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Balancing a Child's Right to be Heard with Protective Measures Undertaken in "the Best Interests of the Child": Does the International Criminal Court Get it Right?

*By Naila S. Awan**

I. INTRODUCTION

Issues involving children's rights often require the balancing of competing interests in order to determine what course of action is in "the best interests of the child." Determining the extent of a child's right to participate in judicial and administrative proceedings, such as criminal trials before the International Criminal Court ("ICC"), is one example of a situation in which a balancing of children's interests is required.

Traditionally, criminal courts have focused on "protecting the rights of the accused adult rather than enabling children to participate optimally as witnesses in court within their developmental capabilities."¹ The United Nations Convention on the Rights of the Child ("CRC") recognized the general disregard for the needs of child victims and witnesses and sought to remedy these shortcomings through provisions that address a child's right to participation and the need for courts, administrative tribunals, and other public and private actors to take "the best interests of the child" into consideration in their operations.² The Convention acknowledges that when children are testifying before a tribunal, one must consider: the ability of an individual child based on his or her evolving capacities to handle the situation, what structures or procedures would be appropriate for a child, and what measures could help to prevent retraumatization, redress harm, and empower the child.³ These considerations seem particularly potent in instances where a court, like the ICC, is addressing widespread human rights abuses.

Courts and other bodies addressing human rights or other abuses suffered by children have internalized the CRC's balancing requirements. These bodies have widely recognized the need to ensure that children have a right to participate in proceedings, while also accounting for the fact that certain protective measures should be implemented in order to guarantee that the proceedings are not unnecessarily traumatic.⁴ The procedures may vary depending on a child's age, maturity, and overall ability to handle the situation.⁵

This Article aims to determine if the approach that the ICC has adopted with regard to child witnesses conforms to the principles of participation and protection outlined in the CRC. It asks if the methods that the ICC has taken with regard to child victims and witnesses are enough,

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¹ Kay Bussey, *An International Perspective on Child Witnesses*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 209, 212 (Bette L. Bottoms et al. eds., 2009).

² See, e.g., United Nations Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Comm. on the Rights of the Children, Gen. Cmt. No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶¶ 25–40, U.N. Doc CRC/C/GC/14 (May 29, 2013).

³ See *infra* Part II.

⁴ For instance, in the United States the need to protect children who are testifying in criminal trials has sometimes outweighed a defendant's rights under the Confrontation Clause: U.S. courts have allowed children to provide video testimony in instances where testifying before the defendant may prove too traumatic so long as other due process guarantees are followed. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 856–57 (1990). The international community has also recognized the need to protect children who are giving testimony before commissions and tribunals. See *infra* Parts III, IV (describing the efforts that have been undertaken by the ICC to allow children to participate in proceedings and provide child victims and witnesses with necessary protections and outlining some of the efforts that truth commissions have made to balance a child's right to participation and protection).

⁵ See, e.g., CRC, *supra* note 2, at art. 12(1); see *infra* Part II.

or if additional measures should be implemented by the ICC in order to better promote a child's right to participation and protection. In addressing these questions, Part II of this Article will proceed by examining the right of children to testify and the need to protect children. Part III will discuss the likelihood that child witnesses and victims will testify before the ICC and the approach that the ICC has taken to provide victims, particularly child victims, with the requisite level of protection. Part IV will then examine whether these measures seem to have struck the correct balance and, if not, if there are additional protective measures that should be implemented.

II. BALANCING THE RIGHT TO BE HEARD WITH THE DUTY TO PROTECT

Children have a right to be heard in international tribunals. In analyzing these rights, it is useful to look at the rights enshrined in the CRC. While international tribunals are not States Parties that may ratify and thus be considered bound by the obligations outlined in the CRC, the CRC is the most widely ratified human rights treaty.⁶ The fact that the CRC has been nearly universally accepted among nations supports the assertion that the rights enshrined in the treaty are ones recognized by the international community and that, as such, international tribunals must also respect CRC rights. Indeed, even the United States, which is one of the two nations that has yet to ratify the CRC,⁷ has measures in place to allow children to participate in criminal proceedings while also providing measures of protection.⁸

When dealing with child witnesses, both international and national courts struggle to balance a child's right to be heard and the duty to protect children. In the international context, it is particularly important to include children in proceedings that address serious crimes, such as those that fall under the jurisdiction of the ICC.⁹ The necessity of making sure that children are both provided a forum to be heard and protected from possible threats or retraumatization is clear when one considers that "children are among the principal victims . . . of war[—c]hildren are brutally targeted in war-affected countries, killed, tortured, raped and abducted into armed groups to fight in adult wars where they may be forced to commit atrocities against their own families and friends."¹⁰ Taking these factors into account, it becomes clear that in order to fully understand what occurred during times of unrest, serious human rights abuses, and conflict, and in order to empower victims, it is necessary to provide children with the opportunity to participate in international tribunals that are addressing crimes they have experienced or witnessed.¹¹ In addition, child participation is a requisite to fully understand the trauma—whether physical or psychological—that has been inflicted on children and take appropriate and adequate measures to

⁶UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty, U.N. NEWS CTR. (Jan. 20, 2015), <http://www.un.org/apps/news/story.asp?NewsID=49845#.VOIMPyhs3Q> ("The CRC [is] . . . the most widely ratified international human rights treaty in history. As of today, only two countries have yet to ratify the landmark treaty—South Sudan and the United States.")

⁷See, e.g., *id.*

⁸See *supra* note 4 (discussing *Maryland v. Craig*, 497 U.S. 836 (1990)).

⁹The crimes that fall under the ICC's jurisdiction are discussed *infra* Part III.A.

¹⁰Marta Santos Pais, *International Law and Children's Rights: A Critical Review and a Wish List*, in INTERNATIONAL JUSTICE FOR CHILDREN 49, 55–57 (Council of Europe ed., 2008) (discussing child participation in the truth and reconciliation commissions in Sierra Leone and noting the ways in which child participants reported that their involvement in the truth and reconciliation process had benefitted them).

¹¹This opinion has been asserted in a number of texts. See, e.g., Martine F. Delfos, *The Developmental Damage to Children as a Result of the Violation of Their Rights*, in DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CAREGIVERS AND COMMUNITIES 39, 61 (Jan C. M. Willems ed., 2d ed. 2007) ("In order to prevent violations, to really assess the damage done, to know whether and which help is needed, the voice of the child should be heard.")

redress or help alleviate such harm.¹² In providing children with the right to be heard, however, it is also important to take into account the need to prevent children from being subjected to threats, retraumatization, or other forms of harm. Both the right to be heard and the duty to protect, by acting in “the best interests of the child,” are recognized in the CRC; these issues are discussed below.

A. A Child's Right to Testify in Proceedings

Participation may be defined as “the process of sharing decisions which affect one's life and the life of the community in which one lives.”¹³ There is a common belief “[t]hat victims who suffered heinous crimes deserve special attention in international criminal trials by being accorded participatory rights.”¹⁴ This view seems to have emerged as the international perception of crime has evolved. Initially, “crime was seen primarily as a violation of the public order, as an offense against the common good.”¹⁵ However, during the last quarter of the twentieth century, the view of crime changed, and the international understanding of crime, while acknowledging that there are public interest factors at play, has evolved to view crime “first and foremost . . . as an infringement of the individual rights and interests of the victim.”¹⁶ This perspective requires justice to not only involve “punishing offenders” but also to “pay[] attention to the needs and interests of the individuals whose rights have been violated and who have suffered loss.”¹⁷

The above views and principles extend to all members of society, regardless of age. The application of the right to participate to children has been spurred by two major developments that have occurred over the past twenty or more years. First, social theories have emerged that view “children as social actors in their own right, not simply as the objects of sociali[z]ation.”¹⁸ Second, and more notably for purposes of this Article, is the influence of the CRC—an instrument that asserts children have a right to “a voice in decision making, as well as rights to freedom of thought and expression.”¹⁹

Additionally, it is generally acknowledged that providing children with the right to be heard can help protect other rights,²⁰ help children “come to terms with their experiences [, give children] a sense of pride in their contribution,”²¹ and promote a more peaceful future in societies emerging from conflict. Indeed, child participation has helped to curb violations of children's rights and assist in “post-conflict resolution and reconstruction processes.”²²

¹² *Id.* at 58 (“Growing up in a stressful situation, experiencing trauma, or even pervasive trauma, obviously has its effects on the physical, psychological and social development of the child. Often, we cannot see the damage unless we take a close look and listen to the child.”).

