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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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6 | Conclusions and recommendations

6.1 INTRODUCTION

The Rome Statute is undoubtedly a landmark legal instrument as regards the participation of victims in international criminal proceedings and their right to receive reparations.¹ The Rome Statute is also pioneering in respect of gender-perspective and children's rights.² Provisions such as Article 68(3) of the Rome Statute, which opens the possibility for victims to participate in proceedings, and Rule 86 of the RPE, which contains a general principle stating that the ICC shall take into account the needs, among others, of child victims and witnesses,³ were unprecedented before the adoption of the Rome Statute in 1998. In that regard, the Rome Statute and in general the entire ICC legal framework is more inclusive than any other international tribunal. Thus, the ICC legal framework is comprehensive and consistent with the CRC and internationally recognised children's rights.

The main challenge for the ICC is to interpret and apply this comprehensive legal framework in its various country situations and in circumstances of

1 Article 68(3) of the Rome Statute enshrines the right to participation and Article 75 of the Rome Statute provides for victims' reparations.

2 Articles 6(b) and (e), 7(g), and 8(2)(b)(ix)(xxii)(xxvi) and 2(e)(iv)(vi)(vii) include crimes particularly affecting children. Article 21(3) includes the principle of non-discrimination and the compulsory application of internationally recognised human rights. Articles 36(8)(b), 42(9), 43(6) and 44(2) provide that ICC judges, the Office of the Prosecutor, Registry and staff in general must have specialists in violence against women and children, among other issues. Articles 54(1)(b) and 68(1) and (2) provide that the personal circumstances of victims and witnesses, including age and gender, among other factors, should be considered during the investigation and protective measures shall be taken in order to protect these victims and witnesses. Rules 16-19 of the RPE provide for the functions of the Registry and particularly the VWU, vis-à-vis victims and witnesses, particularly the needs of children and other vulnerable individuals. Rule 86 of the RPE contains the general principle that in making any direction or order, the Court shall take into consideration the needs of victims and witnesses, among them children and victims of sexual or gender violence and persons with disabilities. Rule 87 of the RPE enumerates protective measures available to protect victims and witnesses and Rule 88 refers to special measures for victims and witnesses, including children. Rule 112(4) of the RPE also foresees the application of measures to avoid traumatising of witnesses, including children, persons with disabilities and victims of sexual or gender violence. Rules 63(4) and 70-72 of the RPE contain the principles of evidence in cases of sexual violence.

3 UN Guidelines, para. 9(a) defines "child victims and witnesses".

armed conflict and massive human rights violations, as is the case of most (if not all) crimes within the jurisdiction of the ICC. This application and interpretation may result in discrimination of children (*de facto*) in spite of the ICC's legal framework, which although perhaps legally faultless, may be applied or implemented in the field and vis-à-vis child victims and witnesses in a controversial or undesirable manner (*i.e.* the *Lubanga case* and the Trial Chamber's conclusions regarding the use of intermediaries and child witnesses referred to above).⁴

The following conclusions and recommendations are a modest proposal that in the view of the author may improve the interaction of the ICC with child victims and witnesses so that their involvement is empowering but at the same time protective of their best interests, overall well-being and security, in accordance with the aforesaid ICC legal framework but also with internationally recognised children's rights. The following recommendations are based on existing international children's rights instruments, namely the CRC, but also other international instruments analysed in Chapter 3 of this research as well as the UN Guidelines referred to in Chapter 5.

It is imperative to understand that the Rome Statute was adopted in 1998 and therefore was in accordance with internationally recognised human rights at the time of its adoption. However, law, as any other social science, is in constant change and development, and children's rights and what we identify as "internationally recognised human rights" is progressively changing and developing. These final conclusions and recommendations endeavour to interpret the Rome Statute and the RPE with internationally recognised children's rights law adopted to date. Moreover, where applicable and in accordance with the Rome Statute, this Chapter will use as guidance soft law instruments in children's rights that have been adopted in recent years and that could enhance and progress the ICC's practice vis-à-vis child victims and witnesses.

6.2 CREATING A CULTURE OF CHILDREN'S RIGHTS IN INTERNATIONAL JUSTICE

In order to take into consideration the needs of children, the ICC should create a culture of children's rights throughout the entirety of its judicial proceedings, from the initial stages of an investigation to the final phase of reparations orders and their implementation.⁵ After all, Rule 86 of the RPE obliges the ICC

4 Article 21(3) of the Rome Statute and Article 2 of the CRC. See also UN Guidelines, paras 8(b), 15-18; Paris Principles, principle 3.2.

