UNIVERSITY OF CAPE TOWN

REPARATIONS AND CHILD SOLDIERS IN AFRICA: THE LEGAL REGIME OF REPARATIONS FOR FORMER CHILD SOLDIERS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT.

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DECLARATION

I, GODKNOWS MUDIMU, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

The involvement of children to fight in armed conflicts remains one of the main challenges towards the full realization of children's rights on the African continent. Despite a substantive legal framework affording protection and prohibiting the enlisting and recruitment of child soldiers, this practice remains prevalent in many parts of Africa particularly in the Great Lakes Region. As a result of their childhood and the traumatic events they are exposed to during armed conflicts, children inexorably suffer from many forms of harm including physical, mental and psychological harm. Addressing this harm as a matter of urgency is crucial for the proper and effective reintegration of these children into society.

The Rome Statute departs from the silence of many international criminal law instruments which focus exclusively on the prosecution and sentencing of criminals overlooking the needs of the victims of international crimes by offering redress. It introduces a new and unique reparative system that aims at providing redress to the victims of international crimes within the courts' jurisdiction. This reparative regime which is still in its early life stages faces many challenges and uncertainties. In its first case dealing with principles relating to reparations, the International Criminal Court (ICC) showed these challenges and the difficulty of establishing permanent guidelines on future reparations to former child soldiers who are victims of the international crime(s) of the enlisting and recruitment to fight as combatants. Clear principles can help current and future victims by having an insightful and realistic expectation of the modalities and the scope of the reparation award they can get from the ICC.

DEDICATION

To the men and women who dedicate their lives to the great cause of making this world a safer and better place for children, especially those in armed conflicts.

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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
ASP	Assembly of States
CAR	Central African Republic
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights law
ILC	International Law Commission
ILL	International Labour Law
ILO	International Labour Organization
IRC	International Red Cross
LRA	Lord Resistance Army
PCIJ	Permanent Court of International Justice
RPE	Rules of Procedure and Evidence
RTFV	Trust Fund Regulations
SCSL	Special Court for Sierra Leone
TFV	Trust Fund for Victims
UN	United Nations Organisation

FPLC	Force Patriotique pour la Libération du Congo
OPAC CRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

Contents

CHAPTER ONE: INTRODUCTION AND CONTEXT

1.1 INTRODUCTION

The enlisting and recruitment of children to fight in armed conflicts has been expressly prohibited under International Criminal Law (ICL)[1], International Humanitarian Law (IHL);[2] International Human Rights Law (IHRL)[3] as well as International Labour Law (ILL)[4]. Importantly, these different legal frameworks apply differently in different conditions.[5] Despite the existence of an overwhelming legal regime banning the recruitment of children to fight in hostilities, there is vast evidence to show the continued recruitment and subsequent direct or indirect participation in warfare.[6] A particular region in which this practice is dominant is the Great Lakes Region, encompassing Uganda, Central African Republic (CAR) and The Democratic Republic of Congo.[7] Most legal writing and research in this area has focused on causes of such recruitments; and reasons children join armed forces among other issues.[8] There is generally less literature on how to treat and rehabilitate the affected children after having served as combatants.

The above becomes more imperative when one looks at the harm suffered by these children. The taking part of children (directly and indirectly) in armed conflicts has been shown to have devastating effects on children's psychological, physical and mental

[1] The Rome Statute of the International Criminal Court (ICC) of 1998, Article 8 (2) (e) (viii).
[2] Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Article 77; C Tomuschat 'Human rights and international humanitarian law' (2010) 21 *European Journal of International Law* 16.
[3] Convention on the Rights of the Child (CRC), 1989 (U.N Doc. A/44/49) Article 38; Optional Protocol to the CRC on the involvement of children in armed conflict (OPAC CRC) 2000 (UN Doc.A/RES/54/263, Article(s) 1, 2 and 3.
[4] The International Labor Organization (ILO) on Worst forms of Child Labor Convention 182, 1999, Article 3 (a).
[5] C Tomuschat, note 2 *supra* 16.
[6] Human Rights Watch 'Key Statistics' Available at http://www.theresolve.org/the-lra-crisis/key-statistics/ [accessed 26 February 2014].
[7] G Machel 'U.N Report on promotion and protection of the rights of children: Impact of armed conflict on children' U.N. Doc. A/511306 (1996) para 3, Available at http://www.unicef.org/graca/a51-306_en.pdf [accessed 26 February 2014].
[8] *Ibid.*

development.[9] The Trust Fund for Victims (TFV)[10] in its collective assistance for victims related to child soldiers echoed the same by stating that, 'children have suffered from depression, Post Traumatic Stress, disintegration from family and community, stigmatization due to the label of child soldiers, lack of access to health services, health and psychological problems related to sexual violence during their captivity and lack of access to educational services.'[11] This statement provides a tip of the iceberg when it comes to the harm that these children have been subjected to. The alienation and isolation of these children from the normal society further supports the need for a comprehensive scheme of reparations to address the harm suffered and end the long cycles of violence.

1.2 THE PROBLEM OF CHILD SOLDIERS

The enlisting and recruitment of children to fight as combatants has been one of the major continued child abuses in many regions, Africa included. Over the past decade, more than two million children have been killed in armed conflicts around the globe.[12] A further disturbing number of over six million children have been seriously injured or permanently disabled as a direct consequence of armed conflict.[13] Moreover ten million have been left with serious psychological trauma.[14] In Africa, the practice of enlisting and recruiting children to fight in armed conflicts has been presented in starker terms in Northern Uganda and the Democratic Republic of Congo (DRC). The Lord Resistance Army (LRA) has been known for this practice around the Gulu area in Northern Uganda.[15] An estimated number of between 8000 and 10000 children have been forced

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[9] A Perreau- Saussine, 'The dilemma of child soldiers: who is responsible' (2005) 16 *The Kings Law Journal* 393.

[10] Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims (TFV) Resolution ICC-ASP/1/Res.6

[11] S Aubry and MI Henao-Trip 'Collective reparations and the International Court' Reparations Unit, Briefing Paper No.2, August 2011, University of Essex.

[12] SOS Children's Villages 'Children in conflict: child soldiers' Available at http://www.child-soldier.org/ (accessed 2 June 2014).

[13] *Ibid*.

[14] *Ibid.*

[15] CS Grover, '*Child soldier victims of genocide forcible transfer: Exonerating child soldiers charged with conflict related international crimes'* (2012) Springer 164.

to join the LRA.[16] Writing in 2000, Hughes pointed out that an estimated number of between 250 000 and 300 000 children were currently actively involved in armed conflicts.[17] While these figures remain only estimates, it is feared that the statistics might be far high. A direct participation of children in combat in which they witness and participate in the 'destruction, killing, rape, abuse of drugs, cutting both women and men's genitals, cutting of body parts, forced and early marriages among other atrocities is contrary to the ideals of the modern world'.[18] The physical, mental and psychological impact of these acts on children is immense with a long bearing on their general contribution to society as they grow into adulthood.

The problem of child soldiers continues in Africa, despite the adoption by many African States of the Convention on the Rights of the Child (CRC)[19] and the African Charter on the Rights and Welfare of the Child (ACRWC)[20] which prohibits the recruitment of children under the age of 18 to fight in warfare. The Great Lakes region in Africa remains one of the most affected regions by the issue of child soldiers.[21] A constant reference to this region will be seen throughout the thesis, particularly on the impact of warfare on children.

1.3 THE ROME STATUTE AND REPARATIONS

The Rome Statute's reparations regime is established under Article 75 of the Rome Statute. Article 75 of the Rome Statute empowers the court to 'develop principles relating to reparations' legal regime.[22] The Statute of the International Criminal Court ('Rome Statute') brings in a major breakthrough in the development of international criminal law and in the recognition of individual criminal responsibility for international

[16] *Ibid* the author argues that most of these children are aged between 13 and 16 years; See Also SOS Children's Villages' note 12 *supra*.
[17] L Hughes, 'Can international law protect child soldiers?' (2000) 12 *Peace Review* 399.
[18] L Hughes note 17 *supra* 399; For a gruesome account of these atrocities see also A Honwana, '*Child Soldiers in Africa'* (2007) University of Pennsylvania Press 34.
[19] CRC, note 3 *supra*.
[20] African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990).
[21] A Honwana, note 18 *supra* 29.
[22] Article 75.

crimes.[23] Since the creation of the International Criminal Court (ICC), one of its major goals has been to offer a meaningful way of redress for victims of international crimes.[24] It introduces the concept of reparations[25] in ICL, a change that can be explained, in part, by the growing attention given to victims within national criminal justice and in the manner in which the previous court tribunals dealt with victims.[26] The importance of reparations in addressing the harm suffered by the victims of war crimes has begun to claim recognition in the jurisprudence of the ICC. In *Prosecutor v Thomas Lubanga Dyilo*[27], the Pre-Trial Chamber stated that, 'the reparations scheme provided for in the Statute is not only one of its unique features but also a key feature.'[28] In the Pre-Trial Chamber's opinion, 'the success of the ICC is to a greater extent linked to the success of its reparation legal regime.[29] When one considers the distinctiveness of the harm suffered by child soldiers as a consequence of their involvement in wars, it calls for an appropriate redress mechanism to be applied. The Rome Statute empowers the ICC to make reparations with the intention of providing restitution, compensation and rehabilitation to the victims.[30] The Optional Protocol to the CRC echoes the provisions under Article 75 by emphasizing the need by state parties to assist in the physical, psychological and social rehabilitation of the affected children.[31] The Committee on the Rights of the Child under its General Comment 16 also speaks of the need for 'an effective reparation order when children's rights have been violated'.[32] It provides that 'when determining the level or form of reparation, mechanisms should take into account

[23] C Ferstman 'The reparation regime of the International Criminal Court: Practical considerations' (2002) 15 *Leiden Journal of International Law* 15, the author points that the Rome Statute built on the important achievements of the International Military Tribunal at Nuremberg and other former tribunals.
[24] *Ibid*.
[25] *Ibid*; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation G.A. Res. 60/147, 15, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), at 19-23. Despite it being soft law, it defines reparations as including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
[26] L Zegveld 'Victims' reparations claims and international criminal courts, incompatible values?'(2010) 8 *Journal of International Criminal Justice* 79, the author notes that both the Tokyo and Nuremberg Tribunals did not mention victims. They were more concerned with bringing perpetrators to justice 79.
[27] *Prosecutor v Thomas Lubanga Dyilo*, [Decision on the Prosecutors Application for a warrant of Arrest, Article 58] ICC-01/06-01/06 (10 Feb 2006) para 136.
[28] *Ibid*.
[29] *Lubanga* [Decision on Warrant of Arrest], note 27 *supra*.
[30] The Rome Statute, Article 75 (1).
[31] OPAC CRC note 3 *supra*, Articles 6 (3) and 7 (1).
[32] UN Committee on the Rights of the Child (CRC) General comment 16 (2013) on State obligations regarding the impact of the business sector on children's rights paras 30-31.

that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage.'[33] Despite this general comment focusing primarily on the impact of business on children's rights, the principle of effective reparations when children's rights are violated equally applies in this situation. Van Boven[34] notes that reparations serve the purpose of-

> 'relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts…reparations should respond to the needs and wishes of the victim.'[35]

The complementarity role of the Rome Statute and the CRC is noteworthy. Whilst the Rome Statute provides for reparations to victims of war crimes, the CRC specifically addresses children. As will be shown in Chapter 4, the combination of these legal instruments can create a strong basis for a unique reparative system that focuses primarily on children.

1.4 PROBLEM STATEMENT

As highlighted above, the issue of reparations in ICL is a new development. This research proceeds on the assumption that this new feature adds a progressive element to the Rome Statute legal regime. The second assumption is that the reparation regime, if appropriately applied, would go a long way towards satisfying the needs of victims of international crimes, particularly child soldiers. However this is only possible if there is a comprehensive legal regime with clear principles and guidelines to guide the ICC in its decision making, particularly when dealing with child soldiers. At present, there is only one case that dealt with reparations on an *ad hoc* basis.[36]

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[33] *Ibid*, para 30 dealing with remedies and reparations.
[34] T Van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' Final Report U.N. Doc. E/CN.4/Sub.2/1993. (Accessed 02 June 2, 2014).
[35] *Ibid*, para 137.
[36] M Wessels 'How we can prevent child soldiering' (2000) 3 *Peace Review: A Journal of Social Justice* 407. *Situation in the DRC: The Prosecutor v Thomas Lubanga Dyilo;* [Decision Establishing the Principles and Procedures to be applied to Reparations] ICC-01/04-01/06, 07 August 2012.

A legal regime that addresses reparations for child soldiers is crucial. Wessels points out that, "it is vital to address child soldiering since it inflicts massive damage on children, tramples human rights, and plants seeds of future violence and armed conflict".[37] Perreau-Saussine emphatically supports the same statement by stating that 'the harm suffered by these children is immeasurable'.[38] One can argue that if child soldiering is not adequately addressed, real peace and development in the affected areas will not be attained.

This research is a contribution to the existing jurisprudence gap. It seeks to explore the limitations of the current reparations legal regime under the Rome Statute. The jurisprudence of the International Criminal Court will be analyzed. It further seeks to establish whether the ICC has fulfilled its obligations under the Rome Statute; including that of establishing guiding principles on how reparations should be awarded.[39] Lastly, given the tremendous impact of war on children, this research seeks to justify why a separate legal regime of reparations for children is vital.[40]

1.5 SCOPE OF STUDY

The research focuses on the issue of child soldiers and the applicable legal instruments. In dealing with reparations, it primarily focuses on Article 75 and how it relates to Article 79 of the Rome Statute. It looks at how this article can be applied in the context of former child soldiers for an effective integration and rehabilitation process back in society. As a result of the general focus on children, the conventions and legal instruments dealing with the rights of children will also be under examination. Geographically, this thesis will focus on the Great Lakes Region where the problem of child soldiers has been widespread.

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[37] *Ibid* paras 85-86.
[38] A Perreau- Saussine, note 9 *supra* 393.
[39] The Rome Statute, Article 75 (1).
[40] BA Abbott 'Child Soldiers- the use of children as instruments of war', 23 *Suffolk Transnat'IL. Rev* 318, the author argues that a child's participation in warfare violates their innocence, exploits their vulnerability, and destroys their future and therefore the future of their society.