¹³ Yanghee Lee, *Child Participation and Access to the United Nations Convention on the Rights of the Child*, in INTERNATIONAL JUSTICE FOR CHILDREN 105, 107 (Council of Europe ed., 2008) (referencing Roger Hart's definition for participation).

¹⁴ CHRISTINE SCHUON, INTERNATIONAL CRIMINAL PROCEDURE: A CLASH OF LEGAL CULTURES 293 (2010).

¹⁵ Anne-Marie de Brouwer & Marc Groenhuijsen, *The Role of Victims in International Criminal Proceedings*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 149, 151 (Göran Sluiter & Sergey Vasiliev eds., 2009).

¹⁶ *Id.*

¹⁷ *Id.* at 151–52.

¹⁸ Nigel Thomas & Barry Percy-Smith, *Introduction to A HANDBOOK OF CHILDREN AND YOUNG PEOPLE'S PARTICIPATION: PERSPECTIVES FROM THEORY AND PRACTICE 1* (Barry Percy-Smith & Nigel Thomas eds., 2010); Andrew West, *Children and Participation: Meanings, Motives and Purpose*, in HAVING THEIR SAY: YOUNG PEOPLE AND PARTICIPATION: EUROPEAN EXPERIENCES 14, 14 (David Crimmens & Andrew West eds., 2004).

¹⁹ Thomas & Percy-Smith, *supra* note 18, at 1; West, *supra* note 18, at 14.

²⁰ See, e.g., Gerison Lansdown, *The Realization of Children's Participation Rights: Critical Reflections*, in A HANDBOOK OF CHILDREN AND YOUNG PEOPLE'S PARTICIPATION: PERSPECTIVES FROM THEORY AND PRACTICE 11, 13 (Barry Percy-Smith & Nigel Thomas eds., 2010) (“Participation is a fundamental rights in itself. It is also a means through which to realize other rights.”).

²¹ Pais, *supra* note 10, at 57 (discussing the ways in which children believed their participation in the truth and reconciliation commissions in Sierra Leone benefitted them).

²² Comm. on the Rights of the Child, Gen. Cmt. No. 12 (2009): The Right of the Child to be Heard, ¶¶ 122, 125, U.N. Doc CRC/C/GC/12 (July 20, 2009) [hereinafter Gen. Cmt. No. 12]. For this reason, “the Committee [has] encourage[d] States [P]arties to

The CRC explicitly recognizes that children have a right to be heard. This basic right is enshrined in Article 12, which states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²³

In instances where serious crimes have been perpetrated against or experienced by a child, Article 12 requires that children be given the right to participate in any and all proceedings affecting them if they are “capable of forming [their] own views.”²⁴ The Committee on the Rights of the Child emphasized that a child’s right “to be heard and taken seriously” was one of the CRC’s four fundamental principles.²⁵ By establishing that the right to be heard was an essential right, the CRC “expresses . . . respect for the child as an autonomous person”²⁶ and “recogni[z]es that] the child [i]s a full human being, with integrity and personality, and with the ability to participate fully in society.”²⁷

Children have the right to be heard on any issues that influence their life.²⁸ As Article 12(2) mentions above, this right exists in both administrative and judicial proceedings. Furthermore, the ability to exercise this right is not dependent on whether or not a child initiated the proceedings: “[t]he right to be heard applies to both proceedings which are initiated by the child . . . as well as those initiated by others which affect the child.”²⁹ Such proceedings include those involving “victims of armed conflict and other emergencies.”³⁰

The right to be heard is one that children may or may not choose to assert³¹ and one that should not be limited based on the age of a child.³² Additionally, while children may exercise

support mechanisms which enable children, in particular adolescents, to play an active role in both post-emergency reconstruction and post-conflict resolution processes.” *Id.* ¶ 126.

Graça Machel also addressed the need to include children in the transitional justice process, stating:

Having been witnesses and victims of the crimes of war, children have a key role in addressing those crimes and in reconciliation and peace-building processes in their communities. Children and adolescents contribute a tremendous pool of capacity, energy, ideas and creativity, and as countries emerge from societal or political violence, that vital human resource is urgently needed.

Graça Machel, *Foreword to CHILDREN AND TRANSITIONAL JUSTICE: TRUTH-TELLING, ACCOUNTABILITY AND RECONCILIATION* viii, x (Sharanjeet Parmar et al. eds., 2010).

²³ CRC, *supra* note 2, at art. 12.

²⁴ *See, e.g., id.*

²⁵ Gen. Cmt. No. 12, *supra* note 22, ¶ 2. Another one of the four overarching principles of the CRC is that primary consideration should be given to the best interests of the child, a principle, discussed *infra* Part II.B, which essentially calls for the additional layers of protection for child witnesses and victims that have been adopted by international courts and truth commissions.

²⁶ Eva Brems, *Children's Rights and Universality*, in *DEVELOPMENTAL & AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CAREGIVERS AND COMMUNITIES* 11, 19 (Jan C. M. Willems ed., 2d ed. 2007).

²⁷ *Id.* (internal quotation marks omitted); *see also* ANNA HOLZSCHEITER, *CHILDREN'S RIGHTS IN INTERNATIONAL POLITICS: THE TRANSFORMATIVE POWER OF DISCOURSE* 86 (2010) (noting that Article 12 is important because it “transforms the identity of the child targeted by the [CRC] from a mute beneficiary to a social agent”).

²⁸ Gen. Cmt. No. 12, *supra* note 22, ¶ 18.

²⁹ *Id.* ¶ 33. Additionally, these proceedings are not limited to traditional adversarial settings, but also are considered to encapsulate “alternative dispute mechanisms such as mediation and arbitration.” *Id.* ¶ 32.

³⁰ *Id.* ¶ 32.

³¹ *Id.* ¶ 16. Article 12(1) of the CRC states that children have “the right to express [their] views freely.” *Id.* ¶ 22. The Committee on the Rights of the Child has said that this provision of the CRC “means that [children] can express [their] views without pressure and can

their right to be heard either directly or through a representative, they must be presented with “the opportunity to be directly heard in any proceedings.”³³ In order for this right to be fully realized, however, decision-makers must not only listen to what a child has to say, but also must give “serious consideration [to the statements made by children] when making decisions.”³⁴

States Parties to the CRC—and one could assert, based on the nearly universal acceptance of the CRC, the international community—are obligated to ensure that children have the opportunity to exercise their right to be heard.³⁵ In fact, the international community seems to have recognized that the protection of the right to be heard is especially important in instances where children have witnessed or been the victims of crime.³⁶

B. The Duty to Protect Children from Harm and How it Relates to the Right to be Heard

While it is of the utmost importance to promote participation opportunities for children, “[p]romoting . . . participation[] without appropriate recognition of the potential risks involved, may lay children open [to a number of harms, including, but not limited to,] harmful exposure in the media, . . . punishment[,] retaliation,³⁷ and psychological harm. In fact, a substantial number of children are plagued with fear and anxiety when testifying in criminal court.³⁸ The stress associated with testifying in a criminal trial has been linked to a number of factors, including: “(1) the adversarial and formal nature of criminal courts; (2) direct-examination and, even more so, cross-examination procedures; (3) facing the defendant; and (4) children’s general lack of knowledge about the legal system.”³⁹ Additionally, in instances of widespread human rights abuses and conflict, children are often the victims of sexual abuse.⁴⁰ In instances of sexual abuse,

choose whether or not [they] want[] to exercise [their] right to be heard” and that children “must not be manipulated or subjected to undue pressure.” *Id.*

³² Gen. Cmt. No. 12, *supra* note 22, ¶ 21 (“The Committee emphasizes that [A]rticle 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard in all matters affecting her or him.”). Brems, *supra* note 26, at 19; Lansdown, *supra* note 20, at 12 (“By requiring that attention is given to both age and maturity, Article 12 makes clear that age on its own should not be used to limit the significance accorded to children’s views Considerable evidence exists to indicate that information, experience, social and cultural expectations and levels of support all contribute to the development of children’s capacities.”).