5 UN Guidelines, para. 9(c) defines the "justice process" as encompassing the detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice. See also UN Guidelines, para. 29.

to take the needs of children into consideration in any action or decision. It is thus fundamental to mainstream a child-sensitive perspective throughout ICC proceedings (analysed in Chapter 5 above), involving all actors engaged with the ICC, including judges, prosecutors, counsel, staff and also intermediaries and others working in the field.⁶ However, a court-wide strategy that incorporates children's rights is not an ICC-only endeavour. The ICC exists and works in close relationship with the ASP, as well as with local and international NGOs, inter-governmental organisations and grass-roots groups. All these actors, along with the ICC, are required to create an international judicial system that is inclusive and safe for child victims and witnesses and properly addresses their needs.⁷

Moreover, as the international community and national and local authorities could look at the ICC practice as a "good example" and an institution that represents the "highest standards" of human rights, the ICC should adhere to its obligation pursuant to Article 21(3), and thus apply and interpret the law pursuant to internationally recognised human rights. Consequently, ICC standards should as a minimum act pursuant to internationally recognised children's rights.

Recommendation 1: The ICC should sign agreements of cooperation and support with UN specialised agencies (i.e. UNICEF and UN Women) as well as with international and national inter-governmental and non-governmental organisations specialised in children's rights.

The ICC does not operate alone and should benefit from the expertise and knowledge acquired by other actors after decades of experience with children's rights or in the field. An institutional agreement with children's rights organisations and programmes, beyond informal case-by-case cooperation, could guarantee a long-lasting relationship between the ICC and such institutions. These organisations could give their expert advice to the ICC on children's rights issues and could even provide the ICC with much needed resources (including human resources specialised in certain areas of children's rights). Local NGOs or other organisations could also assist the ICC in its activities (i.e. by implementing an ICC strategy on child-friendly outreach). The UN Special Representative for Children and Armed Conflict or even the CRC Committee could in due course monitor the work of these local and international actors or cooperate with international and national tribunals and other justice mechanisms, which should complement the ICC's mandate. Either one

6 UN Guidelines, para. 9(d) defines "child-sensitive" as an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

7 Paris Principles, principle 3.26.

of these two monitoring entities could eventually adopt general recommendations in this regard.⁸

6.3 RECOGNISING THAT CHILDREN'S RIGHTS ARE NOT OPTIONAL

Pursuant to the principle of non-discrimination enshrined in Article 21(3) of the Rome Statute, any interpretation or application of the law which has the effect or purpose of impairing or nullifying recognition, enjoyment or exercise of any human right of children is prohibited. In order to avoid discrimination against child victims and witness participating in the ICC's judicial process, a children's rights perspective is necessary and consequently, the application of the CRC is not discretionary or optional. To the contrary, it is compulsory pursuant to Article 21(3) of the Rome Statute, which provides that the application and interpretation of the law must be performed in accordance with internationally recognised human rights and abiding to the principle of non-discrimination. As a result, the fundamental principles of the CRC should be guiding principles of the ICC when dealing with child victims and witnesses of international crimes.⁹

Recommendation 2: Although the ICC is not a "State Party" to the CRC it should apply these human rights standards, where relevant, in order to fulfil its mandate pursuant to Article 21(3) of the Rome Statute and in light of Rule 86 of the RPE.

Whenever the applicable law of the ICC is interpreted and applied, a children's rights approach should take the innate bias and adult-centred nature of most legal instruments, including the Rome Statute, the RPE and other ICC provisions, into consideration.

For every legal provision, it is necessary to ask: how does this provision particularly affect children? How could this provision result in the non-discrimination/inclusion of children or certain groups of children (*i.e.* girls)?¹⁰ This simple exercise enables the practitioner (be it a judge, prosecutor or lawyer) to disregard the discriminatory application or interpretation of a law that, although formally non-discriminatory, could result in unfairness and exclusion when applied under certain circumstances (*i.e.* on-going armed conflict) and regarding certain groups (*i.e.* children).¹¹

8 See for example: 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).

9 Particularly Article 2, 3, 6 and 12 of the CRC. See also the UN Guidelines, para. 8(d).

10 UN Guidelines, para 8(b).

11 Article 21(3) of the Rome Statute and Article 2 of the CRC. UN Guidelines, paras 15-17.

A children's rights perspective is not an exclusive topic of cases dealing with crimes in which children are a material element of the crime (*i.e.* child recruitment). Most crimes (if not all) within the jurisdiction of the ICC will ultimately have children as their victims. It is practically impossible to think of a crime before the ICC that would not have any children as its victims, either directly or indirectly. Consequently, a children rights perspective needs to be incorporated in all ICC proceedings regardless of the nature of the crime being investigated or prosecuted. For example, charges brought against accused persons should undertake to include within the "facts and circumstances" the crimes committed against children in a given situation. Moreover, when reparations are granted to victims, children should be included among the beneficiaries. Thus, from the initial steps of the OTP's investigation to the final stages of reparations proceedings, a child's rights perspective could guarantee the fight for impunity for crimes committed against children pursuant to the Preamble of the Rome Statute.

