrespective of national considerations or priorities; build on the resilience of children, enhance self-worth and promote their capacity to protect their own integrity and construct a positive life; incorporate the views of women and girls; take into account the age and stage of development of each child and any specific needs; develop links with all programmes, policies and initiatives which may benefit these children and their families either directly, for example through local or national social welfare programmes, or indirectly, through reconstruction and rehabilitation of national institutions and other development programmes. As for material assistance, the Paris Principles provide that this should: aim to enable children leaving an armed force or armed group to assume a place within their community and standard of living comparable to that of other children of the same age; take into account that circumstances vary, and it should not be assumed that all children who have been associated with an armed force or armed group require direct material assistance in order to reintegrate; give particular attention to the needs of children with disabilities or girl mothers; avoid that assistance impedes reintegration, particularly if it is perceived to be rewarding children who have committed acts harmful to their community; be structured and provided in a manner that does not either stigmatise or inappropriately privilege children or place them at risk.

97 Paris Principles, principle 8.

3.4.3 United Nations Resolutions[98]

UN resolutions are not included as "applicable law" under Article 21 of the Rome Statute, however they could be of guidance for the interpretation and application of law in the ICC. In fact, as previously stated, the Appeals Chamber of the ICC confirmed that a UNGA Resolution, particularly the UN Basic Principles, could be applied in this broader sense of "guidance".[99] Although the applicability of UNSC or Economic and Social Council (ECOSOC) Resolutions have not been analysed by the Appeals Chamber yet, they could also be applicable under the same general interpretation of "guidance" explained above.[100]

Moreover, UNGA Resolutions could be of importance in ICC proceedings as they reflect the unanimous view of UN member States and thus could be viewed in some instances as international customary law. For example the UNGA Resolution of 1999 calls upon States and other parties concerned (*i.e.* international organisations such as the ICC) to continue to "cooperate with the Special Representative, to implement the commitments they have undertaken and to carefully consider all the recommendations of the Special Representative and address the issues identified".[101] Likewise, the Resolution of 2006 urges international cooperation to ensure the respect for children's rights in armed conflict and calls upon governments, UN bodies and other actors, to cooperate in concert to fulfil their mandates as regards children.[102]

These UNGA Resolutions recognise the legal capacity and mandate of the ICC to end impunity for serious crimes against children, and urges States (including non State Parties to the Rome Statute) not to grant amnesties for

98 The Resolutions contained in this section were selected from the list of "Key documents" included in the webpage of the Office of the UN Special Representative to the Secretary General on Children and Armed Conflict: <http://www.un.org/children/conflict/english/index.html> accessed 8 August 2013. However, there may be other resolutions, as well as numerous UN reports from other UN Committees, Councils and agencies, which may also be useful in particular ICC cases. Likewise, other UNGA and UNSC resolutions, such as those related to women, peace and security could also be applicable as regards child victims before the ICC.

99 *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, para. 33.

100 Though this section does not intend to encompass all resolutions that could apply to the work of the ICC, it will refer to those that have been identified as valuable in what refers to children and their interaction with the ICC. Moreover, ECOSOC Resolution "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes" will be analysed and referred to in depth in Chapters 5 and 6 of this research.

101 UNGA, *The Rights of the Child: Resolution adopted by the General Assembly* (17 December 1999) A/Res/54/149 paras 4, 16 and 17.

102 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231, 9.

these crimes.[103] Moreover, as previously stated, the ICC does not and should not work alone in fulfilling its mandate, and the experience and knowledge acquired by the office of the Special Representative is useful for the work of the ICC. This in fact has been the case in the first trial of the ICC, where judges requested observations to the Special Representative on a series of issues related to the use of children as child soldiers.[104] Thus UNGA Resolutions could reinforce ICC decisions calling for State cooperation in matters related to children in ICC proceedings (*i.e.* investigation of crimes committed against children) as they reflect the commitment of UN member States to work collectively (including with the ICC) in situations where children are affected by armed conflict.[105]

The UNGA Resolution on the "Rights of the Child" of 2003, which incorporates for the first time reference to the Rome Statute of the ICC,[106] and all subsequent UNGA Resolutions that call for the end of impunity for perpetrators of crimes against children as defined in the Rome Statute,[107] could thus be

103 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231, 5. See also: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (23 January 2007) A/RES/61/146, 6

104 *Lubanga Case* 'Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04-01/06-1229. The submissions of the Special Representative are further analysed in Chapters 4 and 5.

105 The Resolution of 1999 also referred to the ECOSOC decision to call for "systematic, concerted and comprehensive inter-agency efforts on behalf of children, as well as adequate and sustainable resource allocation to provide both immediate emergency assistance to and long-term measures for children". See: UNGA The Rights of the Child: Resolution adopted by the General Assembly (17 December 1999) A/Res/54/149, para. 11, referring to ECOSOC Conclusions, A/54/3, chap. VI, para. 5, agreed conclusions 1999/1, para. 22. For the final text, see UNGA Official Records, *Report of the Economic and Social Council for 1999: Foreword by the President of the Council* (31 December 1999) A/54/3/Rev.1. For example, the ICC's outreach programme in the Central African Republic implemented such collective work with local and international NGOs and other actors because it lacked permanent staff in that country during the beginning of the investigations. Hence, outreach focused on raising awareness on the mandate of the ICC among representatives of the affected communities (including NGOs, academia, journalists, victims associations, women's groups, students, legal professionals, etc.) is paramount. See: ICC, PIDS, *Outreach Report 2008*. Available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/outreach%20reports/Pages/icc%20outreach%20report%202008.aspx> accessed 8 August 2013.

106 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (19 February 2003) A/RES/57/190, 13.

107 See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (9 March 2004) A/RES/58/157; *Rights of the Child: Resolution adopted by the General Assembly* (24 February 2005) A/RES/59/261; *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231; *Rights of the Child: Resolution adopted by the General Assembly* (23 January 2007) A/RES/61/146; *Rights of the Child: Resolution adopted by the General Assembly* (22 February 2008) A/Res/62/141.

useful legal basis to requests of cooperation, particularly as regards non-State parties to the Rome Statute.

Other UNGA Resolutions, which are more specific in their contents, such as that one of the "Rights of the Child" of 2004, which refers to diversity within the concept of children, particularly addressing the needs of the girl child, children with disabilities, refugee and internally displaced children, child workers and migrant children, could be useful for "guidance" purposes, particularly when interpreting general ICC provisions such as Rule 86 of the RPE.[108] Likewise, the UNGA Resolution on the rights of the child adopted in 2010, which focuses mainly on the rights of children to be heard on matters affecting them, could serve as guidance in the interpretation of ICC provisions in accordance with Article 12 of the CRC.[109]

As explained above, although UNGA Resolutions are not applicable law *per se*, the recommendations contained therein may be implemented, not only within the UN system, but most importantly, by States and other international actors working with children (including the ICC). Most importantly, these UNGA Resolutions reflect some issues in which there is international agreement and consensus on the obligations of States and other international and national actors, and thus *opinio juris*, in relation to children's rights but also as regards States' obligation to cooperate with the ICC. Although it could be argued that most UNGA Resolutions may be very general in their contents to serve as guidance for the application or implementation of the Rome Statute, they could be particularly useful for ICC judges in decisions concerning cooperation of UN member States with the ICC, particularly in relation to non-State Parties to the Rome Statute (*i.e.* in cases triggered by UNSC referrals), in which the legality of the ICC and its jurisdiction to investigate and prosecute certain crimes may be challenged. Accordingly, read together with Chapter IX of the

108 Resolutions on the "girl child" adopted in 2010 and 2011, affirm the need for mainstreaming gender perspective in all policies and programmes regarding children and the need to fight impunity for crimes committed against girls, particularly sexual violence. See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (22 February 2008) A/Res/62/141, 2; UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (13 March 2009) A/Res/63/241, 3; UNGA, *The Girl Child: Resolution adopted by the General Assembly* (3 March 2010) A/RES/64/145, para. 29; UNGA, *The Girl Child: Resolution* (18 November 2011) A/C.3/66/L.24/Rev.1; UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (9 March 2004) A/RES/58/157, 8-9.