³³ Gen. Cmt. No. 12, *supra* note 22, ¶ 35. In making the determination of whether they want to be directly heard or communicate through a representative, children must be made “aware of the possible consequences of th[eir] choice.” *Id.* ¶ 41. Additionally, should a child determine that he or she wants to communicate through a representative, there need to be certain measures in place to ensure that the representative is actually expressing the views of the child and not other individuals. *Id.* ¶¶ 36–37.

³⁴ Lansdown, *supra* note 20, at 12.

³⁵ Gen. Cmt. No. 12, *supra* note 22, ¶ 15; *see also id.* ¶ 19 (stating that Article 12(1)’s use of “shall assure” places “States [P]arties . . . under [a] strict obligation to undertake appropriate measures to fully implement [the] right [to be heard] for all children”).

³⁶ *See, e.g., id.* ¶¶ 62–64; *see generally* U.N. Econ. & Soc. Council Res. 2005/20, U.N. Doc. E/RES/2005/20 (July 22, 2005) [hereinafter Resolution 2005/20] (“Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes”); U.N. Econ. & Soc. Council, Commission on Crime Prevention and Criminal Justice, *Implementation of the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, E/CN.15/2008/11, (Jan. 2008) [hereinafter *Implementation of 2005/20*], available at http://www.unodc.org/unodc/en/commissions/CCPCJ/session/17_Session_2008/CCPCJ_17.html (follow “pdf” hyperlink in the table row for Document Number E/CN.15/2008/11).

³⁷ Lansdown, *supra* note 20, at 19.

³⁸ Natalie R. Troxel et al., *Child Witnesses in Criminal Court*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 150, 152 (Bette L. Bottoms et al. eds, 2009); COUNCIL OF EUROPE, PROCEDURAL PROTECTIVE MEASURES FOR WITNESSES: TRAINING MANUAL FOR LAW-ENFORCEMENT AGENCIES AND THE JUDICIARY 241 (2006) (noting that children may find interviews and other instances of questioning to be stressful and that, for this reason, the basic principle that should be employed “is to take care not only of the collection of evidence, but also of the child’s psychological welfare,” and to minimize the number of times that interviews are conducted in a criminal investigation).

³⁹ Troxel et al., *supra* note 38, at 153.

⁴⁰ *See, e.g.,* SAVE THE CHILDREN, HIDDEN SURVIVORS: SEXUAL VIOLENCE AGAINST CHILDREN IN CONFLICT 1 (2012), available at http://www.savethechildren.org.uk/sites/default/files/images/Hidden_Survivors.pdf; Gema Palencia, *The Youngest Victims of a Weapon Without Ammunition*, GUARDIAN (June 10, 2013, 10:20 AM), <http://www.theguardian.com/global-development-professionals-network/2013/jun/07/weapon-without-ammunition>.

children may be even more reticent to share their opinions, as they “fear . . . reprisal from the perpetrator, embarrassment, or lack of power within the system.”⁴¹

The above realizations have contributed to the duty to protect children being inextricably linked to the right to be heard and balanced against that right. The international community has repeatedly recognized the interrelationship between the right to be heard and the duty to protect⁴² and noted that “a higher duty of care” is owed to children when affording them the right to participate than is owed to adults.⁴³

The CRC acknowledges this need for balancing in Article 3, which requires that the actions taken by “courts . . . , administrative authorities,” and other public and private bodies be in “the best interests of the child.”⁴⁴ Article 3 states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.⁴⁵

The Committee on the Rights of the Child discussed the interrelationship between Articles 12 and 3 of the CRC in General Comment No. 12. In the Comment, the Committee noted “that every action taken on behalf of the child has to respect the best interests of the child” and that “there is no tension between article 3 and 12.”⁴⁶ Rather, the Committee regards the right to be heard and the requirement that the best interests of the child be taken into consideration as complementary,⁴⁷ fundamental principles of the CRC.⁴⁸ Particularly in instances where children have been witnesses or the victims of crime, the Committee has recognized that the right to be heard needs to be provided in a careful and considerate manner in order to provide children protection and prevent retraumatization.⁴⁹ In General Comment No. 12, the Committee on the Rights of the Child aptly addressed the importance of respecting the child's right to be heard

⁴¹ Bussey, *supra* note 1, at 212; *see also* ABIGAIL ERIKSON ET AL., INT'L RESCUE COMM., CARING FOR CHILD SURVIVORS OF SEXUAL ABUSE: GUIDELINES FOR HEALTH AND PSYCHOSOCIAL SERVICE PROVIDERS IN HUMANITARIAN SETTINGS 27 (2012), available at http://www.unicef.org/pacificislands/IRC_CCSGuide_FullGuide_lowres.pdf.

⁴² *See generally* Resolution 2005/20, *supra* note 36; *Implementation of 2005/20*, *supra* note 36; Gen. Cmt. No. 12, *supra* note 22.

⁴³ Lansdown, *supra* note 20, at 18.

⁴⁴ CRC, *supra* note 2, at art. 3(1). In fact, the best interests of the child and child participation in judicial and administrative proceedings have been viewed as interrelated from the outset of the CRC's drafting process. This can be seen in Article 3(1) of the original working text, which read: “[i]n all actions concerning children, whether undertaken by their parents, guardian, social or State institutions, and in particular by courts of law and administrative authorities, the best interests of the child shall be the paramount consideration.” HOLZSCHEITER, *supra* note 27, at 171.

⁴⁵ CRC, *supra* note 2, at art. 3(1)–(2).

⁴⁶ Gen. Cmt. No. 12, *supra* note 22, ¶¶ 70, 74.

⁴⁷ *Id.* ¶ 74. In discussing the way that articles 3 and 12 reinforce each other, the Committee notes: “[T]here can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.” *Id.*

⁴⁸ *See id.* ¶ 2 (noting that the right to be heard and consideration of the best interest of the child are two of the four underlying principles of the CRC).

⁴⁹ *Id.* ¶ 21. (“States [P]arties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offense, sexual abuse, violence, or other forms of maltreatment. States [P]arties must undertake all necessary measures to ensure the right to be heard is exercised ensuring full protection of the child.”).

while simultaneously providing protections to children who testify about their experiences in conflict situations: "Children's participation helps them to regain control over their lives, contributes to rehabilitation, develops organizational skills and strengthens a sense of identity. However, care needs to be taken to protect children from exposure to situations that are likely to be traumatic or harmful."⁵⁰ In attempting to strike the correct balance between protecting "the best interests of the child" and respecting their right to be heard, one must not "[e]rr[] too far on the side of protection [because doing so can] den[y] children the right to be heard, inhibit[] opportunities to develop their capacities for participation and . . . can serve, perversely, to heighten risk."⁵¹

The Committee outlined a number of measures that members of the international community should take in order to help strike the correct balance between protection and participation. These measures include making sure that children are fully informed about the procedures and the setting in which they will be giving testimony;⁵² that children are not interviewed more than necessary, particularly when they are testifying about traumatic events;⁵³ that the conditions of the setting where a child will provide testimony make the child feel at ease;⁵⁴ and that children are "informed about [the] availability of health, psychological and social services."⁵⁵ Additionally, the Committee stated that it is preferable that children "not be heard in open court, but[, rather,] under conditions of confidentiality."⁵⁶

As the carefulness of the Committee suggests, one must take heed when trying to strike the correct balance between participation and protection. While the best-interests principle necessitates taking certain actions that provide children participating in criminal trials, like those before the ICC, with added safeguards due to their youth and sensitivities, this principle should not be used to "trump other rights in the Convention [or] override the child's right to express views. Indeed, consideration of the child's views must be an integral part of determining the child's best interests"⁵⁷

The ICC has seemingly internalized the provisions of the CRC. The ICC's jurisdiction, procedures, and protocols not only make it more likely that children will appear before the court,

⁵⁰ *Id.* ¶ 125. This idea was also expressed by Lansdown, who stated: "It is necessary to balance the right to participation with the right to protection, recogni[z]ing that it can be as harmful to make excessive or inappropriate expectations of children as to deny them the right to take part in decisions they are capable of making." Lansdown, *supra* note 20, at 18.

⁵¹ Lansdown, *supra* note 20, at 18.

