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The child in ICC proceedings

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CHAPTER 5

THE CHILD CLAIMANT

5.1 INTRODUCTION

On the basis of Article 75 of the Rome Statute, a child who has become the victim of international crimes that fall within the jurisdiction of the Rome Statute can, like adults, claim reparations in order to remedy the harm suffered.⁵⁷⁴ The opportunity to not only participate in the course of the criminal proceedings (*Chapter Three*) but also claim reparations, constitutes an additional opportunity for children to be involved in ICC proceedings by pursuing their personal interests.

Reparations for international crimes claimed by a child constitute, in principle though, a twofold novelty: firstly, as with all victims of international crimes, until the establishment of the ICC, victims were unable to claim reparations before an international court or tribunal specifically mandated to adjudicate claims of this nature; secondly, children in particular have only occasionally been involved in other existing international or regional complaint mechanisms pursuing claims on their own behalf. Whether, however, the ICC will indeed be able to implement these two novelties in practice, remains to be seen.

This chapter examines the participation of children in reparation proceedings before the ICC bearing in particular in mind that prior to the establishment of the ICC, victim participation was largely limited to the participation of adult victims. It has been established in the foregoing chapters that child participation in criminal proceedings may require procedural treatment which takes into account the evolving capacities of the individual child. A similar need, which requests child specific treatment from a procedural and substantive perspective, might also exist in relation to child participation in reparation proceedings.

The first case before the ICC, the proceedings against *Thomas Lubanga Dyilo* draws particular attention to child soldiers. The recruitment of children below the age of fifteen years is the only war crime being charged in this case. In light of this uniqueness, also addressed in the course of the previous chapters, the current

⁵⁷⁴ A brief overview of the procedural particularities in relation to the child claimant have earlier been published by this author, see Beckmann-Hamzei 2012. The present chapter constitutes an update.

chapter will scrutinise once more this specific case.⁵⁷⁵ The child sensitivity of the law and practice is thus specifically addressed in light of the possibility for children to claim reparations. The analysis also aims to establish to what extent the principles (from a procedural and substantive perspective), which have been developed in this specific case, are also relevant and can be applied more generally to children claiming reparations for harm suffered as a result of an international crime.

The central questions which are examined in this chapter read as follows: how is the right to reparation applied to children in the proceedings before the International Criminal Court? The analysis examines to what extent is or should there be a child claimants participation which constitutes a modified or distinct approach to adult participation. It will be considered in particular whether it is necessary to adjust the procedures regulating reparation claims but also the substantive aspects of reparations specifically for child claimants. Moreover, it will scrutinise to what extent the participation of children in reparation proceedings is in the best interests of the child. Or, whether the participation of children as claimants can be considered not worthwhile because of not providing child victims with a meaningful international remedy?

The chapter commences with a brief overview of the right to reparation – a right which finds its origin in human rights law and which in particular has been implemented by human rights institutions. Specific attention is paid to the question whether and if so how the human rights approach as regards the right to reparation is relevant for child participation in the ICC context. The discussion is followed by a brief analysis of the legal framework of ICC reparation proceedings. Afterwards the research focusses on the specific procedural aspects which played a role in the ICC's practice in relation to child claimants. Taking the different civil nature of reparation proceedings as a starting point, the chapter zeroes in on those features that are of particular relevance to the child. In this regard, the chapter examines the child-specific forms of reparations from a procedural and substantive perspective (5.4.1). Then, the chapter focusses on the child and young adult's eligibility as regards child-specific forms of reparations (5.4.2). Finally, selected issues concerning the implementation of reparation awards in relation to the child claimant are analysed (5.4.3).

Based on earlier findings on the possible transfer of the approaches adopted by human rights institutions to ICC reparation proceedings, the practice of the ICC towards the child claimant is examined in particular in light of the practice of those

⁵⁷⁵ ICC-01/04-01/06-2904. See in particular para. 181. The Chamber held that, '[a]lthough in this decision the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case. This decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.'

institutions and in particular Truth and Reconciliation Commissions which are experienced in child rights matters.

5.2 THE CHILD AS BENEFICIARY OF THE RIGHT TO REPARATIONS

The right to reparations

The right to reparation is a general principle of international law. In 1928 the Permanent Court of International Justice ruled that,

‘it is a principle, even a general conception of law, that any breach of engagement involves an obligation to make reparation.’⁵⁷⁶

Accordingly, damage which is the result of a violation of a rule must be compensated. While this ruling concerned an inter-state dispute and the obligation of a state to compensate the other state in case of a violation, further analysis is necessary in order to determine whether and how individuals can rely on a right to reparations.

The right to reparations has indeed been codified in international and regional human rights law.⁵⁷⁷ The first comprehensive and more general international legal document addressing the right to reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law has been agreed upon by the General Assembly only in 2005.⁵⁷⁸ In Resolution 60/147 the United Nations’ General Assembly adopted and proclaimed 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*.⁵⁷⁹ Principle 11 defines victims’ right to remedies as follows:

‘[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law included the victim’s right to the following as provided under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;

⁵⁷⁶ Permanent Court of International Justice, Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Series A, No. 17 (1928), at 29.

⁵⁷⁷ See, among others, art. 8 of the Universal Declaration of Human Rights, art. 2(3) International Covenant on Civil and Political Rights, art. 39 of the Convention on the Rights of the Child, art. 41 European Convention on Human Rights.

⁵⁷⁸ Capone 2013,50-57.

⁵⁷⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/60/147 (2005).

- (c) Access to relevant information concerning violations and reparation mechanisms.’

The right to reparation is thus part of the right to an effective remedy.⁵⁸⁰ Principle 15 provides specifically in relation to reparations that,

‘[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. (...) In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.’⁵⁸¹

Despite the fact that, to date, the right of individuals to reparations has been codified in human rights law, the question remains how victims of violations of international humanitarian law – a distinct branch of international law which applies to parties to an armed conflict – can claim reparations.⁵⁸² It has repeatedly been pointed out that international humanitarian law does not provide a procedural right to claim reparations.⁵⁸³ A major step in order to provide victims of international humanitarian law with such a right has been taken with the UN Basic Principles. These are not limited to victims of violations of human rights law but include victims of serious violations of international humanitarian law.⁵⁸⁴ Another step further has been taken with the coming into force of the Rome Statute. Article 75 of the Rome Statute explicitly enables individuals (at the discretion of the Court) to claim reparations for having suffered harm as a result of international crimes within the jurisdiction of the Court. The procedural possibility for individuals to claim reparations for having become victims of breaches of international humanitarian law has thereby entered the field of international criminal law.⁵⁸⁵ The earlier addressed gap of a procedural possibility to claim reparations for having suffered harm as a result of a violation of international humanitarian law has thereby been closed to a certain extent, namely in relation to those violations which qualify as victims of an international crime within the jurisdiction of the ICC.

Bearing in mind the aforementioned, the United Nations’ General Assembly Basic Principles, despite their non-binding legal force, enjoy broad recognition. This recognition is, for instance, reflected in the fact that the ICC also refers to almost identical formulations in the Rome Statute and the respective rules as regards

⁵⁸⁰ Donat-Cattin 2008, Article 75, at 1400.

⁵⁸¹ See similarly, art. 1 of the Declaration of International Law Principles on Reparation for Victims of Armed Conflict (The Hague, Resolution 2/2010).

⁵⁸² Droege 2007, at 348.

⁵⁸³ Zegveld 2003, at 487. Kleffner 2002, at 238.

⁵⁸⁴ Zegveld 2003, at 499.

⁵⁸⁵ Droege 2007, at 354.

reparation and in particular the available forms of reparation (5.3, 5.4.3).⁵⁸⁶ Further, the Court explicitly recognised the relevance of the UN Basic Principles in its case law. 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”) [...]’.⁵⁸⁷

Principles 19 to 23 of the UN Basic Principles refer to the following forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The available forms of reparations under the ICC reparation framework, in particular with regard to child claimants, will be addressed in detail below (5.4.1).

The child as a beneficiary of the right to reparations

Bearing in mind the aforementioned aspects of the right to reparations one may raise the question whether the right to reparation is also a right of the child. It can indeed be assumed that the child is a beneficiary of the right to reparation.⁵⁸⁸ This assumption can be made as the UN Basic Principles do not distinguish between adults and children. Furthermore, in support of this assumption, it is noted that the Preamble of the UN Basic Principles also refers to Article 39 of the UN Convention on the Rights of the Child. Article 39 states that,

‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.’

⁵⁸⁶ For a brief overview of the drafting history on victims’ right to reparation before the International Criminal Court, see Donat-Cattin 2008, Article 75, at 1400-1402.

⁵⁸⁷ ICC-01/04-01/06-1119, para. 35.

⁵⁸⁸ The other components of the right to a remedy are the right to access justice and the right to know the truth. For a brief overview of the right to a remedy, see Donat-Cattin 2008, Article 68, at 1279; Donat-Cattin 2008, Article 75, at 1400. See, for example, art. 8 of the 1948 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) (1948), UN Doc. A/810 (1948), at 71; art. 2(3) of the 1966 International Covenant on Civil and Political Rights, 993 UNTS 171; art. 39 of the 1989 Convention on the Rights of the Child, 1577 UNTS 3. See also, Principles 15-18 of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/60/147 (2005). For further information on the right to reparation for violations of international humanitarian law, see, Gillard 2003, at 529-553. Reparations within the context of international criminal proceedings, see, Zegveld 2010, at 77-111; UNICEF 2010a, at 51; UNICEF 2009b, at 96.

The reference in the Preamble of the UN Basic Principles to Article 39 of the UN Convention on the Rights of the Child underlines that children are also to be seen as beneficiaries of the right to a remedy and thereby also the right to reparation.

Furthermore, the International Law Association also took position to this particular aspect. The Reparation for Victims of Armed Conflict Committee adopted a declaration which specifically addresses the right to reparation for victims of armed conflict. Article 4 (2) of the *Declaration of International Law Principles on Reparation for Victims of Armed Conflict* (The Hague, Resolution 2/210) also states that children are also to be seen as beneficiaries of the right to reparation. The Commentary on this paragraph underlines that,

‘due account [is] to be taken of situations where victims are in no position to claim themselves, as for example when the victim is incapacitated or a minor child. In these situations, third persons might be legally entitled to claim on behalf of the victim. However, reparation has to be awarded to the victim.’

In the same tenor, the non-governmental organisation *International Center for Transitional Justice* held in a 2011 report that,

‘[t]he right to reparations extends to all victims of gross human rights violations, including children. Few reparations programs have explicitly recognized children as beneficiaries, however, and others have struggled with effectively designing and administering child-sensitive reparations. Child-specific reparations are crucial because they reaffirm the rights of children in face of past violations, attempts to remedy lost opportunities and provide for their futures.’⁵⁸⁹

In similar words, the ICC Trust Fund for Victims pointed out that child victims’ right to a remedy and reparation is undeniable.⁵⁹⁰

Specifically in relation to victims of armed conflict, the Reparation for Victims of Armed Conflict Committee of the International Law Association underlined in 2010 that,

‘[i]n view of the relevant state practice and taking note of a strong majority among scholars, the Committee came to the conclusion that until most recently, international law did not provide for any right to reparation for victims of armed conflicts.’⁵⁹¹

⁵⁸⁹ Aptel & Ladisch 2011, at 4.

⁵⁹⁰ ICC-01/04-01/06-2872, para. 39. See generally on the right to an effective remedy, van Boven 2009, at 22-25. ICC-01/04-01/06-2872, para. 39.

⁵⁹¹ Reparation for victims of armed conflict Committee of the International Law Association, Introduction, Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) (2010), at 2.

Thus, the International Criminal Court, as the institution which is mandated to rule on reparations for the commission of international crimes, is the first and moreover the only permanent international criminal court, specifically mandated to rule on reparation claims of this nature.⁵⁹²

Having established that the child is indeed a beneficiary of the right to reparation one may turn to the second aspect of this paragraph, namely the possibility to transfer a human rights approach to ICC proceedings. Bearing in mind that the roots of this concept lie in general public international law and thus not as such in international criminal or international humanitarian law, the branches of law which are predominantly applied in the context of ICC proceedings, it is necessary to consider whether the findings of human rights institutions (as the institutions being most experienced in ruling on reparation claims which have been filed by individuals) can be referred to as a yardstick for the interpretation of the ICC reparation scheme. The ICC reparation scheme is, after all, in need of such a yardstick as a guiding procedural regulation and practice is almost non-existent. As the regional human rights courts are the judicial institutions with the most experience in applying the right to reparation, this chapter will refer to the practice of the European Court of Human Rights as one example of an experienced judicial institution in this matter.

Article 34 of the ECHR, entitled ‘Individual applications’ provides that,

‘[t] the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.’⁵⁹³

Article 41 ECHR states that,

‘[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.’

Individuals may thus apply for reparations before the European Court of Human Rights, a possibility in relation to which the Court is well known for having established extensive practice.

⁵⁹² Donat-Cattin 2008, Article 75, at 1401; Mazzeschi 2003, at 343. For further information on the right to reparation for violations of international humanitarian law, see Gillard 2003, at 529-553. Reparations within the context of international criminal proceedings, see Zegveld 2010, at 77-111; UNICEF 2010a, at 51; UNICEF 2009b, at 96.

⁵⁹³ See also, art. 61(1) of the American Convention on Human Rights.

The possibility to transfer human rights concepts, as for instance established in the case law of the European Court of Human Rights or the Inter-American Court of Human Rights, to ICC proceedings has been elaborated upon in *Chapter One*. It has been argued that 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 not only rule upon child participation in light of the internationally recognised interpretation of the Convention on the Rights of the Child but also in light of other relevant human rights treaties, such as the European Convention on Human Rights. The ICC is therefore advised to carefully assess those mechanisms, which are experienced in child participation.

