



Universiteit  
Leiden  
The Netherlands

## **The child in ICC proceedings**

Beckmann-Hamzei, H.

### **Citation**

Beckmann-Hamzei, H. (2015, September 3). *The child in ICC proceedings*. Intersentia, Cambridge, United Kingdom, Cambridge. Retrieved from <https://hdl.handle.net/1887/34974>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/34974>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/34974> holds various files of this Leiden University dissertation

**Author:** Beckmann-Hamzei, Helen

**Title:** The child in ICC proceedings

**Issue Date:** 2015-09-03

## CHAPTER 4

# THE CHILD PERPETRATOR AND THE CHILD OF A(N) (ALLEGED) PERPETRATOR

### 4.1 INTRODUCTION

The current chapter focusses in more detail on the fact that children themselves can qualify as perpetrators of international crimes and the possibility to prosecute child perpetrators internationally. In addition, the chapter examines the procedural implications when a child of a(n) (alleged) perpetrator is involved in the course of the criminal proceedings before the International Criminal Court.

Children participate as soldiers in hostilities.<sup>523</sup> The phenomenon of child soldiers and their involvement in conflict situations is a continuing reality. Today's estimated number of child soldiers amounts to more than 300,000 children.<sup>524</sup> As a consequence of their recruitment, children have committed and continue to commit the most atrocious acts amounting to international crimes, such as war crimes and crimes against humanity.<sup>525</sup> The procedural capacity of the child perpetrator under international criminal law, to date, only concerns children between the age of fifteen and eighteen years at the moment of crime commission. The question raised with regard to this procedural capacity reads as follows: Are the best interests of the child taken into account when considering the international criminal prosecution of (alleged) child perpetrators?

The capacity of the child of a(n) (alleged) perpetrator is not a strictly legal one. This is because it is derived from the child's parent who is charged with or convicted for international crimes. Being the child of a(n) (alleged) perpetrator might bear numerous and far reaching consequences. The child is likely to be confronted with the factual and often lengthy separation from his/her parent considering that institutions, such as the *ad hoc* Tribunals or the ICC in The Hague, are situated far away from their home and proceedings (including detention) tend to last for several years. The parent's involvement in criminal proceedings may also lead to stigmatisation and exclusion of the child in his/her community. In addition to these non-legal consequences, a number of issues arose in the practice of the ICC which

---

<sup>523</sup> Mann 1987, 32, at 50; The Redress Trust 2006, at 5-22. See generally, Cohn & Goodwin-Gill 1994.

<sup>524</sup> UNICEF, fact sheet, <http://www.unicef.org/emerg/files/childsoldiers.pdf>.

<sup>525</sup> *Ibid.*.

anticipate that certain decisions taken by the Court may have particular consequences for the child and may therefore require that the Court sufficiently takes into account that decisions addressed at the (alleged) perpetrator may have implications for the child. It is for this reason that this derived capacity – despite its limited procedural value – is nevertheless assessed as a procedural capacity within this research since it may give rise to questions concerning the best interests of the child.

## 4.2 RECRUITMENT OF CHILD SOLDIERS

The participation of children in hostilities can be traced back in history, but it has particularly increased during the past decades.<sup>526</sup> The *Cape Town Principles and Best Practices* of 1997 propose actions to be taken by States and communities in order to prevent child recruitment, demobilise child soldiers and reintegrate these children into family and community life.<sup>527</sup> The Coalition to Stop the Use of Child Soldiers underlined once more in its *Global Report 2008* that ‘where armed conflict does exist, child soldiers will almost certainly be involved.’<sup>528</sup>

Forced or voluntary recruitment is the result of different causes and is led by varying motivations.<sup>529</sup> Children, particularly orphans, the unaccompanied, the less-wealthy or those that come from a disadvantaged background who do not participate in an education system and who spend their free time on the streets, are at particular risk of becoming child soldiers because they do not benefit from the shelter that is provided by educational institutions,<sup>530</sup> family networks or other bodies.