⁵² Gen. Cmt. No. 12, *supra* note 22, ¶ 25. The Committee requires that a child "be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential[] because it is the precondition of the child's clarified decisions," *id.*, and allows children to "receive[] all necessary information and advice to make a decision in favour of [their] best interests." *Id.* ¶ 16. To this end, "[t]he decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be" *Id.* ¶ 41.

⁵³ *Id.* ¶ 24. ("[A] child should not be interviewed more often than necessary, in particular when harmful events are explored. The 'hearing' of a child is a difficult process that can have a traumatic impact on the child.")

⁵⁴ *Id.* ¶ 23 ("States [P]arties must ensure conditions for expressing views that account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions."). The Committee further elaborates on this requirement later in the Comment, stating:

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

Id. ¶ 34.

⁵⁵ *Id.* ¶ 64. For further discussion on proper mechanisms for participation see Lansdown, *supra* note 20, at 21 (noting that there are "a set of indicators relating to the principles or standards that are widely agreed to represent appropriate practice when working with children. Participation of children must be transparent, accompanied by appropriate information, voluntary, respectful, relevant, child friendly and enabling, inclusive, safe and sensitive to risk and accountable").

⁵⁶ Gen. Cmt. No. 12, *supra* note 22, ¶ 43.

⁵⁷ Lansdown, *supra* note 20, at 19 (internal quotation marks omitted).

but they also adopt many of the measures prescribed by the Committee to ensure that the ICC acts in “the best interests of the child” by attempting to balance the right of a child to be heard with the duty to protect the child.

III. THE INTERNATIONAL CRIMINAL COURT: PROMOTING THE RIGHT TO BE HEARD AND BALANCING IT WITH THE DUTY TO PROTECT

The ICC's definition of the crimes within its jurisdiction and its definition of “victim” make it likely that a higher number of child victims and witnesses will be brought before the ICC than have been brought before other international tribunals. For this reason, a proper balancing of the right to participate and the need to protect children, as understood by the CRC, is required.

As noted above, the CRC canonizes both the right to participate or be heard and the need to act in the “the best interests of the child.” While the ICC, as an international organization, cannot be a party to and is not bound by the CRC, one may argue that the fact that the CRC has been ratified by all but two States⁵⁸ supports the assertion that the international community is in general agreement that children should be provided the rights and protections expressed therein. Even if the ICC did not make a conscious decision to apply the CRC principles applicable to child testimony, one may view the rules and procedures that the ICC has implemented toward victims and witnesses generally, and children in particular, as internalizing the CRC principles of participation and protection.

This Part will proceed in five sections. First, Section A will review the likelihood of child victims coming before the ICC. Next, Sections B through D will look at the general principles of participation and protection in the ICC. Finally, Section E will discuss provisions of the Rome Statute, which established the ICC, and the ICC's Rules of Procedure and Evidence that are especially applicable to children.

A. *The ICC and the Increased Likelihood of Child Testimony*

Children are more likely to participate as witnesses or victims in ICC proceedings for two reasons. First, children are more likely to participate in ICC proceedings because of the crimes that are defined as falling within the ICC's jurisdiction. The ICC was developed to address “the most serious crimes of international concern.”⁵⁹ The Rome Statute gives the ICC jurisdiction over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.⁶⁰ Included among the definitions of each of these crimes are actions that specially target children. For instance, one action that may constitute genocide for purposes of the Rome Statute includes that of “[f]orcibly transferring children” of “a national, ethnical, racial or religious group . . . to another group” with the “intent to destroy, in whole or in part” the group from which the children were removed.⁶¹ Additionally, the Rome Statute prohibits groups from enlisting children under the age of fifteen into the armed forces or using children under the age of fifteen “to participate actively in hostilities,” whether the conflict is of an international character or not.⁶² Because certain acts of genocide and war crimes, specifically the crime of using child soldiers, are, by definition, crimes committed against children, the Rome Statute essentially acknowledged from the outset that the experiences of children would be given prominence by the ICC.

⁵⁸ See *UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty*, *supra* note 6.

⁵⁹ Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 1, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute].

⁶⁰ *Id.* at arts. 5, 6–8.

⁶¹ *Id.* at art. 6.

⁶² *Id.* at art. 8(b)(xxvi), (e)(vii).

Second, the definition of “victims” adopted in the ICC’s Rules of Procedure and Evidence (“RPE”) is broader than what had previously been used in ad hoc tribunals investigating and prosecuting serious breaches of international humanitarian and human rights law, and the definition’s scope makes it much more likely that children may be considered victims of crimes that were not perpetrated directly against them. The definition of who is considered a victim of a crime falling under the jurisdiction of the ICC is expressed in Rule 85 of the ICC’s RPE. Rule 85(a), which is of the greatest relevance for purposes of this Article, states: “For purposes of the Statute and the Rules of Procedure and Evidence: (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”⁶³ This definition is broader than the definitions employed by the ad hoc criminal tribunals for Rwanda and the former Yugoslavia in that it does not limit victims to those individuals “against whom a crime over which the tribunal has jurisdiction has allegedly been committed.”⁶⁴ Rather, under the ICC definition anyone “who . . . suffered harm may qualify as [a] victim [—leaving the definition open to] include immediate family members or dependents of those who have suffered harm.”⁶⁵ Thus, the ICC is likely to include more child witnesses and victims in its proceedings than other international criminal courts in the past not only as a result of its jurisdiction over crimes that may only be committed against children (i.e., child soldiers), but also because it recognizes that family members and dependents must be considered “victims” of the crimes falling within its jurisdiction.

B. The ICC’s Expanded Notion of Victim Participation

It is acknowledged that “the primary role and function of international(ized) criminal tribunals is to investigate and prosecute the most serious crimes of concern to the international community.”⁶⁶ However, “the role and function of international(ized) criminal tribunals is no longer limited to administering traditional forms of justice. Instead, the role and function of these courts has been expanded to include . . . victim empowerment.”⁶⁷ The ICC has taken specific steps to empower victims while also providing them protection through its expanded understanding of who the victims of some of the most atrocious crimes are, as well as its general rules and procedures regarding participation.

With regard to participation, the Rome Statute has been lauded as progressive because it “formal[ly] recogni[z]es . . . the dignity and the rights of victims, notably . . . their right to participate actively in the proceedings”⁶⁸ and their right to protection.⁶⁹ In fact, the ICC is the first

⁶³ Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/INF/3/Add.1 Rule 85(a) (2000) [hereinafter ICC Rules of Procedure and Evidence]. In determining whether or not an individual qualified for ICC victim status, judges will ask whether:

(1) the victim applicant is a natural person as set forth in rule 85(a) . . . , (2) a crime within the jurisdiction of the Court appears to have been committed, (3) the victim applicant has suffered harm, and (4) such harm arose “as a result” of the alleged crime within the jurisdiction of the Court.

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-320, Fourth Decision on Victims’ Participation, ¶ 30 (Dec. 12, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc610092.pdf>; Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-121, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ¶ 11 (Sep. 25, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc747034.pdf>; Brianne McGonigle, *Apples and Oranges? Victim Participation Approaches at the ICC and the ECCC*, in THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE 91, 98 (Cedric Ryngaert ed., 2009).

⁶⁴ de Brouwer & Groenhuijsen, *supra* note 15, at 157.

⁶⁵ *Id.* The authors also note that the ICC definition makes an important departure from those definitions employed by the ad hoc criminal tribunals in that it “recognizes a victim as a victim from the moment he or she reports a crime, whereas the [definition adopted by the International Criminal Tribunal for the former Yugoslavia] and the [International Criminal Tribunal for Rwanda] only seems to recognize a victim from the moment the guilt of the accused has been established.” *Id.*

⁶⁶ McGonigle, *supra* note 63, at 91.

