

Michał Jerzy Dębowski

Cardinal Stefan Wyszyński University in Warsaw, Poland

e-mail: michaljdebowski@gmail.com

ORCID: 0000-0002-8685-9750

CAPACITY OF A CHILD TO ACT IN PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT

Abstract

In order to properly approach the question of legal capacity of children to act in the proceedings before the ICC, three problems should be distinguished: the problem of legal capacity, the problem of representation, and the evidential rules. An analysis of the requirements of an application for participation in the proceedings as a victim and the requirement of informed consent in the case of a witness leads to the conclusion that capacity to act in the proceedings before the ICC is available to persons who are capable of giving consent. The legal validity of consent should be subject to the law of the nationality, the law of the country of domicile, or the country of habitual residence. The representation of a child before the ICC is not regulated. It should be assumed that in the first instance the parents are designated to represent the child, in the second – it is a guardian, and in the third – other adult, in respect of whom the ICC finds it satisfactory that they are acting in the best interests of the child. Rules of evidence pertaining to the circumstances on which the capacity to act and the right of representation of a child are founded encompass standards of proof, means of evidence, burden of proof and presumption in favour of a child's participation. The normative framework of children's participation in the proceedings before the ICC is characterised by the preponderance of *lacunae* over matter expressly regulated. It poses a risk of nullification of a child's right to be heard.

KEYWORDS

International Criminal Court, capacity to act in the proceedings before the International Criminal Court, representation of a child, child victim, child witness

SŁOWA KLUCZOWE

Międzynarodowy Trybunał Karny, zdolność procesowa w postępowaniu przed Międzynarodowym Trybunałem Karnym, reprezentacja dziecka, pokrzywdzony-dziecko, dziecko-świadek

The issue of children's participation in proceedings before the International Criminal Court ('ICC') has scarcely been elaborated until 2013.¹ Upon first verdicts of the ICC in cases concerning conscripting and enlisting of children,² the procedural-law status of a child in proceedings before the ICC has been given more attention by scholars.³ In order to properly approach the question of legal capacity of a child to act in these proceedings, three problems should be distinguished: the problem of legal capacity, the problem of representation, and the evidential rules. Neither have these problems been analysed separately nor has the

¹ The scarcity of scholarly writing has been reported by: Helen Beckmann-Hamzei, *The Child in ICC Proceedings* (1st edn, Intersentia Ltd 2015) 22 and also Linda A Malone, 'Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court' [2015] 43 Georgia Journal of International and Comparative Law 599, 610. From earlier literature: Rosemary Barberet, Cécile Van de Voorde, 'Children and International Criminal Justice', in Mangai Natarajan (ed), *International Crime And Justice* (Cambridge University Press 2011); Stuart Beresford, 'Child Witnesses and the International Criminal Justice System. Does the International Criminal Court Protect the Most Vulnerable?' [2005] 3 Journal of International Criminal Justice 721.

² *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), judgment pursuant to Article 74 of the Statute of 14 March 2012 ICC; *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), decision on sentence pursuant to Article 76 of the Statute of 10 July 2012 ICC; *The Prosecutor v Mathieu Ngudjolo Chui* (ICC-01/04-02/12), judgment pursuant to Article 74 of the Statute of 18 December 2012 ICC; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07),), judgment pursuant to Article 74 of the Statute of 7 March 2014 ICC; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07), decision on sentence pursuant to Article 76 of the Statute of 23 May 2014 ICC.

³ Chronologically: Amann (n 3); Cynthia Chamberlain Bolaños, *Children and the International Criminal Court* (1st edn, Univeriteit Leiden 2014); Beckmann-Hamzei (n 1); Naila S Awan, 'Balancing a Child's Right to be Heard with Protective Measures Undertaken in "the Best Interests of the Child": Does the International Criminal Court Get it Right?' [2015] 35 Children's Legal Rights Journal 98; Malone (n 1); Patryk Gacka, 'Can Duress Exclude Criminal Responsibility of Former Child Soldiers? The Case of Dominic Ongwen Before The International Criminal Court', [2019] 82 Studia Iuridica 78.

question of proper representation been conclusively resolved.⁴ Therefore, posing the following questions remains valid:

1. which legal norms govern the children's capacity to act in proceedings before the ICC,
2. who may act on behalf of children that do not have the capacity to act in proceedings before the ICC,
3. what are the rules of evidence for proving the facts on which the capacity to act and right to act on behalf of a child are founded.

