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Is anybody playing?

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“Is Anybody Playing? The Right to Reparation for Child Victims of Armed Conflict”

"Proefschrift ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof.dr. Ph. Eijlander, en Scuola Superiore Sant'Anna op gezag van de rector magnificus, prof. P. Perata, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de Ruth First zaal van de Universiteit op maandag 7 oktober 2013 om 10.15 uur door Francesca Capone, geboren op 22 juli 1983 te Avellino, Italië".

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List of abbreviations:

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AP ACHR	Additional Protocol to American Convention
AU	African Union
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on International Economic, Social and Cultural Rights
CPA	Child Protection Agency
CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DDR	Disarmament Demobilization and Reintegration
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
MRM	Monitoring and Reporting Mechanism
NGO	Non-Governmental Organization
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
POW	Prisoner of War
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Truth Commission
TFV	Trust Fund for Victims
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	General Assembly of the United Nations
UNGA Res	United Nations General Assembly Resolution
UNHCR	United Nations High Commission for Refugees

UNICEF	United Nations International Children's Economic Foundation
UNSC Res	United Nations Security Council Resolution
UNSG	United Nations Secretary General
WHO	World Health Organization

1. Introduction

1.1 Children and reparation: together under the spotlight

According to Tomuschat ‘few would argue that persons suffering a grave breach of their human rights should not have a right to full reparation’, even less would argue that children should not be awarded prompt and adequate reparation for the harms suffered, although it is still unclear under which circumstances, how and to what extent children can concretely exercise this right.¹ Since the approval, in 2005, by the UN General Assembly (‘General Assembly’) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law (hereinafter ‘Van Boven-Bassiouni Principles and Guidelines’ or ‘Basic Principles and Guidelines’) a lot of emphasis has been placed on the existence of individuals reparation claims under international law; moreover, thanks to the innovative character of the Principles, also collective and symbolic reparations have finally gained proper consideration.² Reparation is a term with a well-established legal meaning, it refers both to the obligation to repair and the right to claim and obtain redress. According to Redress reparation comprises ‘the wide range of measures that may be taken in response to an actual or threatened violation, including the substance of the relief as well as the procedure to attain it’.³ Under international law the forms of

¹ C. Tomuschat, ‘Reparation for Victims of Grave Human Rights Violations’, in *Tulane Journal of International and Comparative Law*, 10(2002): 157.

² UN General Assembly’s Resolution A/RES/60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

³ Please see Redress, ‘A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law’, 2003 <http://www.redress.org/downloads/publications/SourceBook.pdf> (accessed July 2011).

reparation identified are restitution, compensation and satisfaction. Within the human rights framework also rehabilitation and guarantees of non-repetition are included amongst the kinds of reparation available for the victims.⁴

So far international institutions, such as the Inter American Court of Human Rights (IACtHR), have mostly focused on reparations awarded in the aftermath of gross human rights violations.⁵ The role played by regional human rights bodies, in particular by the IACtHR, has been essential for the development of an innovative and forward-looking approach towards reparation, especially in the aftermath of mass scale violations of human rights.⁶ The legal consequences arising from gross and serious violations of international human rights and humanitarian law, which, under certain circumstances, may constitute crimes under international law, are very specific: universal jurisdiction, the non-applicability of statutes of limitations, and, in particular, the right to a judicial remedy.⁷ From the mid twentieth century to present, wars,⁸ insurgencies, ethnic unrest and

⁴ Please see the *Basic Principles and Guidelines* supra n2.

⁵ In its judgments the Inter-American Court of Human Rights refers to ‘reparations’. The recourse to the plural, which is often used to allude to national administrative programs, highlights the Court’s tendency to award many forms of redress, ranging from material to symbolic reparation.

⁶ On the Inter American Court of Human Rights’ jurisprudence in general, see L. Burgorgue-Larsen and A. Ubeda de Torres, *The Inter American Court of Human Rights: Case Law and Commentary* (Oxford University Press: Oxford, 2011). With regard to violations against children, see M. Ferial Tinta, *The Landmark Rulings of the Inter American Court of Human Rights on the Rights of the Child* (Martinus Nijhoff Publishers: Leiden, 2008).

⁷ See generally C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), see also M.C. Bassiouni(eds), *International Criminal Law* 3rd edition (Leiden: Martinus Nijhoff Publishers, 2008), A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008). See also ‘A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation’, Redress, March 2006.

<http://www.redress.org/downloads/publications/Reparation%20Principles.pdf>, (accessed January 2010).

⁸ L. Harbom, E. Melander & P. Wallensteen, ‘Dyadic Dimensions of Armed Conflict, 1946-2007’, in *Journal of Peace Research* 45(2008): 697-710. According to the authors there has not been a single war since 1945, although there have been more than 232 armed conflicts. The difference between ‘war’ and ‘armed conflict’ lies in the fact that the state and condition of ‘war’ is created by means of a formal declaration, whereas the state and condition of ‘armed conflicts’ is created by means of an informal declaration. Bearing in mind the distinction, in the course of the present work the terms may be used interchangeably.

the repressive actions of authoritarian regimes have produced enormous human suffering and the deaths of tens of millions, the majority of whom have been civilians.⁹ A consistent part of those civilians, killed or injured, are children. Moreover, according to the 2011 Annual Report of the UN Special Representative of the Secretary General for Children and Armed Conflict, 28 million children in scholarly age live in countries affected by conflict.¹⁰

UNICEF has estimated that over one billion children live in areas affected by conflict, which is almost one-sixth of the world population.¹¹ This large group of children can be defined as ‘war-affected children’. An important caveat is needed from the outset: in case of armed conflict the whole population is potentially affected, however, from a legal point of view, there is a difference between those who have been affected and those who have experienced *in concreto* IHL violations.¹² Only those who suffered direct or indirect harm as a result of acts or omissions that constitute a violation of international human

⁹ M. C. Bassiouni, ‘Facing Atrocity: The Importance of Guiding Principles on Post-conflict Justice’, *Introduction to the Chicago Principles on Post-conflict Justice* (Chicago: International Human Rights Institute, 2007).

¹⁰ See the Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict (July 2011), A/HRC/18/38. See generally Human Security Report, 2012, <http://www.hsrgroup.org/human-security-reports/2012/text.aspx> (last accessed January 2013).

¹¹ UN Children's Fund (UNICEF), Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World, April 2009, available at: <http://www.unhcr.org/refworld/docid/4a389ca92.html> [last accessed April 2012].

¹² According to Zegveld: ‘This definition (‘war victims’) potentially refers to an entire population that has been caught up in an armed conflict. (..)Indeed, the main purpose of IHL is to protect war victims. To contend that violation of the right to protection entails a claim to reparation would, however, be absurd, since every member of the population affected by the armed conflict is a victim. The Supreme Court of the Netherlands clear that for the beneficiaries of the right to protection, notions such as legal remedies and compensation are not workable. In a judgment of 29 November 2002, the Supreme Court decided that rules of IHL do not protect persons against stresses and tensions that are consequences of air strikes as such and do not protect persons with regard to whom the rules and norms have not been violated in concreto. The right to invoke the rules of IHL is therefore confined to those who personally were the victims of violations of IHL.’ See L. Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, in *International Review of the Red Cross* 85(2003): 497-526.

rights or humanitarian law norms can be recognised as victims and consequently legitimised to claim for reparation.¹³ It is possible to assert, without sowing dissension, that children are no longer the passive bystanders of international and internal conflicts, as they have become the target of atrocities or have been forced to turn themselves into perpetrators. More and more children on a daily basis experience gross human rights violations and/or serious violations of humanitarian law, which may amount to crimes under international criminal law. Being victims of such violations entails three different remedies in the aftermath of conflicts, namely the right to know, the right to access justice and the right to reparation, the latter representing the focus of the present work.¹⁴

The study of those remedies, provided by international public law, involves different actors. On the one hand stand the victims, individuals or groups entitled to reparation; on the other hand stand the subjects in charge of providing redress; these are perpetrators, states and their agents, alternative mechanisms such as Truth commissions (TC), trust funds and administrative reparations program.¹⁵ Reparation can be awarded as

¹³ The word ‘victim’ has a broad meaning (e.g. according to the Oxford Dictionary it derives from the Latin word ‘victima’: a living creature killed as a religious sacrifice). The term ‘crime victim’ instead generally refers to any person, group, or entity who has suffered injury or loss due to illegal activity; the harm can be physical, psychological, or economic. For the purpose of the present work ‘victim’ is used in the sense of ‘crime victim’.

¹⁴ These are the remedies traditionally identified for violations of human rights law. See in general D. Shelton, *Remedies in International Human Rights Law* (2nd edn New York: Oxford University Press, 2005). Please see Principle VII of the Van Boven-Bassiouni Principles and Guidelines *supra* n2.

¹⁵ On the states as subjects responsible to award reparations, see D. Shelton, ‘The UN Principles and Guidelines on Reparation: Contest and Contents’, in *Out of the Ashes: reparations for victims of gross and systematic human rights violations*, K. De Feyter and al. (Antwerp: Intersentia, 2005): 22. ‘The State is responsible for providing reparation for its acts or omissions constituting violations within the scope of the Basic Principles and Guidelines. In cases where a non-state actor is responsible for the violation, liability should be imposed if possible and the State should enforce any judgment for reparation against individuals or entities held responsible.’ As for the TCs, commonly their role is to provide the states with recommendations, which include also reparation policy, but, as it is going to be further explained and discussed, some TCs, e.g. the South African TC, have an *ad hoc* Reparation Committee explicitly charged with restoring victims’ dignity. On this point see Chapter 4. See also R. Falk, ‘Reparations, International Law, and Global Justice: A

the outcome of a criminal proceeding, implying the capability of the victims to take part in the trial and the direct exercise of the right, or they can be part of a broader strategy within a state to acknowledge the victimization and encourage reconciliation and peace in the aftermath of a conflict, which should presuppose the involvement of the victims in the decision making process and in all the stages of a reparation program adopted.¹⁶

Children, individually or collectively, have been carefully left aside: no study has been undertaken yet about their role as autonomous and independent holders of the right to reparation. Bearing in mind that they, in particular child victims of war, are not adults in miniature, but human beings with specific needs, it is necessary to investigate the ‘nature’ of this right and to what extent it may be exercised by child victims of war.

1.2 General overview

It is a truism that the issue of reparation for individual-victims has finally gained momentum and important milestones have marked this long pattern, including the decision on reparations recently issued by the ICC in the Lubanga case, which has finally singled out the principles that will be applied by the Court in its reparation order(s).¹⁷ In the past years the right to reparation has been punctually commented and scrutinized both at the domestic and at the international level,¹⁸ especially since its empowerment can be

New Frontier’, in *The Handbook of Reparations* P. De Greiff (New York: Oxford University Press, 2006): 478-504.

¹⁶De Greiff in the UN *Rule of Law Tools for Post-Conflict States* (2008), dedicated to reparation programs, underlines the difference between ‘reparation efforts’ and ‘reparation program’s: ‘This publication distinguishes between reparations “efforts” and “programs”. The latter should be reserved to designate initiatives that are designed from the outset as a systematically interlinked set of reparations measures. Most countries do not have reparations programs in this sense. Reparations benefits are most often the result of discrete initiatives that come about incrementally rather than from a deliberately designed plan.’

¹⁷ ICC-CPI-20120807-PR831, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012. <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf> (last accessed September 2012)

¹⁸The adoption by the UN General Assembly of the Van Boven-Bassiouni Basic Principles and Guidelines is the result of a growing interest towards victims’ rights which has been marked by the contributions of several prominent authors including, Dinah Shelton (supra n14) and Christian Tomuschat. In particular Professor

instrumental to the promotion of a victim-oriented approach before courts and in the states' decision makings related to the transition from conflict to peace. By this time it is quite trivial to affirm that the right to a remedy and reparation constitutes part of international law, as it is embedded in regional and global human rights treaties, in humanitarian law, international criminal law and the law of state responsibility, as it is going to be set forth in Chapter 3.¹⁹

Nevertheless, the efforts made to concretely apply these provisions are still far from being satisfactory. There is a significant lacuna between the normative framework and the concrete assessment of victim's needs, and a consistent gap between the needs' assessment and the efforts put into practice by the actors responsible to award reparations to the victims.²⁰ The situation gets even more complicated when it comes to children. As human beings, they are entitled to the fundamental rights embodied in the Universal Declaration of Human Rights (UDHR) and the other covenants which compose the so-called 'Bill of Human Rights', namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular Article 2(3) of the ICCPR set forth states' obligations to provide each person whose rights have been violated with an effective remedy, promptly enforced by the authorities when granted.²¹ Children first and foremost benefit from the protection

Tomuschat in his scholarship has strongly disagreed with the idea of an individual right to reparation as part of international customary law. See Tomuschat supra n1.

¹⁹ See Shelton, in De Feyter et al. supra n15.

²⁰ On this point see Falk supra n15 at6, 'As the 2004 Advisory Opinion on the legal status of the Israeli security wall clearly reaffirmed, there does exist in international law a well-established entitlement for the victim of legal wrongs to appropriate reparations. But between the affirmation of the legal right/duty and its satisfaction there exists a huge conceptual gap', at 491. And also J.Sarkin, 'Reparations for Gross Human Rights Violations as an Outcome of Criminal versus Civil Court Proceedings', in De Feyter supra n15: 'Generally on the regional and international legal stage, it has been very difficult for many victims to obtain reparations from courts for gross human rights abuses. While there have been some success in developing the law, and while some cases have awarded victims' reparations, there have been few actual payments to victims.'

²¹ See Article 2(3) ICCPR, adopted by the General Assembly on 16 December 1966 and entered into force 23 March 1976 (pursuant Article 49).

granted to them by the United Nations Convention on the Rights of the Child (CRC), the most comprehensive and exhaustive body of children's rights, which has been universally ratified with the exception of only two countries.²² Children 'in war' enjoy also the safeguards provided by international humanitarian law either as civilians or as child-soldiers. Furthermore, in international law there are specific treaties which recognize children's particular vulnerability as girls or children affected by disabilities.²³ What is missing in this existing legal framework is a substantial effort to guarantee and provide the right to reparation for victims, and in particular for children. It feels, indeed, as these two 'worlds', child victims of armed conflict and reparations, albeit recently objects of extensive discussions and debates, have never 'met' so far. Despite the soaring awareness of the impact that reparation, if adequately awarded to the youngest members of a war-torn community, can have, especially in terms of prevention and long-term peace's achievement, the study of this topic has been, surprisingly, not yet extensively undertaken.

1.3 Women first, children next?

Children's destiny, especially during or after a conflict, is often intertwined with women's. Though, the main difference is that women in the course of time have gained a stronger position, which has empowered (or empowered, entitled sounds as if it is a legal entitlement?) them to demand specific reparations and ask for appropriate initiatives. Most of the projects submitted to the International Criminal Court ('ICC') Trust Fund for Victims (TFV), for instance, have incorporated gender-specific interventions in order to

²²The CRC has been adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. The only two countries worldwide that did not ratify the Convention so far are USA and Somalia.

²³Namely, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities. Several other legal tools serve the scope to guarantee and trigger children's rights under every circumstance, and particularly in conflicts. See also the Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation (2007), International Meeting on Women's and Girl's Right to a Remedy and Reparation, Nairobi. http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf (last accessed March 2011). For an exhaustive collection of children's rights in international law, please see E.M. Belser et al., *Sourcebook of International Children's Rights* (Berne: Staempfli Publishers, 2009).

support the special vulnerability of women and girls. These efforts are far from being a peculiarity of the ICC alone. In fact many reparations programs aim to prioritize women's redress, notably in post-conflict countries where the female population usually constitutes the main resource left to the nation.²⁴

Nowadays it is also widely accepted to properly conceptualize the many forms of violence that target or affect women's reproductive function or capacity, in particular rape or other sexual abuses in reparation debates.²⁵ As the outcome of the International Meeting on Women and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007, the Nairobi Declaration was adopted aiming to 'enlighten the debate on the issue of reparations, most specifically in cases of sexual violence'. The Declaration is intended to give voice to women who have survived such atrocities:

In this respect, the Nairobi Declaration builds on the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. However, it adds to the debate in that it seeks to redefine reparation from a gendered perspective.²⁶

These efforts may be considered as a legacy coming from the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Court for Rwanda ('ICTR'), since, through the issuing of some ground breaking judgments, crimes of sexual violence are recognised as war crimes, crimes against humanity and

²⁴For instance in Rwanda after the 1994 genocide there were twice as many women as men and while the gap has since narrowed, more than a third of households are still headed by women. According to the Rwandan Commerce Minister Monique Nsanzabaganwa, actually women make up 55% of the workforce and own about 40% of businesses. On this point see also C. Ferstman et al. *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Leiden: Martinus Nijhoff Publishers, 2009):10.

²⁵ On this point please see R. Rubio-Marin, *The Gender of Reparations* (Cambridge Ma: Cambridge University Press, 2009) and from the same author, *What Happened to the Women? Gender and reparations for Human Rights violations* (New York: Social Science Research Council, 2006).

²⁶V. Couillard, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence' in *the International Journal of Transitional Justice*, 1(2007): 444–453.

genocide.²⁷ The *Akayesu case* and others held before the *ad hoc* tribunals created a new awareness that women had been used as a means of war.²⁸ They became visible, personalized and recognized in the international criminal justice's framework as a specific group of vulnerable victims. Notably, it has been specifically recognized that the restoration of the status quo ante, traditionally one of the key aims of reparation, is not desirable in case of violations against women perpetrated on the grounds of structural inequality and discrimination. As Yepes has recently underlined 'reparations in transitional contexts should be seen not only as a way to fix a problem of the past; they should be conceived as an instrument to promote a democratic transformation and to attain better conditions of distributive justice for all.'²⁹ This concept, known as 'transformative reparations', has been foremost associated with the condition of women. As stressed in the Nairobi Declaration:

Reparations must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girl's lives that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.³⁰

²⁷See A. L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Antwerpen: Intersentia, 2006).

²⁸See for instance *The Prosecutor v. Jean Paul Akayesu* (ICTR-96-4), 2 September 1998, Para 416 et ss. And also *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Foča case, IT-96-23 and IT-96-23/1, 22 February 2001).

²⁹ See R. Yepes, 'Between Corrective and Distributive Justice: Reparations of Gross Human Rights Violations in Times of Transition', at 20. Inaugural Address of the UNESCO Chair in Education for Peace, Human Rights and Democracy, http://www.uu.nl/university/research/EN/international_collaboration/latinamerica/Documents/OratieRodrigoUprimny.pdf (last accessed March 2011)

³⁰Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation (2007), International Meeting on Women's and Girl's Right to a Remedy and Reparation, Nairobi, at Para 3. http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf (last accessed March 2011)

The same concerns have been expressed by the Inter-American Court of Human Rights in the ‘*Cotton Fields case*’ where the Court has strongly stated that:

The Court recalls that the concept of “integral reparation” (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [...] the reparations must be designed *to change this situation, so that their effect is not only of restitution, but also of rectification*. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable. Similarly, the Tribunal recalls that the nature and amount of the reparations ordered depend on the characteristics of the violation and on the pecuniary and non-pecuniary damage caused. Reparations should not make the victims or their next of kin either richer or poorer and they should be directly proportionate to the violations that have been declared.³¹

Similarly the UN Secretary General has emphasized that reparations are increasingly recognized as an important vehicle to address gender inequality. To that extent reparations for survivors of sexual and gender-based violence must link redress for individuals with efforts to eliminate economic and social marginalization, including through increased access to health, education, property rights and positive redistributive measures.³² The International Criminal Court in its decision on the reparations’ principles and procedures to apply in the *Lubanga case* has further clarified that ‘reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes.’³³ The Court has openly referred to the principles enshrined in the Nairobi Declarations, but this

³¹ IACtHR, *González et al. (‘Cotton Field’) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205 at Para 450 (Emphasis added).

³² Report of the Secretary General to the Security Council, ‘The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (12 October 2011) S/2011/634, at Para 27.

³³ ICC, Decision establishing the principles and procedures to be applied to reparations, *supra* n17 at Para 192.

time without circumscribing the application of ‘transformative reparations’ only to victims of gender based violence.³⁴

The idea to broaden the classic scope of reparation and use redress mechanisms to address the injustices that derives from a damaged social fabric is definitely not new on the international agenda. However, it has not been thoroughly explored with regard to child victims.³⁵The lack of ‘a strong voice’ and the scarcity of concrete opportunities to express their views and opinions make the crimes committed against them less visible and more difficult to punish, affecting their chances to obtain not only adequate reparation, but also to rectify the factors that lead to the over exposure to situations which exacerbate their vulnerability.

1.4 Focussing the analysis on child victims of armed conflicts

Much emphasis has been placed in recent years by the United Nations Security Council on the importance to identify the violations of international law which affect in particular children in armed conflicts. Through UN Security Council Resolution (UNSC Res.) 1612/2005, a Working Group on Children and Armed Conflict and a Monitoring and Reporting Mechanism (MRM) have been established on the purpose of systematically monitoring, documenting and reporting on children’s situations in war-torn countries. In 2009 with the adoption of the UNSC Res 1882 the scope of the MRM has been further expanded and enforced. Earlier, with UNSC Res 1539/2004, six grave violations against children have been selected due to their ability to be monitored and quantified, their egregious nature and the severity of their consequences on the lives of children. Such violations are killing or maiming of children, recruitment or use of child soldiers, rape and other forms of sexual violence against children, abduction of children, attacks against

³⁴ Ibid, in footnote 381 the Court refers to the Nairobi Declaration, Para 3.

³⁵ With the remarkable exception of the Inter-American Court of Human Rights. See IACtHR *Rosendo Cantú et al. v. Mexico*, 31 August 2010, Series C. No. 216, at Para 206 and *Case of the “Street Children”* (Villagrán-Morales et al.) v. Guatemala. Merits, (November 19, 1999) Series C No. 63, at Para 184.

schools and hospitals and denial of humanitarian access to children.³⁶ The function of the UN MRM mechanism has been explained as follows:

Once the MRM is activated in a given country, a country task force, chaired by the highest UN authority on the ground and composed of relevant UN agencies, is responsible for collecting information on all six grave violations. Annual country reports are prepared by the task force, reviewed and vetted by the Office of the Special Representative of the Secretary-General on Children and Armed Conflict (OSRSG-CAAC) as convener of the UN system on children and armed conflict, and submitted by the Secretary-General to the Security Council working group. The latter subsequently issues recommendations to relevant stakeholders, including the Security Council, governments concerned, UN actors, and donors. Another crucial piece of the Children and Armed Conflict architecture involves the preparation and implementation of action plans, which are concrete time-bound commitments by a listed party to a conflict to halt recruitment and use of child soldiers, sexual violence, killing and maiming, or attacks on schools and hospitals. The completion of an action plan and the subsequent cessation of violations is the only officially defined way to be delisted from the annexes to the Secretary-General's report on children and armed conflict, although factual developments may lead to the same end result (e.g. if a party cease to exist).³⁷

As of March 2012 only a total of 17 parties have entered an action plan, namely five governments and 12 non-state actors.³⁸ Despite the limitations to its scope and effective implementation the MRM has become a central process to ensure better protection of children in armed conflict and broaden the notion of responsibility for violations committed against children by including illegal armed groups in the discourse.³⁹

³⁶ See Working Paper 1, Office of the Special Representative of the Secretary General for Children and Armed Conflict, 'The Six Grave Violations against Children During Armed Conflict: The Legal foundation' (October 2009).

³⁷ See International Peace Institute, 'Engaging Non-State Armed Groups on the Protection of Children: Towards Strategic Complementarity', April 2012 http://www.genevacall.org/resources/research/f-research/2001-2010/IPI_E_Pub_ENGAGING_NONSTATE.pdf (last accessed May 2012).

³⁸ Ibidem at 3.

³⁹ See generally K. Barnett and A. Jefferys, "Full of Promise: How the UN's Monitoring and Reporting Mechanism Can Better Protect Children," London: Humanitarian Practice Network/Overseas Development

Under international criminal law, the crimes committed against children can be divided in three sub-categories: child-specific crimes, in which children are a material element of the crime (e.g. forced transfer of children and imposition of measures intended to prevent births in order to perpetrate genocide, enlistment, conscription and use of children to participate in hostilities); crimes which target children in a way that they are disproportionately victimized in comparison to the adult population (e.g. destruction of schools and hospitals, attacks to humanitarian missions); crimes with particularly serious effects on children, where children, due to their age and development, face more difficulties to be rehabilitated than adult-victims (e.g. rape and sexual violence).⁴⁰

If the crimes that affect children need to be identified and require the adoption of specific measures, clearly the same should happen with regard to the kind of reparations designed to overcome their effects. As Mazurana and Carlson pointed out ‘it is not possible to fully repair children after they have experienced such harms. It is not possible to recover the years of lost education, or the time that would have been spent developing emotional and spiritual ties to family. Friends and communities, as well as the skills to enable children to take pride in contributing to their households’ livelihoods.’⁴¹ Commonly reparations’ aim is understood as the elimination, as far as possible, of the consequences of the illegal act, in order to restore the situation that would have existed if the act had not been committed. In the case of children, in particular those suffering from the most heinous crimes, the reinstatement of the *status quo ante*, besides being not feasible, is simply not enough: the traumatic events experienced require more than the return to the situation existing prior to the conflict. The actors involved in this process are burdened

Institute, HPN Network Paper No. 62, September 2008. Security Council Report, “Children and Armed Conflict,” Cross-Cutting Report No. 1, New York: July 2011.

⁴⁰C. Chamberlein, Legal Adviser of the International Criminal Court, Paper presented at Leiden University on 12 November 2010, in occasion of the seminar on ‘Children’s Rights before the ICC’, organized within the course on ‘Children’s Rights in International Law’.

⁴¹ D. Mazurana and K. Carlson, ‘Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of armed Conflicts and under Authoritarian and Dictatorial Regimes’, in Rubio- Marin, *supra* n25 at 12.

with the responsibilities to fulfil war-affected children's right to reparation and, at the same time, to avoid the risk to re-traumatize them and trigger secondary victimization.

2. Setting the scene: preliminary clarifications, methodology and research question

2.1 Introduction

Before diving into the complex issues related to child victims' right to reparation some preliminary considerations need to be made. First and foremost it is necessary to better explain the terminology used in this thesis and to clarify both the concepts of 'reparation' and 'children', including the ratio behind the incorporation of child-soldiers within the child victims group; secondly it is important to briefly introduce the legal framework which governs children's right to reparation. Finally, this Chapter will describe and discuss the methodology adopted to answer the research question which is central in this study.