⁶⁷ *Id.*

⁶⁸ Caroline Fournet, *Mass Atrocity: Theories and Concepts of Accountability—On the Schizophrenia of Accountability*, in EXPLORING THE BOUNDARIES OF INTERNATIONAL CRIMINAL JUSTICE 27, 44 (Ralph Henham & Mark Findlay eds., 2011); *see also* Håkan Friman, *Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court*, in INTERNATIONAL CRIMINAL

international court conducting criminal prosecutions to allow “victims of mass crimes to participate in its proceedings as victims.”⁷⁰

Although the reason for providing victims with a right to participate in ICC proceedings is not explicitly stated in the Rome Statute, “[i]t is clear from the preamble of the Statute . . . that bringing justice to the ‘victims of unimaginable atrocities that deeply shock the conscience of humanity’ and ‘lasting respect for . . . international justice’ were important rationales behind the establishment of the [ICC].”⁷¹ Additionally, by providing for direct victim participation in ICC proceedings, the Rome Statute and the RPE “allow victims to present their views and concerns on issues that personally affect them,”⁷² provide “fairness to . . . victim[s] who ha[ve] suffered harm, [help] avoid[] secondary victimization and victim alienation, treat[] victim[s] with dignity and respect, [and] ensur[e] that the truth is exposed and that a just punishment is imposed.”⁷³

C. ICC Basic Principles Related to Victim Participation

The international community has agreed on a basic set of rights that must be accorded to victims while simultaneously permitting a fair trial for the accused. These rights include: “[t]he right to respect and recognition”; “[t]he right to receive information”; “[t]he right to provide information”; “[t]he right to legal advice or representation”; “[t]he right to protection of privacy and physical safety”; and “[t]he right to receive victim support.”⁷⁴ The ICC has a number of rules and procedures in place in order to address these rights as well as the concerns that arise regarding child participation in international criminal proceedings.⁷⁵

There are three explicit ways that the Rome Statute provides for victims to directly participate in proceedings.⁷⁶ First, Article 15(3) allows victims to “make representations to the Pre-Trial Chamber, in accordance with the” RPE when the Prosecutor has determined “that there is a reasonable basis to proceed with an investigation.”⁷⁷ Second, under Article 19(3), “victims . . . may . . . submit observations to the [ICC]” in proceedings related to the “jurisdiction or admissibility” of a case.⁷⁸ Third, Article 68 of the Rome Statute addresses the “[p]rotection of . . . victims and witnesses and their participation in [ICC] proceedings.”⁷⁹ Article 68(3), in particular, has been viewed as encapsulating a victim’s right to participation.⁸⁰ This Article states:

PROCEDURE: TOWARDS A COHERENT BODY OF LAW 205, 211 (Göran Sluiter & Sergey Vasiliev eds., 2009) (noting that “[v]ictim participation is a *right* provided for in the ICC Statute”).

⁶⁹ de Brouwer & Groenhuijsen, *supra* note 15, at 155 (“The Rome Statute and its accompanying Rules of Procedure and Evidence are generally characterized as being innovative in the area of victims’ rights. The Rome Statute primarily provides for three types of victims’ rights: (1) participation, (2) protection, and (3) reparation.”).

⁷⁰ *Id.* at 149.

⁷¹ Friman, *supra* note 68, at 208.

⁷² McGonigle, *supra* note 63, at 94.

⁷³ Friman, *supra* note 68, at 208.

⁷⁴ de Brouwer & Groenhuijsen, *supra* note 15, at 153–54.

⁷⁵ See, e.g., Pais, *supra* note 10, at 56 (discussing ways in which the Rome Statute addresses the protection of child witnesses and victims); Cécile Van de Voorde & Rosemary Barberet, *Children and International Criminal Justice*, in INTERNATIONAL CRIME AND JUSTICE 41, 43 (Mangai Natarajan ed., 2011) (noting that the Rome Statute “and accompanying documents include multiple child-related provisions [that include] special measures to protect children during the investigation and prosecution of cases, and . . . requirements [that the] ICC [employ] staff with expertise in children’s issues”).

⁷⁶ For a discussion of the three articles of the Rome Statute that allow for direct victim participation see McGonigle, *supra* note 63, at 94 and de Brouwer & Groenhuijsen, *supra* note 15, at 158.

⁷⁷ Rome Statute, *supra* note 59, at art. 15(3).

⁷⁸ *Id.* at art. 19(3).

⁷⁹ *Id.* at art. 68.

⁸⁰ Friman, *supra* note 68, at 211 (noting that the right to participation described by Article 68(3) should not be viewed as being “confined to those proceedings for which specific references to victim participation are made in the [Rome] Statute and the Rules of Procedure and Evidence”); see also Ernesto Kiza & Holger-C. Rohne, *Victims’ Expectations Towards Justice in Post-Conflict Societies: A Bottom-Up Perspective*, in EXPLORING THE BOUNDARIES OF INTERNATIONAL CRIMINAL JUSTICE 75, 86 (Ralph Henham & Mark Findlay eds., 2011) (noting that Article 68(3) establishes “[a] more inclusive approach [to] the victims’ participatory role in the procedure”).

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.⁸¹

Article 68, thus, establishes that victims should be permitted to participate in ICC proceedings whenever their “personal interests are affected.” Additionally, this Article describes one of the protective measures that the ICC may elect to take: namely, allowing victim participation at the ICC to be either direct or indirect.⁸²

Despite the above provisions providing victims with a right to participate in ICC proceedings, victim participation is neither automatic nor absolute.⁸³ Rather, victim participants must “ask the relevant Chamber for permission to demonstrate how their personal interests are affected [via application] before [they can] actively exercis[e] many of their rights.”⁸⁴ Additionally, the Chambers have been granted “wide discretionary powers to control participation” by both the Rome Statute and the RPE.⁸⁵ While Article 68 acknowledges that victims must be afforded the right to participate in proceedings where they have a personal interest in the case⁸⁶ and requires the ICC to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,”⁸⁷ the Rome Statute and the RPE both fail to provide specific procedural rights outlining the extent to which individuals may participate and the form which participation must take.⁸⁸ Thus, ICC judges are granted enormous discretion in their decisions regarding the proper “modalities of participation.”⁸⁹ And, even those procedural rights that are granted may then be limited by the ICC Chamber acting “*proprio motu*, or at the request of the parties, the Registry or any other participant, if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules.”⁹⁰

D. ICC Protective Measures and the Rationales for Establishing Them

The rationales for using special and protective measures to shield victims and witnesses who interact with international criminal courts include: “(1) . . . minimiz[ing] serious risks to . . . their security; (2) . . . avoid[ing] serious incursions on . . . their privacy and dignity; and (3) . . .

⁸¹ Rome Statute, *supra* note 59, at art. 68(3).

⁸² See, e.g., McGonigle, *supra* note 63, at 98; de Brouwer & Groenhuijsen, *supra* note 15, at 149 (noting that “victims may . . . present either themselves or through a legal representative, their views and concerns, where their personal interests are affected”).

⁸³ McGonigle, *supra* note 63, at 95.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Rome Statute, *supra* note 59, at art. 68(3).

⁸⁷ *Id.* at art. 68(1).

⁸⁸ McGonigle, *supra* note 63, at 105 (noting that the exception to this statement is the general right of victims to file requests with the ICC).

⁸⁹ *Id.* McGonigle summarized some of the modalities of participation identified by the judge at the pre-trial stage of the ICC case *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* as including:

[N]otification rights; access to transcripts and documents in the case in the form they are made available to the non-proposing party; the right to examine and make submissions on the admissibility and value of evidence on which the Prosecution and Defense intend to rely at the confirmation hearing; the right to examine witnesses; attend hearings; make oral motions, responses and submissions; and file written motions, responses and replies.

Id. at 105–06.

⁹⁰ *Id.* at 106. These competing interests may include the “physical or psychological well-being of victims and witnesses.” *Id.*

reduc[ing] trauma associated with . . . participation or giving testimony in court.”⁹¹ These rationales appear to largely guide the protective measures under the Rome Statute and the RPE.⁹²

The primary provisions governing the protection of victims and witnesses in the ICC are in Articles 68 and 69(2) of the Rome Statute and Rules 87 and 88 of the RPE.⁹³ These measures “must be taken . . . during the investigation and prosecution of the crimes[.]”⁹⁴ However, the measures that are taken to protect victims and witnesses will vary depending on the individual and the circumstances surrounding his or her testimony. This is evidenced by the Rome Statute’s requirement that the ICC take into account “all relevant factors, including age, gender[,] health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”⁹⁵

E. ICC Child Participation Rules and Procedures

When dealing with international criminal proceedings, such as those before the ICC, common issues arise with regard to child testimony. These issues include, but are not limited to: “how to obtain sufficient information from children, particularly from young children, without using leading or suggestive questions; how children should present their evidence; how to appraise children’s evidence; and how to balance children’s rights to a voice in the legal system with defendants’ rights to a fair trial.”⁹⁶ The principles of protection and participation embraced by the CRC, and the means by which the ICC has sought to actualize them, address some of these issues.