*Recommendation 3: Pursuant to Article 3 of the CRC, the best interests of the child should be taken into consideration in all actions concerning child witnesses or victims or any other child that could be affected by the work of the ICC.*¹²

Although a standard procedure could be adopted by the ICC when dealing with child victims and witnesses, the best interests of a child concerned should be customised on a case-by-case basis, taking into consideration, *inter alia*, the child's views, his or her cultural and socio-economic situation, and any rights he or she may have pursuant to the Rome Statute and the CRC. Moreover, the concept and application of best interests of the child in a given case should not be unilaterally decided by the ICC, but should be decided upon in consultation with the child.

6.4 ADAPTING ICC PROCEEDINGS TO ARTICLE 12 OF THE CRC

Throughout this research, ICC provisions, its case law and practice have been analysed from a children's rights perspective, taking into consideration the CRC as point of departure. As a result, several recommendations are hereinafter offered as a means to make ICC proceedings more child-friendly; that is a judicial system inclusive of children's rights and one that guarantees participation of children in a safe, respectful and empowering manner and that takes serious consideration of their views in accordance with their age and maturity.¹³

12 UN Guidelines, para. 8(c). See also Paris Principles, principle 3.4. as regards the "best interests" of former child soldiers.

13 Article 12 of the CRC and UN Guidelines, paras. 8(d) and 21.

Recommendation 4: Pursuant to Article 12 of the CRC, the ICC should seek the views of child witnesses and victims, in accordance with their age and maturity and should duly inform the child about the judicial process.

A child's ability to participate as a victim or testify as a witness should be presumed and the burden of proof should not be imposed on the child to demonstrate his or her capacity. Judges and counsel in ICC proceedings should treat the child witness or victim with respect and dignity, protecting his/her well-being, but also avoiding paternalistic or patronising conducts that may demean the child's capacity, based on his/her age and maturity.¹⁴

An on-going process of information-sharing and mutual dialogue between the child concerned and the ICC is necessary to guarantee that the active participation of children in ICC proceedings meets their needs (particularly their safety, well-being and privacy) pursuant to Rule 86 of the RPE. Children that participate as victims or witnesses before the ICC must be duly prepared and be fully informed, in such a way and in a language they understand, about their rights and obligations, procedures before the ICC, as well as any consequences or effects that their interaction with the ICC may have upon their situation and that of their family.¹⁵ The right to information must be guaranteed at the outset of the child's interaction with the ICC, for example when a child is first approached by an ICC investigator or offered to fill-in a victim's application form. If applicable, the child, and his or her parents or caregivers, must be duly informed about any unfounded expectations or misconceptions about the ICC or the outcome of ICC proceedings.¹⁶

Children who interact with the ICC should receive feedback about the outcome of ICC proceedings or any decision affecting them.¹⁷ A child who has been approached by ICC investigators must be given proper information and feedback about any decision affecting them (for example a prosecutorial decision confirming a child as a trial witness or a decision withdrawing a child from the trial witnesses list). The same need for feedback is required when ICC staff or intermediaries approach a child to fill-in a victim's application form. The child is entitled to receive proper feedback regarding his or her application and any judicial or administrative decision affecting them (*i.e.* appointment of a common legal representative).

Recommendation 5: Child victims and witnesses should receive adequate support from specialised staff, trained in children's rights, children with trauma and violence against children, including sexual violence.

14 Article 68(1) of the Rome Statute and UN Guidelines, para. 8(a) and Part V.

15 Article 13 of the CRC.

16 Article 5 of the CRC.

17 UN Guidelines, para. 30(b).

Children's participation before the ICC should not be a re-traumatising event,¹⁸ and the ICC should support child victims and witnesses throughout ICC proceedings.¹⁹ When the ICC first approaches a child, whether directly or through an intermediary, children should be supported so that they are not re-traumatised or taken advantage of by adults with other interests (*i.e.* be it an investigator trying to produce evidence or an intermediary trying to benefit from the child).²⁰ From the outset, a neutral support person from the VWU should at all times supervise and monitor interaction of the ICC with children, so that their rights and well-being are safeguarded and become a priority of the ICC's activity, pursuant to Article 68(1) of the Rome Statute and Rule 86 of the RPE.²¹

The ICC must put in place an accountability mechanism so that children interacting with the ICC, either directly or through intermediaries, can complain or obtain remedies when their rights are disregarded or violated in ICC proceedings.²² Investigations pursuant to Article 70 of the Rome Statute should be carried out whenever there is information that crimes against the administration could have been committed in which child victims or witnesses were involved.