2.1.1 What is reparation?

Amongst the legal consequences arising from gross and serious violations of human rights law and humanitarian law, there is the right to reparation, in the forms of restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. As anticipated in the introductory Chapter 'reparation' is a legal term, which refers to both the obligation to provide and the right to obtain redress in the aftermath of a wrongful conduct. To use the words of the UN Secretary General:

Reparations are arguably the most victim-centred justice mechanism available and the most significant means of making a difference in the lives of victims. United Nations experience demonstrates that reparations may facilitate reconciliation and confidence in the State, and thus lead to a more stable and durable peace in post-conflict societies.⁴²

From a strictly legal point of view the right to reparation is a secondary right that derives from the breach of a primary norm.⁴³ Being entitled to the right to reparation empowers the

⁴²Report of the Secretary General to the Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (12 October 2011) S/2011/634, at Para 26.

⁴³According to Mazzeschi 'individuals are directly holders of rights by virtue of those primary norms which establish human rights and humanitarian law and by virtue of those secondary norms which establish reparation for breach of the primary norms.' P. Mazzeschi, 'Reparation Claims by Individuals for State

victims to obtain redress for the harm suffered and, when it is possible, to have the situation fully restored that was in existence prior to the violation. The restoration of the *status quo ante* is traditionally one of the principles which govern the general discourse on reparation. According to the often-quoted passage of the *Factory at Chorzow Judgment*, which is going to be further discussed in the next Chapter, the aim of reparation is to ‘wipe out all the consequences of the wrongful act’.⁴⁴ Since gross violations of HRL and IHL have a severe impact on the enjoyment of victims’ fundamental rights, an attempt to apply the concept of restitution would generate what has been defined by Roth-Arriaza the ‘basic paradox at the heart of reparation’, namely the tear between a promised return to the *status quo ante* and the knowledge that such a status could not, in any case, be restored.⁴⁵ Bearing this paradox in mind is useful to better understand both the limitations and the immense potentialities of each and every reparative measure set up in the aftermath of a wrongful act to redress the harm suffered by the victims, in particular children.⁴⁶ Reparations in war-affected countries are often part of a broader process, widely known as transitional justice, which encompasses the full range of mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.⁴⁷ Reparations, as the

Breaches of Humanitarian Law and Human Rights: An Overview’, in *Journal of International Criminal Justice* 1(2003):339-347.

⁴⁴ See case of *Factory at Chorzow*, Merits, Permanent Court of International Justice, Ser. A, No. 17 (1928), p. 47.

⁴⁵ N. Roht-Arriaza, ‘Reparations in the Aftermath of Repression and Mass Violence’, in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, in E. Stover and H. M. Weinstein ed. (Cambridge: Cambridge University Press, 2004): 122.

⁴⁶ ‘For most serious human rights violations, such as extrajudicial killings or forced disappearances, the principle of *restitutio in integrum* cannot be applied, because in all those cases it is impossible to turn back victims to the situation in which they were before the atrocity took place. This impossibility of full restitution in most cases of gross human rights violations is accepted by almost all tribunals and scholars; that is why in view of terrible human rights violations we usually speak of the efforts to repair the irreparable.’ See Yepes, *supra* n29 at 7.

⁴⁷ See United Nations Approach to Transitional Justice Guidance Note of the Secretary General, March 2010, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (last accessed September 2012). See

indispensable component of a transitional justice process, strive to allow ‘victims to move forward’ it is sometimes difficult to distinguish redress mechanisms from other actions (for instance under the heading of development aid) undertaken to alleviate the suffering of societies affected by the plague of armed conflicts.

2.1.2 Reparation and development aid

In the aftermath of every war, the contours that define the notions of reparation and development aid are often blurry and in order to distinguish amongst the different kinds of actions that can be put in place to restore, or rebuild, reconciliation and peace, a few clarifications are necessary. The strategies and plans elaborated to trigger development and growth can be described as processes by which a war-torn society increases the general and individual prosperity and welfare of its citizens.⁴⁸ Reparation, on the other hand, is a legal remedy which can be claimed, enforced and even waived by its legitimate holder. Development foremost pursues the aims of alleviating poverty, supporting post-conflict recovery and addressing socio-economic needs of the population at large, whilst reparations, awarded through judicial mechanisms or national programmes, aim to provide redress to the consequences of human rights and humanitarian law violations.⁴⁹ Moreover, development assistance targets members of the affected community at large, conflict-affected persons in general (‘CAPs’),⁵⁰ whilst reparation is to the ‘exclusive’ benefit of the

also Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/616, 23 August 2004.

⁴⁸ N. Roht-Arriaza and K. Orlovsky, ‘A Complementary Relationship: Development and Reparations’ ICTJ Research Briefing, July 2009, available at <http://ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf> (last accessed September 2012).

⁴⁹ Please see the UN Women and UNDP Report of the Kampala workshop ‘Reparations, Development and Gender’, December 2010.

<http://www.unrol.org/files/Kampala%20workshop%202011%20Reparations,%20Development%20and%20Gender.pdf> (last accessed June 2011).

⁵⁰ See R. Carranza, ‘Relief, Reparations and the Root Causes of Conflict in Nepal’, ICTJ 2012, footnote n5: ‘However, these (‘CAPs’ and ‘victims’) are not equivalent terms since people can be affected by conflicts without having suffered a human rights or international humanitarian law violation.’

<http://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf> (last accessed October 2012).

victims, recognized as those who suffered, either directly or indirectly, from the wrongful acts committed. In other words the wrong, and the harm suffered thereof, are the indispensable corollaries which qualify an individual as ‘victim’ and triggers the exercise of the right to reparation; instead the identification of the beneficiaries of a development strategy does not depend on the occurrence of violations of HRL or IHL.⁵¹

2.1.3 Individual and collective reparation

Another preliminary caveat is necessary as development or aid strategies often tend to be confused with collective reparations. The Basic Principles and Guidelines by affirming that ‘victims are persons who individually or collectively suffered harm’ have officially introduced the issue of collectiveness in the reparations discourse.⁵² Individual reparations as stated by Magarrell ‘[...] are important because international human rights standards are generally expressed in individual terms. Reparation to individuals therefore underscores the value of each human being and their place as rights holders’.⁵³ Although at the moment there is no legal definition of ‘collective reparations’⁵⁴ the term has been explained as ‘the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law’.⁵⁵ According to Rosenfeld the elements

⁵¹ Ibidem, Carranza at 5, ‘It is important to note the distinction between relief and reparations. Reparations recognize that rights have been violated and that the state is obligated to repair the consequences of the violation. Relief is the immediate assistance offered to those affected by man-made or natural disasters, where the goal is simply to relieve recipients of the extraordinary physical burdens brought on by an emergency or to help them deal with the immediate aftermath of the disaster. Relief is important and useful for victims but it cannot be a substitute for reparations’.

⁵² Supra n2, Principle 8.

⁵³ See L. Magarrell International Center for Transitional Justice (‘ICTJ’) 2007, ‘Reparations in Theory and Practice’, <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> (last accessed June 2011)

⁵⁴ ICC-CPI-20120807-PR831, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012. ‘Women's Initiatives highlights the absence of a definition of collective reparations in international law. It submits that the term "collective reparations" encompasses reparations that are directed at specific groups of people, as well as the wider community.’ At Para 61.

⁵⁵ See F. Rosenfeld, ‘Collective Reparations for victims of Armed Conflicts’, in *International Review of the Red Cross* 92(2010): 731-746. See also Letschert and Van Boven, ‘Providing Reparation in Situations of Mass Victimization: Key Challenges Involved’. In R.M. Letschert, R. Haverman, A.L.M. de Brouwer, & A.

which qualify reparations as collective are four: the benefits, a collective as beneficiary, collective harm, and a violation of international law. The author defines collective reparation as the immediate corollary to collective harm, clarifying that ‘the targeting of a collective can cause harm that differs from the harm caused by targeting the same number of individuals who are not part of a collective.’⁵⁶ The Rabat report provides an additional explanation stating that:⁵⁷

collective reparation(s) are focused on delivering a benefit to groups of victims that suffered from human rights or humanitarian law violations, such groups may be bound by different factors, which include a common identity (cultural, religious, ethnic or tribal roots), gender, vulnerability, age etc. [...].⁵⁸

During the process of crafting its first, and recently issued, decision on reparations the ICC has further delved into the debate on collective reparations.⁵⁹ As the Office of the Public Council for Victims (‘OPCV’) has underlined in its submission to the Trial Chamber 1 on the issue of reparations:

Pemberton (Eds.), *Victimological Approaches of International Crimes* (pp. 155-186). (Cambridge -Antwerp: Intersentia, 2011).

⁵⁶ See Rosenfeld supra n55 at 734.

⁵⁷ See *The Rabat Report: The Concepts and Challenges of Collective Reparations*, International Center for Transitional Justice, 2009 available at <http://ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf> (last accessed October 2011). See also Magarrell supra n53 at 5-6.

⁵⁸ It is clearly impossible to list such factors exhaustively, nevertheless the Rabat Report at p 42 provides some useful examples, in particular ‘the Peruvian reparations process considers certain groups of people as beneficiaries of the collective reparations program. One category includes peasant communities, indigenous populations, and villages affected by the conflict. A second category refers to non-returning displaced people from affected communities. The criteria for identifying the first category consist of a combination of geographical circumstances and a certain level of direct harm, whether individual or collective’. See also the Committee on the Right to Reparation for Victims of Armed Conflict, International Law Association, The Hague, August 2010. Commentary to Article 6: ‘The concept of collective reparation has been even less explored than the right to individual reparation. Still, there are some developments that indicate that international law endorses collective reparation.’

⁵⁹ ICC-CPI-20120807-PR831, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012.

collective reparations can be given a broad and a narrow interpretation. A narrow approach would include measures that cater for existing groups who are linked by cultural, ethnic, social, cultural or spiritual factors. Applying a broad interpretation, collective reparations would address the position of individual victims who are part of a community or other group, and the awards would complement any individual reparations measures.⁶⁰

Until now ‘collective reparation’ has been used to refer to a number of different situations, encompassing the modalities of awarding reparation, the impact of the violation on the community, the types of goods distributed and so on.⁶¹ As the ICC Trust Fund for Victims has specified ‘collective reparations shall be distinguished between collective reparations that are “inherently collective and exclusive” (such as specialized health services for a targeted group of victims), and those that are “community oriented and not exclusive” (such as schools that benefit the entire community).⁶² The Inter-American Court of Human Rights has issued several orders for collective reparation following the ‘community based’ approach, especially in cases where gross and systematic human rights violations have occurred.⁶³ Throughout the Court’s jurisprudence the notion of collective reparation has been broadly interpreted by awarding a wide variety of reparative-collective measures, in particular in cases of mass victimization.⁶⁴

⁶⁰ ICC-01/04-01/06-2863, Para 31-32.

⁶¹ Ibidem.

⁶² See Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, 25 April 2012, at Para 174.

⁶³ See D. Contreras-Garduno, ‘Defining Beneficiaries of Collective Reparations: The Experience of the Inter-American Court of Human Rights’, in *Amsterdam Law Forum* 4(2012); 41-57. IACtHR *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C No. 134, at Para 316; IACtHR *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79.

⁶⁴ IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Reparations and Costs, Judgment of November 19, 2004, Series C No. 116, at Para 93-111. On this point see T.M. Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’, in *Colombia Journal of Transnational Law* 46(2008):352-419. According to the author ‘the breadth and depth of the remedies ordered are impressive, in addition to monetary compensation, the Court required the State to take the following measures, among others: the investigation, prosecution, and punishment of the responsible parties; a public

2.2 Defining child victims

Article 1 of the UN Convention on the Rights of the Child ('CRC') establishes that 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. This definition has been embraced also at the regional level. In the Inter American arena, there is no standard definition of the child for legal purposes, therefore both the Inter-American Court of Human Rights and the Inter American Commission have stipulated that the definition of child is based on the provisions of Article 1 of the CRC.⁶⁵ The same criterion has been applied within the European and the African Human Rights systems: in particular Article 1 of the European Convention on the Exercise of Children Rights states that it targets everyone who has not yet attained the age of 18 years and also the African Charter on the Rights and Well-being of Children, adopted in July 1990, defines as child every human being less than eighteen years of age.

2.2.1 'Victim' within the international law framework

The notion of reparation is intrinsically coupled with the idea of victim.⁶⁶ The definition of victim I will refer to is the one contained in paragraph five of the Van Boven-Bassiouni Basic Principles and Guidelines:

victims are 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. Where appropriate, and in accordance with

acceptance of responsibility for the case's facts; establishment of a village housing program; medical and psychological treatment for all surviving victims; implementation of educational and cultural programs; and translation of the judgment into the appropriate Mayan language.'

⁶⁵ Inter-American Court of Human Rights, Juridical Condition and Human Rights of the Child. Advisory opinion OC-17/02 of August 28, 2002. Series A No 17, Chapter V. Of course, reparations can be also the outcomes of administrative proceedings, which for the purpose of this thesis fall within the reparations awarded by the State through national plans and strategies.

⁶⁶On the victim-centred trend adopted by the criminal justice system, see D.Garland, *The Culture of Control, Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁶⁷

There must be a direct causal link between the victim and the harm suffered, only when this link exists and it is provable before the courts the right to reparation arises. When, instead, this nexus is not fully accomplished the acquisition of the status of victim will entirely depend on variable factors, such as the domestic laws of the different countries.⁶⁸ The scope of the present thesis is confined to child victims of armed conflicts, namely the human beings under the age of 18 who were harmed as a result of serious violations of rules of international law applicable in armed conflict, encompassing both international humanitarian law and international human rights law. The term ‘harm’ can be understood as the negative outcome resulting from the comparison of two conditions: the condition with and without the causing event, which can be identified with the consequences of the state’s misconduct and/or with the criminal acts imputable to individual perpetrators.⁶⁹

2.2.3 Children’s vulnerability

Child victims of armed conflicts are usually referred to as a ‘vulnerable group’, although it is difficult to conceptualize vulnerability in a conflict or post-conflict context. In addition to the increased prevalence of violence against civilians, conflicts are also inextricably linked to poverty; in fact 90% of the 150 conflicts post-WWII have occurred in developing

⁶⁷The definition of victim contained in the Van-Boven Bassioni Principles is the one entailed in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly through the Resolution 40/34 of 29 November 1985.

⁶⁸This may foment a lack of homogeneity which hampers the development of a universal victim-oriented trend. In particular one should not forget that, as Rubio-Marín has strongly stressed, reparations have primarily strived to give victims a sense of recognition in order to help them to face their trauma and overcome it. R. Rubio-Marín, *What happened to the Women?* (New York: International Center of Transitional Justice eds. 2006): 32.

⁶⁹ See S. Vandeginste, H. Robouts ‘Reparations for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim’, *Third World Legal Studies*, 16(2003): Article 5.

Available at: <http://scholar.valpo.edu/twls/vol16/iss1/5>

countries.⁷⁰ Vulnerability can be generally defined as ‘the exposure to uninsured risks leading to a socially unacceptable level of well-being’ and it is measured according to physical and emotional development, ability to communicate needs, mobility, size and dependence.⁷¹ The exposure to uninsured risks is a children’s prerogative, since they are vulnerable above all in regard to their age and immaturity, and their mental attitude might be easily influenced by the inability or impossibility to speak for themselves and act independently from adults.⁷² Children’s vulnerability has been described by some authors as a ‘double vulnerability’ to the extent that they are exposed to two kinds of risks: the biological, which concern the threats to their health and well-being, and the environmental ones.⁷³ According to UNICEF children living in conflict-affected areas are ‘more likely to be poor, malnourished and unhealthy.’⁷⁴ In particular there are four main ways a child’s health is severely impacted by armed conflict:

[...]First, conflict-driven displacement increases child death and injury, mainly through increased susceptibility to infectious disease from unsanitary living conditions. Second, children have a higher risk of food insecurity and malnutrition during times of conflict. Third, children, especially girls, are subjected to an increased risk of sexual violence from armed combatants during

⁷⁰ See A.J. Pollard, A. Finn et al., *Hot Topics in Infection and Immunity in Children* (New York: Springer, 2005) quoted in T. Tamisharo, ‘Paper commissioned for the EFA Global Monitoring Report 2011, The hidden crisis: Armed conflict and education’ (Final Draft June 2010).

⁷¹ J. Hoogeveen, et al, *A Guide to the Analysis of Risk, Vulnerability and Vulnerable Groups*, World Bank, 2005.

<http://siteresources.worldbank.org/INTSRM/Publications/20316319/RVA.pdf> (accessed March 2011).

⁷²On children’s vulnerability in war torn countries, see K. Cheney, *De-constructing Childhood Vulnerability*, paper series of the Institute of the African Child, Ohio University, December 2010. http://iss.academia.edu/KristenCheney/Papers/366079/Deconstructing_Childhood_Vulnerability, (accessed April, 2011). See also the UNICEF’s study on Child’s Vulnerability in Barbados, St. Lucia, St. Vincent and the Grenadines, http://www.unicef.org/barbados/cao_resources_vulnerability.pdf (accessed May 2011)

⁷³See H. Hamzei, ‘Child Victims before the International Criminal Court: Avenue to Justice for the Most Vulnerable?’, in L. Hopkins et al. *Negotiating Childhoods*(Oxford: Inter-Disciplinary Press, 2011): 113-122.

⁷⁴See UNICEF ‘Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World’ (April 2009).

conflict.⁷⁵ Fourth, conflict induces long-term physical and psychological disability in children, especially among child soldiers.⁷⁶

In her ground breaking report on the impact of armed conflict on children, Graca Machel has pointed out that children in war torn countries face higher risk than their peers in experiencing:

infant, child and adolescent mortality, low immunization, low access to health services, high malnutrition, high burden of disease, low school enrollment rates, high repetition rates, poor school performance and/or high drop-out rates; intra-household neglect; family and community abuse and maltreatment, in particular harassment and violence; economic and sexual exploitation, due to lack of care and protection'.⁷⁷

Graca Machel has identified the groups of children most affected by armed conflicts and therefore, most vulnerable: child-soldiers, unaccompanied children, refugees and internally displaced children, children sexually abused or exploited, children injured by landmines and unexploded ordnance.⁷⁸ The Special Representative of the UN Secretary General on Children and Armed Conflict has further stressed the growing vulnerability of children and its relationship with the changing nature of the current armed conflicts:

Children have become more vulnerable due to new tactics of warfare, the absence of clear battlefields, the increasing number and diversification of parties to conflict that add to the complexity of conflicts and the deliberate targeting of traditional safe havens such as schools and

⁷⁵ According to Humphreys 'between June 2007 and June 2008, 6,766 cases of rape were officially reported in the DRC and 43% of the reported cases involved children.' See G. Humphreys, 'Healing child-soldiers', in *Bullet World Health Organization* 87(2009) :330-331.

⁷⁶See Tamisharo, supra n70.

⁷⁷G. Machel, *UN Report on the Impact of Armed Conflict on Children*, A/51/306, 1996. 'Armed conflicts across and between communities result in massive levels of destruction; physical, human, moral and cultural. Not only are large numbers of children killed and injured, but countless others grow up deprived of their material and emotional needs, including the structures that give meaning to social and cultural life. The entire fabric of their societies, their homes, schools, health systems and religious institutions are torn to pieces.'

⁷⁸ Ibidem.

hospitals. Moreover, the increasing use of terrorist and counter-terrorist activities sometimes blurs the line between what is legitimate and what is not in addressing security threats.⁷⁹

Each and every war has a strong impact on the whole population and in particular on children, nonetheless after each and every war children have been neglected and their rights punctually overlooked. It is striking, but not surprising, to note that the 217 orphans known as the ‘Tehran children’, Jewish minors who fled Nazi Europe through Russia and Iran, were not amongst those who benefited from the massive reparations plan established to compensate the victims of the Holocaust. Only in August 2012, after 60 years since their resettlement in Israel, the Tel Aviv District Court has recognized that the government did not fulfill part of the deal reached with Germany and that the ‘former’ vulnerable children have been denied their right to reparation, posing the legitimate question of how different their lives could have been in case of prompt and adequate redress.⁸⁰

2.2.4 Child-soldiers: why victims?

According to the latest working paper released by the Office of the UN Special Representative of the Secretary General for Children and Armed Conflict ‘while many children are affected by armed conflicts and some of them are direct victims of war crimes, a very small minority of children are also involved in committing crimes’.⁸¹ The number of children unlawfully recruited to participate in the armed conflicts is certainly low if compared to the number of children affected by them, in particular those injured, sexually abused, orphaned and so on. Nevertheless, in the past two decades the use of children as soldiers, or more in general as war’s active stakeholders, has increased generating a widespread phenomenon, endemic in each context where an armed conflict

⁷⁹ See <http://childrenandarmedconflict.un.org/effects-of-conflict/the-changing-nature-of-conflict/> (last accessed August 2012).

⁸⁰The group was awarded a total of \$4.2 million. Please see <http://www.jspace.com/news/articles/tehran-children-granted-4-2-million-in-holocaust-restitution/10344> (last accessed August 2012).

⁸¹Office of the Special Representative of the Secretary General for Children and Armed Conflict, *Children and Justice during and in the aftermath of Armed Conflict*, working paper n.3 (September 2011).

arises.⁸² According to the definition enshrined in the Paris Principles, child-soldiers are included within the wider group of children associated with armed forces or armed groups.⁸³

A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.⁸⁴

The *ratio* behind the choice to recruit minors lays on the assumption that they can be easily intimidated and indoctrinated; due to their age and immaturity often they do not fully understand the consequences and the implications of their actions and to further distort their state of mind they are sometimes forced to assume alcohol and drugs.⁸⁵ In some cases the crimes committed by child-soldiers are imposed by their adult-commanders as they are most likely the results of threats and heinous violence; the lack of *mens rea* and the objective impossibility to escape or disobey the orders shall *per se* justify child-soldiers assimilation to victims rather than to perpetrators.⁸⁶

⁸² See in general Redress (September 2006), *Victims, Perpetrators or Heroes: Child Soldiers before the International Criminal Court*, at 27. See M. Drumbl, *Reimagining Child-Soldiers in International Law and Policy* (Oxford: OUP, 2012), in particular Chapter 2 where the author provides an overview of child-soldiers in each of the world's regions.

⁸³ Ibidem at 4 'Armed forces refer to officially state militia, whilst armed groups refer to non-state entities distinct from those forces.'

⁸⁴ See UN Children's Fund (UNICEF), 'The Paris Principles' Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, February 2007.

<http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (last accessed August 2012)

⁸⁵ Drumbl, *supra* n82 at 6, singles out the four stereotypical images of child-soldiers: the first one typifies the child-soldier as a faultless passive victim, the second one is that of child-soldiers as irreparable damaged goods, the third posits the child-soldiers as a hero who fought for a just cause, the fourth one characterizes child-soldiers as demons and bandits.

⁸⁶ 'According to Justice Devlin *mens rea* consists of two elements 'It consists first of all of the intent to do an act and secondly of the knowledge and the circumstances that makes that act a criminal offence', cited in E.

However, children are often judged like adults as if they bear the complete responsibility of the offences they are charged with. As Happold has wisely underpinned the debate concerns the extent to which ‘these children should be held responsible for their actions or simply seen as innocent tools of their superiors’.⁸⁷ The fact that this issue is not properly regulated at the international level, not even with regard to the crimes which fall within the category of ‘international crimes’, has vastly contributed to increase the degree of uncertainty which characterizes the status of child-soldiers.⁸⁸ The provision to take into account for this matter is Article 40(3) of the CRC which affirms that state parties to the Convention shall seek to establish the minimum age below which children are presumed to be not capable to violate penal law.⁸⁹ Unfortunately, the provision does not go any further: without imposing the establishment of a common standard it leaves to each state the duty to set a minimum age.⁹⁰ Article 77(2) of the Additional Protocol to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (‘Protocol I’) states that:

[T]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of *fifteen* years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed force[...].⁹¹

van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Criminal Law* (The Hague: T.M.C. Asser Press, 2003): 43.

⁸⁷ M. Happold, ‘The Age of Criminal Responsibility in International Law’, in K. Arts and V. Popovski, *International Criminal Accountability and Children* (The Hague: T.M.C. Asser Press, 2007).

⁸⁸ ‘The crimes that transcend national boundaries and are of concern of the international community’. Ibid.

⁸⁹ Article 40(3): States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law [...].

⁹⁰ For example in England and Wales the minimum age for criminal responsibility is as low as ten years old. See ‘T. v United Kingdom and V. v United Kingdom’, in *European Human Rights Law Reports* 30 (2000): 603.

⁹¹International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

According to Articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ('Optional Protocol') states parties shall raise the minimum age for voluntary recruitment of persons into their armed forces recognizing that individuals under the age of 18 are entitled to special protection, whilst armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. The Statute of the ICC affirms that the conscription or enlistment of children under the age of 15 years, or their use to actively participate in both international and non-international armed conflicts, constitutes a war crime.⁹² Notwithstanding the normative efforts to prevent and punish the enlistment and conscription of children, there is no agreement on what should be the minimum age of criminal responsibility for the children who committed the crimes after being unlawfully recruited, in particular:

the difficulties are rife as treaty provisions continue to make a distinction between persons under 15 years of age, for whom the prohibitions are generally robust and absolute and those between 15-18 years old, who can be voluntarily conscripted into military forces.⁹³

In order to overcome such lack of clarity UNICEF, amongst many other actors, has strongly advocated for a 'straight 18 ban on all participation and recruitment' which, as already pinpointed, was adopted in some relevant provisions, but not yet translated in a universally accepted approach to defeat the plague of child-soldiering.⁹⁴ According to

⁹² See Article 8 of the Rome Statute.

⁹³ See F. Ni Aolàin, N. Cahn and D. Haynes, 'Masculinities and Child Soldiers in Post-Conflict Societies', in *Masculinities and the Law: A Multidimensional Approach* in F. R. Cooper and A. C. McGinley (eds.), (New York: New York University Press, 2012): 240.