The Rome Statute and the RPE establish protections in the ICC for vulnerable individuals, including child witnesses and victims.⁹⁷ Not only are there certain crimes within the ICC’s jurisdiction that are specifically related to children,⁹⁸ but the Rome Statute and the RPE also establish “special measures to protect children during the investigation and prosecution of cases,” and require that there be “ICC staff with expertise in children’s issues.”⁹⁹

⁹¹ de Brouwer & Groenhuijsen, *supra* note 15, at 173.

⁹² See, e.g., *id.* (“[T]hree main categories of protective and special measures for [ICC] victims and/or witnesses can be discerned, namely, those aimed at: (1) protection from the accused and his counsel (also referred to as anonymity measures); (2) protection from the press and the public, such as the use of pseudonyms for victims and witnesses (also referred to as confidentiality measures); and (3) protection from re-traumatization, such as measures that avoid face-to-face confrontation with the accused.”).

⁹³ Article 68 was discussed *supra* Part III.C. As mentioned, Article 68 requires the ICC to take appropriate, protective measures for the “safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” Rome Statute, *supra* note 59, at art. 68. Additionally, Article 68 discusses alternatives to public hearings and the ability of the Victims and Witnesses Unit to advise the Court on “protective measures, security arrangements, counseling and assistance.” *Id.* Article 69(2) describes alternatives for witness testimony. *Id.* at art. 69(2). Additionally, the RPE discuss protective measures and special measures in Rules 87 and 88, respectively. ICC Rules of Procedure and Evidence, *supra* note 63, at R. 87, 88.

⁹⁴ de Brouwer & Groenhuijsen, *supra* note 15, at 173. Many of these measures will be discussed in more detail *infra* Part III.E.

⁹⁵ Rome Statute, *supra* note 59, at art. 68(1) (emphasis added); see also de Brouwer & Groenhuijsen, *supra* note 15, at 173.

⁹⁶ Bussey, *supra* note 1, at 210. The reasons that these issues arise with regard to child testimony become apparent when one considers, in part, that “[c]hildren, especially younger ones, are open to suggestion and their spontaneous statements tend to be brief” and that “children, due to fear of the suspect, will hesitate in giving a statement.” COUNCIL OF EUROPE, *supra* note 38, at 241.

⁹⁷ See Van de Voorde & Barberet, *supra* note 75, at 43.

⁹⁸ See *supra* Part III.A.

⁹⁹ Van de Voorde & Barberet, *supra* note 75, at 43. Some provisions of the Rome Statute that require that ICC staff have experience on children’s issues include Articles 36(8)(b) and 42(9). These articles state:

Article 36(8)(b): States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against . . . children.

. . . .
Article 42(9): The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, . . . violence against children.

Rome Statute, *supra* note 59, at arts. 36(8)(b), 42(9). For a general overview of the forms of protection provided by the Rome Statute and the ICC’s Rules of Procedure and Evidence see *Fact Sheet: Children & the ICC*, CITIZENS FOR GLOBAL SOLUTIONS (July 26, 2010), http://globalsolutions.org/files/public/documents/ICC_children.pdf.

A number of provisions of the Rome Statute allow individuals to take into account the circumstances of victims and witnesses, including children. These provisions call for the Prosecutor of the ICC to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the [ICC in order to] respect the rights and personal circumstances of victims and witnesses . . . , in particular where [the crime] involves . . . violence against children.”¹⁰⁰ Additionally, as mentioned above in Part III.C, the ICC is required to take measures necessary “to protect the safety, physical and psychological well-being, dignity and privacy of [child] victims and witnesses.”¹⁰¹

Beyond the above provisions, both the Rome Statute and the RPE contain more specific provisions that assist the ICC in providing children with the level of protection that they need in order to secure their safety, as well as their mental and physical health. For instance, the ICC is permitted to conduct portions of proceedings in camera “or allow the presentation of evidence by electronic or other special means.”¹⁰² Additionally, Rule 75(1) states that if a child witness is the son or daughter of the accused, they will “not be required by a Chamber to make any statement that might tend to incriminate the accused” parent unless the child elects to make such a statement.¹⁰³ Furthermore, while under Rule 66(1) “every witness” is required to take an oath declaring that his or her testimony will be “the whole truth and nothing but the truth,”¹⁰⁴ Rule 66(2) makes a special exception for children, stating:

A person under the age of [eighteen] . . . who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.¹⁰⁵

The Rome Statute also created a Victims and Witnesses Unit (“VWU”) to “provide . . . protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of

¹⁰⁰ Rome Statute, *supra* note 59, at art. 54(1)(b).

¹⁰¹ *Id.* at art. 68(1). Rule 86 of the Rules of Procedure and Evidence bolsters this requirement. This rule states: “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children” ICC Rules of Procedure and Evidence, *supra* note 63, at R. 86.

¹⁰² Rome Statute, *supra* note 59, at art. 68(2). These protective measures should be implemented, “[i]n particular, . . . in the case of . . . a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.” *Id.* The Rules of Procedure and Evidence also address the use of in camera proceedings. *See, e.g.*, Rules of Procedure and Evidence, *supra* note 63, at R. 87(3).

¹⁰³ ICC Rules of Procedure and Evidence, *supra* note 63, at R. 75(1); Van de Voorde & Barberet, *supra* note 75, at 45.

¹⁰⁴ ICC Rules of Procedure and Evidence, *supra* note 63, at R. 66(1).

¹⁰⁵ *Id.* at R. 66(2). Some have questioned the legitimacy of this protective measure, particularly in light of the *Lubanga* case, which involved child soldiers and thus, understandably included a number of child witnesses and victims. In *Lubanga*, “some witness testimony [was] inaccurate [and] some of the witnesses [were] accused of coming to The Hague with [the] intention of providing false testimony.” Sylvia Ngane, *Should States Bear the Responsibility of Imposing Sanctions on Its Citizens Who as Witnesses Commit Crimes before the ICC?*, in *EXPLORING THE BOUNDARIES OF INTERNATIONAL CRIMINAL JUSTICE* 131 (Ralph Henham & Mark Findlay eds., 2011). However, the common rebuttal is:

[T]he majority of children have the capacity to recall accurate and relevant information . . . [and that] there is also no empirical evidence to support any contention that children lie more often than adults, or that they are less capable of telling the truth. In fact, . . . literature reveals that by the time they are four, most children understand the difference between truth and lies sufficiently to testify, although they may have difficulty defining these concepts.

Stuart Beresford, *Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?*, 3 J. INT’L CRIM. JUST. 721, 739 (2005).

testimony given by such witnesses.”¹⁰⁶ The ICC’s RPE embellish on the duties that the VWU has with respect to children. Of particular note, Rule 17(3) states:

In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.¹⁰⁷

The Rules further provide that, “the [VWU] may include, as appropriate, persons with expertise, *inter alia*, in the following areas: . . . (f) Children, in particular traumatized children; [and] . . . (i) Social work and counsel[ing] . . .”¹⁰⁸

An additional protection that may apply to child victims, although not especially crafted for them, is the ability to participate as anonymous victims. Anonymous participation may look different at the pre-trial¹⁰⁹ and trial stages.¹¹⁰ With regards to the trial phase, in *Prosecutor v. Lubanga Dyilo*, Trial Chamber I described how, in certain circumstances, victims may remain anonymous. The decision regarding anonymity will consider the risks that may be posed to individuals who testify, particularly when there is an ongoing conflict, as well as “the precise circumstances and the potential prejudice to the parties and other participants.”¹¹¹ However, Trial Chamber II in *Prosecutor v. Katanga & Ngudjolo Chui*, stated that the ICC would “not authori[z]e testimony from any victims who wish to remain anonymous to the Defen[s]e” but at the same time refused to “rule out the possibility of anonymous victims participating in the proceedings.”¹¹²

As the above measures demonstrate, the ICC has attempted to balance the right of children to be heard in judicial proceedings with the duty to provide protections to child victims and witnesses, while at the same time assuring that the accused is provided a fair trial. In particular, the ICC seeks to prevent retraumatization and physical injury by allowing special protective measures, such as in camera interviews, to be used and by having individuals employed that are trained to deal with issues involving violence against children.

