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Children's participation at the ICC: Is the Court a wolf disguised in sheep's clothes for them?

Child victims' and witnesses' participation at the ICC seen in
light of the Children's Rights Convention.



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My choice for the title of this thesis was inspired by the remarks made by an independent analyst that I met while I was volunteering in Uganda in 2009. He said that the ICC looked at first wonderful by trying to prosecute individuals for gross violations against children and letting them participate in the proceedings, however until now he found that the court did not fulfill any expectations and even further harmed children by re-traumatizing them. This reminded me thus of a wolf (the ICC) disguised in sheep's clothes. However at the same time the ICC does take the specific needs of children into account in its Statute and Rules of Procedure, therefore the question mark shows that it has to be analyzed to what extent the ICC takes children's rights into account.

Cover photo © Stella Airoidi 2010, *this picture of two African children, one with malaria, on their way to fetch water, was taken by the author on the dirt road in Rwanda. It is purely decorative, and does not want to suggest that these children are potential victims or witnesses at the ICC, but it shows how modern conflicts affect the entire community, including children.*

ABSTRACT

This thesis will seek an answer to the following question: *are the rights of children who participate as victim or appear as witness before the newly established International Criminal Court fully protected?* The thesis will first reveal in a fictional case about 17 year old Victoria how children are affected by modern wars. Then the dissertation will review the contribution of different international instruments for the protection of children during armed conflict to various concepts. Chapter 3 will provide more insight in victim's participation and child witnesses in general. And will analyze the international legal framework protecting and supporting children who participate in international justice mechanisms, with a particular focus on the CRC and the RS. Chapter 4 will reveal six particular areas of concern with regard to children's participation at the ICC. The author of the thesis will conclude that the rights of children who participate as victim or appear as witness before the ICC are taken into account by the ICC, but that there remains a lot to be done to enable children's full access to the ICC in a protective and supportive way and to let them testify as witness without harming them. The author stresses that children should in particular give their views and concerns in videotaped statement taking to avoid as much as possible later testifying in the Court in The Hague.

ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
AP I	Additional Protocol to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts
CAAC	Children affected by armed conflict
CAAFAG	Child Associated with an Armed Force or Armed Group
CRC	United Nations Convention on the Rights of the Child
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
ECtHR	European Court of Human Rights
GCU	Gender and Children Unit
HRL	Human Rights Law
ICC	International Criminal Court
IACHR	Inter-American Court of Human Rights
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ILO	International Labour Organization
NGO	Nongovernmental Organization
OP I	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

OP II	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prosecution and Child Pornography
OTP	Office of the Prosecutor
OPCV	Office of Public Counsel for Victims
OU	Outreach Unit
RPE	Rules of Procedure and Evidence
RS	Rome Statute
SCSL	Special Court for Sierra Leone
SRSG	Special Representative of the Secretary-General
UN	United Nations
UNICEF	United Nations Children’s Fund
UNSC	Security Council
UNSCR	Security Council Resolution
UNSG	Secretary-General
US	United States
VPRS	Victims Participation and Reparation Section
VWU	Victims and Witnesses Unit

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MAP: SITUATIONS OF CONCERN



Source: This image of situations of concern is based on the 2010 report of the Secretary-General to the Security Council (A/64/742-S/2010/181) and is available at:

http://www.un.org/children/conflict/_media/maps/CAACWorldMap2010_english.pdf.¹

¹ Thus these are not the situations which are currently under investigation at the International Criminal Court. Moreover, the recent report of 2011 (UN doc, A/65/820 - S/2011/250) shows that no parties were taken off of the list and even four more added --two in Yemen and two in Iraq.

CASE: 17 YEAR OLD GIRL VICTORIA AFFECTED BY MODERN WAR

This thesis will deal with the legal framework for children participating at the ICC, however it must not be forgotten that we are not talking only about articles, rules and procedures, but about real children with real stories. The following case is about a 17 year old girl affected by the terrible consequences of modern war. We shall call her Victoria. This case will give more insight in the way children are used as child soldiers in armed groups and armed forces and the need to focus also on the other crimes committed against children. While the case of Victoria is fictional, her story, as shown by quotes from real children, is the sad truth for many real children. Although most of them died from the atrocities committed against them and cannot tell their story anymore. As a reader you can ask yourself how a story like hers can help holding those responsible accountable and establish peace.

Victoria was born in a small village, where she was very happy before the conflict broke out. She helped her mother with cooking, went to school, and played with her brothers and sisters and other children from the village. Where exactly Victoria was born, and what the reasons were for the conflict to break out does not matter much for her story. All children in armed conflicts, no matter if they were born in Afghanistan, Colombia, Iraq or Uganda, share the same kind of horrible experiences.

*"My life before the war was very simple but very happy." "Very peaceful, beautiful, and the people are incredibly kind and nice. I didn't fear anything. Anything! Nothing at all. A lot, a lot of trust among people; perhaps way more than we should."*²

One day when Victoria, then 13 years old, was helping her mother in the shop, soldiers came out of the bush to her mother's store and demanded food and water. This marked the beginning of the conflict. At that time Victoria and her family never expected that one day they would be targeted too. But while the months and years passed, the conditions in the country worsened. There were rumors about children who were stolen at night to fight for the armed groups and never came back. Children who managed to escape had the most horrible stories.

² Former child soldier Ismael Beah. Beah, 2007.

*“One boy tried to escape, but he was caught. They made him eat a mouthful of red pepper, and five people were beating him. His hands were tied, and then they made us, the other new captives, kill him with a stick. I felt sick.”*³

Every night when the sun was gone, Victoria and her family were scared. But while other people from the village fled to refugee camps, they stayed at their village since her father still could get some food from his farm for them. Moreover they heard that the refugee camps were already so packed that there was hardly food and space for everyone and the armies were even recruiting children there.

*“Now it's worse, it's not only aggressive but worse ... They are selling anybody, you know, the boys from nine to 15 in the camp they are just selling them.”*⁴

Since the rebels would occasionally also attack the schools, Victoria did not go to school anymore. One day, when she was on her way to fetch water she met some boys whom she knew from the village. They told her that they were voluntarily going to join the armed forces to fight against the rebels. They were encouraged by their community to avenge the killings and lootings. Other children of Victoria's village have been driven by the poverty and lack of access to schools and jobs to also join the armed forces and some others even joined the rebels themselves, because they had nothing else left.

*“My parents, and also my grand-father were killed and I was running. I was so scared. I lost everyone; I had nowhere to go and no food to eat. In the mayi-mayi (a rebel group) I thought I would be protected, but it was hard. I would see others die in front of me.”*⁵

The next night while Victoria was sleeping there was another attack on her village. This time the rebels killed almost everyone; they burned down houses, and raped wives on top of their husband's corpses. Victoria, then 16 years old, and two of her younger brothers, age 9 and 14, got abducted by the rebel group. Victoria had to witness how her younger brothers were forced to kill her own parents⁶

3 Susan, 16 years old. Human Rights Watch, 1997.

⁴ Refugee Leader. Waging Peace, 2008.

⁵ Jacques, 15 years old. He was recruited into a mayi-mayi group when he was 10 years old. Amnesty International. 2006.

⁶ Annan and Blattman, 2010, p.10.

*"I closed my eyes and fired the gun, but I didn't hit her. So I shot again. I had to bury her and put dirt on top of her. The commander said, 'You'll have to do this many more times, and you'll have to learn not to cry.'"*⁷

Armed groups and armed forces like to use child soldiers, given that children are easily manipulated and brainwashed, and tend to be loyal to their commanders.⁸ Moreover armed groups often lack other volunteers and resources, so they are highly dependent on children.

*"The first time I went into battle I was afraid. But after two or three days they forced us to start using cocaine, and then I lost my fear. When I was taking drugs, I never felt bad on the front. Human blood was the first thing I would have every morning. It was my coffee in the morning... every morning."*⁹

At the beginning of her abduction, Victoria did not have an active fighting role, but performed many other tasks, such as cooking, portering and spying. In addition she was used as sex slave and forced into marriage to the leader of the armed group. This supporting work is often seen by the international community as secondary, unimportant and harmless.¹⁰ But in reality it is very harsh and like slavery; when Victoria failed to perform her domestic duties (whether they were fair or not) she often received cruel punishment, her nose and breast was chopped off. Moreover she also saw other children's hands, ears and lips get chopped off by the commanders.¹¹

*"They all had sex with me. A man would come, then another and another. I wasn't even the youngest. Some girls were even younger than me. Even the commanders called for you. You couldn't refuse... They said they'd kill you if you ran away..."*¹²

One young girl described her parents being killed and cooked and that other abductees were forced to eat their bodies. She said: *"Every time I try cooking using the pot, I see my parents inside the pot"*.¹³ Moreover Victoria and the other boy and girl soldiers in the armed forces and groups were forced to drink water from human skulls, eat human flesh and collect bags of ears and hands.¹⁴

7 Angela, 12 years old. She told Human Rights Watch that she was told to shoot a friend when she joined Colombia's FARC guerrillas. Human Rights Watch, 1997.

8 Denov, 2008, p. 815; Machel, 1996, p. 94.

9 Ibrahim, 16 years old. Free the Children, 2001.

10 McKay and Mazurana, 2004, p. 121.

11 Denov, 2008, p. 819.

12 F., 13 years old. Amnesty International, 2004.

13 Young Ugandan girl. Interviewed by Ochen, 2011.

14 McKay and Mazurana, 2004, p. 119.

“They made us drink the blood of people, we took the blood from the dead into the bowl and they made us drink...then when they killed the people they made us eat their liver, their heart, which they took out and sliced and fried...And they made us little ones eat.”¹⁵

As the conflict went on and many rebels died, the girls were also put in the front line to fight. Victoria, like the other children, received training in how to use arms and was forced to kill many people.

“First I got my basic training for one and a half months. A four months special training was then given. A friend who came with me was shot and she died. At that time I felt sad and I cried.”¹⁶

Finally Victoria, then 17 years old, was able to escape. She was quite lucky to end up in a DDR center for child soldiers, since only one-third of the girl soldiers went through one. Girls were often seen only as wives and domestic workers and not recognized as soldiers and thus sent home immediately.¹⁷ However, while Victoria received at the center some basic support, they provided no help for the long term.¹⁸ Moreover in the center she heard rumors about former child soldiers going to the International Criminal Court in Europe and getting a lot of money for that, which they sent to their parents. Victoria was wondering if she could do the same.

¹⁵ Peruvian woman, recruited by the Shining Path at age 11. Brett and McCallin, 1996.

¹⁶ Former child soldier Abirami. Kearins, 2003, p.40.

¹⁷ Denov, 2008, p. 829; Hussain, 2010, pp. 181-183.

¹⁸ Annan and Blattman, 2010, p. 11.

1. INTRODUCTION

1.1 CHANGING NATURE OF THE PROTECTION OF CHILDREN DURING ARMED CONFLICT

The case of Victoria shows that children in modern wars become not only the victims of firearms, landmines, and bombardments, but that they also see their family members and friends being murdered, raped and tortured in a horrible way. Moreover, they lose their homes, have no access to education, health and food anymore. Many crimes also occur directly against girls and boys, given their young age and dependence on others which makes them extra vulnerable.¹⁹ And even more alarming: traditional warfare has changed so dramatically that nowadays children are also targeted directly and used as soldiers.²⁰ While in the past children have also been targeted and have been victims of crimes under international law, they were only mentioned as part of broader crimes against civilians.²¹

Nowadays there is much more attention to the specific violations against children in armed conflict. The UN Security Council identified six grave violations against children during armed conflict; killing or maiming, recruitment or use of child soldiers, rape and other forms of sexual violence, abduction, attacks against schools or hospitals and denial of humanitarian access.²² The annual report of the Secretary-General (hereinafter 'UNSG') of 2011, showed that 2010 was another tragic year for children in conflict all over the world. The list named 22 countries where violations against children are committed violations against children, ranging from conflicts in Afghanistan, Colombia, Democratic Republic of Congo, Iraq, and the Philippines to Uganda and Yemen.²³ While children are still being recruited and used as child soldiers, another alarming new trend is the attack on schools and hospitals.²⁴

Since the Second World War, the legal protection of children in armed conflicts has grown steadily. It began with the protection of children under the provisions of the Geneva Conventions, followed by several United Nations Security Council Resolutions (hereinafter 'UNSCR') and International Human Rights Law conventions, from which the 1989

¹⁹ Parmar and Roseman, 2010, p. 2.

²⁰ Coomaraswamy, 2010, pp. 535–549. Machel, 1996; UNICEF, 2009.

²¹ Aptel 2010 (a), pp. 69 and 89.

²² UNSCR 1612 (2005); United Nations, *Working paper N.1; The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, October 2009, available at: <http://www.un.org/children/conflict/documents/SixGraveViolationspaper.pdf> (consulted on 18 May 2011).

²³ UN doc, A/65/820 - S/2011/250, 11 May 2011.

²⁴ UN doc, A/65/820 - S/2011/250, 11 May 2011.

Convention on the Rights of the Child (hereinafter 'CRC') is by far the most important one. A milestone regarding the protection of in particular child soldiers was the criminalization of the crime of child recruitment as a war crime in the Rome Statute (hereinafter 'RS') of 1998, which established the International Criminal Court (hereinafter 'ICC').²⁵ The articles on child recruitment were further repeated within the Statute of the Special Court of Sierra Leone (hereinafter 'SCSL').²⁶ Both Courts have addressed the issue of child recruitment in different judicial decisions during the pre-trial, trial and appeals stages. Moreover the Statute of both Courts also includes many other crimes such as war crimes, crimes against humanity and genocide which affect children. Some of these crimes are child-specific crimes,²⁷ but also the other crimes (the so called "generic" crimes) which are not exclusively committed against children²⁸ but against the population at a whole, can affect children severely because of their vulnerability. The ICC and SCSL recently are also paying more attention to these "generic" crimes which affect children particularly and/or disproportionately compared to adults.²⁹

Because of these increased attention and protection of children during armed conflict, children recently became involved in proceedings before international criminal tribunals, courts and Truth and Reconciliation Commissions (hereinafter 'TRC').³⁰ The TRC of Sierra Leone and Liberia are the most successful example of addressing children's participation in their statutory rules and regulations.³¹ The truth commissions showed that children play an essential role in the process of truth-seeking, not only as victims and witnesses but also as members of the affected community since they are the future of that community.³²

However, children's participation at the ICC has so far been limited and when it has happened it has not always been successful. It must not be forgotten that a TRC is a non-judicial mechanism and therefore can be much more flexible in addressing children's needs during its proceedings. Moreover, contrary to the ICC, TRC are often located in the post

²⁵ Webster, 2007, p. 239. See also: Articles 8 (2) (b) (xxvi) and 8(2) (e) (vii) RS.

²⁶ Article 4 of the Statute of the SCSL.

²⁷ See for example Article 6 (e) RS, which prohibits the genocidal act of transferring children from one group to another, and Article 8 (2) (b) (xxvi) RS, which prohibits the recruitment of children under 15 into armed forces or groups.

²⁸ See for example Article 7 (1) (g) RS which prohibits sexual slavery and Article 6 (d) RS which prohibits the genocidal act of preventing births.

²⁹ Aptel 2010 (a), pp. 84 and 92.

³⁰ Machel, 2010, p. xii.

³¹ Parmar and Roseman, 2010, p. 2.

³² Parmar and Roseman, 2010.

conflict country itself and thus can adapt more easily to the local circumstances. Therefore the focus of this thesis will be on the ICC which is a big challenge for children's participation.

Children's participation in judicial and non judicial mechanisms fulfills their right to be heard in proceedings affecting them pursuant to Article 12 CRC. However, there must be proper protections in place when children are involved as victims and witnesses, because otherwise their participation becomes limited at best or damaging at worst. Therefore there must be a balance made between the child's rights to be heard under Article 12 CRC and the child's best interest under Article 3 CRC. Moreover, in judicial proceedings the right to a fair trial for the accused must not be forgotten.

1.2 CHILDREN AND THE INTERNATIONAL CRIMINAL COURT

The ICC is the first permanent international criminal court ever, which is there to assist to end impunity for the perpetrators of the most serious crimes of concern to the international community.³³ Where children were mostly involved as only witnesses before, this changed with the adoption of the RS of the ICC in 1998.³⁴ This Statute recognized for the first time in an international criminal tribunal the victims' rights to participation. Victims as participants have, in contrast to witnesses, certain other rights, such as the submission and challenging of evidence, they are entitled to a legal representative and can participate in all stages of proceedings when considered appropriate by the Judges.³⁵

However, whether the ICC is an effective avenue for justice for children like Victoria has yet to be seen. The ICC is still evolving this issue in its case law. The very first case before the ICC against the Congolese warlord *Thomas Lubanga*³⁶ deals with only one crime: the enlistment and conscription of child soldiers. However, the scope of this crime is not clear yet and currently under debate in the Trial Chambers, in particular because just recently studies revealed the complex role of girls within armed groups and forces.³⁷ Moreover this

³³ ICC, *about the Court*, available at <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>, consulted on 21 June 2011.

³⁴ For a brief overview on the chronology of the ICC see ICC, *chronology*, available at: <http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/chronology%20of%20the%20icc?lan=en-GB> (consulted on 21 June 2011).

³⁵ Funk, 2010.

³⁶ ICC-01/04-01/06-803-tEN.

³⁷ Annan and Blattman et al., 2010

case showed that children had to deal with specific procedural difficulties and were not fully protected. First of all, their participation was already barred when they wanted to submit their application form for victim's participation, because the form requires difficult to obtain proof of identify and age.³⁸ Secondly the child soldier who gave testimony recanted his testimony immediately after lunch, because he got threatened by *Lubanga* during the trial and became afraid. After this incident the ICC put witness protections in place and took further steps to prevent these kinds of problems, and presented a broader list of allowed identification documents. However, these were only informal steps. To which extent the ICC's legal framework - for the purpose of this thesis consisting of the RS and the Rules of Procedure and Evidence (hereinafter 'RPE') - and proceedings respect the rights of children is not clear.

1.3. NEED FOR THE STUDY

While there is extensive literature on children (mostly victims of sexual abuse) participating in national trials in their own country³⁹ and also some articles about children participating in TRC's⁴⁰, there is almost no research on war child victims who have to testify in a different culture and country as is the case with the ICC in The Hague. There are many books about war children in general, which deal their material law protection, with why they became child soldiers, what they had to do, how to end child soldiering, and how to reintegrate them to the community.⁴¹ However, what the impact of these studies is on the exact scope of the crime of child soldiering at the ICC is not yet clear, since this crime is currently under debate at the ICC Trial Chambers.⁴² There is little attention on how these war children should be involved in international criminal proceedings. This is of course also due to the fact that the ICC just started its very first trial two years ago and did not yet let many children participate. The needs of a war child, who might be a child soldier, testifying far away from its own country may however differ significantly from the needs of other children and therefore it is necessary

³⁸ ICC RC/ST/V/INF.4, 30 May 2010, p.3.

³⁹ See for example Whitcomb, D., *When the Victim Is a Child*, 1992; Morgan, J. and Zedner, L., *Child victims: crime, impact, and criminal justice*, 1992.

⁴⁰ Pamar and Roseman, 2010.

⁴¹ See for example Singer, P., *Children at War*, 2005; Wessels, M., *Child Soldiers; From Violence to Protection*, 2006; Happhold, M., *Child Soldiers in International Law*, 2005. See also Gates, 2010.

⁴² All Africa, *Daily Report UN Official Urges Justice For Girl Soldiers*, January 7, 2010, available at: <http://allafrica.com/stories/201001080009.html> (consulted on 20 June 2011).

to provide more insight into their specific needs and how the procedural legal framework should adapt to that.