6.5 PRESERVING THE EVIDENCE OF CHILD WITNESSES

The results in the *Lubanga* trial, in which child witnesses were found unreliable and in the end lost their victims status, prove that urgent measures must be taken to preserve the evidence of child witnesses in ICC proceedings. If these child witnesses would have been properly screened in the initial stages of the investigations, perhaps some of them would have been found unreliable early on in the investigation, and not at the end of a trial, and more than 5 years after their initial interviews with investigators.²³

Alternative mechanisms other than live testimony in court should also be explored by the ICC in order to preserve the child's testimony from the passing of time. Pursuant to Article 56 of the Rome Statute or Rule 68 of the RPE, taking adequate safeguards to secure the rights of the defence, statements of child witnesses could be taken soon after the commission of the crimes, to be presented later in trial. Otherwise, the evidence of child witnesses (even the most reliable and trustworthy) may not endure the prolonged judicial proceedings

18 UN Guidelines, para. 42; Paris Principles, principles 3.18 – 3.19 and 7.75.

19 UN Guidelines, paras 22-25 and 30; Paris Principles, principle 8.

20 Article 68(1) of the Rome Statute and Rules 86-88 of the RPE. See also Article 19 of the CRC.

21 Rule 17 of the RPE; UN Guidelines, para. 24.

22 Paris Principles, principle 3.17.

23 Paris Principles, principle 7.28 provides useful guidelines in relation to interviews of former child soldiers.

before the ICC.²⁴ If one considers the developmental changes (both physical and mental) that a child undergoes while ICC proceedings are on-going, it would in reality be astonishing to “preserve” the evidence of these child witnesses unless measures are taken to actually safeguard their testimonies and encapsulate them from the passing of time, the loss of memory and changes in the mind of a child or an adolescent, who very often will move on to adult life while ICC proceedings are pending. However, as noted above, such measures should not be prejudicial to the rights of the defence to challenge evidence brought against the suspect or accused person.

Recommendation 6: Safeguards must be adopted to preserve the evidence given by children, protecting it from the passing of time, growth and development, as well as from intermediaries or third persons (including parents) with different interests, all of which could eventually affect its reliability.

As noted above, evidence of children can be preserved by taking written statements *in lieu* of in-court testimony or by adopting in-court measures to facilitate an honest and uninhibited testimony.

Child victims or witnesses appearing before the ICC may not necessarily understand the difference between right and wrong, telling the truth or lying. They may also not understand the meaning of crimes against the administration of justice, such as giving false testimony. Child witnesses appearing before the ICC must fully comprehend, in a language and manner they understand, the rights but also the responsibilities of witnesses testifying before the ICC, including the importance of telling the truth, the significance of the oath and the crime of false testimony.

However, even if children do understand the meaning of truth, they may also have fears or trauma (*i.e.* fears of further stigmatisation or retaliation) that may make it difficult, or prevent them from being sincere and truthful when the ICC approaches them. A child victim that is first approached by a stranger and is asked to fill-in an application form may understandably lie about his exact identity or his family, particularly since that child may have personally already experienced a crime in which another adult(s) caused him or her harm. Why would that child trust any adult (even if this is an ICC staff member)? Although child victims and witnesses should not be “coached” in preparation of their statement or testimony before the ICC or in filling-in a victim’s application form, they should adequately be informed and screened to ensure that the information they give to the ICC is trustworthy and eventually reliable for criminal proceedings.²⁵ An investigator or ICC staff member collecting application forms or interviewing a potential witness should first and foremost gain the trust of the child. Only then can it be expected that the child concerned

24 UN Guidelines, para. 18.

25 UN Guidelines, para. 18.

will give a sincere and trustworthy testimony or account. Early actions from the prosecution could avoid multiple subsequent contacts and interrogations of the child witness that could eventually result in conflicting and contradictory statements that ultimately undermine the child witness' credibility.²⁶ The prosecution should thus take measures and judges should be keen to authorise these measures in order to preserve the evidence of child witnesses, while at the same time safeguarding the rights of the defence (*i.e.* admission of a prior written statement instead of oral testimony, in-court measures to facilitate testimony of child witnesses, expeditiousness of proceedings when related to child witnesses).²⁷

Recommendation 7: The ICC should adopt measures by which children can participate in court proceedings in a safe and appropriate manner and in accordance with the rights of the accused and the expeditiousness of proceedings.