109 This resolution emphasises that children's participation must be institutionalised and active consultation of children and the consideration of their views must be encouraged. The Resolution also concludes that institutions dealing with children (such as the ICC) should adopt a child-centred attitude, establish or strengthen structures for children, involve children in planning, design and evaluation of policies and plans, fund for the participation of children, ensure equal participation of children, including girls and adolescents, and ensure child-sensitive procedures. See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (3 March 2010) A/Res/64/146, paras 32, 33 and 58.

Rome Statute and the principle of complementarity, UNGA Resolutions confirm the obligation of all UN member States to cooperate with the ICC.

As regards UNSC Resolutions, their validity as applicable law in the ICC has not yet been analysed by the judges of the ICC. However, they could be of significance, since in light of Article 13 of the Rome Statute, a referral by the UNSC by way of Resolution from that body is one of the three triggering mechanisms of the ICC's jurisdiction. This gives noticeably some validity to the UNSC Resolutions as applicable law within the ICC. Moreover, UNSC Resolutions could be of use to determine whether crimes within the jurisdiction of the ICC have been committed, particularly the newly defined crime of aggression.

In relation to children and armed conflict, UNSC Resolutions have been taken on a nearly yearly basis since 1999.[110] Although their contents, as with UNGA Resolutions, may sometimes be too general, these Resolutions could be of relevance for ICC proceedings, particularly as regards cooperation of non-State Parties with the ICC when crimes against children are committed. For example, Resolution 1314 (2000) urges all parties to armed conflict to bear in mind relevant provisions of the Rome Statute, while it urges Member States of the UN to sign and ratify the Optional Protocol to the CRC. This is the first UNSC Resolution that refers to the Rome Statute. Although in this Resolution the UNSC gives a different legal value to the Rome Statute vis-à-vis the Optional Protocol to the CRC (it does not "urge" for its ratification),[111] the fact that the UNSC (and therefore some of its permanent members who oppose or have not ratified the Rome Statute) mentions the Rome Statute and urges its consideration in situations of armed conflict, was already a significant victory for the ICC's positioning in the international arena (as this Resolution was issued even before the Rome Statute entered into force). Subsequent UNSC Resolutions that have referred situations to the ICC (*i.e.* Darfur and Libya), have

110 UNSC, *Security Council resolution 1261 (1999) (on children in armed conflicts)* (25 August 1999) S/RES/1261 (1999); *Security Council resolution 1314 (2000) (on the protection of children in situations of armed conflicts)* (11 August 2000) S/RES/1314 (2000); *Security Council resolution 1379 (2001) (on the protection of children in armed conflicts)* (20 November 2001) S/RES/1379 (2001); *Security Council resolution 1460 (2003) (on children in armed conflict)* (30 January 2003) S/RES/1460 (2003); *Security Council resolution 1539 (2004) (on children in armed conflict)* (22 April 2004) S/RES/1539 (2004); *Security Council resolution 1612 (2005) (on children in armed conflict)* (26 July 2005) S/RES/1612 (2005); *Security Council resolution 1882 (2009) (on children and armed conflict)* (4 August 2009) S/RES/1882 (2009) and *Security Council resolution 1998 (2011) (on children and armed conflict)* (12 July 2011) S/RES/1998 (2011). See also: Matthew Happold, *Child Soldiers in International Law* (Manchester 2005) p. 42-49.

111 UNSC, *Security Council resolution 1314 (2000) (on the protection of children in situations of armed conflicts)* (11 August 2000) S/RES/1314 (2000), paras 3 and 4.

reinforced the position of the ICC vis-à-vis the international community and particularly as regards non-State parties.[112]

Most importantly, as these UN Resolutions reflect reiterated and often unanimous declarations to the ICC's jurisdiction as regards international crimes in general, but also in particular as regards crimes committed against children, they serve as clear examples of the international community's acknowledgment that the ICC has jurisdiction to investigate and prosecute crimes committed against children, including in situations where these crimes occur in the territory of non-State parties (*i.e.* Libya and Darfur). Moreover, these Resolutions reflect the international community's commitment to cooperate with the ICC in fulfilling its mandate.

3.5 Regional Instruments and Case Law

3.5.1 Brief introduction to the Regional Human Rights Systems

The case law of the regional human rights systems could be useful for ICC proceedings, as they offer guidance to ICC judges when interpreting patent human rights provisions (such as Article 67 of the Rome Statute).[113] The ECtHR has valuable jurisprudence that could thus be helpful for the ICC judges when interpreting concepts such as fair trial and equality of arms, for example vis-à-vis protective measures for child victims or witnesses.[114] Moreover, in particular the case law of the IACtHR could be of use for the ICC when taking decisions pertaining to reparations, as this regional court has developed extensive jurisprudence on this subject.[115] As regards the African Court on

112 Likewise, Resolution 1379 (2001), though not referring specifically to the Rome Statute, does call Member States to put an end to impunity, and prosecute those responsible for international crimes. committed against children and to ensure that post-conflict and truth-and-reconciliation processes address serious abuses involving children. See: UNSC, *Security Council resolution 1379 (2001) (on the protection of children in armed conflicts)* (20 November 2001) S/RES/1379 (2001), para. 9(a).

113 *Lubanga case* 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"' (14 December 2006) ICC-01/04-01/06-773, paras 50 and 51. The Appeals Chamber referred to the ECtHR: *Doorson v the Netherlands* (26 March 1996) Reports of Judgments and Decisions 1996-II, para. 72.

114 The ECtHR has its origins in the Council of Europe's European Convention on Human Rights (European Convention) of 1950. The 47 State Parties to the Council of Europe are automatically parties to the Convention and are under the jurisdiction of the ECtHR. The ECtHR has its headquarters in Strasbourg, France and after the adoption of Protocol 11 in 1998, the ECtHR was reformed into a permanent tribunal. Information has been obtained via the website of the ECtHR: <http://www.echr.coe.int> accessed 8 August 2013.

115 The IACtHR was created through the Inter-American Convention on Human Rights of the Organisation of American States. Although the international treaty was signed in 1969, it was not until 1978 that it was enforced. The IACtHR was not established until 1979 in

Human and Peoples' Rights (AFCtHPR), its case law (when it develops) could be of use for future ICC decisions.[116]

As these three courts have jurisdiction to make advisory opinions and to render judgments regarding contentious cases of violations of human rights in these three continents, they have in general the potential to also overlap with the ICC's jurisdiction as violations of human rights to be evaluated by these regional courts could also encompass crimes within the Rome Statute. Hence, the ICC could also refer to these regional court's findings (i.e. to determine whether there was an "attack" under crimes against humanity). Moreover, regarding victims' participation, individuals acting in the ECtHR could also be victims in ICC cases related to crimes committed in a State party to the ICC but also to the ECtHR system.[117] Moreover, in relation to the IACtHR, victims could be entitled to reparations in the regional human rights system but also in ICC proceedings. Thus, in the future it could be possible that the ICC would in a sense "share" its jurisdiction with these regional human rights courts.

3.5.2 The African Human Rights System

To date the AFCtHPR has only rendered one judgment on merits.[118] However this judgment relates more to the jurisdiction of the court, which still needs to be reinforced, than to specific violations of human rights, and particularly children's rights. The court has made various decisions declaring it has no

San José, Costa Rica. However, unlike its European counterpart, the IACtHR is not permanent. The judges meet only periodically in sessions in order to hear and decide upon pending cases. The information has been obtained via the website of the Inter-American Court of Human Rights: <http://www.corteidh.or.cr/> accessed 8 August 2013.