1.6 AIMS OF RESEARCH

This thesis seeks to investigate the problem of child soldiers and how Article 75 of the Rome Statute can be used effectively to provide reparations to former child soldiers. In doing this, the relationship between the Rome Statute and the Convention on the Rights of the Child, the optional Protocol on Children in Armed Conflicts and other legal instruments will be looked at. It also seeks to highlight the continued practice of enlisting and recruiting of child soldiers, especially in Africa, despite the overwhelming presence of legal instruments that criminalize such acts.

1.7 METHODOLOGY

Primary and secondary sources of law were used in this study. The primary sources included instruments in international human rights law such as multilateral agreements, conventions, protocols, treaties and established sources of customary international law. Case law from national courts and international tribunals were also used. Secondary sources used were textbooks, journal articles, official international and national reports and documents, resolutions of the United Nations General Assembly and Security Council.

1.8 TERMS AND CONCEPTS

The use of the term 'child soldier' is not without problems. The very concept of defining a child, who is also a soldier, is not common within the international legal framework.[41] Looking through various legal instruments, defining who a child is appears to be a clear cut exercise.[42] The African Charter does not make an exception on who qualifies as a

[41] G Goodwin-Gill and I Cohn, '*Child soldiers: The role of Children in Armed Conflicts'* (1994) Clarendon Press, pp.186-208. The authors' point that when children fight in war, they lose their inviolability as non-combatants and become 'legitimate' military targets whose death or disablement result in the weakening of the armed forces of the enemy which is the only legitimate aim in war.

[42] CRC, art 1 defines a child as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier"; ACRWC note 20 *supra*, Article 2 defines a child as any person below the age of 18.

child. It provides a bracket definition of anyone below the age of 18 as a child, whilst the CRC makes an exception to the straight 18 rule.[43] It is the defining of a child who is also a soldier that is fraught with problems. Many scholars agree that there is a need for a universal definition of who qualifies as a child; and furthermore that the definition must meet the cultural realities that exist in various societies.[44] These authors highlight that the definition of a child and childhood is a cultural construct that varies across cultural boundaries.[45] Fox argues this point by stating that,

> 'Although it has become quite clear in regard to who is a child, as well as what constitutes a combatant or soldier, there is no such clear understanding of or category for someone who is both a child *and* a soldier. The very concept of *child-soldier* or *child-combatant* does not exist within law, with the exception of provisions made for captured, armed minors.'[46]

Attempts have been made in trying to find a workable definition. The UNICEF offers a starting point. It defines a child soldier as,

> 'any person below the age of 18 years, who is part of any kind of a regular or irregular armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups other than family members.'[47]

The UNICEF definition brings to the fore the issue of direct and indirect participation. The definition also includes girls who are recruited for sexual and marriage purposes. It is thus a comprehensive definition which does not limit a child soldier to those actively involved in fighting. Machel also attempts to do this in her special report to the UN on child soldiers. She defined a child soldier as, "any child (boy or girl) under the age of 18 who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defense units or other armed groups."[48] From both definitions, the central theme seems to be one of discouraging the distinction between

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[43] CRC, Article 1, the CRC provides for anyone below 18 as a standard definition of a child, unless the laws of a particular country provides for an early attainment of adulthood.
[44] M Wessels *Child soldiers: From Violence to Protection'* (2006) Harvard University Press 5.
[45] *Ibid*.
[46] M Fox 'Child soldiers and international law: Patchwork gains and conceptual debates' (2005) 7 *Human Rights Review* 30.
[47] UNICEF, 'Fact sheet: Child Soldiers' Available at http://www.unicef.org/emerg/files/childsoldiers.pdf (accessed 2 June, 2014).
[48] Machel Report, note 7 *supra*.

children who actively serve as combatants with those who are indirectly involved. Such an approach is the one this thesis will adopt. These children often face the same dangers whether they have been directly or indirectly involved in armed conflict.

The other term that needs to be defined is who qualifies to be a 'victim (s)', worthy of redress under international law. Generally, most human rights treaties do not provide for a comprehensive definition of who is a victim. A few declarations however do so, thereby reflecting soft law developments. For example, The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[49] defines a 'victim (s) as,

> 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.'[50]

It further provides for immediate family members as well as dependents of a person directly involved in the harm as victims. Despite it being soft law, it provides guidelines on who can qualify for reparations. The UN Basic Principles also has a similar definition.[51] The document defines victim(s) as,

> 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.'[52]

The above mentioned documents extend the definition to both immediate family members, and dependents of people who have suffered harm. Again, it adds the collective or individual character of harm. Finally, The Rules of Evidence and Procedure[53] to the Rome Statute broadly defines a victim. They define victim(s) as,

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[49] U.N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Res GA, 40/34 of 29 November 1985, Available at http://www.ohchr.org/Documents/ProfessionalInterest/victims.pdf (accessed 02 June, 2014).
[50] U.N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power note 49.
[51] UN Basic Principles and Guidelines note 25 *supra*.
[52] *Ibid* para V (8).
[53] ICC-ASP/1/3, Rule 85.

> "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; Victims may include organizations or institutions that have sustained direct harm to any of their property that is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[54]

The definition is broad to include organizations and other entities that have an inherent humanitarian purpose. In this thesis, whilst there may be reference to other victims, the primary focus is on child soldiers.

The term 'reparation' is coined under Article 75 of the Rome Statute.[55] Neither the Statute nor its rules define the term. The Oxford English dictionary defines reparation as the 'action of making amends for a wrong done, the compensation for remedying of some loss or the repair of an injury'.[56] Under the Rome Statute, it is clear that the word reparation is associated with the words restitution, compensation and rehabilitation.[57] Central to this definition is the idea of redressing harm suffered.[58] It can be said that the term connotes the obligation to provide redress and the right to receive such reparations.[59] Under the Rome statute, there is an absence of punishment as the central concern of reparations.[60] This is supported primarily by the fact that the legal regime of reparations under Article 75 does not fall under the general penalties provision.[61] The term reparation(s) will be used in this thesis as referring to the non-punitive measures ordered by the court for the sole purpose of remedying human rights violations.

1.9 CHAPTER SYNOPSIS

[54] ICC-ASP/1/3, Rule 85.
[55] The Rome Statute, Article 75.
[56] The Oxford English Dictionary, Vol. VIII (Oxford: Clarendon Press, 1933), 457-458, cited by C McCarthy *Reparations and Victim Support in the International Criminal Court'* (2012) Cambridge University Press 58.
[57] Article 75.
[58] C McCarthy, *note* 56 supra79.
[59] *Ibid*.
[60] *Ibid*.
[61] The Rome Statute, part VII dealing with applicable penalties.

Chapter 1- This chapter introduces the topic and provides a brief overview of reparations. It looks at the aims, objectives, and the research methodology. It also highlights the problem statement upon which this topic is premised. Some relevant concepts and terms will also be explained.

Chapter 2- This chapter looks at the legal framework prohibiting the use of children as combatants. It looks at the ICL, IHL, IHRL and ILL. Finally, it highlights the harm suffered by children when they take part in armed conflicts.

Chapter 3-This chapter provides an analysis of the Rome Statute and the nature of reparations that it establishes. It looks at the TRV and its relationship with Article 75. The focus is on the different modalities and the practicality of their application, especially to former child soldiers.

Chapter 4- This chapter looks at reparations in practice. The ICC jurisprudence will be addressed together with other aspects that can compromise the reparations under the Rome Statute.

Chapter 5- This chapter will recap the inherent need for addressing past injustices suffered by former child soldiers. It will also offer recommendations on a protective approach that can work in the best interests of children.

CHAPTER TWO: CHILD SOLDIERS AND INTERNATIONAL LAW

2.1 INTRODUCTION

This chapter looks at the legal framework prohibiting the use of children to fight as combatants. It looks at International Criminal Law (ICL), International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Law on Child Labour (ILL). The Rome Statute is not the only instrument that outlaws the enlisting and recruitment of child soldiers. As will be shown below, several international law instruments that have been in existence long before the Rome Statute also condemn the practice. Arguably, the main reason for outlawing the practice is due to the harm and impact that war and conflicts inflict on children especially relating to their survival and development.[62] It is the violation of the children's rights through participating in armed conflicts that gives rise to a claim of reparations.[63] This calls for an examination of the legal regime that protects children against this practice.

There appears to be an increase in the number of children enlisted and recruited to fight in armed conflicts.[64] This practice is more visible in Africa, particularly in the Great Lakes Region, where internal wars are widespread. Even when one looks at national legislation in countries were the practice of recruiting and enlisting children exists, many have equally strong legal instruments prohibiting the practice. [65] This requires an analysis of the current legal framework. Furthermore, the harm element which is at the

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[62] DB Mezmur 'Children at both ends of the gun: child soldiers in africa' *in* J Sloth-Nielsen (ed) *Children's Rights in Africa: A legal Perspective*' (2008) Ashgate Publishing Company 200.
[63] L Moffett 'Reparative complementarity: Ensuring an effective remedy for victims in the reparation regime of the International Criminal Court' (2013) 17 *The International Journal of Human Rights* 369.
[64] Human Rights Watch 'United Nations Human Rights Council: Special Session on the Human Rights Situation in the Central African Republic' (2014) Available at http://www.hrw.org/news/2014/01/20/united-nations-human-rights-council-special-session-human-rights-situation-central-a [accessed 25/07/2014]; More figures of child soldiers in Africa with DRC, Central African Republic and Uganda leading in recruitment, Available at http://www.hrw.org/news/2012/03/12/child-soldiers-worldwide [accessed 25/07/2014].
[65] Ugandan National Resistance Army Statute, 3/92, the Conditions of Service Men Regulations 1993; DRC Transitional Constitution (2003), Article 184 banned the recruitment of any persons below the age of 18 to fight in hostilities; DRC Decree Law No. 066 of June 2000 in which the Government pledged to take all feasible actions to stop those below 18 years to actively engage or fight during the armed conflicts.

crux of the Rome Statute reparation regime will be highlighted. The importance of the harm element in the reparation legal framework was succinctly stated in the *Lubanga* case where it was pointed out that the harm suffered by the victims ought to be real and certain in order for one to successfully claim reparations.[66] It can be argued that the participation of children in armed conflicts and the harm element are closely related.

2.2 THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF CHILD SOLDIERS

2.2.1 International Humanitarian Law

International Humanitarian Law is that body of laws designed to ensure the respect of the general principles of humanity during periods of international and non-international conflicts.[67] The International Red Cross (IRC) defines IHL as-

> 'a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict *and* protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.'[68]

It is designed 'to ensure a minimal protection even during the most profound tragedies of human society, namely war.'[69] Children thus fall under the protection of this branch of the law during wartime.

The four Geneva Conventions of 1949 and their respective Additional Protocols provided the first legal instruments safeguarding children's rights during warfare.[70] The Geneva Conventions include the Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[71], Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed

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[66] *Lubanga* (Reparation Principles) note 36 *supra* pp. 34-35.
[67] D Weissbrodt and C Vega, *International Human Rights Law: An Introduction* (2007) University of Pennsylvania Press 212.
[68] International Committee of the Red Cross (ICRC) 'War and Law' Available at http://www.icrc.org/eng/war-and-law/index.jsp (Accessed 21/07/2014).
[69] C Tomuschat, note 2 *supra*.
[70] DB Mezmur note 62 *supra*.
[71] 1949, 75 UNTS 31.

Forces at Sea[72], Convention III relating to the Treatment of Prisoners of War [73] and Convention IV related to the Protection of Civilian Persons in Time of War[74]. These Conventions are a codification of the minimum humane treatment that must be observed by fighting forces during armed conflicts, as regards civilians, children and women among others.[75] Under the Conventions, children are regarded as a 'special kind of people who require special treatment during wartime'[76]. This means that child combatants must be treated under the Geneva Convention as a special type of combatants by virtue of them being soldiers when they are not supposed to be. However, it must be noted that this special treatment can only be provided when they have been captured, injured or detained.[77] When children participate in war as combatants, they become legitimate targets of the other party whose targeting can result in the weakening of the other forces.[78] This means that the protection offered under the Geneva Conventions is limited. Article 3 common to all the four Geneva Conventions, establishes certain rules that no derogation is permitted.[79] Importantly, it addresses non-international armed conflicts to which the majority of child recruitment in Africa occurs.[80]

The four Conventions are however silent on the participation of children in armed conflicts. This position was addressed under the Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts.[81] It provides that:

> '[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities

[72] 1949 75 UNTS 85.
[73] 1949 75 UNTS 135.
[74] 1949 75 UNTS 287.
[75] RK Dixit 'Special protection of children during armed conflicts under the Geneva Conventions regime' (2001) *ISIL Year Book of International Humanitarian and Refugee Law* Available at http://www.worldlii.org/int/journals/ISILYBIHRL/2001/2.html [accessed 22 December 2014].
[76] *Ibid*.
[77] *Ibid* 587.
[78] C Aptel 'Unpunished Crimes: the Special Court for Sierra Leone and Children' *in* CC Jalloh (ed) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (2014) Cambridge University Press 346.
[79] Article 3, Common to the Four Geneva Conventions.
[80] *Ibid*.
[81] Additional Protocol I, Article. 77.

> and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, the Parties to the conflict shall endeavor to give priority to those who are oldest'.[82]

It appears that all that is required of the parties is to 'take all feasible measures' in stopping the recruitment. The convention is silent on what constitutes 'feasible measures'. Some authors have defended the wording of the article stating that it denotes the level of obligations and that it avoided absolute terms to cater for the voluntary participation of children in armed conflicts.[83] Nevertheless, the article does not protect children in absolute terms, and adopts the lower minimum age threshold of 15. A wider protection appears to be under the Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts[84] . It provides that 'children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.[85] The provision does not leave open different interpretation standards by parties as to what constitutes 'feasible measures' contained under Additional Protocol I. It also closes down the voluntary enlisting defense that can be raised by parties. Some authors have argued that recruitment includes both compulsory and voluntary practices, which implies that parties should refrain from enlisting those children who voluntarily join their armed forces.[86] Despite such arguments, the inclusion of the concepts of 'direct' and the omission of 'indirect' under Protocol I suggests that indirect participation of children in armed warfare is permissible or that it is not treated as harshly as direct recruitment. Additional Protocol II reflects the compromise in that it retained the lower age threshold of 15 under Additional Protocol 1, but it closed the voluntary enlisting defense loophole.