Participation of children as a prosecution witness, although a possibility, is not the only way in which children could interact with the ICC and may sometimes be detrimental, as proven by the *Lubanga case*, in which children's interaction proved to be prejudicial for the child and ultimately for the entire case.²⁸ Thus, other alternatives could be foreseen in which children are not witnesses under oath, but still communicate their views and concerns to the judges pursuant to Article 68(1) of the Rome Statute. For example, the Chamber could hold *in situ* visits to the places where the child victims or witnesses reside, in order to know the context in which crimes occurred or where the children concerned are living. The Chamber or an official from the Chamber could also take testimonies from child witnesses in their own country, albeit with safeguards to guarantee the rights of the defence. Child victims could also address the judges by way of unsworn statements, simply to express their views and concerns, and without having to be subject to cross-examination.²⁹

Recommendation 8: The ICC should take measures to ensure that child witnesses give testimony in a safe and appropriate manner.

There will be instances when the *viva voce* testimony of a child witness is necessary. In such instances, the competent Chamber could decide to appoint an expert on judicial proceedings dealing with children, which would enable

26 UN Guidelines, paras 12-14.

27 UN Guidelines, paras 30-31.

28 As noted above, the Trial Chamber in the *Lubanga case* found that all but one former child soldier witness were unreliable.

29 Article 68(3) of the Rome Statute and Article 12 of the CRC. See also UN Guidelines, paras. 8(d) and 21.

the Chamber to take informed judicial decisions to guarantee the child witnesses' safety and well-being pursuant to Article 68(1) of the Rome Statute.³⁰

Prior to any intervention in which the testimony of a child will be taken, he or she should be properly informed, in a way and language that he or she understands, about the proceedings that will take place. Children should also be adequately informed about the importance of telling the truth and the significance of the oath, if this is taken. Moreover, whenever children are examined as witnesses in ICC proceedings, they should be approached in a child-friendly, amenable environment that must be adapted to children's needs. Whether in a courtroom or in any room via video link or via a recorded or written statement, measures must be taken so that the location where the child testifies is hospitable (clothing of lawyers and judges, sight screens in case of presence of the accused, etc.).

Court sessions in which children appear should avoid any disruptions or distractions, unless these are due to the needs of the child (*i.e.* requested break or assistance). Thus, procedures such as the Rule 98 deposition exercise made in the *Lubanga case*, could be used to take the testimony of child witnesses without interruptions due to objections from the parties. Examination or cross-examination (if necessary) should be done in a conversation-like manner that favours open communication between the child witness and those listening to his or her testimony. Multiple interviews or examination of a child witness should be avoided and efforts must be made so that evidence from child witnesses is uninterrupted and is collected promptly, avoiding long periods of time between interviews or examinations or changes in the person(s) conducting such interviews or examinations.³¹

In principle, cross-examination of child witnesses by trial lawyers should be avoided and child witnesses should give testimony by way of a written statement or a previously recorded statement. In cases where there are manifest contradictions, the Court could examine the child witness. However, it would be more appropriate for judges, and not counsel, to pose any questions to the child witness. This would also avoid multiple interruptions of testimony due to parties' objections. As noted above, this examination could take place *in situ*, in an environment that is close and familiar to the child witness, or via video-link. At all times child witnesses should be able to give their testimony in their own words and not in the strenuous manner in which cross-examination is often pursued by counsel.

30 UN Guidelines, para. 14.

31 UN Guidelines, paras 30-31.

Recommendation 9: Adequate support should be offered to children who participate in person in ICC proceedings either as victims or witnesses.

The judicial proceedings in which child witnesses testify or participate in person, should preferably be confidential in nature. Whenever it is possible and not contrary to the rights of the accused person, children participating as victims before the ICC should remain anonymous. If disclosure of the child's identity to the accused is necessary, measures should be taken to avoid eye contact or direct confrontation between the accused person and the child.

Whenever a child victim or witness participates or testifies before the ICC, support staff, such as psychologists, should be available to offer support to the child throughout his or her interaction with the ICC. The witness preparation and familiarisation process should include an informal meeting between the child witness, and counsel, but could also include judges, in order to build confidence and create a friendly environment of trust between the child witness and those who will hear his or her testimony.³²

6.6 PROTECTING CHILDREN AGAINST EXPLOITATION

Many child victims and witnesses of crimes within the jurisdiction of the ICC will be refugees, displaced, separated, unaccompanied or orphaned.³³ This situation makes them extremely vulnerable to exploitation and manipulation, including crimes against the administration of justice.³⁴

Recommendation 10: The ICC must take measures to protect child victims and witnesses from exploitation by third persons that may want to take advantage of ICC proceedings for their own benefit.