Trial Chamber I, indeed, seems to follow such an approach in the *Lubanga* case by explicitly stating that,

‘given the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations, the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field.’⁵⁹⁴

Seeking guidance in the law and practice of the experienced institutions may, however, only be interesting for the ICC when these institutions have indeed been confronted with cases in which children claim reparations.

One may or may not be surprised that only a small percentage of claims have been brought by children. As a preliminary note, it therefore seems that children have not invoked their right to reparation frequently. Furthermore, neither the procedural nor the substantive aspects of reparation claims submitted by minor claimants are explicitly addressed and regulated in great detail.

The Council of Europe published data on cases before the European Court of Human Rights which deal(t) with child rights issues. The Council points out that at the ECtHR, 303 cases dealt with issues that were relevant to children between 1968 and March 2014.⁵⁹⁵ Considering that at the end of 2011 more than 46,000

⁵⁹⁴ ICC-01/04-01/06-2904, para. 186.

⁵⁹⁵ The Council of Europe provides for an overview of all cases http://www.coe.int/t/dg3/children/caselaw/CaseLawChild_en.asp. Most applications were submitted by parents, see among many others, *Eriksson v. Sweden*, Judgment (Merits and Just Satisfaction) of 22 June 1989, Application no. 11373/85, para. 1; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgment (Merits and Just Satisfaction) of 12 October 2006, Application no. 13178/03. Only in a few cases children applied on their own behalf. See Commission decision, *X. and Y. v. The Netherlands*, Admissibility Decision of 19 December 1974, Application no. 6753/74, at 118-119; Court judgment, *Tyrer v. United Kingdom*, Judgment (Merits) of 25 April 1978, Application no. 5856/72; *V. v. United Kingdom*, Judgment (Merits and Just Satisfaction) of 16

applications have been ruled upon by the ECtHR, the number of cases involving children constitutes a small percentage.⁵⁹⁶ Taking a closer look at these cases, it becomes clear that the majority dealt with the substantive protection of children under the ECHR, such as protection under Article 8 ECHR – the right to family life.⁵⁹⁷ Most of these cases have been lodged by parents who argued that their conventional right regarding separation from parents or the medical treatment of their children have been violated. Children themselves did not submit a complaint on their own behalf in the vast majority of the cases. This means that children were rather the object of the dispute before the ECtHR instead of taking a more active role as a claimant.

The American alternative at regional level is manifested in the American Convention on Human Rights.⁵⁹⁸ As before the Human Rights Committee and the ECtHR, child victims are not excluded from submitting a complaint to the Inter-American Commission of Human Rights.⁵⁹⁹ Complaints may be submitted for a violation of their rights committed by Member States of the Organization of American States.⁶⁰⁰ Thus far, child victims themselves did not submit a complaint. The Inter-American Court was confronted with cases which were submitted as

December 1999, Application no. 24888/94; *T. v. United Kingdom*, Judgment (Merits and Just Satisfaction) of 16 December 1999, Application no. 24724/94; *S.C. v. United Kingdom*, Judgment (Merits and Just Satisfaction) of 15 June 2004, Application no. 60958/00; *Costello-Roberts v. UK*, Judgment of 25 March 1993, Application no. 13134/87; *D., H. and others v. Czech Republic*, Judgment of 7 February 2006, Application no. 57325/00; *A. v. The United Kingdom*, Judgment (Merits and Just Satisfaction) of 23 September 1998, Application no. 25599/94, para. 7; *A. and B. v. The United Kingdom*, Admissibility Decision of 9 September 1996, Application no. 25599/94.

⁵⁹⁶ For statistical information see, European Court of Human Rights, pending and decided Applications Allocated to a Judicial Formation, http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Pending_applications_chart.pdf; http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Stats_EN_112011.pdf.

⁵⁹⁷ Art. 8(1) of the 1953 Convention for the Protection of Human Rights and Fundamental Freedoms states that, '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' *Tyrer v. the United Kingdom*, Judgment (Merits) of 25 April 1978, Application no. 5856/72; *Marckx v Belgium*, Judgment (Merits and Just Satisfaction) of 13 June 1979, Application no. 6833/74; *Johnston and Others v. Ireland*, Judgment (Merits and Just Satisfaction) of 18 December 1986, Application no. 9697/82; *Vermeire v. Belgium*, Judgment (Merits) of 29 November 1991, Application no. 12849/87.

⁵⁹⁸ 1978 American Convention on Human Rights, 1144 UNTS 123.

⁵⁹⁹ Article 23 in conjunction with 27 Rules of Procedure IACHR. The Inter-American system distinguishes between petitioners and victims. Article 1 of the Rules of Procedure of the IACTHR defines a 'victim' as a 'person whose rights have been violated according to a judgment pronounced by the Court,' while an 'alleged victim' is defined as a 'person whose rights under the Convention are alleged to have been violated.' A 'petitioner' not necessarily the victim itself but the person who actually fills the complaint.

⁶⁰⁰ Art. 44 American Convention on Human Rights in conjunction with art. 27 of the Rules of Procedure of the IACHR.

representatives of the minor victims either by the parents of the children or NGOs.⁶⁰¹

It is interesting to also briefly look at the UN human rights mechanism in order to see whether complaints have been submitted by children. To date, just one complaint has been submitted to the UN Human Rights Committee by a 16-year-old boy, while other complaints relevant to children were, as in the case of the ECtHR, submitted by parents or close family members of the child in their own right.⁶⁰²

The new Protocol under the Convention on the Rights of the Child is likely to be the first complaint mechanism which is specifically designed to provide access to an international complaint procedure for the child. The recently adopted complaint procedure (December 2011) is likely to be the only human rights mechanism which will receive more complaints submitted by minors than adults. Moreover, in contrast to the other human rights treaties, this mechanism (once entered into force) is the only mechanism, which is mandated to address human rights violations *and* selected violations of international humanitarian law.⁶⁰³ It thereby constitutes the only existing human rights mechanism which will be mandated to rule upon the recruitment of child soldiers. It is important to note that decisions of the Committee on claims submitted by children are legally not binding for the State concerned.

It can be concluded that the child is a beneficiary of the right to reparation. It has also been established that the law and practice of experienced institutions, such as

⁶⁰¹ “*Street Children*” (*Villagrán-Morales et al.*) v. *Guatemala*, 19 November 1999 (Merits), at para. 5; *Yean and Bosico Children v. The Dominican Republic*, 8 September 2005, at para. 5; *Vargas-Areco v. Paraguay*, 26 September 2006, at para. 6. See for further information, Capone 2013, at 190-196.

⁶⁰² As of 9 April 2008, the Human Rights Committee registered 1777 communications with respect to 82 countries. Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (9 April 2008), <http://www2.ohchr.org/english/bodies/hrc/stat2.htm>. *S.H.B. v. Canada*, Communication No. 192/1985, *S.H.B. v. Canada*, UN Doc. CCPR/C/29/D/192/1985 (1987); *A. and S.N. v. Norway*, Communication No. 224/1987, *A. and S.N. v. Norway*, UN Doc. CCPR/C/33/D/224/1987 (1988); *Darwinia Rosa Mónaco de Gallicchio v. Argentina*, Communication No. 400/1990, *Darwinia Rosa Mónaco de Gallicchio v. Argentina*, UN Doc. CCPR/C/53/D/400/1990 (1995); *Baban et al. v. Australia*, Communication No. 1014/2001, *Baban et al. v. Australia*, UN Doc. CCPR/C/78/D/1014/2001 (2003); *Derksen v. The Netherlands*, Communication No. 976/2001, *Derksen v. The Netherlands*, UN Doc. CCPR/C/80/D/976/2001 (2004).

⁶⁰³ UN General Assembly, Rights of the Child, UN Doc. A/RES/66/141, A/66/PV.89 (2011). Arts. 38-39 of the 1989 Convention on the Rights of the Child, 1577 UNTS 3 and 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222. In 2011, an open-ended working group drafted an Optional Protocol to the Convention on the Rights of the Child to provide a complaint procedure against State Parties. General Assembly, Human Rights Council, Seventeenth session, Agenda item 5, Human rights bodies and mechanisms, Report of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, UN Doc. A/HRC/17/36 (2011). See for recent update www.crin.org.

the European Court of Human Rights, can indeed be referred to as yardstick in the context of ICC proceedings. It is, however, also shown that children have not frequently applied for reparations in their own right before the aforementioned human rights institutions.

5.3 RULES AND PRACTICE GOVERNING REPARATION PROCEEDINGS

The few rules and early practice governing reparation proceedings before the International Criminal Court serve as the point of departure for an analysis of the legal status of the child claimant. In turn, the legal framework of child claimant participation is addressed in light of both the general rules applying to reparation proceedings and specific aspects which arise for the child claimant. This approach is chosen in order to examine whether and to what extent the ICC is already or should be encouraged to adopt a child sensitive approach which is to be distinguished from the approach to be taken when adult victims participate.

The analysis is in particular based on the first case and judgment of Trial Chamber I in the proceedings against *Thomas Lubanga Dyilo*. It is noted that procedural details of reparation proceedings, such as the application of eligibility criteria, are left unregulated.⁶⁰⁴ Neither do the *travaux préparatoires* serve as a guiding yardstick in relation to the procedural details of reparation proceedings. Instead, the Court itself is vested with the task of developing principles which regulate the award of reparations.⁶⁰⁵

It is due to the major lack of procedural regulation that this chapter immediately includes the first practice of the Court in relation to reparation proceedings in order to provide an overview of the ICC's reparation scheme. The procedural implications of the existing regulation in light of the addressed practice are therefore, in contrast to the approach of the previous chapters, a major part of the current section.

General aspects of reparation proceedings

Pursuant to Regulation 86 of the Regulations of the Court, applications for participation in reparation proceedings have to be submitted to the Registrar. A joint application form for criminal and reparation proceedings has been made available on the website of the Court.⁶⁰⁶ The existence of the joint form alludes that the technical matters as regards the information and documents which are to be

⁶⁰⁴ ICC-01/04-01/06-2863, para. 10.

⁶⁰⁵ Art. 75 Rome Statute.

⁶⁰⁶ The joint application form is online available, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/victims/forms?lan=en-GB>. For further discussion about the information to be provided in the form, see *Chapter Three*.

provided are very similar, if not even the same, as the procedure to be followed when applying for participation in criminal proceedings.⁶⁰⁷

With regard to the additional common administrative aspects of the application procedure, further information can be found in *Chapter Three* (sections 3.4-3.5). The administrative similarity does not imply that participation in the reparation proceedings is dependent on participation in the criminal proceedings. Instead, the Rome Statute and the respective rules do not require that participation in the reparation proceedings necessitates previous participation in the criminal proceedings. Neither is the submission of reparation claims dependent on the conclusion of the criminal proceedings or the commencement of reparation proceedings. Accordingly, victim participation in the criminal and reparation proceedings are in principle two distinctive possibilities of victim participation before the ICC.

Irrespective of the general independence of reparation proceedings, in one aspect, the successful claiming of reparations is definitely interrelated with criminal proceedings. As will be established in greater detail below, individual reparation awards ordered against the accused can only be implemented after a successful conviction of the perpetrator.⁶⁰⁸ This, once more, does not imply that victims have to participate in criminal proceedings, but means that criminal proceedings have successfully been concluded before reparation awards can be implemented against a convicted person.

In substantive terms, article 75 of the Rome Statute constitutes the heart of the reparation scheme of the ICC. It states that,

‘[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.’

This provision clearly leaves the Court with a wide discretion as regards reparation procedures and, in particular, the form and implementation of reparation awards. Limited guidance can be found in this provision in relation to the forms of reparations which are addressed in more detail below (5.4.1).

Particular attention is to be paid to the practical handling of requests for reparations. Remarkably, the Trust Fund for Victims, and not the judicial institution of an ICC Chamber, has been mandated by Trial Chamber I to decide upon access or denial of

⁶⁰⁷ See, Rule 94-99 RPE.

⁶⁰⁸ Rule 98(1) RPE.

the potential beneficiaries.⁶⁰⁹ An approach which can be criticised for introducing a procedure which is no longer under judicial scrutiny – while the establishment of the ICC was particularly welcomed for providing victims of international crime with a judicial remedy. Such practice implies that the right to claim reparations right loses its judicial dimension and thereby renders, in fact, the codification of Article 75 of the Rome Statute – to claim remedies - meaningless as regards the right to claim remedies before a judicial institution. As the right to a remedy encompasses the right to access justice, the availability to judicial reparation proceedings is thereby included.⁶¹⁰

Trial Chamber I's decision in the *Lubanga* case to delegate the substantive processing of reparation claims mainly to the TFV constitutes a development which therefore gives rise to concern. The Chamber itself pointed out that,

[it] agrees with the observation of Pre-Trial Chamber I when it stated: The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system. [...]⁶¹¹

The delegation to a non-judicial institution, such as the TFV, which is not an organ of the Court, entails the risk that the success or failure of the reparation proceedings is largely decided outside the ICC.⁶¹² Such a development cannot be said to mirror and accomplish the groundbreaking step that the International Criminal Court is the first permanent international criminal court which does not only aim to combat impunity but also to provide victims of international crimes with an opportunity to claim judicial remedies for the harm suffered. As the judicial remedies before the ICC for victims of international crimes, to date, constitute the only international avenue which might enable victims to enforce their legal right to a remedy, the transferal of this task to a non-judicial institution, not bound by the rule of law, is to be questioned.

Delegation of the task to decide upon the substantive details of reparations to a non-judicial institution means in particular that victims', including children's, legal right to reparation is assessed by an institution, which is not experienced and equipped to address the legal components of the right to a remedy. It may thus be questioned

⁶⁰⁹ Ibid., para. 284.

⁶¹⁰ See in this regard, Principle VII 11(1) 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/60/147 (2005). Principle IX 17 also refers to reparation judgments, which underlines once more that the right to reparation entails a judicial reparation mechanism when the liability of individuals or institutions has been established.