In addition, given that the ICC for the first time in international criminal law recognizes the participation of victims, this issue is also still evolving in the ICC's case law and the precise role of victims still has yet to be determined. In particular, child victim's participation has not yet been widely addressed. Either authors only address victim's participation at the ICC in general and put no special focus on children⁴³, or they do focus on international children rights, even in times of armed conflict, but then do not focus on the ICC and thus also not on victims participation in international criminal proceedings.⁴⁴ One published master thesis by a student did take children specifically into account when analyzing the ICC's legal framework and pre trial proceedings, but couldn't take any practical observations into account regarding the trial proceedings since the first trial just started a year after the writing.⁴⁵

In 2010, the UNICEF Innocenti Research Center issued a study on *Children and Truth Commissions*⁴⁶ and a study on *Transitional Justice and Children*⁴⁷ about the emerging good practices and lessons learned on the protection of the rights of child victims and witnesses. With regard to the ICC, the study on *Transitional Justice and Children*, however, focused mainly on the accountability of children for crimes in international criminal law and only highlights some challenges for the participation of children to which it does not give any answers.⁴⁸ Therefore, these studies leave a gap open on the issue of the procedural status of child victims and witnesses before the ICC.⁴⁹ Nevertheless, these studies showed- as noted above- that it is necessary that children can participate in transitional justice mechanisms; children who had no say in the process became frustrated and vulnerable to continued violation in the future. Addressing the concerns of children is a good tool for reconciliation and peace building in their affected community, since they are the future.⁵⁰ Also with regard

⁴³ See for example Funk, 2010.

⁴⁴ See for example Dillon, 2010.

⁴⁵ See for example Van de Sandt, 2008.

⁴⁶ UNICEF Innocenti Research Center, 2010.

⁴⁷ Parmar and Roseman, 2010.

⁴⁸ Smith, 2010, p. 41.

⁴⁹ Even though later in 2010 a new series of Working Papers came out which support and complement this study, the main challenges of the old papers are still unaddressed. See the website of www.Unicef-irc.org (consulted on 26 June 2011).

⁵⁰ Machel, 2010, p. x-xi.

to the ICC proceedings children should be able, already during their childhood, to participate. If children have to wait until they are adults to participate, the passing of time can seriously weaken their position to prove the suffered harm.⁵¹

Furthermore, it must be noted that previous studies which analyzed mechanisms and processes of transitional justice and the role of children often focused on what did work and what did not work. This approach can indeed be useful. However, the risk is that it falls into a 'one size fits all' approach. This is mainly something which will not work for the ICC, since its system is very special and unique. Its law, structures and procedures, the growing number of different country situations, the role of state- and non state actors, is much more complex than those of the other tribunals and courts. The ICC is a hybrid court which derives its procedures from both the inquisitorial and the adversarial system which makes it even more complex.⁵² Despite the fact that the ICC took the 'Principles and Procedures for the Protection of Children in the SCSL' into account and was supported by UNICEF on many child issues, the author will show in this thesis that there is still more to be done to protect and support child victims and witnesses at the ICC.

1.4 LIMITATION OF THE STUDY

To limit my research scope, this thesis will not focus on children as perpetrators of crimes. The ICC states in Article 26 of the RS that children under 18 should not be prosecuted under international law, because they are not among those 'bearing greatest responsibility' but must be considered primarily as victims of violations of international law. In addition, until now, no international court or tribunal has ever prosecuted anyone under the age of 18.⁵³ It must be noted however that a few national courts did try children for human right abuses committed during war. Some of these children faced hard abuses while in custody and/or where sentenced to death.⁵⁴ Thus when former child soldiers testify at the ICC they must be aware of the risk of self-incrimination.⁵⁵ It also should not be forgotten that it is acknowledged that some form of accountability for crimes committed by children can be in the best interest of

⁵¹ Hamzei, 2010, p. 2.

⁵² Schabas, 2007, p. 42; Smith, 2010, p. 41.

⁵³ Aptel, 2010 (a), pp. 101-106.

⁵⁴ Arts, 2006, p. 184.

⁵⁵ Aptel, 2010 (a), p. 36.

the child and improves the processes of reconciliation and reintegration. For example their free and willing acknowledgment of the crimes they committed through restorative processes that support *inter alia* mediation and truth-telling.⁵⁶ This will let their families and community to better understand the reasons, nature and consequences of what happened, why and how, thus decreasing the stigma that is attached to child soldiers. However this topic is not within the scope of this thesis and thus will not be further discussed.⁵⁷

1.5 AIM OF THESIS AND RESEARCH METHODOLOGY

This thesis' intent is to explore to what extent a child friendly environment for child victims and witnesses participating in the ICC proceedings exists. It will offer recommendations concerning specific areas of concern where the practice of the ICC could be improved regarding the protection of child victims and witnesses, how to improve their knowledge and tools to participate and the scope of the child specific crimes. This will be useful for the ICC, child protection organizations, legal experts, child rights advocates and other professionals. Additionally, child friendly procedures are not only beneficial for the children, but they will be of assistance for the overall proceedings, given that children may give more credible and accurate testimonies and statements. The author is also aware of the constant balancing of the judges of the ICC between the rights of (child) victims and witnesses and the rights of the accused. This thesis will therefore pay attention that the rights of children will not impair the right to *inter alia* a fair and open trial.

For the analysis of the procedural status of child participants as victims and witnesses and requester of reparations within the ICC the research method that will be used is the literature study. Legal instruments and judicial decision; an analysis of current developments and its implications will be made after scrutinizing current statutes, rules of procedures, jurisprudence and guidelines relating to the procedural rights of children and their participation in justice mechanisms at the ICC and other International Criminal Tribunals and International Courts.⁵⁸ In particular the SCSL, the International Criminal Tribunal for the

⁵⁶ Aptel, 2010 (a), p. 98.

⁵⁷ See for a discussion on accountability of children of war crimes: Arts and Popovski, 2006.

⁵⁸ This author chose to see the rules, articles and jurisprudence of the ICC in light of in particular the CRC and not in light of other children standards – such as the UN Guidelines on Justice for Child Victims and Witness of Crime – given that the CRC is a binding legal instrument which is almost universally ratified.

former Yugoslavia (hereinafter 'ICTY'), the International Criminal Tribunal of Rwanda (hereinafter 'ICTR'), the European Court of Human Rights (hereinafter 'ECHR') and the Inter-American Court of Human Rights (hereinafter 'IACHR') will be analyzed.⁵⁹ Moreover the most recent textbooks, journal articles and research reports on the subject will be used for this research study. In addition a field visit to the ICC was made to get a better idea of what the court looks like. This thesis will moreover explore the social and psychological aspect of children participating at the ICC. It will integrate the legal context with empirical findings and thereby build a bridge between the social scientific and judicial world.

In addition it is essential to know which rights children have and, more in particular, which crimes against children are criminalized at the ICC to see whether children might participate as victim, witness or applicant for reparations for a certain crime. Therefore an analysis of the contribution of international legal instruments to the evolution of the concept of a child, crimes against children and the state obligation to prosecute is made. In particular, International Humanitarian Law (hereinafter 'IHL'), Human Rights Law (hereinafter 'HRL') and non binding instruments that protect children during armed conflict are scrutinized.

The main question of this thesis is:

Are the rights of children who participate as victim or appear as witness before the newly established International Criminal Court fully protected?

1.6 STRUCTURE OF THESIS

To put this question in perspective, this paper will first review in **Chapter 2** the international legal instruments that protect children during armed conflict and in particular prohibit the use of child soldiers. It will start to give a short overview of the different set of rules that protect children during armed conflict in section 2.2. Then it will look at the contribution of different international instruments to the evolution of the concept of a child in section 2.3, the concept of crimes against children in section 2.4., and the concept of the state obligation to prosecute in section 2.5.

⁵⁹ Due to limit space of this paper and their particular relevance for the ICC the SCSL, ICTY, ICTR, ECHR and IACHR were analyzed. Other courts were also analyzed, however due to lack of relevance and space they were left out in this thesis.

Chapter 3 will start in section 3.2 with a background on child victim's participation, some general remarks on child witnesses and explain the particular difficult situation of child soldiers. Then in section 3.3 it will analyze the international legal framework protecting and supporting children who participate in international justice mechanisms with particular focus on the CRC. After that in section 3.4 the author will define a 'child victim' and a 'child witness' and give the reader a preliminary understanding on the ICC's proceedings and special measures by analyzing Rules, Articles and Special units of the ICC in light of the CRC and its own jurisprudence.

Chapter 4 will reveal six particular areas of concern with regard to children's participation at the ICC. The first area of concern discussed in section 4.2 is the outreach to child victims and the cooperation with NGOs; in section 4.3 the proof of age of a child will be addressed, in section 4.4 problems concerning informing the child about possible consequences of their participation is analyzed, section 4.5 will analyze various problems with regard to the statement taking and testimony of child witnesses, section 4.6 looks at the role of intermediaries. And finally in section 4.7 the last area of concern will be addressed regarding the length of the process.

Chapter 5 will end with an overview of the finding. It will conclude that the rights of children who participate as victim or appear as witness before the ICC are taken into account by the ICC, but that there remains a lot to be done to enable children's full access to the ICC in a protective and supportive way and to let them testify as witness without harming them. The author stresses that children should in particular give their views and concerns in videotaped statement taking to avoid as much as possible later testifying in the Court in The Hague. The author ends with several recommendations and areas which need further research.

CHAPTER 2: THE INTERNATIONAL LEGAL FRAMEWORK PROTECTING CHILDREN DURING ARMED CONFLICT

2.1 INTRODUCTION

Before we go deeper into the procedural rights of children at the ICC, it is necessary to first analyze the international legal instruments that protect children during armed conflict and in particular prohibit the use of child soldiers. It is essential to know which rights children have and more in particular which crimes against children are criminalized at the ICC to see whether children might participate as victim, witness or applicant for reparations for a certain crime. In particular, the scope of the crime of child soldiering at the ICC is not yet completely clear and is currently under debate in the Trial Chambers.

The protection of children during armed conflict is spelled out in several IHL and HRL instruments, and in several non binding instruments.⁶⁰ This shows how important the protection of children's rights is and acknowledges their vulnerable position compared to adults. Armed conflicts affect all children because of the breakdown of economic and social systems, which will mean *inter alia* that they will have less or no access to education and health. Even though this chapter will deal with armed conflicts, this author also acknowledges that children can be victims of horrible crimes without the context of an armed conflict, which happens for example to children who get trafficked.⁶¹

This chapter will not be an exhaustive analysis on each and every material rule protecting children, but will provide the reader with the necessary background to understand the evolution of different aspects of protecting children during armed conflict. It will start to give a short overview of the different set of rules that protect children during armed conflict in section 2.2. Then it will look at the contribution of different international instruments to the

⁶⁰ An analysis of national instruments is beyond the scope of this thesis. See for a broad analysis of material rights protecting in particular child soldiers: Airoidi, 2010. See *also* Vargas-Baron, E., National Policies to Prevent the Recruitment of Child Soldiers, 2007, available at: http://www.humansecuritygateway.com/documents/UPITT_Vargas-Baron_NationalPoliciesToPreventChildSoldierRecrutiment.pdf (consulted on 6 July 2011).

evolution of the concept of a child in section 2.3, the concept of crimes against children in section 2.4, and the concept of the state obligation to prosecute in section 2.5. Even though most grave crimes against children occur during armed conflict, this author is aware that some grave crimes may also occur in times of peace.

2.2 DIFFERENT SET OF INTERNATIONAL RULES THAT PROTECT CHILDREN DURING ARMED CONFLICT

2.2.1 INTERNATIONAL HUMANITARIAN LAW

In 1949 the international community passed the four Geneva Conventions to regulate and humanize war. The conventions laid down the foundations of IHL, consisting of rules that are only applicable during armed conflict.⁶² They do not only bind states, but also impose several obligations on armed groups.⁶³ There are several provisions providing some kind of protection to children⁶⁴, though they are only mentioned as part of broader crimes against civilians under the Fourth Convention.⁶⁵ In 1977 two Additional Protocols were added to the Geneva Conventions, which provided further protection for children during armed conflict. They in particular prohibited for the first time- though in rather vague words- child recruitment and the direct participation of children in hostilities.⁶⁶ In general, IHL did not specifically focus on children in armed conflict.⁶⁷ Although children were victims of crimes under international law, children were not targeted as specifically as is happening in modern warfare, where they are frequently used as child soldiers and are at a higher risk than ever before.⁶⁸ However, recourse to IHL is important for the definition of general concepts as will be seen in section 2.3 and forward.

⁶² See also the Hague Conventions of 1899 and 1907; together with the Geneva Conventions they form IHL; Biehler, 2008, p. 357.

⁶³ Happhold, 2005, p. 127.

⁶⁴ See for example: The Fourth Geneva Convention; Articles 14, 17, 23, 24, 50, 82, 94, and 132. A full text of all Articles of the Fourth Geneva Convention is available at the website of the ICRC, available at: <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=art> (consulted 21 June 2011).

⁶⁵ Aptel, 2010 (a), pp. 69 and 89.

⁶⁶ Coomaraswamy, 2010, p. 535. See Article 77 of Additional Protocol I for international armed conflicts and Article 4 of Additional Protocol II for non-international armed conflicts, which provides a broader protection by also prohibiting voluntary enlistment. For a broad analysis of these Articles and their gaps in protection see Airoidi, 2010, pp.20-22.

⁶⁷ Aptel, 2010 (a), pp. 69 and 89.

⁶⁸ Machel, 2001, p.5

2.2.2 HUMAN RIGHTS LAW

In particular, recourse to the CRC is important, which was adopted in 1989 when the international community realized that children need more specific protection. It lays down several social/economical/political and cultural rights for children.⁶⁹ Even though the CRC is by some commentators praised and by others heavily criticized⁷⁰, this convention is the most rapidly and widely ratified convention in the world.⁷¹ Armed conflicts of course can violate every right of a child that is laid down in the CRC; *inter alia* the right to life, the right to education, the right to be with family and community, and the right to health care.⁷² However the most alarming trend in modern armed conflicts is the use of child soldiers⁷³, which is prohibited by the CRC in Article 38 for children under 15.⁷⁴ In 2002 two Optional Protocols were adopted to the CRC, one on children and Armed Conflict (hereinafter 'OP I') and the other on the Sale of Children, Child Prostitution and Child Pornography (hereinafter 'OP II'). Given that the way we perceive and explain the world has changed a lot since 1989 and the Machel Study of 1996 shed light on the impact of armed conflict on children.⁷⁵

Other important Human Rights Conventions are: the International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (hereinafter 'ILO Convention No. 182') which list to the worst forms of child labour *inter alia* the use of child soldiers; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter 'Palermo Protocol') which links child soldiering to trafficking in persons; and the African Charter on the Rights and Welfare of the Child (hereinafter 'ACRWC') which is the only regional treaty in the world that addresses the issue of child soldiers and also provides protection to other children affected by armed conflict. The ACRWC is particularly important since a large part of cases where children are involved in war are nowadays happening in

⁶⁹ For a broad introduction to International Children's Rights and the CRC see, Dillon, 2010, pp. 3-141.

⁷⁰ Dillon, 2010, p.111.

⁷¹ Singer, 2005, p. 141. Only the US and Somalia did not ratify it. See Status of ratification of the CRC; 140 Signatories and 193 Parties.

⁷² For a short overview of all the rights for children laid down in the CRC see the website of UNICEF, *fact sheet: Convention on the rights of the child; what rights?*, available at: http://www.unicef.org/malaysia/UNICEF_-_Fact_Sheet_-_CRC_-_Summary_of_42_art.pdf (consulted on 21 June 2011). For an overview of children's involvement in war see Denov, 2010, pp. 20-47.

⁷³ For a broad overview on explanations of child recruitment see Gates, 2010, pp. 55-140.

⁷⁴ Article 38 CRC reiterated the IHL provision regarding child recruitment. For an analysis of this Article see Airoidi, 2010, pp. 23-25.

⁷⁵ Machel, 1996.

African countries. And unlike the CRC, the ACRWC takes important specific African socio-cultural and economic realities into account.⁷⁶

2.2.3 SOFT LAW

Because it took almost a decade for the ACRWC to enter into force (from 1990 to 1999), the not legally binding Cape Town Principles were adopted in 1997. These principles are to date broadly acknowledged and have influenced the development of regional and international laws as well as policies at the national, regional, and international levels.⁷⁷ Changes like criminalizing child recruitment in the RS and jurisprudence in this area led to acknowledgement of the necessity to update them.⁷⁸ As a result in 2007 the Paris Commitments and Principles were adopted,⁷⁹ which reaffirm political and legal standards and offer a set of legal and operational principles to protect children and provide an operational guide for the prevention, release and reintegration of child soldiers.⁸⁰ In addition the UNSC has adopted many resolutions on the protection and rehabilitation of 'children affected by armed conflict' (hereinafter 'CAAC').⁸¹ Even though these instruments are not binding, they have a high influence as will shown in the next sections.

2.3 EVOLUTION OF THE DEFINITION OF A CHILD

As you may remember from the case about 17 year old Victoria, she was 16 when she got abducted by the rebels, while her younger brothers were 9 and 14 years old. Sadly enough the question rises whether Victoria is a child and thus needs special protection. While in the western way of thinking she should be treated as a child, since she did not turn 18 yet, the above mentioned instruments are far from being consistent in whether she would fall under the definition of a child (soldier). This section will therefore analyze the definition of a child under IHL and under HRL.

⁷⁶ Olowu, 2008, p. 23; Amoah, 2008, p. 333.

⁷⁷ Coomaraswamy, 2008, para. 33.

⁷⁸ The Paris Principles, 2007, p.4.

⁷⁹ By now 84 countries endorsed the principles. See '*Countries that have endorsed the Paris Principles*', 29 September 2009, available at: <http://www.un.org/children/conflict/documents/ParisPrinciplescountrylist09.pdf> (consulted on 18 May 2011).

⁸⁰ See The Paris Principles, 2007, p 4.

⁸¹ Hamilton, 2006, p. 274.

Under IHL, the Geneva laws do not give a definition of “child,” however they include provisions about “children,” “young people”, “minors,” “mothers and their young children,” children under eighteen, fifteen, twelve and seven years, “maternity cases,” “pregnant women” and “expectant mothers.”⁸² In general in most of the provisions the age of the child is set to be fifteen. According to the Commentary of the International Committee of the Red Cross (ICRC), the Geneva Convention chose 15 as age limit most of the time, because beyond that age there is, according to them, no longer the same necessity for special measures.⁸³

With regard to HRL, the CRC defines for the purpose of the convention a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier“.⁸⁴ However the CRC makes an exception on this age limit. In article 38, which deals with children involved in armed conflict, it sets the age limit for the prohibition of child soldiers to 15.⁸⁵ The ILO Convention No. 182, the Palermo Protocol, and also the ACRWC state that a child means all persons under the age of 18.⁸⁶ Likewise the non binding instruments put the age of a child to 18.⁸⁷

The definition of what a child is does not only depends on age, but other cultural, social, economic, gender and class determinants are also important that go beyond the notion of age.⁸⁸ Some commentators on the CRC noted that the CRC uses a certain flexibility in the age of the child due to the fact that the age of 18 is not necessarily the same as the age of majority in various countries, which depends often on economic and social circumstances.⁸⁹ For example criteria like marriage, end of schooling, commencement of work and other social and economic roles are also used to define when adulthood starts. In situations of conflict the definition of childhood can be even more complex, when children have lost their parents and

⁸² Udombana, 2006, p. 74. A full text of the Fourth Geneva Convention is available at the website of the ICRC, available at: <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=art> (consulted on 21 June 2011).

⁸³ Udombana, 2006, p.72.

⁸⁴ Article 1 CRC.

⁸⁵ Mezmur, 2008, p. 203.

⁸⁶ Article 2 ILO Convention No.180; Article 3 (d) Palermo Protocol; Article 2 ACRWC.

⁸⁷ See the Cape Town Principles and the Paris Principles.

⁸⁸ Denov, 2010, p. 2.

⁸⁹ Udombana, 2006, p. 80.

become the caretakers of younger children or become soldiers.⁹⁰ The definition of what a child is does obviously reflect current knowledge, and thus will continue to change over time.

As a consequence there is now a grey zone of what a child is, in particular with regard of the 15 to 18 year old children. Moreover there is a double regime depending on which international instrument you look at. Countries which ratified the CRC have to look at child recruitment of children before the age of 15, while those countries which ratified the OP 1 have the age limit set at 18.⁹¹ Given that it is not fully clear when a child becomes an adult, it puts children at risk of not getting the protection and support which they actually, according to their age, require. According to this author it is therefore important that a clear definition of a child exists which defines a child as everyone under the age of 18 without any exceptions.

Unfortunately, the RS of the ICC also does not give any definition of what a child is. While the Court states that it will not prosecute persons under the age of 18, with regard to child soldiers it only criminalizes the recruitment and use of children as soldiers under the age of 15. Therefore this author wants to emphasize how important it is that the other crimes committed against children will also be prosecuted and will put the focus on all children under the age of 18 so that children like Victoria will also get the protection they need.