These issues deserve discussion because they are fundamental to the realisation of children's rights, they are not precisely regulated, and have sometimes been confused with the status of adults who were children at the time of the act. An attempt to find answers to these questions is the aim of this article.

The notion of capacity to act denotes an ability of a person to perform valid acts in particular proceedings by themselves. It is defined by law. It is the general capacity to exercise any such rights, such as the right to file an application for participation in the proceedings or express consent for being called into the witness stand.⁵ Capacity to act should be discerned from the capacity to be a party to judicial proceedings. Person possessing the capacity to be a party may be devoid of the capacity to perform valid procedural acts on their own. The capacity to be a party to particular proceedings and the capacity to act in these proceedings are regulated by norms of procedural law. Matters of substantive law are the capacity to be a party of legal rights and obligations and capacity to perform legally valid acts.⁶

The notions set out in the previous paragraph function under different names in different legal orders. What is relevant is that regardless of geographical context the question of whether an individual can act on their own in judicial proceedings remains valid. The name 'capacity to act' appears as culturally neutral. The equivocal name 'legal capacity' will be avoided in this article.

In light of the jurisprudence of international tribunals and official documents of the ICC, in the context other than the crime of conscripting and enlisting children into armed forces or groups or using them in hostilities,⁷ a child is a per-

⁴ cf Beckmann-Hamzei (n 1) 205-208; Bolaños (n 3) 238.

⁵ In the practice of the ICC informed consent of adults acting on behalf of a child witness has been deemed indispensable. Beckmann-Hamzei (n 1) 205.

⁶ Maksymilian Pazdan, '§ 64. Zdolność sądowa i zdolność do czynności procesowych' in Marek Safjan (ed), *System prawa prywatnego*, Vol 1, Prawo cywilne – część ogólna (C.H. Beck, 2007) 924–927. These capacities are also referred to by an umbrella term 'capacity'. See Benedetta Ubertaini, 'Capacity and Emancipation', *Encyclopedia of Private International Law* 1 (1st edn, 2017) 251.

⁷ The definition of that crime sets the age limit of a victim at fifteen years. See Article 8 section 2 item b(xxvi) and item c(vii) of the Rome Statute of the International Criminal Court [1998] UN Treaty Series 2187/38544/3 ('RS') as amended by the Resolution RC/Res. 5 of the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June

son under the age of eighteen.⁸ This age limit has been drawn from Article 1 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 ('Convention on the Rights of the Child').⁹ Nonetheless, the Office of the Prosecutor considers young persons whose ages are unknown to be 'children' for the sole purpose of its engagement with them, unless there is a reasonable basis to believe otherwise.¹⁰ As the aim of this article pertains to the capacity of a child to act, it will only concern persons who are children at the time of the proceedings.

Before answering the questions set out at the beginning, it should be clarified in which procedural roles a child may appear before the ICC.

A child cannot act as an accused¹¹ in proceedings before the ICC, as the age of criminal responsibility before the ICC is eighteen. Pursuant to Article 26 of the RS, the jurisdiction of the Court *ratione personae* is limited to persons who have attained the age of eighteen years at the time of the commission of the crime within the jurisdiction of the Court. There are no exceptions to this rule. Scholars agree on this point.¹² More specific remarks are made in the context of child soldiers. It is underscored that child soldiers by their very 'normative nature' are victims, not

2010 [2010] UN Treaty Series 2868/A-38544/197, and by the Resolution RC/Res. 6 of the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 [2010], the amendments were circulated by the Secretary-General under cover of depositary notification C.N.651.2010.TREATIES-8 of 29 November 2010.

⁸ Situation in Uganda (ICC-02/04), decision on the victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06 of 10 August 2007 ICC, paras 20 and 112; *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (ICC-02/11-01/15-379), decision on victims' participation status decision of 7 January 2016 ICC, para 60; The Office of the Prosecutor, Policy on Children (The Hague, 2023) <<https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>> accessed 31 May 2024, 1, 15–16 and 50 footnote 97; The Office of the Prosecutor, Policy on Children (The Hague, 2016, <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF> accessed 31 May 2024, 2 and 11–12 and the jurisprudence cited therein. The 2023 Policy introduces also the term 'youth' which shall denote a person between eighteen and twenty-four years of age. In footnote 24, however, the age limits have been set at eighteen and twenty-five years of age, The Office of the Prosecutor (2023) (n 9) 16.