2.2.2 Jurisdiction

[82] *Ibid*, Article 77, para 1.
[83] RK Dixit, note 75 *supra* 12.
[84] Geneva Convention (Additional Protocol II).
[85] *Ibid*, Article 4 (c).
[86] Van Bueren *International Law on the Rights of the Child* (1995) Martnus Nijhoff Publishers 336.

Additional Protocol I apply to international armed conflicts and only prohibit children from engaging in direct armed conflicts. This has a significant impact in the African context as most conflicts, particularly in the Great Lakes region are internal armed conflicts - usually fought between the governments of the day against armed rebel groups or between armed rebel groups themselves. This limitation is rectified by Additional Protocol II, which specifically abolishes the direct and indirect participation of children in warfare during internal armed conflicts. [87] Additional Protocol II is thus more aimed at dealing with internal armed conflicts. This is a progressive development, as most violations of the rights of children are committed during internal armed conflicts. Most African governments and rebel groups often recruit children to boost their capacity during these conflicts. Despite attempts by the above legal instruments to abolish the enlisting and recruitment of child soldiers, the age threshold adopted is too low.[88] Minor children as young as 8 years are reported to be recruited by armed rebels, particularly in Uganda, DRC and the Central African Republic (CAR).[89]

2.2.3 International Human Rights Law (IHRL)

International Human Rights Law is that branch of the law that embodies fundamental rights encompassing civil, political, social, economic, cultural, environmental and other rights to which every individual is entitled to by virtue of them being human.[90] This branch of the law was heavily influenced by events during World War I and II.[91] Under this branch of law, States are under an obligation to promote, protect and fulfill human rights.[92] On the international level, the CRC[93] and its Optional Protocol[94] are the direct

[87] Geneva Convention AP II Article 4 (3) (c).
[88] Additional Protocols to the Geneva Conventions (age restriction for children to engage in armed conflicts (direct or indirectly) is 15).
[89] More figures of child soldiers in Africa with DRC, Central African Republic and Uganda leading in recruitment, Available at http://www.hrw.org/news/2012/03/12/child-soldiers-worldwide [accessed 25/07/2014].
[90] DR Mekonnen and JL Pretorius 'Prosecuting the Main Perpetrators of International Crimes in Eritrea: Possibilities under International Law' (2008) 33(2) *Journal for Juridical Science* 76, 81.
[91] C Tomuschat, note 2 *supra* 16.
[92] Vienna Declaration Programme Action, Adopted by the World Conference on Human Rights in Vienna (25 June 1993) para 5.
[93] CRC, note 3 supra.
[94] OPAC CRC note 3 *supra.*

applicable instruments offering protection against the recruitment of child soldiers. Van Bueren notes that the CRC is a unique treaty in that it is- 'concerned with the principles of international human rights treaty law and the application of international humanitarian law'.[95]

Regionally, the African Charter on Human and Peoples' Rights[96] and the African Charter on the Rights and Welfare of the Child[97] (ACRWC) are the direct human rights instruments that address this phenomenon. The ACRWC is important as it is the only regional instrument that addresses the issue of child soldiers directly.[98] It provides that state parties must observe humanitarian law during armed conflicts - thereby offering a wider protection.[99] Furthermore state parties must refrain from recruiting any child under the age of 18 and must take all necessary measures in making sure that children do not take direct part in hostilities. [100] However, it omits any reference to indirect participation, thereby making it seem permissible. Furthermore, given the fact that most recruitment is done by rebel armed groups, placing all obligations on state parties is an inadequate measure especially in the African context.

Article 38 of the CRC emphasizes the importance of humanitarian law and that state parties must respect IHL during armed conflicts.[101] It further provides that state parties, 'shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.'[102] Unfortunately, the article was a compromise between state parties and retained the minimum age threshold under the Geneva Conventions. The compromise is apparent, as it is the only article in the Convention that provides a lower age threshold when dealing with the definition of a

[95] Van Bueren note 86 *supra* 349.
[96] African Charter on Human and Peoples Rights, (1981).
[97] ACRWC, note 20 *supra*.
[98] ACRWC, note 20 *supra*.
[99] *Ibid*, Article 22, para 1
[100] *Ibid*, para 2.
[101] CRC, note 3 *supra* Article 38 (1).
[102] *Ibid*, Article 38 (2).

child.[103] It can therefore be argued that Article 38(2) does not provide equal protection for all children involved in conflict situations. Furthermore, it contradicts the high standards set under Article 1 by lowering the age threshold from 18 to 15. This contradiction has undoubtedly compromised the zero tolerance to the recruitment of children to fight as combatants. Also, the enforcement mechanisms under the Convention and its Optional Protocol are weak, primarily relying on state reporting and treaty body monitoring.[104]

2.2.3.1 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The Machel report, on the use of children to fight as soldiers, recommended 18 years, as the minimum-age for the enlisting and recruitment of children into armed forces.[105] The Optional Protocol to the CRC on the involvement of children in armed conflict, which came into existence partly as a result of the recommendations of the Machel report, adopted 18 as the minimal age for recruitment.[106] It encourages state parties to raise the minimum age from 15 to 18.[107] Most child soldiers are recruited by rebel groups, though some governments also have links to such illegal activity. This Optional Protocol allows member states to recruit children under the age of 18, provided certain safeguards are met.[108] Whilst the recruitment of children under the age of 18 is permitted for state parties in certain circumstances, the position is not the same for armed groups. Under Article 4, it provides in uncompromising language that at no time can armed groups recruit or use persons under the age of 18 years to fight as soldiers. The article imposes an obligation on state parties to prevent such recruitment and to impose criminal

[103] CRC, Article 1 defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'
[104] I Cohn 'Progress and Hurdles on the Road Preventing the Use of Children as Soldiers and Ensuring their Rehabilitation and Reintegration' (2004) *Cornell International Law Journal* 37, 531.
[105] G Machel note 7 *supra*.
[106] OPAC CRC note 3 *supra*, Article 2.
[107] *Ibid*, Article 3 (1).
[108] Some of the safeguards include (a) genuine informed consent, (b) reliable proof of age prior to acceptance into national military service reliable and (c) such recruitment is genuinely voluntary.

punishment for those who violate such standards.[109] Whilst the intention behind the distinction between state parties and armed rebels on recruiting children under the age of 18 is sound, it has the effect that rebel groups may fail to abide by this standard, which does not bind state parties. In most cases, armed groups are desperate to recruit fighters and children provide a ready source.

2.2.3.2 The African Charter on the Rights and Welfare of the Child

The shortcomings of the CRC with regards to child soldiers, particularly relating to the age categories, has resulted in the adoption by African states of the ACRWC.[110] The ACRWC adopts a strict 'no under 18 rule' to the enlisting and recruitment of children.[111] Article 22 urges state parties to respect IHL during armed conflicts which affect the rights of children.[112] The ACRWC further directs state parties to take all necessary measures to ensure that no child participates directly in armed conflicts.[113] However the omission of indirect participation can be perceived as a weakness on the part of the ACRWC. Nevertheless, the ACRWC can be said to be the most uncompromising legal instrument currently available with regards to the banning and participation of children in armed conflicts.[114] It must be noted that the CRC and the ACWRC both blend IHL and IHRL.

Similar to the CRC, the ACRWC faces numerous challenges as regards implementation mechanisms. The issue of child soldiers on the African continent invariably shows that it is not the absence of, or the lack of adequate and relevant legal instruments, but that it is a matter of weak implementation mechanisms that needs attention.

[109] Optional Protocol to the CRC on Armed Conflicts note 3 *supra* Article 4 (1) and (2).
[110] BD Mezmur, 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game? '(2008) 23(1) *SA Public Law* 1, 14; ACRWC, note 20 *supra*.
[111] ACRWC note 20 *supra*, Article 2 provides that, 'for all purposes of this Charter a child means every human being below the age of 18 years.'
[112] *Ibid,* Article 22.
[113] ACRWC note 20 *supra.*
[114] For example the ACWRC directs states parties to take 'all necessary measures' whilst the OPAC CRC only requires state parties to take 'all feasible measures.'

2.2.4 International Criminal Law and a Comparative Analysis of the Rome Statute and the Statute of the Special Court for Sierra Leone

An international crime is "an act, which the international community recognizes as not only a violation of ordinary state criminal law, but one which is so serious that it might be considered as a matter for international concern."[115] Most ICL crimes also qualify as human rights violations of IHL.[116] It is argued that due to the nature of such crimes, the responsibility of the State, which customarily would have jurisdiction over it, to prosecute such cases cannot apply.[117]

International Criminal Law criminalizes the enlisting and recruitment of children to fight as combatants.[118] The Rome Statute in Article 8 states that it is a war crime to enlist or recruit children under the age of 15 to fight in an armed conflict.[119] It creates liability for both the state and armed groups if this article is violated.[120] The crime of enlisting and recruiting children is a continuous crime[121] which can only cease upon the child leaving the armed group in which he or she is recruited, or when the child reaches the legal age. [122] In dealing with the degree of involvement into the armed forces, *The Prosecutor v Brima et al* held that,

> 'An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or

[115] C Than and E Shorts, *International Criminal law and Human Rights* (2003) Sweet & Maxwell Ltd 13.
[116] *Ibid*.
[117] *Ibid*.
[118] The Rome Statute, Article 8 (2) (b) (xxvi).
[119] *Ibid*.
[120] *Ibid*.
[121] AW Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) Oxford University Press 254.
[122] Situation in the Republic of Congo, *The Prosecutor v Thomas Lubanga Dyilo* Case Number: ICC 01/04/01/06 (Decision on Confirmation of Charges), para 244.

acting as human shields are some examples of active participation as much as actual fighting and combat.'[123]

The judgment makes it clear that active participation does not only involve the actual fighting on the ground but is a wide phrase that includes the many functions that are needed for the general operations of the army.

On matters of jurisdiction and application, the Rome Statute does not apply 'to any person who was under the age of 18 at the time of the alleged commission of a crime.'[124] This means that those who might have committed an international crime whilst under the age of 18 cannot be held accountable under the Rome Statute. This position differs from that of the Statute of the Special Court for Sierra Leone, which includes provisions for the prosecution of crimes committed by persons aged above 15 years.[125] Thus the focus of the Rome Statute is based on the portrayal of children as blameless victims rather than as perpetrators of the crimes.

The Special Court of Sierra Leone made some significant judgments that can help illustrate the meaning of 'conscripting and enlisting'. The Statute of the Special Court for Sierra Leone criminalized the 'conscripting or enlisting of children under the age of 15 years into armed forces or groups or their use in participating actively in hostilities.'[126] In interpreting this provision, the Appeals Chamber in the case of *Prosecutor v Fofana* (CDF) upheld that the requirements for the crime should simply be

[123] *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007, available at: http://www.refworld.org/docid/467fba742.html [accessed 30 July 2014].
[124] The Rome Statute Article 26.
[125] UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at: http://www.refworld.org/docid/3dda29f94.html, Article 7 [accessed 23 July 2014]. The article provides for the prosecution of children above the age of 15 during the time of committing the crime, a position which differs from Article 26 of the Rome Statute. The recent Situation before the ICC, *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* in which Ongweni was a minor when he committed the crimes against humanity will shed light on how former child soldiers can be treated in future cases.
[126] Statute of the Special Court for Sierra Leone, Article 4 (c).

that 'the accused recruited children by way of their conscription or enlistment or participation actively in hostilities'[127].

In the case of *Prosecutor v Norman*, Justice Robertson pointed that conscription implies some degree of force or coercion.[128] The same interpretation was also made in the *Lubanga* case in which the court defined conscription as 'forcible recruitment and enlistment as voluntary recruitment.'[129] The prosecution in the *Lubanga* case cited with approval the *Fofana* interpretation.[130] One major criticism of the Statute of the Special Court for Sierra Leone is that it adopted the lower age threshold of 15, which is found under the Geneva Conventions. There are notable differences between this position and that of the CRC's Optional Protocol in which State parties can in certain limited scenarios recruit children. However, international criminal law dealing with the abolition of child soldiers is emphatic and uncompromising. The Statute of the Special Court for Sierra Leone created an ad-hoc Court, which provides important interpretation guidelines from its jurisprudence. Despite the existence of criminal sanctions for recruitment of child soldiers, armed groups continue to recruit children. An example is LRA in Uganda which is reported to recruit across borders, including in the southeast of CAR and the northeast of DRC.[131]

2.2.5 International Labour Law

Dugard defines ILL as that body of legal rules concerning labour law that apply between sovereign States and entities that have been granted international personality by sovereign States.[132] When children participate in war as combatants, either directly or

[127] *Prosecutor v Fofana*, Case No. SCSL-04-14-A, Appeals Judgment (May 28, 2008) para 139.
[128] Dissenting Opinion of Justice Robertson, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), Norman (SCSL-2004-14-AR72(E)), Appeals Chamber, 31 May 2004
[129] Situation in the Democratic Republic of Congo *The Prosecutor v Thomas Lubanga Dyilo*, (Judgment Pursuant to Article 74 of the Statute) Case No. ICC-01/04-01/06-2842 para 572.
[130] *Ibid*.
[131] HRW, available at http://www.hrw.org/news/2012/03/12/child-soldiers-worldwide [accessed 25/07/2014].
[132] J Dugard *International law: A South African perspective* (2005) Juta 329.

indirectly, it constitutes child labour.[133] Child labour is "work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development."[134] It entails work that by its nature is 'mentally, physically, socially or morally dangerous and harmful to children.'[135] The ILO aims to abolish some of the worst forms of child labour as a matter of urgency. It provides for the elimination of harmful labour practices which includes "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, *including forced or compulsory recruitment of children for use in armed conflict.*"[136] This means that armed groups that recruit children do so in clear violations of the ILO framework. The ILO adds another dimension which looks at recruitment of child soldiers as a harmful practice.