2.4 EVOLUTION OF THE CONCEPT OF CRIMES AGAINST CHILDREN DURING ARMED CONFLICT

The earlier international courts, like the International Military Tribunal of Nuremberg and Tokyo established in the aftermath of World War II, and the ICTY and the ICTR established in 1993 and 1994, mainly referred to crimes against children only as part of crimes committed against civilians or certain groups as a whole.⁹² With a few exceptions, crimes against children were mostly dealt with by national courts. The success of these international tribunals led to the establishment of other mixed or 'hybrid' courts, like the Special Panels in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and the War Crimes

⁹⁰ Denov, 2010, p. 3.

⁹¹ While more countries ratified the CRC, it is interesting to note that the US did not ratify the CRC, but did ratify OP 1 to the CRC. See the status of ratification of the CRC and of OP I.

⁹² Aptel, 2010 (b), p. 2.

Chamber in the Court of Bosnia-Herzegovina.⁹³ Each of these courts has a limited specific jurisdiction and moreover the procedures and rules of these courts include only very few provisions specifically addressing crimes against children and their specific rights and needs. This gap emphasizes the relatively little attention that was given to children's issues at the time of the establishment of these courts.

The establishment of the ICC in 1998 and the SCSL in 2000 changed this situation; these courts played a major role in criminalizing for the first time as war crimes the use of child soldiers. The current focus on the use of child soldiers should however not detract from other international crimes against children which affect them psychically and psychologically in many different ways. The crimes within the jurisdiction of the ICC are genocide, crimes against humanity, war crimes, and the crime of aggression.⁹⁴ As the case of Victoria showed, all of these crimes affect children, who may also be raped, tortured, enslaved and killed in a horrible way.

There are three child-specific crimes covered by the RS, which by definition can only be committed against children.⁹⁵ The war crime of using child soldiers got the most attention and has a long history; therefore section 2.4.1 will start with a short analysis of the other two child specific crimes before it will discuss this crime more extensively. Moreover, also the so called "generic" crimes -which are not exclusively committed against children, but against the population at a whole- can affect children severely and disproportionately because of their vulnerability. The ICC and SCSL are just recently paying more attention to these "generic" crimes, which will be shortly addressed in section 2.4.2.⁹⁶

2.4.1 CHILD-SPECIFIC INTERNATIONAL CRIMES IN THE RS OF THE ICC

2.4.1.1 Forcible transfer of children from one group to another

The genocidal act of the forcible transfer of children from one group to another, with the intention of destroying a particular national, racial, ethnic or religious group, is defined in Article 6(e) RS. This provision comes from the 1948 Convention on the Prevention and

⁹³ Aptel, 2010 (b), p. 3.

⁹⁴ See Article 5 RS.

⁹⁵ Beresford, 2005, p. 730.; Aptel 2010 (a), p. 84; Aptel 2010 (b), p. 4

⁹⁶ Aptel, 2010 (a), pp. 84 and 92. For an overview of the charges at the ICC, see the website of the ICC, *cases*, available at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/> (consulted on 3 July 2011).

Punishment of the Crime of Genocide, and has been reproduced in the statutes of the ICTY and ICTR. Herewith it is also the only reference to children in these international tribunals. While in general the crime of genocide has the character of the psychical destruction of the targeted group, the forcible transfer of children results 'only' in its cultural elimination. Up to date this crime has not been litigated in an international or mixed tribunal.⁹⁷

2.4.1.2 Attacks against schools and other educational buildings

The war crime of attacking schools and other buildings dedicated to education is laid down in article 8(2)(b)(ix) RS. In essence this crime does not target children specifically, but it primarily affects them. This crime was already listed in the Geneva Conventions.⁹⁸ It can also be found in the ICTY, where the court developed solid jurisprudence on the importance of protecting schools against attacks.⁹⁹ However in the ICC also this crime has not yet been litigated. There is, however, growing attention for this crime.¹⁰⁰ The annual report of the UNSG of 2011 showed that while children are still used as child soldiers, another alarming new trend is the attack on schools and hospitals.¹⁰¹

2.4.1.3 Conscripting or enlisting or using children to participate actively in hostilities

Given that the first trial at the ICC dealt with only this crime, it is important for child victims and witnesses to know the precise scope of this crime to see whether they are protected by it or not, and thus whether they could participate at the ICC as a victim or witness of this crime. This section will therefore analyze the prohibition of this crime more in depth.

The crime of conscripting or enlisting children or using them to participate actively in hostilities is defined as war crime in Article 8(2)(b)(xxvi) RS in case of an international armed conflict and in Article 8(2)(e)(vii) RS in case of an non international armed conflict. This article prohibits: "*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*". This article was

⁹⁷ Aptel, 2010 (b), p. 13.

⁹⁸ Article 50 of The Fourth Geneva Convention.

⁹⁹ See the *Kupreskic* (2000) and *Kordic and Cerkez* (2001) cases at the ICTY.

¹⁰⁰ United Nations, *Working paper N.1; The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, October 2009, p.14.

¹⁰¹ UN doc. A/65/820 - S/2011/250, 11 May 2011.

reiterated in article 4(c) of the statute of the SCSL. Moreover, the SCSL in its *AFRC* judgment of June 2007 approved the decision in the *Norman* case¹⁰² that the crime of child recruitment has the status of customary international law.¹⁰³

Especially the age limit of 15 was a huge disappointment for child right advocates, since many other instruments after the CRC of 1989 did increase the age to 18. In particular OP 1 to the CRC in 2002 was a huge step forward in the protection of children during armed conflict, since it raised the age of forced child recruitment to 18.¹⁰⁴ In addition the ILO Convention No. 182, protects children under the age of 18 against forced or voluntary recruitment.¹⁰⁵ The Palermo Protocol goes even further in its protection by linking child recruitment to the trafficking in persons, and prohibits both forced and voluntary recruitment of children under 18.¹⁰⁶ Moreover, the regional ACRWC prohibits 'recruiting any child' under the age of 18 in Article 22(2). The meaning of this term includes voluntary recruitment under 18 for both armed groups and armed forces and thus provides also a broad protection for children like Victoria.¹⁰⁷

Thus even though there was almost universal consensus about increasing the age from 15 to 18 in OP I to the CRC, and also other international instruments set the age limit to 18, in the RS it was set at 15 for both armed forces and armed groups. This is very unfortunate for child soldiers like Victoria since they will not be covered by the RS crimes of conscripting or enlisting or using children to participate actively in hostilities. Furthermore, in the ICC's case law in particular three issues rose about the content of this crime.

2.4.1.3.1 Three particular issues with regard of the content of this crime at the ICC Trial

The first issue the ICC dealt with in its jurisprudence was whether there should be a distinction made between conscripting and enlisting children. The court reiterated the SCSL in that it is irrelevant whether a child voluntarily joined or was forced to join. The court

¹⁰² SCSL-2004-14-AR72(E), para. 17.

¹⁰³ Sainz-Pardo, 2008, p. 589. See also Webster, 2007, p. 247.

¹⁰⁴ Popovski, 2008, p. 460; Gilbertson, 2008, p. 7. For a discussion on the protection of OP I see Airoidi, 2010, pp. 25-27.

¹⁰⁵ See Article 3 (a) ILO Convention No. 182; Mezmur, 2008, pp. 203-205; Leibig, 2005, para. 43.

¹⁰⁶ See Article 3 Palermo Protocol.

¹⁰⁷ Lloyd, 2008, pp. 35-36; Mezmur, 2008, pp. 203-205.

referred in its decision to the above mentioned CRC, OP I to the CRC and the ILO Convention.¹⁰⁸ The second issue was about whether the crime should be treated as three different offenses.¹⁰⁹ Since it was stated with regard to the first issue that there should be no distinction between conscripting and enlisting it could thus be argued that there are only two offenses under this provision; the offense of recruiting children and the offense of using them to participate actively in hostilities.¹¹⁰ This brings us then to the third issue the ICC is currently dealing with in its case law, namely what is meant by using children to ‘*participate actively in hostilities*’?

The above mentioned articles of the RS consist of new codified law. Their wording comes from the general protection of children in the 1949 Geneva Conventions and the two Additional Protocols of 1977.¹¹¹ And also from the CRC which reiterated in the IHL provision regarding child recruitment.¹¹² However, the RS has the same weaknesses as the provisions of the Geneva Conventions and its AP and the CRC; namely that it is not clear what ‘active’ participation means.

With regard to the term ‘participate actively in hostilities’, the delegates of the Preparatory committee, when drafting the statute, agreed that they would prohibit not only children's ‘direct’ participation in combat, but also their ‘active’ participation in military activities associated with combat such as spying, laying mines, transmitting messages, and the use of children at military checkpoints.¹¹³ Thus active participation seems to cover more than direct participation. Conversely a recent study by the ICRC on direct participation in hostilities noted that the terms of “direct” and “active” participation indicate the same quality and degree of individual participation in hostilities.¹¹⁴ The ICC-Pre-Trial Chamber I¹¹⁵ followed the Preparatory committee in this regard and established that thus Articles 8(2)(b)(xxvi) and (e)(vii) RS do not cover activities unrelated to hostilities, such as “food deliveries to an airbase or the use of domestic staff in married officer’s quarters.”¹¹⁶ The SCSL- Trial Chamber II however took a different approach in its AFRC judgment of June

¹⁰⁸ ICC-01/04-01/06-T-223-ENG, p. 11. See *also* ICC-01/04-01/06-803, para. 245.

¹⁰⁹ Aptel, 2010 (b), p. 9.

¹¹⁰ Aptel, 2010 (b), p. 9.

¹¹¹ Article 4(3)(c) of AP II and Article 77 of AP I.

¹¹² Article 38 CRC.

¹¹³ A/AC.249/1998/L.13, 30 January 1998, p. 23

¹¹⁴ ICRC, 2009, p. 42; Hamilton, 2006, p. 273.

¹¹⁵ ICC-01/04-01/06-803, para. 261.

¹¹⁶ Sainz-Pardo, 2008, p. 571.

2007:

*“Using children to participate actively in the hostilities encompasses putting their lives directly at risk in combat (...) any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”*¹¹⁷

In January 2010, SRSR Coomaraswamy appeared as an expert witness in the trial of Lubanga, where she argued strongly that the Trial Chamber must follow the jurisprudence of the SCSL, given the girls’ multiple and changing roles and tasks in the armed forces and groups as seen in the case of Victoria.¹¹⁸ She argued that drawing a clear line between the roles of child soldiers would exclude a great number of child soldiers, particularly girl soldiers, from the coverage of the crime.¹¹⁹ She held that girl soldiers are too often invisible because they are also wives and domestic aids and slip away or are not brought forward for DDR programmes. The SRSR pointed out that children are one minute fighters, the other a ‘wife’ or sex slave and the next they have to cook. Because of the complex status of girls, Coomaraswamy urged to include them within the crime of using children. She emphasizes that the ICC should look if the roles played by child soldiers were ‘essential to the function’ of the armed group.¹²⁰ This would cover a wide range of roles, including girls or boys who are used for sexual purposes and domestic work, such as cooking.¹²¹

While the international instruments mentioned above lack a precise definition of what a child soldier is, a broad definition of child soldiers as the expert witnesses argues for would be in line with other international efforts to stop child soldiering. One of these is the non legally binding Cape Town Principles of 1997 which contain a very broad definition of child soldiers. Their definition of ‘child soldier’ reads:

“any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters,

¹¹⁷ SCSL-2004-16-T, paras. 736-737.

¹¹⁸ All Africa, *Daily Report UN Official Urges Justice For Girl Soldiers*, January 7, 2010, available at: <http://allafrica.com/stories/201001080009.html> (consulted on 20 June 2011). Recent studies of 2009/2010 about children involved in armed conflict revealed the particular role girls play in armed forces and groups. See for more in depth on their roles Airoidi, 2010, pp.14-18.

¹¹⁹ Coomaraswamy, 2008, para. 23.

¹²⁰ *Ibid.*

¹²¹ See for a broad overview and discussion of the legal gap of the protection of girl soldiers in international instruments Airoidi, 2010, pp.20-35.

messenger and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms."¹²²

This definition thus recognizes the specific roles of girl soldiers apart from boy soldiers, namely sexual abuses and forced marriage and furthermore domestic work. Moreover, it sets the recruitment age at 18 and prohibits both forced and voluntary recruitment. Victoria would thus be protected under this definition. Several African regional human rights instruments have already begun recognizing and interpreting, consistent with the Cape Town Principles, that girls are included within the definition of child soldiers.¹²³ Also, Graca Machel uses the definition in her follow-up book.¹²⁴

As a contrary argument, while a broad definition would indeed provide protection to a broader group of child victims, it is argued by certain authors that a broad scope would be in breach with the rights of the defendant and the principle of legality, which underlines that the law has to be precise, clear, and cannot be applied retroactively.¹²⁵ To these authors prosecutors and judges should not broaden the scope of the recruitment and use of child soldiers, but should charge and convict those responsible also for the other crimes against children which will be dealt with in the next section, like torture, sexual slavery and enslavement, which are equally important.¹²⁶ This would be also more in line with the Paris Principles of 2007, which although they reiterated the broad definition of child soldier as contained in the Cape Town Principles, do not use the term 'child soldier' but the term 'Child Associated with an Armed Force or Armed Group' (hereinafter 'CAAFAG'). Choosing the label 'CAAFAG' seems wise since it is less politically controversial and is a relatively expansive definition of a CAAFAG, including in particular all the complex roles of girl soldiers.¹²⁷ This term covers a broad range of children associated with armed conflict and thus stresses the importance to focus on all crimes against children and not only the crime of the recruitment and use of child soldiers. However until now the ICC has not yet provided a clear

¹²² The Cape Town Principles, 1997, p.2.

¹²³ Coomaraswamy, 2008, para. 33.

¹²⁴ Machel, 2001, p. 7.

¹²⁵ Aptel, 2010 (b), p. 12.

¹²⁶ Aptel, 2010 (b), p. 12.

¹²⁷ Wessels, 2006, p. 7.

definition of the crime and several authors use the terms child soldiers and CAAFAG interchangeably.

This author want to emphasize here that this problem shows exactly the difficult task of the judges of balancing the rights of victims, who want a broad definition of the crime, and the rights of the defendant and the principle of legality.¹²⁸ Thus, to avoid any problems, and to not violate the rights of the accused, the best case would be if the prosecutor will not charge only for the recruitment and use of child soldiers, but also for the other crimes committed against children, such as enslavement, torture, and rape, which are equally important.

However, unfortunately, in the *Lubanga* trial the legal representatives for some of the victims requested unsuccessfully new charges against Lubanga in addition to to the crime of the recruitment and use of child soldiers, such as sexual slavery, inhumane treatment and cruel treatment.¹²⁹ Their request was denied by the Appeals Chambers, because they found that the Trial Chambers finding that the legal characterization of the facts may be subject to change was based on a flawed interpretation of Regulation 55.¹³⁰ Thus in the case of *Lubanga* it is not fully clear who can be child victims and witnesses under this crime.

2.4.3 GENERIC CRIMES VICTIMIZING CHILDREN IN THE RS OF THE ICC

Besides the above mentioned child specific crimes there are more 'generic' crimes which affect children too. These include the crime against humanity of trafficking in children, the war crime of willfully starving a population as a method of warfare and rape and other grave sexual violations committed during armed conflict.¹³¹ Given their vulnerability children are more affected and disproportionately harmed by these crimes than adults are. Therefore these crimes committed against children should receive greater consideration and attention from international courts.¹³²

¹²⁸ Aptel, 2010 (a), pp. 81-82.

¹²⁹ ICC-01/04-01/06-1891.

¹³⁰ ICC-01/04-01/06-220.

¹³¹ Webster, 2007, p 239. See for example Article 7 (1) (g) RS which prohibits sexual slavery and Article 6 (d) RS which prohibits the genocidal act of preventing births.

¹³² Aptel, 2010 (b), p. 14.

In the SCSL the generic crime of sexual violence and crimes targeting girls received specific attention. The SCSL has charged individuals with the crime of sexual slavery in which children (girls) are mentioned as a distinct victim group.¹³³ The ICC could have done the same in charges against Katanga and Chui, since the evidence showed that specifically children were raped too; however, the prosecutor subsumed them under the broader category of 'civilians'.¹³⁴

Nonetheless, the ICC specifically reiterates articles 19 and 34 of the CRC in its Statute. The RS defines sexual slavery, rape, enforced prostitution and forced pregnancy as a crime against humanity and as a war crime.¹³⁵ These acts of sexual violence had already been specified as war crimes in the case law of the ICTY and ICTR, which brought increased attention to the systematic use of sexual and gender-based crimes against civilian populations.

The ICTR, for example, has successfully convicted perpetrators of rape and sexual crimes and has classified these crimes as elements of genocide.¹³⁶ In the ICTY, historic precedents were set when the court recognized rape as a violation of the laws and customs of warfare and as a basis of torture under the Geneva Conventions.¹³⁷ And the ICTY in *Prosecutor v. Kvočka et al.*¹³⁸ was the first to recognize forced marriage as a prosecutable crime during armed conflict. In addition, the OTP of the SCSL has presented the first explicit arguments regarding the crime of forced marriage, charging it as a crime against humanity.¹³⁹ This is in particular important for girl soldiers who often are forced to marry rebel leaders. Even though the ICTY and ICTR referred to children a few times in their jurisprudence, there was no specific provision dealing with children included in their statutes and also the staff members had little expertise with children. This was due to the lack of interest and attention of these crimes at the international level.¹⁴⁰ Therefore it is very important that the ICC will explicitly focus on children. This would be also much more in line with the increased interests for crimes against children at the international level. However while the

¹³³ SCSL-03-01-PT-264, pp. 4-5; SCSL-04-15-T-619, p.16.

¹³⁴ ICC- 01/04-01/07-717, p. 92. See *also* Aptel 2010 (b), p. 17.

¹³⁵ See Article 7(1) (g) RS for crimes against humanity and Article 8 (2) (b) (xxii) RS for war crimes in international armed conflicts and Article 8 (2) (e) (vi) RS for war crimes in non international armed conflicts.

¹³⁶ ICTR-96-4-T.

¹³⁷ IT-95-17/1-A. See *also* Mazurana and Carlson, 2006, pp. 9-10.

¹³⁸ IT-98-30/1-A.

¹³⁹ Mazurana and Carlson, 2006, p. 10.

¹⁴⁰ Aptel, 2010 (b), p.43.

SCSL¹⁴¹ mentioned children as a distinct victim group in the detailed charge, the ICC unfortunately subsumed them under the broader category of civilians in its charges against *Katanga and Ngudjolo Chui*.¹⁴² Thus it still has to be seen whether the ICC is going to focus more on crimes against children in the future.

2.4.4. INCREASED INTEREST FOR CRIMES AGAINST CHILDREN AT THE UN LEVEL

At the international level, UNSCR do not only condemn child specific crimes such as child recruitment¹⁴³, but recently they also emphasize the importance of special measures to prevent sexual violence against children and women during armed conflict.¹⁴⁴ A highlight in the improved response and accountability for crimes against children was the adoption of UNSCR 1612 (2005)¹⁴⁵, which identified six grave violations against children during armed conflict; killing or maiming, recruitment or use of child soldiers, rape and other forms of sexual violence, abduction, attacks against schools or hospitals and denial of humanitarian access.¹⁴⁶ Moreover this resolution established a Working Group on Children and Armed Conflict¹⁴⁷ and a UN monitoring and reporting mechanism to gather systematically information on these six violations.¹⁴⁸ A precondition for such a monitoring and reporting mechanism in a country was at first only the existence of the use and recruitment of child soldiers.¹⁴⁹ In 2009 the list with preconditions has been expanded by UNSCR 1882 (2009)¹⁵⁰ to include also rape and other sexual violence against children and patterns of killing or maiming of children.¹⁵¹ However, the application of SCR 1612 is still limited to specific countries and does not include all the other international crimes affecting children.¹⁵² In 2009

¹⁴¹ SCSL-03-01-PT, pp. 4-5.

¹⁴² ICC-01/04-01/07-717, p 92.

¹⁴³ See UNSCR 1261 (1999), marking the beginning of UNSCR on CAAC. Subsequent SCR are UNSCR 1314 (2000), UNSCR 1379 (2001), UNSCR 1460 (2003), UNSCR 1539 (2004) and UNSCR 1612 (2005), available at: <http://www.un.org/documents/scres.htm> (consulted on 18 May 2011).