⁹ Convention on the Rights of the Child [1989] UN Treaty Series 1577/27531/3. cf Malone (n 1) 615.

¹⁰ The Office of the Prosecutor (2016) (n 9) 12. Such approach has not been enunciated in the 2023 Policy, cf The Office of the Prosecutor (2023) (n 9).

¹¹ The status of the accused before the ICC is regulated mainly by Articles 63–67 of the RS and by the rules 134^{bis}–136 of the RPE. They pertain to the presence of the accused at trial, proceedings on an admission of guilt, presumption of innocence, rights of the accused, and taking evidence from the accused. Broadly on that topic see William Anthony Schabas, *An Introduction to the International Criminal Court* (6th edn, Cambridge University Press 2020) 304–321.

¹² Beckmann-Hamzei (n 1) 12, 140, and 147; Malone (n 1) 615; Barberet, Van de Voorde (n 1) 43–44; Schabas (n 11) 66; Karolina Wierczyńska, 'Przesłanki dopuszczalności wykonywania jurysdykcji przez Międzynarodowy Trybunał Karny'. *Studium międzynarodowoprawne* (1st edn, Wydawnictwo Naukowe Scholar 2016) 79.

perpetrators of international crimes.¹³ Sometimes it is argued that the young age of a perpetrator may be taken into account when determining, whether there are sufficient grounds for prosecution,¹⁴ the admissibility of the duress defence,¹⁵ or when child victims claim reparations while having themselves committed international crimes as former child soldiers.¹⁶ It is also noted that excluding minors from the jurisdiction of the ICC does not imply that minors cannot be prosecuted before domestic courts.¹⁷ Considering that no minor has ever been charged with an international crime before any international criminal tribunal, and that the RS has set the age of responsibility for the first time in the drafting history of international criminal justice instruments, it does not seem viable that children will ever be prosecuted at an international level for international crimes.¹⁸

The victim is a quasi-party to the proceedings before the ICC.¹⁹ A victim in proceedings before the ICC shall be a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Organizations or institutions that have sustained direct harm to certain types of property are also considered victims.²⁰ In the context of distinguishing direct and indirect victims by the ICC,²¹ it can be noted that only natural persons may be indirect victims. In any event, the victim shall fulfil four criteria: their identity must be established, they must have personally suffered harm (their personal interests must be affected), a crime within the jurisdiction of the ICC has been committed, and there must exist a causal link between the crime and

¹³ Gacka (n 3) 85-86; Amann (n 3) 427.

¹⁴ Malone (n 1) 608 and 615.

¹⁵ Gacka (n 3) 97.

¹⁶ Beckmann-Hamzei (n 1) 12.

¹⁷ Beckmann-Hamzei (n 1) 140.

¹⁸ Beckmann-Hamzei (n 1) 139–140.

¹⁹ See Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 298; Sergey Vasiliev, 'Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 635.

²⁰ Rule 85 of the Rules of Procedure and Evidence [2002] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr. 1) II.A ('RPE').

²¹ In short terms, direct victims are those whose harm is the result of the commission of a crime within the jurisdiction of the Court. Secondly, indirect victims are those who suffer harm as a result of the harm suffered by direct victims. See *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1813), decision on 'indirect victims' of 8 April 2009 ICC, paras 44–52; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1491-Red-tENG), decision on the 345 Applications for Participation in the Proceedings Submitted by Victims of 23 September 2009 ICC, paras 51–56; Amann (n 3) 427.

the harm.²² In the absence of age restrictions, a child may also act as a victim. This conclusion is reinforced in view of Article 12 of the Convention on the Rights of the Child, which enshrines the right of a child to be heard. The rights codified in the Convention on the Rights of the Child are deemed binding on the ICC and the right to be heard is deemed binding in the proceedings.²³ The ICC considers that, pursuant to Article 21 section 3 of the RS, read in conjunction with Article 12 of the Convention on the Rights of the Child, victims cannot be excluded from participating solely based on their age.²⁴

Although there may be identified some child-specific crimes and crimes which by their nature affect mainly children within the jurisdiction of the ICC,²⁵ all international crimes may place the child in the position of a victim.²⁶

A child in proceedings before the ICC may testify as a witness.²⁷ There is no minimum age of a witness in the proceedings before the ICC set by law. What seems to limit the participation of children as witnesses is their ability to testify.²⁸ It stems from a child's reliability, which in turn is deemed to stem from the degree of maturity of a child.²⁹