⁶¹¹ ICC-01/04-01/06-2904, para. 178.

⁶¹² Trial Chamber I also delegated the decision taking on the legal representation of victims to the Registry. See, see ICC-01/04-01/06-2904, para. 268.

what the added value of the newly introduced reparation procedure before the International Criminal Court is, if in the end, it is not the Court who decides upon reparation claims. One may even argue that, while the Rome Statute creates the impression that victims, including children, may legally claim reparations, the transfer to the Trust Fund for Victims constitutes a delegation of a judicial task which has not been intended by the drafters of the Rome Statute and thus constitutes a delegation which is not in accordance with the overall idea and objective of victim participation in the proceedings before the ICC. Even if the author of this thesis is of the view that the determination of the legal components of the right to claim reparations should be dealt with within the ICC, it does not take away that one may validly question whether a chamber composed of dominantly criminal law judges is sufficiently experienced in deciding upon applications of a rather civil law nature. The Court might therefore re-think whether a specialised chamber should be vested with this specific task.

The conclusion that the Court's delegation of a judicial task and mandate as regards reparation claims to the Trust Fund for Victims is criticised in particular in light of the practice of Trial Chamber I. According to Trial Chamber I, the task of the Court is mainly minimised to 'monitoring and oversight functions', instead of pursuing its mandate as provided for in the Rome Statute of the International Criminal Court.⁶¹³

The importance of a procedurally regulated assessment has also been pointed out by the Reparation for Victims of Armed Conflicts Committee of the International Law Association. In 2012, the Committee concluded in its final report to the Sofia Conference that,

[a] substantive right to reparation includes a procedural right to access to an effective mechanism to which victims may submit their claims.'

As the current procedural rules of the Trust Fund for Victims do not provide for such procedure for claimants, including child claimants, it may indeed be questioned whether this delegation constitutes a referral to an effective mechanism.

A step further in the course of reparation proceedings relates to the actual award of reparations. As regards the award of reparations, the Trust Fund for Victims has an important role. Rule 98 of the RPE states that,

[t]he Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victims.'

⁶¹³ Ibid., para. 286.

According to the Rules of Procedure and Evidence, the Trust Fund for Victims may thus be approached and involved upon a Court order when, for instance, the indigence of the convicted person or the large number of claimants prevent an effective award of reparations.

Furthermore, as conflict situations might make it impossible for a child to access the ICC due to ongoing fighting, for instance, children themselves might not at all be in the position to access the Court in order to claim reparations. There is, however, an opportunity that even without submitting a reparation claim, children may nevertheless become beneficiaries of reparation awards. This is because the International Criminal Court may also award reparations on its own motion (*proprio motu*).⁶¹⁴ The OPCV indicated in this regard that Trial Chamber I should indeed make use of this statutory possibility in the reparation proceedings in the *Lubanga* case.⁶¹⁵ This empowerment of the Court could constitute another opportunity for children be beneficiaries of reparation awards. Particular importance may be underlined in relation to child claimants as this possibility may indeed enable children in a more child-sensitive manner to successfully benefit from reparations without having to comply with all the technical and practical difficulties of the application procedure. It still needs to be seen, however, whether at all and to what extent if at all the ICC will make use of this possibility in relation to children. While TRC practice in relation to the forms of reparations will show that children have been singled out as regards the particular forms of reparations, it may be said that a reparation award made by the ICC on the basis of the *proprio motu* power only towards child victims is less likely to ever be taken as the exercise of this competence as such can be expected to occur not frequently. If ever being relied upon by the ICC, it is then rather unlikely that the Court will give an reparation award which is limited to one specific group of victims. As far as the *Lubanga* case is concerned (the only case which have reached the reparation stage at the time of writing), such approach is not yet feasible.

Child-specific aspects of reparation proceedings

The information which the child is required to submit (irrespective of applying for reparation during trial proceedings or afterwards), amongst others, relates to the child's identity and must contain a rather detailed description and proof of the alleged crime and harm suffered. Similar to when applying for participation in criminal proceedings, a child can be expected to encounter difficulties in providing the administrative and crime-related evidence (*Chapter Three*). Decisive for filling out the application form are, for instance, not only the capacities of the individual child and the available support of adults when filling out the form, but also the

⁶¹⁴ Rule 95 of the 2002 Rules of Procedure and Evidence of the International Criminal Court. For a detailed analysis of the ICC reparation regime, see Dwertmann 2010.

⁶¹⁵ ICC-01/04-01/06-2904, para. 53.

existence of birth registration administration. After all, when conflict situations separate a child from his/her family and identification documents are not at the disposal of the child, the official registration of a child can be crucial for successfully proving identity. It is therefore that Trial Chamber I ruled that,

‘[i]n the reparations proceedings, victims may use official or unofficial identification documents, or any other means of demonstrating their identities that are recognised by the Chamber. In the absence of acceptable documentation, the Court may accept a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf.’⁶¹⁶

It is to be remembered that if, irrespective of the subsequent need that the eligibility criteria, form and implementation of reparations need to be child-sensitive, the reparation proceedings themselves, in particular access requirements, do not sufficiently take into account the constraints a child might be confronted with, the aforementioned right of the child to an effective remedy may become meaningless.⁶¹⁷ In this regard, UNICEF research underlines that in order to ensure that children in fact receive repairing benefits, it needs to be taken into account that,

‘[a]ccess may be impeded by a lack of information, information provided in an inappropriate format or a lack of necessary documents, or by fear of reprisal, stigma and violence. For example, children are even more likely than adults to be illiterate and to lack financial resources that might be necessary (such as for travel, photocopying of documents, etc.) to be aware of, find out about or realize their rights. Additional challenges are that children often are not perceived as independent actors entitled to seek or receive reparations in their own right. [...] Addressing such challenges requires meaningful participation by children and their communities and by children’s rights organizations.’⁶¹⁸

Similarly, the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* suggest that,

‘35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive [...]’⁶¹⁹

⁶¹⁶ ICC-01/04-01/06-2904, para. 198.

⁶¹⁷ See generally on the right to an effective remedy, van Boven 2009, at 22-25. The ICC Trust Fund for Victims pointed out in similar words that child victims’ right to a remedy and reparation is undeniable, see ICC-01/04-01/06-2872, para. 39.

⁶¹⁸ UNICEF 2010a, at 56.

⁶¹⁹ ECOSOC Guidelines 2005. See also, ‘36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice [...]’

Without going into the details of the application procedure itself, Trial Child I explicitly pointed out that a number of requirements which were also requested when applying for participation in the criminal proceedings, are still to be provided for. As for children applying for participation in criminal proceedings, Trial Chamber I stipulated that,

‘[p]ursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims [...]. In order to determine whether a suggested “indirect victim” is to be included in the reparations scheme, the Court should determine whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents. It is to be recognised that the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.’⁶²⁰

While the general distinction between direct and indirect victims was also applied in the course of criminal proceedings, the explicit application of a broad concept of a family and the recognition that children might also qualify as victims through succession constitutes a new development which (thus far) has not been applied in the course of criminal proceedings. Such an interpretation may allow for a wider circle of child claimants to come into consideration for reparations.

Another note needs to be made in relation to the violations for which child victims may seek access to the ICC. As has been elaborated throughout the book, the commission of international crimes leads to high numbers of child victims. Those crimes are, however, not the only violations which occur during conflict situations. Many other violations of the fundamental rights of the child occur simultaneously, such as violations of the right to education and to the enjoyment of the highest standard of health.⁶²¹ The *International Center for Transitional Justice* underlined in this regard that,

‘[i]n many cases, the conflict or rights violations disrupt a child’s education and destroy her or his family support structure, thus creating a situation where children as young as eight years are left to care and provide for their younger siblings. Adults may already have benefited from education and job training before the conflict and may be in a better position to find a sustainable livelihood. In contrast, in many cases children have nothing to go back to; thus one of the serious consequences of massive human rights violations are the lost opportunities.’⁶²²

Beneficiaries of ICC reparation awards are, however, only those children who have suffered harm as a result of a crime within the criminal jurisdiction of the Court.

⁶²⁰ Ibid., paras. 194-195.

⁶²¹ Arts. 24 and 28 of the Convention on the Rights of the Child, 1577 UNTS 3.

⁶²² Aptel & Ladisch 2011, at 27.

The judicial mandate of the Court, as in the course of the criminal proceedings, covers war crimes, crimes against humanity and genocide.⁶²³ Accordingly, a child who is the victim of any other violation is not entitled to access the Court in order to request reparations from a convicted perpetrator or to come into consideration for collective reparations.⁶²⁴ A child can therefore not claim reparations before the ICC, for instance, when it was unable to attend school or suffered from insufficient health care due to conflict situations – rights, which have been provided for under the Convention on the Rights of the Child. This limitation could be considered to lead to an arbitrary situation. This is because child victims of international crimes might, for instance, be eligible for reparations in forms of educational training while children who were not able to attend school as a result of the conflict situation are not eligible for these forms within a ICC context. It is noted that this limitation could be said to find its justification in the determination of the jurisdiction of the ICC, the focus of the Court on individual criminal responsibility and the need to guarantee a fair trial for the accused. Reparation claims from victims of violations beyond the ICC Statute could thereby constitute a threat to the fairness of the proceedings and in particular lack a legal basis under the Rome Statute.

With regard to the potential limitation of beneficiaries to victims of the charged crimes in a particular case, in the same decision Trial Chamber I briefly referred to qualification criteria by limiting the group of potentially entitled beneficiaries to those victims who have suffered harm as a ‘result from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities.’⁶²⁵ It can be deduced from this practice that, as anticipated above, victims of other child rights violations which have not been charged, are indeed not entitled to claim reparations in the respective case.

It is also noteworthy, that Trial Chamber I in the decision establishing the principles and procedures to be applied to reparations, elaborated upon the standard of proof claimants have to comply with when accessing the ICC. The Chamber explicitly held that,

‘[a]t trial, the prosecution must establish the relevant facts to the criminal standard, namely beyond reasonable doubt. Given the fundamentally different nature of these

⁶²³ Art. 5 Rome Statute, Rule 85 of the 2002 Rules of Procedure and Evidence of the International Criminal Court.

⁶²⁴ Rule 94 of the 2002 Rules of Procedure and Evidence of the International Criminal Court state that, ‘[a] victim’s request for reparations under article 75 shall be made in writing and filed with the Registrar.’ The procedural particularities, which accompany children when filing an application for reparations are similar to the access related particularities of children in the criminal proceedings and are therefore not repeatedly addressed in the current Chapter. Until 30 September 2011 the Court received 743 applications for reparations from victims, see Registry Facts and Figures - facts up to date as of 30 September 2010, <http://www.icc-cpi.int/NR/rdonlyres/F67584DE-F045-45E2-9503-8F4D16B3DEAA/282642/RegistryFactsandFiguresEN.pdf>.

⁶²⁵ ICC-01/04-01/06-2904, para. 247.

reparations proceedings, a less exacting standard should apply. Several factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence. This particular problem has been recognised by a number of sources, including Rule 94(1) of the Rules, which provides that victims' requests for reparations shall contain, to the extent possible, any relevant supporting documentation, including names and addresses of witnesses. Given the Article 74 stage of the trial has concluded, the standard of "a balance of probabilities" is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person. When reparations are awarded from the resources of the Trust Fund for Victims or any other source, a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.⁶²⁶

Trial Chamber I introduced as a principle rule in the reparation proceedings in the *Lubanga* case not only a lower evidentiary threshold compared to the standard applied in the course of criminal proceedings, but it also distinguished between reparations awarded directly from the accused and an even lower standard when reparations are awarded through the Trust Fund or another source. Considering the surrounding circumstances, victims of international crimes in general, but also child victims in particular, finding themselves in such a lower standard clearly constitutes a welcome attitude by Trial Chamber I in the *Lubanga* case – even if this is not specifically addressed at child claimants.

At the same time, it seems that it might also encourage victims to apply for participation in the reparation proceedings instead of aiming to participate in the criminal proceedings. As a result of the more lenient evidentiary threshold in the reparation proceedings, it seems that the Court thereby indirectly tries to limit interest and the actual number of victim participants in the criminal process.

5.4 CHILDREN CLAIMING REPARATIONS BEFORE THE ICC: CURRENT AND FUTURE CHALLENGES

It will be established in turn that children indeed claim reparations in the proceedings before the ICC for having suffered as a result of international crimes. The ICC is an institution which (in contrast to human rights institutions) is specifically mandated to adjudicate claims which are based on the commission on international crimes.⁶²⁷ Prior to the establishment of the ICC, victims of the most

⁶²⁶ ICC-01/04-01/06-2904, paras. 251-254.

⁶²⁷ What remains is international humanitarian law. Despite being the branch of international law which provides for the most specific protection of children during armed conflict, it still fails to provide for a complaint procedure. See among others, Bassiouni 2006, at 204-205; Kleffner 2002, at 238. For further information, see Heintze 2007, 91, at 101; Kleffner & Zegveld 2000, at 384-401.

serious crimes under international law were unable to claim reparations before an international criminal court or tribunal with the exception of the Statutes of the *ad hoc* tribunals. These allow for the restitution of property.⁶²⁸ Reparation proceedings before the ICC therefore constitute – next to the possibility to apply for participation in the criminal proceedings (*Chapter Three*) – a novelty in international (criminal) justice.⁶²⁹

In the case of Cambodia, individuals can also claim reparations before the Extraordinary Chambers in the Courts of Cambodia (ECCC). Due to the primary reliance of the ECCC on national law and the very limited practical relevance of these Chambers' practice in relation to children, the possibility to claim reparations before this judicial institution is not addressed in greater detail in the current research.⁶³⁰

Despite the lack of extensive practice with regard to children claiming reparations before the ICC, the permissible practice of various Chambers regarding children's participation in criminal proceedings (*Chapter Three*) provides some insight into a likely reparation approach of the Court.⁶³¹ Furthermore, first

⁶²⁸ See arts. 24(3) ICTY Statute, art. 23(3) ICTR Statute. Zegveld 2010, at 77-111; Bassiouni 2006, at 241; Bachrach 2000, 7, at 16; Walley 2002, 51, at 57; Trumbull 2007, at 786-789.