¹⁴⁴ See UNSCR 1325 (2000), UNSCR 1820 (2008), UNSCR 1882 (2009) and UNSCR 1888 (2009). See also Chikuhwa, 2010, pp. 44-45. For a broad overview on the evolution of the UN protection agenda for children see Gates, 2010, pp.37-51.

¹⁴⁵ UN SCR 1612 (2005).

¹⁴⁶ United Nations, *Working paper N.1; The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, October 2009.

¹⁴⁷ Sainz-Pardo, 2008, pp. 563-564.

¹⁴⁸ Chikuhwa, 2010, p. 48. See also United Nations, *Working paper N.1; The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, October 2009.

¹⁴⁹ Human Rights Watch, 2009.

¹⁵⁰ Human Rights Watch, 2009.

¹⁵¹ UN doc. A/64/742-S/2010/181, 13 April 2010.

¹⁵² Aptel, 2010 (a), pp. 111-112.

UNSCR 1888 was passed, which called for the appointment of a SRSG for Sexual Violence in armed conflict.¹⁵³ Other UN Mechanisms have also been established to support the protection of CAAC. One such a new mechanism is the obligation of the UNSG to annually report on CAAC.¹⁵⁴ These annual reports include general highlights and specific lists of governments and armed groups that recruit and use children in violation of international law.¹⁵⁵ This 'name and shame list' is created to hold violators accountable for their actions by bringing their country situation under the attention of the SC and sometimes passing sanctions against them.¹⁵⁶ This author hopes that the growing interest and attention for crimes against children at the international level will also encourage the prosecution of child generic crimes at the ICC.

2.5 EVOLUTION OF THE STATE OBLIGATION TO PROSECUTE

States have lately realized that merely protecting children against crimes committed during war is not enough, and have acknowledged that they also have obligations towards children in the aftermath of a conflict. The UNSC highlighted in 2005 the responsibility of States to end impunity and to bring perpetrators of crimes against children to justice.¹⁵⁷ Also the non-legally binding Paris Principles call on States to ensure that perpetrators of violence against CAAFAG are prosecuted either through national legislation or through the ICC.¹⁵⁸

The obligation to prosecute perpetrators is defined in various international conventions; *inter alia* in the Geneva Conventions and its AP's, and the Genocide Convention of 1948 and the Convention against Torture of 1984.¹⁵⁹ The Statutes of the ICTY, ICTR and the other international courts establish a duty to prosecute international crimes; primarily for the court or tribunal itself. The RS of the ICC reiterates the obligations of states to prosecute

¹⁵³ See the website of the ICC, *Call to Action*, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/V-M.9.WIGJ_Call_to_Action.pdf (consulted on 18 May 2011). There was already a SRSG for children and armed conflict appointed by the General Assembly in 1996, see the website of the UN, *the office*, available at: <http://www.un.org/children/conflict/english/theoffice.html> (consulted on 18 May 2011).

¹⁵⁴ Chikuhwa, 2010, pp. 46-47.

¹⁵⁵ UN SCR 1460 (2003); Sainz-Pardo, 2008, p. 564.

¹⁵⁶ Aptel, 2010 (a), pp. 111-112.

¹⁵⁷ Mezmur, 2008, pp. 203-209; UNSCR 1612 (2005).

¹⁵⁸ Principles 8.1 to 8.5 of The Paris Principles, 2007.

¹⁵⁹ Bakker, 2010, pp. vi and 2.

international crimes and states that prosecutions by the Court are complementary to national judicial actions.¹⁶⁰ The evolving norms of international law and state practice thus demonstrate that states have the obligation to prosecute perpetrators of crimes against children, in particular if the acts were committed within their own territory. However, the obligation to prosecute perpetrators of international crimes committed abroad, on the basis of the principles of active or passive nationality or universal jurisdiction, varies from one crime to the other. An extensive analysis of the exact scope of states' obligations to prosecute international crimes under the various international legal instruments for each crime is beyond the scope of this paper. However this author wants to emphasize how important it is that national courts and prosecutors also include international crimes in their domestic penal law to comply with the obligations to prosecute.¹⁶¹

Furthermore, this author wants to stress that while the obligation to prosecute has traditionally been understood as an obligation of the public, now a day it is an enforceable right for individual victims, including children.¹⁶² This was the result of a case at the IACHR¹⁶³ in which the Court decided that victims should have an effective prosecution as a remedy for violations of their right to life and personal integrity.¹⁶⁴ The ECtHR further developed that victims must have greater access to criminal proceedings to guarantee that criminal prosecutions are effective.¹⁶⁵

However, it is very questionable how effective the state obligation to prosecute at national level. What characterizes children during conflict is that they are not only more likely to become victims of grave human rights violations, but they also have little awareness and clout to defend their rights against State authorities and seek access to justice. A State should offer an enforcement mechanism for children to seek justice and prosecute the offenders. Regrettably, often the national legal system is not working that well, because the country is still in a crisis or post conflict situation. Systems in conflict areas are often undermined by long delays, too expensive costs, and lack of available, affordable and reliable legal

¹⁶⁰ Bakker, 2010, pp. 1-3.

¹⁶¹ Bakker, 2010, p.13. See Bakker, 2010, for a more extensive examination of the main sources in international law regarding the obligation to prosecute perpetrators of international crimes.

¹⁶² Trumbell, 2007, p.785.

¹⁶³ *Velásquez-Rodríguez*, IACHR Judgment of July 29, 1988. Series C No. 4, para. 174. 6.

¹⁶⁴ *Idem*.

¹⁶⁵ Trumbell, 2007, p.786.

representation and inadequate enforcement of laws.¹⁶⁶ Moreover, victims of human rights violations face often the problem of seeking justice from a system which may have sanctioned the breach in the first place. When there would be investigations into the crimes, it is likely that this will be done by bodies such as the police who may lack independence from the offender and thus will not be able and willing to conduct proper investigations.¹⁶⁷ In addition, many States' laws do not offer an express right to reparation for serious human rights violations.¹⁶⁸ Thus children who face horrible atrocities in a conflict country will often have no knowledge or contacts enabling them to defend their rights, and will often refrain from doing so for fear of further retribution.

Therefore, especially for the children who faced gross human rights violations in crisis and post conflict countries, it is important to have a remedy available at the international level.¹⁶⁹ At the international level, five of the human rights bodies have an individual complaints mechanism available.¹⁷⁰ However, the CRC has no effective enforcement mechanism yet¹⁷¹, which strongly undermines its authority.¹⁷² While children can use the mechanisms of the other human rights conventions, those instruments do not cover the full range and detail of rights that the CRC provides for. Moreover, these mechanisms also lack a Committee with special expertise on children's rights. Recently a growing number of States were willing to accept this individual complaints procedure at the CRC.¹⁷³ As a result in June 2011 the Human Rights Council adopted the CRC complaints mechanism, which will start working in autumn of this year.¹⁷⁴ This is a great breakthrough for children's rights, since it will take into account the specific situation and needs of children which other mechanisms

¹⁶⁶ UNDP, 2004, p. 4.

¹⁶⁷ REDRESS, *Victims of torture and access to justice*, available at: http://www.irtc.org/Files/Filer/IPIP/training/Victims_and_Acces_to_Justice-Primer.pdf. (Consulted on 18 May 2011).

¹⁶⁸ *Idem*.

¹⁶⁹ Mezmur, 2008, p. 209.

¹⁷⁰ An extensive analysis of the different international human rights claims procedure is beyond the scope of this thesis; see for such an analysis the website of CRIN, *complaints*, available at: http://www.crin.org/law/CRC_complaints/ (consulted on 18 June 2011). See also the website of OHCHR, *complaints* available at: <http://www.ohchr.org/English/bodies/complaints.htm> (consulted on 18 May 2011).

¹⁷¹ Flinterman, 2006, p. 307.

¹⁷² CRIN, *Campaign for a CRC Complaints Mechanism*, 2010, available at: http://www.crin.org/law/crc_complaints/ (consulted on 18 May 2011).

¹⁷³ Sloth-Nielsen, 2008, p. 54.

¹⁷⁴ UN doc. A/HRC/13/L.6, 18 March 2010; See also CRIN, *Campaign for a CRC Complaints Mechanism*, 2010, available at: http://www.crin.org/law/crc_complaints/ (consulted on 18 May 2011).

lack. In addition it will put new pressure on States Parties of the CRC to accomplish their obligations and also support them to offer effective domestic remedies.

For now the ICC is, at the international level, an important avenue to justice for war children since the RS implements existing child protection standards as found in *inter alia* IHL, the CRC and OP I. States can enforce these obligations collectively at the ICC, and moreover their membership at the ICC will also encourage them to draft new legislation with safeguard for children at the domestic level.¹⁷⁵ However, complaints mechanisms and judicial procedures do not traditionally have room for the needs of children, and in particular regarding international criminal proceedings children can easily view the entire process as alien and intimidating. The next chapter will deal therefore with these procedural difficulties.

CHAPTER 3: CHILD VICTIMS' AND WITNESSES' PARTICIPATION IN CRIMINAL PROCEEDINGS: BASIC ASSUMPTIONS AND LEGAL FRAMEWORK

3.1 INTRODUCTION

The chapter before showed the increased attention on crimes against children and the obligation of states to prosecute the perpetrators of these crimes. It concluded that the ICC is an important avenue to justice for war children, but that children can easily see the whole international criminal process as alien and intimidating. The author would therefore like to remind the reader that when talking about witnesses and victims and their procedural rights, we are talking about human beings like Victoria. In proceedings dealing with children they are unfortunately too often seen simply as objects of law. While legal proceedings may also empower the child (when done in a protected environment) by giving it a chance to participate

¹⁷⁵ AMICC, *The International Criminal Court and Children's Rights*, available at <http://www.amicc.org/docs/childrenFAQs.pdf> (consulted on 18 May 2011).

in the process, it sometimes seems that the testimony of the children is more in the interest of the prosecutor, who needs their story as evidence.

This chapter will start in section 3.2 with a short background on (child) victim's participation, it will give some general remarks on child witnesses and it will explain the particular difficult status of child soldier victims and witnesses. Then in section 3.3 it will analyze the international legal framework protecting and supporting children who participate in international justice mechanisms with a particular focus on the CRC. After that in section 3.4 the author will define a 'child victim' and a 'child witness' in relation to the ICC and give the reader a preliminary understanding on the ICC's proceedings and special measures by analyzing Rules, Articles and Special units of the ICC in light of the CRC and its own jurisprudence. Specific areas of concern will be analyzed in chapter 4.

3.2 GENERAL REMARKS ON CHILD VICTIMS AND WITNESSES PARTICIPATING IN CRIMINAL PROCEEDINGS

3.2.1 BACKGROUND ON (CHILD) VICTIMS' PARTICIPATION

Just very recently the rights and interests of victims, including children, have been recognized in national and international law.¹⁷⁶ Before that victims were mostly seen as a means for the prosecutor to make a strong case against the accused and there were no safeguards in place to protect them. There were also no special safeguards for child victims who were left out of the process even more often than adults.¹⁷⁷

However, it must be noted that in very ancient times, there was a victim-centric dispute resolution offered to them. In the Code of Hammurabi, who ruled around 2000 B.C.E., victims' rights were included and even a section contained rights and duties of

¹⁷⁶ REDRESS, *Victims of torture and access to justice*, available at: http://www.ictj.org/Files/Filer/IPIP/training/Victims_and_Acces_to_Justice-Primer.pdf. (Consulted on 18 June 2011), p. 2.

¹⁷⁷ Echeverria, 2006, p.152.

children.¹⁷⁸ In the 1400's victims were at the center at the proceedings, although they mostly only visited the punishment of their wrongdoer.¹⁷⁹ In the *Code of Leke Dukagjini*, a set of traditional Albanian laws, the protection of the honor of victims was one of the main issues. In addition to that it provided guidance on criminal matters.¹⁸⁰ In the 1700's and 1800's there was a decline of victim's rights under domestic law, due to the scientification of criminal law and centralized state power. The focus moved to the welfare of the society at a whole, and victims became no more than a source of evidence against the accused.¹⁸¹ The classic school of criminology which emerged around the late 1700's, beginning 1800's, focused on crime control; the role of the victim and the offender was secondary.¹⁸² However at this time also the first women's movements started to appear, which brought victimization of women under attention.¹⁸³ A century later the positivist school of criminology emerged, which put the focus on explaining, or even predicting, the human behavior of the offender, again leaving the role of the victim aside.

In the 1960's criminologists began to look at the culpability of the society, instead of the responsibility of individuals in explaining criminal behavior. This rehabilitative model also left little space for the participation of victims, since according to this model they could not add anything to the diagnosis and rehabilitation of the offender.¹⁸⁴ During the 1960's-1980's there came a revival on the focus of victim's rights in civil law countries. In Italy victims became the right to get some kind of reparations. Likewise, In France the victims could participate as a *partie civile* in the court and in Germany they could also file a complaint to participate.¹⁸⁵ In these civil law countries, the victim or their legal representative could request investigation measures, review and present evidence against the accused and could even cross-examine witnesses.¹⁸⁶ The common law countries traditionally view victims as the one who suffered harm and the perpetrator as the doer of this harm.¹⁸⁷ Thus, in their

¹⁷⁸ Derene and Walker, 2011, p.2. See for more in depth in the influence of ancient legal and social codes on today's victims' rights chapter 2 in Derene and Walker, 2011.

¹⁷⁹ Funk, 2010. p. 19. See for an extensive overview of the development of Victims' Rights under International Law, Funk, 2010. pp. 19-41.

¹⁸⁰ Funk, 2010, pp.21-23; See Gjecov, S. (ed), *The Code of Leke Dukagjini*, New York: Gjonlekaj Pub Co, 1989.

¹⁸¹ Funk, 2010, pp. 23-25.

¹⁸² Funk, 2010, p.27.

¹⁸³ Derene and Walker, 2011, p.6.

¹⁸⁴ Derene and Walker, 2011, p.7; Funk, 2010, pp.29-29.

¹⁸⁵ Funk, 2010, pp. 31-33.

¹⁸⁶ Trumbull, 2007, p. 778.

¹⁸⁷ Miers, 1974. p 86.

adversarial system, it is the prosecutor against the defendant and there is no place for a role for a victim as third party. Nevertheless in the middle of the 70's there rose a bigger focus on child abuse and neglect and more emphasis on victims' needs in the US.¹⁸⁸ Recently the victim's rights movement has also made an impact in the common law countries.¹⁸⁹ The movement argued that it is not right that the victim who is most affected has the least power in the proceedings. While children traditionally were shielded from the legal process in civil matters, since the relationship between child and family and state developed, it is recognized that a balance must be made between protection children and letting them participate.¹⁹⁰

At the international human rights level, as noted before in chapter 2.5, the IACHR and the ECtHR gave victims the possibility to participate. At the IACHR the victims are allowed to participate in all stages of the proceedings, but only after the Court's decision to hear the case. Victims can be those directly affected by the crimes, but also indirectly, such as the next of kin of victims.¹⁹¹ Similarly, the ECtHR provides victims with several rights.¹⁹² Based on the right of individual petition under the human rights treaties, these two Courts started creating a body of case law which greatly involves children. However the ECHR and the IACHR are 'adult' treaties, so even though they sometimes refer to children explicitly, they focus on the human rights of all persons.¹⁹³ Moreover these courts deal with a variety of cases against States who accepted their jurisdiction, but not with cases involving for example child soldiering against individual perpetrators such as the ICC is currently dealing with. Thus the participation of victims will not challenge the rights of the accused as could be the case at the ICC. Moreover, these courts will not face as many victims as the ICC potentially could face, since the ICC prosecutes individual perpetrators who mostly committed crimes during armed conflict which affects thousands of people.¹⁹⁴

¹⁸⁸ Derene and Walker, 2011, pp.8-9.

¹⁸⁹ Trumbull, 2007, p.781; Derene and Walker, 2011, pp.10-24. See for an overview of victims' rights in different European Countries VinE conference papers, *Project Victims in Europe*, 2009, available at http://www.apav.pt/vine/images/VinE_papers.pdf (consulted on 21 June 2011).

¹⁹⁰ Daly, 2011, p. 448. See Article 12 CRC.

¹⁹¹ Grover, 2010, p. 32. For a broad overview on children's rights and the IACHR see CRIN, *Children's Rights and the IACHR*, available at: <http://www.crin.org/resources/infoDetail.asp?ID=18052&flag=report> (consulted on 3 July 2011).

¹⁹² For a broad overview on the ECtHR and children see CRIN, *ECtHR*, available at: <http://www.crin.org/resources/infoDetail.asp?ID=18061&flag=report> (consulted on 3 July 2011).

¹⁹³ Dohrn 2010, p. 835.

¹⁹⁴ Cassadevante Romani, 2009, p. 32.

At the international criminal law level, which mainly is based on the adversarial system, victims (including children) did not have any participatory rights until the establishment of the ICC.¹⁹⁵ The RS of the ICC recognized for the first time in an international criminal tribunal the victims' rights to give their views on whether to investigate or not, the admissibility of a case and other issues that affect their personal interest.¹⁹⁶ The ICC clearly puts the interest of victims first, something the statutes of the ICTY and ICTR did not.¹⁹⁷ Moreover the ICC allows child victims to participate. Child victims are, however, in a more disadvantaged position than adult victims, which I will elaborate on in the next sections.

3.2.2 CHILD WITNESSES IN GENERAL

Testimonies of witnesses in general are very important, since the evidence they provide can make the case against the accused very strong. Eyewitnesses and victims of criminal offenses can for example provide information that a crime has been committed, secure evidence, help to identify the offender, and perhaps even give an insight in the motives of the accused.¹⁹⁸ In some cases which deal with crimes which are especially committed against children, the statements and testimonies of the harmed children are the only available evidence and thus crucial. This is in particular the case when the child was the only person witnessing the crime, as happens often in sexual offenses against children.¹⁹⁹

Child witnesses are different from adult witnesses with regard to several areas, given that they can be more easily influenced than adults and are much more vulnerable.²⁰⁰ In particular children who belong either to marginalized groups in society and/or have lost the protection and support of their families are very vulnerable. This is the case for children

¹⁹⁵ Trumbull, 2007, p.781. For an overview on why the ICTY and ICTR lack victims participation see; Mekijan, and Varughese, 2005, pp. 10-15.

¹⁹⁶ Trumbull, 2007, p. 777.

¹⁹⁷ Trumbull, 2007, p. 777.

¹⁹⁸ REDRESS, *Victims of torture and access to justice*, available at:

http://www.irct.org/Files//Filer/IPIP/training/Victims_and_Acces_to_Justice-Primer.pdf. (Consulted on 18 June 2011), p. 2.

¹⁹⁹ Beresford, 2005, p. 721.

²⁰⁰ Machel, 1996, p. 10.

working in exploitative situations, street children and those who live in institutions.²⁰¹ As a result, this hampers the trial in several areas.

Research showed that it can be very problematic for a child to act as a witness at the hearing.²⁰² The first problem that comes up deals with the protection of children. The confrontation of the child with the accused, the interrogations by strangers (lawyers and judges), being once again confronted with the cruel events of the past and the stress and embarrassment of speaking in public, can all lead to a second traumatising and re-victimization of the child.²⁰³ Moreover it can violate their right to private and family life.²⁰⁴ This is especially the case when the child witness has been a victim itself, and even more so with regard to child victims of sexual offenses.²⁰⁵

The ECtHR stressed in several of its judgments that particularly in these cases one has to watch out for the effects of a 'second traumatising'.²⁰⁶ Therefore the ECtHR accepts that in these cases certain measures to protect the victim may be taken, provided that they can be reconciled with an adequate and effective exercise of the rights of the accused.²⁰⁷ For example, instead of testifying in an open court, they can make a pre trial statement to the court; can make a statement wearing disguise, through closed-circuit television, or by a video conference.²⁰⁸ These possibilities usually provide adequate protection against the confrontation with the accused. However, these protection measures can clash with the rights of the accused for a fair and public hearing²⁰⁹ and the examination of witnesses.²¹⁰ According to this author, in striking a fair balance between the rights of the accused and the child witnesses, the well being of the child should never be undermined.