The legal framework protecting children from recruitment into the armed forces is wide. These laws work together in efforts to eliminate this problem. There is a clear and discernible cross-referencing between ICL, IHL and IHRL especially in the protection of children from recruitment.[137] Despite these branches of law being separate and distinct, they nonetheless complement each other. Notwithstanding this comprehensive legal framework, children are still being recruited and used in fighting internal wars especially in the Great Lakes region. In countries with continuous internal strife like DRC and Central African Republic, these war crimes occur to this day. The impact on children involved is deplorable. Most scholars, psychologists and social workers have gone to great lengths to show the harm and dangers of subjecting and involving children in armed conflicts.[138] The continued existence of child soldiers provides the clear gap between legal instruments and realities in certain parts of the African continent.

2.3 THE IMPACT OF WAR ON CHILDREN – THE HARM ELEMENT

[133] ILO, 'What is Child Labour' Available at http://www.ilo.org/ipec/facts/lang--en/index.htm [accessed 23/07/2014].
[134] *Ibid*.
[135] *Ibid*.
[136] ILO Convention 182, note 4 *supra*, Article 3 (a).
[137] C Than and E Shorts E, note 115 *supra* 12.
[138] DM Wessels, note 36 *supra* 23.

The above section has attempted to show the legal instruments available, protecting children from conscription and recruitment into armed forces. Despite the existence of such a wide-ranging framework, children still take part mostly in internal armed conflicts. This section attempts to show the harm element which is central to the reparative regime of the Rome Statute. The Rome Statute which outlaws and provides for reparations to victims of international crimes clearly illustrates the central and crucial role of victims in the implementation of the Statute.

2.3.1 Victims of International Crimes and Reparations

A victim(s) is defined as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court…"[139] Harm may also be sustained by certain types of organizations which include hospitals, charitable organizations and institutions that carry on humanitarian work.[140] The Rome Statute provides for the court to order reparations for the victims of international crimes.[141] Article 79, establishes a trust fund for the benefit of 'victims and their respective families'.[142] Under the regulations of the Trust Fund, it is provided that, 'other resources can be used to benefit victims of crimes, who have suffered physical, psychological or material harm as a result of these crimes'.[143] The position is summarized by McCarthy when he states that "since both forms of victim referred to in Rule 85 are defined by reference to the concept of harm, this concept is crucial in determining who may benefit from the Rome Statute's reparations regime.[144] The *Lubanga* case supports and expands on this aspect. Many children who were recruited suffered physical injuries, psychological harm, contracted HIV/AIDS and sustained other injuries from the training and through forced recruitment.[145] In many cases, both girls and boys suffered sexual abuse, with girls' experiencing unwanted pregnancies. These children also did not

[139] The Rules of Evidence and Procedure to the Rome Statute, Rule 85.
[140] *Ibid*, 85 (b).
[141] Rome Statute Article 75(2).
[142] Rome Statute Article 79.
[143] Trust Fund Regulations, Rule 48.
[144] C McCarthy, (2012) note 56 *supra* 94.
[145] *Lubanga* (Reparation Principles) note 36 *supra* 23.

regularly attend school.[146] These aspects reflect the reality of all cases of recruitment.[147] Due to their vulnerability, youth and ease of manipulation, children in armed conflicts experience harm differently and often more severely.

2.4.2 Types of Harm Recognized under the Rome Statute

It is clear that the ICC considers harm in the widest possible manner. In the *Lubanga* case, it pointed out that, "material, physical and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim."[148] Furthermore, the court acknowledged that harm that is suffered by one victim can give rise to harm suffered by others, especially in family relationships.[149] This indicates that reparations are not limited to people who are directly affected by the crime. Muttukumaru points that there is evidence that reparations pursuant to Article 75 could be obtained by the victims' families and successors.[150] The Trial Chamber in the *Lubanga* case stated that harm suffered by victims does not necessarily have to be direct and though the word victim connotes personal harm, it does not in all cases imply the existence of direct harm.[151] Judge Pikis however dissented on the nature of the harm. He disagreed with the position that 'harm suffered does not necessarily have to be direct'.[152] According to him, there ought to be a direct causal link of the harm in order for one to qualify as a victim under the reparation regime.[153] To decide otherwise would weaken the reparation regime as an endless list of victims can emanate from such an approach. It can be said that the approach of the dissenting judgment is sound as there must be a causal link between the crime and the harm suffered by the victims. Wiersing in the

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[146] *Lubanga* (Reparation Principles) note 36 *supra* 23.
[147] D Wessels, note 36 *supra* 23.
[148] Situation in the Democratic Republic of Congo, *The Prosecutor v Thomas Lubanga Dyilo* case Number ICC-01/04-01/06 OA90A 10 (Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) para 32.
[149] *Ibid.*
[150] C Muttukumaru, 'Reparations to Victims' *in* SK Roy Lee (editor) '*The International Criminal Court-The Making of the Rome Statute, Issues, Negotiations and Results* (1999) Kluwer Law International 262.
[151] *Lubanga* (Reparation Principles) note 36 *supra* para 107.
[152] *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber First Decision on Victims' Participation of 18 January 2008) Partly Dissenting opinion of Judge G.M. Pikis para 3.
[153] *Ibid.*

same vein states that "harm occurs as a direct consequence of the crimes committed and should not be limited to a narrow assessment of the harm attached to the charges but should be inclusive of the breath of harm suffered as a result of these crimes"[154] The harm element must therefore be wide and inclusive enough, but at the same time it must not be erroneously extended - as the reparation scheme would consequently be too diluted to make an impact.

Both actual pecuniary loss and consequential pecuniary loss are recoverable under the Rome Statute.[155] It is important however that the limits of consequential loss are clearly defined as many forms of this type of harm exist.[156] Victims can claim loss of future earnings, loss of profit, loss of support, loss of pecuniary opportunity among other claims.[157] As will be discussed in chapter 4[158], reparations should not be limited to the crimes that the accused is convicted of, as that might again result in further injuries like stigmatization of those who are not considered as victims.[159]

2.4 CONCLUSION

This chapter has shown both the international and the African regional law instruments related to the protection of child soldiers. As noted above, there is a strong legal framework that often complements each other. Paradoxically, despite such an increase in the legal protection frameworks, there has also been an increase in the number of child soldiers, especially on the African continent, more especially in the Great Lakes Region. The argument has been made that it is not the absence of adequate laws, but rather the lack of strong implementation mechanisms, that is the challenge. Differential legislative standards and obligations, between states and armed groups on recruiting children, can also be attributed to some of the continued recruitment practices. Due to the continued participation of children in armed conflicts, despite laws prohibiting such activity, children suffer severe harm. The element of harm, as discussed above, is central to a

[154] A Wiersing, 'Lubanga and its implications for victims seeking reparations at the International Criminal Court', (2012) *Amsterdam Law Forum* 30.
[155] C McCarthy (2012), note 56 *supra* pp 105-109.
[156] *Ibid*.
[157] *Ibid*.
[158] See 4.2 below.
[159] A Wiersing (2012) note 154 *supra* 31.

successful awarding of reparations under the Rome Statute. As such, the ICC is expected to formulate proper binding guidelines of what kind of harm qualifies for reparations. Failure to provide a clear formulation, as was reflected in the *Lubanga* case, will have serious consequences on those wishing to claim for reparations in the future.

CHAPTER THREE: THE REPARATIONS REGIME UNDER THE ROME STATUTE

3.1 INTRODUCTION

This chapter analyses the Rome Statute and the nature of reparations established under Article 75. It further looks at the relationship between Article 75 and Article 79 which establishes a Trust Fund (TFV) for the benefit of victims of international crimes within the court's jurisdiction. Article 75 does not provide the scope of reparations, or indicate whether the victims have a right to reparations or whether reparations are at the discretion of the court. This chapter will further show that, apart from the common monetary forms of reparations, symbolic ones must be given equal importance as they also contribute to the social integration of former child soldiers in society and their families at large. It will be argued further that symbolic reparations complement the other forms of reparations mentioned under the Article 75.

Before dealing with the Rome Statute, it is important to note that the right to a remedy and reparations for gross violations of human rights is a well-entrenched right under international law.[160] The UN Basic Principles provide a comprehensive guide on redressing harm that occurs as a result of gross violations of international human rights standards. It further acknowledges the existence of the right to a remedy in other international law instruments including the Rome statute. In the same vein, the Nairobi Principles[161] also acknowledged the well-entrenched right to reparations and its role in assisting society in healing and recovery especially after armed conflicts.[162] The Nairobi Principles specifically highlights the plight and disadvantages that woman and young girls experience including religious and cultural practices that places them at a disadvantage and subordinates them.[163] The Cape Town Principles[164], despite being

[160] UN Basic Principles and Guidelines, note 25 *supra*.
[161] Nairobi Principles on Women and Girls' Right to a Remedy and Reparation, Nairobi 2007.
[162] *Ibid*, para 2.
[163] *Ibid*.

silent on the right to a remedy and reparations of former child soldiers also highlights the need to respect children's rights in all processes that affect them.[165] That being said, the inclusion of reparations under the ICC - an institution principally tasked with the prosecution and sentencing of international criminals, is a new and historic development.

3.2 ARTICLE 75 OF THE ROME STATUTE

The inclusion of Article 75 in the statute is a fundamental break from the aims of ICL which is primarily concerned with the prosecution and punishment of international crimes.[166] Van Boven articulates that predecessors of the ICC were strongly influenced by the adversarial system prevalent in other common law countries, which in search for the truth, placed victims in a quasi-dependent position as witnesses.[167] A brief look at the drafting of Article 75 is thus crucial in understanding the nature of reparations it establishes.

3.2.1 History and the Drafting of Article 75

The concept of reparations has been entirely absent from international criminal law.[168] During the drafting of the Rome Statute, divergent views by state parties existed on the inclusion of reparations. Some state parties held the opinion that the inclusion of reparations would undermine the core aim of the statute- which is to effectively prosecute accused persons of international crimes in a fair and transparent manner.[169] The drafting of Article 75 shows the differences that existed between member states on

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[164] Cape Town Principles and Best Practices (Adopted at the Symposium on the Prevention of Recruitment of Children into Armed Forces and on Demobilization and social Reintegration of Child Soldiers in Africa (Cape Town Principles) April 1997.
[165] Cape Town Principles, note 164 *supra* 8.
[166] AW Schabas (2010), note 121 *supra* 879; Cryer Robert, Friman Hakan, Robinson Darryl and Wilmshurst Elizabeth *An introduction to International Criminal Law and Procedure* (2010) Cambridge University press 4.
[167] Theo van Boven, 'Victims' Rights and Interests in the International Criminal Court' *in* Jose Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds) *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko* (2009) Martinus Nijhoff 902.
[168] L Moffett note 63 *supra* 371.
[169] C Muttukumaru, 'Reparations to Victims', *in* Carla Ferstman 'The reparation regime of the international criminal court: practical considerations' (2002) 15 *Leiden Journal of International Law* 667-686.

the nature and form the article was to take. In the 1994 Draft Statute of the ICC, the entire article on reparations including the notion of victim redress was absent.[170] The 1998 report of the Preparatory Committee on the establishment of an ICC, reflects the lack of inclusion of reparations and victim redress provision, and also highlights the disagreements with regard to the nature and form of reparations, among other things.[171] Some of the main sticking issues were whether reparations were to be treated as a right to the victims or they were to be at the discretion of the court.[172] Moreover, an important question was whether State parties were to have a duty to provide reparations on the recommendation of the Court.[173] The final article did not include state responsibility, electing to focus exclusively on individual accountability and leaving reparations to the discretion of the Court.[174] Some authors have argued that the difference between the draft Article 73 and the final Article 75 shows the unique nature of reparations under ICL and IHRL in which the state is responsible when the perpetrator cannot pay.[175] The article focuses on individual criminal responsibility- a position that others argue is inadequate for an effective remedy to the victims of international crimes.[176]

3.2.3 Aims and the Scope of Reparations under the Rome Statute

Most legal writings on the scope of reparations cite the principle established by the Permanent Court of International Justice (PCIJ) formulation in the *Factory at Chorzow* where the court underscored that "reparation(s) must, so far as possible wipe out all the consequences of the illegal act, and re-establish the situation which would, in all

[170] International Law Commission, 'Draft Statute for an International Criminal Court' (1994) Available at http://www.un.org/law/ilc/ [accessed 05 December 2014].
[171] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/2, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Article 73. The entire Article was in brackets, showing the lack of consensus on its contents.
[172] *Ibid* Art 73 (1).
[173] David Donat-Cattin 'Article 75' *in* O Triffterrer (ed) *Commentary on the Rome Statute* (1999); Theo van Boven, note 167 *supra* 900.
[174] This is evident from the wording of the Article which states that the court *may* make an order of reparations.
[175] C Ferstman (2002), note 23 *supra* 371.
[176] *Ibid*, 372.

probability have existed if that act had not been committed."[177] The PCIJ furthermore pointed out that this was not only a principle of international law, but a general conception of law.[178] The above principle summarizes the law of reparations among state parties. This principle can also be extended to the case of former child soldiers, to re-establish in all probability what they would have been, had their recruitment and participation in armed conflict not taken place. It is difficult or nearly impossible to reinstate the situation that former child soldiers were in prior to the enlisting and recruitment due to the passage of time and the nature of harm suffered, particularly with regard to victims of sexual crimes.

Reparations accomplish a dualistic purpose of obliging those responsible for serious crimes to compensate for the harm they caused and of enabling the Trial Chamber to ensure that offenders account for their deeds.[179] The article is not aimed at punishing the offender, but is a response to the general plight of the victims of international crimes who were often left with no remedy.[180] It arose partly as a result of the criticisms leveled against the ICTY and ICTR over their failure to take into account the needs of the victims that require redress.[181] Cattin states that "Article 75 covers a very serious gap on the Statutes of the *ad hoc* Tribunals (Nuremberg, Tokyo, ICTY and ICTR) that did not properly address the issue of justice for victims"[182]. However, the statutes of these tribunals did not have a provision to order reparations.[183] On the other hand, different forms of reparations are provided for under international law.[184] Article 75 of the Rome Statute echoes these principles and includes restitution, compensation and rehabilitation among other forms of reparations the court can order or develop.