⁶²⁹ Art. 75 Rome Statute in conjunction with Rule 94 of the 2002 Rules of Procedure and Evidence of the International Criminal Court, Regulation 88 of the 2004 Regulations of the International Criminal Court and Regulation 104 of the 2006 Regulations of the Registry of the International Criminal Court. Gillard 2003, at 545; Dwertmann 2010, at 15-16; Gray 1996, at 77; Ferstman, Goetz & Stephens 2009; Trumbull 2007, at 789. Plenty of legal research has been carried out on reparations in general. See among many others, Bank & Schwager 2007, 367-412; Bílková 2007, 1-11; de Brouwer 2007, 207-237; Bassiouni 2006, at 203-279; Kalshoven 1991, 827-858; Keller 2007, 189-218; Roth-Arriaza 2004, 157-219; Zappala 2010, 137-164; Zegveld 2003, at 497-526; van Boven 1996, 339-355; van Boven 2009, 19-40; Correa, Guillerot & L. Magarrell 2009, 385-414. Zegveld 2010, 77, at 88. In the case of Cambodia, besides the ICC, individuals can also claim reparations before the Extraordinary Chambers in the Courts of Cambodia (ECCC). Due to the primary reliance of the ECCC on national law and the very limited practical relevance of these Chambers' practice in relation to children, the possibility to claim reparations before this judicial institution falls outside the scope of this research. See generally on victim participation before the ECCC, Mohan 2009, 733-775; Bair 2008, 507-552. The Statutes of the *ad hoc* Tribunals only provided for the restitution of property as a form of reparation, see arts. 24(3) ICTY Statute and 23(3) ICTR Statute. For a brief overview of the drafting history on victims' right to reparation before the International Criminal Court, see Donat-Cattin 2008, Article 75, at 1400-1402.

⁶³⁰ Zegveld 2010, 77, at 88. See generally on victim participation before the ECCC, Mohan 2009, 733-775; Bair 2008, 507-552. The Statutes of the *ad hoc* Tribunals only provided for the restitution of property as a form of reparation, see arts. 24(3) ICTY Statute and 23(3) ICTR Statute. For a brief overview of the drafting history on victims' right to reparation before the International Criminal Court, see Donat-Cattin 2008, Art. 75, at 1400-1402.

⁶³¹ With regard to child participants, see among other decisions concerning child victims of the recruitment crime, ICC-01/04-505, paras. 91, 93, 95, 97, 99. Children as indirect victims - being the immediate family member and dependent of a deceased person often results in personal harm as a result of the death, see ICC-01/05-01/08-320, paras. 41-51. The ICC Registry only provides for general statistical information on the number of applications for reparations. Registry Facts and Figures - facts up to date as of 30 September 2010, <http://www.icc-cpi.int/NR/rdonlyres/F67584DE-F045-45E2-9503-8F4D16B3DEAA/282642/RegistryFactsandFiguresEN.pdf>.

conclusions can be drawn from the practice of Trial Chamber I as regards reparation claims submitted by children against *Thomas Lubanga Dyilo*. In this case, the Registry informed Trial Chamber I that of the 85 applications which have been submitted in total, 77 applications for participation in reparation proceedings have been submitted by victims or on behalf of victims who argue they were below the age of 15 years at the time of their recruitment as a child soldier.⁶³² On 28 March 2012, the Registry of the ICC reported to Trial Chamber I that,

‘[o]f the 85 applications, 53 have been introduced by women and 32 by men; 77 applications have been submitted by or on behalf of persons claiming to be under the age of 15 at the time of the events, seven by parents of such persons and one school Director.’⁶³³

It is noteworthy in this regard that Trial Chamber I, in the decision of 7 August 2012, underlined the importance of ensuring the *accessibility* of the proceedings by not only providing proper information, but also by taking into account the views of the child. The Chamber pointed out that,

‘[t]he victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective. [...]’. The Court shall provide information to child victims, their parents, guardians and legal representatives about the procedures and programmes that are to be applied to reparations, in a form that is comprehensible for the victims and those acting on their behalf. The views of the child are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity.’⁶³⁴

Child victims thus indeed managed to file their applications. The large majority of victims that filed applications for reparations concerns the direct victims of *Thomas Lubanga Dyilo*, namely child victims who were recruited when below the age of fifteen years.

Noteworthy in this regard is that Trial Chamber I unmistakably pointed out that not only those victims who had already participated in the criminal proceedings against *Thomas Lubanga Dyilo* or who had applied for reparations through the application form could participate. Instead, the Chamber held that,

‘[a]ll victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. Notwithstanding the submissions of the defence and the legal representatives of victims, it would be inappropriate to limit

⁶³² ICC-01/04-01/06-2847, para. 9. Until 17 August 2012, 86 applications have been submitted. See, ICC-01/04-01/06-2906.

⁶³³ ICC-01/04-01/06-2847, para. 9.

⁶³⁴ ICC-01/04-01/06-2904, paras. 203, 214-215.

reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.⁶³⁵

It seems that the Court encourages far more victims to participate in the reparation process than limiting the participation to the small group who already successfully applied. It is laudable that the Chamber did not limit the potential group of beneficiaries of reparations in the *Lubanga* case to those victims who were participating in the proceedings at the time of the decision but invites all victims qualifying as direct and indirect victims of the charged crimes.⁶³⁶ As a result of this positive attitude of the Chamber as regards those victims who have not already participated in the course of the criminal proceedings, the potential group of beneficiaries of reparations is clearly not limited to those victims who participated in the course of the criminal proceedings.

The child claimant can expect to be confronted with similar, if not the same, constraints as in criminal proceedings (*Chapter Three*) when seeking access to reparation proceedings. This assumption can be made since in principle the child has to communicate his/her request for reparations to the Court through the earlier addressed joint application form.⁶³⁷

The Chamber pointed out in the same decision that,

[t]he victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.⁶³⁸

Such a victim-centred approach seems to minimise the potential advantage of having already participated during the criminal proceedings. This also means that the added value of child participation in the course of the criminal proceedings, may be questioned even more, since, as was established in *Chapter Three*, participation in the criminal proceedings cannot be considered to be generally in the best interests of the child.

On the other hand, the potential advantage of prior participation may, amongst others, be seen in the fact that in cases which do not lead to a conviction of the alleged perpetrator, further participation and thus hearing of victim's voices is impossible. Waiting until the commencement of reparation proceedings to convince

⁶³⁵ ICC-01/04-01/06-2904, para. 187.

⁶³⁶ ICC-01/04-01/06-2904, para. 194.

⁶³⁷ Similarly, aspects related to child victims' representation and the provision of legal aid can also be expected to reoccur. Since this issue has been analysed in relation to the child participant in *Chapter Three*, the following sections are foremost limited to those child-specific particularities that have not been addressed within the context of the criminal proceedings.

⁶³⁸ ICC-01/04-01/06-2904, para. 203.

the Court of victim's alleged suffering entails therefore the risk of never being heard by the International Criminal Court. Furthermore, participation during the criminal proceedings might, which has, however, not yet been proven, pave the way for a stronger position in the course of reparation proceedings. After all, as a result of their successful prior participation, victim's allegations and claims have already been raised and thereby drew the Court's attention to their individual harm suffered.

Moreover, considering that Trial Chamber I ruled that it is not at all examining those requests for reparations which have been submitted to the Registry prior to this decision, it seems that waiting for the public debate which is held at local level constitutes an opportunity for victims to claim remedies which is a lot easier than applying for reparations prior to the local activities (section 5.4.3 Implementation).⁶³⁹ As the localities should be those which have been mentioned by Trial Chamber I in the judgment and where the crimes for which *Thomas Lubanga Dyilo* has been convicted were committed, the ICC and the potential benefit of reparation are brought close to the victims.⁶⁴⁰ In particular for children, the closeness might constitute an opportunity to submit reparation claims which is far more realistic than trying to apply for reparation proceedings via the formalistic avenue and far away in The Hague.

The aforementioned decision of Trial Chamber I dated 7 August 2012 on the principles and procedures to be applied to reparations, as will be shown throughout this chapter, does, in addition to the major silence of the procedural regulation as regards reparations and in particular child specific aspects, not provide for extensive insight into child-specific challenges the child is and can be expected to be confronted with. Those issues, which might arise with regard to the child in the course of reparation proceedings, have therefore (thus far) not been mirrored extensively in the practice of the relevant Chambers. The analysis of the ICC's reparation scheme (to a large extent) can, as a consequence of the aforementioned gaps in law and in practice, only attempt to anticipate on the current and future challenges the child is likely to be confronted with when requesting reparations.⁶⁴¹

The following sections examine under which conditions, whether and in which form child victims may claim child-specific reparations before the ICC and to what extent a modified approach is required for children in contrast to adults. The section concludes with an examination of the issues concerning the implementation of reparation awards.

Aspects addressed include the child-specific forms of reparations (5.4.1), the eligibility to these (5.4.2) and difficulties in relation to the implementation of

⁶³⁹ The Chamber instructed the TFV to consider these applications, see ICC-01/04-01/06-2904, para. 284. With regard to the public debates at local level, see, para. 282.

⁶⁴⁰ Ibid., para. 282.

⁶⁴¹ Similarly, Ferstman & Goetz 2009b, at 324-333.

reparation awards (5.4.3). The following sections therefore examine whether the ICC, first of all, is the ICC advised to provide different forms of reparations to children compared to other categories of victims? Secondly, should the ICC introduce eligibility criteria for child claimants in order to benefit from child-specific reparations. Finally, is it also necessary to adjust the procedures regulating the implementation of reparation when children are the beneficiaries? This analysis thereby aims to provide insights into the underlying question whether at all or to what extent child participation in reparation proceedings before the ICC is in the best interests of the child or perhaps dispensable for providing child victims with an international remedy?

5.4.1 Forms of reparations

As the Rome Statute and the related procedural rules do not provide for extensive guidance on the forms of reparations - especially not in relation to the child claimant – selected legal documents, the practice of various TRCs and the Inter-American Court of Human Rights is referred to as a yardstick for an evaluation of the ICC reparation scheme as far as the child claimant is concerned. While limited guidance is provided in the final report of the Liberian TRC, the final report of the Sierra Leonean TRC constitutes, up till now, the only TRC report which addresses in more detail children as beneficiaries of specific forms of reparations.⁶⁴²

Reparations share the same purposes for both adult and child victims of international crimes, such as undoing injustice, the restoration of justice and annihilating the consequences of the wrongful act(s). It will be established in turn that in addition to the commonly shared objectives, reparations awarded to children are to be made in a child-sensitive form in order to constitute an effective remedy for children from a substantive perspective.⁶⁴³ This means that while the award of reparations shares a common objective for adult and child victims, the nature of reparations to be provided, as will be seen, differs between adult and child victims.

General aspects concerning the forms of reparations

The central provision concerning reparations, which is applicable to all claimants, can be found in the Rome Statute. Article 75 of the Rome Statute states that,

‘[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’

⁶⁴² Children also seem to participate in the statements sessions of the Kenyan Truth and Reconciliation Commission, <http://www.tjrkenya.org/>. For general information on the establishment, mandate and criticism of the Kenyan TRC see, Reliefweb Kenya; Amnesty International Kenya 2008.

⁶⁴³ Ferstman, Goetz & Stephens 2009, at 24-25. See for example Principles 14-15 of the 2005 UN Basic Principles. For a more detailed overview of the purposes of reparations, see Dwertmann 2010, at 37-43; Magarrell 2009, 2; Shelton 2006, at 6-10.

The wording of Article 75 Rome Statute stipulates that the forms of reparations are not limited to restitution, compensation and rehabilitation, which have primarily been developed in the course of State Responsibility and explicitly defined in the UN Basic Principles.⁶⁴⁴

As regards a definition of these forms of reparation, the 2005 UN Basic Principles are useful to refer to. The Basic Principles define restitution, compensation, rehabilitation and satisfaction as follows:

‘19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law [...].

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.’

Article 75(2) prescribes furthermore that a conviction constitutes the necessary precondition for a reparation award. Accordingly, after the conviction of an alleged perpetrator, the Court may order individual awards directly against the convicted person or deposit a(n) (individual or) collective award with the Trust Fund which has been established for the benefit of victims and mandated to assist the Court in reparation issues.⁶⁴⁵

⁶⁴⁴ General Assembly Resolution 60/147 of 16 December 2005, para. 19-22. For further discussion of the types of restitution, rehabilitation and compensation, see, Donat-Cattin 2008, Article 75, at 1403-1404. Dwertmann 2010, at 15-16, 51-56. For further information on the doctrine of State Responsibility, see Bassiouni 2006, at 205-231. As the forms of reparations before the ECCC are mainly to be suggested by the lawyers representing civil parties in the proceedings, the current research does not address the details of this specific reparation scheme. For further information see, FIDH 2011.