²⁰¹ REDRESS, *Victims of torture and access to justice*, available at: http://www.ircct.org/Files//Filer/IPIP/training/Victims_and_Acces_to_Justice-Primer.pdf. (Consulted on 18 June 2011), p. 4.

²⁰² For more in depth in children as witnesses in court see Walker, N. and Wrightsman, L., *The Child Witness: Legal Issues and Dilemmas*, Sage Publication, 1991.

²⁰³ Wilson and James, 2007, p. 364.

²⁰⁴ See Article 8 ECHR.

²⁰⁵ Aptel, 2010 (b), p. 29.

²⁰⁶ See SN V. Sweden (2004) 39 E.H.R.R. 13, ECHR, para. 43; Wolhuter, Olley and Denham, 2008.

²⁰⁷ Roberts, 2007, p. 350.

²⁰⁸ Alink and Van Zeben, 2006, p.5.

²⁰⁹ See Article 6 (1) ECHR.

²¹⁰ See Article 6 (3)(d) ECHR. However it must be noted that the right to interrogate witnesses is not an absolute rights. Thus it depends on the circumstances wherever the accused had no possibility at all to examine the witness and whether this will affect his right to a fair trial severely; Alink and Van Zeben, 2006, p.5.

Another problem concerns the value of the statements of child witnesses. Research revealed that children are, compared to adult witnesses, generally less emotionally and intellectually developed.²¹¹ Thus they will not always understand the context of the trial and not be able to fully express themselves in highly developed language. As a consequence it can be them much harder for them to discern what the truth is. Additionally, a child may be ashamed to correct what he/she previously stated and thus leaves a false statement as it is. With regard to sexual offense fear, shame and lack of language proficiency play an even greater role.²¹² Nonetheless, research also demonstrated that normally children, just like adults, can be helpful witnesses taking into account certain limitations related to their evolving capacities.²¹³

3.2.3 THE SPECIAL STATE OF THE CHILD SOLDIER VICTIM AND WITNESS

At the international level, child victims and witnesses often are former child soldiers, coming from extremely poor (post) conflict areas. They have to act in international criminal proceedings concerning the most grave human rights violations, which can hardly be compared to crimes committed at the domestic level or other human rights violations such as the ones dealt with at the ECtHR or the IACHR. Cases at the SCSL and the ICC which deal with the crime of using child soldiers are therefore very complex, given that the prosecutor has to mostly rely on testimonies from these former child soldiers.²¹⁴ Moreover, since the focus on crimes against children is very recent, not many children have appeared as witness before international criminal courts yet, and thus there is little practice on how best to involve them.

It must be born in mind that child soldiers are different from the other child victims and witnesses, even the most vulnerable group, since they are not only victims but also themselves perpetrators of atrocities. While children in general are already less developed mentally and emotionally than adults, child soldiers are even more limited in their

²¹¹ Wilson and James, 2007, p. 364.

²¹² Beresford, 2005, p. 721.

²¹³ Wilson and James, 2007, p. 364.

²¹⁴ Sanin and Stirnemann, 2006, pp. 13-15.

development, because they often fought for years with the armed groups and forces and grew up during conflict.²¹⁵

Their experiences of living in a conflict country and being part of an armed force or group often gave them a lower sense of morality compared to other child witnesses. Since they had to commit atrocities themselves they will lie more easily.²¹⁶ Note however Wessels, who presents a study that argues the automatic assumption that child soldiers are more vulnerable than other children and emphasizes their resilience.²¹⁷

Additionally, it is difficult to determine the exact age of child soldiers since they often lived for many years with the armed forces or groups and have neither an identification card nor something similar. Many conflict countries have a lack of reliable information on identification.²¹⁸ Besides this the children/young adults often lie about their age, stating that they are under 18 or 15 in order to be able to participate as child victim or witness. If the court finds out that they lied about their age, their testimony may not be used anymore, because they seem unreliable and may are not considered as a child witness or victim anymore.²¹⁹ In addition former child soldiers are more hesitant to testify, since the whole process can confuse them, intimidates them, and can make them afraid of the consequences that their testimony will have given that they committed atrocities themselves as former child soldier.²²⁰ When child soldiers tell their story the court requires them to be fully conscious of what happened. Thus Victoria is asked to feel again how she had to kill other children and how she saw her brothers killing her parents, how she got raped by the commanders and how her nose and breasts were cut off, as a consequence the risk for re-traumatizing for child soldiers is very high.

Because of all these factors it is particularly difficult to use testimonies of child soldiers and create an environment for them in which they will feel safe enough to appear as witness and or participate as victim. Nevertheless, according to this author it is not impossible to let them participate in an empowering way. The following sections will offer the

²¹⁵ Rosen, 2009, p. 108; SCSL 04-14-T, October 9, 2007.

²¹⁶ Sanin and Stirnemann, 2006, p.9.

²¹⁷ Wessels, 2006.

²¹⁸ UNICEF, 2005.

²¹⁹ Sanin and Stirnemann, 2006, pp. 10-13.

²²⁰ Wilson and James, 2007, p. 364.

international legal framework protecting children who participate in judicial proceedings and then analyze the legal framework of the ICC in light of the CRC.

3.3 INTERNATIONAL INSTRUMENTS TO PROTECT AND SUPPORT CHILDREN PARTICIPATING IN INTERNATIONAL JUDICIAL MECHANISMS SUCH AS THE ICC

As mentioned before the participation of children in international criminal proceedings is very recent. There are only a few international human rights instruments and other instruments that provide for the protection and support of children who participate in transitional justice mechanisms such as the ICC as victim and or witness.

With regard to International Criminal Law no specific norms exist except for those which are defined in the statutes of the international criminal courts and tribunals, however only the ICC gives an important place to victims in the proceedings.²²¹ The RS contains several provisions which deal with the rights of victims and witness; these will be discussed more in depth in section 3.4. Moreover, the international legal framework is important for the ICC, given that Article 21 RS obliges the Court to apply- after its own legal framework- in the second place where appropriate, applicable treaties and the principles and rules of international law.

The first result of campaigns by international victim's rights group was the establishment of *the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (hereinafter 'the 1985 Declaration').²²² This declaration actually did not provide victims with any new rights but demonstrated the recognition by the UN of victim's rights.²²³ In 2005 the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Hereinafter '2005 Basic Principles') was established. These two documents stressed the importance for States to implement measures to improve the access of victims to justice.

²²¹ Cassadevante Romani, 2009, p. 32. See the Preamble of the RS.

²²² See for the use and application of the basic principles, UN ODCCP, 1999.

²²³ Funk, 2010, p. 39.

In 2005, based on these provisions, the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses* (hereinafter ‘2005 UN Guidelines’) were developed. These Guidelines recognize that child victims and witnesses are particularly vulnerable and need special protection, assistance and support according to their age, level of maturity and individual needs. Based on the CRC, the guidelines address the best interests of the child, child protection and participation and other important matters for child victims and witnesses. In addition, these guidelines underline the nexus between human rights and the promotion of psychosocial needs.²²⁴ Some important rights are: the right to be informed, right to effective assistance, right to privacy, right to special preventive measures, and the right to reparations.

At the core of legal framework protecting and supporting children who participate in justice mechanisms is of course the CRC. The CRC has been the basis for many other guidelines on children’s participation as noted above. The legal framework of the CRC is very important for the adoption of a rights-based approach to support and protection for children involved in proceedings at the ICC. The most important principles of the CRC according to this author for children’s participation are: non-discrimination²²⁵; the best interest of the child²²⁶; the right to participation²²⁷, and the promotion of psychological and physical recovery of a child victim, and social reintegration.²²⁸

3.3.1 AN ANALYSIS OF FOUR PRINCIPLES OF THE CRC

3.3.1.1 Article 2 CRC: non-discrimination

Article 2(1) CRC states: “States Parties shall respect and ensure the rights ... to each child... without discrimination of any kind...”

The principle of non discrimination requires that former child soldiers are not stigmatized and treated differently from the other children. All children in the community should be treated

²²⁴ Michels, 2009, p. 10. As noted before, this author will analyze the ICC in light of the CRC, and not in the 2005 UN guidelines, since the CRC is a binding legal instrument that is almost universally ratified.

²²⁵ Article 2 CRC.

²²⁶ Article 3 CRC.

²²⁷ Article 12 CRC.

²²⁸ Article 39 CRC.

equally. Moreover, girls should get the same treatment as boys.²²⁹ In particular, armed conflicts make the gender inequalities that already exist in societies even worse, and therefore make women and children even more insecure, disadvantaged and marginalized, also in the aftermath of the conflict.²³⁰ Girls are not always seen as child soldiers, and therefore do not always fall under the laws protecting children against child soldiering. In particular, girls who were victims of sexual violence find it difficult to testify about what happened to them. However vice versa a focus on girls should not undermine the focus on boys; this author wants to stress that all children, boys and girls, should be treated equally without discrimination but that also their specific needs according to their gender should be taken into account.

3.3.1.2 Article 3 CRC: the best interest of the child in relation to Article 12 CRC: the right to be heard

Article 3 (1) CRC states: *“In all actions concerning children...the best interests of the child shall be a primary consideration.”*

Article 12 (2) CRC states: *“...[T]he child shall in particular be provided the opportunity to be heard in any judicial...proceedings affecting the child...”*

The meaning of these principles is open to discussion and debate, depending on national, local and cultural circumstances.²³¹ In essence, Article 3 states that the best interest of the child should be a primary consideration underpinning every action taken in relation to children, as well as in the implementation of the rights contained in the CRC itself, such as the right to be heard of Article 12 CRC.²³² The relationship between these two rights is a very thin red line. The TRC of South Africa came in 1996 to the conclusion that children should be excluded from the statement-taking and from the hearings, because of the risky and politicized nature of the hearings. The risk of re-traumatization was of particular concern. To the contrary the TRC of Sierra Leone came to another conclusion in 2001. They argued that it was in the best

²²⁹ Coomaraswamy, 2010, p. 546.

²³⁰ Biehler, 2008, p. 363; Denov, 2008, p. 824.

²³¹ Siegrist, 2010, p. 17. See *also* General Comment 12 of the CRC Committee, CRC/C/GC/12, 1 July 2009.

²³² Parmar and Roseman, 2010, p. 25; Smith, 2010, p. 39.

interest of children to participate in the proceedings, since they were among the primary victims and would be frustrated if their voices would not be heard.²³³

The ICC seems to follow the considerations of the TRC of Sierra Leone, by allowing children to take part in its proceedings. This right is not only beneficial for children, but their views and experiences are also important for the establishment of evidence to make a strong case against the accused as noted before. However, participation of children at the ICC puts them also at risk, therefore this author wants to stress that for every stage in the proceedings it is again necessary to see how children's participation can be promoted and protected and be in their best interest.

Furthermore, it is argued by some authors that the best interest of a child and the right to be heard implies that it is fully informed about the consequences of its participation in judicial proceedings.²³⁴ This author agrees with this; the child must be aware of potential positive and in particular negative consequences of the participation. The reason why this so-called 'right to be informed' is not specifically mentioned in the CRC is probably due to the fact that the drafters of the CRC in 1989 did not foresee in the possibility of children participating in an international criminal court.

3.3.1.5 Article 39 CRC: the right to recovery

Article 39 CRC states that: *"States Parties shall take all appropriate measures to promote the ... psychological recovery...of a child victim of: any form of neglect, exploitation, or abuse...; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."*

In addition, Articles 6 (3) and 7 of OP I to the CRC require that the government assists in the rehabilitation and reintegration of former child soldiers. Particularly in situations of armed conflict there is a nexus between children's rights and their psychosocial needs. When the ICC supports the implementation of the other children's rights, such as the right to health, education and non discrimination this will also support their social protection, because it will

²³³ Siegrist, 2010, p. 18.

²³⁴ Michels, 2009, p.9.

make people more aware of children's rights and thus can help reduce violations.²³⁵ The ICC should not only in its judgment take the psychological recovery, reintegration and rehabilitation of children into account when providing reparation to child victims, but also while they are participating and telling their stories. Thus this right to recovery encompasses the right to be heard of a child.

3.4: RULES, ARTICLES AND SPECIAL UNITES RELATING TO CHILDREN AT THE DIFFERENT PHASES AT THE ICC IN LIGHT OF THE CRC

Like any other victim, children like Victoria can participate in different ways in the ICC proceedings. First of all they can participate by putting their views and concerns to the ICC judges when their interests are affected and can send information about alleged crimes to the Prosecutor. Secondly, victims can appear as witness before the ICC. A third role for them could be in the case that an accused person has been convicted by the Court, and they want to request the Court for an order of reparations.²³⁶

The ICC Articles implement articles of the CRC, such as the punishment of crimes committed against children, the recognition that separate procedures are necessary to establish the criminal responsibility of children, special measures protecting children as victims and witnesses during the proceedings, and the requirement that the staff has expertise on children's issues, as will be seen below.²³⁷ The ICC is thus aware of the risk for re-traumatisation and stress for children. However to what extent the ICC Rules, Articles and Special Unites respect the four above mentioned CRC principles is not clear. Therefore this section will analyze the legal framework of the ICC in light of the CRC and its own jurisprudence at the different stages at the ICC.²³⁸ Since the RS and the RPE of the ICC do not

²³⁵ Inter-Agency Standing Committee, 2007, pp. 50-51.

²³⁶ ICC, *Booklet Victims before the International Criminal Court: a Guide for the Participation of Victims in the proceedings of the Court*, available at: http://www.bpi-icb.com/pdf/Victims_before_the_ICC.pdf (consulted on 4 July 2011). (Hereinafter: 'ICC Booklet'), p.9. It must be noted that while one could argue whether the ICC booklet is a highly authoritative source, it has been referred to this booklet multiple times in the academic world by renowned authors such as Funk, 2010.

²³⁷ Aptel, 2010 (a), p. 97.

²³⁸ It must be noted that all the described provisions will apply to all victims and witnesses in general, when specific child-friendly provisions has been adopted these *lex specialis* will be mentioned explicitly.

provide a definition of what a ‘child victim’ and a ‘child witness’ is, the author will give first her interpretation on how to define them.

3.4.1 THE DEFINITIONS OF CHILD VICTIMS AND CHILD WITNESSES IN RELATION TO THE ICC

3.4.1.1 The definition of a ‘Child Victim’

The definition of a ‘child victim’ can be split into two questions. Firstly, what is a child, and secondly, what is a victim? Since the RS and its RPE do not explicitly provide for a definition, we have to look elsewhere for a clarification on the term. As mentioned in chapter 2, the CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.²³⁹ This author is however more in favor of the definition of the ACRWC which contrary to the CRC makes no exception and defines a child as “every human being below the age of 18 years”.²⁴⁰

The question remains then what a victim is. An answer to that can be found in the previous mentioned UN instruments. Section V of the 2005 UN Basic principles, which is based on the 1985 Declaration, defines “victims” as following:

*“... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law....”*²⁴¹

The general definition of victim set out in the 1985 Declaration is adopted by the ICC in 85(a) RPE, which states that victim means “*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.*” Additionally, The ICC Booklet explains that victims can be direct, but also indirect: “*a victim can also be a person who suffers harm as a result of a crime targeted at another person, such as a family member of someone who has been killed*”. Moreover it is stressed that victims include

²³⁹ Article 1 CRC.

²⁴⁰ Article 2 ACRWC.

²⁴¹ Principle 8 of the UN Basic Principles.

children, persons with disabilities, elderly persons and victims of sexual violence.²⁴² The Chambers in the case against *Lubanga* further elaborated on what exactly is meant by suffering harm in the decision on victim’s participation. In the Chamber’s view, the RS did not provide a clear concept of harm and so it applied the Basic Principles, to determine if harm was suffered, which thus can be in a variety of different ways.²⁴³ Judge Blattmann dissents; he argues that the Basic Principles should not be applied because they are not of a decisive authority, and they were deliberately left out of the Statute.²⁴⁴ However, the Appeals Chamber found no error in the Chamber’s reference to the Basic Principles.²⁴⁵

Thus the definition of a child victim for the purpose of this thesis is, according to the author, a child who was below the age of 18 when he or she became a victim of genocide, crimes against humanity and or war crimes. A direct child victim would be a child that for example was used as a child soldier or was tortured or used as sexual slave. An indirect child victim could be a child whose parents have been killed by a rebel group.²⁴⁶ Moreover, it must be borne in mind that a ‘child soldier victim’ must in addition have been younger than 15 when he or she was a child soldier, because otherwise he or she will not fall under the crime of child recruitment.

3.4.1.2 The definition of a ‘child witness’

The RS and its RPE do also not give a definition of the term child witness. The ICC Booklet only helps out with regard to the term ‘witness’. According to the booklet a witness is:

*“a person who gives evidence before the Court by testimony. A witness is normally called by the Prosecutor, who is trying to prove the criminal case against an accused, or the defence, who is defending the accused against the accusation. A witness may also be called by a victim or by a Chamber”.*²⁴⁷

²⁴² ICC Booklet, p. 9.

²⁴³ ICC-01/04-01/06-1119, paras. 35 and 92.

²⁴⁴ ICC-01/04-01/06-1119, Separate and Dissenting Opinion of Judge Blattmann, paras 4-5.

²⁴⁵ ICC-01/04-01/06-1432, para. 33.

²⁴⁶ Hamzei, 2010, p. 2; ICC-01/05-01/08-320, pp.41-51.

²⁴⁷ ICC Booklet, p. 28.

It must be noted that a witness can appear in different capacities. A witness may, for example, claim to be a victim, perpetrator or bystander. Thus, according to this author a child witness before the ICC is a person under 18 at the time of giving a statement or testimony.

3.4.1.3 Main differences between a child victim and a child witness

The ICC stresses that there are many differences between participating as a victim and testifying as a witness. The main differences are explained in the following Box deprived from the ICC booklet (emphasis added).²⁴⁸

Box 5: Main differences between being a participant and appearing as a witness	
<p>Victim as a participant</p> <p>Participation is <u>voluntary</u></p> <p>Communicating to the Court their <u>own interests and concerns</u></p> <p>It is up to the victims to <u>decide what they want to say</u></p> <p>Participation is possible at <u>all stages</u> of proceedings when considered appropriate by the Judges</p> <p>Always entitled to be represented before the ICC by a <u>legal representative</u></p> <p>Normally participates via a legal representative, and need <u>not appear in person</u></p>	<p>Victim as a witness</p> <p>Called by the defence, the prosecution, other victims participating in the proceedings or the Chamber</p> <p>Serve the <u>interests of the Court</u> and the party that calls them</p> <p>Give <u>evidence</u> in testifying and answering related questions</p> <p>Called to testify at a <u>specific time</u></p> <p>Does <u>not</u> normally have a <u>legal Representative</u></p> <p>Always testify in <u>person</u></p>

This box seems to imply that victims’ rights extend beyond those of witnesses.²⁴⁹ Indeed,

²⁴⁸ ICC Booklet, p. 10.

²⁴⁹ See For a list of the key RS and RPE victims’ Rights provisions, Funk, 2010, pp. 82-85.

while victims can say whatever they want, witnesses have to answer specific questions. And while victims seem to be able to participate voluntarily, witnesses seem to have no choice and even always must testify in person. Thus only victims can according to Article 12 CRC give their views and concerns, with witnesses this is not necessarily the case. However, with regard to witnesses there are special protective measures in place which are not there yet for victim applicants.²⁵⁰ Moreover there are many (difficult) steps to formal recognition as a victim.²⁵¹ Thus in the end it is actually not that clear from this box whether it is better for a child to participate as victim or appear as witness. In practice, there is nothing inherently inconsistent about having a dual status as both a victim and a witness. Criminal law experts know that in many cases victims can also be witnesses. This was for example, the case with several victims in the Lubanga trial.²⁵²

3.4.2 A CHILD-FRIENDLY ICC: STAFFING REQUIREMENTS

The RS acknowledges that children can be re-victimized and heavily re-traumatized during the court proceedings when they have to give a statement and/or testify. Therefore the Court put several provisions in place to ensure that the various organs within the ICC function in the best interest of children, which is in line with Article 3 CRC. Articles 36(8)(a)(b), 42(9) and 43(6) RS ensure that judges, legal advisors working in the Office of the Prosecutor (hereinafter 'OTP'), and the Victims and Witnesses Unit (hereinafter 'VWU') within the Registry have experience with issues pertaining to violence against children and are child friendly.²⁵³ The Prosecutor has a special role in protecting the safety, physical and psychological well-being, dignity and privacy of child witnesses, which will be seen in the section 3.4.3.1.