The capacity to testify is analysed on a case-by-case basis. Before questioning a child, the investigators of the Office of the Prosecutor are required to have the child examined by a psychologist or other expert. The main purpose of the examination is to determine whether testifying would involve secondary victimisation.³⁰ In proceedings before the Chamber, psychological assessment shall

²² *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), decision on the Applications for Participation in the Proceedings a/0001/06, a/0002/06, and a/0003/06 of 18 July 2006 ICC, para 7; *Banda and others* (ICC-02/05-03/09), decision on Victims' Participation at the Hearing on the Confirmation of the Charges decision of 29 October 2010 ICC, para 2; *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), decision on 772 Applications by Victims to Participate in the Proceedings of 18 November 2010 ICC; *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11), decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings of 4 June 2012 ICC, para 20; *The Prosecutor v Blé Goudé* (ICC-02/11-02/11), decision on Victims' Participation in the Pre-trial Proceedings and Related Issues of 11 June 2014 ICC, para 13; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07 A3 A4 A5), judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute' of 8 March 2018 ICC, paras 115–116. cf Bolaños (n 3) 164–166 and the judiciary cited therein; Beckmann-Hamzei (n 1) 84–85; Schabas (n 11) 361; Vasiliev (n 21) 649.

²³ Awan (n 3) 99. Similarly: Beckmann-Hamzei (n 1) 26; Bolaños (n 3) 228 and 230. cf Gacka (n 3) 79, footnote 7.

²⁴ *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (n 9), para 60.

²⁵ Malone (n 1) 607; Beckmann-Hamzei (n 1) 12; Barberet, Van de Voorde (n 1) 44.

²⁶ Bolaños (n 3) 108.

²⁷ Barberet, Van de Voorde (n 1) 44; Beckmann-Hamzei (n 1) 11.

²⁸ Malone (n 1) 617; Awan (n 3) 103; Beckmann-Hamzei (n 1) 136.

²⁹ Bolaños (n 3) 207 and 230.

³⁰ Regulation 36 section 3 of the Regulations of the Office of the Prosecutor [2009] ICC-BD/05-01-09 ('ROP').

be conducted prior to the court appearance in order to establish child's capacity to appear before the Chamber and current mental health and to identify special needs.³¹

In proceedings before the ICC, the roles of a victim and witness can be cumulated.³² All protective measures provided for victims are applicable also to witnesses. The widespread pseudonymisation,³³ holding hearings *in camera* and the removal of personal data from publicised minutes of hearings impedes the investigation of the ICC's child interrogation practice. In addition to that, ICC does not publish statistical reports containing empirical data pertaining to children witnesses or victims.³⁴

The capacity of a child to act in proceedings before the ICC has been approached from the perspective of rules 85 and 89 section 3 of the RPE³⁵ and Article 68 of the RS,³⁶ and from the perspective of human rights, namely the right of a child to be heard in judicial proceedings, enshrined in Article 12 of the Convention on the Rights of the Child.³⁷ Neither rules 85 and 89 section 3 of the RPE nor Article 68 of the RS stipulate that some category of subjects has or does not have the capacity to act on their own. As will be demonstrated below, it is possible to derive from the rule 89 section 3 of the RPE norms determining the capacity to act in proceedings before the ICC as a victim. The wording of the rule 89 section 3 of the RPE:

[a]n application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled

³¹ Regulation 94^{bis} section 3 of the Regulations of the Registry [2006] ICC-BD/03-03-13 as amended on 25 September 2006, on 4 December 2013, and on 1 August 2018.

³² Bolaños (n 3) 11; Beckmann-Hamzei (n 1) 37. It has been argued that for the sake of a fair trial, participating victims should not be allowed to act as victim witnesses in the same case. This view has met with valid criticism. See Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in D McGoldrick, P Rowe, E Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues*, (1st edn, Hart Publishing 2004) 327.

³³ Hofmański, Kuczyńska (n 35) 177. See also Michael E Kurth, 'Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 615 and 626–629.

³⁴ These impediments have already been complained about by Beckmann-Hamzei (n 1) 33 and 217–218.

³⁵ Beckmann-Hamzei (n 1) 93–94 and 205.

³⁶ Awan (n 3) 108.

³⁷ Awan (n 3) 103; Malone (n 1) 604 and 617; Beckmann-Hamzei (n 1) 98–99 and 206; Bolaños (n 3) 169–170 and 238–239.

leaves the interpreter with two uncertainties: (1) whether in case of an application for participation of a child, there is an obligation that it has to be made by a person acting on behalf of the child, (2) what is the scope of the term 'child'.

