

UN SABBATICAL LEAVE PROGRAMME 2015 - REPORT

***“CHILD VICTIMS AND WITNESSES IN INTERNATIONAL CRIMINAL
JUSTICE”***

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I. INTRODUCTION

Child rights have gained in the last two decades greater global support and visibility through the almost universal ratification of the United Nations Convention on the Rights of the Child (CRC) and the tireless activity of the Committee on the Rights of the Child - the monitoring body of the Convention and its two Optional Protocols - for the promotion and protection of the rights of all children. Other UN treaty bodies¹ as well as other mechanisms and bodies both at international and regional level are also giving increasing attention and have become more sensitive to child rights. However, quasi universal ratification of the CRC unfortunately does not mean its universal implementation, as children continue to suffer widespread violations of their rights and to be often the first victims of the most atrocious crimes, including rape, sexual violence, abduction, recruitment as child soldiers, trafficking, sexual exploitation and forced labour.

The rapid growth of the international justice system in a relatively little time has brought undeniable advantages in terms of accountability for international crimes, including crimes against children. Norms and procedure have rapidly developed, in particular with the establishment of the International Criminal Court (ICC), as to take account of the special situation of child victims and witnesses, including in the area of participatory and reparation rights. At the same time children, notably those involved in armed conflict, may also be the author of grave crimes, including international crimes.

The research during my sabbatical leave focused on children who become victims of international crimes as well as on their rights and treatment when they enter into contact with international criminal justice as victims or witnesses. Special focus was devoted to their protection and access to justice in terms of participation and reparation, notably on the novelties brought by the ICC in these areas.

The research was part of a wider Ph.D. project carried out at the Graduate Institute of International and Development Studies in Geneva, which also focused on involvement of children in armed conflict – and the standards thereto – and the issue of accountability of

¹ The expert bodies mandated to monitor States' compliance with the human rights treaties to which they are parties.

children for international crimes. My thesis on “*child victims, witnesses and offenders in international criminal justice*” has been deposited at the Graduate Institute on 4 February 2016, with thesis number 1136.

I deeply appreciate the opportunity given to me to carry out this research project.

This sabbatical report presents some of the main findings of my research.

II. OBJECTIVE AND METHODOLOGY

With respect to the objective, the approach of the research was threefold:

- *Analytical*: take stock of the current status of international law and practice (including jurisprudence of international tribunals) with respect to: 1) children who are victims or witnesses of international crimes and 2) the treatment they receive when they enter into contact with international criminal justice;
- *Critical*: assess 1) the current gaps in international law and jurisprudence in the normative framework and jurisprudence in relation to the identified thematic areas, including whether this normative framework, practice and jurisprudence is developing in an effective way and is in the best interest of the child; and 2) at the same time, examine how the increased attention given in international law to children in all these aspects can be balanced with other competing rights, notably the right of the accused (when the child is a victim); or the rights of those victims of the crimes committed by children (when the child is potentially an offender);
- *Forward-looking*: present the different legal, moral and policy questions which are still unsolved in relation to child victims and witnesses of international crimes and their treatment in international criminal justice; and propose solutions on a number of problematic/unsolved issues in these areas.

Human rights law and standards were the guiding principle of the research, while however taking into account the following additional elements:

- The specific situation of children in international criminal justice, where mass atrocities are normally adjudicated;

- The peculiarity of international criminal proceedings vis-à-vis proceedings at national level;
- The possible friction between child rights and the fair trial rights of the accused;
- The rights of the child to participate and obtain an adequate reparation vis-à-vis prosecutorial strategies and judicial efficiency.

With respect to the methodology adopted, in addition to “traditional” academic research and legal analysis of the normative framework, I travelled to The Hague to conduct interviews with a number of both high level and working level ICC officials to discuss a number of questions relevant for my research.