⁹⁴ See D. M. Rosen, 'Who is a Child? The Legal Conundrum of Child-Soldiers', in *Connecticut Journal of International Law* 25(2009): 96 'Human rights-related treaties that incorporate the Straight-18 position include the 1989 Convention on the Rights of the Child, the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the 1990 African Charter on the Rights and Welfare of the Child, and the 1999 International Labour Organization Worst Forms of Child Labour Convention [...] In contrast, sovereign states have stressed the importance of local and national

Happold it has been occasionally argued that Article 77(2) fixes the minimum age of criminal responsibility for war crimes at fifteen, but such a statement is, in the first place, not supported by the text itself and, secondly, the negotiators explicitly decided not to include this kind of provision within the Protocol.⁹⁵ Due to the lack of an international legal framework able to determine child-soldiers status, at the domestic level their consideration as victims or as perpetrators, and the consequent prosecution, will entirely depend on the domestic legislation and on the minimum age for criminal responsibility set by the state. At the international level *ad hoc* and hybrid tribunals normally focus their efforts on the individuals who bear the greatest responsibilities for the violation of humanitarian law perpetrated and child-soldiers usually do not fall within this category, so that their punishment is implicitly or explicitly devolved to domestic courts.⁹⁶

Being this the premise on the legal status of child-soldiers, for the purpose of the current work, they will be considered as victims in need of specific reparative and rehabilitative measures and therefore as a particular sub-group within the general one that encompasses child victims of war.⁹⁷ This, arguably oversimplified, approach has been adopted bearing in mind the flaws and the limits of the image that portrays child-soldiers as faultless and passive victims.⁹⁸ Nevertheless, since the main goal of this work is to discuss the right to

definitions of childhood and the right of sovereign states to establish laws regarding childhood in accordance with their own traditions.’

⁹⁵ See Happold, *supra* n95.

⁹⁶ See Article 26 of the Rome Statute: ‘The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime’. See in general University of Essex Transitional Justice Network, Briefing paper No4 (2011): *The International Criminal Court and Reparations for Child Victims of Armed Conflict* (By Evie Francq, Elena Birchall and Annick Pijnenburg). See also Child-Soldiers International, Report ‘Louder than Words: An Agenda for Action to End State Use of Child-Soldiers’, September 2012.

⁹⁷ P.de Greiff, ‘Establishing Links between DDR and Reparations,’ in *Disarming the Past: Transitional Justice and Ex-combatants*, ed. A. Cutter Patel, P. de Greiff and L. Waldorf, (New York: Social Science Research Council, 2009).

http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B465ede38-0c0d-df11-9d32001cc477ec70%7D.pdf (accessed June 2011).

⁹⁸ See Drumbl *supra* n 82.

reparation for child victims of armed conflict, in light of such aim the minors *unlawfully* recruited and enlisted in armed forces or armed groups, and used for whatever purpose, are identified as subjects entitled to obtain redress.

2.3 Introducing the legal framework

The key provision for the analysis of the right to reparation for children is Article 39 of the CRC. According to it:

State parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁹⁹

Does this Article directly enable children to claim reparation? No, but it obliges State parties to take all the appropriate measures in order to promote their ‘recovery and reintegration’ in the aftermath of every traumatic or harmful event, including war. The ‘obligation of result’ enshrined in Article 39 of the CRC involves the States as active actors and the children as mere recipients of the right, even though it is fairly well established under international treaty law that every violation of human rights and humanitarian law implicate a duty for the responsible state to provide reparation and a corresponding right of victims to claim for reparation.¹⁰⁰ It is trivial to observe that each and every human being should be able to enjoy the wide arrays of human rights, however, in order to exercise such

⁹⁹UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 39.

¹⁰⁰ On this point see H. Rombouts, P. Sardaro and S. Vandeginste, ‘The Right to Reparation for Victims of Gross and Systemic Human Rights Violations’, in De Feyter, *supra* n7. ‘This finding is based on a comparative textual analysis of relevant international instruments and on the case law of international dispute settlement mechanisms, including international human rights bodies.’ See A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional: Memorias de la Corte Interamericana de Derechos Humanos* (Belo Horizonte, Brazil: Del Rey, 2011): 159-165, from the same author see also *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011).

rights children, and in particular child victims, need more than a ‘buzzword’ or a catchphrase. In the aftermath of an armed conflict children, especially those who have no family left, face enormous challenges. They are rarely aware of the protection measures and of the rights they are entitled to; consequently they ignore whether or not they are eligible for reparation, to whom they should submit their applications and how they can have concrete access to the benefits.¹⁰¹ The issues related to children’s access to justice are not new to the international agenda, in fact in order to support the implementation at the national level of the principles enshrined in the CRC, in its resolution 2005/20, the Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (‘Guidelines’). The Guidelines serve to fill an important gap in international standards in the area of the treatment of children as victims or witnesses of crime.¹⁰² The ECOSOC’s guidelines, which represent ‘good practice based on the consensus of contemporary knowledge and relevant regional and international norms, standards and principles’, were adopted with a view to providing a practical framework to achieve some relevant objectives, as assisting states in the review of national laws, procedures and practices so that they ensure full respect for the rights of child victims and witnesses of crime and contribute to the enforcement of the CRC by parties to that Convention.¹⁰³ Chapter XIII of the Guidelines deals with the right to reparation, affirming in paragraph 35 that: ‘child victims *should*, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation *should be readily accessible and child-sensitive*.’¹⁰⁴ The Report of the Secretary

¹⁰¹C. Aptel and V. Ladisch, ‘Through a New Lens: A Child-Sensitive Approach to Transitional Justice’, ICTJ August 2011,

<http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf>.
(accessed September 201128).

¹⁰²See A. Beijer and T. Liefwaard, ‘A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Proceedings affecting Child Victims and Witnesses’, in *Utrecht Law Review* 3(2011):70-106.

¹⁰³C. Laucci, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witness of Crime*, United Nations Office on Drugs and Crime (UNODC), 2009.

¹⁰⁴Emphasis added.

General on the implementation of the Resolution adopted in 2005,¹⁰⁵ based on information received from member states in response to the request to report on legislation procedures, policies and practices established in accordance with the Guidelines, provides a snapshot of the implementation of the right to reparation for child victims at the national level:

A number of countries reported that their legal systems provided for the right to reparation (Austria, Chile, Estonia, Germany, Lithuania, Oman, Poland and Tunisia). In some countries, reparation for damages could be obtained from the offender (Austria, Chile, Germany, Lithuania, Poland and Tunisia). Poland reported that reparation could also be obtained from the State's compensation programmes. Only a few countries reported having reintegration and/or rehabilitation programmes for child victims and witnesses (Estonia, Guatemala, Oman and Philippines). The Philippines reported that its Inter-Agency Council against Trafficking in Persons dealt with the rescue, recovery and repatriation of victims and that the Council advocated the rehabilitation and reintegration of victims.¹⁰⁶

National criminal justice systems foresee the possibility for children to access justice and claim for reparation, however further implementation is still required in order to meet the high bar set by the Guidelines. At the international level the gap between theory and practice is even more pronounced, as set forth by the UN Secretary General in his recent Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies:

Though the right of children to a remedy is well established, few child victims have benefited from reparations programmes to date [...]. Children's needs must be more fully expressed in the design of reparations programmes. Furthermore, increased efforts are required to ensure that both international and national criminal prosecutions are well-resourced to offer reparations together with convictions. Reparations initiatives require greater administrative and political support.¹⁰⁷

¹⁰⁵Report of the Secretary General on 'The Implementation of the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', E/CN.15/2008/11, 29 January 2008.

¹⁰⁶ *Ibidem* at 11.

¹⁰⁷Report of the Secretary General to the Security Council, 'The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (12 October 2011) S/2011/634, Para 27. See also D. O' Donnell, 'The Rights of Children to be Heard: Children's Rights to Have their Views taken into Account and to Participate in Legal and Administrative Proceedings', UNICEF Innocenti Working Paper, 2009. The author considers 52

As it is going to be better addressed in the coming Chapters children have not been fully included in the reparation discourse and they have not been provided with sufficient mechanisms to access justice and exercise their rights. Recently a third Optional Protocol to the CRC, which enables individuals or groups claiming to be victims of a violation of any of the rights set forth in the Convention or its Optional Protocols to submit a communication to the Committee, has been opened for signature and it will enter into force after the ratification by 10 states parties. The Optional Protocol on a communications procedure has been, overall, welcomed with enthusiasm, in particular since, consistently with the right of the child to be heard, it foresees, at least in theory, the opportunity for children to complain directly to the Committee without necessarily going through their parents or legal representatives. Also, the Optional Protocol is expected to enhance children's access to remedies at the domestic level as an indirect effect of its entry into force, in particular this will happen because states 'will not be too interested in being judged by an international committee, they are likely to establish mechanisms of control at local and national level in order to deal with the problem domestically.'¹⁰⁸ However, many flaws have been detected, raising concerns and strong criticism against the Protocol. In the first place it is noteworthy that only written complaints can be submitted under the Optional Protocol. This formal limitation has excluded the admissibility of complaints presented through other means (such as video or audio recording and oral submissions) that would have increased the possibility for children to act directly. Moreover, the Committee on the Rights of the Child included in an earlier draft of the Optional Protocol a 'collective' communications procedure to encourage 'anonymous' submissions without the need to

countries and its research has shown that in some jurisdictions, e.g. Paraguay, Romania and South Africa, children have the right to bring a matter to the Court and to receive support in doing so.

¹⁰⁸ Optional Protocol to the CRC on a Communications Procedure, adopted by the UN General Assembly A/RES/66/138, 27 January 2012. So far the Optional Protocol has been ratified only by two states: Thailand and Gabon. It is striking to note that the CRC was the only human rights treaty with a mandatory reporting procedure which did not have in addition a communications procedure. See the statement released by Mr. J. Zermatten, vice-chairperson of the CRC. OHCHR, Human Rights Treaties Division, newsletter No 11 January-February 2011

actually identify the victims of the alleged violations. According to the final text, instead, the identification of the victims has been deemed to be an essential requirement for the complaint to be considered, affecting the concrete impact of the Protocol and leading to the disappointment of the Committee itself, which was unanimously in favour of a collective procedure.¹⁰⁹ According to the words of the CRC chairperson ‘although acknowledging that the week's proceedings had indeed resulted in a historic event, I am afraid that we have affirmed that children are “mini humans with mini rights” and the current draft fits this idea of children.’¹¹⁰ The establishment of a complaint mechanism represents a significant step forward, but it is important to note: first that the adoption of the Optional Protocol has been driven by political considerations which have lowered the high expectations originally placed on this tool and secondly that states’ compliance with the decisions of the UN treaty bodies acting in their quasi-judicial capacity cannot be legally enforced and it relies on governments’ goodwill.¹¹¹

2.4 The main research question

As Sano and Thelle eloquently pointed out ‘people are not sufficiently present in human rights research [...]. Perhaps a consequence is also that human rights researchers know too little about the reality of human rights implementation’.¹¹² This statement underlines how, too often, the enquiry about a specific topic tends to be limited to the recognition of a

¹⁰⁹ Ibidem, Article 5(1): Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of and of the rights set forth in any of the following instruments to which that State is a party: (a) The Convention; (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.

¹¹⁰ The Chair of the Committee on the Rights of the Child, Yanghee Lee, quoted by Mr. J. Zermatten, vice-chairperson of the CRC. OHCHR, Human Rights Treaties Division, newsletter No 11 January-February 2011.

¹¹¹ See generally S. Joseph, K. Mitchell and L Gyorki, *Seeking Remedies for Torture Victims: a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Geneva: OMCT Handbook Series Volume 4, 2006).

¹¹² H. Sano and H. Thelle, 'The Need for Evidence-Based Human Rights Research', in F. Coomans, F. Grunfeld and M.T Kamminga, *Methods of Human Rights Research* (Maastricht Series in Human Rights, 2009). See also in general A. Bryman, *Social Research Methods* (New York: Oxford University Press, 2004).

certain right and its settlement within the normative framework, without further investigation on the degree to which the right itself can be exercised. In fact, it must be borne in mind, as Zegveld has sharply highlighted, that ‘the recognition of rights is one thing and the right to claim those rights is another’.¹¹³ In the complex scenario so far delineated, the main research question that the present work aims to answer is, in the first place, to what extent and in what ways child victims who suffer from gross human rights violations and serious violations of international humanitarian law occurred in conjunction with an armed conflict, are able to fully exercise their right to reparation?

The enquiry covers the recognition of the right’s existence under international law, children’s access to the relevant participatory rights and, eventually, the award of substantive forms of reparations, compatible with children’s needs and expectations. The answer to the question posed - if child victims of armed conflict can fully exercise the right to reparation - is not an immediate one. It imposes first a deep analysis of the right to reparation in general, in particular its current developments and shortcomings. Alongside, the role of children in armed conflicts has to be defined, discussing in light of the existing legal framework whether the transition from bystanders to targeted victims implies, or will imply, the consequent upgrade from reparation’s recipients to reparation rights holders. In particular, since reparation in the context explored can be granted by different actors, it is vital to understand whether children can equally demand redress before each of them, or instead if there are some ‘privileged interlocutors’. This issue rises especially with regard to the reparations granted as trial’s outcomes, at the regional and at the international level, because of the range of procedural formalities that victims have to fulfil in order to claim for reparation. Such procedural attainments often come within adults’ competence, therefore a second goal will be to examine the role played by parents and legal guardians in fostering children’s right to reparation. Since in post-conflict countries both kinship and guardianship are either difficult to prove or no longer existing, this study will also address the potential function that child protection agencies and NGOs can execute in supporting children’s claims before domestic and international judicial settings.

¹¹³ See Zegveld, *supra* n12..

2.4.1 Methodological approach to the topic and limitations to the study

One of the main challenges of this work is to deal with the absence of referential sources specifically focused on reparations for child victims of war. On the one hand this requires to redouble the efforts in order to extrapolate from the existing scholarship the state of the art and reconstruct the legal framework in order to analyse whether children are capable to fully exercise the right in question; on the other hand it encourages a broader enquiry, which is not limited to one case study, nor to a comparison amongst few countries affected by armed conflict. The target of this thesis are specifically child victims of war, and not war-affected children in general, and, as already pinpointed, violations of both international human rights law and international humanitarian law, that under certain circumstances amount to international crimes, will be considered.¹¹⁴ Every violation of a primary norm should entail the right to reparation, but since it's impossible to focus on all of them, only 'gross human rights violations and serious violations of humanitarian law' will be taken into account, due to the devastating impact that they have on victim's lives.

The possibilities to carry out a single country study or a few country comparisons have been both carefully rated, and finally rejected for the following reasons. A single country study, due to its pure descriptive function, can be useful to determine whether and how in a particular context the full exercise of the right to reparation for war-affected children has been, or has not been, satisfied. However, such approach does not contribute to the construction of valuable recommendations nor it leads to solid conclusions able to transcend the borders of that particular state.

The option of a few country comparisons, although anyway more suitable than a single country study, has been discarded because the actors entitled to grant reparations are

¹¹⁴ On the distinction between victims of war and people affected by an armed conflict see Zegveld *supra* at n 12. In addition to international humanitarian law, there are also other regimes that may apply in armed conflict. Most importantly, there is increasing support for the general applicability of international human rights law in armed conflicts. The applicability of international human rights law in armed conflict was already mentioned in the 1977 Additional Protocols to the 1949 Geneva Conventions. The ICJ addressed this issue for the first time in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, in which it opined that the protection of human rights norms does not cease in armed conflict. This statement was confirmed in the advisory opinion on the Wall on the Palestinian Territory as well as in the judgment in *Congo v. Uganda*.

not just states and in addition every country in the aftermath of an international or internal conflict has decided to cope with its legacy in different ways, e.g. prioritizing the punishment of the alleged perpetrators, as Rwanda did, rather than establishing a TC and promoting truth telling and reconciliation, as it happened instead in many South American nations. Since the topic of this research has so far never been developed in a scholarly work, the strong demand to provide the reader with a broader understanding of the topic arose, triggering the attainment of a general conceptual analysis, rather than a country comparative approach.¹¹⁵

The nature of the topic selected imposes first a solid description of the normative framework which regulates child victims' right to reparation, and then an analysis of how and to what extent such right has been satisfied, even only partially, in contexts where an armed conflict has occurred. At first sight the ambition might seem immense, but in practice the number of efforts directed to foster the right to reparation for child victims of war so far has been extremely low and the elements to take into account, such as the crimes which as yet qualified for the provision of reparations for child victims, the modalities that characterized children's participation in post-conflict settings and the kind of reparations granted, lend themselves to a global study.¹¹⁶

Finally, domestic courts are amongst the actors entitled to grant reparations, but until now they have not been mentioned in this study. For practical reasons an exhaustive analysis of the national jurisprudence of the states which have dealt so far with the reparation's issue was impossible, nevertheless proper references have been made throughout this work to the war-torn countries' national judgements with a focus on children.

¹¹⁵To my personal knowledge only Dyan Mazurana and Khristopher Carlson recently approached this topic, although from a completely different perspective, in particular considering reparations for children only as part of a transitional justice process. More precisely, they are the authors of the Innocenti Working Paper No 2010-08, entitled 'Children and Reparations: Past Lessons and New Directions', and of a Chapter focused on girl-children embodied in Rubio-Marin's book 'The Gender of Reparation'.

¹¹⁶'Global study' is used in this context to define the analysis of the current topic from a global perspective which is not limited to a particular country or region.

The thesis is composed of three parts, each of them further divided in Chapters.¹¹⁷ Coherently with the structure of the main research question, the first part *in primis* investigates the 'state of the art' of reparation, including an historical excursion and the most recent developments and challenges. Hence, the sources, mostly primary, used to construct an exhaustive legal framework, ranged over a wide variety of international criminal law, human rights law and international humanitarian law treaties. The first part is meant to lay down the theoretical grounds of the thesis, in particular Chapter 3 deals with the framework of reparation, exploring the different legal regimes of international law which are relevant to the research's focus, namely international human rights, international humanitarian law and international criminal law. Chapter 4, instead, discusses the issue of children's rights, providing an overview of the most prominent theories that support the existence of children's rights and discussing the entwined relationship between children's right to participation and children's right to claim for reparation. To achieve the latter scope the second part of Chapter 4 looks at the reparations programme established in Colombia to describe how fostering children's participation in the transitional justice process can lead to a more inclusive and attentive approach towards reparation for child victims. In comparison with other national experiences, in fact, the Colombian case is particularly relevant as child victims have been reckoned as active actors within the transitional justice process and have been identified as the beneficiaries of specific reparations provisions enshrined in the Victims' Law.

The second part of the thesis deals with the assessment of children's right to reparation in practice, as witnessed in courts' judgments and other settings. Chapter 5 is focused on the judicial mechanisms set up to cope with gross human rights violations and serious violations of humanitarian law and it delves into the extent to which children have been granted reparation. Chapter 6, instead, targets non-judicial mechanisms such as Truth Commissions, Trust Funds and transitional justice instruments established worldwide to provide child victims with alternative ways to obtain redress. Finally, Chapter 7 contains

¹¹⁷ Each Chapter, in turn, is divided in sections and subsections, the word 'paragraph' has been used throughout the present thesis as a synonym of 'section'.

the conclusive remarks on the legal standing of the right to reparations for child victims of war and the final thoughts on possible ways forward.

A few words need to be spent on how those actors have been compared in the course of the present work. As it is going to be better illustrated in Chapter 6, normally TCs are required to make recommendations to the government with the purpose to help preventing relapses and further abuses. These recommendations are often embodied in a final report, which can also contribute to establish a reparation policy for the victims.¹¹⁸ The TC's mandate can include a strong accent on reparations or it can even set up, within the TC, a Reparation Committee, as it happened for the South African Truth and Reconciliation Commission.¹¹⁹ Therefore, in order to provide the reader with a comprehensive understanding of the role played by the TCs in fostering the right to reparation for war-affected children it has been necessary to narrow the enquiry to the truth commissions which have dealt with child victims, namely: the South African TC, the Guatemala's Commission for Historical Clarification, the Peruvian TC, the Sierra Leonean TC, the Liberian TC and finally the TC set up in Timor- Leste.¹²⁰

¹¹⁸ See F. Capone, 'Discussing the Potential Role of TCs in Assessing Reparations for War-affected Children, in *International Journal of Rule of Law, Transitional Justice and Human Rights*, 2 (2012): 94-115.

¹¹⁹ On TC's in general see R. G. Teitel, 'Human Rights in Transition: Transitional Justice Genealogy', *Harvard Human Rights Journal*, 16(69)(2003):69-94, G.G. J. Knoops, 'Truth and Reconciliation Commission Models and International Tribunals: a Comparison', Symposium on *The Right to Self-Determination in International Law*, organized by Unrepresented Nations and People Organization (UNPO), 29 September-1 October 2006, The Hague, The Netherlands, <http://www.unpo.org/downloads/ProfKnoops.pdf> (accessed March 2011).

And also D. Shea, *The South African Truth Commission* (Washington DC: United States Institute for Peace Press, 2000): 33.

¹²⁰ Although the above mentioned TCs present many differences, they all decided to cope with the sensitive issue of reparations for children suffering from gross human rights violations and/or serious violations of humanitarian law. In particular all of them identified children as beneficiaries of reparations and specifically mentioned them in their recommendations. See UNICEF Report on Children and Truth Commissions by the UNICEF Innocenti Research Centre in cooperation with the International Center for Transitional Justice, August 2010, table at 86.

The study of the TCs has been built on the assumption that, as Chapman and Ball pointed out, 'truth commissions are far better suited to pursue "macro-truth", the assessments of contexts, causes and patterns of human rights violations, than "micro-truth" dealing with specifics or particular events'.¹²¹ Hence, the work of the TCs selected has been considered at a macro-level, focussing on broad variables such as the extent to which children's participation has been encouraged and therefore their right to reparation has been triggered by each TC, the techniques used to collect children's statements, the attention paid to the specificity of children's needs and the 'child-friendliness' of the recommendations submitted to the government.¹²²

In reference to the regional human rights bodies when it comes to reparations for children affected by armed conflicts it is important to investigate which are the distinctive characteristics and the common patterns followed by the different courts. An analysis of the right to reparation for children who experienced gross human rights violations would not be possible without looking at the innovative jurisprudence of the Inter American Court of Human Rights.¹²³ Concepts elaborated throughout the landmark rulings issued, such as 'corpus iuris',¹²⁴ 'project of life'¹²⁵ and 'aggravated responsibility' of states for violations

¹²¹ A. Chapman and P. Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala', in *Human Rights Quarterly* (23)2001: 1-43 at 41.

¹²² The macro-level approach is meant to deal with the bigger picture of how TCs are currently facing the challenge to cope with children's reparations, instead of adopting the so called 'who did what to whom methodology' which is based on multiple data sources focused on each and every victim-survivor story. P. Gready, 'Telling Truth? The Methodological Challenges of Truth Commissions', in Coomans, supra n 112 at 15.

¹²³ See M. Ferial Tinta, *The Landmark Rulings of the Inter American Court of Human Rights on the Right of the Child* (Martinus Nijhoff Publishers: Leiden, 2008).

¹²⁴ According to the IACtHR the concept of 'corpus iuris' in matters related to children implies the recognition of a series of fundamental norms that are linked for the purpose of guaranteeing the human rights of children and adolescents. In this regard, the IACtHR has established that 'the corpus iuris of International Human Rights Law is formed by a series of international instruments with different legal content and effects (treaties, conventions, decisions and declaration) in addition to the decisions adopted by international organizations. Its dynamic development has had a positive impact on international law, by confirming and developing the capacity of the latter to regulate relations between states and the human being under their respective

committed against children, which are going to be properly introduced and explained in the coming Chapters, have served and inspired this thesis rendering the IACtHR's jurisprudence a fundamental source.¹²⁶ The choice not to address the other regional human rights systems, which will be anyway briefly introduced in Chapter 3, is coherent with the focus of the thesis, as neither the European Court of Human Rights nor the newly established African Court of Human and People Rights have ruled over gross human rights violations perpetrated against children in the context of an armed conflict. The judgments directly concerned with the rights of children affected by wars have been singled out and scrutinized, looking at how, and if, the Inter-American Court of Human Rights has taken into account the particular nature of the responsibility incurred by the States that violated children's rights, the kinds of reparation awarded in cases involving minors and the potential impact that those reparations might have on the children and their families.¹²⁷ The same methods have been applied to the study of the jurisprudence of the international and

jurisdictions.' IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No 16, Para 115.

¹²⁵ See Feria Tinta, *supra* n63 'It was in the Loayza Taayo case, a case concerning the torture and wrong imprisonment of a professor in Peru, that the Court (IACtHR) originally developed the notion of 'project of life'. As held by the Court therein, the notion of project of life is different from the notions of 'emerging damages' and 'loss of earnings'. It is concerned with the full self-realization of the person taking into account vocational inclinations, potential, circumstances and ambitions that enable the person to in question to set for him-herself in a reasonable manner specific goals and to attain them.'

¹²⁶ S. Grover, *Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases* (Springer: Heidelberg, 2009).

¹²⁷ *Ibidem*, and see also Feria Tinta, *supra* n62at 417 'With the exception of the *Yean and Bosico Girls* case, in all cases the Court (IACtHR) dealt with gross violations of the right to life. From the perspective of reparations, certainly, the deprivation of life of children has its overtones. As put by an expert witness in one of the cases: there is a word in all languages for the loss of a father, a mother, to be left orphans. But there isn't an expression for the condition of having lost a child.' *Ibid.* at 121 the author notes that in the Case of the *Gómez-Paquiyaury Brothers v. Peru*: 'An important caveat on the topic of Article 5(Right to Human Treatment) in the case related to the fact that the Court held that Emilio and Rafael Gomez had not been the only victims of a violation of Article 5. The experts' views confirmed the position of counsel for the victims: that the relatives of the deceased had also been victims of violations of Article 5. In particular it highlighted the impact of the events on those members of the family who were minors at the time.'

hybrid tribunals which addressed gross human rights violations and serious violations of humanitarian law, without forgetting that in this case the defendants, ergo the actors accountable for reparations, are the individuals who bear the greatest responsibilities and not the States.¹²⁸

¹²⁸ For a partial overview of the sources consulted for the study of the international and hybrid tribunals please see: A. Klip and G. Sluiter, *Annotated Leading Cases of International Tribunals, Vol. IX: The Special Court for Sierra Leone 2003–2004* (Antwerp: Intersentia, 2006). And also see de Brouwer supra n27. at15, K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Leiden: Martinus Nijhoff, 2005), W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010).

3. The right to reparation in international law: highlighting progress and shortcomings

3.1 Introduction

The current Chapter is meant to 'introduce' the right to reparation in general, leaving aside the focus on children in order to provide the reader with a comprehensive overview of the topic, moving from the origins of the law of reparation to the most recent developments and underlining the problematic issues that emerged, according to both the doctrine and the international jurisprudence. To pursue this goal, it is indispensable to begin with 'building up' the legal framework of the right to reparation, considering in the first place those branches of international law that are relevant, namely international human rights law, international humanitarian law and international criminal law. Soft law instruments will also be discussed, such as the Van Boven-Bassiouni Principles and Guidelines.