The use of intermediaries by the ICC, necessary and essential in many circumstances, should nevertheless be closely monitored and controlled by ICC prosecutors, the Registry and ultimately the judiciary. The ICC should only collaborate with reliable and trustworthy intermediaries who are knowledgeable and have experience in children's rights. Although this statement appears self-evident, the *Lubanga* case proved that the ICC relied on untrustworthy intermediaries.

³² Rule 17 of the RPE; UN Guidelines, paras 22-25.

³³ Paris Principles, principle 5.

³⁴ Article 68(1) of the Rome Statute and Rules 86-88 of the RPE. See also Articles 19, 32 and 36 of the CRC. For crimes against the administration of justice, see Article 70 of the Rome Statute. See also Principles 10 and 12(b) of 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.

In instances when such specialised intermediaries are unavailable or inexistent, intermediaries (either individuals or organisations) working with the ICC in the field should be properly trained and informed on children's rights and the best practices to deal with child victims and witnesses.³⁵ At all times, the ICC should ensure that children interacting with the ICC are doing so voluntarily and free of any coercion and that they have been properly informed of their right to participate with the ICC (not their obligation) as well as any implications of their participation. The ICC should make sure that whenever this interaction with the ICC affects the child's well-being or the child is no longer interested, the ICC should respectfully withdraw the child from any dealings with the Court in a manner that is appropriate and non-traumatic and does not affect the privacy, interests and safety of the child and his or her family.³⁶

Although it is true that the ultimate goal of the ICC is to bring perpetrators of crimes to justice, it is also essential that the ICC does not cause harm to the victims it is intended to redress and protect, particularly if these are children. Therefore, close presence of specialised ICC staff in the field, working along with intermediaries but also supervising and monitoring the work they do in the field, is essential to guarantee active children's participation but also their well-being and safety pursuant to Article 68(1) of the Rome Statute.³⁷

6.7 INCLUDING THE PLIGHT OF CHILDREN IN ALL ICC CASES

All crimes within the jurisdiction of the Court, even if exclusively committed against adults, will directly or indirectly have children as victims. Violence against children is a weapon of war in many current armed conflicts. Likewise, children are often target of systematic or generalised attacks against civilians and genocide campaigns. In most cases brought before the ICC children will be among the civilian victims of genocide, crimes against humanity and war crimes. Consequently, this dire reality should be reflected in the prosecutorial strategy of the ICC.³⁸

Recommendation 11: The Prosecutor should endeavour, whenever there is evidence, to include in ICC investigations and trials charges for crimes committed exclusively against children and crimes committed against children in wider, more general attacks against civilians.

35 UN Guidelines, para. 42.

36 Rule 87 of the RPE; UN Guidelines, paras 26-28 and 32-34.

37 Article 68(1) of the Rome Statute and Articles 6 and 16 of the CRC. See also principle 12(b) of the UN Basic Principles.

38 Preamble of the Rome Statute, Article 19(2) of the CRC and principles 3(b) and 4 of the UN Basic Principles.

The Prosecutor should avoid having adult-centred charges that solely reflect the crimes committed against adults and harms suffered by the adult civilian population in a given case. The Prosecutor should endeavour, when there is sufficient evidence, to include a children's dimension in the charges brought by the Prosecutor against individuals, particularly in the "facts and circumstances" of a given case. Thus, the "facts and circumstances" of the charges, necessary to confirm the charges against a suspect and eventually to convict him/her in trial, should undertake to include crimes committed against children, bearing in mind gender particularities.³⁹

Accordingly, the Prosecutor of the ICC should make an effort to include in any investigation: a) crimes committed against children in which children are an element of the crime; and b) crimes committed against children in which children suffer disproportionate effects or are disproportionately victimised vis-à-vis other sectors of the population.

Recommendation 12: The Pre-Trial Chamber should oversee the Prosecutor's investigation in order to guarantee that the charges brought against individuals are comprehensive and inclusive.

The Pre-Trial Chamber has an important role to play as regards the manner and content of the charges the Prosecutor brings against an individual in a particular situation or case. For example, when the prosecution requests authorisation to initiate an investigation under Article 15 of the Rome Statute, the Pre-Trial Chamber could request that information regarding crimes committed against children and the effects that other crimes have on children be considered in the investigation to be authorised. The Pre-Trial Chamber could also instruct that the views of children are included in Article 15 representations made by victims.⁴⁰ Victims' organisations working with children's rights could also play an important role in providing the Pre-Trial Chamber with Article 15 representations, which incorporate the perspective of children. This judicial control is important so that crimes committed against children and the effects that international crimes have on children are adequately charged in pre-trial proceedings and ultimately prosecuted in trial proceedings and included in reparations orders.

