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The child in ICC proceedings

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CHAPTER 1

INTRODUCTION

1.1 INTRODUCTORY OBSERVATIONS ON THE CHILD IN INTERNATIONAL LAW

The particular vulnerability of children and their need for specific protection has been translated in legal protection under international law. The main source of legal protection of the child is provided under human rights law.¹ Independent of the situational background, numerous human rights documents address children's need for protection and their particular vulnerability in substantive terms. Children are provided with rights that are intended to protect the material needs of the child, such as nutrition, shelter, education and health care. The Convention on the Rights of the Child (CRC) provides for the most child specific protection in substantive terms.² In addition to the general protection guaranteed to the child under human rights law, specific protection is also provided to children during armed conflict and large scale violence. In this regard, human rights law also includes the specific call to protect children from being recruited as child soldiers.³ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict focuses in particular on this aspect.⁴ International human rights law and international humanitarian law also include specific calls to protect children from suffering during conflict situations.⁵

International criminal law incorporates child specific protection under distinct crime headings. The Statutes of the different international criminal courts and tribunals vary in this regard. The Statutes of the *ad hoc* tribunals are the most limited. They

¹ UN General Assembly, Report of the Special Representative of the Secretary General for Children and Armed Conflict, UN Doc. A/F95/219 2010, para. 3. Flinterman 2006, 303-313; Ayissi 2002, 5-16; Hamilton & El-Haj 1997, 1-46; Dixit 2001, at 12-35; Heintze 1995, at 200.

² See, e.g., arts. 9, 22, 24, 27-29 1989 Convention on the Rights of the Child, 1577 UNTS 3. For further child specific protection under Human Rights Law, see, e.g., art. 3 of the 2000 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention no. 182), 2133 UNTS 161; art. 22 of the 1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49.

³ See in this regard, art. 38 CRC.

⁴ See, e.g., arts. 1-6 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222.

⁵ See, e.g., arts. 14, 17, 23-27, 49-51, 68, 81-82, 85, 89, 94 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in the Time of War, 75 UNTS 287; arts. 70, 74-75, 76-78 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3; arts. 4-6 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609.

only contain one crime, which explicitly include the victimisation of children as an element of crime. This is the crime of transferring children from one group to the other as an act of genocide which was copied literally from Article III of the Genocide Convention.⁶ A more explicit mention of children as victims of international crimes can be found in the Statute of the SCSL. For the first time in the history of international criminal law, the Statute of the SCSL criminalises the use of child soldiers as a war crime.⁷ Another step further in terms of child protection has been achieved with the coming into force of the Rome Statute. The Statute enshrines child specific crimes within the elements of the crime of genocide, crimes against humanity and war crimes.⁸ The child specific crimes as *actus reus* of genocide and crimes against humanity do not specify age limits nor do they provide other indicia that may concretise the concept of childhood. In contrast, the war crime of recruitment does specify age limits. This crime protects children below the age of fifteen years.⁹

The forcible transfer of children when constituting an element of the crime of genocide (Article 6(e) Rome Statute) and the enslavement of children as a crime against humanity (Article 7(2)(c) Rome Statute) do not have child specific age limitations. Given the express age limit for recruitment as a war crime, it may be inferred that for these crimes, the age limit is the generally accepted age of eighteen years of age. This conclusion is in line with the Elements of Crimes (EoC). As regards child victims of the forcible transfer as an element of the crime of genocide the EoC define that,

‘The person or persons were under the age of 18 years.’¹⁰

In addition to these child specific crimes, there are other international crimes to which children often fall victims. Sexual violence and trafficking as crimes against humanity constitute two such additional crimes.¹¹ Amongst civilians who became victims of sexual violence during armed conflict, children, in particular, girls, are specifically targeted by perpetrators.¹² This can to some extent be explained by the

⁶ Art. 4(2)(e) ICTY Statute, art. 2(2)(e) ICTR Statute. See for more, Schabas 2000, at 281.

⁷ Art. 4 SCSL Statute states that ‘[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’ is a serious violation of international humanitarian law. Justice Robertson was not convinced that this crime was considered a crime under customary international law when allegedly committed by Sam Hinga Norman, dissenting opinion Justice Geoffrey Robertson, SCSL-2004-14-AR72(E), paras. 3-5.

⁸ Arts. 6(e), 7(2)(c), 8(2)(b)(xxvi), 8(2)(e)(vii) Rome Statute.

⁹ Arts. 8(2)(b)(xxvi) and (e)(vii) Rome Statute. For further information, see, Cottier & Zimmermann 2008, at 470-475, 496-497.

¹⁰ Art. 6(e)(5) EoC.

¹¹ Ibid., paras. 45-46, 91. See, for instance, arts. 7(1)(g), 7(2)(c), 8(2)(b)(xxii), and 8(2)(e)(vi) Rome Statute; art. 2(g) of the Statute of the SCSL.

¹² The documentation of young boys being the victim of sexual violence is poorly documented, which does not alter the fact that young boys become victims of sexual violence. See, e.g., UN General Assembly, Report of the expert of the Secretary-General, Ms. Grac’a Machel submitted pursuant to

fact that young girls because of their virginity are expected to carry no, or fewer, sexually transmitted diseases.¹³

Next to the legal protection of the child under international law, the United Nations Security Council permanently monitors the situation of children during armed conflict. The Council has adopted resolutions and it has taken note of reports provided for by the Special-Representative of the Secretary General on Children and Armed Conflict.¹⁴ These resolutions and reports examine the risks and threats children face during conflict situations and call in particular for state action.¹⁵ On a regular basis, a specifically established working group of the Security Council for children and armed conflict monitors and reports on the recruitment of child soldiers.¹⁶ International attempts on various levels to prevent that children are victimised also underline that children are seen as special not only given their vulnerability but also because they embody the future.¹⁷

Considering that international law and state practice mirrors the recognition of children's particular need for protection during peacetime but also in situations in which international crimes are being committed, the prosecution of international crimes committed against children before international courts and tribunals is well embedded. While international prosecutions are thus in line with the overall development of protecting children from the consequences of armed conflict and large scale violence, the involvement of the child in international criminal proceedings also gives rise to new questions which relate to the procedural

General Assembly resolution 48/157, UN Doc. A/51/306 (1996), para. 93. Honwana 2006, at 58-63; Wessels 2006, at 94-101.

¹³ UNICEF, UNICEF, *The State of the World's Children 2005, Childhood under Threat*, www.unicef.org/sowc05/english/sowc05_chapters.pdf, at 45. UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/65/219 (2010), paras. 19-20. The Special Representative of the Secretary-General for Children and Armed Conflict underlined in her 2010 report that, '[s]exual violence against children, particularly in the context of armed conflict, continues to be of utmost concern. Such violations are exacerbated in conflict situations by the general security vacuum and the lack of administrative, law enforcement and judicial infrastructures, among other factors. Sexual violence is often used to achieve military, political and social objectives through, for instance, the targeting of specific ethnicities or terrorizing populations for force displacement. Data indicate that children are particularly vulnerable to sexual violence in and around refugee and internally displaced population settings, and when they are directly associated with armed forces and groups. Child survivors of sexual violence suffer both physical and psychological consequences, which are often debilitating. This is particularly true for girls who have been raped or forced to "marry" combatants, as well as for their children born of rape.'