This Chapter will, in particular, examine whether and in the presence of which circumstances, international law provides for a right to reparation which can be exercised directly by individuals without the state's intermediation. In order to do so, the Chapter is divided in three different sections. In the first one the right to reparation is introduced from its origins to the actual framework, including an overview of the main issues. The second part is focused on the right to reparation in international public law, in particular international human rights law, international humanitarian law and international criminal law. The third and conclusive section is dedicated to the soft law instruments that further crystallize the right to reparation.

3.1.1 Origins of the right to reparation

The current idea of reparation cannot be fully understood without looking at the ancient domestic legal systems upon which civil law and common law have been founded, namely the roman legal system and the Anglo-Saxon law. As already underlined in Chapter 1 when dealing with the definition of 'remedies' and 'reparation', international law had to rely extensively on municipal law to build its own remedial system and implement judicial and

non-judicial mechanisms able to deal with both the breaches of obligations committed by states and the internationally relevant crimes perpetrated by individuals. At the international level the practice to compensate the victims of a state's misconduct is traditionally dated back to the 1794 Jay Treaty, which established the first international commission to adjudicate claims concerning injuries against aliens.

3.1.1.1 *The Roman legal system*

A first glimpse of the right to reparation can be found in the Roman legal system. At the end of the sixth century BC the Roman Republic was established to replace the monarchy and in 451 BC a commission of ten citizens, *decemviri*, was appointed to draft the first written text of law, following the example of the Athenians laws of Solon.¹²⁹ The result was the production of a set of rules, known as the Twelve Tables, focused on those topics, mostly related to the resolution of controversies amongst private parties, which had given rise to legal disputes because not clearly established under customary law.

Since the predominant approach was strongly positivist, the judgements of the roman magistrates were 'concentrated on the prescription of remedies for the delinquent conduct, rather than on the morality of the conduct itself.'¹³⁰ Although the available kinds of remedies for the victim of a *delictum* changed over time, the most common forms were monetary compensation and *restitutio in integrum*.¹³¹ As for the first remedy, in cases which involved serious physical injuries, the parties were prompt to seek an agreement on the suitable sum of money to be paid by the perpetrator to his victim. Nevertheless, when the agreement failed, the Twelve Tables did authorize the so-called 'talion', meaning that the victim was legitimized to inflict retaliation in kind, proportionate to the amount of the injury received.¹³² For injuries identified as 'less serious', retaliation was not allowed and, instead, fixed monetary compensations were prescribed. The second remedy of importance to a party who sought restoration of rights of which he had been unlawfully deprived was

¹²⁹ See in general P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 2003).

¹³⁰ For a detailed overview of the Roman legal system, see: A. Lebigre, *Quelques Aspects de la Responsabilite' Penale en Droit Romain Classique* (Paris: Presses Universitaires de France, 1967).

¹³¹ See C. McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', in *The International Journal of Transitional Justice*, 23(2009): 250–271.

¹³² Stein supra n129 at 5.

the *restitutio in integrum*. The term indicated, and to some extents it still does, the need to fully undo the harm, or in other words to restore the *conditio quo ante* which brings the victims' situation back to what it was just before the infringement of their rights, i.e. in case of a stolen property the return of the property to its legitimate owner.¹³³

3.1.1.2 Reparation in the Anglo-Saxon law

The ancient Anglo-Saxon law, in force since the middle of the sixth century until the Norman Conquest, also used redress as a central element in its justice system.¹³⁴ According to Chaney 'the laws of the early Germanic tribes and of the Anglo-Saxon in particular, were dominated by virtual tables of prices and compensations for offences and injuries'.¹³⁵ The Anglo-Saxon law used to make a distinction amongst the forms of compensations, identifying three different kinds, namely the 'wer' (aka 'were', 'weregildum' or 'weregild', which literally means 'a man's money'), the 'wite' and the 'bot'. The first one indicates the value of a man's life, which varies according to the victim's social status, the second term refers to the fine to be paid to the royal authority and the third one simply represents the general Anglo-Saxon term for compensation. The distinction between 'wer' and 'wite' can be already found in the description of the German society portrayed by Tacitus during the first century. By that time the compensation due in the aftermath of a wrongdoing was partially paid to the injured man or his family and partially paid to the king, prior to the introduction of the metal currency all the penalties were paid in kind, in particular in horses and cattle. The amount of compensation depended on the place occupied by the victim in the social ladder, e.g. the earliest Kentish law established that the 'price' for a violation of

¹³³ The principle of *restitutio in integrum* in international law refers to 'le simple retour au statu quo ante puisque la réparation intégrale dont il est l'expression suppose que l'on mette la victime du fait illicite dans la situation qui serait la sienne s'il n'avait pas eu lieu'. On the point see P. D'Argent. *Les Réparations de Guerre en Droit International Public. La Responsabilité Internationale des Etats à l'Épreuve de la Guerre* (Brussels: Bruylant, 2002).

¹³⁴ See T. Sedgwick, *A Treatise on the Measures of Damages*, ninth ed. (Washington DC: Beard Book, 2000).

¹³⁵ See W.A. Chaney, 'The Economics of Ruler-Cult in Anglo-Saxon Law', in *Journal of British Studies* 4(1965):1-17.

the king's peace was fifty shillings, whilst the 'price' for a violation committed against a freeman was six shillings.¹³⁶

Although the Norman Conquest, which occurred in 1066, has been crucial for the development of the actual English legal system, the compensatory mechanisms in force remained almost unchanged until the establishment of the courts of equity which adopted a different kind of remedies.¹³⁷ Equity, as a set of legal principles created to mitigate the rigor of the common law, found its origin in the late thirteenth century, but the judicial power of the Chancery and the equity's independence from the common law have been finally recognized by the king only in the fifteenth century.¹³⁸

Clearly influenced by the roman law and its *restitutio in integrum*, equity mostly refrained from awarding pecuniary reparation for damage sustained and it rather operated by 'injunctions' and 'specific performances'. The first term refers to orders issued by the courts that could be mandatory or prohibitory, the second instead indicates the court's requirement to perform a specific act, as stated in the contract between the parties violated by the defendant.

3.1.1.3 Early developments of the right to reparation at the international level

At the international level, in order to investigate the origins of the right to reparation, one should look at the first attempts made to regulate the consequences of the so-called interstate disputes. The long pattern towards the modern idea of reparation for breaches of international obligations has been marked by several events.

Under the international legal framework the modern-day practice of granting reparation is often said to date back to the 1794 Jay Treaty, which stipulated Great Britain's obligation to pay full compensation to the American merchants who had sustained losses

¹³⁶Ibid. at 4. See also Sedgwick supra n134 at 4 'English jurisprudence finds its earliest monument in the sixth century in the laws of Ethelbert, king of Kent'.

¹³⁷See J.H. Langbein, R.L. Lerner and B.P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institution* (New York: Aspen Publishers, 2009) 10. See generally J. H. Baker, *An introduction to English Legal History* (London: Butterworths, 4th ed. 2002).

¹³⁸W.D. Lewis, 'Damages Given in Equity in Lieu of a Specific Performance', in *The American Law Register* (1898-1907), 50(Jul., 1902): 394-415. See also W. S. Martin, 'Principles of Equitable Compensation', in R. Carroll, *Civil Remedies: Issues and Developments* (Sydney: The Federation Press, 1996): 114-156.

for the capture of their vessels.¹³⁹ The treaty was negotiated by John Jay, the US secretary for General Affairs on the purpose to defuse the risk of war stemming from the breaches, constantly committed by both Great Britain and USA, of the 1783 Treaty of Paris. Article 7 of the Treaty was devoted to settle the compensation due to the American merchants who suffered the consequences from Britain's continued occupation of military posts located on the American territory. According to Article 7 an *ad hoc* committee was appointed to hear about the claims and calculate the exact amount of the losses and the consequent damages to be paid by the Great Britain.¹⁴⁰ The Jay Treaty, although intensely opposed in the US, represents a milestone in the long path towards the contemporary idea of reparations, since individuals, i.e. the American merchants penalized by the unlawful conduct ascribable to the Great Britain, were authorized to seek compensation before a mixed commission. According to Gray the arbitral tribunals, beginning with the enter into force of the Jay Treaty, 'have assumed without question that international law governs judicial remedies and that it allows remedies analogous to those of municipal law'.¹⁴¹

3.2 Overview of the current framework and main issues

Before providing a more detailed analysis of reparation under international law and explaining its different regimes a preliminary and broader introduction is needed. Only in the aftermath of World War II, with the adoption of the Universal Declaration of Human Rights (UDHR) and the International Covenants on Human Rights, the international community recognized that the wrongs committed by a State against its nationals were more than just a matter of domestic law. The awareness of the individuals' relevance has been slowly growing at different levels: it became firmly embedded, not only within the wide corpus of international human rights instruments, but also in the rulings of several

¹³⁹ See generally C. D. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987).

¹⁴⁰ Article 7 of the Jay Treaty: '[...] That for the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed and authorized to act in London, exactly in the manner directed with respect to those mentioned in the preceding article, and after having taken the same oath or affirmation, (*mutatis mutandis*,) the same term of eighteen months is also assigned for the reception of claims, and they are in like manner authorized to extend the same in particular cases'.

¹⁴¹ See Gray *supra* n139 at 5.

human rights bodies.¹⁴² Nowadays, the extent to which the right to reparation is implemented plays a crucial role in the transition out of conflicts because, while criminal justice *per se* is a struggle against perpetrators, ‘reparation’ is an effort on behalf of the victims and it ought to represent a tangible and concrete manifestation of the liability of the individual-offenders or the states to repair the harms caused. This approach has been forcefully followed by the Inter-American Court of Human Rights, which in the last years has ‘pioneered an expanding range of international judicial remedies for human rights violations.’¹⁴³ Since the *Velasquez-Rodriguez v. Honduras* judgement in 1989, the Court has applied a *holistic concept*¹⁴⁴ of justice for victims of fundamental rights violations, in particular from 2001 to present more than two third of its disputes were issued on reparations.¹⁴⁵ According to Article 63.1 of the American Convention on Human Rights:

¹⁴² See in general the *Dissenting Opinion* of Judge Cancado Trindade in the case *Germany v Italy on Jurisdictional Immunities*, supra n36 from Para. 214 on, who brightly explores the jurisprudence of both the ECHR and of the IACtHR to assess the evolution of the general individuals’ right to access to justice, which ‘includes’ their right to claim for reparations.

¹⁴³ ‘The adjudication, by the IACtHR, of cases of gravity of violations of human rights, has led to a jurisprudential development stressing the fundamental character of the right of access to justice. This right assumes an imperative character in face of a crime of State: it is a true *droit au Droit*, a right to a legal order which effectively protects the fundamental rights of the human person, which secures the intangibility of judicial guarantees (Articles 8 and 25 of the American Convention) in any circumstances. We are here, in sum, in the domain of *jus cogens*, as the IACtHR itself acknowledged in its Judgments in the cases of *Goiburú et al. versus Paraguay* (of 22.09.2006) and of *La Cantuta versus Peru* (of 29.11.2006)’. See on this point also D.Cassel, *The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights*, in De Feyter et al. supra n15.

¹⁴⁴ The IACtHR, as it going to be better explained in Chapter 4, has issued reparations’ orders towards the States held responsible for human rights violations which encompassed all the five kinds of reparations enshrined within the Van Boven-Bassiouni Principles and Guidelines. See for instance IACtHR, *case of Myrna Mack Chang versus Guatemala* (Judgment of 25.11.2003), *case of the Massacre of Pueblo Bello, concerning Colombia* (Judgment of 31.01.2006).

¹⁴⁵ See Cassel supra n143 at 191. See also the ‘Informe Anual de la Corte Interamericana de Derechos Humanos’ (the latest report available is from 2010), http://www.corteidh.or.cr/docs/informes/2010_esp.pdf (accessed March 2012).

if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall Rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also Rule, if appropriate, that the consequences of the measures or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

This principle basically confers to the Court a broad mandate and, as it has been pointed out both in the *Velasquez* and in the *Mack* cases, the power to award reparations is determined under international law and cannot be restricted by national law. As a consequence the Court is free to award the full range of reparations as prescribed by the international law. The European Convention of Human Rights ('ECHR') gives more limited powers to the European Court of Human Rights to order specific non-monetary measures for violations of the Convention. Article 41 of the ECHR¹⁴⁶ states very clearly that the Court may only afford satisfaction to the victims when the domestic law of the respondent State allows partial reparation to be made.¹⁴⁷ The immediate outcome of this provision is that a judgement which establishes a breach of the Convention can only have a declaratory character and the respondent State has to choose the necessary measures to remedy the violation. This traditional approach, patently in contrast with the one adopted by the Inter-American Court of Human Rights, has been exceeded in recent cases where the Court has finally recognised a need to go beyond. In the past years the European Court has ordered both individual and general measures in favour of the victims of the States who have breached their duties under the Convention: in particular the Court ordered restitution of properties and even the release of a person following an unlawful detention.¹⁴⁸ The

¹⁴⁶According to art. 41..'if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

¹⁴⁷ On this point see V.Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non- monetary Measures: Some Remarks in Light of the *Assanidze, Broniowski and Sejdocic Cases*', in *Human Rights Law Review* 7(2007): 396-411.

¹⁴⁸ *Assanidze v. Georgia*, 2004-II 221; (2004) 39 EHRR 653. 2004-V 1; (2005) 40 EHRR 495; *Broniowski v Poland (Friendly Settlement)* 2005-IX;(2006) 43 EHRR 1.(2006) 42 EHRR 360; *Sejdovic v Italy (Grand Chamber)*, Judgment of 2 March 2006, Application No. 56581/00.

newly established African Court of Human and People Rights also provides the individuals affected by violations of the rights enshrined in the African Convention with a right to remedy. Article 27 of the Protocol to African Charter on Human and People's Rights affirms that '[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'¹⁴⁹ The African Court has issued its first judgement in 2009 and at the moment it is too soon to guess which role it will play in the reparations discourse. In terms of accessibility to the Court Article 5 of the Protocol to the Charter establishes that cases can be submitted by the Commission, the State Party which has lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of the human rights violation and African Intergovernmental Organizations. In addition, Article 5(3) specifies that the Court may entitle relevant 'non-governmental organizations with observer status before the Commission, *and individuals* to institute cases directly before it, in accordance with article 34 (6) of this Protocol'.¹⁵⁰

With the purpose to provide the international and the local actors with a tool entirely focussed on the right to reparation, the UN General Assembly in December 2005 adopted and proclaimed the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. This fundamental text, which is going to be discussed in details in the further section, contains the essence of the state of the art and 'identifies mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their

¹⁴⁹See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 9 June 1998, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

¹⁵⁰ Ibid. Article 34(6): 'At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.'

norms.¹⁵¹ Notwithstanding their *soft law status*, the Basic Principles represent a huge step forward in the struggle for the implementation of the individuals' right to reparation worldwide: they finally highlighted the necessity to fully recognize victims' needs, going beyond the equation compensation = reparation and strongly promoting also the adoption of symbolic and collective measures.

The enhancement of the individual's status under international law has witnessed a further development through the entry into force of the Rome Statute and its Rules of Procedure and Evidence ('RPE'), which enshrine the victims-oriented efforts promoted by the ICC. The establishment of the International Criminal Court in 2002 has significantly contributed to further strengthening a victim-oriented approach. Besides its reparation regime, which will be properly discussed in the course of this work, the ICC, especially if compared to the ICTY and ICTR, has strongly fostered victims' access to the remedies provided by international law, including reparation. As stated in article 79(1) of the Rome Statute, on 9 September 2002 a Trust Fund for Victims (TFV) has been set up under a Resolution of the Assembly of States Parties. The goal of the TFV is 'to support programs which address the harm resulting from the crimes under the jurisdiction of the ICC by assisting the victims to return to a dignified and contributory life within their communities.' In agreement with the data diffused by the ICC itself, in 2007/8 the first 42 proposals were submitted to the TFV for consideration and 34 of these have been diverted to the Chambers for approval. In April 2008 the approval was granted and in the next two years 31 projects have been activated in Uganda and in the Democratic Republic of Congo, in these countries, according to the report released in 2012 by the TFV, 70,000 direct beneficiaries have been provided assistance and reparative measures by the fund.¹⁵²

From this brief overview, one can infer that at the international level the awareness of the need to adopt a victim-oriented perspective is soaring and in the past decades some efforts have been made to develop redress mechanisms potentially able to restore the human dignity of the victims and foster their reintegration into civil society, nevertheless it is a truism that many crucial challenges still have to be faced. Before exploring the actual

¹⁵¹ See the Preamble to the Basic Principles and Guidelines *supra* n2.

¹⁵² See 'Learning from TFV's second mandate: From Implementing Rehabilitation Assistance to Reparations', Summer 2012 Programme Progress Report, www.TrustFundforVictims.org (accessed September 2012).

breadth of the right to reparation under international law and in particular under the fields relevant for the present work, some preliminary issues need to be discussed.

3.2.1 Reparation and Remedies

Although the two concepts are often confused, ‘remedy’ and ‘reparation’ are not synonyms: in an unsophisticated way it would be possible to affirm that they are involved in a ‘genus-species’ relationship. The definition of ‘remedies’ provided by the Van Boven-Bassiouni Principles and Guidelines includes the right to equal and effective access to justice, the admission to relevant information concerning violations and redress mechanisms, *and* the right to prompt and adequate reparation.¹⁵³ Under international law, the concept of ‘remedies’ appears to be more complex as it refers not only to the kind of remedies claimable by individuals, which are the ones enshrined within the Principles and Guidelines, but it governs also the inter-states disputes and the consequences of a state’s misconduct towards another state.¹⁵⁴ In national legal systems remedies are secured by the existence of third-party enforcers, in contrast, international law, relying mostly on self-enforcement, has not yet designed a uniform and coherent system of remedies. The basic principle which governs controversies arising amongst states is enshrined in Article 2(3) of the UN Charter, which requests the member states to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.¹⁵⁵

The existing law of remedies is crystalized in the ILC’s Draft Articles on State Responsibility. The provisions enshrined in the Draft Articles on State Responsibility apply to both breaches of customary law and treaty law, unless the treaty provides otherwise. Article 22 of the ILC’s Draft Articles on State Responsibility affirms that under certain circumstances the commission by a state of an internationally wrongful act may justify the

¹⁵³For the purpose of the current work ‘redress’ shall mean ‘the act of receiving satisfaction for an injury sustained’. Bouvier’s Law Dictionary, Revised 6th Ed.

¹⁵⁴ See F. Capone, ‘Remedies’, (R. Wolfrum eds) Max Planck Encyclopedia of Public International Law, Oxford University Press, 2012. ‘Remedies is the field of law dealing with the means by which a right is enforced or the violation of a right is prevented or redressed. Remedies are of four kinds: by act of the party injured, by operation of law, by agreements between parties and by judicial remedies.’

¹⁵⁵ See United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

adoption of non-forcible countermeasures by the state injured on the purpose to achieve its cessation and obtain reparations. Traditionally the term ‘reprisal’ was used to cover otherwise unlawful action taken in time of international armed conflict, whilst ‘countermeasures’ apply to that part of the subject of reprisals not associated with armed conflict and they are to be contrasted with the unfriendly conduct not consistent with any international obligation, commonly identified as ‘retorsion’. Countermeasures are self-help and temporary remedies directed only to the state which is responsible for the international wrongful act, such measures are taken as a form of inducement, not punishment. They serve the scope to persuade the state to fulfil its obligations of cessation and reparations, therefore states should, as far as possible, choose countermeasures that are both proportionate and reversible.¹⁵⁶ Article 51 of the Draft Articles on State Responsibility affirm that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. The issue of proportionality was examined in some details in the Air Service arbitration agreement:

[I]t is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known Rule. In the course of the present proceedings, both Parties have recognised that the Rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the "proportionality" of countermeasures is not an easy task and can at best be accomplished by approximation[...].¹⁵⁷

The state responsible for the commission of a wrongful act is under an obligation to cease the conduct and to offer appropriate assurances, normally given verbally, and guarantees of non-repetition, such as preventive measures to be taken to avoid repetition of the breach. The function of cessation is twofold: to end the violation and protect the continuing validity and effectiveness of the primary rule, thus, it safeguards both the rights of the state injured and the interests of the international community as a whole. The responsible state is also under an obligation to make reparation for the injury caused by the internationally

¹⁵⁶ (Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, ICJ Reports 1997, p.7 at Para.55)

¹⁵⁷ Air Service Agreement of 27 March 1946 (United States v France) R.I.A.A. vol. XVIII 1978, p.444 at Para. 83.

wrongful act. In its judgment concerning the Factory at Chorzow case the Permanent Court of International Justice defined the obligation to make reparation a ‘general principle of international law’.¹⁵⁸ The forms of reparations, identified in the Draft Articles on State Responsibility and endorsed by the jurisprudence of the International Court of Justice and its predecessor, are restitution, compensation and satisfaction, either singly or in combination and, where appropriate, accompanied by interest.¹⁵⁹ According to the Van Boven-Bassiouni Principles and Guidelines, instead, the forms of reparation include also rehabilitation and guarantees of non-repetition.¹⁶⁰

3.2.2 Scope of Violations

The present work is focused on gross and serious violations of international law perpetrated against children in correlation with an armed conflict.¹⁶¹ The Van Boven-Bassiouni Principles and Guidelines, applicable in peace and in war times, also target the most severe breaches.¹⁶² Clearly, both ‘gross’ and ‘serious’ refer to the nature of the violations, which affect in qualitative and quantitative terms the most basic rights, such as the right to life and the rights to physical and moral integrity of the human person.¹⁶³ Nevertheless, the term ‘serious violations of international humanitarian law’

¹⁵⁸Factory at Chorzow (Germany v Poland) (Jurisdiction) P.C.I.J Series A 1927, No9, p.21.

¹⁵⁹J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002): 201.

¹⁶⁰ See Basic Principles and Guidelines supra n2.

¹⁶¹ Since the focus of the present work is on armed conflict, situations of insecurity and instability, which do not reach the threshold of an ‘armed conflict’, are not going to be taken into account.

¹⁶² ‘The fact that the Principles and Guidelines are restricted to the most serious or systematic violations does not mean that the right to reparation only arises in these limited cases. There is a right to an effective remedy and adequate forms of reparation for any breach of human rights or international humanitarian law.’ Redress, supra n3.

¹⁶³ ‘No agreed definition exists of the term “gross” violations of human rights. It appears that the word gross qualifies the term “violations” and indicates the serious character of the violations but that the word “gross” is also related to the type of human right that is being violated’ See *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, final report submitted by Professor Theo Van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fifth session.

requires further explanation. The expression was adopted in the statute of the International Criminal Court in order to make a distinction between ‘serious violations’ and ‘grave breaches’ of international humanitarian law.¹⁶⁴ The latter, in fact, concern only international conflicts, whilst, the ‘serious violations’ are condemned regardless from the context, in both internal and international conflicts.¹⁶⁵ Reparations can be granted to the victims of gross human rights violations and serious violations of humanitarian law occurred in an armed conflict as results of national or international criminal proceedings involving individual-perpetrators and also, taking into account the due differences, as results of the acknowledgment of state’s responsibility.¹⁶⁶

¹⁶⁴Article 50 of the Geneva Convention (I) defines grave breaches of international humanitarian law as: [...]those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.’ <http://www.icrc.org/ihl.nsf/WebART/365-570061?OpenDocument> (accessed April, 2011).

¹⁶⁵On this point see T. Van Boven ‘Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Human Rights Violations and Fundamental Freedom’ Final report submitted to the Economic and Social Council, 2 July 1993, E/CN.4/SUB.2/1993/8. ‘Useful guidance may be found in the work of the International Law Commission regarding the draft Code of Crimes against the Peace and Security of Mankind. Relevant among the draft Articles provisionally adopted by the Commission on first reading are for present purposes those Articles which pertain to genocide (art. 19), apartheid (art. 20) and systematic or mass violations of human rights (art. 21). 2/ In the latter category are listed by the International Law Commission: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; deportation or forcible transfer of population. Guidance may also be drawn from common Article 3 of the Geneva Conventions of 12 August 1949, containing minimum humanitarian standards which have to be respected "at any time and in any place whatsoever"’.

¹⁶⁶On the relationship between individual criminal responsibility and state responsibility please see also Article 58 of the Draft Articles on State Responsibility for Internationally Wrongful Acts and Article 25 of the Rome Statute.

3.2.3 Whose international responsibility?

Both ‘violations’ and ‘crimes’ can be identified as the ‘causes’ of children’s victimization in conflict settings. When such crimes, as it most likely happens, are committed by individuals in name or on behalf a state, then also the state’s responsibility arises, creating a double track of judicial mechanisms. On the one hand stand domestic courts, international and hybrid tribunals mandated to prosecute the alleged perpetrators, on the other hand stand the ICJ and the regional human rights judicial bodies that have jurisdiction over states’ breaches of international law.¹⁶⁷ Individual criminal liability and state responsibility will be properly discussed in this and in the coming sections, however an analysis of the legal standing of the right to reparation could not be exhaustive without considering also the so-called ‘non-state actors’.¹⁶⁸ Many of the atrocities perpetrated in the context of an armed conflict are ascribable to the conduct of non-state actors, nevertheless both IHRL and IHL fail to properly address this issue. Under international human rights law states are the only subjects committed to the protection of the rights enshrined in the

¹⁶⁷ Full recognition of the idea that a state could be held criminally responsible came with the unanimous adoption by the ILC in 1976 of a set of draft articles on state responsibility prepared by the Special Rapporteur Roberto Ago. In particular Article 19, which was included also in the 1996 Draft and then it has been ‘stricken out’ from the 2001 Draft, distinguished between ‘crimes’, namely internationally wrongful acts resulting from the breach by a state of an international obligation essential for the protection of fundamental interests of the international community, and ‘delicts’, any international wrongful act which is not an international crime in accordance with paragraph 2 of Article 19. In the end the concept of ‘state criminal responsibility’ was not supported, neither by state practice nor by the doctrine. See A. Cassese, *Diritto Internazionale* (Bologna: Il Mulino, 2003): 311-312.

