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

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5 | Children's interaction with the ICC

5.1 INTRODUCTION

Children can interact with the ICC as *witnesses* to the defence, the prosecution or the Chamber. As such, they have the right to be protected (Article 68(1) of the Rome Statute) and to other safeguards provided for in the RPE (for example, protective and special measures under Rules 87 and 88 of the RPE or protection to witnesses of sexual violence under Rules 70 and 71 of the RPE). Secondly, in accordance with Article 68(3) of the Rome Statute, children may interact with the ICC as *participating victims*, who can present their views and concerns at various stages of the proceedings when their interests are affected.¹ Lastly, children can interact with the ICC in order to benefit from *reparations* for the harms suffered as a result of a crime within the jurisdiction of the ICC, as provided for in Article 75 of the Rome Statute.

Children may have dual status as witnesses and victims with participatory status. And ultimately, a dual status individual could also receive reparations. Thus, the same child could interact with the Court within all three categories identified above. However, his or her rights will vary, depending on whether his or her interaction is as a witness testifying under oath, a participating victim or a beneficiary of reparations. Moreover, as, depending on the child's interaction with the ICC, his or her interaction may have a different impact on the rights of the accused, a balance must be found at all times in order to guarantee the access of children to the ICC proceedings, in a manner that is respectful to the rights of the accused and a fair trial.

This Chapter will analyse the existing legal framework and case law of the ICC from a children's rights perspective, applying and interpreting ICC provisions in accordance with internationally recognised children's rights and taking into consideration crimes committed against children that have been or can be brought before the ICC. It will aim to provide recommendations on how this practice can be adjusted to better meet the particular needs and rights of children interacting with the ICC, particularly in light of Rule 86 of the RPE, which requires that the needs of children are taken into consideration throughout all ICC proceedings.

¹ As noted in the Introduction, the term child victim also includes victims who make representations in accordance with Articles 15(3) and 19(3) of the Rome Statute.

5.2 REACHING OUT FOR CHILDREN

Article 68(3) of the Rome Statute grants victims the opportunity to express their views and concerns in criminal proceedings before the ICC. Furthermore, Article 75 of the Rome Statute grants victims the right to receive reparations for harms suffered as a result of crimes under the ICC's jurisdiction. However, victims will only apply for participation or reparations before the ICC if they are aware of its existence and their rights before this international tribunal. Outreach is thus of great importance as it enables the ICC to inform victims of the possibility they have to participate in international criminal proceedings. As stated by the CRC Committee, the right to information is to a large degree a prerequisite for the effective realization of children's right to express their views and concerns.² Moreover, the CRC Committee has also stated that the right to information is essential, because it is the precondition of the child's clarified decisions.³

For example, child victims must be appropriately informed about the application process, modalities of participation, forms of reparations and they must receive feedback from the ICC, either if their applications for participation and/or reparations are accepted or rejected. Children who are interviewed as potential witnesses also need to be informed about the judicial process, risks involved, available protective measures, etc. Moreover, child victims should also be informed about the impact their participation will have on the outcome of a trial and they should not have unreal expectations.⁴ Potential child witnesses who are later not called to testify should also receive feedback from the ICC so that their interaction with the ICC does not become a source of frustration.⁵ Although this is required for all witnesses, including adults, information needs to be provided to children in a manner that is accessible and understandable to them, taking into consideration their age and maturity. Moreover, as noted by the CRC Committee, children who express their views in judicial proceedings should receive feedback in order to guarantee that their views are not only heard as a formality, but are actually taken seriously.⁶ Thus the importance of outreach, as it is a two-way sharing of information between child victims and witnesses and the ICC.

2 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 82.

3 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 25.

4 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 41. See also UN Guidelines.

5 ICTJ, *Outreach Strategies in International Hybrid Courts: Report of the ICTJ-ECCC Workshop, Phnom Penh, March 3-5 2010* (Workshop Report 2010) 13.

6 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 45.

Recently in the Kenya Situation, Trial Chamber V emphasised the importance of informing witnesses of all the implications of testifying before the ICC, including the eventual disclosure of information to other parties in the proceedings, and possible consequences for the witness. The Chamber highlighted that informing the witness, and thus keeping him/her in control of his or her situation, may avoid traumatising.⁷

The UN Guidelines also state that child victims and witnesses should be provided support throughout their involvement in the justice process.⁸ The word "throughout" in the UN Guidelines is of particular importance, since the concept of who is a victim or a witness should be broad enough to encompass those situations in which a child is first approached by the ICC, although not necessarily falling within the strict category of a trial witness or participating victim (*i.e.* a victim who has filled-in an application form for participation but is awaiting a decision from the Chamber, or a witness that has been withdrawn from the trial witnesses' list). Support should start at the earliest opportunity and continue uninterrupted throughout the entirety of the person's involvement with the ICC.

Outreach, which has been defined as the set of tools (materials and activities) that are put in to build direct channels of communication with the affected communities, in order to raise awareness of the justice process and promote understanding of the measure, is a function of the ICC that is essential to meet the requirements of information and consequently of consent explained above.⁹ The Outreach Unit at the ICC has defined it as a process of establishing sustainable, two-way communication between the ICC and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC.¹⁰

Outreach has indeed been identified as a non-judicial core function of the ICC since making judicial proceedings available to the public is a central element of a fair trial and therefore necessary to ensure the quality of justice.¹¹ In fact, as stated by Vinck and Pham, to the extent that affected communities

7 *Ruto and Sang case*, 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, paras 26-32.

8 UN Guidelines, para. 30(a).

9 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 3; ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 35. Available at <www.ictj.org> accessed 31 August 2012.

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

11 ICC, PIDS, *Outreach Report 2010*, 81. Available at: <<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/outreach/outreach%20reports/icc%20outreach%20report%202010>> accessed 31 August 2012.

have never heard about the ICC, none of the broader goals of international justice can be achieved.¹²

Although the importance of outreach may be challenged for not being a judicial function of the ICC, it is important to consider the purpose and objective of the ICC in order to understand the positive consequences that outreach has in the overall work of this international tribunal. The ICC was not only established to investigate, prosecute and convict perpetrators of serious international crimes, but also to redress suffering of victims of these crimes, namely by allowing them to participate in proceedings and to receive reparations. In the ICC's first-ever decision on victims' participation, Pre-Trial Chamber I stated that Article 68(3) of the Rome Statute imposes an obligation of the ICC vis-à-vis victims and entails a positive obligation for the ICC to enable them to exercise that right concretely and effectively. The Chamber went further stating that the ICC has a dual obligation: on the one hand to allow victims to present their views and concerns, and on the other, to examine them.¹³

In fact, Article 68(3) of the Rome Statute provides that the Court "shall permit" that the views and concerns of victims be presented and considered in ICC proceedings. This provision makes it clear that the possibility of victims to present their views and concerns and that the obligation of the Court to consider these during the proceedings is not discretionary but obligatory.¹⁴ In fact one could argue that the burdensome individual application process adopted in the ICC's first cases (which is not foreseen in the Statute but was later developed in the RPE, Regulations of the Court and subsequent practice) could be hampering the fulfilment of this obligation by the ICC.

The ICC has the obligation to guarantee that child victims participation in ICC proceedings and eventual reparations in case of a conviction are respectful of their well-being and security. This is provided for in Article 64(2) of the Rome Statute, which states that the Trial Chamber "shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses". Consequently, this provision embodies, along the concept of a "fair and expeditious trial" for the accused enshrined in Article 67 of the Rome

12 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 10. See also Sara Darehshori, 'Lessons Learned for Outreach from the ad hoc Tribunals, the Special Court for Sierra Leone and the ICC' *New England Journal of International and Comparative Law* (Volume 14:2) 299.

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. 71.

14 The English version of the Rome Statute uses the word "shall permit", which indicates an obligation of the Court. The French version of the Rome Statute refers to "permet" and the Spanish version to "permitirá". Although these two languages are not as clear as the phrase "shall permit" in the English version, they both reflect an affirmation of a right and not a mere possibility that can be discretionally granted to victims.

Statute, the “protection of victims and witnesses” provided for in Article 68 of the Rome Statute.

Child victims require access to information that is suitable to their age and maturity (*i.e.* what are the requirements for participation) in order for the ICC to accomplish its mandate. As stated by Vinck and Pham in their analysis of the outreach strategy of the ICC in the Central African Republic, public awareness of the justice mechanism is necessary for it to have a transformative impact on society and also to produce greater judicial accountability, educate on the rule of law and enable deterrence of future crimes and promote peace and reconciliation.¹⁵

This is provided for in the Preamble of the Rome Statute, which refers to putting an end to impunity for the perpetrators of these crimes and contributing to the prevention of such crimes. It is important to note that one of the triggering mechanisms of the ICC's jurisdiction is the *proprio motu* powers of the Prosecutor, who can request authorisation to start an investigation based on information received by inter-governmental and NGOs and other reliable sources. Only if victims and organisations working with victims are properly informed about the ICC's jurisdiction, will such information reach the ICC Prosecutor. Regarding crimes committed against children or the harms suffered by children as a result of crimes within the ICC's jurisdiction, public awareness of the ICC's jurisdiction and mandate is necessary so that information about these crimes is brought to the attention of the ICC Prosecutor.

In fact, outreach (or lack of it) was a “lesson learned” from the ad-hoc tribunals, which initiated outreach after several years of functioning, with harmful, inaccurate and biased local reporting which undermined the tribunals' impact.¹⁶ The SCSL, on the other hand, started outreach at the earliest stages after its establishment and this was translated into greater knowledge about the SCSL in comparison, for example, with Rwandans over the ICTR.¹⁷ This however, may not only be due to outreach, but also to the fact that the SCSL has seat in the place where the crimes occurred and has staff both from the national judicial system and from the international UN system. This could also be taken into consideration when deciding whether future ICC proceedings should take place *in situ*, and thus come geographically closer to the affected victim population.

In 2006, the ICC adopted a “Strategic Plan for Outreach at the ICC”, which laid down the main objectives and principles of this essential part of the ICC's mandate. The main office in charge of developing and implementing outreach

15 Patrick Vinck and Phuong Pham, ‘Outreach Evaluation: the ICC in the Central African Republic’ (2010) *International Journal of Transitional Justice*, 2.

16 Patrick Vinck and Phuong Pham, ‘Outreach Evaluation: the ICC in the Central African Republic’ (2010) *International Journal of Transitional Justice*, 3.

17 Norman H Pentelovitch, ‘Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals’ (Spring 2008) *Georgetown Journal of International Law*, 452.

programmes is the PIDS, which is part of the Registry of the ICC. Already in the initial strategic plan, the ICC acknowledged the importance of having coordinated work between PIDS and other sections of the ICC, such as the VPRS.¹⁸ The ICC also has field offices in the countries in which it is currently involved. These offices have outreach officials that carry out different activities in order to inform the local population about proceedings before the ICC and also receive feedback from these persons as regards the work of the ICC and the impact it has upon them. In fact, the ICC has recognised that in order to fulfil its mandate it is imperative that those communities affected by crimes under its jurisdiction understand its role and judicial activities, and also that a two-way dialogue exists between these affected communities and the ICC, so that the ICC can better understand the concerns and expectations of the communities.¹⁹ This mandate is rather challenging. The ICC is currently involved in eight situations, so it should not only develop a global ICC Outreach strategy, but a tailor-made outreach strategy that accommodates the language, legal and cultural particularities and responds to the needs of the victims of each situation.

Additionally to a tailor-made approach regarding victims in the different situations before the ICC, outreach must also be designed taking into consideration the diversity within the population in a given situation before the ICC. Children should be one of those groups of the population towards which outreach must be aimed at. The UN Guidelines have recognised that children have the right to be informed about the processes and services that concern them.²⁰ In order to achieve this, outreach programmes should be designed so that they are relevant, age-appropriate and provide children with a safe and receptive environment.²¹ Furthermore, information must be provided in such a manner that marginalized children (*i.e.* girls, migrants, etc.) are involved, taking into consideration that “children” is not a homogenous group.²²

In its 2006 Strategy, the ICC already identified children and youth as “the most vulnerable victims of conflict” but also as dual actors in armed conflict, as they can be both perpetrators and victims. To this vulnerability, one can also add that children may very often be “information poor”, which has been described by Vinck and Pham as “those who do not have access to formal media such as newspapers, radio or the Internet because they are socially or

18 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 64.

19 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 3.

20 UN Guidelines, paras 19 and 20.

21 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 35.

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

economically disadvantaged or because they lack physical access to information networks".²³ In order to reach children, the ICC has to develop strategies that take into consideration the way in which children gather or receive information, which is usually, although not necessarily, through adults (*i.e.* their parents or their teachers), but also through social networks.

The ICC has recognised that specific strategies are needed for reaching and engaging with children.²⁴ The ICC Outreach Strategy has referred, in general, to how outreach should be tailored to specific audiences, bearing in mind their specific needs, beliefs, attitudes, opinions and cultural context.²⁵ For example, it has specified that information given by the ICC to local populations should be accurate but also simple and meaningful to a non-specialist audience.²⁶

But how are these messages or information to be transmitted to children interacting with the ICC? The International Center for Transitional Justice has identified the following elements that should be taken into consideration when developing outreach strategies for children: a) children's best interests should be taken into account at all times, according to the different age groups (*i.e.* young children and youth); b) outreach efforts must be built upon a stable infrastructure supervised by adults that are close to the children (*i.e.* families and school teachers); c) children's organisations and agencies (*i.e.* UNICEF) should be consulted when developing outreach activities and materials.²⁷ For example, when the Prosecutor requests the authorisation to start an investigation and victims submit representations pursuant to Article 15 of the Rome Statute, outreach activities could be developed differentiating among children of different ethnic groups (particularly targeting a minority that could be excluded from general approaches), age (young children and youth) and gender (aiming at the girl-child who is often excluded). These outreach activities could be developed in schools with teachers and parents, so that children are protected from undue exploitation by other adults that may want to benefit from ICC proceedings. In cases dealing with former child soldiers, such activities could also be developed in demobilisation centres. Lastly, children's organisations in the field could become partners of ICC in developing these outreach activities, particularly as they could have knowledge of culture, language and other particularities in a given country or locality in order to

23 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 11.

24 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 26.

25 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 46.

26 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 47.

27 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 26.

create tailor-made outreach activities that meet the needs of children in a given situation.

The ICC's Strategic Plan refers in general to "victims" and identifies means such as radio, booklets, posters, cartoons and training seminars to transmit information to them.²⁸ Regarding children and youth, the ICC identifies that a possible tool could be the establishment of agreements with child agencies and other child and youth groups. Means of communication that are identified are for example child-friendly flyers, debates and competitions in schools.²⁹ Most importantly, and as recommended by the International Center for Transitional Justice, materials should be culturally appropriate and written in a manner that facilitates understanding. For example, when designing material for children, experts should be consulted and the material should be tested with children in the field.³⁰

In the ICC's first-ever trial, which involved child victims and witnesses, the PIDS developed an outreach strategy that included, among other activities, radio and television programmes but also meetings with the communities. For example, the PIDS planned a series of activities with demobilised children in order to follow the trial, explain the judicial proceedings and discuss their rights.³¹ Prior to the commencement of the trial, the PIDS carried out several town hall meetings where the affected communities live, including meetings with students and children.³²

Some outreach activities carried out to inform child victims of judicial proceedings before the ICC have been: drama performances or drama clubs,³³ school clubs and/or human rights clubs,³⁴ children/youth radio programmes ("children to talk to children"),³⁵ commemoration days (Day of the African Child) to teach children, parents and community about the prohibition of child recruitment,³⁶ and closed information sessions for women, their husbands and children.³⁷

28 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 52.

29 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 56.

30 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 15.

31 ICC Outreach Unit, *Communication Strategy Trial of Thomas Lubanga* (The Hague, January 2009) <http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf> 10, accessed 8 August 2013.

32 ICC Outreach Unit, *Communication Strategy Trial of Thomas Lubanga* (The Hague, January 2009) <http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf> 10, accessed 8 August 2013.

33 ICC, PIDS, *Outreach Report 2010*, 11.

34 ICC, PIDS, *Outreach Report 2010*, 14.

35 ICC, PIDS, *Outreach Report 2010*.

36 ICC, PIDS, *Outreach Report 2010*.

37 ICC, PIDS, *Outreach Report 2010*, 44.

However, in the analysis carried out by Vinck and Pham of the ICC outreach programme in the Central African Republic, surveys showed that the persons who participate in ICC outreach meetings were on average young male adults, who had a higher level of education, were wealthier and had more access to the media than the general adult population.³⁸ Although the survey did not include reference to children, one could foresee that in comparison with the general population, children could even be more disadvantaged. The study recommends that outreach programmes be tailored to the needs and expectations of heterogeneous communities and target groups in unique contexts, especially those who are unlikely to be reached by traditional media.³⁹

Overall, the following outreach material could be appropriate for child victims in cases before the ICC. These materials however, should be tested and their use and impact should be evaluated for each particular situation in which the ICC is involved: a) comics and graphic novels or other child-friendly information (including plays, radio programmes, etc.);⁴⁰ b) social network internet sites (for situations where youth could be expected to have internet access);⁴¹ c) websites with a section dedicated to children, which could be used by NGOs or other intermediaries working directly with children or their legal representatives with downloadable and printable material;⁴² d) radio programmes in which children ask questions about the ICC that may interest or affect them;⁴³ e) meetings and workshops in schools, demobilisation centres, displaced persons and refugee camps targeted at children and youth;⁴⁴ f) visits of school groups to the ICC premises in the headquarters or in the field (par-

38 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 17 and 19.

39 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 20-21.

40 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 15; Victims' Rights Working Group, *Establishing effective reparation procedures and principles in the ICC* (September 2011); ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 36.

41 ICC has a Facebook and Youtube accounts. <<https://www.facebook.com/pages/International-Criminal-Court/106219979409522>> and <http://www.youtube.com/user/IntlCriminalCourt> accessed 8 August 2013.

42 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 34.

43 See for example Interactive Radio for Justice, which broadcasts radio talk shows in which community members in DRC and Central African Republic ask questions to ICC officials and other experts. See: ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 17.

44 For example, in the ECCC, the outreach programme conducts workshops "Youth for Peace" targeting youth and teaching them about the tribunal. See Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 472.

ticularly in Situation countries);⁴⁵ and g) train the trainer programmes targeting teachers or other adults who can teach children (particularly child victims in Situation countries) about the ICC.⁴⁶

It is however important to understand the ICC's limitations, not only as regards its jurisdiction and mandate, but also its financial and human resources. The ICC cannot fulfil all the needs of outreach in its multiple situations around the African continent. In fact, it is to be expected that in the future the ICC could have situations in other continents, which would add challenges if a tailor-made approach would be adopted. In this regard, the partnerships between the ICC and key organisations and media in different regions of the world is essential so that affected communities learn about the ICC and the judicial proceedings concerning them. Importantly, it must be acknowledged that local civil society organisations can conduct outreach in a way that the ICC cannot, as they already have networks with local communities.⁴⁷

It is important that the ICC benefits from child rights expertise of NGOs and international organisations already working in the field in countries where it has on-going situations and cases. However, the ICC also needs to have child-rights specialists, including in the Outreach Unit (persons who also understand the African-child context, for example in the current situations before the ICC).⁴⁸ Only if the ICC has in-house specialists will it be able to appropriately train its intermediaries and also monitor and organise the work carried out by them in the field. Moreover, it is also important for the ICC to have its own specialists in situations in which NGOs in the field may be unwilling or unable to cooperate with the ICC due to perceptions of impartiality or general security risks for their involvement with the ICC.