6.8 REACHING OUT FOR CHILDREN

Recommendation 13: The ICC should organise outreach activities that target children in a given situation.

³⁹ Articles 23 and 30 of the CRC; UN Guidelines, paras 10-11.

⁴⁰ Article 15 of the Rome Statute and Article 12 of the CRC. See also the UN Guidelines, paras 8(d) and 21.

As already observed above, children should be informed, in a language and manner they understand, about their rights to participate and receive reparations before the ICC, but also about the risks and difficulties they may encounter as a result of their interaction with the ICC. Child victims and witnesses need to be informed about the possibilities but also limitations of ICC proceedings so that they do not have unreal expectations that would lead to frustration or even re-victimisation.⁴¹

Child victims and witnesses have the right to receive, throughout the entire proceedings, adequate feedback about judicial decisions that are relevant to them. The word “throughout” should encompass the initial stages of the investigation through to the final stages of reparations. Outreach is thus essential to communicate with children concerned who may not necessarily be reachable through ordinary means of judicial notification.

Outreach tools must be adapted to the education level, maturity and age of the child population. Children should not be expected to understand legal or adult-centred concepts. Outreach activities that target children need to take into account the means of communication and access to information that children have in a given situation (*i.e.* schools, parents, radio, and internet).

Finally, though the ICC should rely on the expertise and know-how of children’s rights agencies and organisations working in the field, it should not delegate all its outreach activities to third parties. It is essential for the ICC to have its own in-house specialists able to tailor outreach programmes to children in the different situations under the ICC’s scrutiny.

6.9 GUARANTEEING ACTIVE PARTICIPATION OF CHILD VICTIMS

In its first ten years, ICC case law is far from homogenous and sometimes Chambers have adopted different criteria that may send contradicting messages to victims and persons assisting them in their participation process.

Recommendation 14: The ICC case law should become consistent as regards children’s participation as victims in the proceedings in accordance with the CRC and other applicable international instruments.

In relation to child victims, ICC case law should determine once and for all whether child victims need parental consent to apply for participation. Additionally, Chambers should adopt uniform criteria in relation to the concept of legal guardian of children acting on their behalf and the need to prove the kinship between the child victim and the person acting on his or her behalf.

41 Articles 13 and 17 of the CRC. See also principles 11(c), 12(a) and 24 of the UN Basic Principles; UN Guidelines, paras 19-20.

Chambers should also adopt a uniform policy as regards the need for victims to submit individual application forms in order to participate in proceedings via a common legal representative. Whatever criteria is ultimately adopted (individual application forms or collective means of participation), the ICC should take into consideration that in ICC proceedings not only the accused person has the right to be tried without undue delay, but also victims, and particularly child victims, have the right to fair judicial proceedings.⁴²

Considering the rapid developmental changes in children and adolescents, application processes, trials and reparations mechanisms that extend too long in time may become inadequate or even moot. Victims' application processes should be expedited and become more effective so that an increased number of victims does not equate into overburdened parties and ICC organs, and ultimately ineffective participation of individual victims. Victims' participation however, should not be questioned, as it is an intrinsic part of the ICC's judicial system, enshrined in Article 68(3) of the Rome Statute. Victims' participations should be adapted in order to facilitate participation that is meaningful and at the same time conscious of the ICC's limited financial resources and the workload of defence teams. Particularly the use of individual application forms and consequently the case-by-case judicial analysis for each applicant should be revisited.

The recent case law in the Kenya Situation, in which individual applications are no longer necessary, may be a window of opportunity for victim's participation that is effective and not contrary to the rights of the accused and the expeditiousness of trial proceedings. However, if the approach of Trial Chamber V were to be followed, thus requiring application forms solely for victims wishing to participate in person in proceedings, a reform to the RPE and the RoC would be appropriate (particularly Rule 89 of the RPE and Regulation 86 of the RoC). The current case law, although unappealed, may go beyond what the drafters of the RPE and certainly the judges, who drafted the RoC, had foreseen as victims' participation at the ICC.

A collective approach of victims' participation, and ultimately reparations, is foreseeable in all future ICC proceedings, particularly due to the Court's limited resources and the difficult security situation faced by victims in the field. However, children must be included and not be discriminated within the wider "collective" approach. Their views and concerns should be given due consideration,⁴³ and, if necessary, measures of affirmative action should be taken to include children's views, and those of different groups of children (*i.e.* girls), within the analysis of any collective approach.⁴⁴

42 UN Guidelines, para. 30(c).

43 Article 21(3) of the Rome Statute and Article 2 of the CRC. See also Principles 12 and 25 of the UN Basic Principles and UN Guidelines, paras 8(b) and 15-17.