¹⁶⁸ Please see A. Roberts and S. Sivakumaran, ‘Law-making by Non-State Actors: engaging Armed Groups in the Creation of International Humanitarian Law’, in *Yale Journal of International Law* 37(2012): 108-152. According to the authors: “‘non-state actors’ are neither states nor state-empowered bodies. They include individuals, corporations, NGOs, and armed groups.’:118. For the purpose of the present work the term non-state actors alludes, unless otherwise specified, to armed groups. The notion of armed group includes those groups which satisfy the following requirements: first they are parties to non-international armed conflicts and secondly they are sufficiently organised. Although as Sassòli punctually notes: ‘Both the necessary level of violence to make a situation an armed conflict and the necessary degree of organization (to make a group a party to a non-international armed conflict) are admittedly not very clearly defined in IHL’. See M. Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’, in *International Humanitarian Legal Studies* 1(2010): 1-51.

treaties that they have ratified or accessed. Traditionally, when the obligations are breached only states can be held responsible to provide prompt and adequate reparation to the victims. A modest and cautious attempt to overcome this limitation can be found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation, in particular Principle 15 affirms that ‘in cases where a person, a legal person, *or other entity* is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.’¹⁶⁹

However, non-state actors do not incur direct obligations under international law and the only exception is represented by Article 3 common to the four Geneva Conventions of 1949,¹⁷⁰ which establishes minimum standards that parties, including State and non-State actors shall respect in non-international armed conflict.¹⁷¹ Under IHL the dearth of procedures through which victims could claim reparations from armed groups makes it difficult to affirm that the obligation to guarantee the minimum core of protection is mirrored by an obligation to reparation.

¹⁶⁹ See the Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* n2, Principle 15 (emphasis added).

¹⁷⁰ It is questionable whether this assumption applies also to non-state actors which exercise de facto control over a given territory. See UN Assistance Mission in Afghanistan (UNAMA), *Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict*, Kabul, February 2012, p. iv: ‘While non-State actors in Afghanistan, including non-State armed groups, cannot formally become parties to international human rights treaties, international human rights law increasingly recognizes that where non-State actors, such as the Taliban, exercise de facto control over territory, they are bound by international human rights obligations.’ See also in this regard A. Bellal, G. Giacca, and S. Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’, in *International Review of the Red Cross*, 93 (2011): 47-79.

¹⁷¹ See C. Ryngaert, ‘Non-State Actors and International Humanitarian Law’, University of Leuven Working Paper 1(2008). According to the author it is difficult to establish why non-state actors are bound by treaties they have not ‘signed’: ‘in what is seen as the majority view, non-State actors are bound by IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols). This theory is also referred to as the ‘principle of legislative jurisdiction’, pursuant to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction.’ See also S. Sivakumaran, ‘Binding Armed Opposition Groups’, in *International and Comparative Law Quarterly* 55 (2006):369- 381.

It is only under international criminal law that it is possible to find mechanisms, such as international tribunals, able to enforce international humanitarian law against the members of an armed group.¹⁷² Notwithstanding the fact that at least half of the belligerents in the most victimizing armed conflicts around the world, are non-State armed groups, the violations committed can be addressed only in light of individual responsibility, and the issue of reparation is dealt with accordingly.¹⁷³

As stated in the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General ‘serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the ICTY in *Tadić* and largely codified in the ICC Statute’.¹⁷⁴ The conditions identified by the ICTY in *Tadić* case are four: the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the treaty must be applicable to the concrete case; the violation must be ‘serious’ in the sense that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹⁷⁵

When these conditions are met, serious violations of human rights and humanitarian law may implicate the individual criminal liability of their author or authors. It should be noted that under international criminal law individual criminal responsibility arises from two different kind of international norms. These are divided in ‘norms which apply to an individual because of initiative acts committed under his/her own personality and norms which give rise to individual criminal responsibility for acts carried out under the

¹⁷² See Sassoli *supra* n168 at 12.

¹⁷³ *Ibid* at Intro.

¹⁷⁴ See the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, at Para 175.

¹⁷⁵ See *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTJ, 2 October 2005 (IT-94-1-AR72) at Para 94.

international personality or characterization of the state.’¹⁷⁶ Some international crimes such as aggression, genocide, crimes against humanity and war crimes are principally ‘crimes of state’.¹⁷⁷ These crimes are imputable to individuals acting in pursuance of the policies of the state, therefore their commission entail both the criminal responsibility of the individual-author(s) and, at the same time, the international responsibility of the state in name or on behalf of which the individual(s) acted.¹⁷⁸

As a consequence, individual-perpetrator(s) together with the states, that ordered or tolerated the crimes, are the subjects liable to grant reparations to the victims in the aftermath of serious violations of human rights and humanitarian law. According to Article 40 and 41 of the Draft Articles on States Responsibility for Internationally Wrongful Acts, the breach of a state’s obligation arising under a peremptory norm¹⁷⁹ of general

¹⁷⁶ See on this point F. Malekian, ‘International Criminal Responsibility’, in M.C. Bassiouni, *International Criminal Law* (New York: Transnational Publishers, 1998): 191. ‘[...] Piracy, narcotic crimes, the kidnapping of internationally protected persons and any other terrorist activities are international crimes which are frequently committed by individual for private interests’.

¹⁷⁷ See J. Dugard, ‘Criminal Responsibility of States’, in Bassiouni, *supra* n176 at 239. See also D. Scheffer, ‘Genocide and Atrocity Crimes,’ in *Genocide Studies and Prevention*, 3 (2006): 229–250.

¹⁷⁸ State’s responsibility exists also when the relationship between the State and individual is not official, but simply *de facto*. Please see Article 8 of the Draft Articles on State Responsibility for Internationally Wrongful Acts: ‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact* acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10):47. ‘As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a *specific factual relationship* between the person or entity engaging in the conduct and the State’.

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed August 2011). It is also worth noting here that also *ultra vires* acts by authorized individuals may involve international responsibility of the state.

¹⁷⁹ According to Article 53 of 1969 Vienna Convention on the Law of Treaties peremptory norm of general international law is one which is: ‘accepted and recognized by the international community of States as a

international law determines the state's duty 'to cooperate with the other states to bring it to an end through lawful means', without prejudice to the other consequences referred to in Chapters I and II of Part Two of the Draft Articles, which include also reparations.¹⁸⁰

In case of individual criminal responsibility for serious violations of human rights and international humanitarian law, national courts should be regarded as the primary vehicles for prosecuting the perpetrators, especially since international and hybrid tribunals will only be able to try a limited number of individuals, normally those who bear the 'greatest responsibility', while the fight against impunity requires a more far reaching and broader response.¹⁸¹ In particular, states parties to the International Criminal Court have devoted greater attention to the promotion of 'complementarity', the principle according to which the ICC is intended as 'a court of last resort', meaning that it exercises its jurisdiction only when the states are unwilling or unable to investigate and prosecute the crimes enshrined in the Rome Statute.¹⁸²

As for the states' liability, it can be invoked before the International Court of Justice and before the regional human rights bodies, which are the *fora* charged of establishing states' international responsibility for breaches of those obligations deriving from international customary law or international treaty law.¹⁸³ More in details, claims against states for violations of their obligations can be brought before the ICJ by other state

whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

¹⁸⁰Prominent scholars, above all Professor Lauterpacht, have supported the idea that 'there are two regimes of international responsibility for states. One denotes the responsibility of states in general, while the other one denotes the responsibility of states for serious breaches of international obligations.' See Malekian in Bassiouni *supra* n 176 at 196.

¹⁸¹ On this point see Human Rights Watch, 'Justice for Serious Crimes before National Courts, Uganda's International Crimes Division', January 2012.

¹⁸² See M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and Fight against Impunity', in *Max Planck Yearbook of United Nations Law*, A. von Bogdandy and R. Wolfrum (eds.) 7(2003):591-632. Please see UN General Assembly, Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998, A/CONF.183/9.

¹⁸³ See Article 42 of the Draft Article on State Responsibility for Internationally Wrongful Acts.

parties as established under Article 35 paragraph 1 of its statute and, as stated in Article 35 paragraph 2, also by states which are not parties to the Statute.¹⁸⁴

According to Articles 33 of the European Convention on Human Rights ('ECHR') any alleged breach of the Convention committed by a High Contracting Party can be referred to the Court by any other High Contracting Party. Furthermore, and this represents the main difference between the European and the Inter-American human rights systems, according to Article 34 of the ECHR:

the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.¹⁸⁵

With regard to the Inter-American Court of Human Rights, Article 61 paragraph 1 of the American Convention on Human Rights (also known as the 'Pact of San José') establishes that 'only the State Parties and the Commission shall have the right to submit a case to the Court'. Nevertheless, the effects resulting from the erection of such a barrier against individuals' claims to some extent have been mitigated by the enhancement of other victims' rights, above all the right to reparation, promoted over the years by the IACtHR through its innovative jurisprudence, as it is going to be better addressed in Chapter 4. Moreover, the Inter-American Court of Human Rights in its first judgment *Velásquez-Rodríguez v. Honduras* has clarified that:

the international protection of human rights should not be confused with criminal justice. States *do not appear before the Court as defendants* in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather *to protect the*

¹⁸⁴ 'The conditions of access of such States are subject to the special provisions embodied in treaties in force at the date of the entry into force of the Statute, to be determined by the Security Council, with the proviso that in no case shall such conditions place the parties in a position of inequality before the Court'. <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1>.

¹⁸⁵ The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.

victims and to provide for the reparation of damages resulting from the acts of the States responsible.¹⁸⁶

3.2.4 Interaction between IHRL and IHL

As for the simultaneous applicability and the interplay of human rights law and international humanitarian law in cases of armed conflicts, the traditional approach is eloquently described by Tomuschat's words: 'many voices heard and expressed during the last century affirmed that there is a clear distinction between the law of war and the law of peace: they do not touch one another, they do not overlap, either one or the other applies, there is no mixture between the two'.¹⁸⁷ This assumption has been overcome over the years and nowadays the common background is that while humanitarian law applies only in armed conflict as established in Article 2 of the 1949 Geneva Conventions, human rights apply both in peace and war.¹⁸⁸ The general applicability of international human rights law to armed conflicts was already enshrined in Article 72 of the Additional Protocol 1 to the 1949 Geneva Conventions,¹⁸⁹ and it has been reasserted in several judgments of the ICJ, such as *The Legality of the Threat or Use of Nuclear Weapons*, *Wall on the Palestinian Territory* and *Congo v. Uganda*.¹⁹⁰ An often quoted ICJ ruling notes that:

¹⁸⁶ *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988): at Para 134 (emphasis added).

¹⁸⁷ C. Tomuschat, 'Human Rights and International Humanitarian Law', in *The European Journal of International Law* 21(2010): 15-23, at 16.

¹⁸⁸ See A. Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: A Case of Fragmentation?', in *International Law and Justice Colloquium*, New York University, 26 February 2007.

¹⁸⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Article 72 'The provisions of this Section are additional to the Rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable Rules of international law relating to the protection of fundamental human rights during international armed conflict.' Please see also *The Relationship between Human Rights Law and International Humanitarian Law*, UN Sub- Commission on the Promotion and Protection of Human Rights, Working Paper, UN Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005).

¹⁹⁰ On this point see generally McCarthy at 131.

[...] as regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁹¹

More precisely, as the International Law Association ('ILA') recently stated throughout the drafting of the articles on reparations for victims of war 'according to the *lex specialis* rule, it is thus not one of the two regimes that enjoys general priority over the other; rather, the question as to which rule prevails has to be assessed in each particular case'.¹⁹² Both bodies of law are dedicated to the overarching goal of protecting individuals' basic rights, in particular those rights which are fundamentally relevant also from the point of view of international humanitarian law, such as the right to life and freedom from torture, which are exempted from the power of derogation and whose violations impose on States the obligations to prosecute or extradite the perpetrators and to provide appropriate reparations to the victims.¹⁹³

3.2.5 Applicability of Statutes of limitations to serious breaches of international law.

Problems in exercising the right to reparation may derive from the existence of statutory limitations, meaning that the concrete exercise of the right to reparation could find a procedural obstacle in the remoteness of the heinous events occurred. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the European Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted in 1974 by the Council of Europe, have been scarcely supported, as the first has been ratified by 54 states and the

¹⁹¹ Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004, 178, Para. 106.

¹⁹² Committee on the right to reparation for victims of armed conflict, International Law Association, The Hague August 2010, commentary to Article 3 'Applicable Law'.

¹⁹³ See the Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993-94, ACHPR/RPT17th at Annex X and XI.

latter only by one state.¹⁹⁴ Despite the reluctance showed by both UN member states and European states to fully support the proposition that ‘no time prescription should apply to these crimes’,¹⁹⁵ there is a widespread awareness that grave violations of human rights law and serious violations of humanitarian law never die completely.¹⁹⁶ The consequences of those acts are well rooted in the societies where they happened and affect the children and grandchildren of the direct victims for many generations.¹⁹⁷ To illustrate, in 2006 an official commission was established to examine the racist violence occurred in Wilmington (US). The facts scrutinised took place in 1898; at that time sixty black people were killed and more than 2000 had to flee in order to save their lives. Nowadays the commission is proposing paying compensation to the descendants of those victims.¹⁹⁸

The Truth and Reconciliation Commission set up in Canada in 2008 also deals with ‘outworn’ crimes perpetrated against aboriginal children and their families from 1884 to 1996. The direct victims identified since the institution of the Commission are more than 150.000 and such an impressive number refers to the children who were taken from their families and placed in the so-called ‘residential schools’ (i.e. church run schools), where they have been, for over one century, prohibited from speaking their native languages, often beaten and sexually abused. Only in 2007 an agreement was sealed to begin repairing the harm caused by the residential school system ran by the churches and endorsed by the federal government.¹⁹⁹ On June 2008, ten days after the establishment of the TC, the Prime

¹⁹⁴ See M.C. Bassiouni, ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’, in M.C. Bassiouni, *Post-Conflict Justice* (Ardsley NY: Transnational Publishers, 2002).

¹⁹⁵ *Ibid.* at 389.

¹⁹⁶ See Article 29 of the Rome Statute: ‘The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations’.

¹⁹⁷ See Van Boven-Bassiouni Basic Principles and Guidelines, *supra* n2, at Para. IV (6) ‘Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law[...].’

¹⁹⁸ L.Huyse, *All things pass, except the past* (Antwerp: AWEPA Publishers, 2010):34.

¹⁹⁹ See the 2012 Interim Report of the Canadian Truth and Reconciliation Commission, <http://www.TC.ca/websites/TCinstitution/index.php?p=3> (accessed February 2012). ‘More than 150,000 First

Minister Harper issued an official apology to the former students ‘on behalf of all Canadians’. In fact, amongst the scopes of the Canadian TC there is the willingness to ‘educate’ the Canadian nationals so that the mistakes made in the past won’t be repeated. The legacy of the violations suffered by the aboriginal children and their families, passing from one generation to the next, has contributed to ‘social problems, poor health and low educational success rates in the Aboriginal communities today.’²⁰⁰

Many other examples support the statement that there are no statutes of limitations when it comes to gross human rights violations and serious violations of humanitarian law. In 2004 the German government officially apologised and offered money to compensate the victims’ descendants of a massacre perpetrated in 1904 by the German colonizers against the Herero tribe, in Namibia. According to Falk ‘yet remoteness has not inhibited certain categories of claims for reparative justice, especially those associated with indigenous people and the institutions of slavery and slave trading’.²⁰¹ More recently the rights of victims to obtain due redress have been recognized by the UK High Court notwithstanding the time gap between the violation and seeking justice. In what has been enthusiastically welcomed as ‘a historical judgment’ the UK High Court has ruled that the Mau Mau victims of torture and sexual violence perpetrated in 1950 by the British authorities have an arguable case in law and can finally pursue the British government for compensation.²⁰²

Not only the victims’ redress is often deferred: even criminal prosecution can be procrastinated. Cambodia formally asked the UN to help prosecuting those responsible for

Nations, Métis, and Inuit children were placed in these schools often against their parents' wishes. Many were forbidden to speak their language and practice their own culture. While there is an estimated 80,000 former students living today, the ongoing impact of residential schools has been felt throughout generations and has contributed to social problems that continue to exist.’

²⁰⁰ Ibidem. See also ‘They came for the Children’, Truth and Reconciliation Commission of Canada. Report released on 24th February 2012.

²⁰¹ R. A. Falk et al. eds., *Crimes of War* (New York: Random House, 1971).

²⁰² Notably the court has rejected claims from the government's lawyers that too much time had elapsed since the seven-year insurgency in the 1950s, and it was no longer possible to hold a fair trial.<http://www.guardian.co.uk/world/2012/oct/05/maumau-court-colonial-compensation-torture> (last accessed October 2012).

the genocide committed under the Khmer Rouge terror regime only in 1997, and the investigations of the Extraordinary Chambers of Cambodia (ECC) started in 2006, almost thirty years after the fall of the dictatorship.²⁰³ Who is going to benefit from the ECC judgements? The grandsons and granddaughters of the people murdered in the ‘killing fields’?²⁰⁴ Apparently yes, although it is the entire country that needs to finally cope with its oppressive legacy.²⁰⁵ When addressing old wrongs the claims for reparation are not based on the past abuse itself, but on its contemporary repercussions; this means that states, domestic and international courts, TCs and all the other actors involved must be concentrated on those people who continue to be victimized by past breaches of international law and seek to end the effects of that.²⁰⁶

3.3 The right to reparation within the International Law framework

The individual right to reparation is not yet recognized as part of international customary law.²⁰⁷ However, such right is well-established within international treaty law, with a

²⁰³ See D. P. Chandler, *A History of Cambodia* (Boulder, Colorado: Westview Press, 1983), 209–11; E. Gottesman, *Cambodia After the Khmer Rouge. Inside the Politics of Nation Building* (New Haven: Yale University, 2003), 24–25.

²⁰⁴ According to Article 3 of the ECCC Law ‘No statute of limitations apply to genocide or crimes against humanity’. See Pham PN, Vinck P, Balthazard M, Hean S, (2011). *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*. Human Rights Center, University of California, Berkeley.

²⁰⁵ For the purpose of this work it is important to underline that Cambodia during the Pol Pot regime was sadly famous also for the forced marriages policy adopted, which had a devastating impact on children's lives and education. See N. Jain, 'Forced Marriage as a Crime Against Humanity', in the *Journal of International Criminal Justice*, 5 (2008): 1013-1032, and also K. Kogure, *Impact of Forced Marriages in Cambodia under the Pol Pot Regime*, The Institute of Social and Economic Research Osaka University, Discussion Paper No. 805, <http://www.iser.osaka-u.ac.jp/library/dp/2011/DP0805.pdf> (accessed April, 2011).

²⁰⁶ See the ICTJ Policy Briefing ‘Indonesia’s Obligations to Provide Reparations for Victims of Gross Human Rights Violations’, released on December 2011. <http://ictj.org/sites/default/files/ICTJ-Indonesia-Reparations-Policy-Briefing-2011-English.pdf> (accessed December 2011).

²⁰⁷ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012). Dr Evans is one of the few authors who consider the individual right to

nanced degree of development within the different fields. This section, hence, aims at exploring the legal bindingness of the right to reparation under international public law (through the judgments of the International Court of Justice), human rights law, international humanitarian law and international criminal law.

3.3.1 International Public Law

The World Court, a term which refers to both the ICJ and its predecessor the PCJ, is ‘the body where the great legal-political issues of the day between states are discussed’.²⁰⁸ According to Article 38 of the Statute of the Court, which follows the wording of the same Article in the Statute of the PCJ, in order to decide the disputes submitted the ICJ shall apply ‘any asserted rule of international law as produced by three law-creating processes: treaties, international customary law or the general principles of law recognized by civilized nations’.²⁰⁹ Paragraph 2 of Article 38 enshrines the power of the Court to decide *ex aequo et bono*, which means that, depending on the agreement of the parties to a given dispute, the ICJ can also act as ‘law-maker’.²¹⁰ Given its role as the most prominent and authoritative judicial body worldwide, through the rulings issued by the ICJ it is possible to explain the evolution of the right to reparation under public international law and its recent developments.

The current idea of reparation is firmly embedded in the already mentioned judgment of the Permanent Court of Justice, the *Chorzow Factory case*.²¹¹ According to it, the Court established the amount of compensation to be paid by the Polish Government and set the date by which the payment should have been made.²¹² As pointed out in the dissenting opinion of the Polish national judge Ludwik Ehrlich:

reparation as already part of international customary law. This assumption is not shared as there is no evidence of an international custom, as evidence of a general practice accepted as law.

²⁰⁸ See D.J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 2004): 1029.

²⁰⁹ *Ibid.* at 18.

²¹⁰ See in general G. Schwarzenberger, *International Law*, vol.I (London: Stevens, 1957).

²¹¹ *Factory at Chorzow*, Merits, Permanent Court of International Justice, Ser. A, No. 17 (1928), at Para 47.

²¹² *Ibidem* p.4:‘[. . .] that the amount of the compensation to be paid by the Polish Government is 75.920.000 Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured

It followed from Judgment No7, without the necessity of an explicit statement, that the Polish Government *was bound to make reparation* for any damage which may actually and unlawfully have been inflicted [...] This is a consequence of the principle that the violation of an international obligation entails the duty of reparation, a principle *generally accepted in the classification of international disputes of a legal character*,²¹³ which was embodied in Article 13 of the Covenant of the League of Nations, and in Article 36 of the Statute of the Court.²¹⁴

Although the dissenting opinion contested the jurisdiction of the Court on this specific case and therefore its power to grant reparation to the German state, at the same time it stressed the existence under international law of the duty to fully repair, in principle through economic compensation, the breach of an international obligation. Since by tradition under international law states have been at length identified as the main actors, this duty and the correspondent right were not yet attributed to individuals.²¹⁵ Such concept is further stressed in another famous passage of the *Chorzow Factory* ruling, which affirms that:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and *there is no necessity for this to be stated in the convention itself*.²¹⁶

The idea of reparation as the 'complement of a failure' rather than as 'a right', expresses *in toto* the way the principle was used as a meaning to 'solve inter-states disputes' and to

products, stores, etc.) taken over on July 3rd, 1922, for the injury caused to the Oberschlesische Stickstoffwerke Company and 20.179.000 Reichsmarks for the injury caused to the Bayerische Stickstoffwerke Company[...]

²¹³Ibidem, emphasis added.

²¹⁴*Factory at Chorzow*, Merits, Permanent Court of International Justice, Ser. A, No. 17 (1928), Para 228.

²¹⁵Oppenheim stated in the first edition of his famous treatise 'Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects of International Law, and the latter is unable to confer directly rights and duties upon individuals.' See L. Oppenheim, *International Law: a Treatise* (London: Longmans, Green and co, 1905).

²¹⁶See *Factory at Chorzow*, Jurisdiction, Judgment No. 8. P.C.I.J., Series A. No. 9, p. 21.

prevent the insurgence of new ones.²¹⁷ The ICJ has implemented its decisions on reparations in several other cases, e.g. in the already mentioned judgement of the *LaGrand case* and in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²¹⁸ In particular, in the advisory opinion the Court affirmed that Israel had an obligation to make reparation for the damage caused. In fact, according to the ICJ, Israel was under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel was compelled to compensate the natural and legal persons in question for the damage suffered.²¹⁹

Notwithstanding its ‘openness’ towards the recognition of individuals as victims of a state’s misconduct and as subjects entitled to obtain reparations, the Court has promptly showed that international law still favours the preservation of states’ rights and immunities. Recently, the International Court of Justice has ruled a landmark judgement in respect of a dispute originating in ‘violations of obligations under international law’ committed by Italy through its judicial practice in that it has failed to observe the

²¹⁷ In particular before the enhancement of individuals’ rights within the international arena, the idea of reparation was simply assimilated to the concept of ‘remedies’ as explained supra at Paragraph 3.2.1

²¹⁸ “The Court here abandoned the view that reparation was to be made to States with individuals as ultimate beneficiaries. Rather, it found it incumbent upon the responsible party to grant reparation directly to the individuals themselves. For this reason, the judgment has been interpreted as endorsing an individual right to reparation, even if it is drafted in the language of obligations.’ Committee on the Right to Reparation for Victims of Armed Conflict, International Law Association (ILA), The Hague, August 2010. Please see Commentary on Article 6, Para 2(h) of the Draft declaration. <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> (accessed May 2011).

The inherent power of the Court to award reparations was also affirmed in *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), Merits, 1986 ICJ Reports p. 14 at Para 142; *Fisheries Jurisdiction* (FRG v. Ice.), Merits, 1974 ICJ Reports p. 175, Para. 203–05, Para. 71–76 and *Corfu Channel, Assessment of Amount of Compensation*, Judgment, 1949 I.C.J. Reports, p. 244, at Para. 250.

²¹⁹ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004.

jurisdictional immunity which Germany enjoys under international law.²²⁰ Germany's application was filed on the grounds that Italy by allowing its nationals' civil claims,²²¹ based on the violations of international humanitarian law committed by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, has breached its above mentioned obligations.²²² The Court, thus, was called to determine whether or not, in proceedings regarding claims for compensation arising out of the acts perpetrated by the German forces, the Italian courts were obliged to accord immunity to Germany. In its ruling the ICJ found out that the acts committed by the German army fell within the so-called *acta jure imperii* and as such were entitled to jurisdictional immunity, notwithstanding both their unlawfulness and gravity.²²³

In addition to that, the Court also ruled that immunity from jurisdiction is an immunity 'not merely from being subjected to an adverse judgment *but from being subjected to the trial process*', which means that the issue of immunity shall be determined prior to the enquiry on the merits. The Court stated that under current international customary law it is not possible to affirm that a state is deprived of its immunity 'by reason of the fact that it is accused of serious violations of international human rights law or of international law of armed conflict'.²²⁴ Finally, the Court did not detect any conflict

²²⁰ *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ, Judgment of 3 February 2012.

²²¹ Ibid at Para 27: 'On 11 March 2004, the Italian Court of Cassation held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances when the act complained of constitutes an international crime (Ferrini v. Federal Republic of Germany, Decision No. 5044/2004), *Rivista di diritto internazionale*, Vol. 87, 2004, p. 539; *International Law Reports (ILR)*, Vol. 128, p. 658'.

²²² Ibidem at Para 15.

²²³ *Acta jure imperii* are traditionally distinguished from *acta jure gestionis*. The first ones are recognised as the outcomes of the exercise by a state of its sovereign power, whilst the latter concern the non-sovereign activities of a State, in particular private and commercial activities.

²²⁴ The Court further dwells on this point referring to the judicial practice of national courts worldwide and also of the European Court of Human Rights: 'There is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the Rule which it is alleged to have violated. That practice is particularly evident in the judgments of national courts.'

between a rule, or rules, of *jus cogens*, and the rule of customary law which requires a state to accord immunity to another. In particular, according to the Court the rules which govern a state's jurisdictional immunity are 'procedural in character' and their sphere of activity is confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. Given their procedural status, such rules do not bear upon the question if the conducts which triggered the proceedings were lawful or unlawful and therefore they address different matters from the ones addressed instead by the *jus cogens* rules. With regard to reparations, the Court specified that the duty to make reparation to restore the victims of a state's misconduct is not dependent from 'those rules that concern the means by which it is to be effected'.²²⁵ Meaning that, again, there is no conflict between the rules on jurisdictional immunities and the rules which impose the obligation to repair the wrongdoings.