116 The AFCtHPR was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso in 1998. The Protocol entered into force in January 2004 and in 2006, the AFCtHPR was created and its judges were elected. The AFCtHPR has its seat in Arusha, Tanzania, and like its Inter-American counterpart, is not permanent. The AFCtHPR has 25 State Parties, namely those members of the OAU that have additionally ratified the Protocol relevant to the establishment of the AFCtHPR. Unlike the IACtHR and ECtHR, which have decades of functioning, the AFCtHPR only became functional in 2008, when it received its first cases. Information has been obtained via the website of the African Court on Human and Peoples' Rights: <http://www.african-court.org> accessed 8 August 2013.

117 The IACtHR still requires that cases be presented via the Inter-American Commission of Human Rights, which declares the cases admissible in first instance and then presents the claim to the tribunal. In the AFCtHPR, NGOs with Observer Status before the African Commission and individuals can institute cases directly before that tribunal if the State party from which they come from has made a declaration allowing such direct applications. In all three systems States can directly present cases.

118 *Femi Falana v African Union* 'Judgment of 26 June 2012' (26 June 2012) Application No 001/2011.

jurisdiction, particularly because NGOs or individuals have applied without the State declaration allowing for such direct application. Nevertheless, this regional tribunal has several pending cases and consequently it is expected that the AFCtHPR will render more judgments in the near future.[119] As noted above, this regional human rights system may be of value in the future, once it consolidates jurisprudence that could be useful for the ICC.

As regards children's rights, it is important to note that the African human rights system adopted in 1990 the African Charter on Rights and Welfare of the Child, which entered into force in 1999. This is an innovative instrument that has been ratified by 41 African states, and deals with children's rights from a unique African perspective.[120] As stated by the UN, the CRC and its Optional Protocol, along with the African Charter, constitute the legal backbone of war-affected children in Africa and their co-existence provides windows of opportunity for the effective protection of children living in conflict and post-conflict situations across the continent.[121]

The African Charter refers to forms of children's rights violations that are closely related to crimes under the jurisdiction of the ICC. For example, Article 22 refers to children and armed conflict and adopts the same threshold as the Optional Protocol to the CRC, which is a prohibition of child recruitment under the age of 18. Article 23 touches upon refugee and internally displaced children, guaranteeing the same rights to both categories. Furthermore, Article 25 of the Charter refers to children separated from their parents, and establishes the obligation to give special protection and assistance to these children, and thus brings together the principle of best interests of the child with other children's rights (the right to family life and the right to the child's ethnic, religious or linguistic background) regarding protection and assistance of these children in situations of armed conflict. Other provisions of the Charter could be of use to interpret crimes within the ICC's jurisdiction committed against children. For example, Article 27 of the Charter refers to crimes of sexual exploitation against children, prohibiting not only sexual exploitation, but also any type of inducement, coercion or encouragement of a child to engage in any sexual activity. Although under Article 22 of the Rome Statute, crimes within the ICC's jurisdiction should be interpreted in accordance with the principle of legality, the definition adopted by the Charter could be of use

119 See: <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases> accessed 8 August 2013.

120 See: <http://www.achpr.org/instruments/child/ratification/> accessed 8 August 2013.

121 Centre for Conflict Resolution and Office of the United Nations High Commissioner on Human Rights, *Children and Armed Conflicts in Africa*: *Policy Advisory Group Seminar Report* (April 2007) 6.

to interpret the crimes of "other forms of sexual violence", when these are committed against children.[122]

It is also important to note that the Charter created an African Committee of Experts on the Rights and Welfare of Child, which is the main treaty-created body that has as mandate children's rights protection and promotion in the African continent (Articles 32-46). This Committee could eventually cooperate with the ICC in the investigation and prosecution of crimes committed against children. For example, the Committee could submit an expert report on children in situations investigated or prosecuted by the ICC in the African continent or could also cooperate in the enforcement of reparations orders where child victims in Africa are beneficiaries. This would not only be particularly helpful for the ICC's work, it could also provide the ICC with a unique African insight of the situation of children in this continent and the particular effects of crimes under the jurisdiction of the ICC upon children in the African context.

3.5.3 Inter-American Human Rights System

In relation to children's rights, the Inter-American system has no specific instrument related to this group. However, the case law of the IACtHR in this area is valuable and could be of guidance for the current and future work of the ICC. Using as starting point Article 19 of the American Convention on Human Rights and Article 16 of the Additional Protocol to the American Convention on Human Rights, that briefly and very generally refers to the rights of the child,[123] the IACtHR has interpreted many other human rights

122 Another Article that could be particularly important, as it is closely related to such crimes as child recruitment and sexual slavery in present armed conflicts, is Article 28 of the Charter, which refers to the protection of children against the use of drugs, their production and their trafficking. Article 29 of the Charter, which touches upon sale, trafficking and abduction of children by any person, including their parents or legal guardians, is also a valuable provision that could be used to encompass within crimes such as child recruitment, other forms of abduction or abuse against children (*i.e.* begging).

123 Article 19 of the American Convention on Human Rights provides the following: Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. Article 16 of the Additional Protocol to the American Convention on Human Rights states: Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system. See: Organisation of American States, *American Convention on Human Rights ("Pact of San Jose", Costa Rica)* (22 November 1969); Organisation of American States, *Additional Protocol to the American Convention on Human Rights in the*

provisions within the Inter-American system from the perspective of children, providing an hermeneutic analysis of all other rights included in these instruments with the rights of the child. Accordingly, the IACtHR has stated that the content and scope of Article 19 of the American Convention must be specified, taking into account the pertinent provisions of the Convention of the Rights of the Child, as this instrument and the American Convention "are part of a very comprehensive international *corpus juris* for protection of children".[124]

Although, contrary to the ICC, jurisdiction of the IACtHR is based on state-responsibility, the IACtHR has established standards that could be applicable in the ICC's system, such as protection of children in situations of armed conflict, the crime of child recruitment, but also as regards reparations for child victims of gross violations of human rights. As Feria-Tinta has noted, the IACtHR has pronounced itself on individual rights of children under complaint procedures in a way that no other international judicial body has been empowered to do.[125] In more than three decades of existence, the IACtHR has rendered decisions regarding children in situations of extreme vulnerability, such as situations of armed conflict, forced disappearances, torture, street children, etc. Undoubtedly these ground-breaking rulings will be of value for the work of the ICC as many of these gross violations of human rights are also crimes within the jurisdiction of the ICC.

Far from endeavouring to analyse in depth the wide-ranging case law of the IACtHR, this Chapter will briefly refer to some of the most important rulings of this regional Court that could be of significance to guarantee children's rights within the ICC's system. Although the ICC is a criminal tribunal, it also has particular characteristics, which are parallel to the IACtHR proceedings, particularly as regards victims' participation and their right to receive reparations. Moreover, given that most ICC crimes are also violations to human rights, the IACtHR case law may be of use when defining crimes within ICC's jurisdiction (such as child recruitment).[126]

The first case brought before the IACtHR concerning children was the *Villagrán Morales Case against Guatemala*, better known as the "*Street Children*

Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (16 November 1999) A52.

124 *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 153.

125 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 2.

126 This section is based on the reading of these main decisions as well as the analysis made by Mónica Feria Tinta on the case law of the IACtHR regarding children's rights. However, since the IACtHR has developed more case law related to the rights of children in the latter years, this Chapter also includes more recent jurisprudence. See: Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008).

Case".[127] In this case dealing with the crimes committed against street children in Guatemala, the IACtHR dealt with crimes of torture and wilful killing (both crimes currently under the jurisdiction of the ICC). In more recent cases the IACtHR has also referred to child soldiers and children in armed conflict, all which could be applicable to situations and cases brought before the ICC.

3.5.3.1 Definition of child

In reference to the definition of a child, the IACtHR adopted the standard of the CRC since its first case, stating that a child is anyone under the age of 18, unless by law, he/she previously attained majority.[128] The IACtHR has also referred to the superior interests of the child, affirming that the prevalence of the child's superior interests should be understood as the need to satisfy all the rights of the child. In the view of the IACtHR, the superior interests affect the interpretation of all the other rights established in the Convention when a case refers to children.[129] According to Feria-Tinta, this example very well serves to illustrate how rights could intertwine and indeed be indivisible.[130] This interpretation of the IACtHR could be of use, for example, when determining the "superior" or best interests of the child requiring protective or special measures, vis-à-vis the rights of the accused in ICC proceedings.