¹⁴ See, e.g., UN Doc. A/68/267 (2013); UN Doc. A/65/256 (2012); UN Doc. A/65/219 (2010); UN Doc. S/RES/1882 (2009); UN Doc. S/RES/1612 (2005); UN Doc. A/60/335 (2005); UN Doc. A/55/163-S/2000/712 (2000); UN Doc. S/1999/957 (1999).

¹⁵ *Ibid.*.

¹⁶ See for instance, UN Doc. A/65/256 (2012), S/2011/793 (2011), UN Doc. A/65/219 (2010), UN Doc. A/60/335 (2005). For more specific information, see www.un.org/sc/committees/WGCAAC/.

¹⁷ Parmar *et al* 2010; UNICEF 2005b.

involvement of the child. Questions which relate to the child sensitivity of ICC proceedings constitute the central subject of this research.

1.2 THE CHILD AND THE ICC

Among the international criminal courts and tribunals, the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) are the first courts which specifically focus on crimes committed against children. The SCSL included, amongst other charges, the charge of the recruitment of child soldiers in all cases.¹⁸ The first case before the ICC, the proceedings against *Thomas Lubanga Dyilo*, solely charged the war crime of child recruitment.¹⁹ Trial Chamber I (whose decision was upheld by the Appeals Chamber on 1 December 2014) convicted *Thomas Lubanga Dyilo* for having recruited child soldiers in the conflict in the Democratic Republic of the Congo.²⁰ Other cases before the ICC have also included the war crime of child soldiering in their indictments.²¹ As a consequence of this charging policy, children have been involved in the proceedings before the SCSL and the ICC in different capacities.²² In addition to their involvement as witnesses in the proceedings, children can participate as victims of international crimes in the criminal and reparation proceedings before the International Criminal Court.

The International Criminal Court is the first permanent international criminal court. Prior to the establishment of the ICC, the *ad hoc* tribunals in the 1990s and hybrid courts, including the Special Court for Sierra Leone, played a major role in the renaissance of international criminal law.²³ The primary objective of these institutions is of a punitive nature.²⁴ Through the prosecution of international crimes, the courts and tribunals aim in particular to avoid impunity of such crimes.²⁵ This purpose is also restated in the Preamble of the Rome Statute of the ICC.²⁶ In addition to the punitive objective of the earlier criminal courts and tribunals, the ICC and international criminal law more generally also serve other purposes, such

¹⁸ See, for instance, SCSL-03-01-T, SCSL-04-15-A; SCSL-04-16-A; SCSL-01-14-A.

¹⁹ ICC-01/04-01/06-2.

²⁰ ICC-01/04-01/06-2842; ICC-01/04-01/06-3121.

²¹ ICC-01/04-01/07-717; ICC-01/04-02/06-2.

²² Prior to the establishment of the ICC, children also participated in truth and reconciliation proceedings in, for instance, Sierra Leone and Liberia. Truth and Reconciliation Commissions are established on a temporal basis in order to establish a historical record of human rights violations and to examine the roots of the conflicts and the consequences of such violations. In order to establish the truth, such commissions organise public and closed hearing sessions in which statements are taken from all parties involved: victims, witnesses and perpetrators. Individual criminal responsibility is thus not an objective of such commissions. See, for example, Hayner 1994, 597-655; Chapman & Ball 2001, 1-43; Evenson 2004, 730-767; UNICEF 2010a, ix-x.

²³ Cryer, Friman & Robinson 2010, at 122; Triffterer 2008, at 16-21. Sloane 2007, at 39, Fletcher & Ohlin 2005, at 540, Robinson 2003, at 482.

²⁴ Sloane 2007, at 39, Fletcher & Ohlin 2005, at 540, Robinson 2003, at 482.

²⁵ Van den Wyngaert 2011, 495.

²⁶ Fletcher & Ohlin 2005, at 540.

as deterrence, prevention, education and acknowledgement.²⁷ These remedial goals, and in particular the purpose of acknowledgement introduced a greater role for victims before the ICC.

As this greater role for victims in the course of the proceedings also entails the potential of greater child involvement in ICC proceedings, it is necessary to briefly address the underlying debate of victim participation in ICC proceedings in order to situate child victim participation within the broader context and debate.

The procedural status of victims of international crimes was limited before the earlier institutions. Victims were only involved as witnesses who gave testimony during examination and cross-examination.²⁸ The Rome Statute provides for additional procedural capacities. It enables victims, including children, for instance, to become procedural participants pursuing their own interest.²⁹ Victim participation is not limited to the criminal proceedings. Victims may also participate in reparation proceedings which are to be held when alleged perpetrators have been found individually responsible before the commission of international crimes.³⁰ Remedial goals and a particular focus on reconstruction of post-conflict societies have in this way entered the court room of international criminal proceedings.³¹ These other purposes and expectations of international criminal justice have put the punitive nature of international criminal law and the ICC under pressure. In contrast to this strict criminal law approach which is, for instance, also argued in favour for by ICC Judge van den Wijngaert, another ICC judge, Judge Odio-Benito upheld a victims-orientated approach.³² In her separate and dissenting opinion to Trial Chamber I's judgment in the *Lubanga* case, the judge argued that,

'that the Majority of the Chamber addresses only one purpose of the ICC trial proceedings: to decide on the guilt or innocence of an accused person. However, ICC trial proceedings should also attend to the harm suffered by the victims as a result of the crimes within the jurisdiction of the Court. It becomes irrelevant, therefore, if the prosecution submitted the charges as separate crimes or rightfully including them as embedded in the crimes of which Mr. Lubanga is accused. The harm suffered by victims is not only reserved for reparations proceedings, but should be a fundamental aspect of the Chamber's evaluation of the crimes committed.'³³

²⁷ Gradoni *et al.* 2013, at 55-67; Drumbl 2012, 162; Akhavan 2001, at 8; Meron 1994, at 78; Bassiouni 1983, at 30.

²⁸ Olasolo 2009, at 513-514; Sloane 2007, at 48.

²⁹ Art. 68(3) Rome Statute. Donat-Cattin 2008, at 1288; Jorda & Hemptinne 2002; Bitti & Friman 2001, at 459.

³⁰ Art. 75(3) Rome Statute in conjunction with Rules 86, 89 and 90 RPE and Regulation 86 of the Regulations of the Court. Henzelin, Heiskanen & Mettraux 2006, at 321-327.

³¹ Keller 2007, at 189-190; also see Fletcher & Ohlin 2005 criticising this development, at 552.

³² Van den Wijngaert 2012.

³³ ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para. 8.