The Court also stressed that international law does not contain a rule requiring the payment of full compensation to each and every individual victim and accepted by the entire community of states as a rule completely exempt from derogation.²²⁶ In particular, if

Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (Bouzari v. Islamic Republic of Iran, Court of Appeal of Ontario, (2004) Dominion Law Reports (DLR) 4th Series, Vol. 243, p. 406; ILR, Vol. 128, p. 586; allegations of torture), France (Judgment of the Court of Appeal of Paris, 9 September 2002, and Cour de cassation, No. 02-45961, 16 December 2003, Bull. civ., 2003, I, No. 258, p. 206 (the Bucheron case); Cour de cassation, No. 03-41851, 2 June 2004, Bull. civ., 2004, I, No. 158, p. 132 (the X case) and Cour de cassation, No. 04-47504, 3 January 2006 (the Grosz case); allegations of crimes against humanity), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity); European Court of Human Rights: Kalogeropoulou and others v. Greece and Germany (Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537.) and Al-Adsani v. United Kingdom [GC], Application No. 35763/97, Judgment of 21 November 2001, ECHR Reports 2001-XI, p. 101, Para. 61; ILR, Vol. 123, p. 24.'

²²⁵ Supra n220 at Para.94.

²²⁶ On this point see Tomuschat supra n1 at3 and also n181. Professor Tomuschat was one of the three legal representatives of the Federal Republic of Germany in the case under consideration before the ICJ. See also the Dissenting Opinion of Judge Cancado Trindade :'[T]he finding of the particularly grave violations of human rights and of international humanitarian law provides, in my understanding, a valuable test for the

a state, which received funds as the outcomes of a comprehensive settlement in the aftermath of an international armed conflict, decides to use such funds to rebuild its national economy and infrastructure instead of distributing them amidst the victims, it is, then, not entitled to allow further claims by individual victims against the state which already ‘transferred the money’.²²⁷

In other words, the Court saw the lack of compensation to the victims as a misdeed attributable to Italy rather than as a breach of the obligation to make adequate and prompt reparation perpetrated by Germany. This judgement, the most recent in which the ICJ has addressed the issue of reparation, represents a relevant example of the procedural hitches that a claim for reparation has to face before the international judicial bodies, in particular with regard to the jurisdictional immunities which still ostracize the individuals’ exercise of the right to reparation in the aftermath of a state’s misconduct.

3.3.2 International and Regional Human Rights Treaties

Since the aftermath of WWII the right to reparation has been firmly entrenched in several international human rights treaties. To use Zegveld's words 'a victim right to reparation depends in the first place on his rights, as recognized under international law, having been breached. A victims' right to reparation therefore presupposes rights of victims in international law.'²²⁸

removal of any bar to jurisdiction, in pursuance of the necessary realization of justice. In sum and conclusion on this point: (a) there is no State immunity in such cases of extreme gravity, cases of *delicta imperii*; and (b) grave breaches of human rights and of international humanitarian law ineluctably entail the duty to provide reparation to the victims’. At Para. 213.

²²⁷ The Court referred to the two agreements signed in 1961 between the Federal Republic of Germany and Italy, the first one concerned with the ‘Settlement of certain property related, economic and financial questions’ and the second one concerned with ‘Compensation for Italian Nationals subjected to National-Socialist measures of persecution’. Both the agreements excluded from the beneficiaries of the compensations the individual victims who laid the claims upon which the ICJ ruling under consideration is based, namely the thousands of former Italian military internees who had been denied the status of ‘prisoner of war’ and deported to Germany and German occupied territories for use as forced labour.

²²⁸ L. Zegveld, ‘Victim’s Reparations Claims and International Courts’, in *Journal of International Criminal Justice* 8(2010): 79-111.

Human rights' violations create a right to obtain an adequate and prompt remedy and, at the same time, a duty by individual perpetrators and/or States to satisfy this right. As it is going to be explained in the course of this paragraph, human rights law is the field of international law which has mainly contributed to the recognition of individuals as holders of the right to reparation, as it emerges from the analysis of the human right treaties and the jurisprudence of the human rights bodies.²²⁹ In order to accomplish the main goal of this Chapter and avoid overlapping, the jurisprudence of the regional human rights courts relevant to this work (i.e. the Inter-American Court of Human Rights) will be discussed in Chapter 5, whilst here the focus will be strictly on human rights treaty law.

Article 8 of the UDHR²³⁰ provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or the laws. The principle prescribed in Article 8 became part of the declaration only at the very late stage of the drafting procedure of the UDHR. The proposal was made by delegates coming from Latin American countries and reflected a principle already recognized by many states. A propellant argument was the lack of other articles in the UDHR which could be invoked by an individual against the State if his human rights had been violated. It's self-evident that the compilation of article 8 has been strongly influenced by this need and also by the principles of *recurso de amparo* and *habeas corpus*. These two principles, in fact, represent an example of local remedies, the first one typical of Latin American countries, the second one, instead, recognized as the Anglo-Saxon fundamental instrument for safeguarding individual freedom against unlawful detention. As Shelton has pointed out 'it is thus appropriate and probably inevitable that international tribunals draw upon national law, as well as international law, to develop remedies.'²³¹ With the proclamation of the UDHR, eventually the individuals' protection moved from the local to the international stage, allowing, in theory, all the human beings to have access to some kind of remedies. It is noteworthy that Article 8 of the UDHR adopts the term 'remedy' and does not make any explicit reference to

²²⁹ A.A. Cançado Trindade, *Évolution du droit international au droit des gens. L'accès des individus à la justice internationale: Le regard d'un juge*, (Paris: Pédone, 2008).

²³⁰ Adopted and proclaimed by the UN General Assembly on December 10, 1948.

²³¹ See in general Shelton in De Feyter supra n15.

'reparation'. As already explained in the introduction to this chapter 'remedy' and 'reparation' have a genus-species relationship, which implies that the right to reparation, through its inclusion within the broader category of 'remedies', is protected and promoted by human rights treaties.

The International Covenant on Civil and Political Rights ('ICCPR') regulates the right to a remedy in a more comprehensive way. It is included in three different articles, addressing in Article 2(3) the right to access an authority competent to afford remedies and in Articles 9(5) and 14(6) narrowing the focus to the situation of unlawful arrest, detainment or conviction, stating that everyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation or to be compensated according to law. On May 26, 2004 the Human Rights Committee adopted the General Comment N.31 (which replaced General Comment N.3, reflecting and developing the same principles) on Article 2 of the ICCPR. According to the Human Rights Committee:

Article 2 is couched in terms of the obligations of the State Parties towards individuals as the rights holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the "Rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.²³²

Article 2, paragraph 3, requires that besides providing the individuals with an effective protection of the Covenant rights, State Parties have to ensure that they also have 'accessible and effective remedies' to vindicate those rights. Moreover, such remedies must be appropriately adapted in order to take into account the special vulnerability of certain categories of person, including in particular children.²³³ Paragraph 16 of the General

²³² Nature of the General Legal Obligation Imposed on States Parties to the Convention, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, at Para2.

²³³ Shelton, in De Feyter supra n15: 'The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of

Comment is particularly focused on the right to reparation for the victims of violations of the rights protected by the Covenant:

without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3) is not discharged. In addition to the explicit reparation required by Articles 9(5) and 14(6) the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.²³⁴

Other examples of the UN treaty bodies' commitment to implement the right to a remedy and reparation can be found in the work of the Economic, Social and Cultural Rights Committee and in the general recommendation of the Committee on the Elimination of Racial Discrimination (CERD).²³⁵ The third General Comment of the Committee on Economic, Social and Cultural Rights emphasizes that effective measures to implement the Covenant might include judicial remedies with respect to rights that might be considered 'justiciable'. The general recommendations issued by the CERD contain, instead, a focus on the right to remedy for vulnerable victims, as it emerges especially in recommendations number 5 and 23, where the importance of awarding adequate reparation, in particular for indigenous people, migrant workers and minority groups, has been acutely stressed.²³⁶

comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.'

²³⁴ See UN Human Rights Committee (HRC), General comment no. 31 [80], the nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, Para16.

²³⁵ The nature of States parties obligations (Art. 2, par.1): 12/14/1990. CESCR, General Comment 3. (General Comments).

²³⁶ The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they

Provisions on the right to a remedy are present also in Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women and in Article 14 of the UN Convention against Torture ('CAT').²³⁷ The latest in particular establishes that 'each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.'²³⁸ Also the CRC contains an *ad hoc* provision on the right to reparation: the already mentioned Article 39, which will be explained and discussed in greater depth in the following Chapter.²³⁹

The regional human rights treaties promote the right to a remedy and reparation in various provisions: Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article XVII of the American Declaration on the Rights and Duties of Man,²⁴⁰ Articles 10 and 25 of the American Convention on Human Rights, Article 7 and 21 of the African Charter on People and Human Rights. In many treaties it is possible to encounter also references to the right to legal protection for violations of privacy, family, home and correspondence or for attacks on honour and reputation, which also trigger the right to obtain satisfactory remedies. Some examples at the regional level can be found in Article 11(3) of the American Convention on Human Rights, Article 8 of

have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories. General Recommendation No. 23: Indigenous Peoples: 18/08/1997, at Para5.

²³⁷ Art 2(c) 'To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'.

²³⁸ See also generally UN Committee against Torture (CAT), General Comment No3 Implementation of Article 14 by States parties, 19 November 2012 CAT/C/GC/3.

²³⁹ Please note that differently from the other international human rights treaties Article 39 of the CRC uses the terms 'recovery' and 'rehabilitation' instead of 'remedy' or 'reparation.'

²⁴⁰ On this point see Shelton, in de Feyter supra n15 at2.

the European Convention on Human Rights and Article 5 of the African Charter on People and Human Rights.

3.3.3 The right to reparation under International Humanitarian Law

With regard to human rights law, as addressed in the previous paragraph, the existence of an individual right to reparation has been widely discussed. Under international humanitarian law the recognition of an individual right to reparation and its concrete exercise seem to be still controversial and quite anchored to the ancient concept of States as undisputed protagonists of the world's scene. States, indeed, are able to claim for reparations and, of course, to grant them when a violation of humanitarian law occurred. The scope of this paragraph is, hence, to investigate whether this principle fully applies also to the individuals affected by breaches of humanitarian law. As Gillard notes:

While there is general consensus that there is no reason for limiting the right to compensation referred to in the Hague Convention and Additional Protocol I to States and that individual victims should also benefit, problems have arisen when such persons have attempted to enforce this right to reparation directly before national courts'.²⁴¹

If individual claims for violations of humanitarian law perpetrated by states and brought before national *fora* have not always been successful,²⁴² due to the fact that sometimes they are precluded by a peace settlement or simply dismissed through the payment of lump-sums, at the international level the situation has begun to be slightly different, since lately a few quasi-judicial bodies have been created either by the UN Security Council or by peace treaties to review the claims of individual victims and to grant reparations.²⁴³

²⁴¹ See E. C. Gillard, 'Reparations for violations of international humanitarian law', in *International Review of the Red Cross*, 85(2003): 529-553.

²⁴² Ibid at 537: 'For instance, on a number of occasions in recent years, claims by individuals for compensation from Japan for violations of international humanitarian law have been rejected by the courts of Japan on the ground that the lump-sum payments made under the above-mentioned 1951 peace treaty absolved Japan from any further responsibility'.

²⁴³ E.g., the United Nations Compensation Commission (UNCC) or the Eritrea-Ethiopia Claims Commission. See Para. 3.3.3.4.

3.3.3.1 'War-reparations' after WWI and WWII

According to Gattini 'it is a widespread belief that the consequences of war, particularly of major wars, inevitably escape the strict judicial appraisal. For various and often contradictory extrajudicial reasons, factors above and beyond the law seem to determine how the consequences of war are dealt with.'²⁴⁴ As Titus Livy punctually reported the practice of war-reparations is dated back to the First Punic war and, ever since, it has been steered by political decisions rather than by legal considerations.²⁴⁵ Therefore, war-settlements have been traditionally sorted out as they were different from many other international dispute settlement and this led to far-reaching implications also with regard to war-reparations, intended as the payments and transfer of goods imposed on the defeated party by the triumphant side.

Reparations within the international humanitarian law framework cannot be discussed without first making reference to the reparations awarded in the aftermath of the two World Wars. If the Jay Treaty, briefly introduced at the beginning of the current Chapter, can be regarded as a valid example of how diplomacy can be successful in avoiding the insurgence of an armed conflict and securing individual victims' satisfaction, the same cannot be said about the reparation regime established after WWI, which has been proved to be a 'constant source of tension during the inter-war period' and also one of the main causes which led to WWII.²⁴⁶ According to Trachtenberg 'the Allies tried to make Germany compensate them for some of the damages they had suffered; this attempt to extract reparation dominated European politics during the critical period immediately following the conclusion of peace.'²⁴⁷ In this context little attention was paid to the population's needs since reparations, understood only as monetary compensation, were seen as a means to punish the German government, to cement the victors' justice and to

²⁴⁴A. Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', in *European Journal of International Law* 13(2002): 161-181.

²⁴⁵ Titus Livy, *The Early History of Rome: Books I-V of the Ab Urbe Condita* (London: Penguin classics, 2002).

²⁴⁶ Please see P. D'Argent, 'Reparations after WWII', (R. Wolfrum eds) *Max Planck Encyclopedia of International Law*, Oxford University Press, 2012.

²⁴⁷ See M. Trachtenberg, *Reparation in World Politics* (New York: Columbia University Press, 1980): Preface.

solve France's economic problems through what it was called the 'Allied economic cooperation'.²⁴⁸ The reparations clauses settled under the Versailles Peace Treaty established also a Reparation Commission which, representing the victorious powers, was in charge of determining the amount of damages to be paid by Germany.²⁴⁹

The 'economic vivisection' which characterized the reparations regime set up after WWI, was not reiterated when WWII came to an end. In the first place because, unlike the first world war, WWII seriously damaged the infrastructure and the economy of the defeated nations as the Allied powers reacted to the Axis aggressions triggering what was known as a 'total war'.²⁵⁰ Secondly because the political division of the world, agreed at the Potsdam conference in 1945, led to a military occupation of the territories of the defeated nations, therefore the occupying powers did not want to impoverish the resources under their control through the establishment of an unsustainable reparation regime. The 'majestic' reparation plan proposed by the Soviet Union during the Yalta conference in February 1945, to be developed and implemented by the Commission for the Compensation of Damage established in Moscow, was firmly rejected by the United States and Great Britain. The disagreement was grounded on the fact that both the US and Great Britain wanted the reparation strategy to be based on the so-called 'first charge principle', according to which:

in working out the economic balance of Germany reparations payments were to be made only if means were provided to pay for any needed essential imports into Germany. In short, Great Britain and the United States wanted Germany to pay its bills before reparations were taken from it. Exports were first to pay for imports; only thereafter could they be considered reparations.²⁵¹

At the following conference held in Potsdam the Allied powers elaborated a reparation regime based on the approved division of Germany into occupied zones. Instead than

²⁴⁸ Ibid at vii.

²⁴⁹ Please see Treaty of Peace of Versailles, 28 June 1919, Articles 231-247. Germany-Allies, 225 Consol. T.S. 188.

²⁵⁰ See D'Argent, *supra* n246 at Para. 2.

²⁵¹ On this point see B. Kuklick, 'The division of Germany and American Policy on Reparations', in *The Western Political Quarterly* 23(1970): 276-293.

focusing on monetary compensation as it happened after WWI, the Western countries to better comply with the first charge principle decided to target the German industries, in particular they dismantled the existing industries in order to move them to France and UK and they harvested the scientific knowledge ‘acquiring’ most of the German patents and prominent scientists.²⁵² The Soviet Union applied to the territories under its control a different reparation policy, as it quickly ceased to demolish the industrial plants and decided to manage their production for the purposes of reparations through a system of Soviet ownership.

As for the other states that joined forces with Germany, the reparations imposed on Japan and on the European allies of the Nazi regime have been also made through the dismantling of the factories and the deliveries of goods or raw materials. The reparations regime set in the aftermath of WWI was aimed at ‘humiliating’ and punishing Germany by decreasing its national wealth, whilst the reparation strategies stemming from WWII pointed at making Germany finally harmless damaging its scientific and technological resources. Nevertheless, it should be noted that in both cases priority was given to the satisfaction of victorious powers rather than to the individual victims affected by the atrocities committed during the conflict, with the exception of the hefty compensation paid by West Germany to Israel for the persecution of Jews during the Holocaust.²⁵³

3.3.3.2 International and non-international armed conflicts

Before further discussing the right to reparation under international humanitarian law, some clarifications with regard to the key concepts adopted need to be made. International Humanitarian Law is a set of Rules which is solely dedicated to limiting the effects of an armed conflict.²⁵⁴ There is no doubt that the definition of armed conflict is still

²⁵² See D’Argent, *supra* n246 at Para 37. ‘The dismantling of industrial plants was a way to exact reparations on the short term and at the same time to pursue long term security goal by disarming the former enemies.’

²⁵³ See K.R. Grossmann, *Germany and Israel: Six Years Luxemburg Agreement* (New York: Herzl Press, 1958)

²⁵⁴ ‘The term “armed conflict” delineates the temporal and geographical frame within which reparation claims of victims may arise. The present Declaration does not provide a definition of this term. Instead, it contains a dynamic reference to international humanitarian law. This has the following reason: *there is no definite and*

controversial, whilst there is *consensus* that all the situations which are referred to by international humanitarian law constitute an armed conflict. International humanitarian Law covers both international and national armed conflicts: the first ones fall within the provision of common article 2 of the 1949 Geneva Conventions and it applies to 'all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'²⁵⁵ International armed conflicts also deal with the occupation phase, according to article 1(4) of the 1977 Additional Protocol I to the 1949 Geneva Conventions they include situations 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.

Common Article 3 of the 1949 Geneva Conventions refers to non-international armed conflicts, but it does not provide a definition of the armed conflicts that do not have an international character. Notwithstanding the lack of an 'official definition' in Article 3 it is possible to gather it from other sources.²⁵⁶ First, article 1(1) of the 1977 Additional Protocol II to the 1949 Geneva Convention stipulates that the Protocol shall apply to conflicts 'that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol.'²⁵⁷

unambiguous definition of what constitutes an armed conflict under international law. However, there is consensus that all the situations which are referred to by international humanitarian law constitute an armed conflict.' See International Law Association, Commentary to Article 2 of the Draft Declaration, *supra* n 58, (emphasis added).

²⁵⁵ Full text at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> (accessed May 2011).

²⁵⁶ C. Greenwood, 'Scope of Application of Humanitarian Law', in: D. Fleck (ed.), *The Handbook of international humanitarian law* (Oxford: Oxford University Press, 2008). These sources have been identified by the Committee on the Right to Reparation for Victims of Armed Conflict, International Law Association (ILA), *supra* n58.

²⁵⁷ *Ibid.* 'Under current international law, the threshold for characterizing hostilities as non-international armed conflict is thus lower than the one contained in article 1(1) of the 1977 Additional Protocol II to the 1949 Geneva Conventions. Only two conditions have to be met: (i) the groups involved in the conflict have

Secondly, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Tadic* further clarified its meaning. The tribunal held that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.²⁵⁸ Finally, article 8(2) (f) of the Rome Statute of the International Criminal Court (ICC) provides additional guidance as to what constitutes a non-international armed conflict. It stipulates that:

paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.²⁵⁹

The right to reparation, in all the existing forms, presupposes a violation of international law and this principle refers also to humanitarian law violations committed within a conflict, no matter whether national or international.

3.3.3.3 The right to reparation under the International Humanitarian Law Conventions

According to Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land 'a belligerent Party which violates the provisions of the Regulations respecting the Laws and Customs of War on Land shall, if the case demands, be liable to pay compensation [...]'. A similar requirement to pay compensation for

to feature an organized structure; and (ii) the violence committed must be qualified as "protracted". The criterion of protracted armed violence has been interpreted as referring more to the intensity of the armed violence than to its duration.'

²⁵⁸ "Opinion and Judgment", *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997.

²⁵⁹ <http://www.icc-cpi.int/NR/rdonlyres/0D8024D3-87EA-4E6A-8A27> (accessed May 2011).

violations of international humanitarian law is expressly established in Article 91²⁶⁰ of the Additional Protocol I to the Geneva Conventions.²⁶¹

Even though both the Hague Convention and the Additional Protocol I speak exclusively of 'compensation', reparations for violations of international humanitarian law can take various forms, namely all the five forms enshrined in the Van Boven-Bassiouni Principles and Guidelines. In the armed conflict context one of the most common, also according to the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, is 'restitution', which is meant as the return of unlawfully taken property.²⁶² Moreover, according to Gillard:

the acceptance of a duty to make reparation is also often found in treaties concluded between belligerents at the end of hostilities. However, this obligation is frequently not expressly related to violations of international humanitarian law, but rather to violations of the prohibition to the use of force.²⁶³

The Van Boven-Bassiouni Principles, which trigger the individuals' right to reparation, state that 'the liability of parties to a conflict to pay compensation for violations of international humanitarian law committed by persons forming part of their armed forces should entail an obligation to compensate not only states, but also individual victims'.²⁶⁴ As Zegveld stresses 'the obligations of states and other warring parties under international

²⁶⁰ Article 91 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

²⁶¹ On this topic see D'Argent, *supra* n133.

²⁶² Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict in article 3 states that 'Each high contracting Party undertakes to return at the close of hostilities to the competent authorities of the territory previously occupied, cultural properties which is in its territory if such property has been exported in contrast with the principles laid down in the first Paragraph. Such property shall never be retained as war reparation.'

²⁶³ See Gillard *supra* n241 at 533.

²⁶⁴ The Van Boven-Bassiouni Principles and Guidelines, *supra* n2 at Principle 15.

humanitarian law could, thus, be constructed as being mirrored by victims' rights for which international humanitarian law envisages a cause of action if they are violated.²⁶⁵

At the national level, it should be borne in mind that neither international humanitarian law *in toto* nor a specific Article can oblige the states to directly apply international humanitarian law's provisions in their legal systems. Therefore, only when the State chooses to give direct effect to the international humanitarian law's Rules those Rules can be invoked by individuals before the national courts. In particular, national courts have frequently rejected individuals' claims based on Article 3 of the 1907 Hague Convention IV, arguing that this provision is not applicable in litigation between affected individuals and States, but it is rather meant to deal with conflicts amongst states.²⁶⁶ An example can be found in the sadly famous 'comfort women' cases brought before the Japanese national courts in the aftermath of World War II to seek compensation and official apologies for the women used as sexual slaves by the Japanese army during the conflict.²⁶⁷ The plaintiffs, namely the women who suffered from the sexual abuses perpetrated, based their claims on the existence of an individual right to obtain compensation under international customary law and under article 3 of the Hague Convention. The national courts, both the Lower Court and the Supreme Court of Japan, dismissed the claims arguing that neither under international customary law nor under the Hague Conventions, States are obliged to uphold the individuals' claims for breaches of international humanitarian law.²⁶⁸

Nevertheless, other national courts, e.g. some United States (US) courts, adopted a different, or even opposite, approach in cases involving victims of human rights and humanitarian law violations who sought reparations on the basis of the Alien Tort Claim Act (ATCA) and the Torture Victims Protection Act (TVPA). According to those acts 'district courts have original jurisdiction of any civil action by an alien for a tort only,

²⁶⁵See in general Zegveld *supra* n12.

²⁶⁶See F. Kalshoven, 'State Responsibility for Warlike acts of the Armed Forces: from Article 3 of the Hague Convention IV of 1907 to Article 91 of the Additional Protocol I of 1977 and beyond.' in *International and Comparative Law Quarterly* 40(1991): 827-858.

²⁶⁷On this topic, see Y. Yoshiaki, *Comfort Women: Sexual Slavery in the Japanese Military during World War II* (New York: Columbia University Press, 2000).

²⁶⁸See generally Zegveld *supra* n12.

committed in violations of the law of nations or a treaty of the US'.²⁶⁹ In other words, universal civil jurisdiction enable the US national courts to provide foreigners with compensation or other remedies for violations of international law, including also war crimes, even if they occurred outside the US territory.²⁷⁰ Clearly, the recognition of an individual right to claim for reparations before national *fora* as a result of international humanitarian law's violations seems to depend on discretionary factors and, in particular, on the political will of the State. At the international level, instead, the use of tribunals and claim commissions set up to deal with the consequences of a conflict is slowly increasing, encouraging individuals' complains and triggering their right to obtain satisfactory remedies in the aftermath of international humanitarian law's breaches.

3.3.3.4 Reparations before *ad hoc* claims commissions

Ad hoc claims commissions established in the aftermath of conflicts have significantly contributed to the development of an individual right to reparation for violations of humanitarian law. Following World War I, under the Treaty of Versailles a complex reparation system was built. According to article 297 of the treaty, which enshrined the legal basis for the US-German Mixed Claims Commission, although 'the settlement of war claims belonged to the exclusive sphere of the States individuals were, under exceptional circumstances, entitled to obtain compensation'.²⁷¹ Notwithstanding the fact that individuals could not directly claim reparations, this provision can be regarded as a landmark in the struggle towards the recognition of an immediate victims' right to reparation for violations of humanitarian law.

Furthermore, mention should be made of the United Nations Compensation Commission ('UNCC'), which has been set up by the Security Council in 1991 to process

²⁶⁹ *Ibidem* at 353.

²⁷⁰ For a better and deeper understanding of this topic, see A. Roberts, *The ATS and the TVPA in Comparative Perspective*, paper presented at the Public Policy Roundtable on the Alien Tort Statute and US Enforcement of Foreign Judgments, April 29th 2010, Northwestern University, US.

http://www.law.northwestern.edu/searlecenter/papers/Roberts_ATS_Final.pdf (accessed May 2011).

²⁷¹ R. Dolzer, 'The settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945', in *Berkeley Journal of International Law* 20(2002):212-232.

claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait.²⁷² The Security Council, indeed, decided to create a fund from which compensation should be paid for the above mentioned losses and injuries. In addition to the fund, the Secretary General recommended the establishment of a body, the UNCC, mandated not only to verify and to value the claims, but also to administer the payments. It is through the words of the Secretary General that the role and the nature of the Commission are clarified:

the UNCC is not a court or an arbitral tribunal before which the parties appear, it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving dispute claims. It is only in this late respect that a quasi-judicial function may be involved.