<sup>526</sup> Mann 1987, at 50-52; Honwana 2006, at 1. Revaz & Todres 2006, at 303. See generally, Abbott 2000, 499-537; Harvey 2003. See with regard to the Democratic Republic of the Congo, UN General Assembly/Security Council, Children and armed conflict, Report of the Secretary-General, UN Doc. A/59/695-S/2005/72 (2005), para. 18; UN Security Council, Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo, UN Doc. S/2006/389 (2006), paras. 18-27.

<sup>527</sup> Cape Town Principles 1997. The Principles define a child soldier as ‘any person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such as groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.’

<sup>528</sup> Soldiers - Global Report 2008, at 12. See also, Child Soldiers - Global Report 2004, at 12. Children have been recruited throughout history, see, for example, Singer 2005, at 9-15. Armed forces or opposition groups in developing countries, in particular, are well-known for recruiting children and using them actively in hostilities, see, UN General Assembly/Security Council, Report of the UN Secretary-General, Children and armed Conflict, UN Doc. A/62/609-S/2007/757 (2007), paras. 19-136. See also, Hingorani 1989, 133-138; Breen 2003, 453, at 468-470.

<sup>529</sup> See generally, Happold 2005; Tiefenbrun 2008, 415, at 426-434; Francis 2007, 207, at 211-214; Brett 1999, 875, at 859-862; Cohn & Goodwin-Gill 1994, at 37-43.

<sup>530</sup> Cahn 2006, 413, at 421; Van Bueren 1994, at 813; De Berry 2001, 92, at 94-105. See also, Cape Town Principles 1997, 2-3.

Furthermore, a child may not be able to oversee the consequences of signing up for voluntary recruitment. Above and beyond, recruiters prefer to use children because they can be easily influenced, coerced and controlled.<sup>531</sup> One witness of the Prosecution in the *Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* stated that,

‘[il] préférait être escortée [sic] par les enfants soldats ages de moins de 16 ans parce qu’ils exécutaient sans oppositions.’<sup>532</sup>

The existence of and trade in light weapons (predominantly AK 47s) enables recruiters to effectively use children in combat, since the light weight of such weapons means that they can be easily carried and handled by children.<sup>533</sup> Additionally, the large number of children among combatants can also be explained by the majority of children among the overall population.<sup>534</sup>

### 4.3 PROSECUTING THE CHILD

Child perpetrators of crimes under international law were never charged with such crimes in international (judicial) proceedings. The first and only international mechanism that explicitly entails the jurisdictional mandate for the prosecution of alleged child perpetrators was the Special Court for Sierra Leone. Article 7 of the Statute stipulates that the Court has jurisdiction over minors who were between fifteen and eighteen years of age when the alleged crime was committed.<sup>535</sup> Consequently, on the one hand, the SCSL Statute recognises that children may be perpetrators but, on the other hand, lacks jurisdiction over child perpetrators below the age of fifteen years.

As regards those children who were between fifteen and eighteen years at the moment of crime commission, it was extensively discussed whether they should be

<sup>531</sup> UNICEF 2005c, at 44; Wessells 2006, at 33-37; Udombana 2006, 57, at 61-67; Gustaffson 1999, 328, at 332; Becker 2010.

<sup>532</sup> See, ICC Case Information Sheet ‘The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui’, [http://www.haguejusticeportal.net/Docs/Fact%20Sheets/Katanga\\_Chui\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Fact%20Sheets/Katanga_Chui_EN.pdf). Statement of W-28 at DRC-OTP-0155-0106 at 0113, para. 37.

<sup>533</sup> Gallagher 2001, 310, at 329. UNICEF 2005c, at 44. UN General Assembly/Security Council, Report of the UN Secretary General on Children and Armed Conflict, UN Doc. A/58/546-S/2003/1053 (2003), paras. 42-44; Rosen 2005, at 14-16; Wessells 2006, at 18-19.