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[177] PCIJ *The Factory at Chorzow,* Claim for Indemnity *Germany v Poland* Merits (1928) 47.
[178] *Ibid*.
[179] *Lubanga* (Reparation Principles) note 36 *supra* para 179; however, some authors like C McCarthy (note 56 *supra* 81) argue that reparations under the Rome Statute are non-punitive.
[180] C McCarthy (2012) note 58 *supra* 81.
[181] Only restitution to property was made provision for under these Statutes, (Article 24 (3) of the ICTY and 23 (3) of the ICTR).
[182] D Donat-Cattin, note 173 *supra*.
[183] Naomi Roht- Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 184.
[184] UDHR, Article 8 makes provision for an effective remedy in cases of human rights violations; Rome Statute, Article 75; UN Basic Principles and Guidelines at II (d) and IX; International Covenant on Civil and Political Rights (1966) U.N. Doc. A/6316, Article(s) 9 (5).

3.3 FORMS OF REPARATIONS UNDER ARTICLE 75

The concept of reparations established under the Rome Statute refers to all the measures that may be employed to redress the various types of harm that victims may have suffered as a consequence of certain crimes committed.[185] Cattin points out that the word reparation refers to "a broad and flexible concept introduced in the statute to allow the judges to decide upon the widest possible range of the means of remedy to victims' rights violations."[186] Under Article 75, only three forms of reparations are explicitly mentioned which are restitution, compensation and rehabilitation.[187] The use of the word 'including' under Article 75 indicates that they are not an exhaustive list, but the court can develop other forms. This means that other forms of reparations that are symbolic in nature can be awarded under article 75.[188]

3.3.1 Restitution

The ICC is empowered under article 75 to order restitution with respect to victims of international crimes. Restitution refers to the 'restoration of the situation that existed before the wrongful act was committed.'[189] According to the UN Basic Principles and Guidelines, restitution must restore the victim to the original condition before the violations occurred.[190] It includes "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."[191] In respect of former child soldiers, the above modes can assist in their speedy and holistic integration into society. It is often regarded

[185] Greiff, de Pablo, *The Handbook of Reparations* (2006) *Oxford* University Press 452.
[186] D Donat-Cattin note 173 *supra*.
[187] Rome Statute, Article 75 (2).
[188] FV Garcia-Amador, BL Sohn and RR Baxter, '*Recent Codifications of the Law of the State Responsibility for Injuries to Aliens'* (1974) *Sijthoff* 96. The authors argue that reparations have been defined since ancient times in broad terms and include measures of satisfaction.
[189] Responsibilities of States for Internationally Wrongful Acts UN Doc (2001), Article(s) 34 and 35.
[190] UN Basic Principles and Guidelines Principle note 25 *supra* 19.
[191] *Ibid*.

as the primary form of reparation as it aims to re-establish the status of the victim prior to the commission of the crime.[192]

The ICC can only make restitutionary orders against a convicted person and this provision does not apply to State parties.[193] However it may be difficult to achieve the state of affairs that existed prior to the harm. The Court in *Lubanga,* whilst recognizing the inapplicability of restitution orders, especially to former child soldiers, indicated that restitution orders can be more appropriate for charitable organizations, schools and clinics among others.[194] This is vital as addressing the harm done to these organizations can have a wider positive impact on former child soldiers.

3.3.2 Compensation

The Rome Statute provides for compensation as a form of reparations. Some authors point out that principles relating to compensation may simply refer to 'the available national procedures under which individual victims may have effective access to an appropriate civil remedy.'[195] In some instances however, the legal system may be totally dysfunctional. In such cases, the ICC must "operate according to general principles of fairness and allow the victims access to other sources of monetary compensation including the TFV established under Article 79".[196] Important guidelines on the assessment of appropriate compensation under the UN Basic Principles provide that-

> '[c]ompensation 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...'[197]

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[192] The International Federation for Human Rights (F I D H) '*Victims' Rights before the ICC*: *Reparations and the Trust Fund for Victims*' 6, Available at https://www.fidh.org/International-Federation-for-Human-Rights/international-justice/international-criminal-court-icc/Victims-Rights-Before-the [accessed 06 December 2014].
[193] Rome Statute, Article 75 (2).
[194] *Lubanga* (Reparation Principles) note 36 *supra* para 225.
[195] D Donat-Cattin, note 173 *supra*.
[196] *Ibid* 972.
[197] UN Basic Principles and Guidelines note 25 *supra*, Article 20.

The assessment must look at other factors such as the nature of harm, the material damages including lost opportunities, employment, and future earning potential among others.[198] The nature of the crime and its impact on the individual victim will be of crucial importance in the general assessment of the amount to be compensated.[199] In respect of former child soldiers, their age, gender and specific harm must be taken into account in establishing and awarding compensation orders.

A compensation order must identify victims and their identities and the amounts that each individual will obtain.[200] The ICC must not limit the compensation award to those victims who might have participated during reparation proceedings but must devise a mechanism to establish a class of victims which will allow the continued addition of victims and potential claimants to the list. In cases where the convicted is indigent, it will be important for the court to develop lasting guidelines as to how the reparations regime will function. The inclusion of article 79 can go a long way in addressing the above scenario in the event of the convicted person(s) being indigent. Clear guidelines and principles must be established to shed light on how Articles 75 and 79 will relate and complement each other.

3.3.3 Rehabilitation

This form of reparations is appropriate in most cases of child soldiers and is expressly provided for under Article 75. It includes measures designed at alleviating the physical, psychiatric or social harm suffered by the victims.[201] It has been pointed out that rehabilitation measures must not be left to the very last part of the proceedings but must be adopted throughout the proceedings in combination with protection proceedings under Article 68.[202] This will ensure that harm will be addressed as soon as possible without waiting for a conviction which normally takes years to obtain. Rehabilitation of victims cannot be left as the sole responsibility of the convicted or accused person(s) but

[198] UN Basic Principles and Guidelines note 25 *supra*, Article 20.
[199] *Ibid*.
[200] C McCarthy, (2012) note 56 *supra* 215.
[201] *Ibid*, 215.
[202] D Donat-Cattin, note 173 *supra* 971.

must include the society at large and the TFV.[203] This can be enabled by the ICC through permitting the TFV and other governmental and non-governmental organization to provide assistance or distribute such financial assistance as may be provided and ordered by the court.[204]

In the *Lubanga* case, the court stated that rehabilitation measures should include medical and psychological services.[205] Individual rehabilitation may include for example the provision of prosthesis and psychiatric treatment.[206] Psychiatric treatment is also an appropriate rehabilitation mechanism since most child soldiers either witnessed or committed horrendous acts during armed conflict. Cattin argues that rehabilitation orders made by the court must be aimed at not only the affected former child soldiers, but must also include those who did not participate actively in the armed conflict as combatants who nonetheless suffered harm.[207] Lessons from some reparation schemes already underway in parts of Northern Uganda must be observed.[208] It has been reported that projects that focus exclusively on child soldiers as victims result in resentment, stigmatization among other negative effects on the part of the non-receivers.[209] Thus, rehabilitative projects that target all affected children within a community are more favorable and can assist in the general integration of former child soldiers as it reduces stigmatization. The NGO's in their submissions in the *Lubanga* case pointed out that 'rehabilitation measures on former child soldiers must address the behavioral changes and problems of former child soldiers, must develop cultural and sporting activities, must provide appropriate education for former child soldiers and must assist in their social and economic reintegration'[210]. It can be gathered from the above that rehabilitation mechanisms must be child focused and sensitive to their needs.

Van Bueren notes the inherent dangers associated with rehabilitation of former child soldiers. The author argues that 'indoctrination can masquerade as recovery and

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[203] D Donat-Cattin, note 173 *supra* 971.
[204] *Ibid*.
[205] *Lubanga* (Reparation Principles) note 36 *supra* para 233.
[206] C McCarthy, note 56 *supra* 215.
[207] D Donat-Cattin, note 173 *supra* 971.
[208] M Gotze 'Reparative Justice at the International Criminal Court: Best Practice or Tokenism' *in* M Wemmers Jo-Anne, (ed) *Reparations for Victims of Crimes Against Humanity, The Healing role of Reparation* (2014) Routledge 66.
[209] *Ibid*.
[210] *Lubanga*, (Reparation Principles) note 36 *supra* para 45.

integration'.[211] Both governments and non-governmental organizations must refrain from further inflicting harm in the name of rehabilitation.

3.3.4 Symbolic Reparations and Measures of Satisfaction

It has been said that in cases of mass victimization, reparations can be cemented through other means that are non-monetary or non-pecuniary forms of compensation or rehabilitation.[212] Such measures have a wider scope apart from compensating the victims as they respond to the need to publicly acknowledge the causes and effects of the crime at the same time restoring the dignity of the victims in a societal context.[213] These forms include public apologies, establishment of national days for commemorations, public insurance[214] and the creation of parks or monuments dedicated to the memory of victims. [215] Also included is the proper burial of victims who are buried in mass graves or far away from their original areas. This is of significance to child soldiers who might have lost close relatives during conflicts. The reburials of lost family members from afar can potentially assist in their rehabilitation by providing closure. The court may further provide assistance through the provision of information concerning the remains or the clarification of the circumstances in which victims might have died.[216] This position was clearly stated by the Inter-American Court of Human Rights (IACHR) when it noted in *Bamaca-Velasquez v Guatemala*[217] that-

> '[t]he right that every person has to the truth has been developed in international human rights law…The possibility of the victim's next of kin knowing what happened to the victim…is a means of reparation, and therefore an expectation

[211] Van Bueren note 86 *supra* 348.
[212] D Donat-Cattin, note 173 *supra* 971.
[213] D Donat-Cattin 'Article 75' *in* O Triffterrer (ed) *Commentary on the Rome Statute* (2008) (2nd Ed), 1405.
[214] UN Basic Principles of Justice for Victims of Crime and Abuse of Power cited by D Donat-Cattin, note 213 *supra* 1405.
[215] *Ibid*. See also McCarthy C, (2012) note 58 *supra* 216.
[216] Rome Statute Article 93 (1) (g) provides for the co-operation of a relevant state in respect of examination of places or sites, including the exhumation and examination of grave sites.
[217] *Bamaca-Velasquez v Guatemala*, 'Reparations and Costs', 22 February 2002, Inter-Am Ct. H.R Series C. No. 91 para 84.

regarding which the State must satisfy the next of kin of the victims and society as a whole'.[218]

Although the above was applying to a State, the same principle can be extended to reparations ordered against individual convicted persons. In essence, the offender should offer public apologies to the victims. Cattin however points out that the offender cannot be forced to offer such apologies unless the declaration of the apology is sincere.[219] The same was noted by the Trial Chamber 1 when it stated that giving apologies would only be appropriate with the convicted person's consent.[220] Cattin further argues that 'the court cannot oblige an individual to repent as it infringes his or her freedom of determination and inner moral sphere'.[221] The point to note is that wherever possible, the convicted person must be given a platform to offer apologies to the victim families if he or she wishes to do so.

The healing and rehabilitation process requires the interaction of former child soldiers and their involvement in the wider reparations scheme.[222] Symbolic reparations will also work more effectively since most of the convicted perpetrators are usually indigent.[223] This means they cannot pay reparations of monetary value to all the potential victims.[224] This position is true when one looks at the potential number of victims of war crimes in Uganda, DRC and CAR.[225]

Bringing comfort and closure to the victims without focusing on the usual payment of something plays an important role in the wider reparative framework. The building of monuments and institutions among other official creations is one of the most effective ways of redressing the past harm suffered. It is important that such commemorations be used for re-building the nation and not for the advancement of personal interests. This

[218] *Bamaca-Velasquez v Guatemala*, 'Reparations and Costs' note 217 supra, para 74.
[219] D Donat-Cattin (2008) note 184 *supra* 1405.
[220] *Lubanga* (Reparation Principles) note 36 *supra* para 269.
[221] D Donat-Cattin (2008) note 184 *supra* 1405.
[222] DJ Christie, *Transforming Societies after Political Violence: Truth Reconciliation and Mental Health* (2009) Springer 110.
[223] L Moffett, *Justice for Victims of before International Criminal Court* (2014) Routledge 228.
[224] *Ibid*.
[225] *Ibid*.

lesson is underscored in the Rwanda case, where the commemoration dates to remember those who died in genocide are highly politicized and used to denounce opposition parties among other things.[226] Such an abuse will defeat the aims of symbolic reparations.

Former child soldiers are reported to have committed some of the heinous crimes in Sierra Leone, Uganda, and DRC among other countries.[227] These atrocities include killings, murders, assaults, torture and detentions among others.[228] Whilst the Rome Statute views child soldiers as innocent victims, the affected societies might not easily share the same position. It then becomes important for the former child soldiers to offer public apologies in their communities. Such an approach will not only assist the transformation of the societies involved but also helps in the healing of former child soldiers themselves.[229] Reparations for child soldiers must be balanced in a way that respect their rights (both as victims and perpetrators) and the rights of the communities they victimized. The CRC provides that 'all state parties must take appropriate measures to promote physical and psychological recovery and social reintegration of child victims'.[230] Such psychological and social re-integration must include the former child soldiers acknowledging and apologizing to the victim societies. An approach like this is therapeutic and helps in the general integration of former child soldiers into society.[231] In all this, sight must not be lost that former child soldiers under the Rome Statute are victims of war crimes despite having committed serious crimes themselves.

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[226] Waldorf Las *in* C Ferstman, M Gotze and A Stephens (ed) (2009) '*Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making'* Martinus Nijhoff 523.
[227] Sierra Leon Truth and Reconciliation Commission (SLTRC) Final Report Vol. 3(b), 'Children and Armed Conflict in Sierra Leone' (2004) para 228, Available at http://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents [accessed 06 December 2014]
[228] *Ibid,* para 228.
[229] The Redress Trust 'Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court (September 2006) Available at http://www.redress.org/downloads/publications/childsoldiers.pdf [accessed 04/08/2014] 32.
[230] CRC, note 3 *supra* Article 39.
[231] SC Grover, *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged With Grave Conflict-related International Crimes* (2012) Springer 132.