III. MAIN FINDINGS

1) Children victims of international crimes

International criminal justice only recently started devoting attention to child victims of international crimes. Child-specific international crimes have been included in the Statutes of modern international tribunals, notably in the ICC Statute. They include genocide for transferring children from one group to another²; war crimes for attacking schools and other buildings dedicated to education³; and war crimes for conscripting or enlisting children or using them to participate actively in hostilities⁴. Other crimes, such as forced marriage⁵, particularly affect children because of their vulnerability. The crime against humanity of enslavement⁶ is also child-specific as it is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in

² Article 6 (e) of the Rome Statute. This provision was in fact already included in articles 4(e) and 2(e) of the ICTY and ICTR Statutes as well as in article 2(e) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

³ Arts. 8 (2)(b)(ix) and 8 (2)(e)(iv) of the Rome Statute.

⁴ Articles 8 (2)(b)(xxvi) and 8 (2)(e)(vii) of the Rome Statute.

⁵ The first conviction for forced marriage in an international tribunal was issued by the Special Court for Sierra Leone (SCSL), Judgment: *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Barbor Kanu* (AFRC case), Case N° SCSL-04-16-T, Appeals Chamber Judgment, 22 February 2008.

⁶ Article 7 (c) of the Rome Statute.

the course of trafficking in persons, in particular women and children”⁷. Of course, children can also be victim of other ‘general’ international crimes, such as murder, torture, rape or sexual violence, among others.

The ICC Statute contains other references to children as victims of international crimes. In the Preamble, it is mentioned that the State parties are “Mindful that that during this century millions of *children*, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. Furthermore, crimes involving violence against children are mentioned with respect to the particular attention needed vis-à-vis their investigation, the protection of victims and witnesses and children’s participation in the proceedings⁸.

It can therefore be affirmed that international criminal tribunals are slowly starting to devote more attention to children as a separate category of victims, and not just generally as part of the ‘civilians’ population, in particular in relation to sexual violence and sex-related crimes⁹. It is indeed important that international tribunals recognize the special vulnerability of children, including girls, in times of conflict and the “disproportionate impact” that international crimes tend to have on them¹⁰.

So far, a lot of attention has been especially devoted in international criminal justice to the crime of child recruitment and use in hostilities. This international crime has been included in both the Statute of the Special Court for Sierra Leone (SCSL) and of the ICC. Several

⁷ Specific crimes against children are also included in the International Convention for the Protection of All Persons from Enforced Disappearance (ICED), in which article 25 provides that “ Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

The Working Group on enforced or involuntary disappearances has also adopted a General Comment specifically on the issue of children and enforced disappearances; A/HRC/WGEID/98/1 (14 February 2013).

⁸ Arts. 42, 54 and 68 of the Rome Statute.

⁹ This was the normal treatment afforded to child victims during the trials in Nuremberg and Tokio and, to some extent and with the mentioned exceptions, in the ICTY and ICTR as well.

¹⁰ See Aptel, C., “Children and Accountability for International Crimes: The Contribution of International Criminal Courts”, *Innocenti Working Paper 2010-20*, Florence, UNICEF Innocenti Research Center, August 2010.

prosecutions have focused on this crime in both courts. This special attention - which can be explained not only with to the gravity of the crime, but also in light of the fact that there has been enormous pressure and virtually universal consensus on the need to prosecute it - has to be welcomed¹¹. However, it should not work at the detriment of other crimes that affect children with the same devastating effects. In fact, relatively little attention has been given until recently to other child-specific crimes in the practice of international criminal tribunals, despite the fact that children are usually the first victims of these crimes in all conflict situations.

For instance, other crimes against children, including sexual-related crimes, have been deliberately excluded from the prosecution charges in the *Lubanga* case before the ICC, the first case which has reached the conviction stage before the Court, in spite of the reported abundant evidence of the involvement of the accused in the commission of these crimes. Given the lack of charges related to these crimes, and the fact that therefore they were not comprised in the Pre-Trial Chamber's Decision on Confirmation of Charges¹², the Trial Chamber decided not to include them in a further stage of the trial arguing - with Judge Odio Benito dissenting - that these crimes were not the subject of the charges against the accused and thus merely accepting the Prosecutor's request¹³.