⁶⁴⁵ As the ECCC do not have a trust fund for victims and considering that most of the (alleged) perpetrators are indigent and bearing in mind the fact that the ECCC are not mandated to award individual reparations (being limited to collective and moral reparations, ECCC Internal Ruler 23(1)(a) and (b)), the reparation scheme and the potential forms of reparations to be awarded by the ECCC are not addressed within the ambit of this research. Arts. 75(2) and 79 Rome Statute; Rules 97 and 98 of the 2002 Rules of Procedure and Evidence of the International Criminal Court. Rule 98 states that, ‘1. Individual awards for reparations shall be made directly against a convicted person. 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. [...]. 3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate.’ Assembly of State Parties, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Resolution ICC-

Considering that most of the alleged perpetrators in the pending criminal proceedings before the ICC have provisionally been found wholly indigent, with the exception of *Jean-Pierre Bemba Gombo*, reparations in the form of compensation - if restitution is at all possible (which is rather unlikely bearing in mind the underlying crimes) - is in the majority of cases not feasible.⁶⁴⁶ Neither is it conceivable that those persons are able to provide for rehabilitation – a form of reparations which is more suitable in cases of State Responsibility, which is a type of responsibility not at issue in ICC proceedings which is limited to the prosecution of individuals.⁶⁴⁷ Individual awards for reparations which are made directly against a future convicted person are, therefore, most likely to be ordered in other forms of reparations such as satisfaction.⁶⁴⁸

Bearing the forgoing in mind, it is understandable why Trial Chamber I came to the conclusion that collective reparations, which are to be provided through the Trust Fund for Victims, are to be preferred in the *Lubanga* case. The Chamber ruled that,

‘[g]iven the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified. [...] The convicted person has been declared indigent and not assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as public or private apology to the victims, is only appropriate with his agreement’⁶⁴⁹

The Trust Fund for Victims (TFV) may indeed be more suitable and capable of providing for collective awards and the other forms of reparation when, for instance,

ASP/1/Res.6, adopted at the 3rd plenary meeting, on 9 September 2002. The mandate of the Trust Fund also provides for the disbursement of reparations to individuals, see, Regulation 59-68 of the 2005 Regulations of the Trust Fund for Victims, ICC-Asp/4/Res.3 See for further information, Shelton 2006, at 230-238.

⁶⁴⁶ ICC-01/04-01/06-63; ICC-01/04-01/07-79; ICC-01/04-01/07-298; ICC-01/05-01/08-76. ICC-01/04-01/06-2806, para. 10. Trial Chamber I also ruled that restitution is not very likely to be an achievable form of reparations in the *Lubanga* case, see ICC-01/04-01/06-2904, paras. 223-225.

⁶⁴⁷ Art. 25(1) in conjunction with art. 26 Rome Statute. The forms of reparations as defined in the UN Basic Principles are considered to be forms of reparations which are available in cases of state responsibility, see Gillard 2003, at 535. Dwertmann 2010, at 129-149.

⁶⁴⁸ Art. 75(2) Rome Statute in conjunction with Rule 94(1)(f) of the 2002 Rules of Procedure and Evidence of the International Criminal Court. Dwertmann 2010, at 150-159. The 2005 UN Basic Principles define satisfaction as follows: ‘22. *Satisfaction* should include [measures such as] (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth [...]; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, [...]; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; [...], para. 22.

⁶⁴⁹ ICC-01/04-01/06-2904, paras. 219, 269. See also, para. 274.

the number of victims render individual awards inappropriate.⁶⁵⁰ Noteworthy in this regard is that in cases where the ICC orders that a reparation award against a convicted person is to be deposited with the Trust Fund, the Board of Directors may decide to complement its ‘resources collected through awards for reparations with “other resources of the Trust Fund.”’⁶⁵¹ At the beginning of 2011, the total sum of those ‘other resources’ which are comprised of voluntary contributions from governments, international organisations or individuals, amounted to € 5.8 million. A further increase of voluntary contributions has been pointed out in the Draft Strategic Plan of the Trust Fund in 2013.⁶⁵² The largest amount of these resources (€ 4.45 million) has been allocated to activities in the Democratic Republic of the Congo, Northern Uganda and the Central African Republic and may be spent within the ambit of the second mandate of the Trust Fund.

Regulation 50 of the Regulations of the Trust Fund state that the Trust Fund is also mandated to provide

‘physical or psychological rehabilitation or material support for the benefit of victims and their families.’⁶⁵³

In contrast to the Trust Fund’s mandate in relation to reparation orders of the Court, this mandate may be implemented irrespective of a prior conviction and reparation award.⁶⁵⁴ In addition to the abovementioned amount of resources allocated to particular situations pending before the ICC, currently € 1.5 million has specifically been allocated for the award of future reparations – an increase compared to 2010 where the resources for reparations amounted to € 750.000.⁶⁵⁵ It needs to be

⁶⁵⁰ Regulation 69 Regulations of the 2005 Regulations of the Trust Fund for Victims.

⁶⁵¹ Regulations 54 and 56 Regulations of the 2005 Regulations of the Trust Fund for Victims.

⁶⁵² <http://www.trustfundforvictims.org/news/tfv-board-directors-approves-draft-strategic-plan-raises-reparations-reserve-€-1-million>.

⁶⁵³ For an overview of the Trust Fund’s assistance to children and youth, see The Trust Fund for Victims, *Assistance to children and youth*, <http://www.trustfundforvictims.org/projects#Assistance%20to%20children%20and%20youth>. As stated in the Fall 2010 Programme Progress Report of the Trust Fund for Victims, ‘[t]he dual mandate of the TFV envisions the possibility for victims and their families to receive assistance separate from and prior to a conviction by the Court, using resources the TFV has raised through voluntary contributions. While this support is distinct from awards for reparations, in that it is not linked to a conviction, it is key in helping repair the harm that victims have suffered [...]. [T]he TFV can provide assistance to victims in a more timely manner than may be allowed by the judicial process. Secondly, assistance is targeted to victims of the broader situations before the ICC, regardless of whether the harm they suffered stems from particular crimes charged by the Prosecutor in a specific case.’ Trust Fund for Victims, Programme Progress Report, *Learning from the TFV’s second mandate: From implementing rehabilitation assistance to reparations* (2010), <http://www.trustfundforvictims.org/>, at 47. For a more recent overview of the activities of the Trust Fund, see Trust Fund for Victims, Programme Progress Report Summer 2012.

⁶⁵⁴ Regulations 50 (a) and (b) of the 2005 Regulations of the Trust Fund for Victims. 2010 Trust Fund for Victims, Programme Progress Report, at 40.

⁶⁵⁵ Regulations 21 and 47, 48 of the 2005 Regulations of the Trust Fund for Victims. 2010 Trust Fund for Victims, Programme Progress Report, at 40, <http://www.trustfundforvictims.org/financial-info>.

underlined that this amount constitutes the available Trust Fund resources for reparation awards at a specific moment for all cases before the ICC – while an exact number of all potential cases before the ICC cannot be given in advance. Bearing in mind the indigence of most alleged perpetrators, this limited amount is unlikely to be sufficient to finance the entirety of potential (individual or collective) reparation claims of large numbers of claimants if, in particular, compensation is requested. As a result, the need to complement the reparation allocated resources with ‘other resources’ of the Trust Fund for Victims does not only seem to be expectable, but has also been suggested by Trial Chamber I in the *Lubanga* case.⁶⁵⁶

Child specific aspects concerning the forms of reparations

With regard to the forms of reparations which could be considered to be adequate for child victims of international crimes, it is noted at the outset that due to children’s steady psychological and physical developmental status (as reflected in the principle of the evolving capacities), reparations for children should take sufficiently into account the particular needs of children as reflected in the

‘interdependence of children’s political, civil, economic and social rights [...] and consider children who have experienced violations of a broad set of rights [...].’⁶⁵⁷

The *Key Principles for Children and Transitional Justice* request in particular that,

‘[r]eparations programmes should be based on a careful assessment of the harms suffered by girls and boys during armed conflict and political violence to determine their individual and collective needs. [...] In determining reparations for children, due account should be taken of the relevant provisions and principles of the CRC, such as the right to health care and education and the rights of children with disabilities to special care.’⁶⁵⁸

The Registry of the ICC pointed out in the *Second Report on Reparations* in the *Lubanga* case that,

‘[f]or children who lose their childhoods through conscription, and the opportunities and possibilities it affords, loss of social, education and familial opportunities are a key form of harm inflicted through conscription. Such forms of harm have been widely recognized in international jurisprudence.’⁶⁵⁹

Accordingly, wiping out the consequences of the wrongful act(s), for instance, requests that reparations awarded to children are to be targeted in the sense that their particular needs are accommodated. It thereby needs to be taken into account

⁶⁵⁶ ICC-01/04-01/06-2904, paras. 271-274.

⁶⁵⁷ UNICEF 2010a, at 55.

⁶⁵⁸ UNICEF 2010b, at 415. Shelton 2006, at 298.

⁶⁵⁹ 01/04-01/06-2806, para. 21.

that full reparation of the harm suffered by the child during armed conflict cannot easily be imagined; moreover it may not even be possible.⁶⁶⁰ Repairing the loss of family members, irrecoverable bodily harm and foremost the loss of a person's (entire) childhood are in itself not eligible for recovery.⁶⁶¹

The *International Center for Transitional Justice* held in this regard in a 2011 report that,

'[t]he right to reparations extends to all victims of gross human rights violations, including children. Few reparations programs have explicitly recognized children as beneficiaries, however, and others have struggled with effectively designing and administering child-sensitive reparations. Child-specific reparations are crucial because they reaffirm the rights of children in face of past violations, attempts to remedy lost opportunities and provide for their futures.'⁶⁶²

It is therefore argued in this research that the distinguishing factors between adult and child specific forms of reparations concern in particular the following three aspects, namely, access to and provision of child specific health care, education and family live/shelter. While all victims of international crimes might be in need of health care, access to health care is to be provided in a manner which also enables children to benefit from health care measures. This is because a large group of children, depending on the individual evolving capacities, is likely to be dependent on adults when seeking access to health care. In other words, in situations in which support persons are not at hand, a particular group of child victims of international crimes might face difficulties in accessing health care measures. Furthermore, not being in the position to benefit from health care measures which also aim to provide assistance as regards the harm which requests an immediate response exposes children to the risk to suffer even further from neglect as one of the potential consequences of situations in which international crimes are committed.⁶⁶³

The second aspect which calls for child specific forms of reparations relates to children's need to benefit from educational training. While education is usually delayed if not even provided at all during and as a result of conflict situations, children who are for these reasons prevented from participating in educational programs are particularly disadvantaged. This is, for instance, because sufficient educational training is, *inter alia*, crucial for enabling the child to build up a stable future in particular in economic terms.⁶⁶⁴ Considering the before mentioned, the more important it is that children are entitled to receive forms of reparations which aim to fill the gaps of educational training in order to enable the child to build up a stable future on the basis of those skills which are taught during educational trainings. In contrast to children, adults (generally speaking though) face not the

⁶⁶⁰ UNICEF 2010a, at 51. Mazurana & Carlson 2010, at 25.

⁶⁶¹ Mazurana & Carlson 2009, 162-214.

⁶⁶² Aptel & Ladisch 2011, at 4.

⁶⁶³ Tyler, Allison and Winsler 2006, 3.

⁶⁶⁴ Hammarberg 1990, 100.

difficulty of having missed educational training when having reached adulthood prior to the commencement of the conflict situation. As a result, they are in principle capable to rebuild their economic existence based on the educational and vocational training they have benefitted from when peace is re-established. Child specific forms of reparations should therefore include educational training which addresses the individual needs of the victims, taking in particular into account the particular educational phase the child claimant has not been able to benefit from as a result of having suffered from international crimes. This also means, that young adults who have been victims of a crime within the jurisdiction of the ICC and who have been prevented from participating in educational programs during childhood as a consequence of the conflict situation should also be able to come into consideration for educational programs being award despite having reached majority in the meanwhile.

The third distinguishing core factor relates to children's need to be provided with sufficient shelter as a measure which could be provided for by reparation awards. While family life cannot per definition be expected to be re-established after the course of conflict situations, providing children with shelter in terms of a safe environment constitutes the core condition in addition to essential health care measures. Without a safe environment, the healthy development of the child in accordance with their evolving capacities is not easy to be ensured if not even impossible.

The aforementioned pillars of forms of reparations to children complements the approach developed by the inter-American Court, the so called 'damage to a life plan' concept, which also calls for a holistic view as regards the forms of reparations to be provided to child victims.⁶⁶⁵

Turning next to the characteristics of ICC reparation proceedings, when considering potential forms of reparations, huge numbers of victims, including child victims, are to be expected to claim reparations before the ICC. Reparations in the form of compensation, in particular individual cash payments, are less likely to be awarded to (individual) children. While the example of Germany shows that a large number of victims as such does not prevent cash payments to be awarded, as illustrated by the reparation agreement which was concluded between Israel and the Federal Republic of Germany in 1952 but also the 772 million Euros which Germany agreed in 2013 to award to Holocaust survivors, such approach, at least to date, seems less likely in the context of ICC proceedings.⁶⁶⁶ This is because the currently amount of financial resources which are at the disposal for victims in the course of ICC proceedings, make it simply not likely that individual cash payments constitute a realistic form of reparation to be awarded.⁶⁶⁷ In addition, considering the

⁶⁶⁵ See in this regard, Chamberlain 2014, at 212.

⁶⁶⁶ Honig 1954, 564; Spiegel 2013 <http://www.spiegel.de/international/germany/germany-to-pay-772-million-euros-in-reparations-to-holocaust-survivors-a-902528.html>.

⁶⁶⁷ The final report of the Sierra Leonean TRC underlined that reparations in the form of cash payments are not generally considered to be appropriate bearing in mind the large number of

importance of health care, education and shelter as forms of reparation for children, it may generally be questioned whether cash payments are adequate for young claimants.

Considering furthermore the indigence of the majority of the (alleged) perpetrators currently facing judicial proceedings before the ICC, it is neither likely that the ICC will award reparations in the form of restitution and rehabilitation if not being deposited from the Trust Fund for Victims.