3.5.3.2 Special protection of children, particularly during armed conflict and in situations of gross violations of human rights

The IACtHR also determined that due to the vulnerability of children vis-à-vis adults' human rights violations against children are crimes against humanity and they are an aggravating factor of responsibility (State-responsibility).[131] The IACtHR has affirmed that violations such as inhumane treatment, torture, etc. are worse when children are victims of these violations, since the State has a special obligation regarding them, over and above those it has regarding adults.[132] The IACtHR has also concluded that the special vulnerability of boys

127 Case of the "Street Children" (Villagrán-Morales et al) v Guatemala (*Street Children case)* Reparations and Costs, Judgment of May 26, 2001 Series C No 77.

128 *Street Children case*, Merits, Judgment of November 19, 1999 Series C No 63, para. 188.

129 Case of the Girls Yean and Bosico v Dominican Republic (*Yean and Bosico case)* Preliminary Objections Merits Reparations and Costs, Judgment of September 8, 2005 Series C No 130, para. 134.

130 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 218.

131 *Street Children case,* Merits, Judgment of November 19, 1999 Series C No 63, para. 146 and Case of Bulacio v Argentina (*Bulacio case)* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, para. 133.

132 Case of the "Juvenile Reeducation Institute" v Paraguay (*JR Institute case*) Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, paras 301-302.

and girls due to their condition as such becomes even more evident in a situation of armed conflict, since they are least prepared to adapt or respond to said situation and, sadly, it is they who suffer its abuse in a disproportionate manner.[133] This interpretation of the IACtHR could be helpful when determining whether the threshold of ICC's jurisdiction has been reached (*i.e.* when deciding whether serious bodily or mental harm has been committed as a crime of genocide). In light of the aforesaid case law, the ICC judges could interpret that the "seriousness" requirement is reached more easily when the crimes are committed against children than against adults.

In regards to children's rights in situations of armed conflict, the IACtHR's judgment in the *Gomez Paquiyauri v. Peru Case* was the first international case concerning protection of children in the context of an armed conflict to be adjudicated by an international tribunal where the substantive law concerning the rights of the child was fully examined.[134] In this case, the IACtHR established that special measures of protection and additional duties that States have towards the fundamental rights of children are non-derogable in times of war.[135] Findings such as this one of the IACtHR could be of use when determining whether war crimes were committed against children as protected civilians under international humanitarian law, and particularly when interpreting common Article 3 of the Geneva Conventions.

Referring to crimes of torture committed against children, the IACtHR has also established important jurisprudence as regards the crime of torture, which could be of use to define this crime in ICC proceedings. The IACtHR has stated that in order to determine whether torture has been committed, all circumstances should be taken into consideration, including nature, context and method of aggressions, their physical and mental effects and the sex, age and state of health of the victims.[136] Regarding the psychological effects of torture, the IACtHR indicated that this might be inferred (particularly when the victim is no longer alive) as a result of the circumstances in which the crime of torture was committed.[137] These findings could thus be also useful when determining the "harms suffered" in ICC reparations proceedings for child victims of torture.

The IACtHR extensively analysed the crime of forced disappearances, and thus its jurisprudence could be particularly helpful to define this crime

133 *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 156.

134 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 58 referring the Case of the Gómez-Paquiyauri Brothers v Peru (*Gómez case*) Merits Reparations and Costs, Judgment of July 8, 2004 Series C No 110.

135 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 154, referring to the *Gómez case,* Merits Reparations and Costs, Judgment of July 8, 2004 Series C No 110.

136 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 74.

137 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 163.

included in the Rome Statute but also to determine the harms suffered by victims of forced disappearances. As regards child victims of this crime, the case law of the case of *Contreras et al. v. El Salvador* is of significance, since the IACtHR determined that the abduction of children and separation from their parents and family harms the mental, physical and moral integrity of children and leads to feelings of "loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on age and the specific circumstances".[138] The IACtHR also determined children's rights to an identity and a name and to have a family are violated when these crimes are committed.[139]

In the case of *Gelman v. Uruguay*, the IACtHR also analysed the situation of a child who was abducted from her biological parents as a baby and given away to another family during the Argentinean and Uruguayan dictatorships in the 1970's.[140] The IACtHR determined that the abduction of children constitutes a complex act that involves a series of illegal actions and violations of rights that impede restoration of the relationship of the children and their family members.[141] In another case, the *Cotton Fields case,* the IACtHR determined that violence against children takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their cultural and physical environments and includes all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[142] Findings of the IACtHR in cases of forced disappearances and abductions of children such as the above, could be useful for ICC proceedings dealing with child recruitment, abductions of children for slavery, including sexual slavery, forced prostitution of children, and forced displacement of children, since all these crimes have in common the fact that children are very often deprived of their family life and identity.

The IACtHR has also analysed crimes of sexual violence committed against children, and it has concluded that during armed conflicts women and girls face specific situations affecting their human rights, such as rape, which is often used as a symbolic means of humiliating the opposing side and predominantly affects those who have reached puberty or adolescence. It has also determined that sexual violence "can include acts that do not involve penetra-

138 Case of Contreras et al v El Salvador (*Contreras case)* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 85.

139 Case of the "Las Dos Erres" Massacre v Guatemala (*Las Dos Erres case)* Preliminary Objection Merits Reparations and Costs, Judgment of November 24, 2009 Series C No 211.

140 Case of Gelman v Uruguay (*Gelman case)* Merits and Reparations, Judgment of February 24, 2011 Series C No 221.

141 Case of Gelman v Uruguay (*Gelman case)* Merits and Reparations, Judgment of February 24, 2011 Series C No 221, para. 120.

142 Case of González et al v Mexico (*Cotton Field case)* Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205 para. 407; *Contreras case,* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 101.

tion or even any physical contact".[143] Such findings could be useful in ICC proceedings to determine whether rape was committed with a genocidal intention (with the intent of humiliating a group) but also to determine "other forms of sexual violence" that go beyond the physical contact (*i.e.* forced pornography).

The IACtHR also has extensive case law regarding the rights of indigenous persons, which could be applicable to ICC proceedings in cases in which the victims are part of an indigenous group. In this regard, the IACtHR has been particularly pioneering in the topic of the harms suffered by indigenous persons and consequently adequeate reparations for those harms. For example, in the case of *Xákmok Kásek Indigenous Community v. Paraguay*, the IACtHR referred to violations suffered by the indigenous community and the particular effects they had in children's education, healthcare and overall wellbeing.[144] In the case of *Chitay Nech et al. v. Guatemala*, the Court referred to the effects of forced disappearances and forced displacement in the lives of children in an indigenous community, which carries abandonment of their traditions and culture.[145]

3.5.3.3 Recruitment of children

The IACtHR has also dealt with crimes of child recruitment as violations of human rights within the Inter-American system. Although recruitment could be a violation of human rights and not necessarily a crime within the ICC's jurisdiction, its jurisprudence could be useful to determine the harms suffered by child victims of these crimes and the consequent reparations.

In the Case of *Vargas Areco v. Paraguay*, the IACtHR dealt with recruitment of children under the age of 18 in the armed forces of that country. Although this case was about torture and killing of a minor who had been recruited by the Paraguayan armed forces, and did not directly deal with the legality of his recruitment, the IACtHR affirmed that international law sets forth special rules to protect the physical and psychological integrity of children while involved in military activities, whether in times of peace or during armed conflict.[146] In this case, the IACtHR referred to the coercive environment in which children are recruited, since many of them are recruited "through

143 *Cotton Field case,* Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205, para. 407.

144 Case of the Xákmok Kásek Indigenous Community v Paraguay (*Xákmok Kásek case)* Merits Reparations and Costs, Judgment of August 24, 2010 Series C No 214.