3.4 THE TRUST FUND FOR VICTIMS OF INTERNATIONAL CRIMES ARTICLE 79

The above highlights the reparative regime under Article 75. As discussed above the conviction centered reparative regime is filled with many limitations. The idea of a Trust Fund entirely designated for the benefit of victims of international crimes was a noble idea, first introduced by the International Law Commission (ILC) in its Draft Statute for the ICC.[232] The main purpose of the TFV was underscored by the Trial Chamber when it stated that "the main responsibility of the TFV is first and foremost to ensure that sufficient funds are available in the eventuality of a court reparation order pursuant to article 75 of the Statute."[233] This means that the TFV works as an intermediary through which the ICC can make its reparative awards. It has another independent mandate from the court which is to use its 'other resources' for the benefit of victims.[234] The TFV is regulated mainly by the Trust Fund Regulations (RTFV).[235] The Assembly of States (ASP) is responsible for laying out the guidelines that regulates the activities of the TFV. The management and daily activities of the Fund are given to the Board of Directors- individuals who are elected by the ASP.[236]

The Pre-Trial Chamber's decision was heavily criticized by the Secretariat- an institution created to assist the Board of Directors in discharging its mandate. It noted that to put some funds aside in anticipation of a reparative award to be made by the Court was financially unwise and would result in the creation of two categories of victims - those benefiting from reparation award and those seeking assistance.[237] Such a position has the potential of discriminating against victims by virtue of their participation or non-participation through the court-ordered reparations.

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[232] M Jennings *in* O Triffterer (ed) *Commentary on the Rome Statute* (2008) 'Article 79',1005; C McCarthy , (2012) note 56 *supra* 225.
[233] Situation in the Republic of DRC *Decision on the Notification of the Board of Directors of the TFV in accordance with regulation 50 of the Regulations of the TFV*, Case No (ICC-01/04) 11 April 2008, 7.
[234] Regulations of the Trust Fund for Victims (RTFV), Resolution ICC-ASP/4/Res.3 Rule 98 (5).
[235] *Ibid*.
[236] ICC-ASP/1/Res.6.
[237] Report of the Bureau on the Assessment of the Regulations of the TFV', ICC-ASP/7/32, para 16.

3.4.1 Sources of the TFV's Funding

Under the RTFV, Regulation 21 provides for four sources of revenue for the TFV[238]. Firstly the TFV is funded 'through voluntary contributions, secondly from money and other property collected through fines and forfeiture, thirdly from resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 and lastly from 'such other resources' other than assessed contributions as the ASP may decide to allocate to the TFV'.[239] Schabas argues that the fines and forfeiture proceeds are the only genuine income of the Fund.[240] The proceeds from fines and forfeitures can only benefit the Fund and the Court is not empowered to use such assets for its own benefit.[241] The forfeiture of assets is meant to deprive the perpetrator of the proceeds of the crime.[242] Schabas points out that it seems unlikely that the TFV will be funded or will obtain assets or resources as a result of a conviction as most convicts are often declared indigent.[243]

3.4.2 The Relationship of the TFV and the ICC

McCarthy argues that the fact that the Rome Statute empowers two distinct bodies with the provision of victim redress can potentially create a degree of institutional tension. [244] The Trial Chamber's focus are the victims in specific cases before it while the Trust Fund's mandate is wide; requiring it to have regard to all the victims within the Court's jurisdiction.[245] It can be said that the two institutions complement each other with one being a judicial body and the other being bureaucratic or managerial.[246] Schabas points out that the TFV operates to some extent as 'a humanitarian non-governmental

[238] RTFV, note 235 *supra* Regulation 21.
[239] RTFV, note 235 *supra* Regulation 21.
[240] AW Schabas (2010), note 121 *supra* 910.
[241] M Jennings (2008) note 232 *supra* 1441.
[242] *Lubanga* (Reparation Principles) note 36 *supra* para 133.
[243] AW Schabas *An Introduction to the International Criminal Court* 4th ed (2011) Cambridge University Press 363.
[244] C McCarthy, (2012) note 56 *supra* 240.
[245] *Ibid*.
[246] *Ibid*.

organization in an environment that is largely independent of the judicial process.'[247] Article 79 provides that the TFV is to be managed by criteria to be determined by the ASP.[248] In the event that the court orders reparations to be made through the TFV, pursuant to Article 75, the Fund is under an obligation to implement such a request.[249] When it uses its 'other available resources', the Trust Fund is required to notify the appropriate Chamber which in turn has the power to disallow it in proceeding with the plan in certain circumstances.[250]

From the wording of Article 75, it can be said that in cases where the court is to make an order directly against a convicted person, pursuant to Article 75(2), the court is empowered to specify the nature, form and scope of those awards.[251] The court can nonetheless delegate decision making to the Trust Fund. Section 3 of the RTFV deals with situations where the decision for reparations has been triggered by the decision of the court.[252] Evident from the section is the co-operative nature between the two institutions. The Board of Directors retains the discretion to decide whether it is appropriate to complement the resources collected through awards for reparations with its "other resources of the Trust Fund." A decision of this nature must be informed by the available resources within the Fund among other considerations.

Schabas is skeptical of the TFV's role and its functionality as a whole. Firstly he notes that its significance will depend on its ability to obtain substantial amounts from convicted persons.[253] This position is most unlikely since most of the accused and convicted criminals are often indigent. He further notes that the notion that state parties will continue to channel funds to the TFV will soon dry out as most states will prefer to allocate such amounts to already established institutions with more expertise in the

[247] AW Schabas (2010), note 121 *supra* 910.
[248] Rome Statute, Article 79.
[249] The International Federation for Human Rights (F I D H) note 30 *supra* 23.
[250] RTFV, note 235 *supra* para 50 (a) (iii), If the court is of the opinion that proceeding with such projects can jeopardize the impending court proceedings or would violate the presumption of innocence of the accused; the court can stop the reparation proceedings.
[251] Rome Statute, Article 75(2).
[252] RTFV, note 235 *supra* section 3.
[253] AW Schabas (2010), note 121 *supra* 909.

area.[254] The situation is further made uncertain by the fact that the distribution of properties of the accused (assuming they are located) is often not an easy task.[255] Finally, he notes that the management of the TFV is a costly scheme with uncertainty on whether the costs of the operation can be justified in light of its uncertain potential.[256] An example is the TFV's 2010 budget for its operational costs. The operational costs amounted to €1.4 million- an amount which is reported to have exceeded the actual income of the Fund during that year.[257]

Whilst the above mentioned criticisms can potentially undermine its operations, the TFV has already underscored some major achievements through various notable projects. The flexibility of the TFV is shown in that, prior to any conviction by the court; it was already funding various projects for the benefit of victims.[258]

According to the Fund, its various projects already underway include:

> 'rehabilitating and reintegrating child soldiers including girl combatants and abductees through family re-unification, foster placement, and support for victims of rape, providing opportunities to improve households livelihoods through agricultural and micro-credit initiatives; promoting radio for justice, a community-based radio approach that focuses on transitional and restorative justice to heal memories and integrating a broad range of programme approaches to provide a comprehensive package of support services to target group affected individuals.'[259]

That being said, it is no doubt that the TFV faces tremendous challenges in discharging its mandate. Some of the challenges are due to the hands-off approach by the court; choosing to delegate its mandate to the TFV to define and limit the scope of the eligible applicants.[260] The Court in the *Lubanga* case approved the TFV 'five-step plan' which

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[254] AW Schabas (2010), note 121 *supra* 909.
[255] *Ibid*.
[256] *Ibid*.
[257] AW Schabas (2011) note 243 *supra* 365.
[258] *Ibid*, note 243 *supra* 364, the author notes that most of these projects were in DRC and Uganda in which active situations were being addressed by the Chambers.
[259] Report to the ASP on the Activities and Projects of the Board of Directors of the TFV for the period 1 July 2007 to 30 June 2008', ICC-ASP/7/13, para 16**.**
[260] M Gotze, note 208 *supra* 66.

included 'establishing the localities that must be involved in the reparations, a process of consultation within the localities, an assessment of harm to be carried out by experts, holding of public debates in the localities to explain reparations and finally the collection of proposals for collective reparations'.[261] Though the Registry and other support structures of the Court can assist in this activity, the Court has principally tasked the TFV with this enormous task. The Court should have, through its reparation principles decision, identified the communities and set some limitations on which victims are eligible for reparations, rather than leaving this to the TFV.[262] Giving this task to the TFV can appear arbitrary to other communities who will be left out in the reparations programmes.[263] Selecting the victims and their communities, if not carefully done, can negatively affect the perception of equality, fairness and non-discrimination by the court.

3.5 INDIVIDUAL AND COLLECTIVE REPARATIVE AWARDS

One of the aspects the Trial Chamber had to deal with was whether reparations were to be determined on an individual or collective basis for the victims. Mégret argues that despite the recognition of both individual and collective reparative awards, the ICC reparative regime is biased towards the individualization of awards.[264] The author notes that among other factors, this bias is due to cultural individualism influence within the ICC and also the influence of human rights law - a discipline which traditionally focused on the individual.[265] Article 75 does not specifically mention any of these two modes. It can be argued that whether collective or individual awards are to apply is a matter that was left to the court to decide as part of 'establishing principles'.[266] The Rules of Procedure and Evidence (RPE) directly make provision for both modes of reparations. Rule 97 provides that "the court may award reparations on an individualized basis,

[261] *Lubanga* (Reparation Principles) note 36 *supra* para 282.
[262] M Gotze, note 208 *supra* 66.
[263] *Ibid,* the author argues that a judicial body identifying the communities has legitimacy over the TFV doing the same.
[264] Frédéric Mégret 'The Case of Collective Reparations before the International Criminal Court' in M Jo-Anne Wemmers *Reparations for Victims of Crimes Against Humanity: the Healing Role of Reparation* at 172.
[265] *Ibid*, 232.
[266] Rome Statute, Article 75.

where it deems it appropriate, on a collective basis or both."[267] Under Article 75, the Court's power to order reparations through the TFV appears to suggest a more collective basis for reparations. This is further supported by RPE, preferring collective awards when the TFV is funding those awards.[268] The Trial Chamber citing the IACHR in *Moiwana Community v Suriname*[269] noted that 'both forms are not mutually exclusive and may be awarded concurrently'[270]. However, it reiterated that when collective reparations are awarded, they must still aim to address the individual harm of the victims.[271]

Individual reparation awards offer a measure of personalized attention - a position that recognizes the societal recognition of the suffering caused.[272] However, they face many challenges in their implementation including unavailability of funds, high costs of assessing different amounts, duplication of awards among others.[273] Thus, some authors note that individual reparations may not be feasible, desirable or sufficient in cases of gross and systemic human rights violations.[274] They further argue that collective reparations are more suitable in those cases that the victims were targeted as a group rather than individually.[275]

In its submissions to the Trial Chamber, the TFV was emphatic in its preference towards 'a community based approach to reparations'[276]. It further submitted that given the limited resources, and the number of victims, collective reparations offer a more meaningful form of assistance to the affected individuals and communities.[277] In most

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[267] The Rules of Procedure and Evidence to the Rome Statute, 2000 (ICC-ASP/1/3), Rule 97
[268] *Ibid*, Rule 98.
[269] (Preliminary objections, merits, reparations and Costs), Judgment of 15 June 2005, paras 194 and 201.
[270] *Lubanga*, (Reparation Principles) note 36 *supra* para 406.
[271] *Ibid*.
[272] Frédéric Mégret note 264 *supra* 175.
[273] *Ibid*.
[274] H Rombouts, P Sardaro and S Vandegiste 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights' *in* K De Feyter, S Parmentier, M Bossuyt and P Lemmens (editors) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (2005) Antwerpen 460.
[275] *Ibid*.
[276] *Lubanga* (Reparation Principles) note 36 *supra* para 55.
[277] *Ibid*.

African societies, a child's upbringing is the responsibility of the whole community hence his or her recruitment as a child soldier damages the individual child and the community as whole. Awards that can address the needs of the victims' through constructing and equipping schools, hospitals, counseling centers, recreational and sporting facilities among others can impact positively on former child soldiers. Furthermore, the educational programmes and activities must reflect the lost educational opportunities as a result of recruitment and promote the development of self-esteem of the former child soldiers among others.[278]

Nevertheless, some cases including to victims of sexual abuse, can warrant the need to individualize the awards. Thus the Women's Initiatives submissions in the *Lubanga* case, whilst preferring collective over individual awards, highlighted the need to target certain individuals within the group.[279] The court as mentioned above did not dwell much or define what collective reparation mean in relation to reparations. This position does not add any clarity to the plight of former child soldiers.

3.7 CONCLUSION

The discussion above attempts to show the provisions of reparations under the Rome Statute, particularly how they relate to each other. Article 75 is flexible enough to allow the court to order diverse reparation awards separately or in conjunction with each other. The article is also centered on the guilty verdict of the accused- a limitation that can potentially affect victims anticipating reparation awards. The inclusion of the TFV under Article 79 is a contrast to the obvious financial pitfalls of the conviction centered reparative regime under Article 75. This chapter stressed the idea that symbolic reparations must be utilized as they complement other forms of reparation. The reparative regime under the Rome statute is undoubtedly unique but its success will largely depend on the availability of resources to fund the various reparations. In its first decision dealing with reparations, the Trial Chamber failed to address the suggested

[278] Cape Town Principles note 164 *supra* 10.
[279] *Lubanga* (Reparation Principles) note 36 *supra* para 60.

mode of reparations. Moreover, by delegating the major duties to the TFV, the Trial Chamber appears to be avoiding its mandate under Article 75.

CHAPTER FOUR: THE REPARATIONS JURISPRUDENCE IN PRACTICE

4.1 INTRODUCTION

This chapter analyzes some selected aspects that can potentially affect reparations to former child soldiers. It focuses on gaps that the *Lubanga* case (judgment establishing reparation principles) ought to have addressed fully. It will be argued that the Trial Chamber's judgment establishing principles to be applied during reparations whilst confirming some important applicable principles in international children's rights was a missed opportunity in laying solid, permanent principles down. It will be argued further that the lack of conviction by the trial chamber to the guiding principles under the (CRC)[280] did not do justice to the reparation principles it established. The situation is further eclipsed by the dictum in the Trial Chamber that the principles regarding reparations established were only limited to the *Lubanga* case. Observing some lessons from other reparation schemes can assist the ICC in discharging its mandate.