Its institution has been criticized by prominent scholars, Arangio-Ruiz amongst others, for being 'both beyond the range of the Security Council's competences and unfounded in international law'. Certainly the existence of such body can arouse controversies, but what is relevant here is only the impact it might have on individuals' reparations' claims.²⁷³

Its Provisional Rules for Claims procedure provides that 'a government may submit claims on behalf of its nationals'. Individuals are granted a right to compensation that has to be exercised by the State they are nationals of. In exceptional cases, however, private legal persons might directly submit claims to the Commission, and a special procedure is put in place to process claims of stateless individuals. The criterion for compensation is that the loss must arise as a direct outcome of Iraq's invasion and occupation of Kuwait, which, 'although isn't explicitly spelled out, refers to losses arising out of Iraq's violation of *jus ad bellum*'.²⁷⁴ The UNCC concluded the claims processing in 2005 and payments to individuals were granted until 2007. Another valuable example of how the recognition of individuals' right to reparation for violations of humanitarian law is

²⁷² See in particular F. Wooldridge and O. Elias, 'Humanitarian Considerations in the Work of the United Nations Compensation Commission', in the *International Review of the Red Cross* 85(2003):555-581.

²⁷³ See G. Arangio-Ruiz, 'On the Security Council's "Law Making"', in *Rivista Italiana di Diritto Internazionale* 83(2000): 607-725.

²⁷⁴ See Gillard supra n241 at 541

getting a foothold can be found in the peace agreement signed in December 2000 between Ethiopia and Eritrea.²⁷⁵ It establishes:

a neutral Claims Commission charged with deciding, through binding arbitration, all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.²⁷⁶ The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.²⁷⁷

The December treaty only authorized the Commission to award compensation and, through the Decision No. 3 of July 2001, the Commission itself stated that the most appropriate remedy for claims is, in principle, 'monetary compensation'. Nevertheless, the decision did not eliminate the possibility to grant other forms of reparation, but only 'if the remedy can be shown to be in accordance with international practice and would be reasonable and appropriate in the circumstances.'²⁷⁸

On the basis of the previous *excursus*, it follows that individuals in theory can legitimately claim for reparations in case of violations of international humanitarian law more successfully at the international level, although there is still a long way to go before transforming it into a widespread and corroborated practice. In particular, as Wooldridge and Elias sharply pointed out 'a number of factors should be taken into account for the

²⁷⁵ See A. de Guttry, H. Post and G. Venturini, *The 1998–2000 War Between Eritrea and Ethiopia: An International Legal Perspective* (The Hague: T.M.C. Asser Press, 2009).

²⁷⁶ See M. Matheson, 'Eritrea-Ethiopia Claims Commission: Damage Awards', in *American Society of International Law Insights* 13(2009).

²⁷⁷ Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea.

<http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf> (accessed May 2011).

²⁷⁸ Eritrea-Ethiopia Claims Commission, Decision number 3: Remedies, 24 July 2001.

smooth functioning of a future “war reparations regime”.²⁷⁹ In particular they refer to two elements: 'the *political will* and the practical means of securing the funds', which are amongst the preconditions needed to set up a mechanism able to enforce the right to reparation in the aftermath of an armed conflict.²⁸⁰

3.3.4 The right to reparation in International Criminal Law

As Crane underlined 'the previous century was remarkable in its propensity to commit atrocity'.²⁸¹ Eventually, the last decade of the twentieth century witnessed major efforts at different levels in the pursuit of 'justice' after gross human rights violations and serious violations of international humanitarian law. Developments are evident on a range of fronts, including the institution of the so-called *ad hoc* tribunals for the former Yugoslavia and Rwanda, the creation of hybrid tribunals such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts in Cambodia ('ECCC'), the Special Tribunal for Lebanon (STL) and, finally, the establishment of the International Criminal Court (ICC). To use Drumbl's words one could easily conclude that 'international criminal law is everywhere'.²⁸² What is meant by 'international criminal law' is 'a body of international Rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.'²⁸³

The aim of this section is to discuss whether at the international level the urge to obtain 'justice' has been limited to the prosecution of those who bear the greatest responsibilities for such heinous crimes, as pinpointed in the previous definition, or, instead, it is correct to

²⁷⁹See Wooldrige and Elias, *supra* n272 at 579 (emphasis added).

²⁸⁰ *Ibid.* at 581.

²⁸¹D. M. Crane, 'Back to the Future. Reflections on the Beginning: International Criminal Law in the Twenty-first Century', in *Fordham International Law Journal* 32(2008): 1761-1769.

²⁸² M. Drumbl, 'International Criminal Law: Tacking Stock of a Busy Decade', in *Melbourne Journal of International Law* 4(2009): 38-49. On international criminal law in general, see A. Cassese at al. *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011).

²⁸³ See Cassese *supra* n7 at 15.

affirm that the notion of 'justice' has been slowly extended to the recognition and the satisfaction of victims' rights, in particular their right to be granted prompt and adequate reparation. Before analyzing this topic and dwelling on the restricted role so far attributed to the victims in international criminal proceedings, which can be considered as a legacy stemming from the Nuremberg Trials, it is important to briefly refer to the role of victims at the domestic level.

3.3.4.1 Reparations in civil law and common law criminal systems

International criminal law includes both substantive and procedural rules. The first set of rules establishes which acts fall within the definition of international crimes, it specifies the criteria according to which such acts are prohibited, but also the circumstances that excludes perpetrators' criminal liability. The set of rules that constitutes, instead, procedural criminal law 'governs the action by prosecuting authorities and the various stages of international trials.'²⁸⁴ The entire body of international criminal law 'simultaneously derives its origins from, and continuously draws upon, international humanitarian law, international human rights law and national criminal law.'²⁸⁵ In particular, with regard to the latter, it is worth to notice that international criminal law has originally evolved from the so-called municipal case law (intra-state law) and it can, therefore, be considered as the 'transposition on to the international level of Rules and legal constructs proper to national criminal law or to national trial proceedings.'²⁸⁶ National criminal law, though, is difficult to classify as uniform. In fact, to use Cassese's words 'amongst the different systems, the two principal ones emerged so far: namely the common law legal system and the civil law one.'²⁸⁷ Since international criminal law is not yet enough developed to autonomously supply a solution for every substantive or procedural issue, it has to rely on national criminal law, especially when it comes to reparations.

In many civil law countries victims have a role in the criminal proceedings. As Sarkin points out 'in Latin American a victim or his/her representative can participate as

²⁸⁴ See Cassese, *supra* n7.

²⁸⁵ *Ibid* at 189.

²⁸⁶ *Ibid.* at3.

²⁸⁷ *Ibid.* at 15.

private prosecutor or “querellante adhesivo”, with the ability to initiate a prosecution or to attach as co-prosecutor to a case initiated by the Public Ministry.²⁸⁸ In other civil law countries, such as, for example, Italy, France and Germany, the criminal and the civil aspects of a case are brought together thanks to the so-called *partie civile* institute. As a consequence, the victim has the right to be represented in the trial, to be fully informed and to contribute to the resolution of the case bringing witnesses and/or experts. If the criminal case is unsuccessful the civil claim normally follows its fate. In most jurisdictions if the accused is acquitted the victim's case also fails, whilst in others, e.g. France, Norway and Sweden 'the failure of the criminal aspect of the case does not mean automatic failure for the victim' and the civil case can be transferred to a civil court.²⁸⁹ Despite its undeniable positive aspects, the civil law system is far from being perfect. In particular victims are often not aware of their rights and they choose not to join the criminal proceeding, moreover there is a need to comply with specific civil law Rules and a range of limitations that affect also the reparations awarded, which most likely take the form of compensation.²⁹⁰

In countries regulated by common law the relationship between the state and the offender is the only one under the spotlight. The purpose of criminal law is to punish the perpetrator and the victims, hence, only play a limited role. They may not even be called to testify and certainly they are not considered as an important party in the process. The award of reparations, therefore, depends on the single state's legislation, since it cannot be regarded as a common law's cornerstone. More than one third of the US courts, for example, are required by statute to order restitution, unless there are compelling or extraordinary circumstances and also the United Kingdom has slowly changed its traditional attitude towards compensation.²⁹¹

²⁸⁸Sarkin, in De Feyter, supra n15.

²⁸⁹ Ibid. at173. Please see also Zegveld supra n228. And C.P. Trumbull IV, 'The Victims' Participation in International Criminal Proceedings', in *Michigan Journal of International Law* 29(2008):777-826.

²⁹⁰ See E. Hoegen, M. Brienens, *Victims of crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) II of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Eindhoven: Wolf Legal Publishers, 2003).

²⁹¹Sarkin, supra n15 at 168.

At the international level, the influence of the common law systems has been always quite strong: during the first international trial held before the Nuremberg Tribunal there was no room left for victims and punishment was the one and only goal to pursue. This trend has been embraced by the later international *ad hoc* tribunals and only recently, as it is going to be better explained in the next paragraph, it has been, eventually, questioned.

3.3.4.2 How the 'Nuremberg legacy' has shaped current international criminal law

Tomuschat defines the Nuremberg and the Tokyo trials as 'milestones in the development of international law'.²⁹² The indictment of the German Nazi leaders certainly represented a revolution since the Nuremberg Tribunal (aka International Military Tribunal, IMT) was the first international criminal tribunal to try individuals for their violations of international law.²⁹³ From that point on international criminal law adopted a strong focus on prosecution and punishment, rather than on victims' rights and needs.²⁹⁴

Thanks to Nuremberg, individual responsibility finally became one of the international community's cornerstones. In particular, the Tribunal relied exclusively on international law, building the legal basis for prosecution without taking into account the German law of the Nazi period, which would have 'excused' many of the crimes committed by the German army.²⁹⁵ Moreover, the establishment of the first international tribunal meant

²⁹² C. Tomuschat, 'The Legacy of Nuremberg', in *Journal of International Criminal Justice* 4(2006):830-844. See also in general Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford: Oxford university Press, 2003).

²⁹³ See M. J. Kelley and T. L.H. McCormack, 'The Nuremberg Trial and the Subsequent Development of International Law', in D. Blumenthal and T. L.H. McCormack, *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden: Martinus Nijoff Publishers, 2008) at 102.

²⁹⁴ This is how the main principle regulating the Nuremberg trial has been expressed in the Judgment: 'crimes against humanity are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'. United States et al. v. Hermann Wilhelm Goering et al. In *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 November 1945-1 October 1946(1947) Vol22, 217th day, at 466.

²⁹⁵ See also G. Wherle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Institute Press, 2010) at 8. 'The Charter (Nuremberg Charter) expressly emphasized that the domestic legality of a crime did

to prosecute people accused of committing three specific categories of crimes: war crimes, crimes against humanity and crimes against peace. According to article 7 of the IMT's Statute 'the official positions of the defendants, whether Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishments'. This provision has been embodied in the statutes of the later international criminal courts and tribunals, piercing the protective screen traditionally provided by state sovereignty to the alleged perpetrators.²⁹⁶

Notwithstanding the extraordinary outcomes achieved by the Nuremberg Tribunal in terms of international law's implementation and demise of the 'absolute states' sovereign power',²⁹⁷ it is undeniable that victims were left empty-handed: they have not been called to testify and none of them were allowed to join in as civil part and claim for reparations.²⁹⁸ This happened for several reasons, for instance because at that time there was a general lack of awareness of the full extent of the crimes perpetrated in the name of Nazism, including the holocaust,²⁹⁹ but also due to the fact that the prosecution was 'overwhelmingly based on documentary evidences', which minimized the role and the participation of the victims.³⁰⁰

As Danieli suggests 'the consequences of this exclusion have been devastating on both direct and indirect victims.' Justice, thus, has been seen by the survivors as a 'far-away concept not available to them on a personal or local level'.³⁰¹ Individual claims were introduced only after the Nuremberg trials on the basis of agreements stipulated between the Federal Republic of Germany and the Allies. The scope of the agreements was mostly related to the restitution of properties unlawfully subtracted to the legitimate owners. In addition to that, Germany 'enacted legislation to provide assistance to persons who had

not prevent its prosecution. Individual criminal responsibility did not depend on whether the act violated the laws of the country in which it was committed.'

²⁹⁶ Tomuschat supra n292 at 838.

²⁹⁷ Ibid. at 837.

²⁹⁸ Zegveld, supra n228 at 86.

²⁹⁹ Ibid. at87.

³⁰⁰ Y. Danieli, 'Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law,' in *Cardozo Law Review* 27(2006): 1634-1649.

³⁰¹ Ibid. at 1643

been persecuted on racial grounds' seeking to compensate the consequences of the heinous violations suffered by the victims.³⁰² The Western Allies laid the blame for the crimes committed, and therefore the whole reparations' issue, on the newly constituted German Federal States.

The so-called Final Federal Compensation Law, entered into force on 14 September 1965, represented the peak of the *Wiedergutmachung* (literally 'making something good again') principle adopted by Germany to manifest its willingness to compensate the Jews for the wrongs done to them.³⁰³ Nevertheless, although the value of the compensations granted until the recent days 'exceeds any judicial reward in history',³⁰⁴ the impossibility to participate in the Nuremberg trials and to be publicly acknowledged and recognized as victims contributed to the construction and the enhancement of the 'conspiracy of silence'.³⁰⁵ The society, hence, rather than support the victims and foster their recovery intensified their sense of isolation and mistrust in all the most important sectors, including justice.³⁰⁶ As a consequence, the Nuremberg trial missed its chance of being a healing opportunity, remaining, instead, strictly focused on the punishment of the perpetrators and passing this legacy to the later international *fora*, which only very recently, have begun to allow and even promote victims' participation. In particular the ICTY and the ICTR (followed also by the SCSL) fully rely on national courts for compensations and this approach firmly derives from the idea that criminal courts are set

³⁰² Tomuschat supra n1 at 179.

³⁰³ See A. Colonomos and A. Armstrong, 'German Reparations to the Jews after WWII: a Turning Point in the History of Reparations' in De Greiff, supra n108, 407 'First (the 1965 Law) it created a hardship fund of DM 1.2 billion to support refugees from Eastern Europe who were previously ineligible for compensation under the BEG, primarily emigrants from 1953 to 1965. The fund distributed lump-sum payments beginning at DM 1,000-3,000 depending on the damage incurred. Second the law contained the presumption that if a claimant had been incarcerated for a year in a concentration camp, subsequent health problems could be causally linked to their persecution under the Nazi regime.'

³⁰⁴ Ibidem at 180.

³⁰⁵ Y. Danieli, *The International Handbook of Multigenerational Trauma* (New York: Springer, 1998).

³⁰⁶ According to Cassese: '[...] The trial (Nuremberg) was designed to render great historical phenomena plainly visible, and was conceived of as a means of demythologizing the Nazi State by exposing their hideous crimes for all the humanity.' Supra n7 at 330.

up to try the accused, rather than to provide redress measures to the victims.³⁰⁷ If national courts fear that victims' reparations policies could delay their work, one can only imagine how this concern can be felt on a larger scale, where the workload and the length of the trials are significantly harder to handle.³⁰⁸

Only restitution of property, as Rule 105 common to both ICTY and ICTR states, might fall within the *ad hoc* international tribunals' tasks, meaning that the Trial Chamber, *proprio motu* or at the request of the Prosecutor, shall hold a special hearing to determine the rightful owner of the property at issue. As it is going to be properly discussed throughout the present work, so far only the ICC, at least in theory, provides a full legal remedy for victims of international crimes, whilst the Lebanon Tribunal, according to article 25 of its Statute, adopted another way of dealing with victims' reparations that can be placed somewhere in between the traditional approach descending from the Nuremberg Tribunal and the quite revolutionary one embraced by the ICC.³⁰⁹ As for the ECCC, it is worth to mention here its commitment to award symbolic and collective reparations to the direct and indirect victims of the Khmer Rouge's regime.³¹⁰

This brief introduction on how international criminal law began to incorporate the right to reparation served the scope to provide the reader with a first overview of the way this issue was approached so far.. Likewise, the following section will deal with the soft

³⁰⁷ ICTY Rules of Procedure and Evidence, Rule 106(2), common to the ICTR: 'Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.' See in general T. Meron 'The Ad Hoc International Tribunals and the Proposed International Criminal Court', in *ASIL Bulletin* 9(1995): 5-34.

³⁰⁸ See Zegveld *supra* n228.

³⁰⁹ 'Article 25 of the Lebanon Tribunal's Statute stipulates that: [t]he Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal'. Subsequently, when the Tribunal has found the accused guilty, a victim may bring an action in a Lebanese or other national court or other competent body to obtain compensation, based on the judgment of the Lebanon Tribunal which shall be final and binding as to the criminal responsibility of the convicted person. See Zegved, *supra* n104, 90.

³¹⁰ See T. Holness and J. Ramji-Nogales, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*, Documentation Center of Cambodia, 2012.

law instruments that concurred to the recognition and the progress of the right to reparation.

3.4 The right to reparation in international soft law instruments

According to Shelton ‘declarations, resolutions and other non-treaty texts also address the right to a remedy (and reparation).’³¹¹ Soft law consists of written instruments that spell out ‘rules of conduct’ not intended to be legally binding, consequently they are not subject to the law of treaties and, as Harris underlines, they do not generate the *opinion juris* required for them to be state practice contributing to custom.³¹² This paragraph will deal with the soft law instruments which have contributed to the development of the right to reparation.³¹³ There are three most valuable soft law tools concerning the issue of reparation, which are going to be briefly introduced and discussed: namely the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, the ILC’s Articles on State Responsibility and the Van Boven-Bassiouni Principles and Guidelines.

3.4.1 The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power

The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power was approved by the UN General Assembly on 29 November 1985. It contains in the first place a definition of victim which has been recalled also by the Van Boven-Bassiouni Principles in 2005, although the term ‘victim’ in the Declaration refers specifically to those who suffered from acts or omissions, including abuse of power, committed by public officials or other agents in violation of national criminal law.³¹⁴ The Declaration embodies a set of articles focused on the reparative measures that States should put into practice for victims of crimes and abuse of power. In particular, the Declaration refers to ‘restitution, compensation and assistance’ the last one allegedly incorporates in itself the forms of reparation, ‘satisfaction’ and ‘rehabilitation’, identified in the most recent Van Boven-

³¹¹ See Shelton, *supra* n14 at 117.

³¹² Please see Harris *supra* n.204 at 62.

³¹³ See generally B. Conforti, *Diritto Internazionale* (Napoli: Editoriale Scientifica, 2006).

³¹⁴ See Shelton, *supra* n14

at 152.

Bassiouni Principles and Guidelines.³¹⁵ As for the fifth kind of reparation, the ‘guarantees of non-repetition’, it does not appear in the Declaration, although a reference has been made in the conclusive part to the necessity to incorporate in the national legislation norms proscribing abuses of power.³¹⁶

3.4.2 Reparations in the ILC’s Articles on State Responsibility

As Shelton pinpointed ‘prior to the development of international human rights law, violations of international law were met with responses under law of state responsibility.’³¹⁷ In August 2001 the ILC finally adopted and forwarded to the UN General Assembly the Articles on State Responsibility.³¹⁸ In occasion of the submission the ILC did not recommend the General Assembly to consider their adoption as a treaty.³¹⁹ The articles represent a huge effort with regard to the codification of the law of state responsibility, and in particular they set forth the principle of reparation and reassert the existing law on remedies.³²⁰

³¹⁵ [...]14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in Paragraph 3 above[...]’ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985.

<http://www.un.org/documents/ga/res/40/a40r034.htm> (accessed August 2011).

³¹⁶ Ibidem, Principle No19.

³¹⁷ Shelton supra n14.

³¹⁸ See in general J. Crawford et al., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010).

³¹⁹ Ibidem at 85.

³²⁰ See also C. D. Gray, *Judicial Remedies in International Law* (Oxford: Oxford University Press, 1990):217-219.

The consequences of a wrongful act committed by a State are two: cessation of the wrongful conduct and reparation. In the final version of the Articles on State Responsibility, cessation has been treated as an inherent obligation of the responsible state and no longer as a form of satisfaction and *ergo* as a reparative measure.³²¹ Cessation is, thus, represented in Article 30 as mandatory and, unlikely restitution and other kinds of reparation, it is not subject to the limits of proportionality. It is worth notice here that the Articles articulate all the Rules concerning reparations as ‘obligations of the responsible state’ rather than as rights held by the injured party.³²²

The Articles related to the issue of reparation contain: a definition of the right to reparation, embodied in Article 31 (which is included in Chapter one of part two ‘Content of the international responsibility of a State’), a description of the forms of reparation, Articles 34-39, and, finally, two innovative rules on reparations for ‘serious breaches of obligations under peremptory norms of international law’, enshrined in Articles 40-41. The first part of the articles which deal with reparation, namely Article 31, is a restatement of what has been defined as ‘the Chorzow Factory declaration’, which affirms that it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.³²³ In origin this obligation seemed to be a bilateral matter involving exclusively the responsible state and the injured one. As it has been extensively discussed throughout the previous paragraphs, the right to reparation, together with the other range of remedies provided in international law, it is no longer an interstate issue, but it pertains also to the individuals affected by the violations occurred. Article 33 of the Articles on State Responsibility endorses the overcoming of an interstate approach, stating in the first paragraph that ‘the responsible State’s obligations in a given case may

³²¹See Shelton, *supra* n14.

³²²The shift from ‘right’ to ‘obligation’ has been made in 1999. In J. Crawford’s Third Report on State Responsibility one reads: ‘This (reparation as a right of the injured party) works well enough in the strictly bilateral context, where the obligation in question is owed exclusively by one State to another and the latter is (correspondingly) the only possible injured party. But it creates a significant difficulty in those cases where the same obligation is owed simultaneously to several, many or all States, some or all of which are legally interested in its breach.’ At Para15 http://untreaty.un.org/ilc/documentation/english/a_cn4_507.pdf (accessed 20 August 2011).

³²³ *Ibidem* at 839.

exist towards another State, several States or the international community as a whole.’³²⁴ Paragraph two relates to the non-exclusivity of interstate reparations, enshrining a ‘savings clause’ which underlines that reparations may be owed to individuals, intergovernmental organizations or other non-state entities.³²⁵

The Articles concerning the kind of reparation that the responsible state should award to the counterpart enlist ‘restitution’ as the primary form, reflecting the judgment of the PCJ in the *Chorzow Factory case*.³²⁶ Restitution is, thus, defined as ‘the re-establishment of the situation which existed before the wrongful act was committed’ rather than as the restoration of the *status quo ante*. The ILC in the Commentary to the Articles specifies that the second option is narrower since ‘it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned’, instead, the definition adopted absorbs into the concept of restitution other elements of full reparation.³²⁷ Moreover, the responsible state is discharged from the obligation to retribute only when it is materially impossible or it ‘involve(s) a burden out of proportion to the benefit deriving from restitution[...]’.³²⁸

According to paragraph 1 of Article 36 ‘the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.’³²⁹ In the reparations’ hierarchy adopted by the ILC compensation comes right after restitution and they need to be combined when restitution fails to eliminate all the consequences of the harm. Paragraph two of the article on compensation establishes that the responsible state must

³²⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed August 2011).

³²⁵ See generally Shelton, *supra* n14.

³²⁶ *Ibidem* at 91.

³²⁷ See the Commentary to the Draft Articles, *supra* n319 at 67.

³²⁸ See Article 35, *supra* n319 at 32.

³²⁹ *Ibidem*.

compensate for ‘any financially assessable damage’, and this includes also loss of life, arbitrary detention and other personal injury. The Commentary refers to the formula coined by Umpire Parker in the *Lusitania cases* to calculate damages for wrongful death, while, in case of unlawful detention, it recalls the use of *per diem* amounts.³³⁰

The third kind of reparation contemplated by ILC is satisfaction. According to Article 37 satisfaction, in the form of ‘an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality’, it is required only when both restitution and compensation have not fully repaired the harm. Satisfaction, notwithstanding its exceptional character, just as the other two reparative measures has to respect the principle of proportionality. The Commentary to the Articles on State Responsibility states that moral damages have also to be repaired by restitution and compensation, since it is normally possible to translate the loss in economic value; therefore satisfaction plays an important role only when the damage is not financially assessable, e.g. when the injury has a symbolic feature. The most innovative contribution on reparation attributable to the ILC concern Articles 40 and 41. The first article serves to define the breaches identified in the Chapter, which present a different connotation because the obligation violated derives from a peremptory norm of international law and also because ‘of the intensity of the breach in question which must be serious in nature.’³³¹

³³⁰Opinion in the *Lusitania cases*, 1 November 1923 at35‘[...] our formula expressed in general terms for reaching that end is: Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.’

http://untreaty.un.org/cod/riaa/cases/vol_VII/32-44.pdf (accessed August 2011).

³³¹ See the Commentary supra n319 at32. According to Article 53 of the 1969 Vienna Convention on the Law of Treaties ‘[...] a peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

Article 41 sets forth the consequences of ‘any serious breach within the meaning of Article 40’ and it reflects the need to strengthen the rule of law and the cooperation amongst states.³³² Two are the obligations that the international community as a whole has to observe in case of the breaches envisaged by Article 40: the non-recognition of the unlawful situation created and the prohibition of aid and assistance in maintaining it. The obligations enshrined in Article 41 are without prejudice to the other consequences listed in the previous Articles, namely the cessation of the wrongful act and the duty to make reparation. Paragraph three of Article 41 leaves the doors open to possible further consequences that may derive from a breach of international law and, according to Shelton, this forbearance makes Article 41 ‘the only provision in the reparation Rules [...] that may reflect the progressive development of international law’.³³³

3.4.3 The Van Boven-Bassiouni Basic Principles and Guidelines

In 1989 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, nowadays Sub-Commission on Promotion and Protection of Human Rights, assigned to Professor Theodor Van Boven the task to conduct an analysis on the right to a remedy and reparation, in the forms of restitution, compensation and rehabilitation, for victims of gross violations of human rights and fundamental freedoms. As outcome of the study the Special Rapporteur was required to evaluate the possibility of developing a draft of basic principles and guidelines. The Commission on Human Rights, through resolution 1994/35, approved the first draft submitted by Van Boven as a ‘useful basis for giving priority to the question of restitution, compensation and rehabilitation.’³³⁴ Five years later

³³²See Commentary to the Articles on State Responsibility supra n319 at 85: ‘Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, Paragraph 1 also envisages the possibility of non-institutionalized cooperation’.

³³³See D. Shelton ‘Righting Wrongs: Reparations in the Articles on State Responsibility’, in *American Journal of International Law* 96(2002): 843.