The human rights approach is of the view that the involvement and participatory status of victims is as important as the criminal prosecution of alleged perpetrators in the course of ICC proceedings.³⁴ In contrast to the human rights perspective, scholars have argued that international criminal proceedings are not the right forum for victims to elaborate on their experiences. It has been suggested that truth commissions constitute a better forum for victims' views. Robinson provides a critical analysis of a victim-focused approach in international criminal proceedings. This scholar addresses in particular the potential negative implications for the accused when a victim-focused approach determines the course of the criminal proceedings.³⁵ Worth mentioning in this regard is the dissenting opinion of ICC Judge Van den Wyngaert in the proceedings against *Germain Katanga*.³⁶ The judge, by vehemently disagreeing with the majority decision, upheld that a fair trial for the accused constitutes the core objective of ICC proceedings.³⁷ This ongoing debate has repercussions for the interpretation of the substantive and particularly procedural rules of the ICC. It is within this dialectic that the current thesis looks at the position of the child in ICC proceedings.

1.3 RESEARCH AIM, STATEMENT OF THE PROBLEM AND RESEARCH QUESTIONS

We can thus witness a growing attention for the child as a victim of international crimes. Whereas the child hardly featured in the crimes catalogue of the *ad hoc* tribunals, the SCSL and the ICC Statutes contain more specific child crimes and at both courts the prosecutors made use of these provisions. In line with this, and possibly as a result of the silence of the law, the *ad hoc* tribunals did not have a child focus in their charging policies. The indictments did not include any child specific crimes. A similar increase in attention can be discerned at the procedural level.

The procedural rules of the *ad hoc* tribunals hardly refer to the child. Neither were children extensively involved in their practice as witness or otherwise. The practice changed with the establishment of the SCSL. As the Sierra Leonean conflict is known for the wide recruitment of child soldiers and given the inclusion of this crime in the Statute, the indictments charged, amongst others, crimes committed against children.³⁸ Consequently, children also participated quite considerably in the procedures of the SCSL as witness. The increased focus on and participation of the child at the SCSL may thus well be explained by the character of the conflict and by the type of crimes committed.

³⁴ Ibid., paras. 22-35.

³⁵ Robinson 2008, at 938, 961.

³⁶ ICC-01/04-01/07-3388-Anx.

³⁷ Robinson 2003, at 484. ICC-01-04-01/07-3319, paras. 25-36. See also, Wyngaert 2011, at 488; Vasiliev 2015.

³⁸ See, for instance, SCSL-03-01-T, SCSL-04-15-A; SCSL-04-16-A; SCSL-01-14-A.

As indicated, the ICC continued this focus on the child in terms of substantive law and charging policy. In fact, the charges in the very first case, the case against *Thomas Lubanga Dyilo*, are limited to the charge of child soldiering. While all indictments before the SCSL included the recruitment crime in addition to other crimes, the first case before the ICC is unique. The prosecutorial decision to focus on the recruitment crime gives room for greater involvement of children in the procedure compared to cases in which other crimes have also been charged.³⁹ Both the SCSL and ICC procedural framework do not include express bars or limitations to involve children in the procedures.

The above anticipates, that in addition to children's role as beneficiaries of substantive protection under international law, their status seemed to have gained another component: the child as procedural player. Whether the child is also in need of particular procedural protection as a result of being a child, has not been comprehensively addressed under international law and is therefore the subject of this research. The Special Representative of the Secretary General for Children and Armed Conflict underlined in the 2010 report to the United Nations General Assembly the imperative of child participation in transitional justice and in particular that

'procedures to protect the rights of children involved in transitional justice processes should include a specific focus on adolescents and should be constituent with the evolving capacities of the child.'⁴⁰

Providing for child participation which is constituent with the evolving capacities of the child presupposes in the context of this research that the child is able to increase his or her own participation in the decision-making process.⁴¹

In contrast, under domestic law, the special status of children in both practical and legal terms has been translated into special child-sensitive procedures. This is particularly the case because children are often not accepted in legal systems as subjects with full legal capacity and competence to act.⁴² These procedures recognise the inherent difficulties for children to have access to justice and their need for particular protection when involved as a procedural actor. Children who participate in ICC proceedings may equally be confronted with specific childhood

³⁹ Drumbl 2012, at 19. Women's Initiatives for Gender Justice 2012.

⁴⁰ UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/65/219 (2010), para. 45 and Annex Principles for child protection and participation in transitional justice, principle 6. In addition, the European Union also only recently started to focus more intensively on the procedural legal status of the child, see, Stalford & Drywood 2009, 143-172.

⁴¹ *Ibid.*, at 50. See also, Breen 2007, 71, at 81. O'Kane, Feinstein & Giertsen 2009, at 261.

⁴² Strode, Slack & Essack 2010, at 247-249; Cunningham 2006, 275, at 277; Hafen & Hafen 1996, 449, at 453.

related procedural particularities. These may arise at various stages in the proceedings before the ICC.

In light of the aforementioned, the research aim of this is twofold: Firstly, it analyses whether and to what extent the proceedings are child-sensitive. Secondly, a lack of child-sensitivity might lead to child participation which cannot be considered to be in the best interests of the child, meaning in particular that the legal or factual consequences of child participation threaten the well-being of the child. Consequently, where necessary, this research aims to establish whether additional child-specific regulation and awareness is necessary in order to accommodate the particular needs of the child.⁴³ It thereby also aims to establish whether it is at all possible that ICC proceedings are sufficiently child-sensitive. If not, it might be necessary to reconsider the possibility that children participate. Summarising the foregoing, the concrete objective of this research reads as follows:

The research aims to provide informed insights into whether and to what extent participation in ICC proceedings is in the best interests of the child.

When addressing these aims, it is to be kept in mind that, even if victims, including children, may participate in the proceedings before the Court and claim reparations, the author agrees with the perspective that the ICC has as its primary objective to ensure a fair trial for alleged perpetrators. Accordingly, the punitive nature is of foremost importance when balancing the best interests of the child to participate against the core objective of international criminal justice. One may therefore as such still question the principal relevance of child participation in ICC proceedings.

In light of this research aim and considering the fact that child development is not a static process, the problem statement reads as follows:

To what extent is the ICC procedural framework child-sensitive taking account of the evolving capacities of the child?

With a view to shedding light on this problem statement, some concrete research questions have been formulated that guide the evaluation in respect of the different capacities in which children participate. As child participation in the proceedings before the ICC constitutes a matter of fact, one may raise the question whether such participation is a welcome development. Is it in the best interests of the individual child? Should it be appraised positively if viewed from broader angles such as the role of children in processes of post-conflict reconstruction? These questions are not purely legal in nature. Instead, they are part of a broader debate that cannot be limited to a legal analysis but is also involving other fields such as psychology and sociology. With this caveat in mind, the current research intends to contribute to the debate by offering legal views and perspectives. It is therefore not aimed at

⁴³ See also in this regard, Doek 1992, at 632.

providing final and conclusive answers to these questions but wishes to contribute to the debate on whether child participation in different procedural capacities is in the best interest of the child.