145 Case of Chitay Nech et al v Guatemala (*Chitay case)* Preliminary Objections Merits Reparations and Costs, Judgment of May 25, 2010 Series C No 212 paras 125 and 135.

146 Case of Vargas-Areco v Paraguay (*Vargas-Areco case)* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 112.

coercion on the children themselves or their relatives".[147] This finding is significant, particularly since the child, who was 15 years old at the time of his recruitment, had presumably enlisted "voluntarily". This interpretation could be of use in determining cases of child recruitment before the ICC and the reasoning of whether voluntary enlistment exists at all in coercive circumstances such as poverty, armed conflict or internal displacement.

3.5.3.4 Procedural rights of children

The IACtHR has also adopted important rulings referring to children's rights in judicial proceedings, interpreting the principle of equality and non-discrimination from a children's rights perspective. Thus, findings such as the one below, could be useful for ICC proceedings involving child victims or witnesses: "the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to the privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character".[148]

The IACtHR also stated that the principle of equality does not impede adoption of specific regulations and measures regarding children who require different treatment due to their special conditions insofar as this treatment is targeted towards the protection of children's rights and interest.[149]

Taking into consideration the above conclusions of the IACtHR, Article 21(3) of the Rome Statute could be read using the above interpretation in order to adopt measures (including affirmative action) to have children represented in ICC proceedings (as victims participating pursuant to Article 68(3) of the Rome Statute and as beneficiaries of reparations pursuant to Article 75 of the Rome Statute). The IACtHR has concluded that children participate in judicial proceedings under different conditions from those of an adult and thus, special measures should be adopted for an effective defence of their interests and in order to ensure that children enjoy a true opportunity for justice. Although the IACtHR has made these findings mainly in relation to children in conflict with the law, these general principles are still applicable within the context of children participating as victims and witnesses in ICC proceedings. In this

147 *Vargas-Areco case,* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 129.

148 Juridical Condition and Human Rights of the Child (*Child Advisory Opinion)* Advisory Opinion OC-17/02 of August 28, 2002 Series A No 17, para. 45.

149 Child Advisory Opinion, para. 79.

sense, the IACtHR findings could be of use to affirm in ICC proceedings that children have at least the same fundamental guarantees of due process as any other person, but that additional safeguards are also necessary to fulfil the ICC's mandate pursuant to Rule 86 of the RPE.[150]

The IACtHR's Advisory Opinion on the Juridical Condition and Human Rights of the Child could be of great significance for ICC proceedings, particularly when defining the principle of non-discrimination enshrined in Article 21(3) in cases where children are involved in ICC proceedings. In this decision, the IACtHR determined that it is evident that a child participates in proceedings under different conditions from those of an adult and to argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, the IACtHR determined that it is indispensable to recognise and respect differences in treatment, which correspond to different situations among those participating in proceedings.[151] The IACtHR also established in that same decision that to accomplish its objectives, the judicial process must recognise and correct any real disadvantages that may require countervailing measures (*i.e.* in the ICC context these could be protective and special measures, but also outreach activities targeting child victims) that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests. The IACtHR further concluded that if these countervailing measures are not adopted, it is impossible to say that there is true opportunity for justice.[152]

> In relation to the actual participation of a child in the proceedings, the IACtHR stated that the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests. It determined that those responsible for the application of the law, must take into account the specific conditions of the child and his or her best interests to decide on his or her participation, as appropriate, in establishing his or her rights, considering as much as possible, the views of the child of his or her own case.[153] These conclusions could be helpful in ICC proceedings when determining whether the participation of a child victim pursuant to Article 68(3) of the Statute is appropriate, not only vis-à-vis the rights of the accused, but also as regards the best interests of the child.

The IACtHR could also offer useful case law as regards protective and special measures under Rules 87 and 88 of the RPE vis-à-vis the rights of the accused under Article 67 of the Rome Statute. For example, as to the public nature of judicial proceedings, the IACtHR has stated that when addressing issues pertaining to children, it is appropriate to set certain limits to the principle of

150 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 41-42.
151 Child Advisory Opinion, para. 96.
152 Child Advisory Opinion, para. 97.
153 Child Advisory Opinion, paras 101-102.

publicity of proceedings, not in relation to the parties, but rather vis-à-vis the public observation of the procedural acts.[154]

3.5.3.5 Children's rights to reparation

As stated before, perhaps the most valuable case law of the IACtHR is that one pertaining to reparations, as in this aspect the IACtHR has been undoubtedly pioneering and often unique. The IACtHR has significant case law as regards the concept of victim and thus, within the ICC context, its case law could be helpful to define a victim under Rule 85 of the RPE and consequently also to determine whether the victim suffered harm (for the purposes of participation under Article 68(3) of the Rome Statute, but also reparations pursuant to Article 75 of the Rome Statute). Moreover, the IACtHR case law could be helpful in order to determine the evidentiary threshold required under Rule 85 of the RPE, and particularly whether inferences of the harm suffered are possible in this regard.

The IACtHR has adopted a notion of victim and beneficiary that encompasses not only the child, but also his or her family as direct victims of violations, as it has stated that relatives of these children are also direct victims of violations, since crimes suffered by child victims may also constitute cruel and inhumane treatment for their relatives, particularly their parents. The IACtHR has also established that circumstances such as the closeness of the family relationship and the degree to which the family member(s) witnessed the violation, are elements to consider as to whether they are also victims of violation.[155] In fact the IACtHR has established that in cases of gross violations against children (particularly forced disappearances and torture) no evidence is required to conclude that the distress suffered by the child extends to the closest members of the family, especially those who had close emotional contact with the child, such as parents, siblings and grandparents.[156] The IACtHR also stated that relatives of child victims are victims themselves on account of their own suffering as they suffer from psychological distress as a direct consequence of the violation suffered by the child.[157] Likewise, the IACtHR has concluded that when parents of children suffer from gross human rights violations (*i.e.* extrajudicial killings), the Court may infer that the violation could have prejudiced the schooling of the children of the victim, even if there is no evidence in this regard.[158] Importantly, the IACtHR has adopted a broad concept of

154 Child Advisory Opinion, para. 134.
155 *Street Children case,* Merits, Judgment of November 19, 1999 Series C No 63, para. 174.
156 *Bulacio case,* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, paras 98-99.
157 *Vargas Areco case,* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 95.
158 Case of Family Barrios v Venezuela (*Barrios case*) Merits Reparations and Costs, Judgment of November 24, 2011 Series C No 237, para. 336.

family and next-of-kin which could certainly be useful in cases involving child victims before the ICC. The IACtHR has stated that the concept of family goes beyond marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside marriage.[159]

In relation to child victims who have died, the IACtHR has established that family members, such as the mother and grandmother of child victims are to be considered on the one hand as successors of their next of kin who are dead and, on the other, as victims themselves, since the IACtHR presumes that a person's death causes non-pecuniary damage to his/her parents and siblings.[160] Moreover, the IACtHR established that children who were not yet born at the time of the violation (*i.e.* forced disappearance) also suffered a violation of their moral and mental integrity because they lived in an environment of suffering and uncertainty.[161]

As regards the notion of harm and reparation, the IACtHR has developed important jurisprudence on the concept of "damage to a life plan" of an individual as a result of grave violations to his/her human rights. In cases involving children, the IACtHR has established that measures adopted to protect children are of special importance, because children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan.[162] However, determining the life plan, and thus the material harm suffered by children may be difficult given the lack of precise information on real earnings of victims. In these cases, the IACtHR has determined for example, that the minimum wage in the country where the victims lived was used as basis to grant compensation to the victims and/or their relatives. The IACtHR has established that in what refers to children, where there is no certainty regarding the activity or profession they might practice in the future, the IACtHR has deemed that loss of earnings must be based on evidence that establishes losses with certainty. The IACtHR thus determined that this loss of earnings must be calculated on basis of the victim's age and the end of his or her life expectancy at the time of the events coupled with the minimum wage in force in the country concerned.[163] The IACtHR also established that violations to children can also result in damages to their families, for example, loss of jobs of the parents due to the

159 Child Advisory Opinion, para. 69.

160 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, paras 65-68.