Alternatively, reparations in the form of satisfaction and/or guarantees of non-repetition could constitute forms of reparations directly ordered against the convicted person since these forms of reparations can be offered independently of the financial constraints of the convicted person. The Registry of the ICC suggested in its Second Report on Reparations that collective awards could even be provided to a group of victims “as a Whole”. It underlined that,

[i]n the context of the Lubanga case specifically, collective award to a group of victims as a whole would for instance be appropriate in a situation where a large number of children had been abducted for purposes of child conscription from a particular locality resulting in enduring harm to the social fabric of the community.⁶⁶⁸

Legal research and international practice on how a child’s needs could be reflected in child-specific forms of reparations is, to date, available to a very limited extent. The thus far available guidance on child-specific forms of reparations is addressed in turn. Particular attention has been granted to child beneficiaries within a few international documents. More extensive guidance can be found in the final report of the Sierra Leonean Truth and Reconciliation Commission.⁶⁶⁹ The form of reparation awards to child claimants therefore confronts the ICC with the difficulty that major guidance, in particular within the context of judicial proceedings, is non-existent. This omission, however, constitutes at the same time a challenge for the ICC to promote that children, for the first time in international criminal justice, will benefit from child-specific and therefore child-sensitive reparation awards.

victims and, in particular, the expressed preference of individual victims to receive reparations in the form of social services, see TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 245.

⁶⁶⁸ ICC-01/04-01/06-2863, para. 73. See also, Trial Chamber I’s elaboration, see ICC-01/04-01/06-2904, paras. 226-231.

⁶⁶⁹ Mazurana & Carlson 2010, at 1-2. In addition, the following truth commissions also mentioned children as particular beneficiaries of reparations: South Africa, Guatemala (Commission for Historical Clarification and Recovery of Historical Memory Project), Peru, Timor-Leste and Liberia, UNICEF 2010a, at 88. The Sierra Leonean TRC, however provided for the widest range of crimes, including sexual and gender-based crimes, that qualify children to benefit from reparation programmes (individual reparation awards have, however, not yet been implemented). For further information see, Mazurana & Carlson 2010, at 12-14. For an overview of the mandates of the various TRCs, see Parmar 2010.

Little guidance as to the forms of reparations can be found, for instance, in the Convention on the Rights of the Child. Article 39 of the Convention on the Rights of the Child points out that,

‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.’

Article 6(3) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict reflects a similar request that children are in need of targeted reparations by requesting States Parties to

‘take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.’⁶⁷⁰

Similarly, the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* suggest that,

‘reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed.’⁶⁷¹

These international documents establish that reparations to children ought to be ordered in the form of rehabilitation measures if restitution or financial compensation is not conceivable. The Registry of the ICC, however, critically pointed out that it is to be taken into account that,

‘[i]n the specific context of the Lubanga case a number of factors are significant as regards the practicability or feasibility of individual or social rehabilitation as a form of reparation. The first is cost. While the provision of medical rehabilitee, including measures such as prosthetic treatment, undoubtedly has the potential to substantially alleviate the harm suffered by child soldiers, some of whom have been grievously injured in the course of hostilities, it is also a resource intensive form of reparation. For instance, the establishment and operation of some form of medical service capable of providing various forms of assistance to an appropriate category of

⁶⁷⁰ 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222.

⁶⁷¹ ECOSOC Guidelines 2005, para. 37.

victims would require trained and skilled professional staff, certain forms of specialized equipment might also be necessary depending on the help the programme was established to provide and such a programme could also be expected to attract significant operational costs. Moreover, the greater the number of victims such a programme sought to assist the greater these costs could be expected to be. Given the resource intensive nature of rehabilitation programmes, it should therefore be born in mind that the establishment of such a programme may have implications for the other forms of reparation that it would be possible to award and, more generally, for the number of victims whom it would be possible to assist.⁶⁷²

Clearly, the Registry underlines the financial limitations which have implications for the forms of reparations to be awarded. Compared to the reparation which Germany agreed upon to award from 2014 onwards to Holocaust survivors, which, *i.a.*, explicitly covers the medical treatment of the victims, the provision of medical treatment in the case of former child soldiers confronts the ICC with serious difficulties.⁶⁷³ A failure to provide adequate medical treatment, in particular the treatment of those child victims who are in need of prosthetic treatment might, if not being provided, lead to meaningless reparation from a child perspective. This may be assumed, because it is a fact that the physical recovery constitutes the *condition sine qua non* for benefitting from any other form of reparation. Deciding upon the forms of reparation to be awarded in light of the most immediate needs of child victims therefore seems to be a necessity if reparations are to be effective from the victim's perspective. In other words, educational training as a form of reparation, despite being of crucial importance for child victims, can be expected to not be of use for the beneficiaries if physical constraints which are the result of the victimisation hinder the victim to access the training.

Rehabilitation, as was explained before, is furthermore not realistically a form of reparation which convicted perpetrators are frequently able to provide. Notwithstanding the lack of guidance of these documents in terms of reparations ordered directly against a convicted person, they nevertheless underline the importance of rehabilitation and reintegration measures for child victims, which has, indeed also been recognised by Trial Chamber I in the *Lubanga* case.⁶⁷⁴

In addition to the international legal documents that explicitly refer to the child in terms of reparation, the final report of the Sierra Leonean Truth and Reconciliation Commission provides for further guidance by recommending particular forms of reparations to child claimants.⁶⁷⁵ While selective forms of reparations which have

⁶⁷² ICC-01/04-01/06-2863, para. 96.

⁶⁷³ Spiegel 2013.

⁶⁷⁴ ICC-01/04-01/06-2904, paras. 232-236.

⁶⁷⁵ It needs to be noted that the recommended reparations in the final report of the Sierra Leonean TRC still have to be implemented by the government of Sierra Leone. Most TRCs failed to specifically address the issue of reparations to be awarded to children. See in this regard, Mazurana & Carlson 2010, at 9. The Commission was mandated to recommend reparations. See

been recommended by the TRC to the Government of Sierra Leone could also be directly ordered against convicted persons in the context of ICC reparation proceedings, the majority of reparations recommended by the Sierra Leone TRC are, due to the collective character and financial complexity, more suitable to be deposited with the Trust Fund for Victims if similarly applied within ICC reparation proceedings.

Depositing reparation orders with the Trust Fund constitutes an option, which would enable the Court to address the needs of large groups of victims, including particular measures for children. It is to be noted, that the mandate of the Trust Fund in this particular context constitutes a welcome possibility in order to provide targeted reparations to the victims. This position is to be distinguished from the earlier made general criticism (section 5.3) as regards the approach of Trial Chamber I taken in the *Lubanga* case by transferring the decision on reparation awards as such to the TFV. While the Trial Chamber's approach taken is criticised for transferring judicial responsibilities to a non-judicial organ, the decision on the actual forms of reparation is seen as a task which requests especially insights into the substantive needs of the victims and not the question whether the victim fulfils the legal requirements for coming at all into consideration for reparation. A decision by the TFV on the forms of reparation which reflect most adequately the needs of the victim therefore constitutes a decision which the TFV could be equipped and mandated to take.

An appropriate form of reparation awards ordered directly against a convicted person could, for instance, be of symbolic nature. The TRC of Sierra Leone suggested that individuals could be ordered by the ICC to acknowledge their crime(s) committed against children and publicly apologise.⁶⁷⁶ The value of such apology is, however, prior to such an order to be assessed on a case-by-case basis. This is because a forced apology, which does not reflect that the perpetrator means to honestly apologise is of any value to the victims.

The majority of recommendations made by the Sierra Leonean Commission relate to health or education benefits and are therefore suitable to provide the ICC with guidance if reparation orders are deposited with the Trust Fund for Victims.⁶⁷⁷ The Sierra Leonean TRC recommended measures such as:

- assistance to children branded with scars
- health care for amputees or other war-wounded children
- health care for child victims of sexual violence

Article XXVI of the 1999 Lomé Peace Agreement (Ratification) Act and section 7(6) of the 2000 Act to establish the Truth and Reconciliation Commission in line with Article XXVI of the Lomé Peace Agreement and to provide for related matters (2000 TRC Act).

⁶⁷⁶ TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 263.

⁶⁷⁷ *Ibid.*, at 250. See also, for the particular need of war-affected children to receive reparations in the form of educational training, Capone 2010, 98-110.

- free counselling and psychological support
- free education at a basic level for all children
- free education until senior secondary school level for particular groups of children, including war-wounded children, orphans, abducted children and former child soldiers.⁶⁷⁸

By recommending specific reparations for children, the Commission recognised that children constitute a particular group of beneficiaries which are in ‘dire need of urgent care [...] and specific measures of reparations’.⁶⁷⁹ The Sierra Leonean TRC concluded that it is also necessary to distinguish among children themselves and called for specific forms of reparations for particular groups of children. The final report points out in this regard that,

‘[w]hereas many of the recommendations of the Commission refer to all the children in Sierra Leone, the Commission is nevertheless convinced that some specific reparations measures need to be taken in respect of those categories of children who suffered during the war or that still suffer from the consequences of the war such as abducted children, forcibly conscripted children and orphans. The Commission places particular focus on restoring lost educational opportunities for children.’⁶⁸⁰

Likewise the final report of the Liberian TRC recommended particular forms of reparations to be awarded to specific groups of children. The Commission pointed out that,

‘[w]hile reparations generally should avoid targeting specific categories of children, certain groups of victims might need special attention. In particular, reparations should include specific provisions for those victims who have been falling through the cracks of specific post-conflict programs targeted at children, notably former CAFF [children associated with the fighting forces] who have not gone through the DDDR process, girls who have been victims of sexual violence, rape, and sexual slavery, children separated from their parents and family members, children with severe psychosocial trauma and children with social adaption and reintegration problems.’⁶⁸¹

In line with the above, the Sierra Leonean and Liberian TRCs, in contrast to other TRCs, also recommended particular reparations for child victims of sexual and gender-based violence, such as reparations which provide treatment to the harm suffered as a result of maltreatment of the reproductive system of girls and young

⁶⁷⁸ TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 258-259, 261.

⁶⁷⁹ *Ibid.*, at 242-243.

⁶⁸⁰ *Ibid.*, at 243.

⁶⁸¹ Republic of Liberia Truth and Reconciliation Commission, Volume Three: Appendices, Title II: Children, the Conflict and the TRC Children Agenda (2009), <http://trcofliberia.org/reports/final-report>, at 108.

women, including HIV-testing as victims of gender-based violence are more likely to be HIV positive.⁶⁸²

The ICC could be particularly inspired by the final report of the Sierra Leonean TRC when ordering future reparation awards for a variety of reasons: Firstly, the ICC is likely to be confronted with similarly large numbers of claimants - reparation orders beyond the form of satisfaction or guarantees of non-repetition when ordered directly against the convicted persons are therefore not likely to constitute suitable forms of reparations.

Secondly, the focus of the Sierra Leonean TRC could encourage the ICC to deposit reparation awards with the Trust Fund in order to encourage a collective approach towards children by, for instance, ordering measures relating to the particular health and educational needs of child claimants. Such a need has not only been explicitly referred to the Registry of the ICC, but also by the OPCV which represents child claimants in the proceedings against *Thomas Lubanga Dyilo*.⁶⁸³ Thirdly, as in the case of the Sierra Leonean TRC, the ICC might also be advised to distinguish between the needs of particular groups of children. In other words, the ICC is likely to be confronted not only with child claimants who have perpetrated themselves international crimes as former child soldiers – being thus perpetrator and victim at the same time - but also child victims or (victim) witnesses of other crimes within the jurisdiction. Forms of reparations will therefore need to reflect the differences which flow from the various procedural capacities. While there might be a large number of child victims who are in need of medical treatment – irrespective of their procedural capacity – former child soldiers might be in need to benefit in particular from demobilisation, disarmament and reintegration measures. They are thus not only likely to be in need of health and educational measures. This particular group of child victims may therefore be said to be in need of a broader variety of reparations compared to child victims of other international crimes. Children who are victims of other international crimes, such as sexual violence might be in need of particular psychological treatment instead. Consequently, the particular form of reparation for child victims is to be assessed on a case-by-case basis and should in particular focus on the immediate needs of the victim in order enable the victim to benefit from the awarded reparation.

The importance of child-specific measures and the effectiveness of addressing children's needs on a collective basis is also reflected in the current projects of the Trust Fund for Victims. These focus not only on counselling, vocational training and the reintegration of former child soldiers and/or abductees, but also on the measures to be taken for children orphaned by war, in particular the counselling and material support for family members who care for children who lost their parents

⁶⁸² See similar request, UNICEF 2010a, at 56. Mazurana & Carlson 2010, at 15. TRC Liberia, Volume Three: Appendix, at 108-109.

⁶⁸³ ICC-01/04-01/06-2863, paras. 47-61, 98-105.

during war.⁶⁸⁴ The Fall 2010 Programme Progress Report of the Trust Fund underlines that ensuring that large numbers of children benefit from the Trust Fund's projects does not entail that targeted, thus child-specific, measures cannot be provided at the same time. The Trust Fund describes its approach, namely 'targeting both specific categories and specific needs' using an example from one of its projects in Ituri, Eastern Congo:

'Many of these children were abducted into fighting forces, but others were made vulnerable by war in other ways: some lost their parents, some lost their entire families. In designing the project so that all of these children impacted by conflict are supported together, former child combatants can avoid the label of "child-soldier". This is especially important as one of the primary goals of reintegration programmes is to help young people escape stigma and discrimination from their families and communities.'⁶⁸⁵

With regard to the reintegration of former child combatants and abducted children, the TFV implemented particular projects which

'utilize a combination of individual and collective approaches whereby each youth is (1) provided with a kit containing most of the supplies needed for his or her livelihood rehabilitation activity of choice (such as a sewing machine for tailoring or goats for breeding), and (2) is integrated into a group with other youth implementing similar activities.'⁶⁸⁶

The Trust Fund decided to implement projects for child soldiers and/or abductees by combining individual approaches and programmes offered to communities after doing a survey among this particular group of victims.⁶⁸⁷ In Northern Uganda, on the other hand, the same group of victims indicated a preference for individual benefits.⁶⁸⁸ Thus, depending on the perception of former child soldiers in the specific post-conflict community - which is often determined by the role of family, communities and cultural aspects of a particular society - children benefited from individualised reparation projects. If considered more suitable, a combination with community projects were also implemented by the Trust Fund.⁶⁸⁹

This practice underlines, that generalised forms of child-specific reparations do not necessarily reflect the needs of children belonging to a particular post-conflict society. ICC awarded reparations targeting the needs of child claimants are

⁶⁸⁴ The Trust Fund for Victims, *Assistance to children and youth*.