A detailed analysis of other aspects, such as the psycho-social constitution of the child during and after armed conflict and how cultural and geographical circumstances of a particular case at issue influence the child's capacity to recover, is not the focus of this research. Instead, this research departs from the factual observation that children currently participate in judicial proceedings before international criminal courts and tribunals.

1.4 TERMINOLOGY AND CONCEPTS

1.4.1 The child in ICC proceedings

Children can participate in the following five procedural capacities in international criminal and reparation proceedings at the ICC:

In criminal proceedings:

- child witness
- child victim
- child perpetrator
- child of an (alleged) perpetrator

In reparation proceedings:

- child claimant

Child witness

Children frequently become witnesses of international crimes during conflict situations.⁴⁴ Seeing acts of torture, killing, shelling and shooting constitute typical experiences of children who find themselves in situations of armed conflict.⁴⁵

Witnessing international crimes occurs in three constellations: children are either eyewitnesses, become victims themselves or witness because they commit crimes themselves.⁴⁶ Children might thus be called into the witness stand in order to give testimony on international crimes.⁴⁷

⁴⁴ Children and armed conflict, Report of the Secretary-General, G.A. 58/546 – S.C. 2003-1053 UN Doc. A/58/546-S/2003/1053 (Nov. 10, 2003); Promotion and Protection of the Rights of Children – Impact of armed conflict on children, note by the Secretary-General, addendum, G.A. 51st Sess., 4, UN Doc. A/51/306/Add.1 (Sept. 9, 1996).

⁴⁵ See, e.g., Macksoud & Aber 1996, at 75-76.

⁴⁶ Sanin & Stirmemann 2008, at 7.

⁴⁷ Beresford 2005, at 722.

Child victim

Armed conflicts and situations of large-scale violence lead to numerous child victims of international crimes. Children might therefore have an interest to be involved in the course of international criminal proceedings. As has been indicated, certain international crimes are specifically child-oriented and other crimes, such as sexual violence, tend to victimise children in particular. With the establishment of the ICC, victims may indeed participate in international criminal proceedings. When victims convince the Court that they have suffered harm as a result of a crime within the jurisdiction of the Court, they might present their views and concerns during the course of the criminal proceedings.⁴⁸ The Rome Statute does not exclude children from this form of participation.

Child perpetrator

Children may also be perpetrators of international crimes.⁴⁹ In particular, children are identified as perpetrators of international crimes if they have been recruited as child soldiers.⁵⁰ The theoretical international criminal prosecution of child perpetrators has been introduced through the establishment of the SCSL. Minors that have committed crimes at the age of 15-18 could have been confronted with international criminal proceedings.⁵¹ The Prosecutor of the SCSL, however, never charged children.⁵² This prosecutorial decision does not alter the fact that the question of prosecuting children at international level raises may nevertheless be raised. If not before the ICC as a result of Article 26 of the Rome Statute of the ICC which excludes persons under 18 from the jurisdiction of the Court, a specifically established international criminal court for child perpetrators could constitute a form for the prosecution of minors. For this research, this procedural capacity is thus not as such relevant. It may, however, have to be taken into account when child victims claim reparations while having themselves committed international crimes as former child soldiers.

Child of an (alleged) perpetrator

The final capacity in the course of international criminal proceedings relates to the child of an (alleged) perpetrator. Children, whose parents are prosecuted before the ICC might be confronted with numerous consequences of their parents' involvement. While this procedural capacity is of an indirect nature as it is the result of their parents' (alleged) perpetration of international crimes, decisions taken in the

⁴⁸ Rule 85 RPE and art. 68(3) Rome Statute.

⁴⁹ Redress 2006, at 5-22.

⁵⁰ Child Soldiers Global Report 2008, at 36.

⁵¹ Art. 7 Statute of the SCSL.

⁵² See Press release SCSL, Kendall & Staggs 2005, at 7.

course of the proceedings against their parent might bear consequences for the child and are therefore also addressed.

Child claimant

In addition to the possibility of child participation in the course of the criminal proceedings before the ICC, children may also participate in reparation proceedings. Prior to the establishment of the ICC, international claims for breaches of international humanitarian law could not be brought by victims before an adequately mandated international court or tribunal. Human rights bodies have been found to be less equipped to adjudicate these claims.⁵³ As a result, victims of international crimes were for a long time not able to claim reparations for their suffering before an international judicial body.⁵⁴ The first conviction before the ICC, the conviction of *Thomas Lubanga Dyilo*, paves the way for reparation proceedings. As with regard to child participation in the criminal proceedings, the Rome Statute does not entail a bar of child claimant participation in the reparation proceedings.

1.4.2 Childhood

Why are child participants to be distinguished from adult participants? The central concept of this thesis is the concept of childhood. The definition of this concept is under discussion.⁵⁵ The factor age, start of a working life or the completion of educational training have been referred to as criteria which determine the end of childhood.⁵⁶ While the end of this period of life and the entrance into adulthood might vary, depending on socio-economic aspects, such as living in a developed or underdeveloped country it is agreed upon that childhood refers to a particular time in life which should provide sufficient room for play, school and a safe and caring environment.⁵⁷ Article 1 of the CRC is helpful in defining the benchmark of this concept as it provides for an upper age limit. It states that ‘every human being below the age of eighteen years’ is considered to be a child.⁵⁸ Accordingly, irrespective of the factors of a rather substantive nature, the age of a young human being can be considered as a criterion which can be referred to in order to distinguish children from adults.

The clear cut definition of article 1 of the CRC seems to be attractive at first sight and useful to be transposed to the ICC framework when distinguishing between child and adult participation in the proceedings. The Rome Statute and the Rules of

⁵³ Krieger 2006.

⁵⁴ Zegveld 2003.

⁵⁵ See, for a general discussion, Prucnal 2012, at 70-72; Mousavi, Rastegari, & Nordin 2012.

⁵⁶ Boyden & Levison 2000.

⁵⁷ Brocklehurst 2006, at 8.

⁵⁸ See also, art. 2 of the 1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49.

Procedure and Evidence refer to the child in various provisions.⁵⁹ However, explicit reference to a particular age can only be found twice in the Rome Statute. Firstly, Article 26 of the Rome Statute refers to children below the age of eighteen years. This provision determines that the ICC does not have jurisdiction over persons younger than eighteen years of age. Secondly, the war crime of child recruitment criminalises the recruitment of children below the age of fifteen years. The remaining provisions refer to the child without further age specification. The exclusion of the Court's jurisdiction from persons below the age of eighteen years might reflect an understanding of childhood as being terminated when the age of eighteen years is reached. Alternatively, the absence of general criteria that apply to the concept of childhood across all provisions also offers leeway to take a more encompassing approach, and to differentiate between different stages of childhood, such as early, middle childhood and adolescence.⁶⁰

Bearing in mind the aforementioned different stages of childhood and considering the major focus of international criminal proceedings on the war crime of child soldiering, one may argue that children are particularly involved in the proceedings during a particular stage of childhood, namely their teenage years or young adulthood. Very young children, at least in these cases, are not likely to participate as the recruitment of babies or toddlers simply seems to lack any purpose as they cannot be expected to be capable of being used for the spectrum of tasks child soldiers perform.