161 *Contreras case,* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 122.

162 *JR Institute case*, Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, para. 172.

163 *Street Children case*, Merits, Judgment of November 19, 1999 Series C No 63, paras 79-81; Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, para. 288; *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 277.

change in their personal circumstances because of the violations (*i.e.* death or disappearance of a child).[164]

Regarding non-pecuniary damage, the IACtHR has determined that this includes both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them and their next of kin as well as other sufferings that cannot be assessed in financial terms. Given their nature, the IACtHR granted reparations for these damages by paying sums of money or goods or services that can be monetarily assessed, applying judicial discretion and the principle of equity. The IACtHR has also granted reparation in form of execution of acts or works of a public nature which recover the memory of the victims, re-establishes their reputation, comforts their next of kin or transmit a message of official condemnation to the violations in question.[165]

Although the jurisdiction of the IACtHR and the ICC are different as regards responsibility (State v. individual responsibility), the findings of the IACtHR are valuable to the ICC in various manners. Firstly, as noted above, the IACtHR case law could be of guidance as regards the definition of general principles included in the Rome Statute (such as the principle of non-discrimination and the right to a fair trial). The IACtHR case law could also be useful when defining a crime under the jurisdiction of the ICC, particularly when this crime has been committed against children (*i.e.* to determine whether "serious" bodily or mental harm was committed to meet the requirements of the crime of genocide). Moreover, the IACtHR may be of enormous use when determining the "harm suffered" by child victims, in order to determine whether a child is a victim under Rule 85 of the RPE, and thus eligible to participate in proceedings or receive reparations.

3.5.4 European Human Rights System

Unlike its counterpart in the Inter-American system, the European Convention does not have a specific provision regarding children. Nevertheless, in the words of Judge Jean-Paul Costa of the ECtHR, Article 1 of the European Convention[166] provides that States shall secure the rights and freedoms of "everyone", which ultimately includes children too.[167] Furthermore, the ECtHR has often relied on the CRC as guidance in the application of the provisions of the European Convention. In the last decade, the ECtHR, as an organ of the Council

164 *Bulacio case,* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, para. 88.

165 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 84.

166 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.

167 Council of Europe, *International Justice for Children: Foreword by Jean-Paul Costa* (Vol 3 of Building a Europe for and with Children, Council of Europe 2008) 5.

of Europe system, has also worked closely with the Council of Europe Secretariat, particularly with its programme "Building a Europe for and with Children" in order to promote children's rights among its members States and also to improve accessibility of children in the European Human Rights system. Likewise, in accordance with the European Social Charter,[168] children's rights have also been analysed by the European Committee on Social Rights, which, unlike the ECtHR, has jurisdiction over collective complaints against State Parties to the European Social Charter.[169]

It is also important to point out that during the past years, other child-specific instruments have been adopted within the European Human Rights system. For example, in 1996, the European Convention on the Exercise of Children's Rights (ECECR) was adopted to guarantee children's access to judicial proceedings, namely family proceedings.[170] Some of the provisions of this convention could be of use in ICC proceedings. For example, Article 1, paragraph 6, of the ECECR states that nothing in the Convention prevents Parties from applying more favourable rules to the promotion and exercise of children's rights. It enshrines the principle that international legal instruments lay down minimum standards but that States (or international organisations such as the ICC) may go beyond those legal texts to guarantee children's rights. Article 3 of the ECECR provides the minimum standards on the child's right to be informed and to express his or her views in proceedings, particularly: the right to receive all relevant information, to be consulted and to express his or her views, and to be informed of the possible consequences of compliance with these views and possible consequences of any decision. In accordance with this Article, children are considered as having sufficient understanding and have procedural rights that should be granted to them.[171]Article 5 of the Convention further grants children other procedural rights, such as the right to apply to be assisted by an appropriate person of their choice in order to help them express their views and the right to apply themselves, or through other persons or bodies (not necessarily parents or guardians) for the appointment of a separate representative (other than that of their parents). The ECECR also provides minimum guidelines to be followed by the judicial authorities before making a decision. In Article 6, the ECECR states that judges shall consider whether they have sufficient information to make a decision in the best interests of the child, or otherwise, obtain further information. It also obliges judges to ensure that the child has received all relevant information and has consulted with the child in person, where appropriate and allow the child

168 Council of Europe, *European Social Charter* (18 October 1961) ETS No 35 and revised ETS No 163.

169 Council of Europe, *International Justice for Children: Foreword by Jean-Paul Costa* (Vol 3 of Building a Europe for and with Children, Council of Europe 2008) 12.

170 Council of Europe, *ECECR* (25 January 1996) ETS No 160.

171 Council of Europe, *The ECECR, Explanatory Report* <http://conventions.coe.int/Treaty/en/Reports/Html/160.htm> accessed 8 August 2013.

to express his or her views. The above standards set by the ECECR could be of guidance for ICC proceedings dealing with child victims and witnesses.

The Council of Europe also adopted in 2007 the "Convention on the Protection of children against Sexual Exploitation and Sexual Abuse", which provides a legal framework for the prevention and protection of children against this abuse, but also for the punishment of these crimes, including against legal persons or corporations. Importantly, this Convention contains guidelines regarding the investigation, prosecution and procedural measures that could be taken into consideration when dealing with sexual exploitation and abuse against children in ICC proceedings.[172]

The Parliamentary Assembly of the Council of Europe adopted Recommendation 1864 (2009) "Promoting the participation by children in decisions affecting them", which could also be of guidance for the ICC.[173] In Recommendation 1864, the Council of Europe highlighted the need for State Parties to the Council to implement the ECECR and also Article 12 of the CRC, which deals with children's access to justice and their participation in judicial proceedings.[174] The Recommendation urges all decision-makers to seriously consider the opinions, desires and feelings of children, including very young children and ensure that participation is always voluntary and facilitated. Furthermore, the Recommendation proposes that children be able to express their views in a climate of respect, trust and mutual understanding and special attention is paid to avoid putting them at risk in any way.[175]

Moreover, in November 2010, the Committee of Ministers of the Council of Europe adopted a series of guidelines on child friendly justice.[176] This document, which will be analysed more in detail in Chapters 5 and 6, provides recommendations on children's access to justice, including information on the judicial proceedings, protection, safety and participation from the initial proceedings (*i.e.* investigation) to the final phases (*i.e.* enforcement and execution of a decision).

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172 Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse (Lanzarote Convention)*, (25 October 2007) CETS No 201.

173 Council of Europe: Parliamentary Assembly, *Recommendation 1864(2009): Promoting the Participation by Children in Decisions Affecting Them* (13 March 2009) Doc.12080.

174 Paragraph 4 of the Recommendation reflects the clear and intrinsic relationship between the ECECR and Article 12 of the CRC: Whenever a decision which affects a child is taken, his or her opinions, wishes and feelings have to be duly taken into account, having due regard to his or her age and degree of maturity. Age and maturity must be considered together, and these two factors do not solely concern the child's intellectual capacity. The way in which children express their feelings, the development of their personality, their evolving capacities and their ability to confront various emotions and possibilities, are just as important.

175 Council of Europe: Parliamentary Assembly, *Recommendation 1864(2009): Promoting the Participation by Children in Decisions Affecting Them* (13 March 2009) Doc.12080, paras 5-7.

176 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).

Regarding the ECtHR's case law in relation to children, the ECtHR has adopted principles of interpretation and application of the law in order to protect children's rights that could be of guidance for the work of the ICC. Although this study does not intend to review all the abundant jurisprudence of the ECtHR that directly or indirectly relates to children's rights, it aims to analyse some key decisions that are of particular relevance and importance to the work of the ICC.