There are several Units within the Registry of the ICC which deal with victim's issues and pay special attention to the particular needs of vulnerable persons, including children; *inter alia* the Victims Participation and Reparations Section, the VWU, and the Office of Public Counsel for Victims (hereinafter 'OPCV').²⁵⁴ The VPRS informs victims on their

²⁵⁰ ICC RC/ST/V/INF.4, 30 May 2010, para. 16.

²⁵¹ See ICC Booklet, p.17; See *also* Funk, p.89.

²⁵² ICC-01/04-01/06-1379.

²⁵³ Article 36 RS deals with the qualifications, nomination and election of judges. Article 42 RS deals with the OTP.

²⁵⁴ ICC Booklet, p. 10.

rights and assists them with the submission of the application forms and organizing their legal representation. The OPCV is an independent office which provides legal support and assistance to the victims and their legal representatives.²⁵⁵ Later there was within the OTP a Gender and Children Unit (hereinafter 'GCU') established.²⁵⁶ And finally in 2007 an Outreach Unit to tackle challenges the Registry faced in reaching victims, including in particular children.²⁵⁷

3.4.2.1 VWU

Especially the VWU has an important role for children who testify in The Hague. The VWU has to look after the physical protection and security of all child witnesses and additionally they can also provide medical and psychological assistance and other kinds of support. Article 68(4) states that the VWU can advise the OTP and the Court on *inter alia* appropriate protective measures and security arrangements. This includes measures to make sure that the identity and reasons for the travel of the child will not be revealed when it will be at the airport. In addition the VWU can assist child victims before the Court and give legal advice.²⁵⁸ The Court allows the VWU to familiarize the witness with the court proceedings, but it forbids witness proofing since that will impair the rights of the accused and fair trial.²⁵⁹

To make sure that the rights of the child are protected at all time during his/her stay in The Hague, the VWU carries out several assessments, such as a pre-travel/medical check and extensive needs-assessment.²⁶⁰ The needs assessment includes the following elements; Cultural Context; Protection Assessment; Psycho-social Assessment; Accompanying Person; Expectation Management; Video-link Technology. To prevent repetition of assessments by the VWU all relevant information on the child gathered by the GCU and other parties is given to VWU.²⁶¹

²⁵⁵ ICC Booklet, p. 18.

²⁵⁶ See Article 42(9) RS in conjunction with Article 54 (1)(b) RS. See regulation 12 of the Regulations of the OTP.

²⁵⁷ ICC, *Press Release Outreach report*, available at: <http://www.icc-cpi.int/NR/exeres/9E5C454C-C745-4626-95F1-7810C9658CC9.htm> (consulted on 3 July 2011). This unit will be discussed more in depth in chapter 4.

²⁵⁸ See Rules 17 until 19 RPE; Beresford, 2005, p. 735.

²⁵⁹ For what is allowed see ICC-01/04-01/06-679, para.41 and ICC-01/04-01/06-1049, paras. 31-32 and 36; Funk, 2010, p. 168.

²⁶⁰ Van de Sandt, 2008, p. 17.

²⁶¹ Van de Sandt, 2008, p. 21. For a broad overview on these assessments see Van de Sandt, 2008, p.21.

3.4.2.2 The ICC courtroom and building

Note that while the ICC requires its staff to be child friendly, the courtroom itself is located in an unfriendly old garage, which is thus not in line with the CRC. A formal courtroom can have a negative effect on child witnesses, since the atmosphere can be very intimidating and higher the stress for children.²⁶² Moreover it should not be forgotten that the courtroom is located in The Hague, The Netherlands, thus often far away from the victims and witnesses.²⁶³

3.4.3 CHILDREN'S PARTICIPATION IN THE PROCEDURAL STAGES AT THE ICC

There are four different stages at the ICC proceedings; the Preliminary Examination Stage, the Pre-Trial Stage, the Trial Stage and the Appeals Stage.²⁶⁴ The aim of these stages is to guarantee that claims of serious crimes are investigated, prosecuted, and, if the accused is proved guilty, punished. Witnesses will be called at a specific time to appear at a certain stage in the proceeding; often their statement will be already taken before the actual trial starts.

With regard to victims, the RS offers in Article 68(3) victims, including children, the possibility to participate at all stages of the proceedings.²⁶⁵ In order to do so children, like adults, have to complete the written Application Form for Individuals and ask the ICC for permission to participate.²⁶⁶

Whether victims' participation would be allowed at the preliminary examination stage, was long debated at the ICC. The OTP and the defense bar did not want victims to participate at this stage given the fear that this would open the floodgates for victims to independently come up with witnesses and introduce evidence.²⁶⁷ Moreover, it would harm the independence of the OTP and make the process slow.²⁶⁸ The representatives on the other side argued that victims should get full participation in the pre-trial investigations. The Pre-Trial

²⁶² Beresford, 2005, p. 742.

²⁶³ ICC Booklet, p.7. However, The ICC can also hold hearings somewhere else if the judges decide for this.

²⁶⁴ To have a better comprehension of the different stages see Box 3 in the ICC Booklet, p.8.

²⁶⁵ Article 68 (3) RS. For a general overview on victim participation see Greco, 2007.

²⁶⁶ See Regulation 86 of the ICC Regulations of the Court; Rule 89 RPE; ICC Booklet, pp. 9 and 26-28. The Application Form for Individuals is available at the website of the ICC at: <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf> (consulted on 5 July 2011).

²⁶⁷ Funk, 2010, p. 88.

²⁶⁸ Funk, 2010, p. 149.

Chamber stated that victims have broad participatory rights, which includes their right to take part in the investigation stage.²⁶⁹ The Appeals Chamber confirmed these rights, but also put safeguards in place so that the accused’s right to a fair trial would be respected.²⁷⁰

Since there can be a large number of victims participating in criminal proceedings of a certain case, let’s say around 200, group presentation of victims may become the norm at the ICC.²⁷¹ However the nature and extent of the role of the victim’s representatives at this stage is still very uncertain. In July 2009, Trial Chamber II stated in the *Katanga and Ngudjolo* case that concerning the common legal representation of victims, they have to be divided into two groups. One group includes all victims except child soldiers, and the second group includes the latter. However the system of the two separate groups is very restrictive and many questions rise with regard to its implementation which have to be discussed in future research.

3.4.3.1 Preliminary Examination Stage

The first phase at the ICC is the Preliminary Examination Stage, in which the ICC Prosecutor will do a pre-investigation²⁷² whether in a particular situation crimes within the jurisdiction of the Court may have been committed and further investigation is necessary. The OTP is at the moment doing such preliminary examinations in a number of situations, including Afghanistan, Georgia, Guinea, Côte d’Ivoire, Colombia, Palestine, Honduras, Korea and Nigeria.²⁷³ Situations can be referred by a State party or the UN Security Council to the Prosecutor²⁷⁴; or the Prosecutor can start proceedings on his own initiative.²⁷⁵

Children can be immediately involved at the beginning of this stage. For example a child like Victoria could send a letter to the Prosecutor in which she explains the crimes that

²⁶⁹ ICC-01/04-101; ICC-02/04-101.

²⁷⁰ ICC-01/04-01/06-1432.

²⁷¹ Funk, 2010, p.105.

²⁷² According to this author it is better to use the term pre-investigation instead of investigation, since this is not the actual investigation yet, but the assessment on whether the Prosecutor should do an investigations. Even though Article 15 (1) RS mentions investigation, the term preliminary examination of Article 15 (6) covers the actual stage better.

²⁷³ ICC, *OTP*, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (consulted on 22 June 2011).

²⁷⁴ Articles 13 (1) RS and 14 (1) RS.

²⁷⁵ Articles 13(c) RS and 15(1) RS. The prosecutor then first needs to request authorization from the Pre-Trial Chamber for this.

happened against her and her family and friends and could fill in the victims' participation form. The prosecutor will then examine the received information.²⁷⁶ He can also collect on his own initiative more information, such as testimonies from children. If the prosecutor thinks that there is a 'reasonable basis to proceed' he will start with the formal investigation.²⁷⁷ He will then of course need more statements and information from *inter alia* children, for the purpose of finding sufficient evidence to build a case against an accused in the later Trial. At this moment the OTP is carrying out formal investigations in six situations: Northern Uganda, the Democratic Republic of Congo (hereinafter "DRC"), the Darfur, Sudan, the Central African Republic, Kenya and Libya.²⁷⁸ Thus the prosecutor has certain discretion with regard to the imitation of 'situations' and 'cases'.²⁷⁹ It becomes clear that (child) victims, who can participate in both situations and cases, are very dependent on the Prosecutor. Therefore the next section will analyze more in depth the role of the prosecutor.

3.4.3.1.1 Legal framework of the OTP

The RS and the RPE are the legal framework for the OTP when investigating the alleged crimes. Several provisions provide measures which the OTP should take during the statement taking of child victims and witnesses in line with the CRC. Article 68 RS, which deals with the protection of the victims and witnesses and their participation in the proceeding in conjunction with Article 54 RS, which deals with the duties and powers of the Prosecutor, states that the Prosecutor always has the responsibility to take protective measures for the witnesses during the investigations. Article 68 (1) RS in particular notes that the Court shall have regard to relevant factors such as age and gender and violence against children, and that in particular the prosecutor shall during the investigations take measures to protect the overall well-being of the (child) witness, which includes their safety, dignity and privacy. Article 67 RS and Article 68 (1) state that the measures should not violate the rights of the accused and a fair trial. Article 54 (1)(b) RS states that the measures have to respect the interest and circumstances of witnesses, including the age of the child and the nature of the crime. The

²⁷⁶ Article 15 (2) RS.

²⁷⁷ Article 53 (1) RS.

²⁷⁸ ICC, *OTP*, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (consulted on 22 June 2011).

²⁷⁹ The initiation of cases and situations of the prosecutor is beyond the extent of this thesis; see for a broad overview Funk, 2010, pp. 58-66. In short: at a situation there is no arrest warrant issued yet, at a case there is.

OTP has the task to decide on the protection and privacy of witnesses under Article 57 (3) (c) RS. Thus the Prosecutor has to be sensitive towards the interests of children during his investigations and prosecutions and can take, if necessary, special measures for them, such as letting them give testimony in private. The Prosecutor can use the unique investigation opportunity²⁸⁰, which means that he can record the interview; in case that he fears that he will be probably only able once to interview the child.

3.4.3.1.2 Practical implementation of the Legal framework of the OTP

Since the Court's legal framework does not mention how the interviews for the statement taking are actually conducted by the OTP (in the field), this section will attempt to show the practical implementation of the legal framework, although the next chapter will show that this still raises some questions. The statement-taking process is exclusively done by the OTP, this is comparable with the way they do it at the SCSL. First of all most interviewed children are within the age 13-17, but there are also some younger ones. The child can choose the gender of the joint investigation team members, moreover if a child wishes so it can choose additionally any person to accompany him/her.²⁸¹ The OTP-investigators can be very flexible in choosing appropriate (the only demand is that they are safe and secure for the child) venues for the interview. For example, in Uganda most interviews are held in rehabilitation centers for former child soldiers, in Chad in refugee camps and in Darfur the children are interviewed in their home tents.²⁸² It is thus not a big surprise that child-friendly interrogation studios are limited in the field.

To implement the child-friendly provisions of the Court during the statement-taking process, the psycho-social expert of the GCU²⁸³ carries out on a case-by-case basis a pre-interview assessment with the child to see whether he/she is capable enough for the actual interview.²⁸⁴ This is in line with article 12 CRC in conjunction with article 5 CRC which takes

²⁸⁰ Article 56 RS.

²⁸¹ Van de Sandt, 2008, p. 17. Van de Sandt interviewed a psycho-social expert of the GCU regarding the interviewing of children.

²⁸² AMICC, 2006; Citizens for Global Solutions, 2006.

²⁸³ the GCU within the OTP, which was a practical implementation of the specific measures for the protection of child witnesses. Article 42 (9) RS in conjunction with Article 54 (1)(b) RS.

²⁸⁴ Van de Sandt, 2008, p. 17.

the capacity of children into account when participating. Hereafter the prosecutor has to make a security assessment to estimate whether a child will be able to give evidence and what protection is needed. The prosecutor has to inform the VWU so they can take all necessary measures to support and protect them.²⁸⁵ When the safety of the child is in danger the VWU will completely take over all the contact between the OTP and the child.²⁸⁶

The actual statement-taking of the child takes in average two days. The first day the child will get information about possible risks and consequences of participating, about the procedural aspects and the importance of telling their own experiences.²⁸⁷ Empowerment sessions are held to let the child feel comfortable and pleasant before, after and during the interview.²⁸⁸ On the second day the child will read back everything that has been written and will be again informed about security and confidentially matters and will asked questions on his/her consent.²⁸⁹ Of course since we are talking about the gravest international crimes it is questionable how comfortable and pleasant a child, like Victoria, can actually feel when talking about the horrible things that happened to him/her.

3.4.3.2 Pre-Trial Stage

At the Pre-Trial Stage, the Court decides whether or not to issue an arrest order against individuals, and whether or not to confirm the charges gives by the Prosecutor.²⁹⁰ When the Pre-Trial Chamber decides that there is sufficient evidence to confirm the charges, the accused will be committed to a Trial Chamber.²⁹¹ Moreover, the Pre Trial Camber also evaluates the statement-taking process if challenged by the Defence of the accused.

It is not only vital in this stage that the prosecutor protects children, but the Pre-Trial Chamber has the duty to safeguard the security and other interests of the child victims during the whole process as well.²⁹² For this purpose the chamber can order specific measures for

²⁸⁵ Beresford, 2005, p. 737.

²⁸⁶ *Idem.*

²⁸⁷ ICC Booklet, pp. 16-17.

²⁸⁸ Van de Sandt, 2008, p. 17.

²⁸⁹ Van de Sandt, 2008, p. 17.

²⁹⁰ Article 57 RS summarizes the functions and powers of the Pre-Trial Chamber.

²⁹¹ Article 61(7) RS. See also Grover, 2010, p.90.

²⁹² Article 57 (3)(c) RS.

the protection of victims taking into account the rights of the accused. These measures are the same as for the chamber at the trial stage and thus will be analyzed in the next section.

3.4.3.3 Trial Stage

When a case has been committed to the Trial Chamber, the Trial stage begins. The ICC is a mixed court; it has both civil and common law elements. However there is a clear tilt in the direction of the common law approach of an adversarial hearing. Thus in general a witness will testify in person in an open hearing in front of both parties.²⁹³ A witness must comply with an order to testify (unless he or she is excused to do so)²⁹⁴; must make a solemn declaration to speak the truth before testifying²⁹⁵; must first answer questions of the party in whose interest he or she is called; and then in a cross-examination answer questions of the opposing party and if necessary undergo a re-examination by the party that called him or her.²⁹⁶ In addition also a judge can ask questions of any witness.²⁹⁷ When the accused represents him or herself he or she may thus examine witnesses in person.²⁹⁸

Children who have given their statement during the investigation stage to the Prosecutor can, if they want so, testify in the actual Trial.²⁹⁹ Measures which the OTP had to take under Article 68 (1) RS to protect child victims and witnesses shall in particular be taken by the Court itself. They can get advice herein from the VWU.³⁰⁰ Article 68 RS (2) states explicitly that in cases that deal with a child who is a victim or a witness part of the proceedings may be held *in camera* (thus not in public). There are two alternatives for children to provide the evidence outside of a public hearing.

The first alternative allows a witness to give live testimony by means of audio or video-link technology in its own country.³⁰¹ The Chamber and the Registry shall make sure that the venue chosen for the live testimony will protect the witness and also the truthful and

²⁹³ Beresford, 2005, p. 732.

²⁹⁴ Rule 65 RPE.

²⁹⁵ Rule 66 (1) RPE.

²⁹⁶ Rule 140 RPE.

²⁹⁷ Rule 140 (2)(c).

²⁹⁸ Rule 67 (1) (d).

²⁹⁹ Article 93 (1) (e) RS.

³⁰⁰ Article 68 (4) RS. See for a broad description of the role of the VWU section 3.4.2.

³⁰¹ See Rule 67(1) RPE in conjunction with Articles 69(2) RS and 68 RS.

open testimony.³⁰² The Court here thus recognizes that it may not be in the best interest of the child and the outcome of the trial to let a child appear as witness in The Hague. The second alternative is that a witness can give prior recorded testimony.³⁰³ This kind of testimony is very similar to the unique investigative opportunity described in Article 56(1)(a) RS. However this kind of evidence will only be allowed if both the Prosecutor and the Defence had or have the chance to examine the witness during the proceedings.³⁰⁴

If the Court decides to not make use of these two alternatives, there are still other protective measures in place to keep the identity of the witness secret. For example, the name of the witness can be erased from the public records,³⁰⁵ or a pseudonym can be used for the witness.³⁰⁶ The court may also alter the voice or image of the witness.³⁰⁷

The Prosecutor and the Defence have to agree on the order and manner in which the evidence is submitted to the Trial Chamber. If they do not do so, the presiding judge can issue directions.³⁰⁸ Then the actual proceedings will begin. The Defence and the the Prosector have the right to question the witness about relevant matters on their testimony and its reliability, the credibility of the witness and other relevant matters.³⁰⁹ Moreover, the Trial Chamber also has the right to question the witness³¹⁰ and they can control the way of questioning a witness to protect them from intimidation or any other harassment.³¹¹ The Chamber can in this regard decide on special measures under Rule 88 RPE to facilitate the testimony of a child witness with its consent. Moreover the Chamber can also permit that a family member of the witness is present during the testimony-taking, which is called an accompanying person.³¹² Despite of all these protective measures the next chapter will reveal particular areas of concern.

3.4.2.4 Appeals Stage

³⁰² Rule 67(3) RPE.

³⁰³ Rule 68 RPE in conjunction with Article 69(2)RS and 68 RS.

³⁰⁴ Rule 112 (4) RPE in conjunction with Rules 112 (1) and 68 RPE.

³⁰⁵ Rule 87 (3)(a) RPE. in conjunction with Rule 87 (1) RPE, and Article 68 (1) and (2) RS.

³⁰⁶ Rule 87 (3)(d) RPE. in conjunction with Rule 87 (1) RPE, and Article 68 (1) and (2) RS.

³⁰⁷ Rule 87 (3) (c) RPE in conjunction with Rule 87 (1) RPE, and Article 68 (1) and (2) RS.

³⁰⁸ Rule 140(1) RPE.

³⁰⁹ Rule 140 (2)(a)RPE. See also E. Van Sandt, 2008 at 23.

³¹⁰ Rule 140(2)(c) RPE.

³¹¹ Rule 88(5) in conjunction with Rule 140(2) RPE.

³¹²Rule 88 (2) RPE in conjunction with Rule 88(1) RPE, and Article 68 91) and (2) RS.

The last stage is the Appeal Stage in which a challenge of a conviction in the Trial Stage or Pre Trial Stage is issued, or when new evidence occasions a revision of a conviction or sentence. Here the final judgment will be given.³¹³ Up to date the ICC has not rendered any final judgment, so whether and how they will take children into account we don't know yet. However Rule 86 RPE requires that in any direction or order in particular the needs of all victims and witnesses have to be taken into account.

It is for the first time that an international (criminal) court has the power to order an individual to pay reparation to another individual, which may include restitution, indemnification and rehabilitation. Article 75 RS provides (child) victims the right to participate at the reparations stage and puts them at the center of the proceedings.³¹⁴ However victims have to fill out another application form for this.³¹⁵ The RS established a Victim's Representation and Reparations Unit to offer victims counsel with facilities and experts, and to set up principles relating to the reparations to victims.³¹⁶ Several authors however stressed that it is very unlikely that the ICC will provide meaningful reparations to individual victims.³¹⁷ Moreover, the RS creates a Victim's Trust Fund which should handle out reparations for the benefit of the victims of the crimes.³¹⁸ Ms. Coomaraswamy stresses in this regard that the Trust Fund also has a role in psychological and physical rehabilitation and financial support for the victims.³¹⁹

This author wants to emphasize that in particular in the appeals stage Article 39 CRC, the right to recovery, and Article 2 CRC, non discrimination, should be taken into account, so that all children in the community affected by war will benefit from reparations. It is vital that the support provided to the child victims witness does not end once it has left The Hague and is back home, given that the impact of the trial can reopen old wounds of the child and re-traumatize him or her. Concerning children it is in particular important that the whole community is strengthened. And that child soldiers get proper reintegration to have a future in

³¹³ ICC Booklet, pp. 6-7.