Yet, in light of the potential of youth and next generations in processes of post-conflict reconstruction and the explicit limitation of the Court's jurisdiction to persons above the age of eighteen years (Article 26 Rome Statute), child participants within the ambit of this research are understood to be those persons who have been below the age of eighteen years when the triggering moment of, for instance, witnessing international crimes or victimisation, took place. This leads to the logical consequence that their procedural status of being a child participant does not differ despite the fact of having reached majority before the commencement or during the course of the proceedings. It should therefore be mentioned in this regard that keeping the term *child* participant instead of *adolescent* participant does not mean to imply that the current research is limited to minors.⁶¹ Instead, having reached majority while still being involved in ICC proceedings does not alter the legal status of being a child participant within the ambit of this research.

Thus it is possible, that despite having reached majority, young persons may still come into consideration for child specific procedural treatment because they were a child at the triggering moment. It is therefore to be examined whether not only those who are *during* the proceedings minors are in need of child-sensitive procedural treatment but also whether those who have reached majority are still in

⁵⁹ See, for instance, arts. 6(e), 7(2)(c), 8(2)(b)(xxvi), 8(2)(e)(vii), 36(8)(b), 42(9), 54(1)(b), 68(1), 68(2) and 84(1) Rome Statute; 17(3), 19(f), 75(1), 86, 88(1), 89(3) and 112(4) RPE.

⁶⁰ See in this regard, Brocklehurst 2006, at 1.

⁶¹ See for similar criticism Drumbl 2012, at 3-25.

need of a child-sensitive approach when the triggering moment took place during childhood.

1.4.3 The particular vulnerability of the child

Children are particularly vulnerable human beings. The Preamble of the Convention on the Rights of the Child points out that,

‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’⁶²

According to the Convention, the need for special protection is, vested in two childhood-related characteristics, namely children’s physical and mental immaturity. These are two child specific features which exist irrespective of the situational background of the child.

The determination of the degree of the child’s vulnerability is based on various factors. The capacity of the child to express and communicate, the dependence on adults, reading skills, but also the educational levels of parents are decisive in this regard.⁶³ At the same time, not all children are equally vulnerable and children cannot always be considered as being the *most* vulnerable.⁶⁴ It is generally accepted that *being vulnerable* means, that a person is not able to protect him/herself. However, this does not imply that vulnerability should be understood as a static concept.⁶⁵ Even if children are understood to be particularly vulnerable as a consequence of their physical and mental immaturity, there are children who are capable of protecting themselves.⁶⁶ The varying degrees of child vulnerability do not diminish the overall need to distinguish children and adolescents from adults as potentially more vulnerable and in need of special procedural protection. The Committee on the Rights of the Child held in this regard that children should not be seen as *mini adults*.⁶⁷

⁶² Preamble CRC.

⁶³ For further information, see, Werner 2000, 115-132. The author provides an extensive overview of the available studies on factors determining children’s vulnerability. Jensen & Shaw 1993, 697-708. Similarly, Skinner and Tshoko determined the vulnerability of the child in light of the basic needs of the child. A variety of factors have been pointed out as being crucial, including the physical or mental condition of the child, the educational background and family situation. See, Skinner *et al* 2004, 11. See similarly in relation to Palestinian children affected by political violence, Punamäki 1989, 63-79. For a comprehensive overview of all relevant aspects, see Committee on the Rights of the Child, General Comment No. 7, at 16.

⁶⁴ Drumbl 2012, at 93-101.

⁶⁵ Skinner *et al* 2006, 619, at 624.

⁶⁶ UN Committee on the Rights of the Child, General Comment No. 7, at 8.

⁶⁷ The Committee on the Rights of the Child underlined that, ‘[c]hildren differ from adults in their physical and psychological development, and their emotional and educational needs.’ UN Committee on the Rights of the Child, General Comment No. 10, at 5. In the same tenor, see UNICEF 2009b, at 23.

1.4.4 The best interests of the child and child-sensitive procedures

The main objective of this research is to examine whether the law and practice of the ICC is child-sensitive. But what does child sensitivity mean in relation to ICC proceedings? Guidance on what is to be understood under child-sensitivity can be found in the principle of the best interests of the child. This principle has been codified in article 3 of the CRC. Article 3 CRC provides that,

‘[i]n 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*’ (emphasis added).

The call that in all actions concerning children the best interests of the child shall be a primary consideration presupposes that the actors involved, such as judges, prosecutors, defence lawyers and legal representatives, are aware of what is to be considered in the child’s best interests, i.e. that the proceedings are child-sensitive.

Various aspects are acknowledged as being important when measuring the best interests of the child.⁶⁸ The values of societies, for instance, play a decisive role in the determination of the best interests.⁶⁹ The culture and religion in a concrete situation are also of particular relevance, which may lead to different applications of the principle depending on the particular context of a case.⁷⁰ It should also be remembered that the assessment of the best interests of the child may be difficult to determine when examining today’s and tomorrow’s best interests. The child-specific difficulty relates to the fact that what today might be considered to be in the best interests of the child, may not be considered to be so in the future.⁷¹ Furthermore, other issues might override the best interests of the child in the decision-making process as the best interests are only *a primary consideration*.⁷²

The *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* provide the, to date, most explicit yardstick for assessing the best interests of the child. The *Guidelines* suggest that the assessment should include the following elements:

⁶⁸ For an overview of the views raised regarding the difficulty of finding a coherent definition, see Detrick 1999, at 88-90; Freeman 2007, at 27; Van Rossum 2010, 33, at 36. Charlow 1987, 267, at 268. See also, UNICEF 1996, at 15; Artis 2004, 769, at 769.

⁶⁹ Sund 2006, 327, at 330.

⁷⁰ Van Bueren 1998, at 45. Freeman 2007, at 2. Van Rossum 2010, at 44-47.

⁷¹ Freeman 2007, at 3. See for an assessment of the concept within the African context, Himonga 2001, 89-122.

⁷² Van Bueren 1998, at 48. See also, Comment by the United Nations Children’s Fund, UN Doc. E/CN.4/1989/WG.1/CRP.1 (1989), at 13-14 (UN Office of the High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, Volume I, UN Doc. HR/PUB/07/1 (2007), at 343-344); and the report of the 1989 open-ended Working Group to the Commission on Human Rights on the question of a convention on the rights of the child, UN Doc. E/CN.4/1989/48 (1989), paras. 117-126; Committee on the Rights of the Child, 51st session. UN Committee on the Rights of the Child, General Comment No. 12, para. 71.

‘all other rights of the child, such as the right to dignity, liberty and equal treatment shall be respected at all times; a comprehensive approach shall be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.’⁷³

The Committee on the Rights of the Child recently published a General Comment on the interpretation of this principle.⁷⁴ The Committee held that,

‘[t]he concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child.’⁷⁵

The Committee continued stating that,

‘[t]he full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.’⁷⁶

The Committee also stated that,

‘[w]henver a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.’⁷⁷

Bearing the above in mind, child-sensitivity in light of the research aim is in particular understood to refer to the degree of the Court's awareness in law and in practice of the procedural particularities of child participants. In order to ensure that, if desirable and possible at all, child participation can be considered to be in the best interests of the child, a child-sensitive approach is indispensable. This implies that

⁷³ Council of Europe Guidelines 2010, principle B(2)a.-c..