This decision has been widely criticized for not being in the best interests of the victims and for unduly limiting the scope of the several crimes allegedly committed by *Lubanga*¹⁴.

¹¹ McBride has a different and perhaps more pragmatic view on this issue, arguing that one of the main reasons why the first ICC case focused on child recruitment charges exclusively was that the Prosecutor had the perception that the case against Lubanga was very strong and could be presented quite comfortably before the Court. McBride, J, "*The War Crime of Child Soldier Recruitment*", Asser Press, 2014, pages 155 ff..

¹² *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007.

¹³ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, Trial Chamber. I, 14 March 2012 (hereinafter 'Lubanga Trial Judgment'), para. 16.

¹⁴ See, for instance: Matete Nakesha G., "Reflections on Victims participation in the Lubanga Judgment", at 4, available at: http://acontrarioicl.com/2013/05/02/reflections-on-victims-participation-in-the-lubanga-judgment/#_ftn2 "The Chamber's choice to disregard the sexual violence crimes merely because they were not included by the prosecution in the charges against the accused was a disservice to the victims of the crimes of which Mr. Lubanga was found guilty. I agree with Judge Odio Benito's dissenting opinion that sexual violence and enslavement are illegal acts and are directly caused by the illegal crime of enlisting, conscription and the use of children under the age of 15 years".

It has to be welcomed in this respect that one of the declared objectives of the Office of the Prosecutor of the ICC is to “continue to pay particular attention to sexual and gender-based crimes and crimes against children” and that it is developing a policy paper which will address specifically children issues¹⁵.

Generally speaking, if the commission of a generic crime against a person below 18 does not constitute a separate, or a more serious, crime included in a tribunal’s statute, the easiest option to follow is to consider the young age of the victims as an aggravating circumstance, as it was done at the ICTY¹⁶. However, what is important is that the victimization of children in these crimes, and the inherent gravity of targeting them, is adequately addressed throughout the process and does not end up being relevant only when it comes to the determination of the final sentence or to the reparation phase¹⁷. It is therefore important to facilitate children’s access to justice from the outset and hear as much as possible their views and concerns. Likewise, when an international crime is committed against a child, it is essential that the gravity of this conduct and its unique devastating consequences on the child transpire and are reflected throughout the different stages of the proceedings, irrespective of whether this conduct amounts to a child specific crime or to a “generic” crime. The first step towards a child-friendly international justice is recognizing and analyzing the specificities of the crimes committed against children and, thereafter, assessing their consequences and punish the perpetrators accordingly.

¹⁵ ICC OtP Policy Paper on sexual and gender-based crimes, June 2014; pages 10, footnote 9 and page 17, footnote 26. See also OtP Strategic Plan 2012-2015, 11 October 2013, paras. 58 ff.

¹⁶ This seems the approach suggested in the International Convention for the Protection of All Persons from Enforced Disappearances (ICED), which in article 7 (2) (b) provides that States parties to the Convention may establish aggravating circumstances in the event of the commission of an enforced disappearance in respect of, among others, minors. .

¹⁷ See along these lines Aptel, C., “International Criminal Justice and Child Protection”, in *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, UNICEF & Harvard Human Rights Program, 2010, at 97.

2) *Children in international criminal proceedings*

Protection of victims and witnesses

Children, as a category of particularly vulnerable victims - either due to their personal characteristics or due to the circumstances of the crime - should benefit from measures tailored to their situation. Child victims who are also witnesses in criminal proceedings - as they often possess the best, if not the only, evidence of crimes - also deserve particular attention and specific measures of protection. This is true not only for child victims who enter in contact with the criminal justice process at national level, but also for those who do so - and this is increasingly happening – at the international level.