<sup>534</sup> Gallagher 2001, at 325; Bledsoe 1993, at 5.

<sup>535</sup> Paragraph 1 of art. 7 of the 2002 Statute of the Special Court for Sierra Leone states: ‘The Special Court shall have no jurisdiction over any person who was under the age of fifteen at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between fifteen and eighteen years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.’

held criminally responsible under international law.<sup>536</sup> Numerous arguments were raised in favour of and against the criminal prosecution of minors.<sup>537</sup> The Prosecutor of the SCSL proclaimed in this context that he does not intend to start proceedings against minors regardless of his jurisdictional mandate, but instead – as is the case for the other international criminal tribunals – focuses on the ones who bear the greatest responsibility, while children, in principle, did not bear such responsibility in the Sierra Leonean conflict.<sup>538</sup> He underlined that children who committed crimes are instead to be recognised as victims.<sup>539</sup>

At the time of writing, the last case before the Special Court for Sierra Leone – the trial of the former Liberian president *Charles Taylor* – reached the appeals stage.<sup>540</sup> None of the cases brought has involved children in the capacity of a child perpetrator being charged with crimes within the Special Court's jurisdiction.

The subsequent inclusion of Article 26 in the Rome Statute brought the discussion concerning the international criminal responsibility of the child before the ICC to an end by excluding persons below the age of eighteen from the ICC's jurisdiction.<sup>541</sup> The international criminal prosecution of minors has thus been rejected. Considering the practice of the SCSL and the drafting history of this particular provision, it is also unlikely that children will be prosecuted at an international level for having committed international crimes before a future

<sup>536</sup> See for example, Happold 2006, 69-84. See in particular UN, Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2009/915 (2009). The Secretary-General underlined that, 'The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team, the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes', para. 34.

<sup>537</sup> *The Prosecutor of the Tribunal v. Naser Orić* (IT-03-068-T), Judgment, 30 June 2006, para. 400. In this decision Trial Chamber II of the ICTY ruled that, 'the Defence submits that even if the beating by the youth was considered to have caused Milisav Milovanović's death, there can be no criminal liability for a war crime committed by an individual below the age of eighteen. The Trial Chamber considers this submission as completely unfounded in law, as no such rule exists in conventional or customary international law.' For a critical assessment of the exclusion of minors from the Court's jurisdiction, see, Frulli 2002, 527-541. For an overview of the legal framework see, Bakker 2010.

<sup>538</sup> Press release SCSL, 2 November 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2BaVhw%3D&tabid=196>. Art. 1(1) of the 2002 Special Court Statute states: 'The Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 Nov.1996 [...]' Kendall & Staggs 2005, at 7.

<sup>539</sup> Press release SCSL, 24 June 2004, <http://www.sc-sl.org/LinkClick.aspx?fileticket=TazwrTR%2bT7Q%3d&tabid=196>.

<sup>540</sup> See, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx>.

<sup>541</sup> Art. 26 Rome Statute states that, '[t]he Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime.' See also, Parmar et al. 2010, Introduction, xv, at xxv.

international court or tribunal.<sup>542</sup> Excluding minors from the jurisdiction of the ICC does, however, not imply that minors can principally not be prosecuted before national courts.<sup>543</sup> It has been underlined by Clark and Triffterer that,

‘taking into consideration that complementarity and thereby the priority of national criminal jurisdiction prevails anyhow, it appears not only justifiable but also preferable to leave the group under eighteen to the national courts. They are much better equipped to take care of the specific situation in which children have been committing crimes under international criminal law.’<sup>544</sup>

International justice mechanisms have not been used and recognised as a forum to hold child perpetrators responsible. One may therefore conclude that the international criminal prosecution is not considered to be in the best interests of the child.