With regard to the first uncertainty, it has to be noted that it appears clearly from the wording of rule 89 section 3 of the RPE that 'acting on behalf' is a substitute for 'acting with the consent' of a child victim. The rationale behind incorporating a person acting on behalf of a child into the procedure is that persons incapable of expressing consent must be represented by someone else. The representation of such victims by persons acting on their behalf is, therefore, mandatory.

As has been stated, within the legal framework of the ICC, a child is understood to be a person under eighteen years of age. Taken into account the remarks made in the preceding paragraph and the general presumption in favour of the child's ability to participate, derived from Article 12 of the Convention of the Rights of the Child, it has to be argued that rule 89 section 3 of the RPE refers the term 'child' only to such persons under eighteen years of age who are incapable of expressing consent. Therefore, rule 89 section 3 of the RPE states an obligation that in case of an application for participation of a child who is incapable of expressing consent, there is an obligation that it has to be made by a person acting on behalf of a child.

The scope of rule 89 section 3 of the RPE is not limited to the application for participation. Legal instruments governing the proceedings before the ICC do not provide for general norms governing the capacity to act. At the same time, filing the application is a prerequisite for participating in the proceedings (including reparation proceedings) as a victim. Since the most important procedural statement requires compliance with the conditions set in the Rule 89 section 3 of the RPE, the same standards are also required for any further statement affecting the procedural situation of a child victim. It can be easily derived from this requirement that the capacity to act in proceedings before ICC as a victim is, therefore, vested in children who are capable of expressing consent.

As regards witnesses, regulation 38 of the ROP³⁸ does not have normative significance as far-reaching as rule 89 section 3 of the RPE has. Its scope is limited to the questioning of a child performed by the Office of the Prosecutor. No analogous norm is applicable to questioning before the trial chambers. Neither can it be said that all the witnesses examined during the trial must inevitably come through the interview by the Office of the Prosecutor.

The consent to testify, similarly to the application for participation in the case of victims, is a prerequisite for participating in the proceedings as a witness. It can

³⁸ 'When a person is under the age of eighteen, the Office shall obtain consent from his or her parents, guardians or other relevant adult before questioning. In considering whether to question such a person, the Office shall take into account his or her best interests in accordance with article 68'.

be presumed that the standards applicable to the consent to testify also apply to all subsequent procedural statements of a witness. Within the practice of the ICC, the adult consent was deemed an indispensable substitute of a child's informed consent. Indeed, the requirement of the consent of an adult seems to stem from the underlying requirement of the consent to be informed and it should be agreed that some children would be able to give an informed consent on their own.³⁹ The capacity to act in proceedings before ICC as a witness is, therefore, vested in children who are capable of expressing consent.

Having established that identical standards apply to victims and witnesses as regards their capacity to act in proceedings before the ICC, it remains to be seen what requirements the consent on which that capacity depends must meet. Legal instruments governing the operation of the ICC do not provide for norms applicable to assess the validity of such consent. This question is subject to a *lacuna*. For that reason, the application of Article 21 section 1 item c, enabling the ICC to apply general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, is permissible.⁴⁰ This competence is subject to a proviso that those derived principles are not inconsistent with the RS and with international law as well as internationally recognized norms and standards.

The question of the validity of consent is subject to the question of capacity to perform legally valid acts, which in turn falls within the scope of the personal statute.⁴¹ Applicable personal statute is indicated by the conflicts of laws principles. These norms, insofar as they relate to personal statute, converge in the legal orders of the world. According to the position adopted by the majority of conflict of laws legislations worldwide, the nexus of nationality plays a decisive role in determining the personal statute of a natural person. Fewer legislations adopt a domicile nexus or the nexus of habitual residence in this respect. There are also mixed systems which, while employing the nationality nexus as primary, employ domicile or habitual residence subsidiarily.⁴² A separate mention deserves to be

³⁹ Beckmann-Hamzei (n 1) 205–209.

⁴⁰ Bolaños (n 3) 52; general principles of law derived from national laws of legal systems of the world, confined to the field of conflict of laws are an incarnation of 'Rules of International Conflict of Laws', which was the term coined by Kurt Lipstein to denote rules of conflict of laws applicable before international tribunals. Kurt Lipstein, *Principles of the Conflict of Laws National and International* (1st edn, Martinus Nijhof Publishers 1981) 68.