⁶⁸⁵ Trust Fund for Victims, Programme Progress Report, *Learning from the TFV's second mandate: From implementing rehabilitation assistance to reparations* (2010), <http://www.trustfundforvictims.org/>, at 6.

⁶⁸⁶ *Ibid.*, at 13.

⁶⁸⁷ *Ibid.*, at 13. See similarly the request of the OPCV to implement a combination of individual and collective reparations in the *Lubanga* case, ICC-01/04-01/06-2863, para. 14.

⁶⁸⁸ *Ibid.*, at 14.

⁶⁸⁹ See with regard to the need to take sufficiently into account the role of family, community and culture when awarding reparations to children, Mazurana & Carlson 2010, at 19-21.

therefore also to be ordered in light of the specific needs of child claimants within particular conflict societies.

Taking a closer look at the decision of Trial Chamber I in the *Lubanga* case on the principles and procedure to be applied to reparations, it can be concluded that as a first step, the Chamber's approach is promising. Though only very briefly, the Chamber did explicitly state that the age of a child victim constitutes a crucial factor when deciding upon forms of reparations. The Chamber held that,

‘[p]ursuant to Article 68(1) of the Statute, one of the relevant factors – which is of high importance in the present case – is the age of the victims. Pursuant to Rule 86 of the Rules, the Court shall take account of the age-related harm experienced by, along with the needs of, the victims of the present crimes. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account. In reparations decisions concerning children, the Court should be guided, *inter alia*, by the Convention on the Rights of the Child and the fundamental principle of the “best interests of the child” that is enshrined therein.’⁶⁹⁰

Unfortunately, the Chamber did not elaborate in detail to what extent the Convention on the Rights of the Child and the principle of the best interests of the child are to be taken into account. Furthermore, the Chamber did not only underline the importance of reparations which adequately accommodate the suffering of victims of sexual and gender-based violence, but also called for a ‘specialist, integrated and multidisciplinary approach.’⁶⁹¹ Also a case-by-case approach has been indicated as being appropriate – without elaborating, however, on potential difficulties in achieving such an approach.⁶⁹² Forms, such as rehabilitation and reintegration programmes for former child soldiers, medical services and assistance with housing and education have – as was the case in the mechanisms addressed before – been suggested by Trial Chamber I as constituting adequate forms of reparations.⁶⁹³

5.4.2 Eligibility

As a preliminary note it is to be pointed out that the decision of Trial Chamber I of 7 August 2012 establishing the principles and procedures to be applied to reparations in the *Lubanga* case did not address any aspect relating to eligibility.⁶⁹⁴ One may therefore wonder whether eligibility is indeed to be expected to be an issue when child claimants participate in reparation proceedings. It is established in turn that this is indeed the case.

The silence of Trial Chamber I as regards eligibility criteria in this specific decision might be explained by the fact that parties and participants themselves did

⁶⁹⁰ ICC-01/04-01/06-2904, paras. 210-211.

⁶⁹¹ *Ibid.*, para. 207.

⁶⁹² *Ibid.*, para. 213.

⁶⁹³ *Ibid.*, paras. 216, 221.

⁶⁹⁴ ICC-01/04-01/06-2904.

not raise issues relating to the eligibility to child-specific forms of reparations. It might also be simply unconsciously that the Chamber did not rule on this aspect.

Based on the experience of the Sierra Leonean Truth and Reconciliation Commission, which is addressed in more detail in the previous section dealing with the forms of reparations, it can be argued that the eligibility for child specific-reparations constitutes an issue which also might arise in future ICC reparation proceedings. Considering in particular the large number of potential child claimants, the ICC might simply be compelled to introduce eligibility criteria in order to be able to adequately divide the available but limited sources among child claimants. Considering furthermore, that child claimants will usually, with the exception of the *Lubanga* case, will not constitute the only group of victims which is potentially entitled to receive reparations the Court can be said to be in even greater need to introduce eligibility criteria. This is because the simultaneous prosecution of other crimes besides the recruitment crime automatically widens the categories of potential claimants beyond the group of child claimants. In other words, in order to ensure that those child claimants who are in greatest need of child-specific reparation measures as a consequence of the harm suffered from an international crime will indeed receive such reparations, might deem it indispensable to introduce eligibility criteria.

At the same time, the application of eligibility criteria will most likely limit the group of potential beneficiaries. Such limitation will then also confront the Court with the difficulty to decide upon the question who can be considered to be in greatest need to benefit from child-specific forms of reparation. In line with the aforementioned, the Court can also be expected to be confronted with the question of whether child-targeted reparations are limited to the group of claimants below the age of eighteen or whether young adults might also be potential beneficiaries of child-targeted reparations. These questions, irrespective of the fact that it is not of a legal nature, unavoidably requests the ICC again, to look at a holistic approach when dealing with children in the course of the proceedings in order to implement a child-sensitive approach as regards the child claimant. As it has been established throughout this research, such child-sensitive approach is indispensable in order to adequately accommodate the child in the proceedings – be it as participant in the criminal proceedings or as claimant in reparation proceedings.

In contrast to the previous lack of child-specific regulation, selected TRC practice offers some reference on eligibility criteria. In addition to the limited guidance provided in the final report of the Liberian TRC, the final report of the Sierra Leonean TRC constitutes, up till now, the only TRC report which addresses in more detail children as beneficiaries of specific forms of reparations and provides guidance on the application of eligibility criteria.⁶⁹⁵ Truth and Reconciliation

⁶⁹⁵ Children also seem to participate in the statements sessions of the Kenyan Truth and Reconciliation Commission, <http://www.tjrkenya.org/>. For general information on the

Commissions, such as the TRC for South Africa, Peru or Timor-Leste mention children as beneficiaries, but do not provide guidance with regard to the particular aspect of eligibility.⁶⁹⁶

The Sierra Leonean TRC limited the group of child beneficiaries to particular groups of child victims, such as war-wounded victims, victims of sexual violence, children who were orphaned as a consequence of any abuse or violation within the TRC's mandate. In addition, the TRC set an eligibility condition as regards the age of child claimants. The Sierra Leonean TRC ruled that, firstly, the crime causing harm to the child victim should have occurred between 23 March 1991 (beginning of the conflict) and 1 March 2002 (lifting of state of emergency); secondly, only those children who were eighteen years of age or younger on 1 March 2002 were eligible for reparations for children.⁶⁹⁷ As a consequence, young adults who suffered from violations during their childhood but reached majority before 1 March 2002, were not considered to be eligible for those reparations which were particularly designed to address the needs of children.

The final report of the Liberian TRC, on the other hand, established that children *and* young adults should be eligible for child-specific forms of reparations. It stated that,

[r]eparations should aim at repairing the consequences of violations borne by children during the Liberian conflict. There should be symbolic and material reparations for Liberia's children *and* young adults' (emphasis added).⁶⁹⁸

Having reached majority, therefore, in view of the Liberian TRC, should not prevent young adults from being eligible to receive reparations which aim to repair the consequences of the wrongful acts committed against young adults during childhood. The TRC recommended in particular that lost educational opportunities should in particular be covered by reparations by providing additional schooling for those in need. The final report indeed underlines that such measures provided to young adults indeed bear positive consequences for the victims.⁶⁹⁹ Bearing in mind that young adults might still have child-specific needs and should therefore also be eligible for child-specific forms of reparations therefore requests that eligibility criteria do not prevent this particular group of victims from benefitting from child-specific forms of reparations.

The ICC might also be confronted with the need, in order to ensure the practicability of the reparation proceedings, to introduce eligibility criteria for

establishment, mandate and criticism of the Kenyan TRC see, Reliefweb Kenya; Amnesty International Kenya 2008.

⁶⁹⁶ UNICEF 2010a, at 88.

⁶⁹⁷ TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 248, 250. For an overview of the conflict, see TRC Sierra Leone Vol. 1, Chapter 1, Mandate, at 21-46.

⁶⁹⁸ TRC Liberia, Vol. 3: Appendix, at 107.

⁶⁹⁹ TRC Liberia, Vol. 3, Title II, at 100.

specifying the group of victims, including children, who are entitled to specific forms of reparations. A requirement which is based on a temporal element could be helpful in this regard. The period which has been determined to constitute the time frame in which the prosecutor investigated the charged crimes, as contained in the confirmation of charges decision, could for this purpose be referred to as the time slot. Eligibility for child-specific forms of reparations could thus be said to require that claimants have been a child at the moment of crime commission, which simultaneously falls within the period of the confirmation of charges decision. This solution would lead to the result that victims, despite having reached majority in the course of the proceedings, might nevertheless be entitled to request child specific forms of reparation. While Rule 85 RPE does not explicitly provide for such limitation, it could be argued that this limitation is within the object and purpose of this provision and victim participation as such, as it still enables all potential direct and indirect victims to claim reparations. Claiming reparations as such is thus not limited, only the entitlement to a particular form of reparations, namely those who are child-specific, is made dependent on this temporal requirement. That the overall group of victims is automatically limited by specific period stated in the confirmation of charges decision is a practical consequence which exists regardless of the nature of the proceedings (criminal or reparation proceedings). This is because participation in a specific case requires as such that victims comply with the temporal element as stated in the confirmation of charges decision as they would otherwise not qualify as victims of a crime within the jurisdiction of the ICC which is charged against an (alleged) perpetrator.

An upper age limit as introduced by the Sierra Leonean TRC with regard to claimants eligibility to request child-specific reparations, on the other hand, bears far-reaching consequences for children who have reached majority in the meantime but are nevertheless in need of reparations which target the particular needs attacked during childhood, and should therefore be avoided by the ICC. This is because, as has been elaborated in the previous section, victims, who have reached majority in the meanwhile might nevertheless be in need of child specific forms of reparations, such as educational training or particular medical treatment. Being limited to forms of reparation which do not address the particular needs of child claimants (independent of the fact that they might have reached majority in the meanwhile), and especially lost opportunities due to their suffering during childhood, entails the risk to not adequately enable these victims to effectively benefit from reparation awards. Such reparation awards would then not mirror a child-sensitive approach of the ICC.

In the reparation proceedings against *Thomas Lubanga Dyilo*, the competent Chamber should therefore hold that entitlement to child-specific forms of reparations is dependent on the specific age of a claimant at the moment of crime commission (which is also included in the confirmation of charges decision). Thereby, the Court will not exclude those victims from child-specific forms of

reparations who have reached majority during the time frame charged or within the course of the proceedings.

In conclusion, based on the practice of more experienced mechanisms it is argued that child claimants may in the future indeed be expected to be confronted with child-specific eligibility criteria in order to come into consideration for forms of reparations which address the particular needs of this group of victims. Examining carefully the practice of experienced mechanisms might therefore provide useful guidance for the ICC when determining who is to receive child-specific forms of reparations.

5.4.3 Implementation

General aspects of implementation

Concerning the previously examined aspects, the statutory provisions of the International Criminal Court largely remain silent on the implementation of reparation orders. If reparation orders are made against a convicted person or deposited with the Trust Fund for Victims, limited guidance on the modalities for the disbursement of reparations awards can be found in the Rome Statute or the Regulations for the Trust Fund For Victims.⁷⁰⁰ In addition, Trial Chamber I's decision of 7 August 2012 in the *Lubanga* case does set out a five-step implementation plan. According to this plan, the TFV, in conjunction with the Registry, the OPCV and appointed experts, determine which localities are to be addressed in the reparation process. Second, these actors consult with the localities selected. Third, the appointed experts determine the harm suffered within the localities. Subsequently, the principles and procedures of reparation proceedings are to be publicly explained in the localities. During the public debates, victims are invited to express their expectations. Finally, proposals for collective reparations are collected in order to forward them for approval to a competent Chamber of the ICC.⁷⁰¹ Accordingly, the Chamber mainly delegates the substantive parts of the reparation proceedings to the Trust Fund for Victims. The Chamber explicitly held that,

‘[it] is satisfied that, in the circumstances of this case, the identification of the victims and beneficiaries (Regulations 60 to 65 of the Regulations of the TFV) should be carried out by the TFV. [...] The Chamber accordingly: [...] [r]emains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3)(a) of the Statute (including considering the proposals for collective reparations that are to be

⁷⁰⁰ Regulation 66-68 of the 2005 Regulations of the Trust Fund for Victims.

⁷⁰¹ ICC-01/04-01/06-2904, para. 282.

developed in each locality, which are to be presented to the Chamber for its approval) [...].⁷⁰²

Despite the attempt of Trial Chamber I to provide more clarity as regards reparation proceedings by setting out the reparation proceedings in a five-step implementation plan, numerous questions remain unanswered. As a consequence, the reparation proceedings in the *Lubanga* case, but equally the implementation of other reparation awards trigger numerous questions.⁷⁰³

Child-specific aspects of implementation

Bearing in mind the procedural particularities which arose thus far in criminal proceedings, the following two questions, among others, are likely to occur in reparation proceedings in relation to the child claimant: Firstly, how should the Court determine what is considered to be in the best interests of the child? Will the individual child (need to) have a say? Secondly, bearing in mind the urgency of children's needs, are child claimants' reparation requests to be treated with priority compared to adult or other claimants' reparation claims? In turn, guidance on these two questions is sought in the remaining provisions, the practice of the ICC within the criminal proceedings and, again, the involvement of children in the Sierra Leonean TRC.