There is little doubt that substantial progress has been made in the protection of victims and witnesses in international criminal justice since the inception of the ICTY and the ICTR, the two *ad hoc* international criminal tribunals. Significant improvements occurred already with the SCSL, where it was particularly important to create an adequate framework for children entering in contact with the Court, given that regrettably many were directly involved in the conflict not only as victims, but also as perpetrators. Thereafter, the ICC has pioneered the development of a more comprehensive protection and support scheme for victims and witnesses.

The need to pay special attention to former child soldiers acting as witnesses is confirmed by the experience of the Office of the Public Counsel for Victims (OPCV) of the ICC, according to which former child soldiers “appear to be more vulnerable than other witnesses and need a constant follow-up during the testimony and after”¹⁸. The main difficulties they have expressed to the OPCV are : possibility of being intimidated by the accused (they often say that they still “feel their authority”); impossibility to fully recall the details of what happened to them; fear for their security; rejection by their communities; difficulties in reintegrating in the society (this last factor varies depending on the number of years they have spent in captivity; willingness of their family/community to have them back); continuous psychological problems.

It is particularly important to underline that it is necessary to have a holistic approach towards protection measures for children, i.e. these measures should not be limited to in-court

¹⁸ Email correspondence with Paolina Massidda, Principal Counsel of the Office of the Public Counsel for Victims, February 2015.

measures, but should also cover the pre- and post-trial period as well. For most of the children who testified before the SCSL, for instance, the main concern was their security and notably the fear of reprisals once the trial was over and they went back home. The ICC is paying special attention to this issue and trying to reinforce both the psychosocial support and the protection measures at local level¹⁹.

At the same time, it may be incorrect to deem that confrontation with the accused is always traumatizing as it can actually be somehow rewarding for most resilient child witnesses who have also been victims. This is why it is essential to have a careful individual assessment of potential witnesses before the trial, followed by a coordinated and balanced determination of the child vulnerability *vis-à-vis* the prosecutorial strategy needs and the importance of that particular testimony.

Who is a victim?

Rule 85, sub-rule (a) of the Rules of Procedure and Evidence of the ICC establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered.

The notion of victim necessarily implies the existence of personal harm, though it does not necessarily imply the existence of direct harm. In fact, the Appeals Chamber of the ICC has clarified that the harm suffered by a natural person is harm to that person, i.e. personal harm but that, nonetheless, the harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. As an example, the Chamber refers to cases where there is a close personal relationship between the victims, such as the relationship between a child soldier and the parents of that child. Thus, the recruitment of the child may result in personal suffering of both the recruited child and his or her parents²⁰. This approach, which should be considered as the correct one in light of the huge collateral impact of international crimes - and notably the recruitment of child

¹⁹ Interview with Nigel Verrill – Chief of the Victims and Witnesses Unit at the ICC – and his team. The Hague, 29 April 2015.

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008. ICC-01/04-01/06 OA 9 OA 10, 11 July 2008, para. 32.

soldiers - requires nonetheless a comprehensive strategy in order to find an appropriate methodology to deal with a potentially very high number of victims and hence to avoid delay and disruption in the proceedings²¹.

In the *Lubanga* judgment, the first case being adjudicated before the ICC, referring to Principle 8 of the 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, the Trial Chamber established as an overall criterion determined by the Court that a victim is someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss²².

The concept of indirect victims was also considered through a different angle by Trial Chamber I of the ICC when it had to decide on a question received by the Registry in relation to approximately 200 applications to participate in the *Lubanga* trial by applicants who alleged they had suffered harm as a result of crimes committed by the Union of Congolese Patriots (UPC). In particular, the question was “*whether any of these applicants might be considered to be indirect victims in the case, if they were victims of crimes committed by persons who had been conscripted or enlisted whilst under the age of fifteen or used to participate actively in hostilities*”²³.

