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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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Summary

The International Criminal Court (ICC) is the world's first international permanent court with jurisdiction to judge individuals for crimes of genocide, crimes against humanity, war crimes and aggression, with innovative aspects, such as the participation of victims in judicial proceedings, as well as reparations to which victims of crimes within the ICC's jurisdiction are entitled. Thus, the Rome Statute goes beyond the purely retributive nature of judicial proceedings, and includes a restorative mandate, that encompasses the possibility for victims to express their views in international criminal trials as well as the possibility to receive reparations for the harms suffered. However, the advances made with the adoption of the Rome Statute need to be applied to concrete situations currently investigated by the ICC's Prosecutor and in particular cases against accused persons.

This thesis offers an analysis and recommendations for the ICC to fulfil its mandate, particularly vis-à-vis child victims and witnesses of crimes within the ICC's jurisdiction. It firstly analyses the Rome Statute and other applicable law of the ICC, which give the ICC not only a clear penal mandate, but also require that the ICC respects, as a minimum, the safety and well-being of victims and witnesses, particularly those who are most vulnerable, such as children.

However, during its first decade of existence the ICC has faced immense challenges when implementing these legal provisions in its initial cases. The first case before the ICC, the Prosecutor v. Thomas Lubanga Dyilo (*Lubanga case*), involves exclusively charges of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities. This case faced unimaginable difficulties, which could explain why it is still ongoing after more than seven years since Mr Lubanga's first appearance before the judges at The Hague. Within this complex first ICC case, children were at the centre of ICC proceedings, and thus its achievements and failures are a vivid example of the advances and drawbacks of the ICC's mandate vis-à-vis children. Unfortunately, the Lubanga case also demonstrates that the current ICC practice may not adequately protect the safety, physical and psychological well-being, dignity and privacy of children interacting with the ICC, either as witnesses or victims of crimes within the ICC's jurisdiction, pursuant to Article 68 of the Rome Statute. It also raises the issue of whether children should at all testify in international trials (particularly *viva voce* in The Hague) and whether the current victims' participation system is suitable for child victims who may

want to present their “views and concerns” to ICC judges pursuant to Article 68(3) of the Rome Statute.

However, not investigating crimes committed against children (particularly when the Prosecutor has received information or evidence that this has occurred) or excluding children from ICC proceedings (when this is not contrary to their best interests) is not a legitimate course of action, since the Rome Statute and other applicable law provide that children require special attention by the ICC. However, these legal provisions are general and thus other applicable law pursuant to Article 21 of the Rome Statute offer valuable guidance in order to give more specific substance to concepts such as the “needs of witnesses and victims” and their “safety, physical and psychological well-being, dignity and privacy”, and for the purpose of this research, children, as provided for in Rule 86 of the RPE. Hence, this research offers a comprehensive study of the ICC’s legal framework from a children’s rights perspective, while at the same time balancing these rights with the rights of the accused and the right to a fair trial.

The main research question, which is the unifying thread of all six chapters of the research is:

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

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

in other situations. This analysis is important since these multifaceted aspects of children in armed conflict should be taken into consideration when dealing with children's interaction with the ICC in Chapters 5 and 6 of this research.

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

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

Chapter 4 focuses on the substantive law of the ICC. It describes very briefly the ICC's jurisdiction. The Chapter then thoroughly describes crimes committed exclusively against children but also crimes that, although committed against the general population, have disproportionate effects on child victims. This analysis is of significance, since children will interact with the ICC when they are victims or witnesses of crimes within its jurisdiction. Thus, the analysis of the elements of crimes is necessary to identify who are the child victims and witnesses at the ICC. For example, in order to establish whether a child is a victim within the jurisdiction of the ICC pursuant to Rule 85 of the RPE, an analysis of the elements of the relevant crimes is required. Likewise, in order to establish the harms suffered in reparations proceedings, an analysis of the crimes committed against children and the effects that these crimes have upon them is fundamental. This Chapter is also important to understand the

particular circumstances of child victims and witnesses addressing the ICC, who may need protective or special measures as a result of the crimes (*i.e.* a child witness with a post-traumatic stress disorder as a consequence of sexual violence). Thus, although this Chapter analyses the substantive law of the ICC, it ultimately has significant bearing on the procedural issues discussed in Chapters 5 and 6 of this research.

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

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