Instead, a limited number of national cases has been initiated against minor perpetrators. One of the few national examples of a case against an alleged child soldier exists in the practice of the United States in relation to Guantánamo Bay.<sup>545</sup> In 2007 a United States military commission charged Omar Ahmed Khadr, a Canadian citizen who was detained in 2002, with war crimes that were committed at the age of fifteen.<sup>546</sup> Due to a plea deal, judicial proceedings were never held.<sup>547</sup> The Rwandan ‘1994 minors’ that have been detained for crimes committed during the Rwandan genocide constitute another example of national cases against child

---

<sup>542</sup> For a brief historical overview, see Roger & Triffterer 2008, at 771-775.

<sup>543</sup> Without referring to domestic practice, W. Schabas argues that ‘[j]uveniles may be prosecuted for international crimes, just as they may be prosecuted for ordinary crimes, subject to national legislation governing the minimum age of responsibility and the applicable norms of international human rights law.’ Schabas 2010, at 445.

<sup>544</sup> Ibid., at 775.

<sup>545</sup> Another case that involved an alleged child perpetrator in Guantánamo Bay constitutes the case of Mohammed Jawad, who was detained on the Cuban island as an alleged ‘child enemy combatant’, Amnesty International, *United States of America – From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’*, 13 August 2008, AI Index: AMR 51/091/2008, <http://www.amnesty.org/en/library/asset/AMR51/091/2008/en/d47d414f-693e-11dd-8e5e-43ea85d15a69/amr510912008eng.pdf>. His release was ordered on 30 July 2009, Amnesty International, *USA: Judge orders Mohammed Jawad’s release from Guantánamo, Administration still mulling trial*, <http://www.amnesty.org/en/library/info/AMR51/088/2009/en/refresh>. See also, Human Rights Watch, *Releasing Jawad: A Boys life at Guantanamo* (2010), <http://www.hrw.org/en/news/2010/01/11/releasing-jawad-boy-s-life-guantanamo>.

<sup>546</sup> UNICEF, *UNICEF concerned over possible prosecution of child soldier* (2008), <http://www.un.org/apps/news/story.asp?NewsID=25496&Cr=child&Cr1=soldier>. For an overview of the background of the case, see Human Rights First, *The Case of Omar Ahmed Khadr, Canada* (2008), [https://secure.humanrightsfirst.org/us\\_law/detainees/cases/khadr.htm](https://secure.humanrightsfirst.org/us_law/detainees/cases/khadr.htm); Amnesty International, *USA: Military Commission proceedings against Omar Khadr resume, as USA disregards its international human rights obligations*, 26 April 2010, AI Index: AMR 51/029/2010, <http://www.amnesty.org/en/library/asset/AMR51/029/2010/en/23618d64-1d1b-4af0-a9b5-04df1ceaddb2/amr510292010en.html>.

<sup>547</sup> Omar Ahmed Khadr, Human Rights Watch, <http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr>.

perpetrators.<sup>548</sup> Compared to the overall number of perpetrators convicted for the Rwandan genocide, minor perpetrators constitute a very small group.<sup>549</sup> The lack of a broadly established practice to prosecute minors for the commission of international crimes before domestic courts underlines that also under national law, child perpetrators are rather seen as victims of conflict situations instead of being seen as perpetrators.

Notwithstanding the non-existence of international judicial proceedings against children in the capacity of child perpetrators, the fact that children committed the most heinous crimes of concern to the international community was recognised during children's participation in non-judicial procedures of truth and reconciliation commissions like for instance in the TRCs of Sierra Leone and Liberia.<sup>550</sup> Remarkably, the mandate of the Sierra Leonean TRC points out that the Commission is vested with the task of implementing special procedures when children who committed international crimes participate.<sup>551</sup> Cook and Heykoop pointed out that in order

[t]o make sure that all children were treated equally as victims and witnesses before the TRC, the statement-taking forms for children omitted the section designated for perpetrators so that children were identified in the database only as victims or witnesses. This made it clear that the policy and approach of the TRC was to include children's experiences in the findings of the Commission, but not to hold children accountable for the atrocities that took place.<sup>552</sup>

For the first time in the history of TRCs', the Sierra Leonean TRC explicitly referred to children who committed international crimes in its regulation and final report.<sup>553</sup> The TRC Act of 2000 addressed the needs of child victims and introduced special procedures and measures for the protection of children who have committed these crimes.<sup>554</sup> In its final report of 2004, the Commission pointed out that most

---

<sup>548</sup> Morrill 2005, 103, at 106.