The Chamber responded negatively to this question as it considered that only two categories of victims can participate: “those whose harm is the ‘result of the commission of a crime within the jurisdiction of the Court’. Second, ‘indirect victims’: those who suffer harm as a result of the harm suffered by direct victims”²⁴. Thus, for the Trial Chamber in *Lubanga*, the direct victims of these crimes are the children below fifteen years of age who were allegedly conscripted, enlisted or used actively to participate in hostilities by the militias under the

²¹ See Ambos K., “The first Judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive Analysis of the Legal Issues”, *International Criminal Law Review*, Vol. 12, No. 2, 2012, page 117. Ambos adds that “Unfortunately, the Chamber makes no attempt to develop such a strategy”.

²² *Lubanga* Trial Judgment, para 14 (ii).

²³ Second Report to Trial Chamber 1 on Victims' Applications under Regulation 86.5 of the Regulations of the Court, ICC-01/04-01/06-1501-Conf-Exp, 21 November 2008, paragraph 4.

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, *Redacted version of “Decision on ‘indirect victims’”*, ICC-01/04-01/06-1813, 8 April 2009, para 44.

control of Mr. *Lubanga*, while indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. Therefore, it excluded from the category of ‘indirect victims’ those who suffered harm as a result of the (later) conduct of direct victims, i.e. the victims of the acts committed by child soldiers.

This decision is, in my opinion, quite unfortunate for various reasons. First of all, while it is true that setting strict criteria for granting victim status is the best way to ensure a meaningful and effective participation of victims in the proceedings and avoid infringements of the right of the accused to a fair and expeditious trial, the conduct of child soldiers should have been considered in this case as directly linked with and direct consequence of the crime of child recruitment and use in hostilities²⁵.

Furthermore, and more importantly, giving to victims of the crimes committed by child soldiers the possibility to participate in the proceedings and obtain reparation for the crimes suffered could somehow contribute to fill the impunity which most of the times characterises the crimes committed by child soldiers. As we know, in fact, article 26 of the ICC excludes the jurisdiction of the Court on persons below 18, and hearing the voice of victims of these crimes could serve to fill this gap and, to some extent, meet the goals of restorative justice.

It has been pointed out that, even wanting to grant the status of victims to those who suffered harm as a consequence of the conduct of child soldiers, the Court would not need to explore the details of child soldiers’ actions in the course of the proceedings against the accused and that the broadening of the notion would not entail that the accused should be held accountable for the individual crimes committed by child soldiers²⁶. The question is why not? Recruiters could be potentially hold accountable for crimes committed by child soldiers under some forms of vicarious responsibility such as the principle of superior or command responsibility or perpetration by means²⁷, if obviously the required conditions for these modes of liability to

²⁵ See along these lines, Spiga, V., “Indirect Victims’ Participation in the Lubanga Trial”, *Journal of International Criminal Justice*, 8 (2010), at 193; and Jorgensen, N., “Child soldiers and the Parameters of International Criminal Law”, *11 Chinese Journal of International Law* (2012) page 673. See also *The Prosecutor v. Charles Taylor*, SCSL-03-01-T-1283, Judgment, Trial Chamber, 18 May 2012, (Taylor Judgment), 18 May 2012, paras. 1604 and 1968.

²⁶ Spiga, V., *op. cit.*, *supra*, note 25, at 193.

²⁷ Perpetration by means or indirect perpetration is a mode of liability introduced in article 25 (3)(a) of the ICC, according to which: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

apply subsist. However, the Court so far has not yet convicted any superior/commander for the crimes committed by child soldiers using one or more of these modes of liability and this may also explain this decision in *Lubanga*.