⁷⁴ UN Committee on the Rights of the Child, General Comment No. 14.

⁷⁵ *Ibid.*, para. 32.

⁷⁶ *Ibid.*, para. 5.

⁷⁷ *Ibid.*, para. 6.

the potential implications of child participation for the individual child but also for the proceedings as such are to be taken into account. Child-specific regulation and procedural treatment might constitute a tool to determine whether child participation is in the best interests. The preceding elaboration of the CRC Committee also points out, that the awareness of the child-specific particularities should not be limited to the organs of the ICC. Instead, the Court, but equally parties and participants should adopt a child-sensitive approach when engaging with children in the course of the proceedings.

The research therefore aims to examine in particular, whether the actors involved adopt a case-by-case approach when children are involved in ICC proceedings. Again, this research is in need of a yardstick to evaluate international practice. Bearing in mind that the principle of the best interests could constitute such a yardstick, the suggested assessment of the CRC Committee is helpful to be referred to. The Committee suggested in particular to assess the best interests as follows:

‘Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, *inter alia*, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc. [...]’⁷⁸

The above alludes that the assessment of the best interests is not limited to a legal assessment and should generally be made on a case-by-case basis. However, this research is premised on the idea that the proceedings can also be tested against this yardstick in a more generic and abstract manner. The best interests are thereby to be assessed in light of the other rights of the child. An interdisciplinary examination scrutinises the non-legal fields of interests, such as the psycho-social constitution of the individual child. This assessment, in particular the non-legal aspects, clarifies why this research does not aim to provide a definite answer to the overreaching question whether child participation in the proceedings is in the best interests of the child. It is limited to providing an assessment as far as the legal aspects are concerned for all actors involved, in particular judges, when deciding on whether and how children should participate. The limitation to an examination of the child-sensitivity from a legal perspective also explains why this research does not try to give a final and definite conclusion on whether child participation should generally be encouraged or not.

⁷⁸ Ibid., para. 48.

In sum, child-sensitivity is intended to entail that all actors involved in ICC proceedings approach child participants on a case-by-case basis and are aware of the special needs of children. In light of the foregoing it is necessary to bear in mind that participation in the best interests of the child can only be at stake, if desirable at all, when the multiple facets that are inherent to being a child are taken into account.

1.4.5 The evolving capacities of the child

Closely related to the question whether ICC proceedings are to be considered in the best interests of the child, is the principle of the evolving capacities of the child.⁷⁹ It has been explained before that childhood is not a static concept. Instead, depending on the individual capability and circumstances of the child, the capacities of the child might vary. As a matter of fact, a child-sensitive approach generally needs to take into account that the capacities of the child are evolving. It is therefore necessary to determine the factual capacity of the child at the time of the procedural involvement. The principle of the evolving capacities is, again, a principle which can be found in the Convention on the Rights of the Child. Article 5 CRC states that,

‘States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a *manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention’ (emphasis added).⁸⁰

The concept of evolving capacities aims to ensure that the limited autonomy of the child is gradually to be increased to full autonomy, and thereby enables the child to increase his or her own participation in the decision-making process. It ensures in this manner the progression of the child from a legal subject, which possesses a limited autonomy to a subject whose autonomy is unlimited.⁸¹ Such an approach implies that childhood is seen as a dynamic process of human development.⁸² The Committee on the Rights of the Child held in this regard, that

‘according to their evolving capacities, [children] can progressively exercise their rights.’⁸³

The assessment of the best interests of the child in the light of the evolving capacities concept guarantees that the best interests are determined in relation to the individual capacity or developmental stadium of the child at the time of decision-

⁷⁹ Van Bueren 1998, at 49.

⁸⁰ See also, Van Bueren 1998, at 49.

⁸¹ *Ibid.*, at 50. See also, Breen 2007, 71, at 81. O’Kane, Feinstein & Giertsen 2009, at 261.

⁸² Van Bueren 2007, at 37.

⁸³ UN Committee on the Rights of the Child, General Comment No. 4, para. 1.

taking.⁸⁴ Having said this, an increasing capability of the child lessens his or her need to be supervised or guided by others.⁸⁵ As a result of the developmental progression of the child, the respective actors involved should provide the child gradually with greater responsibilities for decisions that affect him or her.⁸⁶

Factors that have an impact on the capacity of the child are, for instance, the gender of the child, the financial situation, the ethnical or cultural background, the geographic position of the child and also socio-political factors, such as living in times of armed conflict or large scale violence.⁸⁷ It needs to be noted that the age of the child, again, is excluded from these factors.⁸⁸ The underlying reason for excluding the age as a relevant factor is reflected in the words of van Bueren, who stated that

‘[a] young child can be mature beyond his or her years.’⁸⁹

Bearing the research aim in mind, the assessment of the law and practice of the ICC is therefore also made in light of the question whether the actors involved take, as part of a child-sensitive approach, the evolving capacities of the child participant into consideration.

1.5 METHODOLOGY

1.5.1 Sources and approach

Legal research is usually conducted through an analysis of the *lex lata* with reference to Article 38 of the Statute of the International Court of Justice which lists the sources of international law.⁹⁰ This thesis focusses on procedure. This focus on procedure has direct ramifications for the approach and identification of relevant sources. Given that procedure is jurisdiction-specific, customary international law is generally not the most suitable source.⁹¹ Hence, the analysis in this research will mostly rely upon and be informed by treaty law, whereby the ICC legal framework obviously functions as the most immediate point of departure.

The primary source for this research is therefore the ICC legal framework. Firstly, the Rome Statute is examined. As supplementary source, the Elements of Crimes (EoC) and Rules of Procedure and Evidence (RPE) are analysed and used in this

⁸⁴ Van Bueren 1998, 50.

⁸⁵ Detrick 1999, at 120.

⁸⁶ UNICEF 2005b, at 3.

⁸⁷ O’Kane *et al* 2009, 267; UNICEF 2005b, 9.

⁸⁸ *Ibid.*, 4.

⁸⁹ Van Bueren 1998, at 136-137.

⁹⁰ 1945 Statute of the International Court of Justice, 33 UNTS 993.

⁹¹ Van den Herik (forthcoming).

regard as interpretative guidance for the Rome Statute.⁹² Following the same methodology, the Statutes and procedural regulations of the *ad hoc* tribunals and the Special Court for Sierra Leone are scrutinised in order to clarify to whether and to what extent child participation has been explicitly addressed in the procedural regulation.

An additional primary source of this research is human rights law. The relevant human rights conventions are scrutinised in light of the question whether these documents can provide guidance for child participation in ICC proceedings.⁹³ Important to note is that this source is not understood to be directly applicable but may constitute a primary source which could be referred to as yardstick for child participation in ICC proceedings.