The effects of war on children are colossal and deprive children of a safe, secure family life and significantly undermine their future.[281] It has been said that apart from poverty and HIV/AIDS, the numerous armed conflicts in Africa that are typically associated with the use of children as combatants add to the challenges that children in Africa face.[282] The impact of war is more vivid on girl victims who face many dangers including HIV/AIDS infections, unwanted pregnancies and the complications associated with early pregnancies among others. Adding to the physical injuries are the emotional and psychological effects that former child soldiers face and continue to experience even post the armed conflict. It follows that no amount of reparations can completely wipe out all the effects of war on children. As noted by Archbishop Tutu- a former trustee of the TFV:

> 'What compensation could you ever give that would be adequate for the loss of a loved one? You couldn't possibly ever replace the one who is no longer there.

[280] CRC, note 3 *supra*.
[281] D Benyam Mezmur note 62 *supra* 213.
[282] *Ibid* 199.

> But frequently simple can be powerful. We hope that this small thing we do for you will somehow pour balm on your wounds and help those wounds to heal.'[283]

In other words, completely restoring the status of children prior to the war is almost impossible. That being said, formulating clear guiding principles on the implementation, form, nature and scope of reparations can have a positive impact on the certainty of future reparation awards. Questions regarding the role of the accused in reparations in general, his or her contributions, the importance of a conviction or the charges themselves were not meticulously dealt with in the *Lubanga* reparative case. The following section looks at some of the challenges that can potentially undermine reparations to former child soldiers. It does so by looking at unclear issues in the *Lubanga* case together with experiences from other reparation schemes.

4.2 LUBANGA AND THE CONVICTION CENTERED REPARATIVE REGIME

The Court ordered reparations under the Rome Statute are conviction centered.[284] This means that the Court can only make a reparation order against the accused after his or her conviction. The effects of this limitation are enormous and affect the need for urgent reparative measures. The conviction centered reparations scheme pre-supposes the availability of assets on the part of the accused or the convicted individual. In most cases like in the *Lubanga* case, the accused individuals' are more often than not indigent or their assets cannot be traced. This means that the reparations they can provide are usually symbolic in nature, assuming they are willing to take part in such reparative schemes. More closely related to this idea is the unbalanced nature of the number of victims to that of the prosecuted or convicted perpetrators. The ICC is not empowered to prosecute all criminals within its jurisdiction, but its jurisdiction is limited to 'the most serious crimes to the international community' and can only prosecute when the State is

[283] C Ferstman 'The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities' *in* Yearbook of International Law (2003) T.M.C Asser Press 424.
[284] Rome Statute, Article 75.

unable or unwilling to prosecute.[285] It is a limitation that respects individual states sovereignty and one that does not purport to overwhelm the ICC where domestic courts are capable of prosecuting the crimes. The end result is that only few cases get to the ICC, a position which has implications for possible reparations. Furthermore it is usually the top military commanders that are prosecuted for war crimes- a position that further limits the base of perpetrators with potential assets to fund reparations. It can be seen that the conviction centered reparative regime faces the main challenge of lack of assets on the part of the convicted.

In addition, since the individual reparations against the accused can only be addressed after a conviction, serious delays can affect reparations against the former child soldiers who more often than not require speedy and urgent redress. For example, the ICC took more than five years in prosecuting and sentencing Thomas Lubanga.[286] As will be shown below, it can affect the victims of sexual abuse and violence who normally need urgent assistance.

Goetz notes that the Chamber ought to have found Thomas Lubanga liable for reparations as a matter of entitlement to victims and then separately find him unable to comply with the order due to his indigent state.[287] The author further argues that this would have left open the possibility of Thomas Lubanga paying for reparations in the event of his financial situation changing. This position is supported by McCarthy who proposes a two pronged approach.[288] Firstly, he suggests that the court must determine the harm element, resulting from the criminal conduct of the perpetrator.[289] Secondly, the court must establish the amount of funds or assets in possession of the perpetrator, which are discoverable at the time of the hearing.[290] He maintains that an approach of this nature can enable the forfeiture of assets hidden or that will accrue to the perpetrator

[285] Rome Statute, Preamble para 10 read together with Article(s) 1, 5 and 17.
[286] For example, Thomas Lubanga was charged in 2006 and only convicted in 2012.
[287] M Goetz note 208 *supra* 64.
[288] C McCarthy, (2012) note 58 *supra* 158.
[289] *Ibid.*
[290] *Ibid.*

after the court makes the reparation order.[291] The approach is progressive in as far as it seeks to safeguard the hidden or the future assets of the accused for the purposes of funding reparations. Due to limited assets or funding coming from most of the convicted criminals, the TFV will most likely fund these reparations subject to the availability of funds.

4.2.1 The Limited Application of the Established Principles in Lubanga

The principles established by the Trial Chamber further cloud the reparative regime under the Rome Statute as their application was only limited to the *Lubanga* case on reparations.[292] Whilst the idea that its judgment was not meant to affect the rights of victims before other courts is commendable, its failure to take a bold stand in developing permanent reparation principles as provided under Article 75 leaves a huge lacunae in the reparative regime under the Rome statute.[293] Under Article 75, establishing reparation principles by the court is a 'must'[294] and had the principles been established the understanding is that they were meant to be permanent guidelines.[295] The uncertainty created is detrimental for future cases and claimants of reparations before the court. The court in dealing with the applicable law expressly stated that the right to a reparation award is 'a well-established and a basic human right.'[296] In the absence of permanent guiding principles, it is then difficult to manage expectations of future claimants.[297] Victims must have realistic expectations of the kind of assistance they can get from the ICC.[298] Due to the limited application of the principles established in the *Lubanga* case, one can only speculate on future reparative awards involving former child soldiers.

[291] C McCarthy, (2012) note 58 *supra* 158.
[292] *Lubanga* (Reparation Principles) note 36 *supra* para 181.
[293] *Ibid*.
[294] Rome Statute, Article 75(1) states that the Court 'shall' establish principles.
[295] M Goetz note 208 *supra* 62.
[296] *Lubanga* (Reparation Principles) note 36 *supra* para 185.
[297] M Goetz, note 208 *supra* 65.
[298] *Ibid*.

4.3 VICTIMS OF SEXUAL VIOLENCE

The Rome Statute takes a broad conception of what constitutes sexual violence. It lists it as a crime against humanity[299], as a war crime[300] and as a violation of other international conventions.[301] Furthermore there is a clear recognition of victims of sexual violence as a special category of people who deserves special attention within the Court.[302] These provisions give special protection to the victims of sexual violence and sexually-related crimes. Moreover, these listed crimes are gender neutral in that they recognize both female and male child soldiers as potential sexual victims.[303] It is common knowledge that Thomas Lubanga was not charged or convicted of sexual crimes.[304] He was charged for the crime(s) of "conscripting, enlisting and actively using children under the age of 15 to fight in hostilities."[305] In its disposition, the Trial Chamber found Thomas Lubanga guilty of, "the crimes of conscripting and enlisting children under the age of 15 years into the *Force Patriotique pour la Libération du Congo* (FPLC) and "using them to participate actively in hostilities' within the meaning of Articles 8(2) (e) (vii) and 25(3) (a) of the Statute from early September 2002 to 13 August 2003."[306]

It comes as no surprise that one of the fiercest criticisms leveled against the *Lubanga* case is its failure to include specific sexual violence charges against the accused. It has been said that:

> '[g]iven the widespread allegations of systematic rape, sexual enslavement and other forms of sexualized violence by the UPC military group in the Ituri region of the DRC, the charges against Lubanga were too narrow, with special criticism that gender-based crimes were not prosecuted.'[307]

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[299] Rome Statute, Article 7 (g).
[300] Rome Statute, Article 8 (2) (b) (xxii).
[301] Article 3, Common to the Geneva Conventions.
[302] Rome Statute, Article 43 (6); Article 54 (b) and Article 68 (2).
[303] LM Anne-Marie de Brouwer *Supranational Criminal Prosecution of Sexual Violence; The ICC and the Practice of the ICTY and the ICTR*' (2005) Intersentia 133.
[304] *Lubanga* 'Judgment Pursuant to Article 74' note 129 *supra* para, 1358.
[305] *Ibid*.
[306] *Ibid,* para 1.
[307] The Hague Justice Portal 'The Prosecutor v Thomas Lubanga Dyilo; a turbulent but promising retrospective' (17 November 2011) Available at http://www.haguejusticeportal.net/index.php?id=12989

Bewicke further critiques this issue and notes that in formulating its charges, the Prosecution omitted various other charges, a position that undoubtedly complicated the reparations stage.[308] In its attempt to include sexually related crimes the Prosecution tried to argue that the definition of "use to participate in the hostilities" was a wide definition which covers both girls and boys who were abused for sexually related crimes.[309] The argument is that they provided an essential support to the armed group- hence the inclusion of sexual violations.[310] Despite the merits of this argument, the failure by the Prosecutor to bring clear separate sexual abuse charges in the *Lubanga* case had an effect on the nature of reparations awarded to the victims. In the end, as argued by Bewicke, some of the victims that the court determined were not direct victims of the criminal activities of Thomas Lubanga were given preferential treatment when it came to reparations- a position the author argues gives rise to a 'philosophical conundrum'.[311] For example, in the *Lubanga* case, the Court pointed that "the conviction and the sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities".[312]This means that the victims of the excluded crimes (mostly sexual abuse, rape, torture etc) will not feel or sense the reparative role of the conviction and sentence. Despondently this category includes many young girls who were former child soldiers.[313]

Given the above, the ICC must establish a reparative regime that can adequately address sexual violence that most children, particularly girl child soldiers encountered including forced pregnancy, sexually transmitted diseases among others. As noted earlier, Article 75(2) appears to suggest that a court can only make an individual order of reparations

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[accessed 28 November 2014]; M Gotze note 208 *supra* 67, notes that the prosecutors and investigators have a duty towards victims just as the police at domestic level do and possible reparations claims must inform such processes.

[308] E Aurora Bewicke 'Realizing the Right to Reparations for Girl Soldiers: A Child-Sensitive and Gendered Approach' (2014) 26 *Columbia Journal of Gender & L*aw 182 pp. 2; 28.

[309] *Ibid*.

[310] *Lubanga* (Judgment Pursuant to Article 74) note 129 *supra*, para 20.

[311] E Aurora Bewicke, note 308 *supra* 2.

[312] *Lubanga*, (Reparation Principles) note 36 *supra* para 237.

[313] M Wessels note 36 *supra* 97. The author argues that both girls and boys are sexually abused when recruited into armed groups.

against the perpetrator if he or she has been convicted of the charged crime. Additionally, the crime committed must have a causal link to the harm suffered.[314] If this is the position, problems will arise as Thomas Lubanga was not convicted of sexual crimes but of violating Article 8 dealing with the enlisting and recruitment of children to fight as soldiers.[315] This situation shows some of the inherent weaknesses of the conviction-centered reparations regime under the Rome Statute. McCarthy points out that both the investigation and prosecution of crimes under the ICC is considerably a selective process with the result that certain reparations cannot be made.[316] He further argues that there is a wide scope of disparities between the victims who receive reparations and those who do not.[317] It can be reasoned that gender issues and their implications must be considered and included at all levels of the proceedings. In the event that the charges are selective, reparations must look at the harm suffered regardless of the charges brought against the accused. Indeed this approach will safeguard the rights of the victims especially for those crimes not brought before the court.

Girl child soldiers face further huddles in their attempt to secure reparations as a result of their 'youth, negative societal perceptions based on their association with the violent perpetrating forces, resentment, rejection and stigmatization from their own families and society.'[318] To add on to the above, in some African societies, harm on children is considered to be harm on the head of the family with the result that girl victims cannot benefit from reparations in their own capacity. Again, some societies do not permit girls or women in general to own property. The implications are that most former girl child soldiers are affected in numerous ways. In the *Lubanga* case, the court mentioned that reparations must not further the already imbedded structural inequalities that exist in societies.[319] The application of that principle was only limited to the Lubanga case, with uncertainties on how future cases will be dealt with.

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[314] C McCarthy, (2012) note 56 *supra* 145.
[315] *Lubanga*, (Judgment Pursuant to Article 74) note 129 *supra* 1358.
[316] C McCarthy, (2012) note 56 *supra* 352.
[317] *Ibid*.
[318] E Aurora Bewicke, note 308 *supra* 10.
[319] *Lubanga*, (Reparation Principles) note 36 *supra* para 227.

The discussion above has highlighted some of the weaknesses of both the Lubanga reparative judgment and the limited scope of charges on reparations. The following section looks at the guiding principles under the CRC. The point to be made is that had the court fully addressed these guiding principles, it would have enabled it to come up with permanent principles. This infusion of the CRC guiding principles would have allowed the Trial Chamber to place children at the heart of the reparative judgment.

4.4 CHILD FOCUSED REPARATION: THE CRC AND ITS GUIDING PRINCIPLES

The Lubanga decision confirmed some of the principles under the CRC without giving much substance to them. The Court acknowledged the age sensitive nature of the victims, the need to reintegrate them back into society among other aspects. It noted the need to-

> '… 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.'[320]

The above statement confirms the principle that children involved in armed conflicts must get all the possible and urgent assistance available. It is one of the articles that echo the protection principles under the CRC. The court mentioned the need to take the best interests of the child together with the child's evolving capacities whenever dealing with children.[321] It did not however expand on those principles and what they entail. The CRC and its guiding principles are of paramount importance in all decisions and matters that affect children and ought to have been applied fully.[322]

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[320] *Lubanga*, (Reparation Principles) note 36 *supra* para 212 citing the CRC, Article 39.
[321] *Lubanga,* (Reparation Principles) note 36 *supra,* para 211.
[322] CRC note 3 *supra*.