Nevertheless, given the reasoning behind this decision, it is feasible that when the charges are broader than in *Lubanga* and are not limited to the recruitment and use of child soldiers, the interpretation vis-à-vis those victims of the crimes committed by child soldiers as not being considered as ‘indirect victims’, may be subject to reconsideration. In fact, this seems to have been the case for the victims participating in the *Katanga* case, where victims were divided in two big groups: the main group of victims included those victims of the attack at the village of Bogoro, location of all the crimes for which the accused was charged; and the second group was of child-soldier victims²⁸. While *Katanga* was finally acquitted from the charges of using children under 15 to participate actively in hostilities, the Chamber found that children were the authors of crimes during the attack in Bogoro²⁹, from which it can be inferred that the first group of victims also includes those who may have suffered harm from the crimes committed by child soldiers.

Participation of child victims

The strong and widespread criticism concerning the lack of a more victim-centered approach in the two *ad hoc* tribunals, and to some extent in the SCSL too, has had significant impact in the discussion and negotiation of the Rome Statute, which resulted in the inclusion of much stronger provisions on victims’ participation in the ICC Statute and rules of procedure.

Throughout my research it appears clearly that there have been extraordinary improvements in the area of access to international justice, including for children. In fact, victims enjoy in ICC proceedings rights that have never been incorporated before in the mandate of an

(a) Commits such a crime, whether as an individual, jointly with another or *through another person, regardless of whether that other person is criminally responsible* (emphasis added).

²⁸ *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute ICC-01/04-01/07-3436, 7 March 2014, para.33 (Katanga Trial judgment).

²⁹ "The Chamber is therefore satisfied beyond reasonable doubt that during the 24 February 2003 attack on Bogoro, children – including some, it is established, under the age of 15 years – were among the Lendu and Ngiti combatants, that they took part in the battle, and that they committed crimes at that time". Katanga Trial judgment, para. 1065.

international criminal court. In general terms, the novelty of recognizing victims - and notably child victims - participatory rights in international criminal proceedings certainly represents a formidable step forward that has to be welcomed. Hearing children's voices, allowing them to express their views and concerns and clearly recognizing their right to reparation for the harm suffered, is intrinsically linked to the very concept of justice. Let's just think, for example, that child victims in *Lubanga* were able to participate introducing evidence, questioning witnesses and present oral and written submissions. This was unimaginable only few years ago.

Out of a total of 129 victims who participated in the *Lubanga* trial, 34 were female and 95 were male³⁰. The Chamber divided the victim participants into two groups, each one represented by a Common Legal Representative³¹. The victims who have been granted permission to participate in this trial were mainly alleged former child soldiers, although some were the parents or relatives of former child soldiers and one was a school. Since some of the victims were still children when they submitted their applications, their parents, relatives or other legal representatives acted on their behalf. The Chamber however accepted that the individual who acted for a child did not need to be their parent or legal guardian – indeed it permitted children to participate directly without an adult representing them³². Four victims were represented by the Office of the Public Counsel for Victims (OPCV) and had dual status of victims and witnesses: three of them gave evidence during the trial and were provided in-court protective measures including voice and face distortion, as well as pseudonyms³³.

Children have been allowed to participate also in the *Ngudjolo* and *Katanga* cases. The cases were initially joint but were severed in November 2012 for the decision of the judges³⁴. In *Ngudjolo*, 11 child soldiers were allowed to participate as victims, though victims' status was

³⁰ *Lubanga Trial Judgment*, para. 15.

³¹ *Ibid.*, para. 20.

³² *Ibid.*, para. 17.

³³ *Ibid.*, para 21.

³⁴ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

later withdrawn for two of them³⁵; while in *Katanga* a common legal representative was appointed for 11 victims belonging to the group of former child soldiers³⁶.

However, in spite of these enormous achievements, various challenges remain to make the access to and participation in international criminal justice a meaningful reality for many child victims.