Moreover, the ICC should not delegate outreach in its entirety to civil society. Although NGOs are often well placed to conduct outreach activities, the ICC should not rely completely on external actors, particularly when

45 For example, in the SCSL, because of the geographical proximity between the ICC and the affected population, the ICC organised visits of school children and university students with question and answer sessions. This could be foreseeable if the ICC conducts hearings in situ in the future. See Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 457.

46 In the ECCC in Cambodia, the outreach program, with several NGO's developed training programmes, for example for law students, who then travelled to provinces to teach villagers about the tribunal. Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 471.

47 ICTJ, *Outreach Strategies in International Hybrid Courts: Report of the ICTJ-ECCC Workshop, Phnom Penh, March 3-5 2010* (Workshop Report 2010) 11.

48 For example, in the SCSL, the Outreach Section was originally composed of Sierra Leoneans. Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 454.

security, safety and confidentiality of child victims and witnesses are at stake.⁴⁹ Reporting by NGOs or media may still be susceptible to polarization and misrepresentation and neither media nor NGOs can speak on behalf of the ICC.⁵⁰ Most importantly, although the ICC is bound by the principle of presumption of innocence and other considerations pertaining to the rights of the accused, local NGO's or other intermediaries in the field could act disregarding the right to a fair trial in ICC proceedings, and thus weaken the ICC's credibility as an impartial and fair court. In essence, as stated by Pentelovitch, international tribunals must work with and not through NGOs in carrying out outreach.⁵¹

5.3 PARTICIPATION OF CHILD VICTIMS AT THE ICC

Article 68(3) of the Rome Statute is the core provision regarding victims' participation at the ICC. This provision states the following:

'(...) 3. Where the personal interests of the victims are affected, the ICC shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the ICC and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the ICC considers it appropriate, in accordance with the RPE. (...)'

Although the RPE and the RoC further develop this notion of victims' participation, it has been mostly the ICC's practice and case law during its first years that has created a legal system that enables victims to present their views and concerns to the judges of the ICC, while safeguarding the rights of the accused to have a fair and impartial trial. This system is far from perfect and can certainly be improved and consolidated. Most regrettably, after ten years of practice the ICC has not adopted a court-wide approach to victims' participation and in fact Chambers' decisions in this regard are often contradictory. Thus, the ICC urgently needs to orchestrate a court-wide strategy on victims' participation, that reflects coordination among the organs of the ICC (including Chambers which have taken noticeably diverse approaches), but also

49 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 29.

50 Lawyers Committee for Human Rights, *Effective Public Outreach for the International Criminal Court* (January 2004), available at <<http://web.undp.org/comtoolkit/why-communicate/docs/Best%20Practices/EffectivePublicOutreachfortheInternationalCriminalCourt.pdf>> accessed 8 August 2013.

51 Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 446.

coordination with the State Parties (budget and political implications) as well as stakeholders in the field (NGOs, intermediaries, international organisations (including the UN) and victims' groups).

This section will analyse the existing legal framework of the ICC as regards victims' participation from a children's rights perspective, applying and interpreting ICC provisions in accordance with internationally recognised children's rights. It will study the developing ICC case law on the subject and will aim to provide recommendations on how this practice could be improved vis-à-vis child victims if a court-wide approach is to be adopted in the future.

5.3.1 Who is a victim?

Pursuant to Rule 85 of the RPE, victims in the ICC can either be: a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC; or b) legal persons, which are understood as organisations or institutions that have sustained direct harm to any of their property. Thus, as noted in Chapter 4 above, the notion of victim will be dependent on the notion of the crime adopted by the ICC Chamber deciding on the victims' status.

As regards legal persons, Rule 85 of the RPE gives examples of such legal persons, and includes organisations or institutions dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes. However, this list should not be read as a *numerus clausus*, and other legal persons not foreseen in it could still be given the status of victims if they have suffered direct harm. For example, a NGO that not necessarily works in charities or for humanitarian purposes (*i.e.* microcredit organisation or human rights organisation) could still be granted the status of victim if it suffered direct harm to its property. In regards to children, institutions used for children's and youth's recreation (such as playgrounds, sports halls) or day-care centres or other buildings dedicated and used by children, could also be included within the definition of "legal person" under Rule 85 of the RPE. However, pursuant to Rule 85(b) of the RPE, the applicant institution would need to prove that the property it owned suffered direct harm and that such property was dedicated to religion, education, art or science or other charitable purpose.⁵²

Trial Chamber I of the ICC used Principle 8 of the UN Basic Principles as guidance to further define the concept of victim under Rule 85 of the RPE. In accordance with the UN Basic Principles, a victim is someone who suffers, either individually or collectively, directly or indirectly, from personal harm in a variety of different ways, such as physical or mental injury, emotional

52 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011), 242.

suffering, economic loss or substantial impairment of his or her fundamental rights.⁵³ Thus, the consequences of international crimes upon children studied in Chapter 1 are relevant to establish whether a child is a victim under the Rome Statute. In addition, it is important to note that only victims who are victims of crimes charged may participate in the trial proceedings. Thus, applicants need to demonstrate the link between the harm suffered and the crimes charged against the accused.⁵⁴

It is also significant that while Rule 85 of the RPE states that legal persons should suffer direct harm, nothing is said regarding natural persons. Thus, it must be understood that natural persons can suffer both direct and indirect harm. This is of particular importance for children, because they could suffer indirect harm as a result of the direct harm suffered by their parents or other caretakers, given their dependency status vis-à-vis adults (*i.e.* the child of an adult victim of a crime that, as a result of the crime, has a permanent disability could indirectly suffer harm as a result of his/her parent's disability). Although in situations where the parent of the child dies as a result of the crime, the ICC case law has disregarded the possibility of relatives participating on behalf of that deceased victim,⁵⁵ it has been accepted that family members of deceased persons may apply to participate for the direct moral damage they suffered as a result of their relative's death.⁵⁶ Therefore, children whose parents have passed away as a result of a crime within the jurisdiction of the ICC may also participate in proceedings for the moral harm they suffered as a result of the death of their parents.

In practice, the Chambers of the ICC have required victims to prove: a) their identity; b) that they suffered harm; and c) that there is a causal link between the harm suffered and the crime within the jurisdiction of the ICC. The ICC

53 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 90-92; 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 31-39.

54 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 62-64.

55 Situation in Darfur, Sudan (*Darfur situation*) 'Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07' (14 December 2007) ICC 02/05-111-Corr, para. 36; *DRC situation* 'Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06"' (31 January 2008) ICC-01/04-423-Corr, paras 24-25.

56 *Katanga and Ngudgolo case* 'Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims' (Public redacted version, 23 September 2009) ICC-01/04-01/07-1491-Red-tENG, paras 51-56.

has also established that victims must not prove these requirements “beyond reasonable doubt”, but that lower thresholds such as inferences of fact, circumstantial evidence, or *prima facie* evidence, suffices.⁵⁷

The ICC’s first decision on victims’ applications to participate in the Situation of Uganda required victims to prove their identity with an official identity document with photograph. However, the same decision concluded that in areas affected by armed conflict “it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties”.⁵⁸ Referring to children, this same initial decision requested the Registry of the ICC to submit a report indicating the age at which children in Uganda could receive an official identity document and also indicating whether it was possible to obtain in Uganda an official document establishing the link between a child and a parent or guardian.⁵⁹

Throughout the years, and taken into consideration the difficulties experienced by most victims in the current Situation countries, case law of the ICC has become more flexible in regards to child victims and their identification, allowing other forms of identification (including non-official documents such as voting cards, student cards, birth certificates or ultimately, when no document is available, a statement signed by two witnesses).⁶⁰

Regarding parents or guardians of children acting on their behalf, the ICC’s first decisions rejected some applications on behalf of children or submitted directly by children themselves, because they did not include consent of their parents or legal guardian.⁶¹ However, later Trial Chamber I in the *Lubanga case*, referring to the CRC, allowed children to act on their own (without parental consent) or to have adults act on their behalf even if they did not

57 *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 12 and 15; *Darfur situation* ‘Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07’ (14 December 2007) ICC 02/05-111-Corr; *Lubanga case* ‘Decision on victims’ participation’ (18 January 2008) ICC-01/04-01/06-1119, para. 99.

58 *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 16-19.

59 *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. 20.

60 *Lubanga case* ‘Decision on victims’ participation’ (18 January 2008) ICC-01/04-01/06-1119, paras 87-88; *DRC situation* ‘Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation’ (20 August 2007) ICC-01/04-374, paras 13-15.

61 *DRC situation* ‘Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241 to a/0250/06’ (3 July 2008) ICC-01/04-505, para. 31.

have an official document linking the adult to the child (either via family link or legal guardianship).

On that occasion the Trial Chamber stated the following:⁶²

'The Chamber notes that the applicant has consented to someone else acting on his behalf. The question that arises is whether the applicant needs to establish that the person acting on his behalf is either a relative or legal guardian, in order to participate in the proceedings. Alternatively, is the Chamber entitled to act on the application that has been submitted "by a person" on the applicant's behalf, which indicates clearly that the victim wishes to participate in these proceedings.

The Rome Statute framework is clear on this issue. There are no provisions establishing categories of people who alone are allowed to act for victims, whether the latter are adults or children. Rule 89(3) of the Rules simply states that "(a)n application ... may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child". It follows that the person acting on behalf of a victim does not have to be a relative or a legal guardian because, within the Rules, the "person acting" is undefined and unrestricted.

In support of this approach, the inevitable experience of most, if not all, children who were recruited in the circumstances alleged in this trial, is that they will have been separated from their parents and other adult relatives at a relatively young age. Many of them have been living, to put it at its lowest, disjointed and very unsettled lives for a number of years. Some children have still not been reunited with their families and they do not have legal guardians. To the extent that they have managed to find representation at all, they are often assisted by people such as schoolteachers and other similar community figures.

In this regard, the Chamber notes the General Comment No. 6 (2005) of the CRC Committee in which it was recognised that separated or unaccompanied children (defined as children who have been separated from both parents, other relatives or from any previous legal or customary primary caregiver), in some situations "have no access to proper and appropriate identification, registration, age assessment, documentation family tracing, guardianship systems or legal advice". The Committee further noted that "in large-scale crises, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organisations working on behalf of these children".

The Chamber has paid careful attention to the experience of the Registry in the field in the DRC, and particularly its opinion that "legal guardianship is very rare in Eastern Congo and many children who do not live with their parents, for instance because they have not yet been reunited with their families after being demobilised from an armed group or because they experience difficulties in reintegration, are looked after by persons such as school principals, transition

62 *Lubanga case* 'Annex A1 to the Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008' (8 May 2009) ICC-01/04-01/06-1861-AnxA1, 59-60.

centres for demobilised children, who do not have a formal status in relation to the child”.

The real possibility exists, therefore, that a number of applicants who seek to participate in these proceedings will be living in circumstances where they cannot be represented by their parents, other family relatives or a legal guardian. In relation to these victims, who are over 18 years of age or are close thereto, they have individually applied through a person acting on their behalf (who is not their next of-kin or their legal guardian) to participate in this trial as a victim. In each instance, the application accords with the express requirements of Rule 89 (3) of the Rules. All of the matters set out above provide strong support for the approach that the Rules have not restricted the types of people who are able to act on behalf of all victims and including child victims. (footnotes omitted).⁶³

The importance of the aforesaid decision is that it recognises that children may submit an victim’s application form to participate in ICC proceedings, regardless of any parental permission or control.⁶³ Since in the *Lubanga case* the children concerned had been separated from their parents for a long period of time in the context of an armed conflict and considering that these children were adolescents between 15 and 18 years old, the Chamber decided that these children could submit an application by themselves, without any parental control or decision.⁶⁴

Trial Chamber II in the *Katanga and Ngudjolo case* similarly ruled that children could submit an application on their own. Likewise, it accepted that a statement signed by two credible witnesses could be used as proof of kinship or guardianship when an adult is acting on behalf of a child victim. However it concluded that this should be done on a case-by-case basis taking into consideration the child’s maturity and capacity to make decisions.⁶⁵ This ICC decision is in fact in line with the CRC, since a child’s maturity is not only age-related, but can also be drawn from the child’s experience, environment and level of support.⁶⁶

Nonetheless, in the *Bemba case*, Trial Chamber III distanced itself from the other two Trial Chambers and required proof of kinship and guardianship between the child victim and the person acting on his or her behalf. It has

63 In fact, the CRC Committee determined that the more the child knows, has experienced and understands, the more the parent or legal guardian, or other persons responsible for the child, will have to transform direction and guidance into “reminders and advice and later to an exchange on an equal footing”. See: CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, 84.

64 Drumbl praises this approach, stating that this is an “individuated, careful and considered approach to assessing the capacity of these children”. See Mark Drumbl, *Reimagining Child Soldiers in international Law and Policy* (Oxford University Press 2012) 161.

65 *Katanga and Ngudjolo case* ‘Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure’ (23 September 2009) ICC-01/04-01/07-1491-Red, para. 98.

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

therefore required that an adult submits the application form for participation on behalf of the child victim.⁶⁷ In the Kenya Situation cases, Trial Chamber V, when referring to child victims, has also required that, if possible, consent be provided by the child's parent or legal guardian. Thus, parental consent although recommendable, appears not to be compulsory and it appears that children could act on their own (that is without an adult acting on their behalf).⁶⁸

Before the Pre-Trial Chambers case law has been more consistent, as proof of kinship between the child victim and the person acting on his or her behalf is necessary for a child to apply to participate in pre-trial proceedings. As proof of kinship, the Pre-Trial Chambers have required either official documents, such as a birth certificate or a letter from the local Council, as well as non-official documents, such as a birth notification card or a baptism card.⁶⁹ Thus, although the Pre-Trial Chambers have made proof of kinship compulsory, a flexible approach has been adopted as to the means to prove this relationship.

Case law at the ICC is far from homogenous regarding children's possibility to participate without parental consent, on their own or via an adult acting on their behalf (even if that adult is not related to them). From a children's rights perspective, and taking into consideration the CRC, the flexible standard adopted by Trial Chambers I and II that allowed child victims to participate in criminal proceedings should be preferred. This approach takes into consideration that parental consent or legal guardianship is sometimes impossible in situations of armed conflict or mass violations of human rights, in which children are very often orphaned or unaccompanied. Furthermore, this standard is also in line with Article 12 of the CRC and the Comments made by the CRC Committee in the sense that the capacity of the child to express his or her views should be presumed and it is not up to the child to prove this capacity.⁷⁰

67 'Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants' (22 February 2010) ICC-01/05 01/08-699 para. 36.

68 *Ruto and Sang case*, 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, para. 33

69 *Kony and others case* 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' (14 March 2008) ICC 02/04 01/05-282 para. 7; *Bemba case* 'Fourth Decision on Victims' Participation' (12 December 2008) ICC-01/05 01/08-320, para. 38; *DRC situation*, ICC-01/04-505, para. 31. See also *Gbagbo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 36 and 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 26.

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

On the other hand, a very strict standard which compels the child to present parental or guardian consent or a proof of this consent, is contrary to this presumption, because it parts from the assumption that children are incapable and thus require consent of an adult to participate in ICC proceedings. Moreover, a blanket approach that treats all children alike or that sets limits of age to determine maturity should be avoided. This should preferably be determined on a case-by-case basis, taking into consideration the personal circumstances of that child.⁷¹

Nevertheless, safeguards must still be developed in order to verify that children have made an informed decision to participate before the ICC and that it is in the best interests of the child to participate in international criminal proceedings. For example, even though the ICC could preliminarily grant status to child victims acting on their own behalf, without parental consent, judges could instruct the Registry to carry a field visit in order to interview these children and check whether: a) they are separated or unaccompanied; b) they have taken an informed decision on their participation before the ICC; and c) their participation is not manifestly contrary to their best interests. This would guarantee that children have access to the ICC, but also avoid that third persons (such as intermediaries) take advantage of the child's situation in order to receive some kind of benefit for the child's participation in the ICC.⁷² As determined by the CRC Committee, children must be able to freely express their view, which is without undue influence or pressure from others.⁷³ Likewise, adults, including the ICC judges and staff, must not unilaterally decide on the best interests of the child. This should be done in consultation with the child concerned and taking into consideration the child's unique context.⁷⁴

Particular attention must be given in this regard to the CRC Committee General Comment on Article 12 of the CRC, which emphasises that the right to be heard is a choice of the child, and not an obligation.⁷⁵ Thus, the ICC should adopt measures to ensure that the child receives all necessary information and advice to make an informed decision in favour of his or her best interests (beyond the interests of his or her parents or guardians or even those

71 Beijer and Liefwaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, p. 70-106.

72 In recent developments before the ICC it has been alleged that intermediaries have induced child victims and witnesses to lie to the ICC in order to receive financial and other benefits. See *Lubanga case* 'Redacted Decision on intermediaries' (31 May 2010) ICC-01/04-01/06-2434-Red2.

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 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 71.

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

of the prosecution or the ICC in general). In this last aspect, it is essential that the ICC provides adequate training in children's rights to those staff members and intermediaries assisting the victims in their application process. Although the work of intermediaries is essential for the functioning of the ICC in the field,⁷⁶ their benevolence could be detrimental to the child victim if his/her particular needs are not taken into consideration (*i.e.* re-victimisation) and safeguards are not adopted (*i.e.* protective or special measures under Rule 87 and 88 of the Rome Statute).

In order to reach more children and to facilitate that their decision to participate is an informed one and in their best interests, the ICC could produce an explanatory booklet aimed specifically to children or persons working with children (*i.e.* social workers, demobilisation centres staff, etc.). Although it is not required that the child has comprehensive knowledge of all aspects of what participation entails, the ICC should guarantee that children have sufficient understanding to be capable of making an informed decision.⁷⁷ This would allow not only for children to know their rights as victims before the ICC but also to inform adults working with children on how to present an application on behalf of a child. Although the ICC has an explanatory booklet to its standard application forms, it does not have group-specific booklets. Such specific booklets could be created to target groups of the population that ordinarily have less access to information (not only children, but also for example victims of sexual violence or specific minority or immigrant groups in a given situation) and that require differentiated treatment in light of their unique needs (pursuant to Rule 86 of the RPE).