The Convention on the Rights of the Child is the most relevant human rights treaty. Concepts from this Convention are used as a source of inspiration and in particular as a yardstick for the determination of the procedural status of the child participant in ICC proceedings. Bearing the aim of this research in mind, it refers in particular to two core principles of the CRC: the principles of the best interests (Article 3) and the evolving capacities of the child (Article 5). As a matter of fact these principles are used for guidance in a different judicial and situational setting. Firstly, as regards the judicial setting it is held that while the proceedings before the ICC are determined by international criminal law, the CRC principles, as set out in the Convention on the Rights of the Child mainly address a domestic setting, in particular proceedings, such as cases being based on domestic family or adoption law. As a result of the different judicial settings, also the legal questions addressed differ. In contrast to the proceedings before the ICC, which cover questions relating to situations of gross human rights violations, mass victimisation and individual criminal responsibility, domestic proceedings with a CRC-component involve individual cases brought, for instance, in relation to family law issues.

Secondly, the transposition of the two core principles of the CRC can also not be considered to be a direct application of the Convention on the Rights of the Child as the situational background is of major difference. The CRC relates to the largest extent to peacetime situations in which children might find themselves. ICC proceedings, however, are per definition held in light of a (sometimes even still ongoing) armed conflict or situation of large scale violence.

Bearing thus the different judicial and situational setting in mind, seeking guidance in the CRC core principles of the best interests and evolving capacities of the child may not necessarily lead to the same implications for the child participant in the course of ICC proceedings.

While the Convention itself does not extensively refer to the child as a procedural actor, the General Comments of the CRC Committee elaborate upon

⁹² Dörmann 2003, at 350. Art. 9(1) of the Rome Statute states that, the ‘Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 6.’

⁹³ See the subsequent section for more on the applicability of human rights law to ICC proceedings.

procedural aspects and implications of child participation in judicial proceedings. These comments are therefore looked at in order to determine whether guidance for child participation in ICC proceedings can be found despite their non-binding force. The almost universal acceptance of the Convention on the Rights of the Child stands for a broad recognition of the rights of the child as entailed by the Convention.⁹⁴ It is recognised though that principles and concepts being introduced by the CRC may not always be directly applicable since they are tailored to be used in the domestic setting. There may thus be a need to transpose the concepts and adjust them to the specific features of an international setting.⁹⁵

The fact that these documents, including the Convention on the Rights of the Child, are mainly drafted for individual cases in a domestic and in particular peacetime context does not necessarily constitute a problem or constraint. Procedural particularities of the child participant might, after all, mainly exist as they might be inherent to being a child – a developmental status which is distinguished from adulthood. The elaboration on the concept of childhood also stipulates in this regard, that children are to be distinguished from adults. This distinction has not been found to exist as a result of a particular situational setting, such as a peacetime environment or a domestic setting. It is recognised that children might be considered to be in need of particular protection because of factors which are inherent to being a child, regardless of whether they participate in domestic or international proceedings.

Next to the legal and other authoritative documents referred to, the case law of the International Criminal Court constitutes the second source of this research. While Article 38(1)(d) classifies judicial decisions as a subsidiary source, it is, due to the major silence of the relevant treaty law, of particular importance for this research. The case analysis is thereby not limited to the decisions of the ICC, but encompasses as a supplementary or comparative guiding source, the case law of the other international criminal courts and tribunals. Equally, questions which arose in domestic proceedings in relation to the child participant in criminal and reparation proceedings are examined if relevant and useful. For the same purpose, the case law of human rights courts is referred to as yardstick and inspiration for a comparative analysis of the procedural particularities of the child participant.

As a third and also supplementary source for this research, scholarly writing is examined. A constraint with regard to this source is reflected in the limited availability of scholarly writing on child participation in international criminal and reparation proceedings. Scholarly writing in related fields of research is therefore

⁹⁴ 193 States are currently parties to the CRC, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. The importance of the CRC beyond a domestic legal context is also reflected in the practice of the European Court of Human Rights which frequently refers to the CRC in its case law. Daly 2012, at 443.

⁹⁵ Raimondo 2008, at 58-69.

used for a comparison. Academic literature on the procedural status of the individual under international law, in particular on victim participation in ICC proceedings is available. Similar problems which have generally occurred in relation to victim participation, for instance, might bear particular consequences for the child participant and are therefore interesting to be used for a comparison and further inspiration.

1.5.2 Relevance of human rights law in ICC proceedings

The relevance of human rights law in ICC proceedings finds its justification in the interrelationship between human rights law and international criminal law. While human rights law primarily aims to protect the rights of individual human beings against states, international criminal law first and foremost intends to prevent impunity of individual perpetrators for violations of such rights in situations of gross human rights violations and mass victimisation.⁹⁶ This means *in concreto* that violations which constitute war crimes, crimes against humanity or genocide fall within the ambit of international criminal law.⁹⁷ Safferling states in this regard that:

‘[h]uman rights are thus protected through criminal prosecution. [...] Yet the concept of how human rights influence proceedings is complex and multi-dimensional.’⁹⁸

In relation to ICC proceedings, the choice to be inspired by human rights and in particular children’s rights and to use concepts developed in this area of law as a yardstick is informed and endorsed by Article 21 of the Rome Statute. Article 21(1)(b) of the Rome Statute provides that the Court shall apply international treaties. Paragraph 3 calls upon the Court to ensure that,

‘the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.’

The exact implications of this provision have been discussed extensively in scholarly writing. It has been argued, that Article 21 of the Rome Statute is not to be understood to imply that the ICC is bound to *apply* those treaties as such.⁹⁹ Instead, it is suggested that reference to international treaties by the ICC is a possibility for the Court to be assisted by such treaties when formulating a decision.¹⁰⁰ It has been pointed out in this regard that,

⁹⁶ See generally in relation to human rights law Alston & Goodman 2013, 58-155; Bassiouni 2012, at 59; Safferling 2004, at 1471.. In relation to international criminal law, see, Morrissey 2012, at 65; Alvarez 2009, at 33; Sloane 2007, at 39, Fletcher & Ohlin 2005, at 540, Robinson 2003, at 482.

⁹⁷ Cassese 2009, at 489; Safferling 2004, at 1476.

⁹⁸ Safferling 2012, at 62-63.

⁹⁹ Nolte 2013, at 288; Grover 2012, at 90; Schabas 2010, at 385; Bitti 2009, at 287-288; Politi & Gioia 2008, at 105.

¹⁰⁰ McAuliffe deGuzman 2008, ‘Article 21 Applicable Law’, at 706; see also, Pellet 2002, at 1067-1070.

‘[w]hile the distinction between interpretation and application is not always easy to make, it is clear that the Court is duty bound (‘must’) to interpret the Statute consistently with internationally recognized human rights.’¹⁰¹

Accordingly, based upon Article 21(1)(b) and (3) of the Rome Statute, the ICC is invited to interpret the Rome Statute and its Rules of Procedure and Evidence in light of other international treaties. The Court may therefore rule upon child participation in light of the internationally recognised interpretation of the Convention on the Rights of the Child. Using for this research the core principles of the CRC as a yardstick for child participation in ICC proceedings does not therefore constitute an approach which is either farfetched or in conflict with the sources the Court may rely upon when formulating a decision.