The first problem is that access of child victims to the ICC has so far been, in proportion, limited. Only a relatively small number of victims of the crimes under the Court's scrutiny have been able to apply for participation, and of this number, an even smaller percentage has been granted victim status and admitted to participate in the proceedings. This may be inevitable considering the very nature of international criminal justice which – per definition – can only have a limited outreach and focuses on the most responsible of the most grievous crimes. This feature of international criminal justice has to be borne in mind when conceiving schemes of participation of victims, including child victims. One possibility that has been suggested would be to make alternative avenues to seek truth and justice accessible to all those who have been left out of the international criminal justice process³⁷.

A second difficulty is linked to the first. Experience at domestic level shows that, in presence of massive atrocities, access to justice is often limited to those who are wealthier, better educated or have the possibility to have legal assistance³⁸. Raising awareness among and improving access to specific categories who may have limited accessibility to the Court, including children, would be an important measure to render justice more equitable.

It is important in this respect to provide victims with clear information about the relationship between participation and reparation, including that participation in the proceedings is not a pre-requisite to be awarded reparation before the ICC, the potential length of proceedings and the ICC's approach to reparation. It is also important not to raise false expectations among

³⁵ *The Prosecutor v. Mathieu Ngudjolo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3, 18 December 2012, para 32.

³⁶ *Katanga Trial judgment*, para. 36.

³⁷ See, for instance, Van den Wyngaert, C., "Victims Before International Criminal Courts: some views and concerns of an ICC Trial Judge", *Case W. Res. J. Int'l L.*, Vol.44, March 2012., page 495.

³⁸ Transitional Justice Network, University of Essex, "The International Criminal Court and Reparations for Child Victims of Armed Conflict", by Birchall, E.; Francq, E., and Pijnenburg, A., Edited by Sandoval, C., Briefing Paper N°4 (2011), page 5.

victims and clarify how the ICC can - if not meet - at least manage victims' expectations as it starts its huge endeavour of the reparations process.

A related criticism often heard is that the victims' participation system as it is functioning does not in fact allow the Court to meet its main goal to end impunity, especially due to the chronic delays, that are so significant that preclude the Court from effectively dealing with other parts of the proceedings.

There have been various initiatives taken by different organs of the Court to improve participation, for instance revising the application system and seeking to facilitate procedures, but these are often uncoordinated and driven by the divergent opinions and views of different judges on the topic, rather than result of a coordinated approach and strategy of the Court³⁹. Trying to simplify as much as possible the procedures within the respect of the rights of the accused is probably the easiest and most straightforward solution. For instance, by allowing victims who have participated in earlier phases of the process to automatically participate in the other phases – if of course the charges related thereto continue to be adjudicated – and victims who participate in a trial to participate in other trials where the underlying crimes are the same.

Another fundamental issue is the need to balance between participatory rights and the right of the accused. It is essential for the credibility of international criminal justice that the jurisprudence of the ICC sets good standards in this respect and avoids judicial interpretation on the participation modalities for victims that could be at variance with the rights of the accused to a fair and impartial trial. There is in fact a widespread conviction among scholars that international criminal justice suffers from an “impartiality deficit”, linked to what is perceived to be a sort of compulsive duty to convict the accused irrespective of – or at least with relatively little regard towards – the rights of the accused. For instance, victims before the ICC may be able to tender evidence pertaining to the guilt of the accused, but do not have the obligation to disclose potentially exonerating evidence. Perhaps, if the Court has decided that victims can lead evidence pertaining to the guilt of the accused – a role that is technically that of the Prosecutor – than perhaps it would be fairer and more in line with the principle of equality of arms that they are also bound to disclose potentially exonerating evidence. The

³⁹ See Independent Panel of experts report on victim participation at the International Criminal Court, July 2013, para. 37.

alternative is that they be only allowed to lead evidence through the Prosecutor and not directly. Participating victim acting as a sort of additional prosecutor may represent a real problem for the due respect of the principle of equality of arms.

Reparation

Another significant novelty introduced by the ICC is that the possibility for victims to participate in the proceedings does not end with the trial but extends to the post-trial phase as well. The Statute and the Rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.