Considering the rapid developmental changes of children, the application process should be expedited in general, but particularly when the application concerns crimes committed against children. A child who applies at age sixteen to participate in proceedings might not be interested in participating or might even be unreachable if the ICC contacts him or her three or four years later. Likewise, the interests of that victim might have also changed significantly and eventual reparations could even become moot with the passing of time.

76 *DRC situation* 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08' (4 November 2008) ICC-01/04-545 para. 25; *Katanga and Ngudgolo case* 'Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure' (23 September 2009) ICC-01/04-01/07-1491-Red, paras 42-43.

77 CRC Committee, *General Comment No. 12* (2009): *The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 21.

5.3.2 The application process

According to Rule 89 of the RPE, victims wishing to participate in ICC proceedings should present a written application to the ICC. During its first years, the ICC developed standard application forms which victims (or someone acting on their behalf) fill-in and present to the ICC. The practice during these first years was that the Registry, more specifically the VPRS, would receive the applications, prepare a report to the relevant Chamber and then transmit to the judges all the applications received as well as the report. Once the Chamber received the applications and the report, it would then instruct the Registry to transmit the application forms (either in full or redacted) to the parties in the proceedings and the parties would be granted the opportunity to submit observations on the victims' applications. The Chamber would finally issue a written decision determining on an individual basis which applicants met the requirements to participate as victims pursuant to Rule 85 of the RPE.⁷⁸

This process proved to be manageable in the *Lubanga case*, considering that the number of victims participating in that first case was quite limited. In fact, only 3 victims were granted status to participate at the pre-trial stage of the proceedings and during the trial phase, 129 victims were granted status to participate in the proceedings.⁷⁹ However, in more recent cases before the ICC, thousands of applications have been received.⁸⁰

The drawback to this increased victims' participation is that the Registry, parties and Chambers appear to have become overwhelmed by the individual-application system. In fact, victims' participation became at one moment torrential in the confirmation of charges of the *Mbarushimana case* and it was reported that hundreds of victims were not able to participate because the Registry had been unable to meet the deadline established by the Chamber to receive victims' applications.⁸¹ Likewise, victims' interests may not be

78 *Lubanga case* 'Decision inviting the parties' observations on applications for participation' (6 May 2008) ICC-01/04-01/06-1308.

79 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04-01/06-1556-Corr; 'Decision on the applications by 3 victims to participate in the proceedings' (18 December 2008) ICC-01/04-01/06-1562; 'Decision on the applications by 7 victims to participate in the proceedings' (10 July 2009) ICC-01/04-01/06-2035; 'Decision on the applications by 15 victims to participate in the proceedings' (13 December 2010) ICC-01/04-01/06-2659-Corr-Red.

80 Wakabi Wairagala, 'Thousands more apply to join Bemba trial as victims' (*The Trial of Jean-Pierre Bemba Gombo: A project of Open Society Justice Initiative*, 30 September 2011) <<http://www.bembatrial.org/2011/09/thousands-more-apply-to-join-bemba%e2%80%99s-trial-as-victims/>> accessed 8 August 2013.

81 Hironelle News Agency 'ICC/Mbarushimana – Registrar Flooded with Victims Requests' (*Hironelle News*, 13 September 2009) <<http://www.hironellenews.com/icc/318-mbarushimana/25509-en-en-130911-iccmbarushimana-registrar-flooded-with-victims-requests1456014560>> accessed 8 August 2013.

adequately represented if one or two legal representatives represent thousands of clients, who may very well have different and even opposing interests.

However, victims' participation is enshrined in the Rome Statute and cannot be "reconsidered" or become impracticable or symbolic. Nevertheless, the procedure and particularly the individual application process should be amended, in order to provide meaningful participation for victims, but also safeguarding the rights of the accused to a fair and expeditious trial. Therefore it is irrefutable that the original application process (used mainly in the *Lubanga case*, *Katanga and Ngudjolo case* and the *Bemba case*), which requires case-by-case evaluation by the Registry, the Chambers and the parties in the proceedings, needs to be revisited, particularly for cases in which a large amount of victims have allegedly suffered harm. Otherwise, the application procedure could become contrary to the principles of fair trial (both for the accused and for the victims themselves) since victims' participation should not overburden defence teams and, on the other hand, victims should be able to effectively participate in proceedings.

Judge Van Den Wyngaert of the ICC commented that the "individualised approach" may work in a national proceeding, but at the ICC it was becoming overwhelming and could become unsustainable. She also suggested that a collective approach should replace the individual system of victims' participation. Most importantly, this ICC judge concluded that victims' participation should not only be respectful of the rights of the accused, it should also be meaningful to the victims, who, within the individual application system, were represented by common legal representatives, mostly in a "symbolic" manner.⁸²

Not surprisingly, Trial Chamber V in the two Kenya Situation cases (of which Judge van de Wyngaert was a member for over a year) decided to change the individual approach to victims' participation. In these two cases the judges concluded that victims wishing to participate in person in trial proceedings need to submit the individual victim's application form. However, for all other victims, the Registry was instructed to create a database or record requiring less detailed information. This general group of victims, who does not need to submit individual application forms, will remain anonymous to the parties. A common legal representative, who works closely with the OPCV, represents these victims' interests.⁸³

This approach, which as Trial Chamber V stated is not a general ICC rule but case-specific, could be a viable form of victims' participation for other cases

82 Christine Van Den Wyngaert, *Victims before International Criminal Courts: Some views and concerns of an ICC trial judge*, *Case Western Reserve Journal of International Law*, Volume 44 (2012), p. 475 – 496.

83 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 24.

with a large number of victims or in which victims have security concerns.⁸⁴ The criteria adopted by Trial Chamber V could also be beneficial for child victims, but only if they are properly included within the general group of victims to be represented by the common legal representative and the OPCV. In this regard, Trial Chamber V instructed that all victims, including the vulnerable ones, should be treated in a fair and consistent manner.⁸⁵ However, in order to fulfil this judicial instruction, outreach is essential so that victim's representation does not exclude certain groups of victims, including children, women and other usually unrepresented or underrepresented groups. Likewise, more resources should be allocated to the OPCV so that their involvement in the proceedings in Kenya does not reduce the OPCV's ability to support victims' in other cases, while at the same time providing legal support to the common legal representative in the Kenya situation cases. However, it is too soon to thoroughly evaluate the impact that this new collective approach will have in the Kenya situation cases.

A new approach that also distances itself from the individual victims' applications has been taken in the pre-trial phase of the *Gbagbo case*. In this case, the Single Judge instructed the Registry to explore the possibility to change the ICC's application process into a collective procedure.⁸⁶ Moreover, the Single Judge proposed a procedure that appears to guarantee effective participation of individual victims within a group. First of all, the Single Judge instructed that only Registry staff assist applicants in completing the collective form.⁸⁷ This direct involvement of the Registry could indeed reduce the risks of having to rely on intermediaries, which as seen in the *Lubanga case*, may be prejudicial to a fair trial.⁸⁸ Furthermore, the fact that the Registry is involved at this early stage may also act as "quality control" so that the applications that reach the Chamber are only those that are complete and in accordance with the ICC provisions. Importantly, the Single Judge foresaw that some "sensitive categories of victims" might not be represented in collective applications.⁸⁹ Though the Single Judge referred exclusively to victims of sexual violence, children could also be included in these special categories that should not be excluded when collective applications are submitted.

84 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 23.

85 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 31.

86 *Gbagbo case* 'Organisation of the Participation of Victims' (6 February 2012) ICC02/1101/11-29-Red.

87 *Gbagbo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 27.

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

89 *Gbagbo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 29.

Recently in the Pre-Trial proceedings in the *Ntaganda case*, the Single Judge in that case followed the precedent of the *Gbagbo case*, albeit with some caveats. The Single Judge adopted again the case-by-case approach, in which each application will be evaluated individually. However, the Single Judge ordered the Registry to group the applications in order to make their assessment more effective. Moreover, the Single Judge created a 1-page application form, containing such basic information that it will most possibly repeat and rarely identify the specific situation of individuals and most likely identify a "pattern" of crimes committed and harms suffered by groups of persons in specific locations.⁹⁰

It seems that most of the recent ICC case law reflects a shift from individual application forms to a more collective approach. At least, the thorough and highly individualised applications forms of the first ICC cases seem to have been abandoned. In fact, it is not anticipated that judges in future ICC cases will go back to the approach adopted in the ICC's first trials, particularly considering that it is resource intensive and thus has budgetary implications, not only for the ICC as an institution, but also for overburdened defence teams. This new collective approach or the recently adopted approach in the *Ntaganda case* should be welcomed, particularly since it simplifies the sometimes cumbersome and complicated individual application forms. However, the fact that one or two legal representatives represent the views of often thousands of clients is not tackled by these new "collective" or "group" approaches. Moreover, there is a patent risk that children, as a vulnerable group, may be excluded from the general interests of the "group". Moreover, although the OPCV has been granted a protagonist role in this new participation system, its role needs to be coupled with more resources. Otherwise, these new collective or group approaches could also become "symbolic" rather than real and meaningful for individual victims.

Furthermore, in spite of its clear effectiveness, this new collective approach could be of questionable legality. Although Article 68(3) of the Rome Statute is general and thus permissible of this type of collective approach, Rule 89 of the RPE and Regulation 86 of the RoC reflect a different intention from their drafters, which clearly foresees an individual application process. Although this individual application process may seem obsolete in most current ICC cases and burdensome for the parties, participants, Chambers and the ICC's budget, amendments to the relevant provisions, and not case law, should ultimately change the individual application approach. Consequently, a reform to Rule 89 of the RPE and Regulation 86 of the RoC would be most appropriate, not only to adapt the ICC's legal framework to the reality of its situations and cases, but also in order to harmonise the current conflicting case law between ICC Chambers in different cases.

⁹⁰ 'Decision Establishing Principles on Victims' Application Process', 28 May 2013, ICC-01/04-02/06-67.

5.3.3 Legal Representation and Legal Aid

Pursuant to Article 68(3) of the Rome Statute, victims have the right to present their views and concerns to the ICC, and this can be done either via direct participation or via a legal representative. For practical reasons, and certainly considering the rights of the accused to a fair and expeditious trial, the majority of victims who have participated in court proceedings thus far have not addressed judges in person, but through common legal representatives. Regardless of whether a collective or individual victims application process is adopted, the practice of assigning a common legal representative to a group of victims should remain in practice. However, as noted above, the views of individual victims should not dissolve within the general interests of “the group” or much less, become unrepresented in light of the legal representative’s own views.⁹¹

In this sense, it is important to separate victims into different groups of common legal representatives when their interests may be conflicting or when victims of a certain group may have specific needs. In the *Lubanga case*, for example, victims were assigned to two groups of common legal representatives and a limited group of victims (those with dual status of victims and prosecution witnesses) were assigned to the OPCV.⁹² In the *Katanga and Ngudjolo case*, victims were grouped into two categories, given potential conflicts of interests. One category of victims were the former child soldier victims and the other the victims of other crimes.⁹³ In the *Bemba trial*, victims were assigned to two groups according to the geographical location of the crimes.⁹⁴

As noted by the Women’s Initiative for Gender Justice, dividing victims into groups based on grounds such as geographical location, although effective for some purposes (particularly access to the victims by the legal representative), could also ignore that victims within that same geographical location may have distinct interests.⁹⁵ In fact, by dividing the victims based on geographical

91 See for example: *Ruto and Sang case* ‘Common Legal Representative for Victims’ Observations in Relation to the “Joint Defence Application for Change of Place Where the Court Shall Sit for Trial” (22 February 2013) ICC-01/09-01/11-620, paras 13-29. In this submission the common legal representative stated that although victims opposed an *in situ* trial in Kenya or Tanzania, he gave his personal view supporting an *in situ* trial.

92 *Lubanga case* ‘Judgment pursuant to Article 74 of the Rome Statute’ (14 March 2012) ICC-01/04-01/06-2842, para. 20.

93 ‘Order on the organisation of common legal representation of victims’ (22 July 2009) ICC-01/04-01/07-1328.

94 ‘Decision on common legal representation of victims for the purpose of trial’ (10 November 2010) ICC-01/05 01/08-1005. As of February 2011, approximately 858 victims were represented by one legal representative and 451 victims by another one. See: Women’s Initiatives for Gender Justice (WIGJ), *Legal Eye on the ICC*, <http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html> accessed 8 August 2013.

95 Women’s Initiatives for Gender Justice (WIGJ), *Legal Eye on the ICC*, <http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html> accessed 8 August 2013.

aspects, particular interests, such as those of child victims, could be neglected. Thus, victims should be grouped taking into consideration not only geographical location, but also grounds such as those included in Article 21(3) of the Rome Statute: age, gender, race, religion, ethnic or social status, etc. Doing otherwise could lead to the discrimination of certain groups of victims within the "general group" represented by a common legal representative. Moreover, preferably, the common legal representative should have some kind of expertise in dealing with victims of a certain group, particularly those included in Rule 86 of the RPE.

Thus, in future cases, it would be appropriate to assign child victims and adult victims distinct common legal representatives. Although not compulsory in the requirements to be included in the list of counsel, it would be appropriate to take into account experience with children and their rights when a lawyer is to be assigned to a group of child victims. This is necessary because a legal representative working with children has a client-lawyer relation that is particular, since the lawyer must not only follow the instructions of his or her client, but also take into consideration that in following such instructions, the child's best interests and overall well-being must be taken into consideration. However, the child's legal representative must not act as a guardian *ad litem*. This is in essence a different role that, if necessary, should be fulfilled by another person assigned by the Court for that particular purpose.

Another key player in the representation of victims before the ICC is the OPCV. In the ICC's first cases, judges instructed the OPCV to act on behalf of unrepresented victims during the application process (prior to their status being granted). The OPCV also assisted legal representatives by providing legal advice and research for their respective submissions before the Chambers. The OPCV also worked along with other sections of the ICC, namely the VWU and the VPRS, in their work in the field in the various situation countries.⁹⁶

More recently, as mentioned above, the OPCV has also been assigned as common legal representative of victims participating in the confirmation of charges hearing in the *Gbagbo case*.⁹⁷ It is important to note that in this case, the Single Judge instructed that the OPCV should be assisted by a team member with wide knowledge of the context and based in Cote d'Ivoire.⁹⁸ Likewise, the Pre-Trial Chamber in the *Ntaganda case* has also given a more prominent

96 ICC, Office of Public Counsel for Victims (OPCV), *Representing Victims before the ICC: A Manual for legal representatives* (December 2010) 34, available at <<http://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf>> accessed 8 August 2013.

97 *Gbagbo case*, 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 42-43.

98 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 44.

role to the OPCV.⁹⁹ A similar approach has also been taken in the two Kenya Situation cases, in which Trial Chamber V decided that the common legal representative of victims should be based in Kenya and the OPCV would attend hearings in representation of the victims and their common legal representative.¹⁰⁰

Although it is too soon to evaluate the results of this new approach assigning more duties to the OPCV, it appears to be favourable to victims, as it combines legal expertise based in The Hague (the OPCV) with local expertise and direct contact with victims in their own language and culture (field team member or common legal representative). However, unless the OPCV is strengthened with more staff and more resources, their assistance to the legal representatives or directly to victims could become a mere allegory.

Moreover, the possibility for victims to participate in person and individually in court should also remain viable, although taking into consideration the appropriateness of this participation in person and the rights of the accused. This possibility was put in practice in the first two trials before the ICC, in which victims requested leave and were granted the opportunity to testify under oath in trial.¹⁰¹ In the *Bemba case*, victims were also granted the opportunity to request leave to present their views and concerns in person, not via sworn testimony as in the previous trials, but simply as victims giving an unsworn statement.¹⁰² Taking into consideration the appropriateness of

99 *Ntaganda case* 'Decision Establishing Principles on Victims' Application Process', 28 May 2013, ICC-01/04-02/06-67.

100 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 59.

101 However, they did not address the ICC as victims, presenting their "interests and concerns", but as witnesses. In these two trials, victims were subject to examination and cross-examination and did not necessarily express their "views and concerns", pursuant to Article 68(3) of the Rome Statute. See: *Lubanga case* 'Decision on the request by victims a/ 0225/06, a/ 0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial' (26 June 2011) ICC-01/04-01/06-2032-Anx; *Katanga and Ngudjolo case* 'Décision aux fins d'autorisation de comparition des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09' (9 November 2010) ICC-01/04-01/07-2517.

102 One representative requested leave for one of his clients to "express his/her views and concerns" via an unsworn statement. The legal representatives of other victims requested leave to call their clients to testify as witnesses and thus to give evidence under oath. They also requested leave to introduce, as evidence, written statements derived from interviews by the parties to their clients. One of the legal representatives submitted that these victims could give evidence on crimes committed in other areas of the Central African Republic referred to in the charges but not covered by the witnesses brought by the prosecution. See: *Bemba case* 'Order regarding applications by victims to present their views and concerns or to present evidence' (21 November 2011) ICC-01/05-01/08-1935; 'Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber' (6 December 2011) ICC-01/05-01/08-1990-tENG, paras 3-4; 'Requete afin d'autorisation de presentation d'éléments de preuves et subsidiairement de presentation de vues et preoccupations par les victims' (6 December 2011) ICC-01/

these requests, and particularly the expeditiousness of proceedings and the rights of the accused,¹⁰³ the Chamber authorised two victims to present evidence as witnesses and three victims to express their views and concerns in person.¹⁰⁴

However, the real impact of the direct participation of victims in trial proceedings is yet to be seen. Victims who participated in the *Lubanga case* trial were deemed unreliable by the Chamber and in fact were referred to the Prosecutor as they possibly could have committed false testimony.¹⁰⁵ Moreover, in the *Ngudjolo case*, the accused was acquitted as a result of lack of evidence, including unreliable witnesses.¹⁰⁶ Thus, it will be in the judgments of the *Katanga case* and the *Bemba case*, as well as the upcoming Kenya cases, in which the impact of victims' participation in person might be evaluated.

Regardless of whether counsel representing victims is a common legal representative or counsel is attached to the OPCV, it is important that they are trained in children's rights, particularly if there are child victims within the group they are instructed to represent. The CRC Committee has stressed that in order for children's views to be transmitted correctly to the judges, legal representatives must have sufficient knowledge and understanding of the various aspects of the judicial proceedings, but also have experience in working with children.¹⁰⁷ The legal representative must thus be aware that he or she exclusively represents the interests of the child or children he or she represents, and not the interests of others (*i.e.* an NGO, the ICC or even the child's parents or guardians). In fact, the Code of Conduct of Counsel already contains a provision that states that in his or her relations with the client, counsel shall

05 01/08-1989-Conf (as referred to in 'Second order regarding the applications of the legal representatives of victims to present evidence and their views and concerns of victims the public decision of the Chamber' (21 December 2011) ICC-01/05 01/08-2027).