⁴¹ Maksymilian Pazdan, *Prawo prywatne międzynarodowe* (16th edn, Wolters Kluwer 2017) 132; Maksymilian Pazdan, '§ 18. Osoby fizyczne' in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 559; Anotol Dutta, 'Personal Status', *Encyclopedia of Private International Law 2* (1st edn, 2017) 1346–1347.

⁴² Maksymilian Pazdan, *Prawo prywatne międzynarodowe* (16th edn, Wolters Kluwer 2017) 124; Maksymilian Pazdan, '§ 18. Osoby fizyczne' in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 557–558. See also Frederick

made of Article 12 section 1 of the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951,⁴³ which indicates the law of the country of domicile or, if a refugee has no domicile, the law of the country of residence as the one governing the personal status of a refugee. The evolution of personal nexuses in the civil-law legal culture proceeded from nationality, through domicile to the law of the place of habitual residence.⁴⁴

The question of whether a child is capable of expressing consent shall, therefore, be assessed based on their national law. In the absence of nationality, it is necessary to resort to the law of the country in which a child is domiciled. Lacking domicile, a child is subject to the personal statute of the country of their residence. The applicable law may contain an overall rule governing the capacity to act in all circumstances or include some specific rules, applicable only to a narrow categories of acts.

The right to be heard, enshrined in Article 12 of the Convention on the Rights of the Child, implies an obligation to take the views of a child into account when undertaking any action that might affect the child.⁴⁵ It does not, however, imply an obligation to recognise the act performed by the child as legally valid. The wording of the General comment No 12 of the United Nations Committee on the Rights of the Child seems to support such an interpretation. The General comment emphasises in many places the need to provide conditions for the child to be able to express their views. However, at no point does it settle that the right to be heard may, in certain circumstances, be tantamount to the need to recognise the child's actions as legally effective procedural acts.⁴⁶ Addressing the right to be heard either directly, or through a representative, it treats the due representation of a child as a question distinct from the right to be heard.⁴⁷ Human rights in principle do not provide a comprehensive regulation of technical questions as the capacity to act. This matter belongs to the domain of procedural law and, in an international context, private international law (conflicts of laws). However, the right to be heard remains the yardstick that the norms of procedure before the ICC and principles of private international law, derived by the ICC from national laws of legal systems must, in any case, conform to (as stipulated in Article 21 section 1 item c of the RS).⁴⁸

Alexander Mann, 'The Doctrine of Jurisdiction in International Law' [1964] 111 *Recueil des Cours. Académie de Droit International* 8, 56; Ubertazzi (n 6) 251.

⁴³ Convention Relating to the Status of Refugees [1951] UN Treaty Series 189/2545/137.

⁴⁴ For an in-depth analysis of this evolution see Mateusz Pilich, 'Łączniki personalne osób fizycznych w prawie prywatnym międzynarodowym (zagadnienia wybrane)' [2016] 19 *Problemy Prawa Prywatnego Międzynarodowego* 7, 11–24. See also Dutta (n 41) 1348–1349.

⁴⁵ United Nations Committee on the Rights of the Child, General comment No 12: The right of the child to be heard (CRC 2009), CRC/C/GC/12, 8 and 11.

⁴⁶ United Nations Committee on the Rights of the Child (n 45) 8, 10–13, and 16.

⁴⁷ United Nations Committee on the Rights of the Child (n 45) 12.

⁴⁸ See footnote 22.

Whenever a child lacks capacity to act, the question of their due representation arises. The ICC practice indicates parents, guardians or other relevant adult.⁴⁹ The provisions on the procedure before the ICC indicate ‘parents or the legal guardian’⁵⁰ or ‘parents, guardians or other relevant adult’.⁵¹ The Victims and Witnesses Unit report on the confidentiality of medical records and consent to disclose medical records of 15 October 2009 indicates a ‘legal guardian’.⁵² Principles for child protection and participation in transitional justice, prepared by UNICEF point out to a ‘parent or guardian’.⁵³ These indications have also been rephrased with the term ‘next of kin’.⁵⁴ These provisions do not state, however, any general rule.