44 CEDAW, article 4.

Finally, if a collective approach is followed, common legal representatives should have demonstrated experience and capacity to deal with child victims-clients and they should be knowledgeable in children's rights. If they do not already have that expertise, counsel in the list of counsel of the ICC and any field staff assigned to the teams of legal representatives should be trained in children's rights issues.⁴⁵ The OPCV, which could be given a leading role in this new collective approach of victims' participation, should also have in-house experts in children's rights.

6.10 PROVIDING MEANINGFUL, ADEQUATE AND FAIR REPARATIONS FOR CHILD VICTIMS, THEIR FAMILIES AND COMMUNITIES

Recommendation 15: Reparations in general, and particularly collective reparations, should take into consideration the harms suffered by child victims as a result of crimes within the jurisdiction of the ICC.

The ICC should take into consideration the socio-economic impact that crimes within its jurisdiction have on children, their families and communities. Reparations for crimes committed against children must take into account the effects these crimes caused on their physical and psychological well-being, their education and family life.⁴⁶ Moreover, when crimes are committed against children, the harms suffered by family members, including parents and siblings, should be presumed. Likewise, when crimes are massively or systematically committed against children, the harms suffered by the community in general should also be taken into consideration.⁴⁷

The ICC will most likely be a forum for collective rather than individual reparations, given the generalized nature of the crimes and the fact that most victims will not be individually identified nor will they have access to the ICC to submit an individual application form to receive reparations. When implementing collective reparations for a community or group of victims in general, the ICC should take into consideration the particular needs of child victims and any priorities they may have vis-à-vis the adult population. If collective reparations concern child victims in particular, the ICC should take into account the needs and views of the different groups of children within a community pursuant to Rule 86 of the RPE (*i.e.* different ethnic groups, boys and girls, children with disabilities or any other condition that makes them a priority group (*i.e.* children with HIV or child-moms)).⁴⁸

⁴⁵ UN Guidelines, paras 22 and 42.

⁴⁶ Principle 15 of the UN Basic Principles.

⁴⁷ Paris Principles, principle 7.30.

⁴⁸ Article 21(3) Rome Statute, Rule 86 of the RPE and Articles 2 and 12 of the CRC. See also article 23 of the CRC in relation to children with disabilities.

6.11 INVOLVING STATES IN AN ICC CHILDREN'S RIGHTS STRATEGY

Recommendation 16: The ASP should elect individuals with expertise in children's rights and allocate funds in order to guarantee child victims and witnesses' rights.

The ASP should elect to key positions such as judges, the Prosecutor, deputy prosecutors, and the Board of Directors of the TFV, persons with expertise in children's rights, particularly violence against children. Likewise, the ASP should monitor ICC organs' recruitment policies so that persons with the above expertise are appointed as staff members. Moreover, the ASP, who approves the ICC's annual budget, should allocate funds to the organs of the ICC so they can fulfil their mandate to include children's rights and gender perspective in their work. Budget limitations or cuts should not unduly reduce the possibility of child victims to participate and receive reparations. Likewise, budget limitations must under no circumstances affect the ICC's duty to protect the well being of child victims and witnesses.

6.12 CONCLUDING REMARKS

Child victims and witnesses in ICC proceedings have suffered immensely as they have directly or indirectly undergone the indescribable horrors of armed conflict and gross human rights violations. Judicial proceedings should redress these most vulnerable victims in a considerate manner, but also acknowledge the immense potential that children have in achieving peace and reconciliation, which should be one of the ultimate goals of international justice. This task is unquestionably difficult to achieve and sometimes the best-intended actions might result in undesirable results that ultimately cause harm to child victims, their families and communities. However, responsibilities should be assumed and after ten years of experience, the ICC should adopt a court-wide policy that protects child victims and witnesses pursuant to Article 68(1) of the Rome Statute, while at the same time enabling their active participation in judicial proceedings. This research is a modest contribution that hopefully will guide ICC staff and officials to achieve the aspiration to "bring justice to victims", and within them, girls and boys who, notwithstanding their young age, witnessed and survived the most serious crimes against humankind.

In the following pages a series of "guidelines" are proposed, which could be of use for all organs of the ICC to implement a children's rights perspective in ICC proceedings. However, these guidelines should be subject to the principle of legality and the rights of the accused person enshrined in the Rome Statute.

A similar comprehensive document could be adopted by an ICC judges' plenary or as an ASP resolution. Otherwise, the suggestions and proposals contained therein could be used as guidance when adopting ICC documents, such as the strategy on victims' participation or on intermediaries, in order to transversally include a children's rights perspective in the work of the ICC.