¹⁰⁶ Rome Statute, *supra* note 59, at art. 43(6). “The [VWU] shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.” *Id.*; see also Van de Voorde & Barberet, *supra* note 75, at 45.

¹⁰⁷ ICC Rules of Procedure and Evidence, *supra* note 63, at R. 17(3). In addition, the Rules require that the VWU be consulted when special measures are being considered to protect child victims or witnesses. *Id.* at R. 88(1). Further, when the Chamber is making its final determination on what special measures should be adopted, it is to “seek . . . the consent of the person in respect of whom the special measure is sought prior to ordering that measure,” whenever it is possible to do so. *Id.* This requirement that the victim or witness assents to the measure, if it is in the person’s capacity to do so, also empowers child victims and witnesses by providing them with a better opportunity to determine the manner in which they are heard.

¹⁰⁸ *Id.* at R. 19(f), (i).

¹⁰⁹ See, e.g., Office of the Prosecutor, *Policy Paper on Victims’ Participation*, INT’L CRIM. CT, 18 (Apr. 12, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-M.1-ENG.pdf (“Chambers have accepted anonymous participation of victims at the pre-trial stage but they limited their procedural rights in the absence of exceptional circumstances to: (i) access to the public documents only; and (ii) presence at the public hearings only. In particular, it has been held that anonymous victims are not permitted to add any point of fact or any evidence, nor question the witnesses according to the procedure set out in rule 91(3).”).

¹¹⁰ *Id.*

¹¹¹ *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims’ Participation, ¶¶ 130–31 (Jan. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc409168.pdf>.

¹¹² *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, ¶¶ 92–93 (Jan. 22, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc831030.pdf>.

IV. BEST PRACTICES FOR CHILD TESTIMONY IN INTERNATIONAL COURTS

It is acknowledged that “[e]mbracing . . . child-cent[er]ed, child-enabling and child empowering values underlying participation” is not, in and of itself, enough.¹¹³ “Enthusiastic [child] participation projects have not always used appropriate methods, nor been based on a sufficiently elaborated conceptual framework[; rather, numerous child participation projects have] over-reli[ed] on compelling but ultimately [over-]simplistic models.”¹¹⁴ For this reason, it is necessary to critically assess participatory and protective measures that courts like the ICC take with regards to child witnesses. The discussion in this Part is necessarily limited to a general view of what the ICC seems to have done correctly and where there may be room for improvement. Because the types of measures necessary, as well as their effectiveness, will vary based on each individual child’s sensitivities and circumstances, this Part does not attempt to assert that a basic, set framework should be employed with regard to every child witness or victim. Rather, it looks at which innovative practices, either currently employed by the ICC or not, seem to best uphold the principles of participation and protection enshrined in the CRC.

A. The Definition of Victim

The ICC has taken a number of very positive measures in its efforts to provide individuals, and children in particular, with safe and adequate participation rights. These practices begin at the onset—with the definition of who victims of crimes under the ICC’s jurisdiction are—and continue through the processes and procedures that the ICC employs with regards to child testimony.

The ICC definition of “victim” seems sufficiently broad to provide children with requisite participation rights. The broad definition of victim embraced by the ICC, and discussed in Part III.A, allows more children the opportunity to be heard in matters affecting them.¹¹⁵ Thus, children will be able to testify if the abuses being investigated and prosecuted by the ICC were perpetrated directly against them, as well as in situations where the abuses have been perpetrated against their immediate family members or those individuals on whom they are dependent.¹¹⁶ The broad understanding of who victims of crimes are should not only be maintained by the ICC but also adopted by other international courts and bodies that wish to promote and advance the right of the child to be heard.

B. Measures Taken to Elicit Child Testimony and Provide Protections During an Investigation or Trial

The ICC has many mechanisms in place that can provide layers of protection to child witnesses. All of these measures seem both well-intentioned and, if properly executed, effective. For this reason, the measures that the ICC has in place¹¹⁷ should continue—namely: the ability to conduct proceedings in camera “or allow [for] the presentation of evidence by electronic or other special means”;¹¹⁸ the ability of children to elect whether to testify against the accused when the

¹¹³ Martin Woodhead, *Foreword to A HANDBOOK OF CHILDREN AND YOUNG PEOPLE’S PARTICIPATION: PERSPECTIVES FROM THEORY AND PRACTICE* xix, xxi (Barry Percy-Smith & Nigel Thomas eds., 2010).

¹¹⁴ *Id.*

¹¹⁵ de Brouwer & Groenhuijsen, *supra* note 15, at 157 (noting “that the ICC definition of victims as contained in Rules 85 . . . offers the best possible protection of the rights and interests of the victim, e.g., to be informed of his or her rights and opportunities, to seek reparation and to participate in proceedings”).

¹¹⁶ See *supra* Part III.A.

¹¹⁷ See discussion *supra* Part III.E.

¹¹⁸ Rome Statute, *supra* note 59, at art. 68(2).

accused is a parent;¹¹⁹ the exception for children to the requirement that individuals testifying must first perform an oath;¹²⁰ the ability of the VWU to “assign . . . a child-support person to assist a child through all the stages of the proceedings”;¹²¹ the requirements that the VWU be consulted when special measures are being considered to protect child victims or witnesses;¹²² and the appointment of staff that are knowledgeable about issues involving child witnesses and victims.¹²³

However, the fact that the ICC has adopted a broad definition of “victim” and has established protective measures available to address the needs of child victims and witnesses is not enough if children are not aware of when they will be considered “victims” by the ICC and what protective measures are available.¹²⁴ To this end, it would be prudent for the ICC to provide a broad, child-friendly public education campaign that allows youth to understand when they can apply to be heard as witnesses or give testimony in investigations or prosecutions being pursued by the ICC. An effective public education campaign that informs children of their rights before the ICC would “be disseminated in child-friendly language and in places where children and their representatives are—in particular, to children in schools (including as part of the regular curriculum), hospitals and other institutions, including [institutions] where children may be detained.”¹²⁵

In order for such a public education campaign to be effective, a foundation must exist that allows children the opportunity to not only know that they have the right to be heard by the ICC, but also allows them to effectively exercise this right. For instance, the ICC must address any hurdles that may inhibit the ability of children to apply to the Court. At the ICC, “victims have to make a written application to the Registrar” to even “have an opportunity to present their views and concerns.”¹²⁶ While this procedure is intended to conform to Article 68(3)’s victim criteria, it has been recognized that:

[With regards to ICC victim applications, t]he relevant population will quite often not have the level of literacy that is common in the Western, industrialized countries. On top of that, they quite often are faced with a language barrier and with a lack of legal knowledge. . . . [Thus,] this kind of admission procedure is likely to be a bureaucratic threshold which might easily turn out to be an insurmountable obstacle for a large number of victims who deserve to be treated in a more sympathetic manner by the [ICC].¹²⁷

These concerns seem particularly applicable to children. If the individuals who are able to apply for victim status before the ICC do not often have the requisite level of literacy and legal

¹¹⁹ ICC Rules of Procedure and Evidence, *supra* note 63, at R. 75(1).

¹²⁰ *Id.* at R. 66(1), (2).

¹²¹ *Id.* at R. 17(3).

¹²² *Id.* at R. 88(1).

¹²³ See, e.g., Rome Statute, *supra* note 59, at art. 42; ICC Rules of Procedure and Evidence, *supra* note 63, at R. 19(f), (i).

¹²⁴ See, e.g., Thomas Hommarberg, *Making International and Regional Human Rights Complaints/Communications Mechanisms Child-Friendly*, in INTERNATIONAL JUSTICE FOR CHILDREN 133, 133 (2008), available at <http://128.121.10.98/coe/pdfopener?smd=1&md=1&did=676524>.

¹²⁵ *Id.* at 134.