The possibility that Article 21(3) invites the use of human rights as a yardstick for an assessment of ICC law and practice has also been addressed by Arsanjani. She pointed out that,

‘[w]hile the original intention behind this paragraph may have been to limit the court’s powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all three categories in Article 21. For instance, if the court decides that certain provisions of the Elements of Crimes or the Rules of Procedure and Evidence are not compatible with the standards set out in paragraph 3 of Article 21, it would not have to apply them.’¹⁰²

Sluiter also seems to prefer such approach, as he stated that Article 21(3) of the Rome Statute,

‘offers a starting point in filling the blanks within the Statute on the basis of human rights law.’¹⁰³

Fletcher and Ohlin argued in relation to Article 21(3) that,

‘[t]hough this phrase obviously refers to the rights of the accused, it can also be read to include the rights of the victims, which opens the door to a more aggressive mode of prosecution.’¹⁰⁴

A more modest and criminal law approach has been suggested by Grover. She pointed out by reference to the drafting history that this provision was primarily drafted with the intention of ensuring the principle of legality and the fairness of the

¹⁰¹ Vagias 2011, at 83.

¹⁰² Arsanjani 1999, at 29.

¹⁰³ Sluiter 2009, at 466.

¹⁰⁴ Fletcher & Ohlin 2005, at 552.

proceedings for the alleged perpetrator. Broadening the protection of others, such as victims, has, according to the author, not been the intention of the drafters.¹⁰⁵

Delmas-Marty, by contrast, suggested that reference and inspiration from human rights law is not limited to the principle of legality and fair trial for the accused. She held that,

‘[t]his provision adds interactions between international criminal law and international human rights law [...] and grants official status to cross-references between these bodies of law. But it may also introduce a hierarchy in favour of human rights, while international judges have until now rejected any such hierarchy. [...] The mechanism of Article 21(3) [...] could encourage them to give greater weight to international human rights instruments.’¹⁰⁶

As the yardstick of human rights law in this research is predominantly suggested for an interpretation of the procedural provisions concerning child participation in ICC proceedings and not for an interpretation of the substantive provisions that aim to protect victims, including children, from international crimes, one may assume that fair trial concerns are not as likely as regards the interpretation of the substantive law. This assumption, however, cannot be relied upon without further research as one can imagine that also a victim-oriented interpretation of the procedural provisions might indeed give rise to fair trial concerns. While this question is not part of the current research due to its general nature, it is a question to be kept in mind within the overall discussion of victim participation in ICC proceedings.

The case law of the International Criminal Court has also addressed the possibility to use human rights law as yardstick – be it without explicitly distinguishing between the substantive and procedural provisions under the ICC system. Direct reference to human rights law has indeed also been made with regard to victims. In the decision of 18 January 2008, Trial Chamber I ruled that,

‘[i]n light of Article 21(3) of the [Rome] Statute, and taking into consideration the decision of the Appeals Chamber that it “makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights”, the Trial Chamber has considered 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 (“Basic Principles”) [...]’.¹⁰⁷

The Chamber explicitly referred to Articles 3 and 12 of the CRC as relevant provisions which need to be considered for victims’ participation.¹⁰⁸ The reference

¹⁰⁵ Grover 2010, at 559, 561-562. The Appeals Chamber also referred to art. 21(3) in relation to the right to a fair trial, ICC-01/04-01/06-772, para. 37-38.

¹⁰⁶ Delmas-Marty 2006, at 3.

¹⁰⁷ ICC-01/04-01/06-1119, para. 35.

¹⁰⁸ *Ibid.*, para. 36.

of the Court itself to the Convention on the Rights of the Child and related human rights documents indicates that, where necessary, the Court does refer to human rights law in relation to others than the accused.¹⁰⁹ In this tenor, Schabas pointed out that,

[h]uman rights sources have proven to be particularly useful in developing issues relating to victim participation and protection. In this context, reference has been made to the Convention on the Rights of the Child, as well as to so-called soft law instruments such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and 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.¹¹⁰

Accordingly, the Rome Statute, ICC practice and scholarly writing permit the approach chosen in this research, namely to use the CRC and related documents as a yardstick for an evaluation of ICC practice in relation to the child participant.

1.6 STRUCTURE OF THE THESIS

This book is divided into three parts. Pursuant to the primary aim of this research (the examination of the child-sensitivity of the ICC procedure), Part I (criminal proceedings) and Part II (reparation proceedings) address the procedural particularities of the child participant. Both parts focus on the question whether and to what extent ICC proceedings are child-sensitive. The analysis of the law and practice focusses in particular on the question to what extent procedural insensitivities exist when children access and are involved in ICC proceedings. Pursuant to the second research aim (to determine whether there is a need for child-specific regulation), the examination of the procedural status of the child within each capacity seeks to provide not only an overview of the procedural rights and protection of the child, but also to scrutinise those fields in which additional procedural regulation, child-focused awareness and practice is needed.

As the procedural particularities might vary depending on the specific procedural capacity in which children are involved, each capacity is addressed in a separate chapter. *Chapter Two* analyses the procedural capacity of the child witness. Questions relating to the legal status and credibility of the child witness are addressed. *Chapter Three* focuses on the child as participating victim. It examines child-specific procedural particularities which are in particular the result of the child's limited legal capacity. Questions relating to the application criteria and the procedure as regards the ability to file an application on his/her own behalf or the

¹⁰⁹ See, for instance, ICC-01/04-01/06-1119, paras. 34-37. See also, ICC-01/04-01/06-1556, paras. 49-50; ICC-01/04-01/06-2035, para. 26. Pre-Trial Chamber III refers to arts. 2(3)(a) and 14(1) of the ICCPR, arts. 6(1) and 13 ECHR, art. 7(1)(a) ACHPR and arts. 8(1) and 25(1) ACHR. See ICC-01/05-01/08-320, paras. 16-17.

¹¹⁰ Schabas 2010, at 399-400.

possibility to be represented by a legal representative in the course of the proceedings are also addressed. *Chapter Four* looks at the possibility of the procedural capacity of the child perpetrator and the derived procedural capacity of the child of a(n) (alleged) perpetrator. Subsequently, *Chapter Five* scrutinises the child in international reparatory justice mechanisms. Particular attention is paid to the law and practice of the International Criminal Court in relation to child claimants. Finally, *Part III* provides a concluding and comparative evaluation of the procedural capacities of the child in the proceedings before the ICC. It connects and evaluates the core conclusions reached within each chapter and offers some overarching reflections on the position of the child as procedural actor in international criminal law (*Chapter Six*). As a final point, the research concludes with a view to the future and in particular calls for further research and procedural regulation of the procedural particularities in relation to child participation in ICC proceedings.