103 *Bemba case*, 'Second order regarding the applications of the legal representatives of victims to present evidence and their views and concerns of victims the public decision of the Chamber' (21 December 2011) ICC-01/05 01/08-2027), paras 10-19; 'Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims' (23 February 2012) ICC-01/05-01/08-2138, paras 5, 21-23.

104 The Chamber authorised victims to testify if the harm suffered and their testimony would be representative of a larger number of victims. See: *Bemba case*, ICC-01/05-01/08-2138, paras 37-39, 55. See also: *Bemba case* 'Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138' (13 May 2008) ICC-01/05-01/08-2140, paras 10-11.

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

106 *Ngudjolo case*, Jugement rendu en application de l'article 74 du Statut, 18 December 2012, ICC-01/04-02/12-3.

107 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 35-37.

take into account the client's personal circumstances, particularly when the client is a child.¹⁰⁸

The Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice have recommended that legal counsel to child victims should be trained and be knowledgeable on children's rights and related issues. Most importantly, the Council of Europe emphasised that children are fully-fledge clients, with their own rights, and that lawyers should bring forth the opinion of the child. Furthermore, in cases where conflicts of interest exist between the child and the parents, a guardian *ad litem* could be appointed.¹⁰⁹ As noted before, it is important to distinguish the figure of a legal representative from that of a guardian *ad litem*. The legal representative is the attorney or legal agent of the child who should represent the views of his or her client, even if these are in conflict with the views of the child's parents or guardians or even with his or her "best interests". In this sense, the figure of the legal representative recognises the child as a client, capable to instruct counsel in legal proceedings. On the other hand, the guardian *ad litem* is of a contrary nature, as it does not recognise the child as a capable party, and in fact is someone (usually also a lawyer) who is appointed to act on behalf the "incompetent" child and thus protect and foresee that his/her best interests are protected and safeguarded throughout the judicial proceedings.¹¹⁰ As noted above, the ICC also has the possibility to appoint a child-support person during his/her interaction with the ICC. This support person may be an ICC staff member, but may also be someone that the child trusts, such as a mentor, guardian or adult family member.

Training of counsel is a key issue. Only if they are properly trained they will be able to address the interests of their clients, and particular groups within those victims, such as children or, as in the *Bemba case*, victims of sexual violence. Another crucial aspect regarding victims' representation is feedback and communication between victims (clients) and legal representatives (their lawyers). In more recent cases, teams of victims' legal representatives have also been assigned field staff that work in the country where the victims are and thus can be in more direct contact with them. For example, in preparation for the trial in the case of the *Prosecutor v. Banda and Jerbo*, the Registry has proposed that the teams of common legal representatives be comprised of two counsel and a case manager, but also legal consultants or field assistants, who may assist the counsel in "maintaining communication with victims who are located in the different countries" and who preferably "have an established

108 ICC Assembly of States Parties, *Code of Professional Conduct for Counsel* (Adopted on 2 December 2005) ICC-ASP/4/Res.1, Article 9 para. 2.

109 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (17 November 2010).

110 The Black's Law Dictionary defines "guardian *ad litem*" as a guardian appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party. Black's Law Dictionary (7th Ed 1999).

relationship with the victims in question or have a background in outreach or victim support".¹¹¹ This in fact is essential in order to preserve the client-lawyer communication that is necessary to adequately represent the views and concerns of individual victims, be it 3 victims (as was the case in the pre-trial of *Lubanga case*) or thousands of victims (as is the current case in the trial of *Bemba case*).

If there are child victims, it is needless to say that field staff working with legal representatives must have training on children's rights and particularly on how to identify the best interests of these child victims and preserve their well-being and avoid re-victimisation during their participation, particularly in light of Rule 86 of the RPE. However, if a conflict of interest should arise between the child-client instructions and his or her best interests, ICC judges could appoint a guardian *ad litem* or a similar figure. A field officer with close relationship to the child could be in the best position to detect such conflicts of interests and inform an ICC-appointed legal representative, a guardian *ad litem* or a child support person, as well as the judges, without delay.

5.3.4 Modalities of participation

As noted above, victims may participate in person in ICC proceedings. However, this is only one possible aspect of their participation in ICC proceedings, pursuant to Article 68(3), insofar as this participation is appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Although victims participate in domestic criminal proceedings in many jurisdictions, victims' participation in the ICC is unique, since international crimes and thus proceedings to judge them have special features that must be considered when deciding upon the appropriate modalities of victim participation.¹¹² Moreover, modalities of victims' participation will also depend on the stage of the proceedings. Thus, while victims' participation may be limited in the initial investigation stages, their participation should reach its peak in reparations proceedings.

5.3.4.1 Pre-Trial Stage – Investigation

Proceedings at the ICC initiate differently, according to the triggering mechanism of the ICC's jurisdiction. When a State or the UNSC refers a situation to the ICC (pursuant to Article 13(a) and (b) of the Rome Statute), victims' parti-

111 Prosecutor v Banda and Jerbo 'Proposal for the common legal representation of victims' (25 August 2011) ICC-02/05-03/09-203.

112 Anne-Marie De Brouwer and Mikaela Heikkilä, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rules* (Oxford University Press 2013) 1341.

cipation at the pre-trial stage is minimal insofar as there is not a concrete case against an accused.

In the first investigations before the ICC, Pre-Trial Chamber I originally determined that victims were “an independent voice” vis-à-vis the Prosecutor in the investigation stage and that their participation was warranted at this early stage given that “the outcome of the criminal proceedings is of decisive importance for obtaining reparations for harms suffered”.¹¹³ However, this initial jurisprudence of the ICC was halted by the Appeals Chamber determination that victims’ interests cannot be affected “in general” at the investigation stage. The Appeals Chamber reversed the Pre-Trial Chamber’s decision authorising victims to participate in the pre-trial proceedings of the “DRC Situation” which determined that “the personal interests of victims are affected in general at the investigation stage, because the participation of victims at this stage can serve to clarify the facts, to punish perpetrators of crimes and to request reparations for the damage suffered”. The Pre-Trial Chamber had concluded that victims’ participation at this early stage was important because “it is at this stage that persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment”.¹¹⁴ The Appeals Chamber was not convinced by this reasoning, and determined that the Pre-Trial Chamber “cannot grant the procedural status of victim entailing a general right to participate in the investigation”, as this early stage cannot be seen as “judicial proceedings” affecting the interests of victims.¹¹⁵

Although the Appeals Chamber did envisage other instances in which victims could participate in pre-trial judicial proceedings prior to an arrest warrant against a particular individual, its decision in fact limited almost all possibilities of intervention by victims regarding the prosecution’s investigation once a situation is referred by a State Party or the UNSC, but before a warrant of arrest or summons to appear is issued. In fact, the Appeals Chamber has ruled that, contrary to what had been established by the Pre-Trial Chamber,

113 *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 51-52.

114 *DRC situation* ‘Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06”’ (31 January 2008) ICC-01/04-423-Corr, paras 63 and 72.

115 *DRC situation* ‘Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007’ (19 December 2008) ICC-01/04-556, paras 45, 46 and 57.

the investigation is to be carried out *exclusively* by the Prosecutor.¹¹⁶ Although victims' participation at this early stage could have had an impact on some of the early situations referred to by State Parties to the ICC, which have been appraised as one-sided or as targeting specific anti-government groups,¹¹⁷ this possibility was halted at an early stage in the ICC history.

Notwithstanding the above, a very different situation occurs when the Prosecutor, using its *proprio motu* powers, decides to open an investigation in a particular State or Situation under Article 15 of the Rome Statute. In this particular instance, the Rome Statute clearly foresees victims' representations, which can be made to the Pre-Trial Chamber. In fact, in order to receive such representations, the Prosecutor has the obligation to inform victims of his intention to request authorisation to investigate under Article 15 of the Rome Statute, either directly to those victims known to him or her or the VWU or by general means (*i.e.* press release). In practice, the ICC Prosecutor has issued general announcements inviting victims to make representations under Article 15(3) of the Rome Statute. The approach taken by the Pre-Trial Chambers, however, has been somewhat different.

Pre-Trial Chamber II in the Kenya Situation instructed the Registry, particularly the VPRS to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.¹¹⁸ Meanwhile, in the Côte d'Ivoire Situation, Pre-Trial Chamber III did not instruct the Registry to identify victims' or victims' groups, but instead relied on the general notice given by the Prosecutor and ordered that any representation received was to be transmitted to the Registry. The Registry was then ordered

116 *DRC situation* 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007' (19 December 2008) ICC-01/04-556, paras 48-51.

117 See for example: Hakan Friman, 'The International Criminal Court: Investigations into crimes committed in the DRC and Uganda, What is next?' (2004) *African Security Review*. See also: Ivana Sekularac, 'Gbagbo faces charges of crimes against humanity – ICC' *Reuters* (The Hague, 30 November 2011) <<http://in.reuters.com/Article/2011/11/30/ivorycoast-gbagbo-idINDEE7AT07V20111130>> accessed 8 August 2013; Mark Kersten, 'The ICC's Next Top Prosecutor: the Candidates' (*Justice in Conflict*, 3 June 2011) <<http://justiceinconflict.org/2011/06/03/the-iccs-next-top-prosecutor-the-candidates>> accessed 8 August 2013.

118 *Kenya situation* 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (10 December 2009) ICC-01/09-4.

to summarise the representations into a report.¹¹⁹ Notwithstanding the procedural differences between the two pre-trial chambers, victims' representations were effectively received in both situations and were taken into consideration by both pre-trial chambers when determining whether to authorise an investigation. However, an approach such as that one taken in Kenya could be more beneficial for child victims, as they might not be informed properly about the possibility to make Article 15 representations, unless information is specifically targeted to them as a group. Thus, relying solely on the "general means", may leave out certain groups of victims (including among them children) that simply do not have access to the general means of information (*i.e.* newspapers, radio or internet).

What is interesting about the procedure of Article 15(3) of the Rome Statute is that victims do not need to submit an application for participation but can simply send their representations directly to the ICC, either by postal mail, e-mail or even submitted in person at the seat in The Hague. Moreover, they can act in a completely anonymous manner or send information on behalf of a "group" (*i.e.* victims of torture) and not on behalf of individuals that could be subject to retaliation. These representations also vary in format, size and contents, and thus are not subject to requirements such as those established by ICC Chambers (*i.e.* identification documents). For example, the ICC has received representations in the form of standard application forms seeking participation, but also audio-video material documenting crimes allegedly committed in a given situation.¹²⁰

Most importantly, in both situations in which victims' representations have been submitted, the Pre-Trial Chambers have taken into consideration the information contained therein to establish if the criteria to authorise an investigation under Article 15 of the Rome Statute were met. For example, victims representations contained information related to crimes allegedly committed, the contextual elements of the crimes (such as the existence of an armed conflict or the wide or systematic nature of an attack). Most importantly, victims' representations also contained information on the victims' interests in the involvement of the ICC in a given situation.¹²¹ This of course is possible considering the lowest evidentiary threshold required to open an investigation, which certainly would not be possible to establish the individual criminal responsibility under Article 74 of the Rome Statute. Thus, it seems that for many victims (who may not wish to participate directly in proceedings or who

119 Situation in the Republic of Cote d'Ivoire (*Cote d'Ivoire Situation*), 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (6 July 2011) ICC-02/11-6, 6.

120 *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red.

121 *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red; *Kenya situation* 'Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10' (29 March 2010) ICC-01/09-6-Red.

may fear retaliation and thus wish to remain anonymous) representations under Article 15(3) is the most appropriate means of participation.

One of the major challenges of victims' representations is the access that victims have to this procedure. In Kenya, the Registry was instructed to carry out field missions to inform victims about their rights and collect their views.¹²² The Registry noted that in that country victims have limited access to media and communications technology and that the OTP general notice was inaccessible to most victims and was well-understood by very few persons in the country.¹²³ In fact, in both the Kenya and Côte d'Ivoire situations, victims' representations received were in their majority from persons in their middle age and predominantly men. Likewise some ethnicities or geographical areas were more predominant than others.¹²⁴ In the Kenya Situation, the Registry noted that, despite efforts made by the VPRS to include as many women as possible, "this was not always easy to achieve". In reference to children, the Registry contented itself with regretting "that it was not ultimately able to identify appropriate representatives to specifically speak on behalf of victims who are children or young people" and their views were consequently "not visible in this process".¹²⁵

Thus, it is clear that ICC practice has not included children in Article 15 proceedings and consequently children are among those who have been excluded, despite field visits and other outreach activities carried out by the Registry. In fact, in the decision authorising the investigation in Côte d'Ivoire, the Pre-Trial Chamber instructed the Registry to carry out general information campaigns paying particular attention to the needs of groups of victims, including children, women, victims of sexual violence and different ethnic groups. The Chamber also instructed the Registry to report to the Chamber if a group of victims or crimes had not been properly included or reflected

122 *Kenya situation* 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (10 December 2009) ICC-01/09-4.

123 *Kenya situation* 'Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10' (29 March 2010) ICC-01/09-6-Red, paras 32 and 35.

124 In the Kenya Situation, there were no victims' representations of children, the youngest being that of a 19-year old person. The average age of the persons who made individual representations was 44 years. Sixty per cent of the victims were men, see 'Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5' (29 March 2010) ICC-01/09-17-Corr-Red, paras 40-45. In the Côte d'Ivoire Situation, out of 655 individual representations received, 20 were from persons aged 0-20 years old while the majority (232) were 31-50 years old. Of these representations (655), 423 were men and 179 were women, while 53 did not specify gender, see *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red, paras 35-36.

125 *Kenya situation*, 'Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5' (29 March 2010) ICC-01/09-17-Corr-Red, paras 48-49.

in the victims' representations received under Article 15 of the Rome Statute.¹²⁶ Clear instructions such as these are welcomed. However, the Registry must fulfil these directives and ICC judges should follow-up and monitor this fulfilment. Thus, the ICC must go beyond "regretting" this exclusion of certain groups such as children, and thus identify them and disseminate information in a child-friendly manner (as explained in the previous section on outreach above), so that children can make meaningful representations under Article 15(3) of the Rome Statute.

5.3.4.2 Pre-Trial Stage – Confirmation of Charges

Although victims' participation in the initial pre-trial stage of an investigation has been limited, it has been widely accepted in the pre-trial stage, once warrants of arrest or summons to appear have been issued and thus individual suspects and charges have been identified by the prosecution. Victims have the possibility to make submissions as regards requests for conditional release and may address the Pre-Trial Chamber by way of both oral and written observations on either procedural or substantive aspects raised at the confirmation of charges hearing. Under the Rome Statute, victims also have the possibility to make submissions on the prosecution's decision not to investigate (Article 53 of the Rome Statute, Rules 93, 107 and 109 of the RPE), on measures for the preservation of evidence (Articles 56(3) and 57(3)(c) of the Rome Statute), on requests for protective or special measures (Rules 87 and 88 of the RPE), on the decision to hold a confirmation of charges hearing *in absentia* (Rules 93 and 125 of the RPE), and on proceedings for the amendment of the charges brought against the suspect (Rules 93 and 128 of the RPE).

Victims in the pre-trial stage have overall remained anonymous vis-à-vis the defence, and thus have solely had access to the public record of the case and their legal representatives have attended public sessions of the confirmation of charges hearing.¹²⁷

During the confirmation of charges hearing, victims (through their legal representatives) have the right to make opening and closing statements. However, the Chambers have interpreted that this right is limited to the charges brought by the prosecution against the accused, and thus victims

126 *Côte d'Ivoire Situation* 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (3 October 2011) ICC 02/11-14, para. 211.

127 *Lubanga case* 'Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing' (22 September 2006) ICC-01/04-01/06-462-tEN, 7-8; *Bemba case*, 'Fourth Decision on Victims' Participation' (12 December 2008) ICC-01/05-01/08-320, paras 103-107; *The Prosecutor v Bahar Idriss Abu Garda (Abu Garda case)* 'Decision on victims' modalities of participation at the Pre-Trial Stage of the Case' (6 October 2009) ICC-02/05-02/09-136, paras 11- 18.

cannot add new charges, or indeed extend the factual basis of the charges.¹²⁸ Hence, ICC practice thus far has been emphatic that investigations and the eventual decision to bring charges against suspects is an exclusive power of the Prosecutor and thus victims' participation in this regard is not appropriate.

Regretfully, this ICC practice impedes victims from addressing crimes committed against children if these have not been included in the charges brought against a suspect. Pursuant to the Preamble of the Rome Statute, the ICC was established to stop impunity for the commission of all crimes within the jurisdiction of the ICC. Hence, although the Prosecutor has the power to choose his or her prosecutorial strategy and limit the charges brought against individuals, Article 54(1) of the Rome Statute also provides that the Prosecutor "shall" establish the truth, extending the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute. Thus, victims' participation, particularly when the Prosecutor has omitted from the charges relevant facts that could be of the victims' interests to establish the truth, could be valuable at the early stages of the confirmation of charges.

However, victims could still address in their submissions the children's dimension of the crimes included in the charges and how the crimes particularly affected or caused harm to child victims. For example, if the prosecution charges a suspect with crimes of sexual violence, victims or their legal representatives could make submissions at the pre-trial stage as to how these crimes particularly or disproportionately affected children or how these crimes caused particular harm to children. Hence, although it is ultimately the Prosecutor's decision as to what will be included in the "facts and circumstances" of the charges, victims' submissions in this regard could encourage the Prosecutor to amend the charges or recharacterise the facts in a given case.

5.3.4.3 Trial Stage

In reference to the trial stage, Rule 93 of the RPE specifically refers to phases of the trial in which victims may participate, including the decision on the joinder or severance of trials (Rule 136 of the RPE), proceedings on the admission of guilt (Rule 139 of the RPE), and assurance of non-prosecution (Article 93(2) of the Rome Statute and Rule 191 of the RPE). However, in the practice of the ICC thus far, victim's participation has gone well beyond these examples.

The Trial Chamber in the *Lubanga case* set the general guidelines on matters related to victims' participation in trial proceedings.¹²⁹ The principles estab-

128 *Katanga and Ngudgolo case* 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case' (13 May 2008) ICC-01/04-01/07-474, para. 122.

129 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, para. 84.

lished in that decision were subsequently followed, at least in general terms, by the Trial Chambers in the *Katanga and Ngudjolo case* and *Bemba case*, and confirmed by the Appeals Chamber.¹³⁰

In general terms, participation at the trial stage has been decided on the basis of evidence or issues under consideration at any particular point in time and victims wishing to participate should set out the nature and the detail of the proposed intervention in a discrete written application.¹³¹ Moreover, in accordance with Rule 131(2) of the RPE, victims have been granted the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information. In principle, victims have had the right to access and receive notification of all public filings and those confidential filings that concern them, insofar as this does not breach protective measures in place.¹³² Victims have also had the possibility to participate in public hearings and to file written submissions and participate in closed or *ex parte* hearings or file confidential or *ex parte* submissions, depending on the circumstances.¹³³ Victims have also presented evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during trial proceedings.¹³⁴ Victims have also been granted the right to lead evidence related to reparations during the trial proceedings under Regulation 56 of the RoC.¹³⁵

130 *Bemba case* 'Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings' (12 July 2010) ICC-01/05 01/08-807-Corr; *Katanga and Ngudjolo case* 'Décision relative aux modalités de participation des victimes au stade des débats sur le fond' (22 January 2010) ICC-01/04-01/07-1788, paras 81-84; and 'Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"' (16 July 2010) ICC-01/04-01/07-2288; *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.