¹²⁶ de Brouwer & Groenhuijsen, *supra* note 15, at 198. Once this application is made, the Chamber reviews it and makes a decision regarding what, if any, level of participation the applicant will be afforded. *Id.*

¹²⁷ *Id.* at 198–99. The authors pose important questions with regards to the adequacy of the current application procedure. Specifically, the authors ask: “Can . . . victims be expected to complete an elaborate ([seventeen] pages) and complicated application form? Does the availability of Court-annexed personnel or representatives from NGOs to offer assistance in completing the form provide adequate protection of victims’ interests?” *Id.* at 199.

knowledge to file a complaint, then children are even less likely to be able to submit a successful application in these circumstances—as neither they nor those on whom they rely may be able to comply with application requirements. In addition, it seems reasonable to suspect that children, whose voices have been traditionally marginalized in society, may not be appropriately identified and assisted in filing their victim applications, even where such assistance is available. This may be particularly true in instances where children could apply as victims not as a result of having had violent acts perpetrated directly against them but rather because they are a family member or dependent of an individual who was physically harmed by an act within the jurisdiction of the ICC.

Additionally, in an attempt to provide children with a greater opportunity to be heard, it may be prudent to provide greater opportunities for children to provide testimony and share their experiences in their home countries. One example of how to creatively obtain child testimony was demonstrated by the South Africa Truth and Reconciliation Commission (“TRC”), which held regional hearings that provided opportunities for child participation beyond mere testimony.¹²⁸ Among the range of methods that the TRC used was allowing children to make “drawings that reflected their experiences.”¹²⁹ While such methods may not always be possible or practicable for the ICC to employ, particularly when conflicts are ongoing or where serious security concerns would arise if people were to cooperate with the ICC or give testimony in their home countries, such alternative methods should be considered when determining how to best increase the level of child participation. These methods may also prove useful in providing corroborating evidence, especially when parallel accounts are provided by a number of children, all of whom separately depicted what happened to them.

When children—particularly those who are very young or still experiencing significant harm from trauma they suffered—do testify, the ICC should strongly consider whether anonymity measures should be applied, even in the absence of a request for such measures on the part of the child.¹³⁰ In order to afford children both participation rights and protection, the ICC should consider whether anonymity measures are appropriate for child victims and witnesses from the outset and allow children the opportunity to appeal decisions that the ICC makes in this regard or request that their identity not be kept anonymous. Such a procedure would allow children to have more control over the manner in which they participate in ICC investigations and prosecutions.¹³¹

In addition, other practices suggested by the Council of Europe’s Convention on the Protection of Children Against Sexual Exploitation and Abuse could also be applied by the ICC to improve child testimony practice.¹³² Specifically, when interviewing children, the ICC should consider: conducting interviews, “where necessary, in premises designed or adapted for this purpose;” using “the same persons, if possible and where appropriate, [to] conduct all interviews with the child;” keeping “the number of interviews . . . as limited as possible;” and allowing the child to not only “be accompanied by his or her legal representative[but also,] where appropriate, an adult of his or her choice, [except in those instances where] a reasoned decision has been made

¹²⁸ See, e.g., TRUTH & RECONCILIATION COMM’N, 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 252 (1998).

¹²⁹ *Id.* ¶ 10.

¹³⁰ See *supra* Part III.E (noting the differing views expressed by the ICC’s trial chambers on this issue).

¹³¹ However, at the same time, application of such protections, as noted by Trial Chamber II, has fair trial implications for the accused—a factor that also has to be weighed in the balancing.

¹³² See generally Council of Europe, Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, C.E.T.S. No. 201, (2007), available at <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

to the contrary in respect of that person.”¹³³ Many of these proposed measures not only seem like prudent steps to take in the name of child participation and protection, but they also align nicely with the measures that the Committee on the Rights of the Child suggested should be taken in General Comment No. 12 in order to fulfill the child's right to be heard.¹³⁴

C. Reporting Back

Part of a child's right to participation includes not only having their voices heard, but also having what they said thoughtfully considered during the decision-making process.¹³⁵ As a result, it is important that children are made aware of both how their testimony was taken into account as well as the overall outcome of the case.

Because ICC trials take place in The Hague,¹³⁶ victims and witnesses may not be aware of what transpires in a trial. For this reason, it is important that the ICC make sure it effectively communicates the results of cases, the rationale for its holdings, and the extent to which child testimony helped to shape the overall outcome. In its efforts to effectively communicate the outcomes of cases to children, a best practice may include following the example set by the TRC in Sierra Leone, which worked with child protection agencies and children to produce a child-friendly version of the TRC's report.¹³⁷ The ICC could also work with child advocates and children to produce a child-friendly documents that reflect how the ICC uses child testimony and explain the decisions that it makes.

V. CONCLUSION

The CRC establishes principles regarding the right of children to participate in judicial and administrative proceedings that are addressing matters that affect them. However, in granting this right, the CRC and the Committee on the Rights of the Child have noted that certain precautionary measures must be employed in order to prevent unnecessary harm to a child—harm that may be mental or physical in nature. The Committee on the Rights of the Child has provided guidance through General Comment No. 12 on what measures may be taken to help actualize the principles regarding participation and protection that are enshrined in the CRC and, therefore, advance the best interests of the child.¹³⁸

The ICC has opened its doors to children through the crimes defined as being within its jurisdiction as well as its definition of who it considers to be a “victim.”¹³⁹ These actions make it all the more apparent that the ICC must make serious efforts to not only provide children with a voice but also protect them from harm. The ICC has largely met this challenge and sought to uphold CRC principles related to participation and protection. It not only provides children with the right to participate in proceedings that they did not themselves initiate,¹⁴⁰ but the ICC also has

¹³³ *Id.* at art. 35(1)(b), (d), (e), (f). The idea of having an adult of the child's choice accompanying the child in the proceedings is not a new idea. In fact, it has been noted that “the presence of a support person increases some children's capacity to testify, resulting in more consistent and credible testimony. [T]he ‘presence of a parent/loved one [has been] associated with children answering more questions during direct examination.’” Beresford, *supra* note 99, at 744–45 (referencing findings from Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y FOR RES. CHILD DEV. 121 (1992)).

¹³⁴ For a discussion of these measures, see *supra* Part II.A, B.

¹³⁵ See *supra* note 31 and accompanying text.

¹³⁶ While there is an option under Article 3(3) of the Rome Statute for the ICC to sit in locations other than The Hague, at this point, trials have only taken place in The Hague.

¹³⁷ UNICEF INNOCENTI RESEARCH CTR. & INT'L CTR. FOR TRANSITIONAL JUSTICE, CHILDREN AND TRUTH COMMISSIONS 11 (2010), available at http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf.

¹³⁸ See generally Gen. Cmt. No. 12, *supra* note 22.

¹³⁹ See *supra* Part III.A.

¹⁴⁰ Gen. Cmt. No. 12, *supra* note 22, ¶ 33.

a number of measures in place that recognize that children must be treated differently than the average adult witness or victim. For instance, the ICC provides children with added protections when they are testifying before it, including access to staff trained in child trauma.¹⁴¹ However, while the ICC's efforts at including children may be viewed as more advanced than the approaches that have been taken by other international criminal tribunals, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia,¹⁴² additional measures should be taken to provide children with the necessary resources and protection to properly exercise their right to be heard.

The ICC may employ a variety of measures to advance the rights of child victims and witnesses to be heard, including: (1) employing education campaigns that both identify who can participate, how participation may occur, and what protective measures are available; (2) amending the application procedure to make it more child-friendly; (3) improving the setting in which children are interviewed; (4) making sure that children are not interviewed more than is necessary;¹⁴³ (5) providing options for anonymity of child witnesses when appropriate and when such anonymity does not serve to violate the due process rights of the accused; and (6) after a verdict has been rendered, making sure that child witnesses and victims know how the information that they provided was used and rendering child-friendly information regarding the holding and outcome of the case, as well as the way in which the ICC involved child participants. This list, while by no means exhaustive, does suggest a point at which reform may start in order to make the ICC an environment that further advances the best interests of the child and is even more respectful of the right of the child to be heard.

¹⁴¹ See *supra* Part III.E.

¹⁴² See *supra* Part III.A.

¹⁴³ It should be noted that the previous two suggestions also comply with suggestions made by the Committee on the Rights of the Child in Gen. Cmt. No. 12, *supra* note 22, ¶¶ 23, 24, 34; see also *supra* notes 52–54 and accompanying text.