It can be argued that Lubanga was a missed opportunity as the Court failed to address all the underlying principles within the CRC. There are four main underlying principles that can be observed under the CRC.[323] They are child participation (Article 12), the best interests of the child (Article 3), the right to life, survival and development (Article 6) and non-discrimination (Article 2). These principles underlie the CRC and whenever issues that affect children (former child soldiers inclusive), they must be applied adequately.

The Trial Chamber ought to have been guided by these underlying principles in establishing principles relating to reparations since it was dealing with a case involving children. A proper consideration of these principles would provide a comprehensive guide to lasting reparations principles and to an easily understood reparative regime as the CRC has been widely ratified by many states, including those where internal conflicts are common.[324] This principle is in line with Article 21 of the Rome Statute[325] which places an obligation on the court to establish and implement reparation principles consistent with internationally recognized human rights principles.[326] This approach also recognizes that a large number of victims in the Lubanga case were children. The following part will briefly consider the CRC these underlying principles.

4.4.1 The Best interests of the Child as of 'paramount consideration'

At the core of this principle is the realization that decisions concerning children must primarily advance their interests and not those of their guardians, parents or society at large. The main argument to be advanced is that the Trial Chamber did not go beyond the surface of this principle in its reparations decisions.[327] The CRC provides that-

[323] UNICEF 'Guiding Principles' http://www.unicef.org/crc/files/Guiding_Principles.pdf (accessed 29 November 2014).
[324] UN Treaty 'Collection Treaty Series' , Vol. 1577, p. 3 shows that 140 States are Signatories and 194 States are Parties, Available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en [Accessed 05 December 2014].
[325] Rome Statute, Article 21 (1b), (1c) and 21 (3).
[326] *Ibid*, Article 21 (3).
[327] For example, this principle has long been acknowledged in various domestic courts like *Cronje v Cronje* 1907 TS 871 at 872 where the court emphasized that the best interests of the child must always be the main consideration when issues affect the child.

> 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'[328]

The Committee on the Rights of the Child has interpreted the above principle as a threefold concept which is a substantive right; a fundamental interpretative legal principle and a rule of procedure.[329] All these different dimensions must be taken into account when dealing with children's rights. It is a flexible concept that can be used to adapt to the special needs of the individual children or a distinct group of children in a given instance.[330] Children coming out of a conflict zone must have their interests assessed individually and as a group. Importantly, this principle must be considered when interpreting other rights and needs including health, education, protection, safety among others.

4.4.2 Child Participation in Reparation Programs

Former child soldiers must be given a platform to express their opinions and feelings regarding their needs in reparation programs. They must take the central stage in the determination of the form and nature of the awards. Under the CRC, the right of the child to be heard is of significant importance and must be respected.[331] It provides that 'a child who is capable of forming an opinion' must be given a platform to express those views without hindrance.[332] Furthermore, those views must be given due weight in accordance with the child's age and maturity.[333] The importance of including the children's views was further underscored by the Committee on the Rights of the Child when it noted that-

> 'The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between

[328] CRC, Article 3.
[329] UN Committee on the Rights of the Child (CRC), General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para 6.
[330] *Ibid*, para 32.
[331] CRC, note 3 *supra* Article 12.
[332] *Ibid*.
[333] CRC, note 3 *supra* Article 12.

children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.'[334]

If this concept is applied to former child soldiers before reparations proceedings, it entails giving them the power and platform to decide on the form, nature and scope of the awards. They must not only be consulted, but their views must be given due weight in decision making. The Court in *Lubanga* case only mentioned that 'the views of children who are capable of forming an opinion must be considered, taking into account their age and maturity.'[335] A mere consideration of the views does not meet the test. As noted by the Committee on the rights of children, "mere tokenism which limit the expression of views or which allows children to be heard but fail to give those views due weight is at odds with the spirit and purposes of the CRC."[336] Some of the core elements of participation include transparency, informative, non-coercive, voluntary, respectful and child friendly.[337] Furthermore, the process must be inclusive, non-discriminatory and sensitive to the children involved.[338]

4.4.3 The Right to Life, Survival and Development

One of the core principles of the CRC is the significance it places on the right to life, survival and development of children in general.[339] The court in *Lubanga* only referred to the importance of a development centered reparation regime without elaborating on the right to life, survival or even referring to the CRC.[340] It has been regarded as the most important right in other regional courts.[341] Reparations must as far as possible ensure that the right to life of former child soldiers is given priority. The right has two elements which are the right to life and the right to survival and development. Importantly, these rights are interlinked with other rights including the child's right to

[334] UN Committee on the Rights of the Child (CRC) General Comment 12, (2009) (CRC/C/GC/12) on 'the right of the child to be heard' para 13.
[335] *Lubanga* (Reparation Principles) note 36 *supra* para 215.
[336] General Comment 12 note 334 *supra*, para 132.
[337] *Ibid*.
[338] *Ibid* para 134.
[339] CRC, note 3 *supra,* Article 6.
[340] *Lubanga* para 213.
[341] *MCCann & Others v United Kingdom* (1995) 21 ECtHR 97 para 88.

the enjoyment of the highest attainable standard of health[342], the best interest principle.[343] In other words former child soldiers experiencing life threatening diseases like HIV/AIDS must be given priority in the order for reparations. Reparations must again enable their further development focusing on the provision of educational activities, employment opportunities and developing their natural talents.[344]

4.4.4 Non- Discrimination

The principle of non-discrimination should be consistently applied 'to all children, whatever their race, religion or abilities; whatever they think or say, whatever type of family they come from' or more related to former child soldiers, whatever they may have done during the armed conflict.[345]

The principle of dignity and non-discrimination should be adopted in all future cases and not limited to the *Lubanga* case.[346] This principle is provided under Article 2 of the CRC. All victims are to be treated fairly and equally where reparations are concerned regardless of whether they participated at the trial stage or not.[347] In the *Lubanga* case it was stated that 'in all matters concerning reparations, the court shall take into account the needs of all the victims, and particularly children.'[348] This raises the question of whether the court was establishing a permanent principle or whether this applied to the present reparations case before the court.[349] The concern comes in light of the dictum that the principles established by the ICC under the *Lubanga* case only applied to that case.

The ICC nonetheless underscored one of the important principles by using a gender neutral terminology when dealing with sexual gender victims. This terminology acknowledges that both boys and girls are potential victims of sexual crimes. The UN

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[342] CRC, note 3 *supra* Article 24.
[343] *Ibid*, Article 3.
[344] Cape Town Principles, note 164 *supra* 8.
[345] CRC, Article 2.
[346] *Lubanga* (Reparation Principles) note 36 *supra* para 187.
[347] CRC, Article 2.
[348] *Ibid*, para 189.
[349] *Lubanga* (Reparation Principles) note 36 *supra* para 189 read together with para 181.

Basic Principles will undoubtedly play a major role in guarding the non- discrimination of the awarding process.[350] The submission by UNICEF in the *Lubanga* case that reparations must be approached on the basis of the best interests of the child and the principle of non-discrimination is of major importance.[351]

The argument to make is that had the court in the *Lubanga* case made full use of the above underlying principles of the CRC, it would have laid fundamental safeguards that are child centered, infused in well-known international human rights standards. An approach of this kind would not only have allowed the Trial Chamber to establish permanent principles, but is also consistent with the Rome Statute as a whole.

Another aspect that can potentially affect reparations to former child soldiers is corruption which is widespread in most African societies.

4.5 CORRUPTION AND REPARATIONS

Sierra Leone offers some practical lessons with regard to the operation of reparations in general. Despite the lack of a provision empowering the SCSL to order reparation against the convicted persons, NGO's and other organizations were actively involved in providing redress to the victims of war crimes in Sierra Leone. Shepler observed disturbing trends where corruption was used in the compilation of the lists of victims.[352] He pointed that,

> '[t]he lists they came up with generally did not match what I knew about the actual participation of children in fighting. The sons of the chief and imam' together with those in school appeared on the list. The list of victims was based on connections or on who could best use the aid, and not necessarily on who had actually participated as combatants.'[353]

Whilst the concept of victims under the Rome Statute extends beyond those who actively participated in the armed conflict as combatants, corrupt local leaders can abuse

[350] UN Basic Principles and Guidelines, Principle 25.
[351] *Lubanga* (Reparation Principles) note 36 *supra* para 83.
[352] S Shepler 'The rites of the child: Global discourses of youth and reintegration, child soldiers in sierra' Leone, (2005) 4 *Journal of Human Rights* pp. 201-202.
[353] *Ibid*.

this by listing their own children, family members and other non-deserving members of society.

In Rwanda, the government established a rehabilitation fund following the genocide to assist survivors.[354] The government pays about 5% of its total revenue into the fund that assist with educational scholarships for the survivors of the genocide.[355] It is however reported that due to corruption, the fund has benefited mostly Tutsis' to the disadvantage of the Hutus'.[356] Sections of the population feel that it discriminates between the main ethnic groups - a position which creates new ethnic tensions.[357] Whilst the above are not ICC or any tribunal ordered reparations, the same dangers must be guarded against by the ICC as this can adversely affect the credibility and functionality of reparations. In this respect, the Registry[358] must play a significant role in the screening and registering of victims.[359]

4.6 CONCLUSION

It has been argued that reparations under article 75 face certain practical challenges including the uncertain role of the accused and the role of the conviction among others. The convicted persons are usually indigent and the prosecution of the case can take years to conclude. This will unquestionably impact on former child soldiers, particularly victims of sexual abuse who need immediate redress. In order for reparations to be successful the court must establish permanent guiding principles, deriving from an understanding of the CRC and its guiding principles. Victims of sexual abuse must be given priority and their needs must also be urgently attended to. Issues of corruption, further reinforcing the imbedded inequalities among others must be guarded against. As

[354] Law No. 02/98 of 22/01/1998, 'Establishing a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda' (FARG) Between October 01, 1990 and December 31, 1994.
[355] L Waldorf *in* C Ferstman, M Gotze and A Stephens (eds) (2009) '*Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making'* Martinus Nijhoff: Netherlands 522.
[356] *Ibid*.
[357] *Ibid*; see also L Moffett note 223 *supra* 228.
[358] Rome Statute, Article 43.
[359] *Ibid*.

a result of the inherent weaknesses against the victim conviction centered reparations regime, the TFV appears to be the only viable way of providing reparations. In this respect, it faces the challenge of mobilizing enough financial resources to fund reparations given the number of victims.

CHAPTER FIVE: CONCLUSION

5.1 CHAPTER SUMMARIES AND CONCLUSIONS

The enlisting and recruitment of children to fight as combatants in armed conflicts remains one of the major violations of children's rights in this century. This problem remains more visible in the African Great Lakes Region where children take direct or indirect part in internal armed conflicts. Against that background, there has been a significant increase in legal instruments outlawing this behavior, providing among other things for the accountability of the perpetrators; reparations and reintegration of the victims into society post the conflicts. The adoption of regional resolutions and declarations, among other documents, has increased, with the goal of ultimately prohibiting this activity. Notwithstanding all these progressive instruments, the recruitment of children continues to grow, mainly by armed rebel groups, whenever internal conflicts occur.

As a result of their youth, when children take part in armed conflicts (direct or indirectly) the harm they suffer can be long-lasting. The need to reverse the harm faced by child soldiers is vital if they are to be reintegrated successfully in society. As noted by Van Bueren, 'reintegration of former child soldiers who have spent many years in armed conflict is not an easy task.'[360] Yet despite the challenges that may be encountered, child soldiers must be successfully reintegrated into society to stop the continuation of cycles of violence. This goal, which is of importance, is underscored by Article 39 of the CRC. It places an obligation on state parties to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of the child victim.'[361] Furthermore reintegration must speak to all the guiding principles that underpin the CRC, which are non-discrimination to all the child victims, adhering to the best interests of the child victims as a matter of primary consideration, aiming for the maximum survival and development of child victims as well as respecting and

[360] Van Bueren note 86 *supra* 348.
[361] CRC, Article 39.

promoting the views and participation of the child victims.[362] The same sentiments are also echoed under the Cape Town Principles. In particular, it emphasizes the need to be sensitive to the child victims especially in integration programmes in the family and schools among others.[363]

It can be said that the CRC guiding principles together with reparations under Article 75 of the Rome Statute can complement each other in informing a reparations regime that is child-centered. The Rome Statute reflects its uniqueness in providing for reparation mechanism for victims of international crimes. The reparation provisions under the statute, if implemented appropriately have the potential of repairing the harm suffered by children during the armed conflicts. The reparation regime under the statute however suffers from many uncertainties particularly those relating to the role of the accused or the convicted in the reparation scheme, the lack of adequate assets to fund such reparations, the impact of charges on future reparations and the lack of permanent guiding principles on their provision. Importantly, timely redress is crucial if the harm suffered by child soldiers is to be adequately repaired. In this respect, the prosecution of international crimes by the ICC often takes years to complete - a position that further compromises the full functionality of the Rome Statute reparative regime.

In its first case dealing with principles to be applied in reparations, the ICC whilst scoring some notable principles failed to fully use the CRC guiding principles to establish a reparative regime that is child-focused. Child soldiers were the main victims in the *Lubanga* case, yet the Trial Chamber failed to fully address the guiding principles under the CRC and its guiding principles. Adopting the CRC guiding principles would have enabled a child-centered reparative regime, while at the same time fully adhering to the Rome Statute reparative regime. The uncertainties from the *Lubanga* case become more complicated when one analyses the limited application of the principles established.

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[362] R Hodgkin and P Newell *Implementation handbook for the Convention on the Rights of the Child* 3 ed (2007) 589.
[363] Cape Town Principles note 164 *supra* 8.

The inclusion of the TFV will play a major role towards the funding of most of the reparations projects (both court ordered and TFV's own initiative projects). However as argued by some scholars, the volume of victims needing redress (child soldiers inclusive) will not match the fund's available resources.[364] In this regard, it will be important to note that the reparative regime under the Rome Statute complements other mechanisms that already exist under international human rights law, non-governmental redress mechanisms, reparations provided by national governments among others. As a distinct redress mechanism, its success is hinged on a clear formulation of the applicable principles to guide the uniformity of awards and the availability of assets to fund the reparations.

[364] AW Schabas (2010) note 121 *supra*.

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