<sup>549</sup> Human Rights Watch, *Lasting Wounds, Consequences of Genocide and War on Rwanda's Children* (2003), at 33, <http://www.hrw.org/reports/2003/rwanda0403/rwanda0403-05.htm>.

<sup>550</sup> TRC Sierra Leone Vol. 3B, Chapter 4 Children and the Armed Conflict in Sierra Leone. Siegrist 2006, 53-65. With regard to the TRC of Liberia, see Volume III, Title II, 'Children, the Conflict and the TRC Children Agenda', [www.http://trcofLiberia.org/](http://trcofLiberia.org/), at 65. The appropriateness of accountability of child perpetrators through alternative to judicial proceedings is also restated in the Key Principles for Children and Transitional Justice which provide that, '[a]ccountability measures for alleged child perpetrators should be in the best interests of the child and should be conducted in a manner that takes into account their age at the time of the alleged commission of the crime, promotes reintegration and potential to assume a constructive role in society. In determining which process of accountability is in the best interests of the child, alternatives to judicial proceedings should be considered wherever appropriate.' UNICEF 2010b, 407-411, at 3.6.

<sup>551</sup> Section 7(1)(4) of the Truth and Reconciliation Commission Act 2000, Being an Act to establish the Truth and Reconciliation Commission in line with art. XXVI of the Lome Peace Agreement and to provide for related matters; <http://www.sierra-leone.org/Laws/2000-4.pdf>.

<sup>552</sup> Cook & Heykoop 2010, 159, at 171.

<sup>553</sup> *Ibid.*, at 164.

<sup>554</sup> See for example sections 6(2), 7 (2) and 7(4) of the 2000 TRC Act.



children who have been found to have committed international crimes are also child victims.<sup>555</sup> In addition to the general findings on this particular group of children, the TRC's final report includes an entire chapter on children in armed conflict in which the substantive particularities regarding this specific group are addressed.<sup>556</sup> The Commission underlined that it does not aim to determine the guilt of former child soldiers. Instead, it does attempt to assess children's role as "victim-perpetrators" and thereby addresses the non-judicial accountability of the child.<sup>557</sup> In this regard, the TRC published statistical information on children who committed crimes during the Sierra Leonean conflict.<sup>558</sup> The recognition of the fact that children have committed international crimes in the course of the conflict is thereby established in the TRC's regulation and also reflected in its findings. Similarly, the Truth and Reconciliation Commission for Liberia paid particular attention to these children. It recognised that the international prosecution of this particular group of children has not been recognised by the international community. Instead, the Commission invited former child soldiers to give a statement before the TRC. The criminal prosecution of children was advised to be regulated under national law or alternative justice mechanisms, such as in the Rwandan *Gacaca* system.<sup>559</sup>

#### 4.4 BEING THE CHILD OF A(N) (ALLEGED) PERPETRATOR

Decisions taken by the Court and its organs may indirectly affect the child of a(n) (alleged) perpetrator and give rise to consequences which particularly affect the child. While qualifying such consequences as a victimisation of the child is considered a step too far, the Court should nevertheless be aware of the potential negative implications for the child.

In this regard, it needs to be noted that the term *child* in this context is understood as referring to the biological (or 'legally' recognised) minor child of the (alleged) perpetrator.<sup>560</sup> This derived procedural capacity differs from the other procedural capacities of the child in the sense that it does not enable children to participate in the proceedings, but rather exists due to their parent's procedural capacity as a(n) (alleged) perpetrator and detainee.