131 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 101-104.

132 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 105-107.

133 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 112-115.

134 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 108-111; *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 93-105; *Katanga and Ngudjolo case* 'Décision relative aux modalités de participation des victimes au stade des débats sur le fond' (22 January 2010) ICC-01/04-01/07-1788, paras 81-84; and 'Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"' (16 July 2010) ICC-01/04-01/07-2288, 37-40; *Bemba case* 'Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings' (12 July 2010) ICC-01/05 01/08-807-Corr paras 29-37.

135 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 119-122.

Regarding individuals with dual status of victim and witness (which in some instances included children), the Trial Chamber in the *Lubanga case* adopted some key principles. The Chamber rejected the suggestion that victims appearing before the ICC in person should automatically be treated as witnesses.¹³⁶ It also concluded that an individual's participation as a victim and witness in the proceedings should not compromise his or her security, but should not grant him or her any right in addition to those of someone who is only a victim or a witness.¹³⁷

In cases involving children, victims' legal representatives could offer crucial evidence to the Chamber in the interests of their clients. For example, expert reports on trauma or the psychological impact crimes charged have on children, could be useful for sentencing and reparations purposes. However, expert evidence could also be offered so that the judicial process adapts to the needs of child victims pursuant to Rule 86 of the RPE. For example, in cases in which child victims/witnesses will participate in person, the legal representatives could offer an expert on judicial processes with children, so that the proceedings are carried out in a manner consistent with the rights of the accused, but also with the needs and well-being of child victims and witnesses. Equally, the legal representatives could request that a special procedure is adopted in which a child or group of child victims address the judges via video-link by way of an unsworn statement, thus avoiding the burden of travelling to The Hague and give testimony in court.¹³⁸ Likewise, legal representatives of child victims could suggest *in situ* visits of the Chamber, for example to meet with child victims in their own town or country. For example, in cases involving child soldiers, the Trial Chamber could visit a demobilisation centre or a former military camp.¹³⁹

5.3.4.4 Appeal Stage

It is important to note that in the ICC system victims have not been granted with the right to file an appeal for a decision affecting their interests. The only possibility that exists in the Rome Statute is that of an appeal against a reparations order.

136 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 132-133.

137 'Decision on Certain Practicalities regarding Individuals who have the Dual Status of Witness and Victim' (5 June 2008) ICC-01/04-01/06-1379, para. 52.

138 This would be in line with the UN Guidelines, which state that children's right to participation includes their right to express their views "in his or her own words" and thus contribute to decisions affecting his or her life. See: UN Guidelines, para. 8(d).

139 ICC Press and Media, 'ICC judges in case against Katanga and Ngudjolo Chui visit Ituri' (Press release 27 January 2012) < <http://www.flickr.com/photos/icc-cpi/sets/72157629051394811/> > accessed 8 August 2013.

However, victims have been granted status to participate in appeals proceedings, although their participatory status is not automatic, and thus does not continue if they participated in the original proceedings giving rise to the appeal. Hence, victims should apply for participation and parties must make new submissions on whether or not they should be granted participatory status. In general, victims who have participated in the proceedings giving rise to the appeal have been granted status to participate in the appeal. However, this practice (adopted following an Appeals Chamber decision on this matter)¹⁴⁰ has proven burdensome, not only to victims, who have to submit an application to participate, but also to the parties, who need to submit observations on the matter. This has also inevitably affected the expeditiousness of interlocutory appeal proceedings, adding a further procedural step to these appeals.¹⁴¹ Thus, it would be more favourable, not only to the victims, but also to the parties in the proceedings, and for the expeditiousness of proceedings as a whole, if victims would have the automatic right to participate in appeals of decisions in which they participated.

5.4 PROTECTION OF CHILD VICTIMS AND WITNESSES

5.4.1 Obligation to protect and support

Throughout the Rome Statute and other ICC provisions, protection of victims and witnesses is regulated, taking into consideration the particular needs of different groups of victims, including children.

Article 68(1) of the Rome Statute, which is the main provision in this regards, states the following:

‘The ICC shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the ICC shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’

¹⁴⁰ *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.

¹⁴¹ *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.

Although this provision refers in general to the "Court" and thus involves all organs of the ICC that interact with victims and witnesses, it gives special consideration to the Prosecutor, who shall take appropriate measures, particularly in the initial stages of the investigation, when other organs of the ICC may not yet be involved. In fact, as early on as the moment when a situation is referred to the ICC pursuant to Article 13 of the Rome Statute, the Prosecutor may already adopt protective measures vis-à-vis individuals at risk (*i.e.* by withholding information to States and pursuant to Article 54(3)(f) of the Rome Statute). Thus, it is clear that the Prosecutor has an obligation to protect individuals interacting with the ICC at the very outset of the ICC's involvement, even when judicial proceedings have not yet started and Chambers have not been seized of any matter.

In early investigation stages, the OTP has an obligation to protect children with whom it interacts, particularly any potential child witness that is interviewed at this early stage. The Innocenti Research Center has proposed that investigators collaborate only with trustworthy, impartial, professional, reliable and reputable organisations, including child protection agencies, when working through "intermediaries" in the field.¹⁴² Furthermore, it recommends that the OTP develops guidelines for all members of the Office that interact with child victims and witnesses.¹⁴³

Referring to children in particular, the Rome Statute and the RPE refer to the need to have persons with expertise in children. Article 43(2) of the Rome Statute provides that the Prosecutor shall appoint advisers with legal expertise in issues, including, *inter alia*, violence against children. As noted by the Innocenti Research Center, to date the OTP has not appointed any adviser on violence against children and it is unclear whether it has an expert on children's rights among its staff.¹⁴⁴ However, as stated previously, the OTP has established the GCU, which is part of its Investigations Division. The GCU has ensured the inclusion of child-friendly guidelines throughout the investigative process and organises trainings to staff members on child-related issues.¹⁴⁵ The GCU may also travel to the situation country to identify possible intermediaries and modes of operating. Furthermore, a psychologist of the GCU accompanies every investigation team that is to interview children.¹⁴⁶

142 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 30.

143 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 31.

144 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 33.

145 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 35.

146 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 36.

The Rome Statute also provides in Article 43(6) for the creation of the VWU. This provision provides that the VWU, as an entity within the Registry:

‘(...) shall provide, in consultation with the OTP, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony given by such witnesses.’

In light of this provision, the VWU protects three categories of persons: a) witnesses who appear before the ICC; b) victims who appear before the ICC; and c) other persons at risk on account of testimony given by others. Thus, ICC provisions refer to a broader group of persons, beyond those witnesses and victims that appear before the ICC to include, for example, family members that could be at risk.¹⁴⁷ Therefore the ICC’s scope of protection goes beyond victims with participatory status and witnesses appearing in court and may include their family members, and even third persons referred to in their testimony as well as intermediaries, translators, etc., who may be at risk.

Pursuant to Rule 17 of the RPE, the VWU should provide victims and witnesses and others at risk with adequate protective and security measures, including short-term and long-term plans for their protection. The VWU should also assist them in obtaining medical and psychological assistance. Pursuant to this provision, the VWU should also play an active role in making recommendations and offering trainings to other organs of the ICC on issues of trauma, sexual violence, security and confidentiality and codes of conduct.

Rule 19 of the RPE foresees that the VWU should have experts, among other areas, on children and particularly traumatised children. Moreover, Rule 17 of the RPE foresees that the VWU may appoint a child-support person to assist a child witness through all stages of the proceedings. A similar “support person” is foreseen in the UN Model Law. This support person should accompany the child from his or her initial interaction with the ICC (*i.e.* first interview with an OTP investigator) until the end of the judicial process (*i.e.* trial and eventual reparations process). The support person should not only provide emotional support, but also act as a liaison between the child and his or her family and legal representative. The support person could also carry out the familiarisation process and even request protective measures on behalf of the child.¹⁴⁸

¹⁴⁷ For example, Rule 93 of the RPE refers to victims participating in proceedings and “other victims”, while Regulation 93(1) of the RoR refers to “persons at risk of the territory of the State where an investigation is taking place” and Regulation 95 of the RoR refers to a “person at risk of harm or death” while Regulation 96 of the RoR refers to “others considered at risk of harm and/or death on account of a testimony given by a witness or as result of their contact with the ICC”.

¹⁴⁸ UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), articles 16-19.

In practice, the VWU works with protected individuals, including children, in three main areas: a) protection; b) support; and c) operations. Regarding protection, the VWU has developed best practices during the last years and offers procedural protective measures (subject to authorisation of the relevant Chamber), protective measures outside the ICC, and lastly, a relocation programme. In relation to support, the VWU provides support to victims and witnesses appearing before the ICC, in order to ensure their psychological well-being, dignity and privacy. This assistance commences from the moment the person is due to travel to the ICC and continues 24 hours per day and seven days per week, until the person returns to his or her home or until needed. Finally, regarding operations, the VWU makes the logistical and immigration arrangements to ensure that victims and witnesses appear before the ICC.¹⁴⁹

Notwithstanding its broad mandate, it is important to note that the VWU cannot act alone, as it will only implement its protection mechanisms upon referral by a party, participant or the Chamber. Thus, for example, when the prosecution considers that a witness or potential witness may be at risk, it will refer his or her situation to the VWU, who will then make an assessment on the protective measures or assistance required.¹⁵⁰

Ultimately the judges of the ICC will decide on judicial protective measures and other special measures that could be adopted to avoid the re-victimisation of a child witness during judicial proceedings. Thus, it is essential that pursuant to Article 36(8)(b) of the Rome Statute, individuals with expertise in, *inter alia*, violence against children, are elected as judges.

5.4.2 Protective and special measures available to child victims and witnesses

The *Lubanga case* and the *Katanga and Ngudjolo case* before the ICC have been challenging in many ways, particularly since they both involved crimes allegedly committed against children. While in the ad-hoc tribunals only a few young adults gave evidence to events that had occurred when they were still under 18 years of age, in the ICC's first cases, a significant group of victims and witnesses in these proceedings were children either at the time of the events

149 ICC, *Structure of the Court, Protection, Victims and Witnesses Unit*, <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx> accessed 8 August 2013.

150 At the beginning of judicial proceedings this interaction between the VWU and the prosecution was not at all clear, and it actually led to various Chambers' rulings on the matter. See: *Lubanga case* 'Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters' (24 April 2008) ICC-01/04-01/06-1311-Anx; 'Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters"' (16 December 2008) ICC-01/04-01/06-1557.

or at the time of their interaction with the ICC.¹⁵¹ In the SCSL, on the other hand, the prosecution called children to testify for cases involving child recruitment. Thus, its practice and “lessons learned” could be useful for the ICC in current and future cases involving child witnesses.¹⁵²

In the *Lubanga case*, ten former child soldiers testified.¹⁵³ Although most of these witnesses were already young adults by the time they testified, they were still children when ICC investigators first contacted them.¹⁵⁴ As stated by An Michels in her experience with witnesses in the SCSL, witnesses older than 18 who were children when the crimes were committed should still be considered child witnesses at the time they testify. She explains that this decision responds firstly to the reality that the exact age of many former child soldiers cannot be established. Furthermore, former child soldiers who spent years fighting during a crucial time of their development may show a significant difference between their mental age and their biological age.¹⁵⁵

The CRC Committee has established that children cannot be heard effectively (either as victims or witnesses) when the environment is intimidating, hostile, insensitive or inappropriate for her or his age. The CRC Committee has stated that proceedings should be accessible and child appropriate, and measures must be adopted, such as child-friendly design of courtrooms, clothing of judges and lawyers, sight screens and separate waiting rooms.¹⁵⁶ Furthermore, the CRC Committee has established that the child should be informed about issues such as the availability of health, psychological and social services and there should be a support mechanism in place and protective measures available.¹⁵⁷ The CRC Committee has also recommended that children be

151 In general, only four per cent of the ad-hoc tribunal’s witnesses were between 18-30 years old when they testified before these tribunals (and thus possibly children at the time of the events). Furthermore, witnesses who were children when the crimes occurred but adults at the time of the testimony were treated like any other adult witness. Thus, little can be taken from the ad-hoc tribunals’ practice regarding child witnesses. See: Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 28.

152 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 14.

153 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 15.

154 *Lubanga case* ‘Judgment pursuant to Article 74 of the Rome Statute’ Separate and Dissenting opinion of Judge Odio Benito’ (14 March 2012) ICC-01/04-01/06-2842, para. 32.

155 An Michels, *Protecting and supporting children as witnesses: lessons learned from the Special Court of Sierra Leone*; cited in Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 28.

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

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

provided with clear explanations as to how, when and where the hearing will take place and who the participants will be.¹⁵⁸ In reference to this last recommendation, the UN Special Representative for Children and Armed Conflict has also stated that expectations of children must be managed as many potential child witnesses or victims may have an erroneous idea as to what they can obtain for being witnesses (it may seem all too exciting from a child's point of view).¹⁵⁹ Similar recommendations are made by the UN Guidelines, which could be advisable for future ICC proceedings involving child witnesses and victims.¹⁶⁰

Since the ICC relies greatly on intermediaries working in the field in situation countries, it is necessary that these individuals and organisations are trained and supervised in order to prevent manipulation or any adverse contact between intermediaries and child victims or witnesses.¹⁶¹ Ultimately, the child's contact with a given intermediary could also affect his or her reliability as a witness. In fact in the *Lubanga case*, only one of the ten child witnesses was found to be reliable by the Trial Chamber, as the credibility and reliability of the other child witnesses were significantly affected by their involvement with certain intermediaries. These nine individuals were not relied on by the Chamber and those that had dual status finally lost their right to participate as victims in the case.¹⁶² As the Trial Chamber concluded in the *Lubanga case*, these children were potentially taken advantage of by the intermediaries and, irrespective of their credibility or reliability, they were children exposed to armed conflict and thus vulnerable to manipulation.¹⁶³ Thus, protective measures for children should not only encompass judicial and non-judicial measures vis-à-vis supporters of the accused person, but also in respect of persons that often work for the ICC in the field, such as the intermediaries discussed above.

In the ICC's practice so far, victims and witnesses may be granted judicial and non-judicial protective and special measures. As regards the judicial measures, the RPE provides the following:

158 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 41.

159 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 13.

160 UN Guidelines, para. 30(d).

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

162 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 207 and 478-484.

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

‘Rule 87 Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the VWU, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to Article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

(...)

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

Rule 88 Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the VWU, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to Article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

(...)

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or

intimidation, paying particular attention to attacks on victims of crimes of sexual violence.'

One of the possible protective measures available for child victims and witnesses is anonymity. Although it has been proposed that the testimony of children should always be anonymous;¹⁶⁴ this position could be in breach with other rights, namely the rights of the accused person pursuant to Article 67 of the Rome Statute. Accordingly, child witnesses have had their identities protected vis-à-vis the public, but they have testified in closed or private sessions in which the accused was present.¹⁶⁵ Thus, the accused has always known the identity of child witnesses well in advance of their testimony. However, a "curtain" has been used in the courtroom so that the witness and the accused person do not have eye contact. The accused, on the other hand, has been able to see the witness via a computer screen.¹⁶⁶

Regarding child victims with participating status, most have remained anonymous vis-à-vis the accused person. However, if the victim wished to participate substantively in the proceedings (*i.e.* present evidence or make a submission) his or her anonymity has been reconsidered and eventually his or her identity has been disclosed to the accused.¹⁶⁷

Considering that it was the first-ever trial before the ICC, and bearing in mind that child witnesses were due to testify in court, the Trial Chamber in the *Lubanga case* set out in a decision some of the measures available as regards "vulnerable witnesses", including children and/or victims of sexual violence.¹⁶⁸ In its decision, the Trial Chamber foresaw the use of measures such as testimonies in closed sessions, use of video-link, and the presence of

164 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 21.

165 See for example: *Lubanga case*, Transcript of hearing (30 January 2009) ICC-01/04-01/06-T-113-ENG, 20-21.

166 See for example: *Lubanga case*, Transcript of hearing (4 February 2009) ICC-01/04-01/07-T-116-Red-ENG 66-67.

167 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119.

168 Recently in the Kenya Situation cases, the VWU has defined "vulnerable witness" as follows: For the purposes of this protocol witnesses are considered to be vulnerable if they face an increased risk to suffer psychological harm through the process of testifying, and/or to experience psychosocial or physical difficulties which affect their ability to testify. The vulnerability of a witness can be determined by different factors: factors related to the person: *age* (*children* or *elderly*), *personality*, *disability* (including cognitive impairments), *mental illness* or *psychosocial problems* (such as *trauma-related problems* and/or *lack of social support*); factors related to the nature of the crime: in particular *victims of sexual or gender-based violence*, *children that are victims of violence*, and *victims of torture or other crimes involving excessive violence*; factors related to particular circumstances, such as *significantly increased stress or anxiety due to relocation/resettlement or fear of retaliation*, *adaptation difficulties related to cultural differences or other factors*. (emphasis added). *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, footnote 5.

psychologists to support the witnesses. It also provided that vulnerable witnesses could be entitled to more frequent breaks, to have control of their testimony and to use the language of their preference.¹⁶⁹

In practice, and pursuant to Rule 87 of the RPE, most testimonies of child witnesses before the ICC have been held in closed or private sessions or with voice and face distortion and pseudonym when sessions are public.¹⁷⁰ Video-link has also been successfully used in ICC proceedings. This possibility avoids eye contact between the witness and the accused and avoids other intimidating factors such as giving testimony in a courtroom in a foreign country.¹⁷¹ Video-link is also favourable for children because they may give testimony without leaving their hometown or country, while in a safe and protected building or room nearby to their place of origin.¹⁷² Also, because the child witness does not have to prepare to travel to The Hague, the child's life is less interrupted by the testimony, including any schooling or other learning or social activities the child may have. However, the International Bar Association (IBA) has also noted that video-link testimony may make it difficult for counsel to "connect" with the witness and that the small field offices in which video-link testimonies are held may also be "oppressive" for the witness.¹⁷³ Moreover, other technical matters, such as the bad quality of the video-link, may also affect the value of the testimony.