A recourse to national laws of legal systems of the world does not produce any outcomes. Statutory representation does not constitute a single coherent institution in private international law, independent of the legal relations from which it arises. Also at the level of conflict of laws, there has been no development of nexuses indicating in an independent manner the law applicable to it. Indeed, the role of statute of statutory representation is fulfilled by the statutes relevant for the underlying legal relationships to which the right of representation is linked.⁵⁵

It follows that no specific norms governing the statutory representation of a person who does not have the capacity to act can be derived from sources enumerated in Article 21 section 1 of the RS. The normative material on the basis of which persons entitled to such representation may be designated are legal norms of a greater degree of generality. The ICC practice indicating parents, guardians or other relevant adult deserves acceptance. Indications of these persons recur in the instruments governing the proceedings before the ICC. Representation by these persons seems to be the optimal solution when it comes to serving the best interests of a child. Treating the best interests of the child as a primary consideration is a duty of the ICC in all actions concerning children under Article 3 section 1 of the Convention on the Rights of the Child and Article 21 section 3 of the RS.⁵⁶

⁴⁹ Beckmann-Hamzei (n 1) 39.

⁵⁰ Rule 17 section 3 of the RPE.

⁵¹ Regulation 38 of the ROP.

⁵² ICC-01/04-01/06-2166, para 6.

⁵³ UNICEF 2010b, 407–411.

⁵⁴ Beckmann-Hamzei (n 1) 43.

⁵⁵ Jadwiga Pazdan, ‘Art. 22’ in J Poczobut (ed), *Prawo prywatne międzynarodowe. Komentarz* (Wolter Kluwer 2017) 410–411; Łukasz Żarnowiec, ‘§ 26. Przedstawicielstwo ustawowe’ in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 820. In the case of parenthood, it would be the statute of parental responsibility. See Piotr Mostowik (ed), *Międzynarodowe prawo rodzinne* (Wolters Kluwer 2023) 254–258; Yuko Nishitani, ‘Kinship and Legitimation’, *Encyclopedia of Private International Law 2* (1st edn, 2017) 1070–1077.

⁵⁶ Awan (n 3) 103; Malone (n 1) 617; Bolaños (n 3) 229.

Whereas it can be presumed that persons who are closest to the child are in the best position to know and control their situation, the risk of a conflict of interest cannot be ruled out. Conflicts of interests may arise out of the relation between a child and their representative or between a child and other person represented by the same representative, as it may happen in the case of the Office of the Public Counsel for Victims.⁵⁷ Safeguarding best interests of the child necessitates that persons whose interests conflict with the interests of the child shall not represent them. As the need for their representation remains, they shall be represented by other persons, without conflicting interests (litigation friends). This issue has been highlighted in the literature.⁵⁸ Neither is it regulated by the legal instruments governing the operation of the ICC nor has it been referred to by the ICC practice.

It is also aptly noted that in a situation where parents or guardians might not be at the disposal of a child for any reasons, including death, disappearance or failure of a legal order to appoint a guardian, an informed consent shall be obtained from a child acting on their own.⁵⁹

For these reasons, there is a need to determine the order of persons who may represent the child. Such an approach has been adopted by the ICC. In a case when a child victim lacked parents or guardians, Trial Chamber I allowed applications to be made on their behalf by another adult.⁶⁰ Indisputably, the parents come first. If parents cannot act on behalf of the child and the child has been assigned a legal guardian, the representation passes to the guardian. If neither parents nor the guardian can act on behalf of the child, the child may be represented by any relevant adult, referred to in the ICC practice. Bearing in mind the need to safeguard the best interests of the child and their right to be heard, the notion of a 'relevant adult' shall not be construed narrowly, but at the same time shall not extend to people who would not look after the interests of the child. Therefore, 'relevant adult' shall be understood as any adult, in respect of whom the ICC is satisfied that they are acting in the best interests of the child. In other words, the notion of 'relevant adult' denotes any adult except from these clearly 'irrelevant'.⁶¹

Having discussed the capacity to act and the right to act on behalf of a child, it remains to examine the rules of evidence for proving the facts on which they

⁵⁷ Beckmann-Hamzei (n 1) 122.

⁵⁸ Beckmann-Hamzei (n 1) 42-44.

⁵⁹ Beckmann-Hamzei (n 1) 42 and 102; Malone (n 1) 617.

⁶⁰ *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1861-AnxA1), annex A1 to the Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008 ICC, paras 59-60. It was not stated in this decision that children may submit a victim's application form to participate in the ICC proceedings, regardless of any parental permission or control if parents were available. cf Bolaños (n 3) 167-168.

⁶¹ Community members or child rights organisations could, for instance, come into consideration. Beckmann-Hamzei (n 1) 43-44.

are based. Two circumstances need to be proved: the age of a child and kinship, guardianship or being a relevant adult.