This capacity is of particular relevance concerning two issues. Firstly, being the child of a(n) (alleged) perpetrator bears consequences for the child and family life at

<sup>555</sup> TRC Sierra Leone Vol. 1, Chapter 5, Methodology and Process, at 190.

<sup>556</sup> *Ibid.*, at 286.

<sup>557</sup> TRC Sierra Leone Vol. 3B, Chapter 4, Reparations, at 286, 439.

<sup>558</sup> Appendix 1, Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone, A Report by the Benetech Human Rights Data Analysis Group of the Truth and Reconciliation Commission (2004), <http://www.sierra-leone.org/TRCDocuments.html>, at 19.

<sup>559</sup> See TRC Liberia, Volume Three: Appendix, at 91-93. The 2005 TRC Act recognised that children may be victims and perpetrators, art. VIII, section 26 (n). The Act underlined the need to adopt in this regard specific measures of protection and procedures. For general information on the involvement of children in the Liberian TRC, see, Sowa 2010, 193-230.

<sup>560</sup> With regard to the age of the child, the Convention on the Rights of the Child's standard of eighteen years could constitute a benchmark.

home. Enforcement measures, such as the freezing of assets, of course have implications for the family of the accused.<sup>561</sup> If applied without sufficiently taking into account the particular needs of the child in his/her daily life such as the payment of school fees and other family allowances, the child is at risk of being negatively affected. Secondly, another issue which underlines that particular consequences arise for the child is mirrored in the organisation of family visits. The various institutions grant the accused and convicted parent the right to family visits.<sup>562</sup> This right aims to serve the wellbeing of the detainee and enables the child to keep contact with the parent despite the detention of his/her parent.<sup>563</sup> The Convention on the Rights of the Child stipulates in this regard that,

‘[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence [...]’.<sup>564</sup>

Article 9 paragraph 2 states furthermore that,

‘States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.’<sup>565</sup>

In practice, the organisation of family visits leads to various difficulties that might constrain the ability of the child to visit his/her parent – as illustrated by the various decisions made concerning family visits of the accused *Thomas Lubanga Dyilo*, *Germain Katanga* and *Mathieu Ngudjolo Chui*. These decisions addressed *inter alia* the number of family visits and the amount of members eligible for visiting their relative.<sup>566</sup> The latter, for instance, is a father of six children. He argued that the

<sup>561</sup> Article 93(1)(k) Rome Statute; Rules 45, 61(D) of the ICTY and ICTR RPE.

<sup>562</sup> Rule 58-64bis of the 1994 Rules of the International Criminal Tribunal for the Former Yugoslavia Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, UN Doc. IT/38Rev. 9 (2005), (as amended on 21 July 2005). The application form for visits is online available [http://www.icty.org/x/file/Legal%20Library/Detention/permission\\_visit\\_detainee\\_en.doc](http://www.icty.org/x/file/Legal%20Library/Detention/permission_visit_detainee_en.doc). Rule 41 of the 2003 Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone (“Rules of Detention”), (as amended on 14 May 2005), <http://www.scs-l.org/LinkClick.aspx?fileticket=sSNS1UL5T3w%3D&tabid=176>.

<sup>563</sup> The Preamble of the Convention on the Rights of the Child recognises ‘that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding [...]’.

<sup>564</sup> Art. 16 CRC. Art. 9(4) states in this regard that, ‘[w]here such separation results from any action initiated by the State Party, such as the detention, imprisonment, exile, deportation or death [...] of one or both parents of the child, that State shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family [...]’.

<sup>565</sup> See similarly, art. 24(3) of the European Charter of Fundamental Rights.

<sup>566</sup> For general discussion of their family visits and size of family, see Report of the Court on the financial aspects of enforcing the Court’s obligation to fund family visits to indigent detained

‘decision on family visits adopted by the Registrar contradicts her obligations in that it only allows for occasional family contact.’