In what refers to *crimes committed against children*, the ECtHR has copious case law on torture, slavery and other violations of human rights that are also crimes within the ICC's jurisdiction. Thus, this abundant case law could be of use to define these ICC crimes. For example, in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the ECtHR held that the State was responsible for torture when it detained an illegal immigrant, a 5-year old unaccompanied child, in an adult detention centre. It found that the child's detention and the conditions of her detention reflected a lack of humanity to such a degree, that it amounted to inhumane treatment.[177] In another case, that of *Siliadin v. France*, the ECtHR analysed modern slavery, in a case where a girl was subject to domestic slavery. In this case, the ECtHR defined "forced or compulsory" labour as "all work of service which is exacted from any person under the menace of any penalty for which the said person has not voluntarily offered himself". It then established that the fact that the victim was a child in a foreign country, with an illegal migratory status and thus feared arrest, created the "threat of penalty" element necessary for forced labour to exist.[178] These findings could not only be of use to define the crime of slavery or sexual slavery, but also to analyse the term of "consent" in crimes of sexual violence in general and in crimes of child recruitment.

In relation to *children's access to justice*, the ECtHR case law could be of use to determine the needs of children under Rule 86 of the Rules (and consequently protective and special measures under Rules 87 and 88 of the Rules) vis-à-vis the rights of the accused pursuant to Article 67 of the Rome Statute. For example, in the case of *S.C. v. the United Kingdom*, the ECtHR determined that in cases involving children, it is "essential that it be dealt with in a manner that takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings, (…) including conducting the hearing in such a way as to reduce as far possible his feelings of intimidation and inhibition". The ECtHR also referred to the concept of "effective participation", which in cases involving children "presupposes that the accused (a child) has a broad understanding of the nature of the trial process and of what is at stake for him or her". Most importantly, the ECtHR held that the said procedure must adapt to the child's needs (taking into consideration age, but

177 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* no 13178/03 ECHR 2006-XI, paras 55-58.
178 *Siliadin v France* no 73316/01 ECHR 2005-VII, paras 116-120.

also special conditions such as handicaps).[179] Although this case dealt with a child's right to participate in proceedings as a defendant, the same principle could apply for a child's right to participate in proceedings before the ICC as victim or witness in a case.

In the case of *S.N. v. Sweden*, the ECtHR referred to the right of child victims for protection in judicial proceedings vis-à-vis the rights of the defence.[180] In this case, which involved a 10-year old boy who had been victim of sexual violence, the ECtHR affirmed that when assessing the concept of "fair trial" for an accused, "certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence". The ECtHR further stated that judicial authorities may be required to take measures which counter-balance the handicaps under which the defence labours.[181] Cases such as this one could be of use for the ICC to guarantee protection to child victims and witnesses, but also guarantee the accused's right to a fair trial. These counter-balancing measures are essential to guarantee victims participation, while protecting them (particularly those most vulnerable, such as children), and protect at the same time the accused's fundamental right to a fair trial. In fact, according to the Appeals Chamber of the ICC, counter-balancing measures are necessary to guarantee the rights of the accused in spite the non-disclosure of information to him/her.[182]

The case of *Bocos-Cuesta v. The Netherlands* could also be of guidance for ICC proceedings involving child victims of sexual violence. In this case, the ECtHR reiterated that the fact that the accused doesn't have access to examine the witness (a child victim of sexual abuse), does not *per se* lead to a violation of the accused's right to a fair trial. For example, the ECtHR referred to the possibility of having the previous interviews of child witnesses recorded or even transmitted via technical devices to the accused, to enable his defence to examine the witness or at least to follow their testimonies. Likewise, the ECtHR found that, although the accused's rights could be limited in order to protect vulnerable children from possible re-traumatisation, these decisions should be based on concrete evidence or for example, expert's opinion.[183]

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179 *SC v the United Kingdom* no 60958/00ECHR 2004-IV, paras 28-35.

180 *SN v Sweden* no 34209/96 ECHR 2002-V.

181 *SN v Sweden* no 34209/96 ECHR 2002-V, para. 47.

182 *Lubanga case* 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"' (21 October 2008) ICC-01/04 01/06-1486, para. 48.

183 *Bocos-Cuesta v the Netherlands* no 54789/00, 10 November 2005, paras 69-74. See also *PS v Germany* no 33900/96, 20 December 2001, in which the ECtHR held that in spite the due protection to child victims and witnesses, the rights of the defence to a fair trial had been violated.

The abovementioned cases are just some examples of the extensive jurisprudence of the ECtHR and the legal instruments of the Council of Europe that could be of use for the work of the ICC. In general, although the case law of the IACtHR and the ECtHR (and expectedly soon of their African counterpart) is regional and related to State responsibility, many of the principles and rights interpreted by these courts are of universal application and thus useful in ICC proceedings concerning children's rights. Although Article 21 of the Rome Statute is silent regarding regional or other international case law, the practice of the ICC judges so far has been to refer to this case law when applying and interpreting the law of the ICC.[184] However, this has been a discretionary power of the judges, and in fact, there is no settled rule as to what case law of the regional courts should be applied. Although perhaps not applicable law *per se*, it appears that this case law could be helpful as "guidance" for ICC judges, insofar as this is not contrary to the provisions of the Rome Statute. For example, when defining crimes under the ICC's jurisdiction, the regional case law could be of use, but must be read and analysed in light of the crimes as defined by the Rome Statute and the Elements of Crimes, and within the limits of the principle of legality enshrined in Article 22 of the Rome Statute. However, as regards other procedural aspects (*i.e.* protective measures versus rights of the accused), the case law of the regional human rights courts will most likely meet the Rome Statute's standards, and thus be more easily transposed to the ICC setting. Moreover, as regards reparations proceedings, which are clear human rights proceedings within ICC's criminal proceedings, the regional case law will most likely not only be in accordance with the Rome Statute, but also give greater specificity to the general ICC provisions in this regard (i.e. Article 75 of the Rome Statute).

3.5.5 Case Law of the Special Court for Sierra Leone

In the same manner in which regional human rights case law has no clear applicability in the ICC, the jurisprudence of other international criminal tribunals is also not strictly applicable law under Article 21 of the Rome Statute. In fact, although it could be used and has been used as "guidance" for the interpretation and application of ICC provisions, this is completely discretionary and in fact, in some instances judges have also disregarded established practice of other international tribunals when this has been inter-

184 See for example: *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04-101-tEN-Corr, paras 51-53; *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, para. 78; *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 31-32.

preted as contrary to the Rome Statute.[185] So, although the current practice of the ICC is that Chambers, parties and participants, including the Appeals Chamber, have referred to such international case law, particularly of the ad-hoc tribunals but also the SCSL, there is no clear rule as to when this case law needs to be followed or disregarded.[186] In essence, it is a discretionary power of the judges of the ICC to refer to this case law, insofar as it is not contrary to the Rome Statute and applying the Appeals Chamber's ruling mentioned above, it could be used as "guidance" to interpret and apply ICC applicable law.

As regards children, the case law recently developed by the SCSL is certainly most significant for the work of the ICC, particularly in relation to the crimes of enlistment, conscription and use of children to participate actively in hostilities. In fact, all the accused before it have been charged with crimes of child recruitment.[187] Although the case law of other international tribunals, particularly the ad-hoc tribunals, could be useful for the interpretation, for example, of provisions of international humanitarian law contained in the Rome Statute, this section will focus on the jurisprudence of the SCSL, as it is the most relevant in respect to children. Moreover, most of the significant jurisprudence of the ad-hoc tribunals is already reflected in the Rome Statute and the RPE provisions (i.e. the crimes of sexual violence and the principles of evidence in cases of sexual violence). In the case of the SCSL, as noted by Trial Chamber I of the ICC in the Court's first ever conviction and sentence (which referred to the case law of the SCSL) although the decisions of other international tribunals are not part of the directly applicable law under Article 21 of the Rome Statute, the case law of the SCSL could potentially assist in the interpretation of the

185 See for example *Lubanga case* 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (8 November 2006) ICC-01-04 01-06-679. This decision prohibited the procedural practice of "witness proofing" which is well established and unquestioned in the ad-hoc tribunals. As will be analysed further in Chapter 5, more recently the Trial Chamber in the Kenya situation cases has allowed this practice, albeit by the name of "witness preparation".