As the age is calculated based on the date of birth, it falls within the identity of a human. Thus, the standards developed by the ICC for proof of identity apply. The early judiciary on victims' participation required victims to prove their identity with an official identity document with a photograph. The standard of proof has been subject to relaxation. The ICC's case law allows other forms of identification (including non-official documents such as voting cards, student cards, birth certificates or ultimately, when no document is available, a statement signed by two witnesses).⁶² As regards the standard of proof, a *prima facie* evidence is sufficient. The burden of proof rests on those who apply for participation.⁶³

As proof of kinship, either official documents, such as a birth certificate or a letter from the local council, as well as non-official documents, such as a birth notification card or a baptism card have been required by the Pre-Trial Chambers.⁶⁴ Trial Chamber II ruled that a statement signed by two credible witnesses could be a proof of kinship or guardianship when an adult is acting on behalf of a child victim.⁶⁵ The standard of proof of kinship has been set by Trial Chamber I at the level of 'sufficient evidence'.⁶⁶ These norms should apply *mutatis mutandis* to the proof of guardianship or other circumstances which determine the 'relevance' of other adult.

It should be noted that whenever a person unsuccessfully purports to prove their kinship, there are no bases to preclude them from proving being a 'relevant person' instead if there is a prospect of succeeding in this.

⁶² Bolaños (n 3) 166.

⁶³ Beckmann-Hamzei (n 1) 88.

⁶⁴ *The Prosecutor v Joseph Kony and Vincent Otti* (ICC 02/04-01/05-282), decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of 14 March 2008 ICC, para 7; *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-320), fourth decision on victims' participation of 12 December 2008 ICC, para 38. See also *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11-86), second decision on issues related to the victims' application process of 05 April 2012 ICC, para 36 and *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11-138), decision on victims' participation and victims' common legal representation at the confirmation of charges hearing and in the related proceedings of 4 June 2012 ICC, para 26.

⁶⁵ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1491-Red-tENG), grounds for the decision on the 345 applications for participation in the proceedings submitted by victims of 23 September 2009 ICC, para 98.

⁶⁶ *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-601-tEN), decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 of 20 October 2006 ICC 12.

Finally, in case of doubts in establishing the circumstances on which a child's capacity to act or a person's right to represent the child depends, the child's capacity to act or of the person's right to act on behalf of the child should be presumed.⁶⁷

In any case, the rules governing the capacity to act, the representation of a child, and the evidential standards shall not lead to the nullification of a child's right to be heard. Victims' participation shall be unquestioned also on account of the fact that it is an intrinsic part of the ICC's judicial system.⁶⁸

Research presented in this article concludes that:

1. children's capacity to act in proceedings before the ICC is governed by norms derived from legal instruments governing the operation of the ICC, which indicate that the capacity to act is vested in children who are capable of expressing consent and by norms of law of the country of their nationality, in the lack of nationality – by the law of the country of domicile, and in the lack of domicile – by the law of the country of habitual residence, applicable to the capacity of expressing consent,
2. parents are the persons who may act on behalf of children that do not have the capacity to act in proceedings before the ICC; if parents cannot represent the child – it is a legal guardian; if the legal guardian cannot represent the child – it is the other adult, in respect of whom the ICC is satisfied that they are acting in the best interests of the child,
3. standard of proof of a child's age is *prima facie* evidence, standard of proof of kinship, guardianship or other circumstances which determine the status of 'other relevant adult' is 'sufficient evidence'; both circumstances shall be proven by a documentary evidence, lacking these, a statement signed by two witnesses should suffice; doubts should be resolved in favour of a child's participation.

It cannot go unnoticed that *lacunae* within the normative framework of the ICC in matters of a child's capacity to act and their representation are of a size greater than the matters explicitly regulated. It should be agreed that the drafters of the RS and the entire ICC system did not expect that, as far as the modalities of participation are concerned, there is a need to draw particular attention to child participation.⁶⁹ Uncertainty of law poses a risk of the nullification of a child's right to be heard. This risk must in any case be avoided.

Although it has been indicated how the ICC should proceed, it seems that more specific standards could be formulated in this respect. The most advisable way would be to reformulate the Rules of Procedure and Evidence by an amendment adopted by the Assembly of States Parties.

⁶⁷ Bolaños (n 3) 230.

⁶⁸ Bolaños (n 3) 239.

⁶⁹ Beckmann-Hamzei (n 1) 117; Bolaños (n 3) 238–239.

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