In the *Lubanga case*, a limited number of witnesses gave testimony via a deposition in accordance with Rule 68 of the RPE. This meant that witnesses gave testimony in closed session in the presence of counsel and a Legal Adviser to the Chamber. Any objection as to the questioning was noted and subsequently resolved by the Chamber.¹⁷⁴ Although this was not used for child witnesses in the *Lubanga case*, this could be a possibility to use in the future for child witnesses. Such a modality of questioning could be made in

169 *Lubanga case* 'Decision on various issues related to witnesses' testimony during trial' (29 January 2008) ICC-01/04-01/06-1140. In another decision in the *Lubanga case*, the Trial Chamber also dealt with the special circumstances of individuals with dual status. In this decision the Trial Chamber dealt with complex issues of client-lawyer relationship of victims and their legal representatives vis-à-vis the party calling the same individual as a witness. It also dealt with the situation of child witnesses-victims and their protection. See: *Lubanga case*, ICC-01/04-01/06-1379.

170 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 115-117.

171 As noted by Christine Kunst, there is a balance of interests that must be struck when deciding on whether to use video-link technology, particularly between the needs of a vulnerable witness and the right of the accused person to confront witnesses against him or her. See: Christine Kunst, *The Protection of Victims and witnesses at International and Internationalized Criminal Courts – the example of the ECCC* (Wolf Legal Publishers, 2013) 229-230.

172 *Lubanga case*, Transcript of hearing (30 January 2009) ICC-01/04-01/06-T-113-ENG.

173 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page 18.

174 Transcript of hearing (12 November 2010) ICC-01/04-01/06-T-333-Red-ENG, 18 to 21.

an office or in a more child-friendly environment than the courtroom and with the presence of minimal staff (one counsel per party and a legal adviser to the Chamber). Furthermore, it avoids witnesses having their testimony interrupted by objections that sometimes may be confusing and distressful. In fact, such a practice could be in line with the Council of Europe's recommendations that court sessions involving children should be adapted, and disruption and distractions during court sessions should be kept to a minimum.¹⁷⁵

In the *Katanga and Ngudjolo case*, the judges of the Trial Chamber, along with counsel to the parties and the participating victims in the trial and Registry staff, visited the DRC, more specifically three localities in which the events concerning this trial allegedly took place.¹⁷⁶ Such visits could be beneficial for cases involving children, in which judges could visit places to know the conditions in which the crimes allegedly took place. Although the judges in the *Katanga and Ngudjolo case* did not interview individuals, in future cases an activity involving children of an affected community could be organised, in which children could informally express to the Trial Chamber their views on the crimes, or their expectations in reference to the trial (including, for example, reparations). With these visits, judges would be able to understand the conditions in which the crimes against children allegedly took place in a manner that is not prejudicial to the best interests of the child, particularly his or her well-being or security, which may be affected by in-court testimony in the headquarters of the ICC in The Hague.

The Pre-Trial Chamber and the Trial Chamber in the *Lubanga case* also took early decisions regarding the witness proofing process, which in the ad-hoc tribunals had been the common practice. This practice, in which parties are responsible for preparing witnesses before trial appearance, significantly changed in the *Lubanga case*, as Trial Chamber I decided that, upon their arrival in The Hague, witnesses would be prepared or "familiarised" by special staff of the VWU.¹⁷⁷

These early ICC decisions prohibiting witness proofing have been thoroughly discussed by academics. While some authors support the practice of witness

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

176 ICC Press and Media, 'ICC judges in case against Katanga and Ngudjolo Chui visit Ituri' (Press release 27 January 2012) < <http://www.flickr.com/photos/icc-cpi/sets/72157629051394811/> accessed 8 August 2013.

177 *Lubanga case* 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (08 November 2006) ICC-01/04-01/06-679; Decision regarding the practices used to prepare and familiarize witnesses for giving testimony at trial' (30 November 2007) ICC-01/04-01/06-1049, and 'Decision regarding the Protocol on the practices to be used to prepare witnesses for trial' (23 May 2008) ICC-01/04-01/06-1351.

proofing in the ad-hoc tribunals and the SCSL,¹⁷⁸ others have welcomed the ICC's prohibition of this practice.¹⁷⁹

In regards to victims of sexual violence, Van Schaack has noted that witness proofing may enable witnesses to refresh their memory, review prior statements, identify relevant facts, present their evidence in a more complete, orderly and structured manner and prepare for cross-examination. To the contrary, the author considers that allowing witnesses to take the stand "cold" threatens to render them unprepared to effectively testify in Court, set them up for re-traumatisation during cross-examination, and risk their being discredited where their testimony is stilted, confused or diverges from prior statements.¹⁸⁰

The Innocenti Research Center has also been critical to this approach by the ICC, stating that witness proofing allows the witness to better get to know the party calling them and thus feel less isolated in the courtroom when undergoing cross-examination. It has been stated that the current practice means that witnesses meet very briefly with counsel and thus are "interrogated by strangers". The Innocenti Research Center states that witness proofing could still be limited to avoid "coaching", and could even include an informal meeting with judges and lawyers of both parties in which matters unrelated to the case could be casually discussed and thus build confidence of the child that should testify.¹⁸¹

Recently, Trial Chamber V in the two Kenya Situation cases changed the approach that had been adopted by the previous Trial Chambers in the ICC, thus allowing some sort of witness proofing, although by the name of "witness preparation". Trial Chamber V defined the term "witness preparation" as "a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony". As for the concept of "witness

178 See for example: Elies Van Sliedregt, Witness Proofing in International Criminal Law: Introduction to a Debate, *Leiden Journal of International Law*, Volume 21 (2008); Karemaker, Taylor and Pittman, Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence, *Leiden Journal of International Law*, Volume 21 (2008).

179 See for example: Wayne Jordash, The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice, *Leiden Journal of International Law*, Volume 22 (2009); Kai Ambos, "Witness proofing" before the ICC: Neither legally admissible nor necessary, in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008); Kai Ambos, Witness Proofing in International Criminal Tribunals: A Reply to Karemaker, Taylor and Pittman, *Leiden Journal of International Law*, Volume 21 (2008).

180 Beth Van Schaack, Witness Proofing and International Criminal Law, IntLawGrrls, 26 November 2008, <www.intlawgrrls.com> accessed on 8 August 2013. Their new website is: <<http://ilg2.org>> accessed on 8 August 2013.

181 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 34.

familiarisation", the Chamber determined that this is the support provided by the VWU to witnesses as set out in the Registry's "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony".¹⁸²

Trial Chamber V noted that a "witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function".¹⁸³ Thus, Trial Chamber V allowed the practice of "witness preparation", previously prohibited by all other previous ICC Trial Chambers, stating "that permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear".¹⁸⁴ According to Trial Chamber V, "judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function" (footnoted omitted).¹⁸⁵

Trial Chamber V recognised the difficulties that witnesses encounter when given testimony before the ICC. It first noted that the crimes under the jurisdiction of the ICC are legally and factually complex. Furthermore, most witnesses who appear before the ICC have no experience in a courtroom or the practice of examination and cross-examination, they come from places far from the seat of the ICC and have different cultural and linguistic backgrounds. Moreover, Trial Chamber V observed that witnesses often testify about events that happen many years ago. All these factors, in its view, increase the "likelihood that witnesses will give testimony that is incomplete, confused or ill-structured".¹⁸⁶

In its decision allowing the practice of witness preparation, Trial Chamber V determined that "proper witness preparation also enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying".¹⁸⁷ Most importantly, Trial Chamber V recognised that Article 68(1) of the Statute includes the Chamber's "duty to take appro-

182 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 4.

183 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 31.

184 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 32.

185 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 50.

186 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 36.

187 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

priate measures to protect the well-being and dignity of witnesses".¹⁸⁸ Moreover, as regards vulnerable witnesses, Trial Chamber V stated that witness preparation "may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events".¹⁸⁹ Lastly, it is important to observe that Trial Chamber V adopted a Protocol, in which it sets out the permitted and prohibited conducts that counsel should follow and it also required that these preparation sessions are video recorded. Thus, judicial control of "witness preparation" will be essential to safeguard the guarantees of a due process in the two Kenya Situation cases.

Moreover, it should be observed that the VWU continues to provide its assistance in the witness familiarisation process.¹⁹⁰ According to the latest VWU Protocol, once a vulnerable witness (which as noted above includes children) arrives at the location of testimony, and subject to the witness' consent, he/she is given a further assessment by the VWU psychologist. The psychologist then discusses any relevant special measures with the witness and seeks his/her consent.¹⁹¹ The VWU has also developed a witness feedback programme which is "designed to provide information to the VWU that would allow the Unit to improve its provision of services to witnesses and to share outcomes and information with other relevant areas of the Court".¹⁹²

Notwithstanding the abovementioned critics against the ICC's approach to witness proofing in the first trials (*Lubanga, Katanga and Ngudjolo and Bemba* cases) and the recent shift in the Kenya Situation, it is clear that the VWU, as a neutral and specialised body of the ICC, may be better placed to offer protective measures and support to a child witness, upon his or her arrival in The Hague, during his or her testimony, and during the "cooling-down" period after the testimony. On the other hand, it is also true that a casual exchange between the witness and counsel, as noted by Trial Chamber V in the Kenya Situation cases, could be beneficial, if this is carried out within legal parameters and in consultation with the VWU, and with the prior informed consent of the witness. Taking into consideration the problems faced in the Lubanga case as regards witnesses' reliability referred to above, the approach taken by Trial

188 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

189 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

190 *Ruto and Sang case*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524-Anx. See also: International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page. 23

191 *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, paras 46-47.

192 *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. 101.

Chamber V, in which the “witness preparation” process involves more participation from counsel, particularly by the party calling the witness, is welcomed and probably will be followed in future ICC trials. Moreover, judicial safeguards, such as the adoption of the Protocol with prohibited conducts, as well as the video recording of these sessions, should circumvent possible tampering of witnesses during witness preparation. However, as noted by the International Bar Association, what is most important is that a court-wide approach as regards witness proofing/preparation and familiarisation is adopted for all cases (i.e. by a judges plenary),¹⁹³ since currently, depending on the case and the Chamber, the ICC practice is conflicting.

Moreover, other measures may be necessary, particularly as regards child witnesses, in order to make their testimony reliable and trustworthy for the effects of an Article 74 judgment, but also in order to avoid re-traumatisation of the child witness. In this regard, the CRC Committee has recommended that questioning be made in a conversation-like format rather than a one-sided examination and under conditions of confidentiality.¹⁹⁴ The UN Special Representative for Children and Armed Conflict in her Working Paper on Children and Justice states that it is rarely in the child's best interests to be interviewed on repeated occasions and interviews should be kept to a minimum and should be conducted only by trained professionals.¹⁹⁵ This is also recommended by the UN Guidelines that state that the number of interviews should be limited and special procedures should be established in order to collect evidence from child victims and witnesses and in order to reduce “unnecessary contact with the justice process”.¹⁹⁶

However, so far in ICC proceedings child witnesses have been subject to thorough examination and cross-examination. They have also been interviewed on various occasions and after long periods of time.¹⁹⁷ This practice should be avoided, particularly regarding child witnesses who may be re-victimised by such an interaction with the ICC. Also, as stated in the UN Guidelines, there should be continuity in the contact between child victims and professionals (i.e. investigators) and trials involving child victims and witnesses should be expedited.¹⁹⁸ If there is a long period of time between the initial interviews

193 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page 24.

194 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 43.

195 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 15. See also Beijer and Liefwaard, ‘A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses’ (2011) *Utrecht Law Review*, 76.

196 UN Guidelines, para. 31. See also Paris Principles, principle 7.28.

197 *Lubanga case* ‘Judgment pursuant to Article 74 of the Rome Statute’ Separate and Dissenting opinion of Judge Odio Benito (14 March 2012) ICC-01/04-01/06-2842, para. 32.

198 UN Guidelines, paras 30(b) and (c).

and the actual trial in which the child witness testifies, the continuity of any relationship with the ICC staff may be difficult if not impossible.

Thus, passing of time is critical when referring to child witnesses and it is perhaps the most patent risk against their reliability.¹⁹⁹ Beresford has stated that although an adult's memory deteriorates, the deterioration of a child's memory is more profound. Furthermore, depending on their age and own individual development, young children may not have a sufficiently developed understanding of the concepts of truth and lies, which form the basis of criminal justice. For example, children may face difficulties in distinguishing between reality and fantasy, especially when recounting traumatic events.²⁰⁰ Thus, ICC proceedings need to be reconsidered when children appear as witnesses.

If child-friendly measures are not taken, testimonies of child witnesses could simply become unreliable and thus disregarded by the Chambers. It would be regrettable to have children endure a judicial process before the ICC in vain, simply because the special circumstances of their age, development and maturity were not taken into consideration. As discussed above, this was in fact the regrettable result in the *Lubanga case*, in which child witnesses and victims were found to be unreliable by the Trial Chamber.

The European Council has established the following guidelines regarding evidence and statements by child witnesses:²⁰¹

'64. Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.

65. Audiovisual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.

66. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.

67. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

199 Beijer and Liefwaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, 94.

200 Stuart Beresford, 'Child Witnesses and the International Criminal Justice System: Does the ICC Protect the Most Vulnerable?' (2005) *Journal of International Criminal Justice* 737, 740.

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

69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.

70. The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.

71. Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.

72. With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.

73. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.

74. The possibility of taking statements of child victims and witnesses in specially designed child-friendly facilities and a child-friendly environment should be examined.'

All of the above are valuable recommendations that should be taken into consideration in ICC proceedings dealing with children, pursuant to Article 68(1) of the Statute and Rules 86 of the RPE. Bearing in mind the strenuous effects that traditional examination and cross-examination and multiple interviews could have on a child's well-being, measures such as the above could be of guidance for future ICC proceedings. After all, these measures are not only beneficial to child victims; ultimately they are beneficial to a fair trial, as it also helps to preserve child witnesses' evidence so that their testimonies are credible and reliable.

Aside from the judicial protective measures identified above, the ICC also provides witnesses and victims with non-judicial protective measures. These measures include a protection system that has been put in place in countries where the ICC has situations and also a witness relocation programme. Moreover, when the witness is giving testimony, the VWU guarantees support "24 hours a day, seven days a week to witnesses during their stay at the location of testimony" in order to attend "the psycho-social and physical well-being and the practical needs of witnesses including any special needs vulnerable witnesses may have".²⁰²

The Initial Response System (IRS) provides for an immediate response to direct or imminent threats to victims or witnesses in the field.²⁰³ This system is a 24/7 emergency response system that enables the ICC to be informed at short notice of any immediate threat to victims and witnesses in order to take

202 *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. 44.

203 *Lubanga case* 'Submission of Redacted Documents' (Document reclassified as public, 18 March 2006) ICC-01/04-01/06-39-US-AnxD.

appropriate actions.²⁰⁴ It should also be noted that the OTP has internal sections that deal with the protection of witnesses. In this regard, it has its own Protection Strategy Unit, which also deals with responsibility for security-related issues.²⁰⁵

The ICC additionally has a witness protection programme, which relocates witnesses in cases where the risk is such that such a measure becomes necessary. However, relocation should be *ultima ratio*, particularly when the individual concerned is a child, as it transfers the witness or victim and often his or her relatives to another location (in or outside his or her home country) and has a permanent character as the person can no longer return to his or her place of origin. In the *Lubanga case* however, 20 prosecution witnesses, including children, were admitted to the ICC Protection Programme.²⁰⁶ Until March 2013, 199 witnesses had testified before the ICC and more than 300 individuals had been admitted into the ICC Protection Programme for their relocation.²⁰⁷ The numbers above demonstrate the vast responsibilities of the VWU, but also of the ICC as a whole in respect of witnesses, victims and other persons at risk in the current 8 situations under the ICC's scrutiny.

Given the implications of permanent relocation, child victims and witnesses should be properly informed of the consequences of their involvement with the ICC, and of what an eventual relocation could entail. In the Kenya Situation, for example, a national newspaper reported that ICC witnesses were negotiating lifetime protection by the ICC.²⁰⁸ This sort of misunderstanding that could lead to unjustifiable expectations of victims and witnesses should be avoided. Although the details of the ICC Protection Programme are confidential, outreach should avoid misconceptions and give the general public, and particularly victims and witnesses concerned, available information on the implications of relocation and other non-judicial protective measures available for witnesses and victims, as well as any risks that the individuals' involvement with the ICC may entail.

204 ICC ASP, Press and Media, 'ICC Registrar participates in panel on impact of the Rome Statute system on victims and affected communities' (Press release 2 June 2010) <http://www.icc-cpi.int/en_menus/asp/reviewconference/pressreleaserc/Pages/icc%20registrar%20participates%20in%20panel%20on%20impact%20of%20the%20rome%20statute%20system%20on%20vict.aspx> accessed 8 August 2013.

205 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, pages 29-30.

206 Jennifer Easterday, 'Witness Protection: Successes and Challenges in the Lubanga Trial' (*The Lubanga Trial at the International Criminal Court*, June 26 2009) <<http://www.lubangatrial.org/2009/06/26/witness-protection-successes-and-challenges-in-the-lubanga-trial/>> accessed 8 August 2013.

207 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, p. 14 and 35.

208 Tom Mailiti, 'Expert: Relocation of a witness does not entail life protection by the ICC' (*The ICC Kenya Monitor*, 29 July 2011) <<http://www.icckenya.org/2011/07/expert-relocation-of-a-witness-does-not-entail-life-protection-by-the-icc>> accessed 8 August 2013.

5.4.3 Protection and reliability of child witnesses

Reliability of child witnesses and reliability tests due to their young age will unlikely be an issue at judicial proceedings in the ICC as it is in national jurisdictions. Young children will not be expected to come to testify before the ICC because there will presumably be other older witnesses available to testify *in lieu* of very young children. The ICC will most probably not be faced with cases in which the sole victim and witness is a small child, as is the situation in many abuse cases in national jurisdictions. Due to the passing of time between the events and the actual trial, and also due to the fact that very small children (for example under 8 years of age) are not likely to be recruited, child witnesses who come to testify before the ICC will most likely be adolescents or even adults at the time of the trial proceedings.

Thus, the issue of child witnesses' reliability is not whether they are capable to testify or not. In principle, child witnesses before the ICC will have the age and maturity to presume that they are reliable and therefore reliability tests will not be necessary. However, as any other witness appearing before a court, their reliability and trustworthiness will be tested. Nevertheless, their particular circumstances, such as age and maturity, should be taken into consideration by the judges when testing the child's reliability and credibility. Likewise, when determining the reliability of a child witness, judges should weigh their evidence bearing in mind the trauma these children could have suffered, as well as the effect that the passing of time has on children's memories.

In the SCSL *Taylor case*, the Trial Chamber took into consideration the young age of a witness at the time of the events and her apparent shyness and nervousness during testimony when evaluating her trustworthiness and reliability. The SCSL Trial Chamber considered that the witness had little education and therefore she would be able to recall events rather than numeric representations of time (*i.e.* the year in which she was captured).²⁰⁹ Although the Trial Chamber in the *Taylor case* ultimately did not rely on this witness to be satisfied "beyond reasonable doubt", the above analysis is a useful example of the various aspects that need to be considered when evaluating a child witness's testimony.