The decision on reparations in *Lubanga*, the first case adjudicated before the ICC, is an historical one, as it is the first time child victims are awarded reparation in an international criminal court. Other elements of the *Lubanga* decision on reparations that needs to be welcomed are the abundant references in the judgement to human rights standards and principles, including the concept of “lost opportunities” or “life plan”, as developed by the Inter-American Court of Human Rights (IACtHR), as well as child rights.

With respect to the forms of reparations, the approach taken by the Trial Chamber in *Lubanga* – and largely confirmed by the Appeals Chamber – suggesting a collective community-based approach appears to be the right one for a number of reasons:

- the collective forms of reparation in *Lubanga* have an individual component and may results in benefits for the individual children (e.g. measures of reparation focusing on health or education);
- they will be designed and implemented in consultation with children themselves and their representatives in the community;
- they are less likely to result in social stigmatization and possible reprisals in the community of origin;
- finally, they are more easily implementable and are less costly

On the other hand, this collective reparations needs to be implemented with an individual component and when victims are older boys and girls or require more tailored measures

because – for instance – they cannot benefit in practice from collective forms of reparation, individual reparations may be preferable. One problem for instance with this approach may be how the former child soldiers who have been relocated for security reasons and did not come back to their community of origin will benefit of the reparations, given that they may be excluded from the collective modalities of reparations directed to their communities of origin.

In this respect it will be important to see whether the decision to opt for collective reparations in *Lubanga* will set jurisprudence and pave the way for similar decisions, at least when reparations need to be awarded to a large group of victims who have suffered the same crime, as in the case of child soldiers. The Trial Chamber, however, has indicated in its decision on reparation in *Lubanga* that the principles relating to reparations and the approach taken to their implementation are limited to the circumstances of the case and that the decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies⁴⁰.

⁴⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations” (hereinafter *Lubanga decision on reparations*), 7 August 2012, para. 181.

Endnote

On 16 December 2014, the Taliban ruthlessly attacked a school in Peshawar, Pakistan, randomly shooting at children in the corridors or while they were trying to protect themselves under the desks⁴¹. In Nigeria, Boko Haram has recently started using girls as young as 10 as suicide bombers, perhaps the youngest ever⁴². Boko Haram is the same terrorist group which in April 2014 has abducted hundreds of female students from the Government Secondary School in the town of Chibok, in the Borno State of Nigeria⁴³. In Iraq, the Islamic State of Iraq and the Levant (ISIL) abducted scores of Yazidi girls, subjecting them to torture, rape, forced marriage and other gross human rights violations⁴⁴.

Those just described are only few of the most horrific crimes of which children have become victims most recently, while they sadly continue to be the first victims in other dozens of conflicts worldwide. We seem to live in an unprecedentedly cruel world where there is no care and respect for what we should value the most: our children.

While impotent in many ways, the little we can do for these children is to treat them with warmth and respect when they enter in contact with the international justice system. We should never forget what they have gone and are going through when they sit in a courtroom for an interview as victims, witnesses or because they have committed crimes most of them will deeply regret every day of their lives.

The machinery of international criminal justice may be a powerful tool to address the brutal abuses and violations against children and give them justice and reparation. To make this a reality, however, it is necessary to make a good and sensible use of it as to avoid that children be re-victimized in any way throughout the process.

⁴¹ http://www.nytimes.com/2014/12/17/world/asia/taliban-attack-pakistani-school.html?_r=0

⁴² <http://www.nytimes.com/2015/01/11/world/africa/suicide-bomber-hits-maiduguri-nigeria-market.html>

⁴³ <http://africacheck.org/factsheets/factsheet-how-many-schoolgirls-did-boko-haram-abduct-and-how-many-are-still-missing/>

⁴⁴ <https://www.amnesty.org/en/articles/news/2014/12/iraq-yezidi-women-and-girls-face-harrowing-sexual-violence/>