5.4.3.1 Best Interests

The assessment of the best interest of the child has been examined within the ambit of *Chapter One*. Similar, if not even greater relevance of the principle of the best interests compared to the previous chapters exists when reparation awards are to be implemented. Article 3 of the Convention on the Rights of the Child, which has been recognised by various Chambers as applicable law in the pending criminal proceedings before the Court states 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.'⁷⁰⁴

Considering that various Chambers recognised the applicability of the Convention on the Rights of the Child, in particular Article 3, the extent to which the determination of the best interests of the child could play a role in reparation proceedings, in particular whether children themselves have a say in what is in their

⁷⁰² ICC-01/04-01/06-2904, paras. 283, 289.

⁷⁰³ Less child-specific questions, such as the potential implication of appeal proceedings and the general time frame of reparation proceedings are interesting but outside the ambit of this research.

⁷⁰⁴ 1989 Convention on the Rights of the Child, 1577 UNTS 3.

best interests when expressing their preference for particular forms of reparations needs to be examined.⁷⁰⁵

Chapter One underlined that an assessment of the best interests of the child is to be made in light of the evolving capacities of the individual child. Such consideration should further take into account that a universal standard for the best interests of the child does not exist.⁷⁰⁶ The earlier mentioned *Guidelines* of the Council of Europe are restated as a yardstick for an assessment of the best interests of the child as regards the implementation of reparation awards. The *Guidelines* request that,

‘their views and opinions shall be given due weight; 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.’⁷⁰⁷

Accordingly, as pointed out in *Chapter One*, the best interests of the child can be assessed through a three-fold test which goes beyond a purely legal assessment: Firstly, the child needs to express his or her views which are to be taken into account; secondly, the best interests of the child in a particular situation need to be examined in light of the other rights of the child. Thirdly an interdisciplinary approach is to be applied in order to scrutinise the non-legal fields of interests, such as the psycho-social constitution of the individual child. As underlined by the Committee on the Rights of the Child, the ICC is encouraged to consider that,

‘according to their evolving capacities, [children] can progressively exercise their rights.’⁷⁰⁸

Also within the context of reparation proceedings, the Court is advised to enable children to progressively exercise their right to reparation and allow their individual participation, by, for instance, inviting them to express their personal views and concerns on the forms of reparations.

Despite the major lack of procedural rules regulating the implementation of reparation awards, Article 75(3) Rome Statute, indeed, enables the Court to ‘invite [...] representations from or on behalf of [...] victims’ which the Court shall take into account before making a reparation order. This provision, therefore, empowers the Court to also invite child claimants and/or their legal representatives to bring

⁷⁰⁵ For further analysis on the question of whether children are capable of express their views, see, *Chapter One*.

⁷⁰⁶ Ibid..

⁷⁰⁷ Council of Europe Guidelines 2010.

⁷⁰⁸ Committee on the Rights of the Child, 33rd session, 19 May-6 June 2003, General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4, 1.

their views and concerns to the attention of the Court before reparation awards are made.

It is noteworthy to repeat in this regard that two former child soldiers (child participants) were invited by Trial Chamber I to give evidence in the courtroom in the criminal proceedings against *Thomas Lubanga Dyilo* (*Chapter Three*). During their testimony, both young adults also expressed their wish to receive educational training as a form of reparation to be awarded by the Court.⁷⁰⁹ Their testimony therefore provided the Court with valuable insights into the personal views and expectations of the young adults. After the conviction of *Thomas Lubanga Dyilo*, Trial Chamber I invited legal representatives and the Office of Public Council for Victims to file submissions in which the expectations of victims were also expressed.⁷¹⁰

In addition, the Court can also assess the personal views and expectations of child claimants by studying their respective application forms. Question 34 of the standard form invites claimants to describe what they expect to receive. On the other side, as the use of the application form is not compulsory for child claimants, one may generally question whether the form will be used to a great extent in the future. If this will not be the case, the Court will be in need to receive information as regards the preferred forms of reparation from other sources, such as the earlier addressed meetings at community level. Next to the potential usefulness of the application form for the Court, it may also be noted at this point that, bearing in mind the limited forms of reparations the Court will be able to order directly against a convicted person, the explanatory note, which states that victims can also expect reparations in the form of compensation or restitution, might be confusing for child claimants (but also adult claimants). It might in particular create wrong expectations concerning what kind of reparations can be expected from the Court.⁷¹¹

The relevance of the possibility for children to express their personal expectations through the one or the other means depends, however, on the promotion of this option in a child sensitive manner. Particularly important in this regard is the earlier addressed right of the child to be adequately informed (*Chapter One*). Children are accordingly in specific need of being properly informed and supported in order to formulate their expectations within the possible forms of reparations which could be awarded by the ICC. Since the number of claimants is likely to be of such size that individual hearings are less feasible, the written statement in any case invites claimants, including children, to formulate their personal needs, expectations and preferences. The extent to which the ICC and in particular the Trust Fund for Victims will take the child-specific wishes into account remains to be seen.

⁷⁰⁹ See for further discussion, <http://www.katangatrial.org/2011/03/judges-in-katanga-and-ngudjolo-trial-hear-testimony-from-participating-victims/>.

⁷¹⁰ ICC-01/04-01/06-2869; ICC-01/04-01/06-2864.

⁷¹¹ International Criminal Court, A guide for the Participation of Victims, at 11-12.

In line with the foregoing, the practice of various TRCs also underlines that victims, including children, have personally been invited for statement sessions.⁷¹² In addition to the possibility for children to express their individual views on reparation in person, the Sierra Leonean TRC cooperated with the Children's Forum Network. The Commission stated in its final report that,

'[t]he children of Sierra Leone have not had a meaningful role and voice in the social, political and economic life of Sierra Leone despite the fact that they were compelled to adopt adult roles during the conflict. The establishment of the Children's Forum Network (CFN), an advocacy group run by children, enabled the Commission to hear and listen to the voices of Sierra Leone's children telling about their experiences in the civil war.'⁷¹³

Increasing the role of child rights NGOs in the context of ICC reparation proceedings could therefore constitute another option in order to fully assess the best interests of the child in respect of reparations to be received. Bearing in mind that many potential child claimants have been permanently or are temporarily separated from their parents due to international crimes, strengthening the position of the child claimant by relying on the support of child rights NGOs potentially constitutes a meaningful tool to enable the Court to fully understand the broad variety of children's needs and wishes. Such need has been pointed out by the Registry. It held that,

'[t]he information in the possession of these groups [NGOs such as UNICEF but also local child rights organisations] may be of great assistance to the Court in determining matters of reparations.'⁷¹⁴

UNICEF submitted in March 2012 a request to participate in the reparation proceedings in the *Lubanga* case in order to assist the Court on matters in relation to child victims.⁷¹⁵ In April 2012, Trial Chamber I, indeed granted leave to UNICEF and a number of other organisations to submit written representations.⁷¹⁶

5.4.3.2 *Prioritisation*

Another aspect which relates to the implementation of reparations concerns the question of the potential priority of claims submitted by child claimants. The ICC

⁷¹² UNICEF 2010a, at 88. See with regard to the Sierra Leonean TRC, TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 235. Children also seem to have been invited to statement sessions before the Kenyan TRC, Children also seem to participate in the statements sessions of the Kenyan Truth and Reconciliation Commission.

⁷¹³ *Ibid.*, at 18.

⁷¹⁴ ICC-01/04-01/06-2863, para. 200.

⁷¹⁵ ICC-01/04-01/06-2855-Anx3.

⁷¹⁶ ICC-01/04-01/06-2870, para. 22. Trial Chamber I provides an overview of all submissions, see, ICC-01/04-01/06-2904.

Statute, again, does not provide guidance on the issue. Regulation 65 of the Trust Fund, on the other hand, establishes that

‘[t]aking into account the urgent situation of the beneficiaries, the Board of Directors may decide to institute phased or priority verification and disbursement procedures. In such cases, the Board of Directors may prioritize a certain sub-group of victims for verification and disbursement.’⁷¹⁷

Accordingly, if the Trust Fund may generally decide to prioritise between certain sub-groups of victims, the prioritisation of the implementation of child claimants’ reparations is not excluded at the outset.

Previous practice with regard to the priority of children’s reparations was, again, established by the Sierra Leonean TRC. By recommending specific reparations for children, the TRC of Sierra Leone recognised that children constitute a particular group of beneficiaries which is in ‘dire need of urgent care.’⁷¹⁸ Despite the fact that the conflict in Sierra Leone resulted in a large amount of victims, the Commission saw a need to give priority to the needs of children. The Commission concluded that reparations to children should be

‘prioritised as victims in need of particular care and assistance given the enduring effects of the violations they suffered.’⁷¹⁹

A prioritised implementation of reparation requests of child claimants therefore does not lack precedence and could also be adopted by the ICC. Furthermore, the prioritisation of reparation awards was also suggested to Trial Chamber I in the *Lubanga* case. The Registry pointed out in its Second Report on Reparation in this case that,

‘the Chamber may consider something [...], by which resources for redress are prioritized in favour of some victims but not others on the basis of equitable criteria in those many cases where the resources at its disposal for redress are insufficient to provide meaningful redress to all victims potentially eligible. In these circumstances it may make more sense to prioritize resources so that certain groups of victims, such as those most in need or those most seriously affected by the crime in question, can receive some meaningful form of redress through Court-ordered reparations.’⁷²⁰

It is therefore a welcome step, that Trial Chamber I ruled that children may indeed benefit from prioritised treatment. The Chamber held that,

‘[it] recognises that priority may need to be given to certain victims who are in particularly vulnerable situations or who require urgent assistance. These may

⁷¹⁷ Regulation 65 of the 2005 Regulations of the Trust Fund for Victims.

⁷¹⁸ TRC Sierra Leone Vol. 2, Chapter 4, Reparations, at 242-243.

⁷¹⁹ Ibid..

⁷²⁰ ICC-01/04-01/06-2806, para. 31.

include, *inter alia*, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members.⁷²¹

Does this mean that a child's claim is generally to be prioritised compared to claims from adult victims? One may indeed assume that, bearing in mind the psychological and physical developmental progression of the child that claims which request medical treatment are to be prioritised – a position which also appears to be adopted before the Sierra Leonean TRC and by Trial Chamber I of the ICC. This may be explained by the fact that (further) delay in medical treatment might cause more disproportionate negative implications for the child compared to adult victims. One may even argue that also victims who have reached majority in the meanwhile are entitled to such prioritised treatment when having suffered harm as a result of an international crime during childhood. Whether a priority of claims beyond a medical necessity, such as claims requesting educational training, will be introduced remains to be seen. In any case, it needs to be remembered that since other Chambers have not yet ruled on reparations, it remains to be seen whether a prioritised treatment for children will generally be provided for.

5.5 CONCLUSION

It has become clear, that, without having yet been extensively confronted with specific questions concerning the forms, eligibility and implementation of reparation awards in relation to the child claimant in the young practice of the Court, the ICC can be expected to be confronted with these aspects in the future. Each of these issues requires that child-sensitive awareness is present in order to ensure that children and young adults can benefit from reparation awards which adequately address the particular needs that are inherent to childhood. It has also been pointed out that these needs are not limited to immediate reparation measures which aim to support the child victim in terms of medical recovery. Instead, a holistic view is to be applied when considering not only who is eligible for child-specific reparations, but also when determining the precise forms of reparations and a potential prioritisation of claims submitted by child victims when implementing reparation awards.

The material scale of an effective remedy requires that reparations to children and young adults reflect their particular needs in order to constitute meaningful reparations. The fact that the procedural framework of reparation proceedings before the ICC is not provided for in the statutory rules, constitutes a complicating factor in this regard.

As regards the decision of Trial Chamber I to not examine individual applications but to forward all to the TFV raises the particular questions of what the

⁷²¹ ICC-01/04-01/06-2904, para. 208.

added value of early reparation requests is, and whether individual requests for reparations being transmitted to the Court prior to the commencement of reparations proceedings is at all in the best interests of the child – bearing in mind the possibility of joining the proceedings at a later stage by participating in the public debates at local level.

In any case, as long as the Rome Statute and the respective procedural rules create the impression that reparations are awarded by the judicial institution of the ICC, a delegation to the Trust Fund cannot be applauded. Instead, the Court should himself fulfil this task, be it with, for example the establishment of specific reparation chambers, including chambers whose members are experts in child rights issues.

As was pointed out previously, the examination of the evolving capacities of the child requires a complex assessment (*Chapter One*). The lack of an explicit analysis of the evolving capacities of child participants in the *Lubanga* case might be caused by the fact that the criminal proceedings simply prevent the ICC from a detailed inquiry. The conclusion of these proceedings may therefore invite but also enable the Court to change perspective. From being a fair trial watchdog, the Court may now also (without losing sight of the fact that the convicted person also has the right to a fair trial in reparation proceedings) act as a protector of the various facets of the best interests of the child. Furthermore, the judges could pay particular attention to the need that a child is invited to participate in accordance with his or her evolving capacities. In addition to the responsibility of judges to take the child-specific particularities into account, explicit awareness of the other actors involved, in particular the Registry, the Trust Fund and the legal representatives has been established as being indispensable for child-sensitive participation in reparation proceedings before the ICC.

In conclusion, if the ICC aims to ensure that children and young adults can remedy the harm suffered during childhood as a result of a crime within the jurisdiction of the Court, the Court is encouraged to bear in mind that not only the procedure itself needs to be child-sensitive but also the material component of the proceedings relating to the forms of reparations. In addition, child-sensitivity should not be limited to those who are minors when claiming reparations. Instead, an adequate response in the law of procedure and practice is necessary in order to also enable young adults who have suffered from violations of rights during childhood to remedy these violation(s) and be in particular eligible for child-specific forms of reparations. Such a response could provide an effective remedy for child victims (being children and young adults in the course of reparation proceedings) in procedural and substantive terms which goes further than only providing *effective access*.