³¹⁴ Funk, 2010, p. 225.

³¹⁵ Rule 94 RPE.

³¹⁶ See articles 68(3) and 75 RS.

³¹⁷ Trumbull, 2008. Pp. 806-807.

³¹⁸ Article 79 RS.

³¹⁹ ICC RC/ST/V/INF.4, 30 May 2010, p.87.

his or her community.³²⁰ However it must be noted that in this regard it is not clear who must protect children after the trial and bears the costs for such protection. The RPE do not say anything on who is responsible for the safety and wellbeing of child victims and if appropriate their family, this thus requires further research. Regardless of whether there was a conviction or not, this author wants to emphasize that children must be protected after legal proceedings, so they will not be harmed by reprisals and further traumatized.

CHAPTER 4: AREAS OF CONCERN IN THE PARTICIPATION OF CHILDREN AT THE ICC

4.1 INTRODUCTION

Chapter 3 showed that victim participation is a new aspect in international criminal law and it revealed two difficulties in the use of child witnesses; one concerned their protection and the other the value of their statements. Regarding child soldiers the Chapter noted that it can be particularly difficult to let them participate as witness or victim, since they face a higher risk of getting traumatized than other children and face problems to establish their age. Section 3.4 showed that with these difficulties in mind the ICC, although located in a very unfriendly old courtroom building, takes children in particular into account and provides several supportive and protective measures for them when participating as victim or witness. However, this chapter will show that the Courts newly evolved jurisprudence reveals some difficulties for children participating (or wishing to do so) in the proceedings. It will show legal gaps and analyze case law against the background of the CRC principles: non-discrimination, the best interest of the child, the right to be heard, and the right to recovery as analyzed in Chapter 3. In addition, this Chapter will not only highlight the challenges the ICC is facing, but also recent developments.

Substantive case law to be assessed will in particular focus on the situation in the DRC, since in the on-going case (and first case ever at the ICC) of the *Prosecutor against*

³²⁰ See for a broad analysis on reintegration of former child soldiers Betancourt and Ettien, 2010.

Thomas Lubanga Dyilo, the accused is charged with only one crime: the recruiting and enlisting of child soldiers, and as a consequence children got highly involved in the proceedings.³²¹ Also the second trial in regard to the situation in the DRC, which started in November 2009, the two former Congolese rebel leaders, Katanga and Ngudjolo Chui are charged *inter alia* with the crime of conscripting child soldiers.³²² Moreover there have been held some pre-trials in the situation of Uganda, where the rebel leaders are also charged for using child soldiers.³²³

This author will address six particular areas of concern; some are more relevant for child victim participants, others for the children appearing as witness, however many of these concerns overlap and are relevant for all children participating in whatever manner. Conclusions will be drawn in relation to the role of children and the extent to which the court took the principles of the CRC into account. The first area of concern in section 4.2 is the outreach to child victims and the cooperation with NGOs; then in section 4.3 the proof of age of a child will be addressed, section 4.4 addresses problems concerning informing the child about possible consequences of their participation, section 4.5 will analyze various problems with regard to the statement taking and testimony of child witnesses, section 4.6 looks at the role of intermediaries. And finally in section 4.7 the last area of concern will be addressed regarding the length of the process.

4.2 OUTREACH ACTIVITIES AND COOPERATION WITH NGOS

The first area of concern deals with how child victims and witnesses like Victoria know that the ICC exists and that they may have the opportunity to participate? The Registry faced many challenges in this regard, such as improving the accessibility of the court and counter misconceptions. As a responds in 2007 the Outreach Unit (hereinafter 'OU') was

³²¹ Thomas Lubanga Dyilo's trial commenced on January 26, 2009 and remains ongoing. For up to date information on the trial see the website of the ICC, *Lubanga*, available at: <http://www.iccnw.org/?mod=drctimelinelubanga> (consulted on 5 July 2011). See also the website Lubanga Trial, available at: <http://www.lubangatrial.org/> (consulted on 5 July 2011). Since the trial started, thirty witnesses have testified before the ICC in The Hague: among ten former child soldiers, several experts, military commanders, social workers, and UN staff. And more than 100 victims have been authorized to take part in the trial.

³²² Ten child soldiers will be among the 345 people authorized to take part in the trial.

³²³ See the website of the ICC, *situations and cases*, available at: <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (consulted on 12 June 2011).

established.³²⁴ The Unit conducts activities to reach the affected communities which are in cases and situation the court deals with. Since 2008 programs specifically focusing on children and youths have been at the center of all outreach strategies. In order to reach them the Unit took steps to build partnerships with local and national institutions taken the security situation into account.³²⁵ But the Outreach Unit still has to overcome several challenges to reach children and become in line with Article 2 CRC. It has to improve the communication with the less educated ones and strengthen gender outreach programs to avoid discrimination amongst children and youths. The 2011 Action plans of the Outreach Unit showed that they are working to overcome these challenges, and want to improve the access for victims to participate in the proceedings and explain the work of the ICC.³²⁶ It is in particular important that children know what to expect from the Court, as seen in the case of Victoria, she heard false rumors which thus will gave her wrong expectations.

In Uganda, the outreach Unit's sessions were held at schools and provided child friendly information about the ICC and encouraged discussions. They designed a role-play model so that children could see the different roles of parties in the court proceedings, followed by a debate on topics such as witness protection, why the accused person had a counsel and what the role of victims is. In Uganda radio stations started programs like "kids talking to kids" in which issues related to war crimes were discussed and the listeners could participate by calling the radio station.³²⁷ It is important that future studies will analyze the impact of these programs and see what has and can be done in other situations to improve the involvement of children.

In particular with regard to outreach activities it becomes clear that child rights advocates and NGOs play an important role for child victims. When children have to fill out the application forms to participate in the courts proceedings or to seek reparation from the convicted persons they provide them with assistance.³²⁸ Moreover, they are often the first ones who talk to victims and take their statements. This highlights the importance of NGOs

³²⁴ ICC, *Press Release Outreach report*, available at: <http://www.icc-cpi.int/NR/exeres/9E5C454C-C745-4626-95F1-7810C9658CC9.htm> (consulted on 3 July 2011).

³²⁵ ICC, *Outreach Report 2010, p.1*, available at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf> (consulted on 2 July 2011).

³²⁶ *Idem.*, p.2.

³²⁷ *Idem.*, pp.13-14. For more information on outreach see ICC, *The Impact of the Rome Statute System on Victims and Affected Communities*, 30 May 2010, pp. 14-15.

³²⁸ For a discussion on the role of national courts and NGO's on the reparation regime see Ferstman, 2002.

for a robust outreach program. However, this can also pose particular challenges. In the *Lubanga* case for example an NGO for the demobilization of child soldiers offered all children who handed in their guns a reintegration kit.³²⁹ The NGO interviewed the children for this purpose and created reports of this. Subsequently the OTP and the VUW interviewed the children, but their information was on some issues conflicting.³³⁰ Furthermore, NGOs quite often refuse to hand over any information.³³¹

Ms. Mansaray stressed that NGOs should not focus only on the victims' rights, but also on the right of the defendant for a fair trial.³³² Since the ICC frequently depends on NGOs to interact with local populations, their cooperation is thus necessary, however, how this should be done and what the added value is of letting child agencies, and NGOs participate at the ICC is a question that requires further research. In addition there are no specific protection and support measures in place in the situation countries for the needs of (child) victim applicants³³³, which definitely have to be developed.

4.3 PROOF OF AGE OF A CHILD

A second area of concern, which was already mentioned in Chapter 3.2.3, is the proof of age of a child. Knowing whether a person is still a child or not is of particular importance for former child soldiers who want to apply for victim's participation and or participate as former child witnesses at the ICC. The *Lubanga* case and also the *situation in Uganda* highlighted this problem.

The prosecution in the *Lubanga* case presented problems in proving the age of the child soldiers, since most of the children had no birth certificates or any other form of documentation to proof their age.³³⁴ In addition an expert witness in pediatric radiology and bone maturation stated that it was very difficult to evaluate the ages of the children in the DRC since there was no standard measure for bone maturation available and data was in particular bad with respect to fifteen up to eighteen year old children. And due to ethnic

³²⁹ Funk, 2010, p. 168.

³³⁰ Funk, 2010, p. 168.

³³¹ Funk, 2010, p. 171.

³³² ICC RC/ST/V/INF.4, 30 May 2010, p.79.

³³³ ICC, *The Impact of the Rome Statute System on Victims and Affected Communities*, 30 May 2010, pp. 18.

³³⁴ ICC-01/04-01/06-T-107, pp. 4-13

differences and food deficiencies it was even harder to establish the age of these children.³³⁵ Given that there has been no final judgment in the trial, it is thus difficult what this evidence will be on the determination age.

Also the situation of Uganda showed that there are many difficulties for children to establish their identity and age.³³⁶ While it is also difficult for adult victims to acquire proof of their identity, in particular for children it is difficult because they have even less financial support and ability to travel to obtain identity cards.

Likewise the SCSL faced problems with determining the age of a child. These cases showed that it was hard to rely on the information of social organizations on whether a person was a child or an adult, since there were no specific ages that determine when children become adults in Sierra Leone. First of all there was no use of birth certificates or calendars, but people relied on external sign of maturity. And secondly there were a lot of secret societies, especially in rural areas, membership allowance would thus imply that they belonged to the adult category.³³⁷ Thus the problem of determining the age of a child is not a particular problem of just one country, but will occur more often in (post) conflict countries.

The consequences of the problem of establishing the age became clearer with regard to the Application Form for victim participation and / or reparation. The form does not make any difference between a child and adult applicant, and thus does not take the children specific characteristics into account. The application form requires victims to identify themselves, and to describe which harm they suffered, moreover, when they want to apply as direct victims of the crime of child soldiering it requires them to establish that they were under 15 years old.³³⁸ The fact that it is for children especially difficult to establish their age is an extra hurdle for them to be accepted to participate at the process, a problem which is broadly addressed by Hamzei.³³⁹

³³⁵ *Idem*, pp. 10-11.

³³⁶ Hamzei, 2010, pp.3-4.

³³⁷ Rosen, 2009, p. 106.

³³⁸ See Regulation 86 of the ICC Regulations of the Court; see *also* Rule 89 RPE.

³³⁹ Helen Hamzei is a PhD Fellow at the Leiden University, her PhD research deals with child war victim's access to justice during and in the aftermath of an armed conflict and the enforcement of their rights.

A welcome step forward with regard to establishing the identity and age for children was made by the Pre-Trial Judge in the Uganda situation.³⁴⁰ He recognized that children are likely not to possess identification documents of their own. He therefore required that the VPRS of the ICC carefully examines the availability of identification documents under Ugandan law and he introduced a lower threshold for children, by also allowing a document which shows the link between the child and its parents. Another Chamber provided for a non-exhaustive list of documents that could show the identity and age of a child.³⁴¹

Thus the ICC is aware that children who are wishing to participate in the proceedings have particular problems to prove their identity and age. However, there are no clear guidelines on this yet and there is no clear list of which documents are allowed. Moreover even though the above mentioned Chambers did recognize that children have difficulties with establishing their identity and age and need other possibilities to prove it, this does not mean that other Chambers have to follow the same approach. As a result this leads not only to legal insecurity for the child victims (that may increase their stress and limit their access to the ICC),³⁴² but also to legal uncertainty for the defendant. The judges face a huge challenge in balancing the right of victims and the right of accused.

4.4 INFORMING THE CHILD ABOUT THE CONSEQUENCES OF PARTICIPATION

A third area of concern is informing children about the possible consequences and risks their participation as victim and or witness in the proceedings will have. Victims wishing to participate should think carefully about the risks, says the ICC booklet on page 16. Unfortunately the ICC has no clear rule obligating to inform the (child) victims about the possible consequences and risks of their participation. This author puts in question to what extent children are able to think carefully about the risks and consequences and thus argues that the Court must have the obligation to inform them. While informing should be already done in the outreach activities, also later during the proceedings children should be informed before participating at a certain stage.

³⁴⁰ ICC-02/04-01/05-252, para., 20.

³⁴¹ Hamzei, 2010, p. 4. See also ICC, *Representing Victims before the International Criminal Court: A Manual for legal representatives*, available at: <http://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF> (consulted on 3 July 2011), p. 47.

³⁴² *Idem*. See for grounds for rejecting child victims' applications Funk 2010, p. 99.

Young children have to make very important decisions during the statement-taking and testimony process. The consequences of their participation may be that they for example will face serious risks to their security. This can result in that the child and also his or her family has to change their identity. Children can also be faced with the fact that their local communities put high expectations on them since the interest and future of the whole community is involved, which can cause a high factor of stress and pressure for them. To make a good decision on possible consequences it is necessary that the child is informed about them. In particular consequences on a long term are difficult for a child to assess, given that the child’s capacity or competence is not yet fully established.³⁴³

In addition a child should be protected against its own lack of experience. Therefore it is important that the ICC takes into account the development, participation and protection of the child as stressed in the principles of the CRC. Even though the CRC does not explicitly mention that victims and witnesses should be informed of potential consequences of their participation in judicial proceedings, it can be argued as noted in Chapter 3 that informing them falls under the principle of Article 3 CRC and Article 12 CRC. In this way the best interest of the child would be to be informed of the consequences of its participation and to be informed about all decisions concerning its involvement during the entire process.³⁴⁴ Possible consequences encompass *inter alia* the emotional and physical risks of giving testimony for the child and his or her surroundings. Moreover it refers to the risks for security and the necessity for protective measures and it also includes possible outcomes of a trial so that the children will have not complete false expectations of what the ICC can mean for them.³⁴⁵

At the SCSL the emotional and physical consequences for being a child witness were explained to the children.³⁴⁶ The ICC almost had a similar legal obligation in omitted Rule 17 (2)(b)(ii) RPE, stating “informing victims and witnesses of [...] potential consequences of their testimony”.³⁴⁷ At the beginning of the drafting period of the Statute this rule was however omitted for the reason that the broad wording was inappropriate since it could scare

³⁴³ Michels, 2009, pp.3-12.

³⁴⁴ Michels, 2009, p.9.

³⁴⁵ Van de Sandt, 2008, p. 48.

³⁴⁶ Van de Sandt, 2008,p.29.

³⁴⁷ Lee, 2001, p.273.

away witnesses to testify.³⁴⁸ Nonetheless, in practice this omitted rule of informing the witness has occurred in a different form at the GCU and VWU since they inform the child witnesses about the court's proceedings and security risks. Several other rules also oblige the court to inform the child witness about their rights and relevant decisions that may impact their interests.³⁴⁹

However, these rules are less precise and therefore this author stresses that a clear Rule, like the omitted one, would have been much better. Now there is legal uncertainty about how and to what extent children have to be informed. Notably, the application forms for victims participation and for reparations do not give the applicants a fair prospective on how unlikely it is that they will eventually participate in the proceedings and or get reparations, thereby creating false hope. Moreover, the delays in the system will also lead to a lot of frustrations for victims, something about which they should be informed beforehand.³⁵⁰

4.5 THE TESTIMONY AND STATEMENT TAKING

The fourth area of concern highlights the problem which was already mentioned in Chapter 3.2.3 with regard to child soldiers victims and witnesses; they come from extremely poor (post-)conflict areas and have to act in international criminal proceedings concerning the most grave human rights violations, thus the risk for re-traumatizing is very high for them. This poses a huge challenge for the ICC, which deals in several cases with the crime of using child soldiers and has to rely on testimonies from these former child soldiers to make a strong case against the accused.³⁵¹ In the courts case law the question rose whether former child soldiers can give credible evidence, and how the statement and testimony taking should be done.

4.5.1 *THE OATH AND THE CREDIBILITY OF CHILD SOLDIER WITNESSES*

First or all when the child witness testifies in trial before the judges of the Court, the

³⁴⁸ Van de Sandt, 2008, p 29.

³⁴⁹ Rule 16(2)(a) and (b) RPE and Rule 75 RPE.

³⁵⁰ Funk, 2010, p. 121.

³⁵¹ Sanin and Stirnemann, 2006, pp. 13-15.

testimony process starts with the solemn undertaking, also called oath.³⁵² Also victims giving their views and concerns have to undertake the oath and become witnesses.³⁵³ However, this oath can be bypassed if a child witness does not understand its nature, but does understand what it means to tell the truth.³⁵⁴ Cases at the ICTY and SCSL showed that even a simple oath could cause complications. At a case before the SCSL a judge used unnecessary difficult formulations to assess whether the child understood the meaning of telling the truth.³⁵⁵ Thus when the judges are going to assess whether a child can understand what it means to tell the truth, this should be done in a uniform and simple manner. Since there are no guidelines on how the judges are going to assess this, this can lead to legal uncertainty and also to a reason for the defence to challenge the credibility of the witness.³⁵⁶

Furthermore the question rises what the purpose is of the assessment of seeing whether children understand to tell the truth. Research is divided on the question whether it will stimulate children to tell the truth. Some studies argue that just like with adults, it does not mean that when children are able to tell the truth they will do so.³⁵⁷ Moreover, if they have the wrong information in their heads, this will not be filtered out by such an assessment. On the other hand, studies revealed that such an assessment indeed promotes truth telling by children.³⁵⁸

In the *Lubanga* trial, the defence challenged the credibility and reliability of a statement made by a child witness at the pre-trial stage, since the child gave names of commanders who were already long dead or could not have been there and talked nervously.³⁵⁹ To proof the credibility of child witnesses the Prosecution filed a report written by psychologist Shauer, entitled “The Psychological Impact of Child Soldiering” to the Trial Chamber.³⁶⁰ Shauer also testified in the trial as an expert witness on child soldiers and trauma

³⁵² Rule 66(1) RPE.

³⁵³ ICC, *Representing Victims before the International Criminal Court: A Manual for legal representatives*, available at: <http://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF> (consulted on 3 July 2011), p. 89.

³⁵⁴ Article 69 (1) RS in conjunction with Rule 66 (2).

³⁵⁵ ICTY-IT-03-68-T.

³⁵⁶ Van de Sandt, 2008, p. 33.

³⁵⁷ Beresford, 2005, pp. 738-739.

³⁵⁸ Van de Sandt, 2008, p 40.

³⁵⁹ ICC-01/04-01/06-803.

³⁶⁰ ICC-01/04-01/06-1729-Anxl, 25 February 2009; Shauer and Elbert, 2009.

and answered additional questions posed by the Chamber, Prosecution and Defence.”³⁶¹ In Section 7 of the report, the expert states:

"Once post-traumatic stress disorder has developed, we see victims, including child soldiers, experience immense suffering due to involuntary sensory, visual or other recall of the most horrific moments of their lives, whereby their autobiographic memory is fragmented and their ability to willingly focus their mind and concentrate is reduced [...] affected survivors can be limited in their capacity to verbally express in detail and chronology, not because they do not remember what happened, but because they enter a state of great anxiety..."³⁶²

This report emphasizes that it is normal for former child soldiers who appear in court to feel stressed and show high physical discomfort, such as speaking quickly and nervously, and tell inconsistencies in their stories, given the horrible events they experienced. Shauer's report thus suggests that this kind of behavior does not prove that the child soldier is lying and cannot be a credible witness. Considering the evidence of the expert witness the Chamber stated that it will not completely dismiss all evidence given by the child but "will attach a higher probative value to those parts of the children's evidence which have been corroborated by other evidence".³⁶³ According to this author it is very questionable whether the participation of child witnesses is in their best interest, and thus stresses that their testimony giving in court should be a last resort, in particular also taken into account that the ICC courtroom and the surroundings of the building are very child unfriendly.

4.5.2 MEASURES TO SUPPORT CHILD WITNESSES IN THE TESTIMONY AND STATEMENT TAKING

4.5.2.1 Witness proofing

Also the report of Shauer highlighted that child soldier witnesses are more vulnerable than other children and need specific measures and protection. Shauer makes several

³⁶¹ ICC-01/04-01/06-1671.

³⁶² ICC-01/04-01/06-1729-Anxl, 25 February 2009.