The Presidency of the ICC underlined in this regard that a

‘detained person’s right correlates with the interests of other affected individuals such as those of his children of minority age who wish to have contact with their detained parent. [...] the Presidency finds that, in the instant case, a positive obligation to fund family visits must be implied in order to give effect to a right which would otherwise be ineffective in the particular circumstances of the detainee.’<sup>567</sup>

This decision illustrates that some difficulties have been observed.<sup>568</sup> The questions which, to date, have not been addressed relate to the concept of a family and whether children of all spouses are eligible for family visits. Furthermore, visa issues still exist for children who wish to visit their parent. The introductory assumption that decisions taken by the Court and its organs may indirectly affect the child of a(n) (alleged) perpetrator and give rise to consequences which particularly affect the child is thus supported by the first decisions relating to family visits.

The ICC is also likely to be confronted with requests concerning the frequency and costs of family visits, in particular when the prisoner is indigent.<sup>569</sup> These questions all have in common that they request child sensitivity by procedural awareness and regulation in order to ensure that the negative implications for the child can be limited or even prevented. For this reason when deciding on issues concerning the (alleged) perpetrator, it is indispensable to also take into account the best interests of the child and his/her rights as contained in the Convention on the Rights of the Child, in particular the child’s right to family life. The recognition of the right of the child to visit his/her imprisoned parents (when being in the best interests of the child) has been addressed particularly within the European context

---

persons, ICC-ASP/8/9, 6 May 2009. *Germain Katanga* is married and is the father of two children. See ICC-01/04-01/07-6, at 2. ICC- Request to lift freezing order to enable Jean-Pierre Bemba to meet his family’s expenses, 01/05-01/08-567-Red, at 18. With regard to the organisation of family visits, see ICC-01/04-01/07-733 and International Criminal Court, Assembly of State Parties, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008.

<sup>567</sup> ICC-ROR217/02/08-8, paras. 1, 35, 37. Regulation 179(1) of the Regulations of the Registry provides that, ‘[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links’. See also, for instance, ICC-01/05/01/08-310.

<sup>568</sup> Article 16(1) CRC.

<sup>569</sup> ICTY and ICTR seem to refuse to financially support family visits of indigent prisoners. See in this regard, *The Prosecutor v. Momcilo Krajisnik* (IT-00-39-T), Decision on the Defence’s Request for an Order Setting Aside, in part, the Deputy Registrar’s Decision of 3 February 2004. This is problematic, considering that the ECtHR (see for instance, *Trosin v. Ukraine*, Judgment of 23 February 2012, Application no. 39758/05; *Messina v. Italy* (No. 2), Judgment of 28 September 2000, Application no. 25498/94) considered family visits to be a fundamental right of the prisoner.

by child rights organisations.<sup>570</sup> It has been pointed out by the *European Network for Children of Imprisoned Parents* (Eurochips), an organisational network which monitors the treatment of children with imprisoned parents in Europe that,

‘[a]cross the EU, good practice examples have been observed regarding support with family contact both on a regular basis, and in cases of an emergency with many examples of flexibility being offered by prison regimes in relation to visits to prisons. For example, in Poland, prisoners who have custody of children below 15 years of age can request one additional visit per month. In Poland and Denmark, it is also possible to combine a number of visits a month into longer ones – this means the visits will be rarer but may have a better quality, especially for families that have to travel considerable distances to visit their relative in prison. In many countries (including Italy, the UK, France, Poland, Sweden, Norway, Belgium), some prisons organize special visits for children with their imprisoned parent where they are able to spend quality time together; however these are sometimes linked to the prisoner’s good conduct as opposed to being prioritised to meet the needs of the child.’<sup>571</sup>

In light of this national practice, the ICC is advised to facilitate regular contact between imprisoned parents and their children. In addition, the Court should provide for the organisation of family contacts and visits in the respective rules. This codification aims in particular to ensure legal transparency for detained persons about the possibility to see and stay in contact with their families.