Similarly, in the *Lubanga case*, Judge Odio Benito in her separate and dissenting opinion took into consideration the fact that child witnesses who are subject to multiple examinations during a long period of time logically and explicably have difficulties recollecting events. In fact, Judge Odio Benito concluded "it would be suspicious if their accounts would remain perfectly alike and unchanged".²¹⁰ Similarly to the Trial Chamber in the *Taylor case*,

209 *Taylor case* 'Judgment' (18 May 2012) SCSL 03-01-1281, paras 1398-1402.

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

although Judge Odio Benito concluded that the children's testimony could not be used to convict the accused "beyond reasonable doubt", her analysis could allow judges to rely on child witnesses' testimonies, in spite of logical and expected contradictions that may exist in their evidence, when the overall evidence of the case supports the accounts contained in those testimonies.

5.5 REPARATIONS TO CHILD VICTIMS

Article 75 of the Rome Statute is perhaps one of the most innovative provisions of the ICC framework, establishing a mechanism for reparations for the benefit of victims.²¹¹

This Article provides as follows:

- '1. The ICC shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the ICC may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund provided for in Article 79.
3. Before making an order under this Article, the ICC may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this Article, the ICC may, after a person is convicted of a crime within the jurisdiction of the ICC, determine whether, in order to give effect to an order which it may make under this Article, it is necessary to seek measures under Article 93, paragraph 1.
5. A State Party shall give effect to a decision under this Article as if the provisions of Article 109 were applicable to this Article.
6. Nothing in this Article shall be interpreted as prejudicing the rights of victims under national or international law.'

5.5.1 Victim beneficiary of reparations

Rule 85 of the RPE should serve as basis to define who is a victim beneficiary of reparations before the ICC, and thus the definition of the crime included in the charges, and eventually decided upon by the judges of the ICC, will have

211 Although this provision is pioneering in international criminal law, other prior instruments, namely the UN Basic Principles and case law such as the one of the IACtHR, could provide guidance for its interpretation. The applicability of these instruments is referred to in Chapter 3 of this research.

a bearing on whether specific individuals or groups of persons are considered as beneficiaries of reparations.²¹²

Although the criteria established by the ICC case law so far regarding identification matters, indirect and direct victims, the *prima facie* evidentiary threshold, etc., could be applied to reparations proceedings, it should be noted that these reparations have a distinct nature, as they occur when there has been a conviction against an individual. Moreover, while in pre-trial and trial proceedings victims have to demonstrate that they have an interest in the case, in reparations proceedings this interest is presumed. The victims, however, will require proving the harm suffered as a consequence of the crime for which an individual has been convicted, albeit with a lower evidentiary threshold, such as balance of probabilities or even presumptions.

Reparations can be made in favour of victims either individually or collectively. Taking into consideration that the ICC will be unable to identify each and every child victim of a given crime for which an individual is convicted, collective reparations appear to be more recommendable due to the often-generalised nature of the crimes of genocide, crimes against humanity and war crimes. For example, in the first case before the ICC, which involves crimes of enlistment, conscription and use of child soldiers, individual reparations could even be detrimental to the victims, who could be further stigmatised vis-à-vis their communities. In fact, it has been recommended that the ICC awards individual reparations solely when the accused has assets that have been seized, there is a link between the accused and a particular group of victims, and the case concerns a limited and definable group of victims.²¹³ So far no pending case before the ICC seems to fulfil the above requirements.

However, safeguards should be put in place when implementing collective reparations, particularly because they could reflect patronising attitudes or replace humanitarian or developmental projects, which should be distinct from reparations mechanisms. As stated above, prior consultations with victims, for example via the TFV, as to what they expect of reparations, could be beneficial.²¹⁴ Most importantly, collective reparations should always aim to

212 The relationship between the definition of the substantive law and its implication in reparations is touched upon in Chapter 3 of this research.

213 P De Grief and W Marieke, 'The Trust Fund for Victims of the ICC: Between Possibilities and Constraints' in M Boossuyt and others (eds) *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006).

214 Guatemalan Commission for Historical Clarification, *Guatemala Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations* < http://shr.aas.org/projects/human_rights/guatemala/ceh/mos_en.pdf > accessed 8 August 2013. The Commission stated that participation of the Guatemalan society was vital in the definition, execution and evaluation of the National Reparation Programme, and that in the particular case of collective reparations, it was essential "that the beneficiaries themselves participate in defining the priorities of the reparation process" (page 51).

have an individual component, which could finally include monetary compensation or rehabilitation that benefits individual victims.²¹⁵

Finally, referring to child victims, collective reparations should pay special attention to children within the group that will benefit from reparations. Within the group of “children”, particular consideration must be given to girls, who often will suffer differently from the crime or have different access to reparations because of gender-specific social and cultural rules. For example, as stated in the Paris Principles, measures should be taken so that girls are not made invisible during the reparations process. Likewise, the particular situation of children who are refugee or internally displaced should also be considered.²¹⁶

Most importantly, victims should be consulted whenever a collective reparations scheme is to be implemented. In fact, the ICC has recognised the importance of victims’ involvement in their own reparations.²¹⁷ Three advantages of consulting with victims can be identified. Firstly, the ICC could know the victims’ real needs and the priorities that victims and their communities may have (including the needs of child victims pursuant to Rule 86 of the RPE). Moreover, consultation also gives victims a sense of ownership, as they are able to define and implement reparations. Finally, it also has a healing effect, as victims are treated with dignity and it helps them to move forward.²¹⁸

5.5.2 Types of reparations and harms

Article 75 of the Rome Statute provides for at least three types of reparations: restitution, compensation and rehabilitation. However, in addition to these, other modalities of reparations could be applicable for child victims of crimes within the jurisdiction of the ICC.

5.5.2.1 Restitution

Restitution is an “ideal” type of reparation, because it takes the victim back to how things were prior to the commission of the crime.²¹⁹ The UN Basic

215 C Tomuschat, ‘Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law’ in: A Randelzhofer and C Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Kluwer Law International 1999) 20.

216 Paris Principles, principles 4 and 5.

217 ICC Assembly of State Parties, *The impact of the Rome Statute system on victims and affected communities* (Adopted 8 June 2010) RC/Res.2, para. 4.

218 Maria Suchkova, *The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation* (University of Essex, Transitional Justice Network, Reparations Unit, Briefing Paper No. 5, 2011) 2.

219 See also Permanent Court of International Justice, *Case of the Factory at Chozow*, Judgment on the Merits, Series A No 17 1928 para. 21.

Principles define it as the possibility to restore the victim to the original situation before the crime. It includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.²²⁰ However, in reality restitution is very often impossible, particularly as regards children, since the passing of time between the commission of the crime and the reparations may make it impossible to restore the child's life to how it was prior to the crime.²²¹ In fact, for many (if not all) victims of crimes within the jurisdiction of the ICC, their childhood is permanently affected by these crimes and thus restitution seems unattainable.

Likewise, restitution should be applied with caution, as the victim should not go back to a previous situation of discrimination or violation of rights. For example, in cases involving child victims, if the child was already suffering from lack of education or proper nutrition, restitution should not just "place" the child in his or her previous precarious condition. This is particularly important for girls, who may be in a situation of disadvantage prior to the crime and should not be returned to this situation as part of restitution mechanisms. Restitution should therefore aim to rectify any discriminatory situation that existed prior to the crime.²²² However, the ICC may not have the mandate nor the resources to "rectify" such injustices. But at least, as noted by the Trial Chamber in the *Lubanga case*, reparations "need to address any underlying injustices and in their implementation the Court *should avoid* replicating discriminatory practices or structures that predated the commission of the crimes" (emphasis added).²²³

5.5.2.2 Compensation

Another type of reparation for victims of crimes within the ICC is that of compensation. Because often restitution is simply impossible (*i.e.* restitution of a deceased parent or because restitution of a life in a place that has been destroyed by armed conflict is impossible), compensation attempts to pay the victim for the harm he or she suffered as a result of a crime (either in cash or by other means).

220 UNGA, *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: resolution adopted by the General Assembly* (UN Basic Principles) (21 March 2006) A/RES/60/147, principle 19.

221 McCarthy notes that although restitution plays a significant role in the reparation awards of international human rights courts, the limitations of the concept have been recognised. Conor McCarthy, *Reparations and Victim Support under the Rome Statute of the International Criminal Court*, Doctoral dissertation, (University of Cambridge 2011), page 138.

222 *Cotton Field case*, Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205 para. 450.

223 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 192.

The UN Basic Principles have defined compensation as the payment for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.²²⁴ The IACtHR has determined that compensation aims at ensuring full or partial reparation for the damage suffered, as long as the damage is financially assessable. Compensation is thus a substitute to make up for a loss or damage that cannot be restored as such.²²⁵

The UN Basic Principles establish the following possible harms to be economically assessable: a) physical or mental harm; b) lost opportunities, including employment, education and social benefits; c) material damages and loss of earnings, including loss of earning potential; d) moral damage; e) costs required for legal or expert assistance, medicine, medical services and psychological and social services.²²⁶ Moreover, in accordance with the ICC Appeals Chamber all forms of harm should be “personally” suffered by the victim, be it directly or indirectly.²²⁷

However, judicial determination of these harms and their eventual monetary assessment may be a complex task. Accordingly, Rule 97 of the RPE provides the Chamber with the possibility to call upon experts in order to determine the scope and extent of any damage, loss or injury and to suggest options concerning the appropriate types and modalities of reparations.

Moreover, as noted in Chapter 3 of this research, the case law of the IACtHR could be of guidance for ICC when it has to determine the harm suffered and its subsequent compensation. For example, the IACtHR has determined that moral damage includes emotional problems (such as intrusive images and thoughts, slowing of thought or concentration process, memory dysfunction), mental problems (such as anxiety, fear, anguish, anger, depression), as well as the physical reactions to these problems (aches, pains, sleep problems, heart disease, etc.). The IACtHR has also affirmed that moral damage may be a sequel to a physical injury, but it may also occur on its own.²²⁸ The IACtHR has also developed the concept of “damage to a life plan”, which could be of guidance in cases involving child victims. The IACtHR has defined this concept as a full self-realisation of the person concerned, taking into account his or her calling in life, particular circumstances, potentialities, ambitions, thus permitting to set for oneself, in a reasonable manner, specific goals.²²⁹ For example a child

224 UN Basic Principles, principle 20.

225 *Velásquez-Rodríguez case*, Reparations and Costs, Judgment of July 21, 1989 Series C No 7 para. 26.

226 UN Basic Principles, principle 20.

227 *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. 1.

228 *Blake case*, Reparations and Costs, Judgment of January 22, 1999 Series C No 48.

229 *Loayza-Tamayo case*, Reparations and Costs, Judgment of November 27, 1998 Series C No 42 para. 147.

victim of recruitment in an armed group could have his or her life plan obstructed by lost years of schooling, unwanted pregnancies or illnesses. Thus, compensation should not only respond to the harm directly suffered by the crime but also to the effects that committing this crime had on the future life of the child victim. For example, when a child victim has suffered from a crime of sexual violence this crime may result not only in physical injuries but also in moral damages. Furthermore, depending on whether the victim is a boy or a girl, or depending on other socio-economic and cultural factors, there could be distinct harms (for example particular health problems) that should be individually addressed.

As noted above, compensation pays victims for the harms suffered, often with money, although other means of payment (*i.e.* a vehicle, housing, etc) may be foreseeable. As regards children, payment of lump sums may not be ideal.²³⁰ Moreover, even if payments are made to child victims, they should always be accompanied by other measures, such as rehabilitation and reintegration programmes, which will enable the victim not only to make better use of the sums received, but also to reintegrate into society.²³¹

5.5.2.3 Rehabilitation

The Rome Statute foresees a third mode of reparation, which is rehabilitation. This type of reparation aims to restore the victim's well-being and health and encompasses medical and psychological care as well as legal and social services.²³² Shelton has defined rehabilitation as a process towards the restoration of the victim's full wellbeing, in order to restore what was lost and to prevent further deterioration of the victim's health (both mental and physical).²³³

Rehabilitation is particularly important for child victims, because children will often (if not always) need psychological treatment and other healing processes after they suffered crimes of such gravity as those under the jurisdiction of the ICC. Ideally, reparations should address the individual child (physically and mentally), through a combination of psychosocial support,

230 Particularly former child soldiers, as such compensation could send a confusing and wrong message to the community and other child victims that "perpetrators" are being awarded and it may not benefit towards the reconciliation and reintegration of the individual child victim with his or her family and community. See: ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 29-30.

231 In this sense, the Trial Chamber in the *Lubanga case* concluded that reparations should secure reconciliation, whenever possible. See: *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 194.

232 UN *Basic Principles*, principle 21.

233 D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 1999) 302-303.

health services and education/training to make up for lost opportunities.²³⁴ In fact, Article 39 of the CRC states that there is a need for “physical and psychological recovery and social reintegration of a child victim”. Furthermore, rehabilitation may very often be a necessary pre-requisite for the child victim’s enjoyment of any restitution or compensation received. In the *Lubanga case*, the expert witness on child trauma stated that when war-related psychological problems of child victims and other civilians remain untreated, the opportunity to initiate a substantial economic development and an increase in the standard of living might be substantially reduced.²³⁵ As the same expert witness in the *Lubanga case* stated, if no rehabilitation is provided, the cycle of violence could affect future generations.²³⁶

Measures of restorative justice, in which child victims of recruitment could assume responsibility for any crimes they committed as a result of their recruitment, should also be taken. For example, it has been suggested that former child soldiers could participate in other forms of accountability beyond the purely criminal or judicial forms.²³⁷ Experiences such as those of Sierra Leone, in which efforts were made to activate traditional mechanisms of reconciliation that included all members of the communities affected by the armed conflict, including formerly recruited children, could be applicable to ICC reparations proceedings.²³⁸ Education programmes could also be beneficial to break the cycle of historic violence.²³⁹ For example, the Paris Principles establish in this regard that it is important to create capacity building within the community in order to prevent crimes committed against children (particularly child recruitment) and support their release and reintegration. The Paris Principles emphasise that the community should be involved in planning programmes so that the community may take care of the demobilised children and prevent their future association with armed groups.²⁴⁰

However, the ICC’s mandate and particularly the limited funds available for ICC reparations thus far may limit its ability to carry out the various tasks involved in the rehabilitation and reintegration of child victims of international

234 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 29, 31.

235 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, (Report of Ms. Elisabeth Schauer following the 6 February 2009 “Instructions to the Court’s expert on child soldiers and trauma” ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 33.

236 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, (Report of Ms. Elisabeth Schauer following the 6 February 2009 “Instructions to the Court’s expert on child soldiers and trauma” ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 25-27 and 34.

237 I Derlyun and others, *Re-Member, Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (Intersentia 2012) 28.

238 I Derlyun and others, *Re-Member, Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (Intersentia 2012) 69-71.

239 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 34.

240 Paris Principles, principles 3.21 and 3.22.

crimes. In this regard, the cooperation of other international and domestic organisations (including inter-governmental and non-governmental) is essential as clearly this goes beyond the ICC's sole responsibility as an international criminal jurisdiction.

5.5.3.5 Other types of reparation

Aside from the three forms of reparations identified above, there are other types of reparations that have been applied in other international jurisdictions, albeit not dealing with individual criminal responsibility but with State responsibility. For example, measures such as public apologies, satisfaction and guarantee of non-repetition could also be foreseeable before the ICC, if adapted to this particular international jurisdiction.

These measures could be beneficial as very often they do not require numerous resources, but nevertheless have an important symbolic value for victims. For example, in case of a public apology, the convicted person could voluntarily decide to issue a public apology towards his/her victims. Although ICC judges cannot order this, a voluntary public apology could be taken into account as a mitigating factor for sentencing purposes.²⁴¹

In what refers to satisfaction and guarantees of non-repetition, this would most likely entail the participation of a State, which assumes responsibility for the crimes committed. This of course goes beyond the scope of the ICC's jurisdiction. However, States could be involved in reparations, such as the construction of a memorial or the establishment of a day of remembrance for the victims of a crime, insofar as States agree to do this pursuant to Article 93 of the Rome Statute.²⁴² Again, although ICC judges cannot order this, at least theoretically this is a possibility. Moreover, this could be a possibility in future cases where the jurisdiction of the ICC and a regional human rights court could coincide in a given situation.²⁴³

Particularly in what refers to crimes of child recruitment, a possible type of reparation would be to implement a transitional justice mechanism in which children (who often have the dual status of victim and perpetrator) come to

²⁴¹ David Donat-Cattin in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn), Nomos Verlagsgesellschaft 2008), page 1405.

²⁴² Symbolic reparations have been compared to "transitional objects" that children use as vehicles for developmental changes (i.e. a blanket or a teddy bear). In the same way, it is argued that symbolic reparations are objects that assist in bridging gaps between the interpersonal world and the social world of victims. See for example Brandon Hamber, 'Narrowing the Micro and Macro' in: Pablo De Grieff (ed) *The Handbook of Reparations* (Oxford University Press 2006) 570.

²⁴³ For example, in the ECCC, victims have requested that apologies made during trial be recorded and published as a form of satisfaction. See: Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 13.

terms with any crimes they have committed.²⁴⁴ As child victims, particularly former child soldiers, could also have perpetrated crimes, the establishment of truth commissions may be a useful tool in dealing with children who have participated in the commission of crimes.²⁴⁵ As mentioned by the Special Representative, most child victims of armed conflict will not testify as witnesses or participate as victims in ICC proceedings. She therefore has suggested that non-judicial mechanisms could provide immediate accountability, enable community reconciliation, provide reparations for losses and harms suffered and allow children to move on with their lives.²⁴⁶ However, such far-reaching reparation programmes should ideally be implemented by the ICC TFC with other international and local actors, as these would clearly go beyond the ICC's judicial mandate and jurisdiction and would require the local and international expertise and resources (*i.e.* of the UN Special Representative on Children and Armed Conflict and other stakeholders).

5.5.3 Principles on reparations

Although Article 75 of the Rome Statute is included in the section dealing with "The Trial", all paragraphs of this provision refer to "the Court" and not to the "Trial Chamber". Therefore, one could interpret that reparations proceedings are not limited to the trial stage and that reparations are not to be exclusively decided by the Trial Chamber. However, as Article 75 refers to "convicted person" it is only logical to interpret that reparations under this provision may only be ordered if the person concerned is convicted. In fact, to implement reparation orders one could even interpret that the Appeals Chamber must first confirm the conviction against a person.

During the first years of the ICC, there was also contention in regards to who shall be "the Court" under Article 75 of the Rome Statute.²⁴⁷ Paragraph

244 The Special Representative of the UN on Children and Armed Conflict has recommended that children are included in truth-telling, traditional healing ceremonies and reintegration programmes. See: UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 10.

245 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 25.

246 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 20.