³⁶³ ICC-01/04-01/06-803.

recommendations to this end. One is that a child witness should get therapeutic sessions before appearing as witness in the courtroom, which can even be video recorded to make clear that the evidence is not altered.³⁶⁴ This recommendation is however seen by the chamber as witness proofing and was already prohibited by the pre-trial chamber in its decision of November 2006, even before the first witness appeared before the Court which showed several difficulties.³⁶⁵

4.5.2.2 Accompanying person

Another measure to assist child witnesses during trial that also raises some questions is given in Rule 88 (2) RPE, which allows an accompanying person. The accompanying person should be there to conform the child who has to tell his or her story. This would be in line with Article 12 CRC in conjunction with Article 5 CRC which acknowledges the role of the child's family and legal caregivers in any decision-making process and takes the evolving capacities of the child into account. The question rises how this Rule 88 should be implemented to take the rights of children into account and also the rights of the Defence.

Research findings on this topic are not conclusive on whether the accompanying persons improve the child's well-being and testimony. Some state that the child is indeed more relaxed and confident and recalls more then when it testifies alone with an advocate.³⁶⁶ Other studies however say that when a family member of the child is present the crying of the child will take longer and moreover that the child will restrain from using sexual explicit language.³⁶⁷ To ensure procedural fairness not only the child's face should be videotaped when it gives a statement, also the face of the accompanying person.³⁶⁸

Although the ICC thus provides in its rules for the possibility of an accompanying person, so far none of the child soldiers who have testified had such a person in the court room.³⁶⁹ It must be noted that it can be questioned whether an accompanying person could not apply to participate as an indirect victim in the proceedings. This topic clearly needs some

³⁶⁴ Easterday, 2009.

³⁶⁵ For what is allowed in familiarizing the witness see ICC-01/04-01/06-679, para.41 and ICC-01/04-01/06-1049, paras.31-32 and 36; Funk, 2010, p. 168.

³⁶⁶ Shauer and Elbert, 2009.

³⁶⁷ Van de Sandt, 2008, p. 39.

³⁶⁸ Beresford, 2005, p. 745.

³⁶⁹ Easterday 2009.

more research. Resource to the SCSL will not help that much in this regard, given that children did not had to travel to another country, like the Netherlands, but testified in Freetown, Sierra Leone. Thus the children did not feel a strong need for an accompanying person to be present in the court room and this issue was also never raised.³⁷⁰

4.5.2.3 Protocols for testimony and statement taking

According to the defence in the *Katanga and Mathieu Ngudjolo Chuicase* case the statement taking period by the OTP creates great problems with regard to the transparency of this process since it is very difficult for other actors, such as the Defence, other victims and NGO's, to monitor the process. The defence draws attention to the fact that the circumstances of the interviews cast some doubts. It mentions that as a minimum requirement the interviews with children must be done with the consent and/or presence of a responsible adult to be credible evidence.³⁷¹ In the instant case it came out that child Witness 28 was interviewed without the consent of any responsible adult; child Witness 157 had consent but no one present; and child Witness 279 was interviewed with the consent of an unknown person. As a consequence the defence has doubts whether the witnesses might could have been influenced by investigators.³⁷² In addition the Defence notes that the presence of a legal representative has been foreseen by Trial Chamber I in the Lubanga case as a precondition for interviewing children.³⁷³ This author consents with the defence that such a person should be present, given that children are more vulnerable than adults and thus are more open for suggestibility. In particular legal and psychological experts are highly recommended and would be line with the CRC.

Therefore this author wants to stress the necessity for the establishment of clear interview protocols on how to interview potential witnesses and victims; this is not only beneficial for the fair trial proceedings, but also very useful for the OTP and for the victim representatives who interview witnesses and victims. Of course these interview protocols must be specially tailored to each investigation, since no situation is the same, and take in

³⁷⁰ Van de Sandt, 2008, p.31. See *also* the website of the SCSL, available at: <http://www.sc-sl.org/> (consulted on 23 June 2011).

³⁷¹ Official Court Translation, ICC-01/04-01/07 27/45 28, para.. 53.

³⁷² *Idem*.

³⁷³ ICC-01/04-01/06-1379, paras. 67 and 72.

particular the special features of children into account. Moreover these protocols must be in line with the latest case law of the ICC on what is appropriate in interviews.³⁷⁴

In addition, these protocols should avoid multiple interviewing, since this can increase the risk of re-traumatizing the child and further harms the truth seeking process, because it increases the chance of suggestibility and inconsistency in a child's story.³⁷⁵ This author recommends that videotaping of all interviews and testimonies should become mandatory, like in the Netherlands, which would to a great extent lessen multiply interviewing.³⁷⁶ Because of technological advancements some of the historical reasons behind giving evidence in person and in public do no longer apply.³⁷⁷ Thus in particular with regard to children these new modern technologies should be used. Moreover, the interviewers must be specialized in child issues and must include in their questions also the questions of the defence, to avoid multiple interviewing.

Furthermore, this author wants to stress that research showed that an immediate statement is less harming than giving testimony at a later trial, because later in time the child will be already busy trying to forget things and thus a recall will be more painful. Moreover, during the statement taking the child will remember more because it is closer to the event. Thus it is actually important that the statement taking will get a higher value during trial. The very first witness ever before the Court already showed the problems testifying in a courtroom presents; he recanted his testimony already after lunch. After this the Court allowed children to testify from behind a screen so that the accused would not be able to see and intimidate them. This author's view is that it would be actually better to let children as less as possible testify in court, and use instead where appropriate their videotaped statement.

After this first witness testimony, the judges also acknowledged that there should be more freedom for a child witness in what it can say when it gives evidence. Therefore they allowed the first child witness after his comeback to freely tell his own story instead of answering strict questions. The Judge also encouraged the witness' testimony by saying to

³⁷⁴ ICC-01/04-01/06-1351, pp. 15-16 and 19-20. Look in particular to the practice of familiarizing the witness.

³⁷⁵ Beresford, 2005, p. 741. Note that in many civil and common law countries interviews with children are minimized, to reduce as much as possible the trauma from interviewing.

³⁷⁶ Van de Sandt, 2008, p. 51. Rule 112 (4) RPE provides for video recording.

³⁷⁷ Beresford, 2005, p.733.

him “you’ve done very well. I wish I could speak as well as you have.”³⁷⁸ This author wants to emphasize that it is indeed important that Judges treat children as human being and not as objects of law, therefore it recommends other Judges to take this example of the Judge and praise and encourage children when they are giving their testimony.

4.6 THE ROLE OF INTERMEDIARIES

The fifth area of concern at the ICC practice is the role of the intermediaries. Since most victims will not speak French or English (the two working languages of the court) interpreters are necessary during the testimony process, but also during the statement taking and application process. As seen in the case of Victoria, many children did not go to school, thus they definitely need help to fill out these complicated Application Forms.³⁷⁹ It is important that intermediaries are familiar with the particular characteristics of a child and are sensitive enough and able to rephrase questions and answers correctly.³⁸⁰ Not only failures in communication should be avoided, but also in particular the relationship between the intermediaries and the witnesses should be more clarified.

First of all there is legal uncertainty with regard to the role of intermediaries in the Application process of Victims. While Rule 89 (3) RPE said that an application form *may* be submitted on behalf of another person, the Chambers added two new conditions for children: the Application Form must be submitted by a person acting on behalf of the child victim and secondly that the application must include the proof of kinship or legal guardianship.³⁸¹ The ICC rejected victim’s applications, because the applicant was a child and the person who submitted the application on his or her behalf was also still a minor.³⁸²

³⁷⁸ Easterday, 2009.

³⁷⁹ The Application Form for Individuals is available at the website of the ICC at: <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf> (consulted on 5 July 2011).

³⁸⁰ Beresford, 2005, p. 745.

³⁸¹ ICC-01/04-374, pp. 12-13; Hamzei, 2010, p.5. See Hamzei, 2010, for a in depth discussion on procedural difficulties for children when submitting the Application Form.

³⁸² Funk, 2010, p. 99.

However, to the contrary Trial Chamber II adopted a more soft approach.³⁸³ It states that it must be looked at a case by case basis what is wishful. On a case by case basis, the court did allow the applications of children without intermediary, for example when they where child conscripts and separated from their parents and other relatives.³⁸⁴ There is no explanation on what kind of standard will be applied in this case by case approach. Trial Chamber I also introduced an exception for children close to 18, and allowed suitable persons.³⁸⁵ However again it is not clear what then close to 18 is and what a suitable person is.³⁸⁶ Thus more clear protocols on this must be established and in particular the involvement of intermediaries must be more described.

Secondly, the role of the intermediaries used by the OTP has been the focus of scrutiny by the Defence.³⁸⁷ In the latest trial session against Lubanga in November 2010, the defence lawyers said that the person who helped the OTP to contact potential witnesses instructed them to give false testimonies. Witness 38, a former child soldier, had to come back to the Court in The Hague and answer the question whether the intermediary bribed him to lie. The child soldier stated: "I only talked about what I knew and did. I did not lie. I have no interest in that. It is a question of morality. Lie is a sin."³⁸⁸ Then he told the court how he met the intermediary and came in contact with the OTP, back in January 2006, which did not sounded suspicious. Furthermore the defence asked the witness whether he received money in exchange to testify against Lubanga. The witness confirmed that he was under the protection program of the ICC and thus received money for food and accommodation, but he stressed that he did not receive any money without signing a document.³⁸⁹

When Intermediary 316 testified and denied all the accusations of bribery against him he said "I am shocked, very shocked at the many lies and the use of forgeries in regards to me".³⁹⁰ However another child soldier, Witness 16 –called by the defence- testified that he planned with Intermediary 316 to lie to the OTP investigators. He said: "The fib was to say

³⁸³ ICC-01/04-01/07-933.

³⁸⁴ ICC-01/04-01/06-1556

³⁸⁵ ICC-01/04-01/06-1556, 67-73.

³⁸⁶ Hamzei, 2010, pp. 5-6.

³⁸⁷ ICC-01/04-01/06-2434.

³⁸⁸ AEGIS, 2010 (b).

³⁸⁹ *Idem*.

³⁹⁰ AEGIS, 2010 (a).

that Thomas Lubanga had enrolled children in the army and I myself was amongst them.”³⁹¹ . These events clearly show again that there must be more transparency in the investigation and statement period of the OTP and the roles of intermediaries. Moreover, the question you can ask yourself is who of the child soldier witnesses is lying? It is very sad and in particular worrying that these children seem to get used again as instruments instead of being seen as human beings

4.7 THE LENGTH OF THE PROCESS AND THE PROTECTION OF CHILDREN IN THE MEANTIME

The last area of concern which has to be discussed here is the length of the legal process. Although it is understandable that the ICC is just a new Court and thus needs a bit longer now this does not take away that delays in the process harm in particular children. Therefore this author wants to stress that the prosecutor has to give priority to children in the trial schedule to avoid unnecessary delays which affect in particular children. Although of course also the memory of an adult will decline in time, studies showed that the decline in memory of children is even more immediately after the event.³⁹² Moreover the time in between the investigation and trial leaves children in particular vulnerable to intimidation and violence. In particular in (post) conflict countries it can be difficult and expensive to provide children sufficient protection in these circumstances. Placing children in another country is also not a good solution, since it will disrupt their live in their home country and they will experience a culture shock, and also placing them in an institution may be psychologically damaging for them. Therefore the area on how to best protect child victims and witnesses in their own country requires further research.

A solution to the lengthy process could be found by thinking about different prosecutorial approaches to hold those responsible accountable. As noted in Chapter 2, child-specific crimes and “generic” crimes can both affect children severely and more disproportionately than adults. According to Aptel³⁹³ one way is to try and charge crimes committed against children separately from crimes committed against adults. The other way is to try them both jointly. Such a first option could avoid unnecessary delays, by focusing on a

³⁹¹ *Idem.*

³⁹² Beresford, 2005, p. 737.

³⁹³ Aptel (a), pp. 96-97.

smaller group of victims, and can more adapt to the specific needs of children. Moreover this would not only fasten the process, but would also highlight the importance that all crimes affecting children are effectively investigated and prosecuted. The case of Victoria showed the horrible stories from real children; the crimes against them should be fully exposed and mentioned and not put under the broader category of civilians, since it became clear that children are much more vulnerable than adults and need special assistance and protection.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

The main question of this thesis was: *Are the rights of children who participate as victim or appear as witness before the newly established International Criminal Court fully protected?*

Chapter 2 showed that the attention on the rights of children during armed conflict and crimes against children grew steadily the last years with as highlight the CRC and the RS. The case of Victoria showed the horrible stories from real children; the crimes against them should be fully exposed and mentioned and not put under the broader category of civilians, since it became clear that children are much more vulnerable than adults and need special assistance and protection.

However, this chapter also showed the lack of a straight-18 approach in the definition of a child which has the consequence that in particular children aged 15-18 fall in a grey zone of protection. This was seen in the RS, where child soldiers are only protected when they are under 15 years. Another peculiarity with the crime of child soldiering is its definition, since there is no clear definition of a child soldier, and its scope is currently debated in the *Lubanga* case at the ICC. This author wants to stress that it is in particular important that next to the crime of child soldiering also all the other crimes against children will be prosecuted at the ICC. Moreover, the Chapter concluded that the ICC is an important avenue to justice for war children, but that children can easily see the whole international criminal process as alien and intimidating. And that recent cases at the ICC revealed several difficulties for children who participate, or are wishing to do so, in the proceedings.

Chapter 3 therefore analyzed the legal framework of the ICC in light of the CRC for children participating at its proceedings. In addition it showed that victim participation is a new aspect in international criminal law and it revealed two difficulties in the use of child witnesses; one concerned their protection and the other the value of their statements. Regarding child soldiers the Chapter noted that it can be particularly difficult to let them participate as witness or victim, since they face a higher risk of getting traumatized than other children and face problems to establish their age. The chapter concluded that the ICC, although located in a very child unfriendly courtroom building, takes children into account and provides several protective and supportive measures for them when participating as victim or witness.

However the last chapter showed that the Courts newly evolved jurisprudence reveals some difficulties for children participating in the proceedings. It showed legal gaps in the ICC's legal framework and concluded that while the ICC took the principles of the CRC into account there still needs a lot to be done. In particular six areas of concern were addressed on which the author will propose recommendations below. Overall it must not be forgotten that children like Victoria participate at the ICC's proceedings, they are thus asked to feel again how they had to kill other children and how they saw their brothers killing their parents, how they got raped by the commanders and how their noses and breasts were cut off when they were exhausted and could not work as hard as the commanders wanted them to.

On basis of this the author concludes that the rights of children who participate as victim or appear as witness before the ICC are taken into account by the ICC, but that there still a lot needs to be done to enable children full access to the ICC in a protective and supportive way and let them testify as witness without harming them. Therefore this author wants to stress that it is in particular important that the ICC solves all legal uncertainties and establishes child friendly guidelines for victims and takes them more into account than it has done so far. Moreover this author wants to highlight the particular value of video-taping the statement taking of children. This would enable children to give their views and concerns, as is their right under Article 12 CRC, and would avoid them to come to The Hague to testify in the courtroom, which is according to this author not in the best interest of a child under Article 3 CRC, given that in particular for war children the risk of re-traumatizing in

international criminal court proceedings is very high. To this end the author proposes several recommendations and areas which need further research.

5.2 RECOMMENDATIONS

5.2.1 Outreach Activities:

- access for victims to participate in the proceedings has to be improved
- the communication with children, in particular the less educated ones, has to be improvement
- outreach programs have to be strengthened to avoid discrimination amongst children
- information of the work of the ICC must be improved
- cooperation with NGOs have to be strengthened and more clarified
- specific protection and support measures must be established in the situation countries for the needs of child victim applicants

5.2.2 Proof of age:

- clear guidelines must be established on which documents and other proof is allowed for the establishment of the age of a child
- the Application Form for victim's participation must take the specific difficulties of children into account

5.2.3 Informing about the consequences of participation

- a clear Rule must be established which obliges all actors of the ICC to inform the child in every stage of the proceedings again of the possible consequences of their participation

5.2.4 The testimony and statement taking

- guidelines must be established for how the oath must be taken by children
- guidelines must be established concerning the familiarization of witnesses with the court proceedings which take in particular children into account
- there must come more transparence in the investigation and statement period of the OTP
- clear interview protocols must be established for the statement taking
- it must be held mandatory that legal and psychological experts are present in the interviewing of children

- the interviewers must be specialized in child issues
- the statements of children must get a more important role so that testimonies in court can be avoided as much as possible
- multiple interviewing of a child must be avoided as much as possible
- videotaping of all interviews must be mandatory
- questions of the defence should be already included the first time when interviewing children
- child witnesses in the court room should be allowed to tell their own story instead of strictly answering questions
- child encouraging words should be used by judges and advocates

5.2.6 The role of intermediaries

- intermediaries must be familiar with particular characteristics of children
- clear protocols must be established clarifying the role between intermediaries and the children
- there must come more transparence in the roles of intermediaries in the statement period

5.2.7 The length of the process

- priority must be given by the prosecutor to children in the trial schedule
- children must be protected in the meantime of the investigation stage and the trial stage
- try and charge crimes committed against children separately from crimes committed against adults

5.3 FURTHER RESEARCH

- It is important that future studies will analyze the impact of outreach programs and see what can be done in other situations to improve the involvement of children.
- It is necessary that the impact of an accompanying person for the child in the court room will be further analyzed and other supportive and protective measures.
- In particular new possibilities with videotaped statement taking must be analyzed to avoid children's testimony taking in the court room.

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GLOSSARY OF TERMS

Accused – An individual person accused before the ICC; a person against whom one or more charges have been confirmed by ICC judges.*

Case – Proceedings before the ICC in which an arrest warrant has been issued in relation to specific individual or individuals.*

Chamber – A Chamber is a composition or group of judges of the ICC assigned to a certain situation or case. For instance, the situations of the Democratic Republic of the Congo and Darfur have been assigned to Pre-Trial Chamber I and the situation of Uganda has been assigned to Pre-Trial Chamber II.*

Chambers – The offices of the judges and their staff. The Chambers of the ICC are composed of three divisions. The Appeals Division, the Trial Division, and the Pre-Trial Division.*

Child – in this thesis a child is considered as every human being below the age of eighteen years without any exceptions.

Defence – The Defence is made up of the defendant and her/his legal advisors.*

Gender and Children Unit – A special unit within the Investigation Division of the Office of the Prosecutor. The Unit conducts *inter alia* pre-interview assessments prior to the interviewing of child witnesses and advises the Prosecutor on all issues related to the interviewing of children.

Outreach Unit – A special unit created as a response to challenges the Registry faced. The Unit conducts activities to reach the affected communities which are in cases and situation the ICC deals with.

Hearing – A session before judges, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying, and usually involving a specific question.*

Office of the Prosecutor – The mandate of the office is to receive and analyze referrals and communications in order to determine whether there is a reasonable basis to investigate, to conduct investigations into genocide, crimes against humanity and war crimes and to prosecute persons responsible for such crimes. The OTP is an independent organ of the Court.*

Proceedings – A sequence of (formalised) stages by which a court comes to a judgement, from the time of initiation of investigations to the final judgement. Stages include; preliminary examination stage, pre-trial stage, trial stage and appeals stage.*

Registry – The organ of the Court responsible for providing administrative and operational support to the President, Chambers of the judges and to the Office of the Prosecutor. It also provides support for the defence and victims, and is responsible for public information and outreach of the Court.*

Situation – A situation under the consideration of the Court. A situation might be defined by a particular conflict involving certain actors and behavior that may amount to crimes within the ICC's jurisdiction. The limits of the situation may be established by the referral from the State Party or the UN Security Council that first requested the Court to act. Or they may be established by the Court itself, where the initiative to investigate crimes comes from the Court itself.*

Trial – Examination of evidence and applicable law by a competent tribunal to determine the issue of specified charges or claims

Victim – For the purposes of the ICC, a victim is a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court.*

Victims and Witnesses Unit – The Unit provides protection and psychological support to witnesses, victims who appear before the Court and others who are at risk on account of the testimony they have given. It is also responsible for witness protection programmes.*

Victims Participation and Reparations Section – The Section assists victims in relation to their applications for participation in proceedings or for reparations, or both. It also assists victims in obtaining legal advice and organising their legal representation.*

Witness – A person who gives evidence before the Court by testimony. A witness is normally called by the Prosecutor, who is trying to prove the criminal case against an accused, or the defence, who is defending the accused against the accusation. A witness may also be called by a victim or by a Chamber.*

*) Definition derived from 'Booklet victims before the international criminal court a guide for the participation of victims in the proceedings of the court'.