It is also to be kept in mind that visiting parents in the detention facilities of the ICC in the Netherlands is likely to be expensive, if not even unaffordable for children. The *European Network for Children of Imprisoned Parents* examined the payment of such visits in the European area. It held illustratively held that,

‘[t]he high cost and inconvenience of travelling to prisons (especially if using public transport), which are often a long way from where the family live and located some distance from public transport stops, deter many families from visiting. In the UK, the government’s Assisted Prison Visits Scheme provides a right to financial support for families on low income. In Sweden, the *kommuns* (municipalities) cover the travel costs of children visiting imprisoned parents. In Poland, financial support is discretionary and can depend on the area the family is living.’<sup>572</sup>

While imprisonment during the course of ICC proceedings can be expected to be arranged in the majority of the cases in The Hague, Netherlands, imprisonment following a conviction could be taken over by any State Party which is willing to take care of convicted persons. This means, that convicted parents will not necessarily be imprisoned in the country of their origin. The regular arrangement of family visits therefore gives rise to certain costs (in addition to the practical difficulties of arranging family visits abroad). The ICC is thus called upon to also

---

<sup>570</sup> Eurochips 2011.

<sup>571</sup> *Ibid.*, at 11-12.

<sup>572</sup> *Ibid.*, at 12.

provide for adequate regulation of the particular challenges relating to family visits abroad.

In general terms, the Committee on the Rights of the Child recommended in particular that,

‘States parties ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary.’<sup>573</sup>

Thus, domestic practice relating to family visits can provide guidance for the ICC when deciding upon family visits and should therefore be taken into account. Considering the financial aspects of family visits, it might, for instance, be appropriate to reserve a separate chapter within the budget of the ICC for children visiting their detained parent. It can be concluded that the arrangement of family visits is only one example which shows that contact in general is to be established by taking into account the rights of the child to be in contact with his/her parent. Accordingly, the ICC organs which are involved in decisions concerning family visits are called upon to ensure that during pre-trial and trial detention of the accused, child rights aspects are not forgotten. The case-by-case examination of the best interests of the child requires furthermore that such decisions are not limited to an assessment of the prisoner’s interest to see his/her family but also take into account whether such visits are in the best interests of the child

#### 4.5 CONCLUSION

Children commit international crimes. The international criminal prosecution of minor perpetrators has, however, clearly been rejected under the Rome Statute of the International Criminal Court. The question which remains is how to deal with these child perpetrators at an international level while at the same time bearing in mind the best interests of the child. The practice of TRCs established that children’s commission of international crimes can be dealt with at an international level without a judicial forum. This practice has been pointed out to be of particular relevance within the post-conflict, reconstruction and reconciliation period. The exclusion of prosecuting minors under the Rome Statute of the International Criminal Court left at the same time no room for doubt that the international prosecution of children when having committed war crimes, crimes against humanity or the crime of genocide, is not accepted to be the proper forum for the adjudication of child perpetrators.

With regard to the procedural capacity of the child of a(n) (alleged) perpetrator it can be concluded that it is crucial that international criminal courts and tribunals recognise that the child may be negatively affected by decisions taken against

---

<sup>573</sup> Committee on the Rights of the Child, “Children of Incarcerated Parents” 2011, para. 31.

his/her parent in the course of international criminal proceedings. Although the freezing of assets and restrictions to family life may be justified within the context of criminal proceedings, the limited understanding of the particularities of the child limits or even prevents the child from visiting his/her parent or living in child-adequate circumstances by, for example not being able to attend school due to a parent's involvement in international criminal proceedings. In conclusion, this procedural capacity requests child sensitive awareness as regards the possible implications for children from the judges and the Registry of the ICC; but equally from defence lawyers representing the interests of their clients in relation to their family life. Finally, while this procedural capacity might be considered less relevant from a criminal law perspective, particular importance is derived from the perspective of child rights. The fact that the child may indeed fall within this procedural capacity requests an adequate legal response which sufficiently takes into account the particular impact of the parent's involvement in international criminal proceedings on the rights of the child.