247 For example, the ICC's Registry foresees the possibility of a single judge taking charge of reparations. See: *Lubanga case* 'Second Report of the Registry on Reparations' (1 September 2011) ICC-01/04-01/06-2806 paras 152-155. This possibility is contended by the OPCV of the ICC, which considers that this should be decided by the three judges of the Trial Chamber. See: *Lubanga case* 'Observations on issues concerning reparations' (18 April 2012) ICC-01/04-01/06-2863 paras 129-130. See also: Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 47-48.

1 of Article 75 of the Rome Statute states that the ICC must establish principles on reparations. Many have argued that the principles should be adopted as a court-wide instrument at the outset of the ICC's creation.²⁴⁸ However, the ICC did not adopt such general principles and in December 2011, the ASP decided that the relevant Trial Chamber should decide about these principles on a case-by-case basis.²⁴⁹

Because ICC principles are thus case-specific and not court-wide, they need to be tailored to the particular needs of victims in a given case. The first case before the ICC that dealt with reparations was the *Lubanga case*. Since this case involves child victims, particularly former child soldiers, the principles adopted in this case dealt with child victims. However, the general principles adopted by the Trial Chamber, although case specific, also contain principles that are of application for all cases before the ICC, and thus set an important precedent for future reparations decisions in other cases.

In the *Lubanga case*, reparations proceedings were initiated and the Chamber heard submissions from the parties and participants in the proceedings, but also from organisations that requested leave to participate.²⁵⁰ Among the organisations that were granted leave, UNICEF submitted its observations on the reparations proceedings.²⁵¹ On 7 August 2012, the Trial Chamber rendered the ICC's first-ever decision establishing principles and a preliminary procedure for reparations before the ICC in that case.²⁵²

The Trial Chamber in the *Lubanga case* determined that in reparations decisions concerning children, the ICC should be guided by the CRC and the

248 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 24; Victims' Rights Working Group, *Establishing effective reparation procedures and principles for the ICC* (September 2011); Octavio Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the ICC: Some Reflections* (University of Essex, Transitional Justice Network, Reparations Unit, Briefing Paper No. 1, 2011) 2.

249 ICC Assembly of States Parties, *Reparations* (adopted on 20 December 2011) ICC-ASP/10/Res.3

250 *Lubanga case* 'Scheduling order concerning timetable for sentencing and reparations' (14 March 2012) ICC-01/04-01/06-2844; 'Women's Initiatives for Gender Justice request for leave to participate in reparations proceedings' (28 March 2012) ICC-01/04-01/06-2853; 'Request for leave to file submission on reparation issues' (28 March 2012) ICC-01/04-01/06-2854; 'Registry transmission of communications received in the context of reparations proceedings' (29 March 2012) ICC-01/04-01/06-2855 with public Annexes 1-3; 'Decision granting leave to make representations in the reparations proceedings' (20 April 2012) ICC-01/04-01/06-2870.

251 *Lubanga case* 'Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations' (10 May 2012) ICC-01/04-01/06-2878.

252 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904. This decision is currently pending before the Appeals Chamber. See: *Lubanga case*, Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Thomas Lubanga Dyilo filed on 6 September 2012 against the decision of Trial Chamber I entitled "Decision establishing the principles and procedures to be applied to reparations" (11 September 2012) ICC-01/04-01/06-2920.

fundamental principle of the best interests of the child that is enshrined therein.²⁵³ It also concluded that reparations should be “gender-inclusive”²⁵⁴ and that the differentiated effect that crimes have upon girls and boys should also be taken into account when deciding on reparations.²⁵⁵ The Trial Chamber also directed that child victims should be informed about reparations procedures and programmes in a manner that is comprehensible for victims and those acting on their behalf.²⁵⁶ Applying Article 12 of the CRC, the Trial Chamber also determined that the views of child victims are to be considered when decisions are made about reparations that concern them.²⁵⁷ It is also important to note that the Trial Chamber used various human rights instruments as guidance to adopt these reparations proceedings, including “soft law” instruments. For example, it referred to the UN Basic Principles, the Paris

253 The UN Guidelines, referred to by Trial Chamber I in their decision establishing the principles on reparations, include a wide array of principles. Although the Trial Chamber did not mention all of them, these could be included in future reparations principles: (a) Dignity. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected; (b) Non-discrimination. Every child has the right to be treated fairly and equally, regardless of his or her or the parent’s or legal guardian’s race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status; (c) Best interests of the child. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development: (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect; (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatised, every step should be taken to enable the child to enjoy healthy development; (d) Right to participation. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity. See: UN Guidelines, para. 8.

254 In what refers to girls in particular, the Nairobi Declaration on Women’s Rights to a Remedy and Reparation (“Nairobi Declaration”) also guided the Trial Chamber in the adoption of its principles. The Nairobi Declaration proclaims that reparations must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that share the lives of girls. In that sense, the Nairobi Declaration foresees the use of affirmative measures to redress inequalities that existed prior to the commitment of the crime. It also states that reparations processes must overcome customary and religious laws and practices that prevent girls from making decisions on their lives. See: Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (Adopted at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, March 2007).

255 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, paras 210 – 211.

256 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, para. 214.

257 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, para. 215.

Principles, among others. The Chamber also stated that UN Reports on the subject of reparations, as well as the jurisprudence of the regional courts of human rights, had further provided guidance to the Chamber.²⁵⁸

Reparations proceedings are currently suspended due to the pending appeal, however, once these proceedings resume, it will be up to the TFV, along with the Registry of the ICC, to implement these general guidelines adopted by the Trial Chamber in future reparations programmes.

5.5.4 Reparations proceedings

As stated before, orders for reparations can only be made once a Trial Chamber has entered a conviction. To date, reparations proceedings have only started in the *Lubanga case*. Although in the *Lubanga case* the Trial Chamber continued hearing the reparations proceedings upon entering a conviction, some have also referred to the possibility of having a “single judge” assigned for this task.²⁵⁹ However, under Article 39(2) of the Rome Statute, three judges should carry out the functions of the Trial Chamber.²⁶⁰ The Trial Chamber in the *Lubanga case* nonetheless determined that other judges could replace the three judges of the original Trial Chamber, particularly since their mandate as judges came to an end.²⁶¹ This and other matters are currently pending before the Appeals Chamber.

Article 76 of the Rome Statute provides that the Trial Chamber can hold a separate reparations hearing if it decides to hear sentencing separately. To the contrary, if a Trial Chamber decides on conviction and sentencing in one hearing, one could also interpret that reparations would also be heard in that same hearing. In the ICC's first trial, the judges decided that they would hold a sentencing hearing separately.²⁶² However, the Trial Chamber admitted that evidence relating to reparations could be presented during the trial pursuant to Regulation 56 of the RoC.²⁶³ Nonetheless, in future trials it could be logical and favourable to the expeditiousness of trials if a Trial Chamber would hear evidence for all three aspects in one “hearing”: a) innocence or guilt; b) sentencing; and c) reparations. Consequently, the Trial Chamber could issue one single decision on these three aspects, pursuant to Articles 74, 75

258 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, paras 185-186.

259 Victims’ Rights Working Group, *A victims’ perspective: Composition of the Chambers for reparation proceedings at the ICC* (April 2011).

260 Redress, *Justice for Victims: The ICC’s Reparations Mandate* (May 2011) 48.

261 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, paras 260-261.

262 *Lubanga case* Transcript of hearing (25 November 2008) ICC-01/04-01/06-T-99-ENG 39.

263 *Lubanga case*, ICC-01/04-01/06-1119, paras 119-122. See also *Bemba case*, ICC 01/05 01/08-807-Corr, para. 28.

and 76 of the Rome Statute.²⁶⁴ This in fact is foreseeable, as Regulation 56 of the RoC provides that the Trial Chamber may decide to hear evidence on reparations during the main trial on the innocence or guilt of the accused.

The current ICC system foresees only individual applications for reparations.²⁶⁵ However, it has been recommended that applicants be granted the possibility to collectively request reparations.²⁶⁶ In fact this is only logical because Rule 97 of the RPE foresees the possibility that the ICC may award reparations on an individualised or collective basis. Therefore, it would be recommendable for the ICC to develop a mechanism to request and receive collective reparations. Another foreseeable method would be to have no application forms at all, for example if a community-based approach is adopted. This in fact is what the TFV suggested for reparations in the *Lubanga case*, so that the communities affected by the armed conflict receive benefits and therefore reparations processes do not ignite further stigmatisation or rivalries.²⁶⁷ This approach was endorsed by the Trial Chamber, although, as noted above, this procedure has been suspended pending the Appeals Chamber decision on the matter.²⁶⁸

Article 75 of the Rome Statute foresees two manners in which the ICC could order reparations. Firstly, the ICC could make an order directly against a convicted person; that is a convicted person with assets or properties that could be used for reparations. However, in cases in which the accused person is indigent or his or her assets have been depleted by costly and long trials, such orders could become implausible. These reparation orders also require that reparations are paid or given directly to the victim by the Chamber (either individually or collectively identified) or “in respect of victims”, for example to relatives or successors.²⁶⁹ In fact, in the *Lubanga case*, the TFV suggested that when there are limited assets, the reparations process should not become

264 See for example Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 46.

265 Victims can request reparations by way of a written application. Although there is a standard application form that was created pursuant to Regulation 88 of the RoC, its use is not compulsory. The above, according to Rule 94 of the RPE, triggers the “procedure upon request”. Likewise, pursuant to Rule 95 of the RPE the Chamber could initiate a “procedure on the motion of the ICC”, in which the Registrar is instructed to provide notification of the reparations proceedings to interested victims, persons and states so they submit a written application pursuant to Rule 94 of the RPE. In regards to this duty to notify victims, the outreach carried out by the Registry, as analysed in the first section of this chapter, is essential because victims will not be in a position to apply for reparations unless they are informed of this possibility.

266 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 38.

267 *Lubanga case* ‘Observations on Reparations in Response to the Scheduling Order of 14 March 2012’ (25 April 2012) ICC-01/04-01/06-2872 para. 103

268 *Lubanga case* ‘Decision establishing the principles and procedures to be applied to reparations’ (7 August 2012) ICC-01/04-01/06-2904, para. 274.

269 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 16.

more costly than the actual award to be granted to victims.²⁷⁰ Thus, reparations of this nature should only be ordered where there are sufficient funds available, proportional to the cost that the reparations process would entail.

A second option is for the ICC to order that the award of reparations be made "through the Trust Fund". In this case the Chamber could order that money and other property collected through fines and forfeitures against the convicted person be transferred to the TFV so that it could then give it to the victims accordingly.²⁷¹ However, it is to be noted that the TFV is an independent entity of the ICC and there is no direct connection between the TFV and the organs of the ICC, and no provision in the Rome Statute empowers the ICC to manage the TFV.²⁷²

Rule 98(2) of the RPE foresees that reparations be made through the TFV "where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim". As stated by the TFV, this mandate of the TFV allows it to transform court-ordered reparations into credible and tangible forms of redress for victims of crimes adjudicated by the ICC. The TFV thus acts as a financial administrator, managing the resources collected through fines or forfeiture or awards for reparations.²⁷³ In accordance with Regulation 43 of the RTFV, the Board of Directors may determine the use of resources transferred to the TFV in accordance with an order of the ICC. Pursuant to Regulation 46 of the RTFV, resources collected through awards for reparations may only benefit victims defined under Rule 85 of the RPE, and, where natural persons are concerned, their families, directly or indirectly affected by the crimes committed by the convicted person. Pursuant to the RTFV, orders made through the TFV can be individual, collective or in relation to an organisation.²⁷⁴ In accordance with the RTFV, when the ICC orders that reparations be made through the TFV, the Secretariat will prepare a draft implementation plan, to be approved by the Board of Directors of the TFV. The TFV will then progressively submit to the relevant Chamber the draft plan and any progress made in its implementation.²⁷⁵ It is important to note that

270 *Lubanga case* 'Public Redacted Version of the ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations' (23 March 2012) ICC-01/04-01/06-2803-Red, paras 270 and 363.

271 See also Rule 218 of the RPE that foresees that reparations of a financial nature be deposited with the TFV.

272 T Ingadottir, 'The Trust Fund for Victims (Article 79 of the Rome Statute)' in: T Ingadottir (ed), *The International Criminal Court: Recommendations on Policy and Practice. Financing, Victims, Judges and Immunities* (Transnational Publishers 2003) 114.

273 TFV, 'Trust Fund for Victims welcomes first ICC reparations decision, ready to engage' <<http://trustfundforvictims.org/news/reparations-mandate-trust-fund-victims>> accessed 8 August 2013.

274 RTFV, regulations 59-75.

275 RTFV, regulations 54-58.

the RTFV also foresees consultation with victims, experts and organisations, in order to decide on the implementation of an award for reparations.²⁷⁶

However, when the convicted person is indigent, it appears that the Trial Chamber could only make a decision establishing the harms suffered by victims and make recommendations to the TFV. The TFV could then grant them reparations with its own resources (TFV's second mandate that will be analysed below). Since the TFV is an autonomous entity with its own budget, it would seem implausible for a Chamber to "order" the TFV to implement a reparations order if there are no resources coming from the convicted person.²⁷⁷ Another possibility for cases with an indigent convicted person would be for the Chamber to order non-financial reparations, such as symbolic reparations (*i.e.* the IACtHR has established that translation of the main parts of the judgment into the local language of the victims is a form of reparation).²⁷⁸ However, this issue is currently pending before the Appeals Chamber, which hopefully will clarify the position of the TFV vis-à-vis other organs of the ICC, and particularly its financial autonomy.

As noted above, the TFV also has a separate mandate specified in Rule 98(5) of the RPE where "other resources of the TFV may be used for the benefits of victims". The TFV currently has 34 projects under this mandate, giving assistance to victims by means of physical rehabilitation, psychological rehabilitation and material support.²⁷⁹ These projects, however, are independent from any judicial determination on the innocence or guilt of an individual.

Although the implementation reparations are still to be seen at the ICC, it is important that these take into consideration the child-oriented principles adopted by the Trial Chamber in the *Lubanga case*.

In addition to the adopted principles, other international instruments, such as the ones mentioned by Trial Chamber I in their decision, could also be of guidance for the implementation of reparations programmes. For example, the UN Model Law provides specific recommendations for restorative justice programmes, which could be applicable to ICC reparations proceedings.²⁸⁰

276 RTFV, regulations 69-71.

277 T Ingadottir, 'The Trust Fund for Victims (Article 79 of the Rome Statute)' in: T Ingadottir (ed), *The International Criminal Court: Recommendations on Policy and Practice. Financing, Victims, Judges and Immunities* (Transnational Publishers 2003) 114.

278 *Plan de Sánchez case*, Reparations and Costs, Judgment of November 19, 2004 Series C No116, 68.

279 TFV, 'The two roles of the TFV: Reparations and General Assistance' <<http://trustfundforvictims.org/two-roles-tfv>> accessed 8 August 2013.

280 ICC reparations proceedings could have the following characteristics: a) be a flexible response to circumstances of the crime; b) be a response to the crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through healing of victims, offenders and communities; c) be an approach that can be used in conjunction with traditional justice processes and sanctions; d) be an approach that incorporates problem-solving and addresses the underlying causes of conflict; e) be an approach that addresses the damages and needs of victims; and f) be a response that

Likewise, as stated by Trial Chamber I in its decision, there is a need to implement gender-specificity in reparations, as girls may have particular needs or face gender-specific obstacles to access reparations programmes.

Moreover, reparations also need to take into consideration the time elapsed from the commission of the crimes to the implementation of reparations. Likewise, it should be considered that child victims could now be young adults, so reparations foreseen for children (access to formal education) may be unviable or futile. In this regard, the appeals procedure could be simplified so that appeals on reparations are resolved expeditiously.²⁸¹

In summary, reparations for child victims must empower and build the capacities of children, but also of families and communities, to address the root causes of the conflict. Reparations should thus heal and not cause harm, either to the victim or his or her community. Hence, a community-based approach as proposed by the TFV and adopted by Trial Chamber I in the *Lubanga case* is welcomed.²⁸²

5.5 CONCLUSIONS

With regard to the participation, protection and reparations to child victims and witnesses before the ICC, the CRC and the UN Guidelines, among other international instruments, should complement the ICC provisions discussed in this Chapter, as they could offer guidance for their interpretation and application. The ICC could in fact adopt a set of guidelines so that professionals (including judges, counsel, VWU staff, and investigators) protect children interacting with the ICC and thus avoid their re-victimisation pursuant to Article 68(1) of the Rome Statute. The UN Model Law (which is based on the UN Guidelines) could be a good basis (where applicable to the ICC) to create a child-friendly legal framework for international criminal proceedings.²⁸³ However, these guidelines should be adapted to the reality and legal framework of the ICC, and would eventually have to be tailored to the particularities of a given case before the ICC.

recognises the role of the community as of the primary forum for preventing and responding to crime and social disorder. See: UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), commentary to Article 30.

281 The appeal on Trial Chamber I's decision on reparations is still pending one year after it was rendered.

282 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 205. See also Paris Principles, principles 7.31 and 7.32

283 UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009). The author proposes a set of guidelines based on the Model Law in the last chapter of this research.

Training is also essential, particularly because staff members involved with child victims and witnesses may not have the adequate specialisation in children and their rights to fulfil the ICC's mandate pursuant to Rule 86 of the RPE. Thus, training in relevant international instruments and standards, in the dynamics and nature of violence against children, in investigation of crimes involving children, and in adult-child communication skills, among many other areas, should be given to investigators, lawyers, judges, and any staff member or ICC official dealing with child victims and witnesses.²⁸⁴

Children's interaction with the ICC should never become detrimental to their psychological and physical well-being or cause re-victimisation. If a child testifies as a witness, participates as a victim or receives reparations, and pursuant to Article 21(3) of the Statute, the ICC must always put the child's best interests as a priority, regardless of any prosecutorial strategy or overall mission of the ICC. Children should never be expected to adapt to judicial proceedings. The ICC must adapt its proceedings, interpreting and applying the law pursuant to internationally recognised children's rights. Although the case law and practice analysed in this research has shown that a children rights perspective sometimes can be found in ICC proceedings, this needs to be further developed in order to fully and comprehensively include children's rights as described in the CRC within the ICC proceedings in which children participate as victims, testify as witnesses or benefit from reparations. As noted throughout this research, this is compulsory pursuant to Articles 21(3) and 68(1) of the Rome Statute, and Rule 86 of the RPE. The following chapter offers a number of recommendations in order to further adapt ICC proceedings to children's rights standards as well as a model of guidelines to be adopted by the ICC.

284 The UN Model Law proposes a multidisciplinary training intended for all professionals combined with a more specific training for each profession. See: UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), 39. Also the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice recommended a multi-disciplinary approach, in which professionals working with child witnesses and victims (including lawyers, psychologists, judges, investigators, etc.) work together to understand the child and assess his or her legal, psychological, social, emotional, physical and cognitive situation. See: Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).