186 See for example, *Lubanga case* 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"' (14 December 2006) ICC-01/04 01/06-773, para. 20; *Katanga and Ngudgolo case* 'Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages"' (27 May 2008) ICC-01/04-01/07-522 paras 16 and 48; *Lubanga case* 'Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1433, para. 78. Drumbl has noted that the references to SCSL case law in ICC rulings suggests "the interactive nature of the jurisprudence of these two institutions". See: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 152.

187 Naïri Arzoumanian and Francesca Pizzutelli, 'Victimes et Bourreaux: Questions de Responsabilité Liées à la Problématique des Enfants-Soldats en Afrique' (December 2003) *Revue du Comité International de la Croix Rouge*, Vol 85, 827.

Rome Statute's provisions as the crimes of child recruitment are identically defined in both Statutes of the SCSL and the ICC.[188]

The first major judgment of the SCSL is that of the Appeals Chamber of 31 May 2004, in which it decided on a preliminary motion by the accused which contended that the principle *nullum crimen sine lege* had been violated because the act of child recruitment was not a crime under customary international law at the time of the alleged commission. The SCSL Appeals Chamber concluded that the crime of child recruitment was crystallised as international customary law, regardless of whether it had been committed in internal or international armed conflict, even before the adoption of the Rome Statute in 1998.[189]

The first conviction in the SCSL (and first ever conviction for crimes of child recruitment) was the Judgment of 20 June 2007, in which Trial Chamber II of the SCSL in the case of Brima, Kamara and Kanu, also known as the Case of the Armed Forces for Revolutionary Council ("*AFRC Case*"), found that the accused were individually criminally responsible for conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities.[190]

> Since the SCSL adopted the elements of the crime in accordance with the Rome Statute and the Elements of Crimes, the above case law could be helpful for the interpretation of the ICC provisions in future judgments before this Court.

Of particular importance is the SCSL jurisprudence as regards to crimes of sexual violence committed against girls that are abducted in armed conflict.

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188 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 603. See also, *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, paras 12-15.

189 The SCSL Appeals Chamber found that the fact that 187 States were parties to the 1949 Geneva Conventions, and 137 States were parties to Additional Protocol II to the Geneva Conventions, and that all but 6 States had ratified the CRC at that time, and that the African Charter on the Rights and Welfare of the Child had been adopted and prohibited such practice, as well as the widespread prohibition of recruitment or voluntary enlistment of children under the age of fifteen in domestic legislations, all lead to the conclusion that the prohibition of child recruitment was crystallised under international customary law, even before the adoption of the Rome Statute in 1998. See: The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131 paras 10-24.

190 As will be studied further in Chapter 4, the Trial Chamber determined that the *actus reus* of the crime was satisfied by either enlisting, or conscripting children under the age of fifteen or by using them to participate actively in hostilities and that enlistment entails accepting and enrolling individuals when they volunteer to join an armed force or group. In what refers to the concept of "conscription" the Trial Chamber concluded that this conduct encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities. The Prosecutor v Brima et al ("*AFRC case*") 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, 711, 729, 733 and 734.

Although this jurisprudence will be further analysed in Chapter 4, it is important to note that the SCSL case law could be of use for ICC cases involving crimes of sexual violence committed against girl-child recruits. Moreover, the case law of the SCSL could be helpful to interpret crimes against humanity of sexual slavery and also the crime of "forced marriage" or " forced conjugal association" as defined by the SCSL, to define "other forms of sexual violence" under the Rome Statute.[191]

Three other cases and convictions have followed after the *AFRC case*.[192] Although the SCSL is now completing its mission and its case law will thus be limited to these four cases, its findings could still be of relevance, at least for the purposes of the first cases before the ICC, as was the case of the Lubanga judgment, in which, as noted above, the Trial Chamber referred to the SCSL's case law on the subject of child recruitment.

3.6 Conclusions

Article 21 of the Rome Statute provides a system of applicable law in which the Rome Statute appears to be the pinnacle of the legal hierarchy. However, upon a closer analysis of this provision, particularly paragraph 3, it is clear that internationally recognised human rights are the "chapeau" of this legal provision and that all interpretation and application of the law is subject to these human rights standards. Referring to children's rights, this means that internationally recognised instruments such as the CRC should guide the

191 *AFRC case* 'Separate Concurring Opinion of Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (c)' (19 June 2007) SCSL 04-16-624 para. 16 and 'Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 ('forced marriages')' (19 June 2007) para. 49; The Prosecutor v Charles Taylor (*Taylor case*) 'Judgment' (18 May 2012) SCSL03-01-1281, paras 422 and 426.

192 The second conviction came on 2 August 2007 judgment, when Trial Chamber I of the SCSL in the case of Fofana and Kondewa known as the Civil Defence Forces ("*CDF Case*"), found the accused Kondewa guilty by majority of '(e)nlisting children under the age of 15 years into armed groups and/or using them to participate actively in hostilities, and other serious violations of international humanitarian law'. In this judgment, the Trial Chamber referred to the general concept of 'recruitment', and came to the conclusion that this term encompasses 'conscription', 'enlistment' and the 'use of children to participate actively in hostilities'. On 2 March 2009, Trial Chamber I of the SCSL in its judgment in the case of Sesay, Kallon and Gbao, also known as the Revolutionary United Front ("*RUF Case*") found the accused individually, criminally responsible for the crime of conscription and enlistment of children under the age of 15 years into armed forces or groups, and of using them to participate actively in hostilities, and other serious violations of international humanitarian law. The findings of the SCSL in the *Taylor case* are also relevant, as the judges analysed the crime of child recruitment, among other crimes. See: The Prosecutor v Moinina Fofana and Allieu Kondewa ("*CDF case*") 'Judgment' (2 August 2007) SCSL 04-14-785, 191, 192, and 291; The Prosecutor v Issa Hassan Sesay et al ("*RUF Case*") 'Judgment' (2 March 2009) SCSL 04-15-1234; *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281 and 'Sentencing Judgment' (30 May 2012) SCSL03-01-1285.

interpretation and application of all provisions within the Rome Statute and other ICC legislation. In fact, one could argue that a statutory provision could become inapplicable if its application would be contrary to the CRC in a given context.

As for other "soft law" children's rights instruments (*i.e.* the Paris Principles), although the ICC is not bound to apply them, it may use them as guidance in order to apply and interpret the ICC's applicable law. This is a discretionary power that the judges of the ICC have, insofar as the "guidance" provided by these instruments is not contrary to the Rome Statute and other applicable law under Article 21(3) of the Rome Statute.

Most importantly, this Chapter has demonstrated that taking into consideration the experience of other international, national and regional tribunals, inasmuch as they are compatible with internationally recognised human rights and the Rome Statute, is not only permissible but also recommendable. Although human rights instruments and case law have to be adapted to the ICC's legal framework (*i.e.* State vs individual responsibility) and with due regard to Article 22 of the Rome Statute containing the principle of legality, its findings could be of use when giving concrete and more specific content to general provisions such as Rule 85 of the RPE, which defines the concept of "victim" or when deciding on reparations measures pursuant to Article 75 of the Rome Statute.

It is important to note, however, that the instruments and case law analysed above are far from being all-inclusive. Applicable law or guidance instruments will vary, depending on the case at hand. The list of "applicable law" under Article 21(3) of the Rome Statute is dynamic, ever-changing and in constant progression. Insofar as developing human rights law achieve the "internationally recognised" level, their application is compulsory under the Rome Statute. As for the other "guidance" human rights instruments, as long as they are not contrary to the Rome Statute and insofar as the interpretation of crimes within the ICC's jurisdiction adheres to the principle of legality, its application by ICC judges will be discretionary. Therefore, it is important for judges, prosecutors, counsel and ICC staff in general to be attentive to the developments in international human rights law, in order to progress the law established in the Rome Statute in 1998, which should not remain "set in stone", particularly not regarding internationally recognised human rights, pursuant to Article 21(3) of the Rome Statute.