³³⁴ See N. Roth-Arriaza, ‘Reparations: Decisions and Dilemmas’, in *Hastings International and Comparative Law Review* 27(2004): 157-219.

the Commission nominated Mahmoud Cherif Bassiouni as independent expert to gather the remarks made by States, intergovernmental and non-governmental organizations and prepare a new version of the principles and guidelines. In 2000, Bassiouni's final report was presented to the Commission, which made it circulating for further comments. In 2002 the Office of the High Commissioner for Human Rights convened an international consultation, chaired by the Chilean Alejandro Salinas, including all the main actors concerned in the drafting process. Salinas submitted to the Commission the results of the consultation held in Geneva in 2003.³³⁵ In the next two years two other meetings were organized to discuss and overcome the issues raised during the consultation. In those occasions some states, *in primis* the US, strongly expressed their opposition towards the extension of the principles relating to violations of international humanitarian law.³³⁶ In October 2004, the final draft was finally approved by the Commission, the draft maintained its new structure and, hence, the references to humanitarian law. As a consequence, thirteen states decided not to vote in favor of the Basic Principles and Guidelines. Germany was the only state to provide an explanation for the withdrawal of its support, based on the following statement:

³³⁵ Report of the second Consultative Meeting on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (GENEVA, 20, 21 AND 23 OCTOBER 2003)<http://www2.ohchr.org/english/events/meetings/docs/report2.pdf> (last accessed 16 August 2010).

³³⁶ 'While in the early stages the Principles and Guidelines addressed the right to a remedy and reparation under international human rights law, later drafts also encompassed this right under international humanitarian law. Certain governments objected to widening the scope of the Principles and Guidelines so as to cover international humanitarian law because of the different evolution and the distinct nature of the two fields of international law entailing different sets of rights and obligations. These governments favoured two separate instruments. However, this view did not prevail.' Note by the High Commissioner for Human Rights on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, transmitting the Report of the third consultative meeting on the 'Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' (E/CN.4/2005/59, 21 December 2004).

[..]The text was an inaccurate reflection of customary international law. It erroneously sought to apply the principles of state responsibility to relationships between States and individuals and failed to differentiate adequately between human rights law and international humanitarian law.³³⁷

3.4.3.1 The main contents and innovations of the Basic Principles and Guidelines

As already pointed out in the introductory Chapter, the most innovative aspect of the Van Boven-Bassiouni Basic Principles and Guidelines lies in their victim-oriented perspective. Unlike the Articles on State Responsibility, which consider the adoption of reparative measures as a State's obligation resulting from the violation of international law, the principles and guidelines approved by the UN General Assembly in December 2005 set forth the existence of a right held by victims who experienced gross human rights violations and serious violations of humanitarian law.

From the beginning, the study on the right to a remedy and reparation assigned to Van Boven was exclusively concentrated on 'gross' violations, indicating both the character of the breach and the type of human right violated. During the consultations summoned by the Office of the High Commissioner for Human Rights the hypothesis to extend the target of the document to every kind of human rights violations was given full consideration. However, since references to international humanitarian law were already included in the draft, the focus remained on the worst violations of both HR and IHL. The Van Boven-Bassiouni Principles and Guidelines serve the scope to pinpoint mechanisms, modalities, procedures and methods for implementing existing legal obligations under international human rights law and international humanitarian law, hence, they 'codify' the current international law on remedies.

The principles and guidelines identify as remedies the following: equal and effective access to justice, adequate, effective and prompt reparation for the harm suffered and access to relevant information concerning violations and reparation mechanisms. In the preamble of the document it is acknowledged that contemporary forms of victimization, *while essentially directed against persons*, may nevertheless also be directed to groups of persons who are targeted collectively.³³⁸ This sentence represents one of the most

³³⁷ On this point see D. Shelton in de Feyter et al. supra n15.

³³⁸ See the Preamble of the Basic Principles and Guidelines, supra n2, (emphasis added).

remarkable innovations of the Van Boven-Bassiouni Principles and Guidelines, since recognizing the existence of violations that affect people collectively finally envisages, although still cautiously, the adoption of collective remedies, and in particular of collective forms of reparations.³³⁹

In the preamble there is also a reference to the ICC's reparation regime and to the participation of victims at all the stages and proceedings of the Court. Consequently, the Van Boven-Bassiouni Principles and Guidelines put a strong accent on international criminal law and on the States' obligation to prosecute perpetrators of certain crimes, namely the crimes under the Rome Statute's jurisdiction. It is noteworthy here that the principles endorse also the concept of complementarity and that they encourage all the forms of judicial assistance and cooperation amongst states, including extradition and the exercise of universal jurisdiction. The Basic Principles and Guidelines strengthen the nexus between reparations, and more in general victims' rights, and international criminal law, highlighting the new path undergone by the International Criminal Court, which, eventually, considers individuals and groups of persons affected by gross human rights violations and serious violations of humanitarian law as rights holders.

As for the forms of reparations encompassed in the document, the authors relied on the already mentioned Articles on State Responsibility. Nevertheless, the Basic Principles and Guidelines depart from the ILC's articles on some points. In particular the Articles on State Responsibility identify cessation as one of the two obligations that derive from a breach of international law, the other being reparation, on the contrary the Van Boven-Bassiouni Principles and Guidelines regard cessation as a form of satisfaction and, hence, reparation. According to Shelton:

the inclusion of cessation within the notion of reparation seems to imply that in absence of a victim there is no duty of cessation. It undermines the Rule of law which is the basis of the obligation to cease any conduct that is not in conformity with an international duty.³⁴⁰

³³⁹ Ibidem, Principle 13: 'In addition to individual access to justice, States should endeavor to develop procedures to allow groups of victims to present claims for reparations and to receive reparations, *as appropriate*.'

³⁴⁰ Please see Shelton, in de Feyter, *supra* n15 at 22.

Otherwise, this inclusion might be read as a reflection of the different perspective adopted by the Basic Principles and Guidelines, in the sense that since the document was drafted bearing in mind victims' rights and needs and not States' obligations the cessation of the wrongful act is something different (more) than a duty and has, in addition to its innate potential as rule of law's driving force, a concrete impact on the individuals affected by the harm.³⁴¹

Guarantees of non-repetition, which represent an independent form of reparation within the Van Boven-Bassiouni Principles and Guidelines, were in the Articles on State Responsibility, instead, regarded as 'intertwined' with the obligation to cease the violation and they were pictured as a preventive measure, since their application presupposed a risk of repetition. In the human rights framework guarantees of non-repetition have a growing range of application, which will also, but not exclusively, contribute to prevention. In fact, they embody a variety of provisions which comprises: ensuring effective civilian control of military and security forces; providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; strengthening the independence of the judiciary.³⁴²

To conclude, the Basic Principles and Guidelines ascribed vast space to the so-called symbolic reparations, in the forms of rehabilitation and satisfaction. Whilst satisfaction was already mentioned in the Articles on State Responsibility as the third kind of reparative measures contemplated, rehabilitation was, instead, enshrined in the CAT and in other human rights instruments.³⁴³ Furthermore, rehabilitation vaguely includes 'medical and psychological care as well as legal and social services', meaning that this kind of

³⁴¹ See Shelton *supra* n 333 at 849.

³⁴² See Principle 23 of the Basic Principles and Guidelines, *supra* n2.

³⁴³ The concept of rehabilitation, although expressed with the term 'assistance', is present in the already discussed Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, see *supra* n 311.

reparation needs to be tailored on a case by case basis in order to produce concrete effects on the victims to whom it has been awarded.

3.5 Conclusions

The current Chapter has explored the degree to which the right to reparation is nowadays embodied in the current international framework, focussing on international human rights law, international humanitarian law and international criminal law as these are the fields of international law most relevant to the present work. The Chapter has provided an extensive overview of the framework that serves the purpose to enshrine and protect the individuals' right to reparation. As emerged from the analysis the right to reparation, although not yet part of international customary law, is well-established in several treaties and soft law instruments. In particular within HRL it is possible to identify the major developments and the most effective mechanisms to trigger individuals' right to reparation. Under international humanitarian law the individuals' right to reparation exists and it is recognized, but unlike international human rights law there are no regional or global mechanisms that allow in general the victims of IHL violations to exercise such right against the states. It can be observed that the UNCC and the Eritrea-Ethiopia Claim Commission represent an exception, whilst the streamlined practice is still reluctant to depart from the traditional notion of 'war-reparations' as an inter-states issue. Finally, international criminal law is still an emerging area of international law and therefore the right to reparation for those who suffered harm as result of breaches of HR and IHL committed by individuals cannot be described as deeply rooted, notwithstanding the victim-oriented approach being developed by the 'newly' established International Criminal Court.

4. Children's right to reparation: drafting the theoretical framework

4.1 Introducing the key arguments

Children's right to reparation, as pointed out extensively in Chapter one, is intimately entwined with the recognition of children as rights holders. The present Chapter, hence, aims at providing an overview of the current position of children under international law, trying to determine if and to what extent they are in concrete capable of exercising their rights. The first part of the Chapter deals with the issue of children as subjects entitled to rights in general and analyses the contribution of different theories, whilst the second is focused on the international legal framework that identifies and protects such rights and the third one approaches children's 'abstract capability' to claim for reparations, referring in particular to the recent developments achieved in Colombia.

Moving from the assumption that, in order to be fully exercised and safeguarded, children's rights need to be grounded either morally and legally, one might notice that the almost universal ratification of a 'Convention' which affirms the existence of rights pertaining to children is necessary, but not sufficient to prove that such rights are widely accepted and recognised within the society.³⁴⁴

Due to its complexity, the question about children's rights' existence hardly will be answered by simply locating the prominent legal tools and piece of legislation. A legal right cannot exist prior to its passing into law, because only from that moment on it can be legitimately enforced. On the other hand moral rights do not need to be enshrined in legal instruments neither to exist nor to be enforced since their violations, or threat against them, can automatically provide grounds for criticism or even social pressure.³⁴⁵ As Feinberg shows the expression 'moral rights' has been used in a variety of ways that have little in common 'except that they (*moral rights*) are not necessarily legal or institutional in

³⁴⁴To use Van Bueren's words 'the aim of any philosophical enquiry into the existence and nature of children's rights is to provide an instrument of analysis with which to test putative and future rights and to distinguish these rights from individual preferences'. G. Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff, 1998): Intro.

³⁴⁵See D. Lyons, 'Rights and Recognition', in *Social Theory and Practice* 32(2006):1-15.

origin'.³⁴⁶ According to Freeman, when we talk about children's rights we are rarely talking of legal or institutional rights, inasmuch most often we refer to moral rights, understood as 'ideal rights or conscientious rights'.³⁴⁷ The long path towards the eventual affirmation of children's rights, which used to be portrayed as 'a slogan in need of a definition',³⁴⁸ has been marked especially by the rapid spread of various theories that defended, or denied, the legitimacy of children as bearers of moral and legal rights. The slow establishment of children's rights within the international legal framework represents a milestone in the struggle to foster the dignity and protection of children worldwide, although the enactment of legal rights by itself risks remaining an abstract and general concept and it does not improve children's lives until it is put into practice.

The discourse on children's status reached its peak in the early 1970s with the advent of the 'children liberationists', who stressed the urgency to attribute to children the same rights as adults. A part from the strong reaction and criticism provoked amidst the public opinion, the theory developed by the children's liberation movement helped creating a new awareness of children's conditions and underlined, relying on works by Jean-Jacques Rousseau and John Dewey, the importance of children's involvement within society.³⁴⁹ As it is going to be better discussed in the next section, the theses supported by the children's liberationists collide with those promoted instead by the so-called child-protectionists. Nevertheless, they both explored the different levels of interactions between the worlds of children and adults, without, however, paying due attention to the substantial issue of children as rights holders and its ontological and teleological grounds.

The debate on the attribution of rights to children ('on which basis', 'which rights' etc..) has been carried out from two different perspectives; a philosophical one and a strictly legal one. The philosophical perspective allowed to lay the foundations for the establishment of children's legal rights, especially within the international framework. Nevertheless, despite the entry into force of the CRC in 1990, which significantly

³⁴⁶J. Feinberg, *Social Philosophy* (Englewood Cliffs NJ: Prentice-Hall, 1973):84.

³⁴⁷M. Freeman, *The Rights and Wrongs of Children* (Dover: F. Pinter publ., 1983):33.

³⁴⁸ See H. Rodham, 'Children Under the Law', in *Harvard Education Review*, 43(1973): 487 and from the same author 'Children's Policies: Abandonment and Neglect', in *Yale Law Journal* 86(1977): 1522-1531.

³⁴⁹J. Dewey, *Experience and Education* (New York: Kappa Delta Pi, 1938).

contributed to the enhancement of the notion of children as active stakeholders and rights holders, the issue of whether it is possible to affirm that children can legitimately exercise specific kinds of rights, namely the ones that require a certain degree of autonomy, is still undecided. The CRC, as it is going to be properly discussed throughout this Chapter, paid great attention to the so-called ‘agency rights’ and in particular to the right to participate as enshrined in Article 12. Participation can be broadly defined as the process of sharing decisions which affect one's life and the life of the community in which one lives. In certain cases, in particular in post-conflict settings, such decisions may (and should) include also reparations. As Van Bueren sharply notes ‘the definition of childhood in international law is critical because it determines which specific rights attach to the status of childhood and which legal remedies are available to children as a class’, meaning that, in order to identify the kind of remedies and, therefore the kind of reparations that a person can claim, it is necessary to have steadily in mind which are the rights he/she is entitled to.³⁵⁰

4.1.1 The evolution of the concept of childhood

Historians traditionally define childhood as a ‘social construction’,³⁵¹ referring mainly to the fact that in Western countries until the Renaissance children have worked side by side with adults, wearing the same clothes and often depicted as ‘men on a smaller scale’.³⁵² The notion of childhood came to light quite recently and according to Freeman only after the Middle Age children started to be perceived as different from adults and labelled as

³⁵⁰ See Van Bueren, *supra* n 344 at 32.

³⁵¹ ‘In medieval society the idea of childhood did not exist [...]. It corresponds to an awareness of the particular nature which distinguishes the child from the adult[...] in medieval society this awareness was lacking’. P. Ariès, *Centuries of Childhood* (London: Jonathan Cape, 1962):128.

³⁵² According to Freeman, *supra* n347 at 9 ‘One can only speculate as to why the idea of childhood did not exist in the medieval society. It may in part have been the result of fear of the infant’s bestiality, itself the product of ignorance of, and pain associated with, child-birth. In part too there is an element of indifference, since infant mortality rates were so high.’

‘weak, innocent and in need of special treatment’.³⁵³ The change emerged first amongst the upper ranks of the society, due to their better education and prosperity and it slowly spread within the whole community.

Nevertheless, children were not considered individuals with an independent will as they lived in subjection to their parents. Only in the latter part of the twentieth century the idea that rights may directly pertain to children finally emerged, generating debates and conflicting theories on the status of children within the international and national normative frameworks. The coming sub-sections, hence, contain in the first place an overview of the main schools of thought (children liberationists and child-protectionists) which have dealt with the issue of children as individuals and in particular with their relationship with the ‘authority’, namely parents, caregivers and state, followed by a discussion of the most prominent theories on rights and their possible extension to children.³⁵⁴

4.1.2 Children’s liberation movement

As already mentioned in the introductory paragraph, the first social movement that affirmed the urge to recognise children as independent individuals arose in the early 1970s and it was known as the ‘children’s liberation movement’.³⁵⁵ Despite its original aspirations, the movement was entirely grounded on adults' claims and challenges, whilst children were nothing more than mere objects and oblivious beneficiaries of the struggle. The movement was founded on the idea that children were one of the major oppressed

³⁵³ Ibid., see also L. de Mause, *The History of Childhood* (London: Souvenir Press, 1974) and H. Cunningham, *Children and Childhood in Western Society since 1500* (London: Addison Wesley, 2005).

³⁵⁴ See Freeman supra n347 at33.

³⁵⁵ Out of comprehensiveness, according to Freeman, supra n342 at18 ‘the beginning of a children’s rights movement can be traced back to the middle of nineteenth century, an article published with the title “The Rights of Children” appeared as early as June 1852. Meanwhile in France, Jean Vallès attempted to establish a league for the protection of the rights of children in the aftermath of the Paris Commune’. Nevertheless, both the mentioned attempts to shed light on children’s rights did not ‘shake’ the public opinion hard enough to start a real movement or school of thought as the ones introduced in the current section.

groups in Western society, alongside women, black people and the proletariat.³⁵⁶ According to Firestone, there was an evident link between the liberation of women and the liberation of children, as she spoke of their respective oppressions as 'intertwined and mutually reinforcing'.³⁵⁷ The movement identified both the nuclear family and the school as the major sources of children's contemporary constriction, arguing that these institutions were responsible for the lack of children's self-determination. Some authors, Holt in particular, defined 'children's rights to vote, work for money, sign contracts, travel and form their own families' as essentials to eventually achieve the craved freedom.³⁵⁸ Meanwhile, he also promoted 'a return to the past with its extended family, communal life and no distinctions between the worlds of children and adults'. The views sustained by the children's liberationists were labelled from the beginning as really controversial, although some moderate advocates of the children liberationist school, in particular Hillary Rodham, focused their claims on the necessity to recognize children's competence to make their own decisions especially during the judicial hearings where children's interests are represented by others.³⁵⁹ The criticism raised by the children liberation's theory was mostly based on two issues. In the first place the criticism was related to the dangers deriving from the little attention placed on the slow rate of children's physical and mental development. The second concern was grounded on the risk of jeopardizing the relationship between children and parents, a pitfall that could allegedly result from the attribution of adult's rights to minors. The children's liberation movement, hence, endorsed a wrong perception of children's capacities, ignoring all the peculiar differences between childhood and adulthood.³⁶⁰ According to Freeman, the irrelevance of children's age declared by the

³⁵⁶ D. Archard, *Children, rights and childhood* (London: Routledge, 2004):70-84.

³⁵⁷ S. Firestone, *The dialectic of sex: the case for feminist revolution* (New York: Farrar, Strauss and Giroux, 2003).

³⁵⁸ J. C. Holt, *Escape from Childhood* (Harmondsworth: Penguin Books, 1974).

³⁵⁹ See generally Rodham, *supra* n 348.

³⁶⁰ It may be worth to distinguish, for the sake of completeness, 'real' from 'rethorical' liberationists. 'A rethorical liberationist does not actually believe that children should be equals of adults. Rather he thinks that claiming as much is the best way of advancing their interests.' D. Archard, "Children's Rights", *The Stanford Encyclopedia of Philosophy* (Summer 2011 Edition), Edward N. Zalta (ed.).

(<http://plato.stanford.edu/archives/sum2011/entries/rights-children/>, accessed 1 September 2011).

children liberationists did simply not square with the common knowledge of biology, psychology and economics as he defines the liberationists' case as 'politically naïve, philosophically faulty and plainly ignorant about psychological evidence'.³⁶¹

4.1.3 Child-protectionists

As Fortin underlines 'the need to protect children from being forced into adulthood before they are sufficiently mature is a common theme of those opposing the liberationists' call for children to gain autonomy rights.'³⁶² Using Minow's words 'alongside with those who 'urged children's rights to liberate young people from a constraining status, worked others who also advocated for children, but sought new protections, services and care.'³⁶³ In fact, child protectionists committed themselves to protect children through judicial rulings and changes in legislation, supporting a model also known as the 'nurturance model'. In particular, child protectionists advocated special programs for children, on the basis that they needed vastly more help and care than adults.³⁶⁴

Child-protectionists share some of the concerns which characterize the so-called 'paternalists', namely the urge to take care of children and shelter them against their own actions as well as against the external world.³⁶⁵ In particular, paternalism was found on the idea that, since children lack any kind of autonomy because of their undeniable and physiological immaturity, adults should decide on their behalf and guide them in each and every sector of life.³⁶⁶ Paternalistic restraints have been, and still are, applied by those in a

³⁶¹ See Freeman, supra n347 at3, from the same author see M. Freeman, 'The Limits of Children's Rights', in M. Freeman and P. Veerman *The Ideologies of Children's Rights* (The Hague: Martinus Nijhoff Publishers, 1992).

³⁶² See J. Fortin, *Children's Rights and the Developing Law* (London: Reed Elsevier, LexisNexis UK, 2003).

³⁶³ M. Minow, 'What Ever Happened to Children's Rights?', in *Minnesota Law Review* 80(1995): 268.

³⁶⁴ See H. H. Foster, *A Bill of Rights for Children* (Springfield Illinois: Charles C Thomas Publishers, 1977).

³⁶⁵ See Fortin, supra n362 at 21.

³⁶⁶ One of the prominent theorists of paternalism was John Stuart Mill who considered self-evidently that children are too immature to be autonomous. J.S. Mill, *On Liberty and the Subjection of Women* (London: Penguin Classics, reprinted 1985): 73. According to Freeman 'the most extreme position (on paternalism) is taken by Hobbes. In the *Leviathan* he put forward the view that children occupied a position of complete dependence [...]. He argued that fathers had the power of life and death over children.' Supra n347 at53.

position of power over children, including not only parents and teachers, but also the judiciary that, according to Eekelaar, when subjecting children to coercive paternalism, may ignore their interest in making choices in their own lives.³⁶⁷ According to Raz, independence and autonomy cannot be regarded as ‘all or nothing’ concepts in the sense that some situations may indeed justify the use of coercion when it is necessary to protect someone else; moreover paternalistic coercion can be excused, although not legitimised, by ‘the trust reposed in the coercer by the coerced person’.³⁶⁸ Both protectionists and advocates of paternalism agree that children cannot be treated as adults, either been granted the same rights. Purdy justifies this statement affirming that ‘if one accepts that there is at least one protective right which restricts children’s liberty, which applies only to children and not to adults, then one has rejected the “equal rights for children thesis”’.³⁶⁹

4.2 Discussing children as rights holders

In order to fully understand children’s status under international law and determine to what extent they may be considered able to claim for reparations in the aftermath of gross human rights violations and serious violations of international humanitarian law, it is necessary to briefly explain what being a right-holder means and which are its far-reaching implications.³⁷⁰ As Dworkin declares we need to ‘take rights seriously’.³⁷¹ Even though he did not refer explicitly to children’s rights, this statement can be extended to them without

³⁶⁷ J. Eekelaar, ‘The Importance of Thinking that Children have Rights’, in *Children, Rights and the Law*, P. Alston et al. (London: Clarendon Press, 1992).

³⁶⁸ J. Raz, ‘Liberty and Trust’, in P. George, *Natural Law, Liberalism and Morality* (Oxford: Oxford University Press, 1996):121.

³⁶⁹ L.M Purdy, *In their Best Interest? The Case against Equal Rights for Children* (Ithaca and London: Cornell University Press, 1992).

³⁷⁰ [Rights] are indispensably valuable possessions. A world without them, no matter how full of benevolence and devotion to duty, would suffer an immense moral impoverishment. Persons would no longer hope for decent treatment from others on the ground of desert or rightful claim[...].’ See J. Feinberg, ‘Duties, Rights and Claims’, in *American Philosophical Quarterly* 3(1966):137-144.

³⁷¹ R. Dworkin, *Taking rights seriously* (London: Duckworth, 1977).

misleading the author's thought. Why is it so important to recognize that children have rights? Because rights offer *fora* for action and:

without rights the excluded can make requests, they can beg or implore, they can be troublesome; they can rely on what has been called *noblesse oblige*, or on others being charitable, generous, kind, co-operative or even intelligently foresighted. But they cannot demand, for there is no entitlement.³⁷²

Rights are traditionally described as 'entitlements (not) to perform certain actions, or (not) to be in certain states, or entitlements that others (not) perform certain actions or (not) be in certain states'.³⁷³ Rights require a twofold analysis, embodying a description of their form (or internal structure) and a description of their function, in a nutshell what they do for the subjects who hold them.³⁷⁴ According to Hohfeld some rights present a complex internal structure that is normally composed of four basic elements, the so-called 'Hohfeldian incidents', which are 'the privilege, the claim, the power and the immunity'.³⁷⁵ Assuming that the Hohfeldian incidents utterly explain a right's internal structure, what remains still unsolved are the issues related to a right's function.

4.2.1 The 'will' theory and the 'interest' theory

There are two main theories which deal with the function of rights, namely the will theory and the interest theory.³⁷⁶ The will theory asserts that the 'capacity for freedom' is what characterizes human agency as it constitutes the core of every account of rights. Will

³⁷²M. Freeman, 'Why it remains important to take children's rights seriously?', *International Journal of Children's Rights* 15(2007): 5-23.

³⁷³L. Wenar "Rights", The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2011/entries/rights/>>.

³⁷⁴ *Ibid.* at 1.

³⁷⁵W. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

³⁷⁶See R. Cruff, 'Rights: Beyond the Interest Theory and the Will Theory?', in *Law and Philosophy* 23(2004):347-397.

theory's advocates and upholders, in particular Hart, Kelsen, Wellman and Steiner, argue that the function of a right is 'to give its holder control over another's duty'.³⁷⁷

The will theory, hence, affirms that to have a right consists of having the ability to establish what others may or may not do, in other words the function of rights is translated into the exercise of one's 'authority over a certain domain of affairs'.³⁷⁸ According to Hart, such authority, or control, reaches its fullest measure when the right holder bears the following powers, namely the power to waive or extinguish the duty or leave it in existence, the power to enforce the duty or leave it un-enforced and the power to waive or extinguish the resulting duty of paying compensation. The will theory over the years excited adverse criticism, mostly based on the fact that within the will theory there can be no such thing as un-waivable rights, definable as the kind of rights over which the holder has no power.³⁷⁹ Moreover, the will theory, as it is going to be further discussed in the next paragraph, tends to exclude from the category of right-bearers all the subjects who are not capable of exercising sovereignty, in particular children.

The interest theory, instead, has been often described as more capacious than the will theory. To use Raz's words to explain the interest theory: 'X has a right, if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.³⁸⁰ According to it, the function of a right is to promote the interests of the right-holder. The 'owner' of a certain right does not 'choose' to exercise or to waive it, but he/she acts for the purpose of furthering his/her own interest. One of the main features of the interest theory, hence, is represented by its twofold attitude to admit the existence of un-waivable rights and to consider as legitimate rights holders all the subjects that are excluded by the will theory for

³⁷⁷ Generally Wenar, *supra* n373.

³⁷⁸ *Ibid.* at 11. See also H.L.A. Hart, 'Legal Rights', in *Essays on Bentham* (Oxford : Clarendon, 1982): 183. 'The idea of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the rights is a small scale sovereign to whom the duty is owed.'

³⁷⁹ For example the 'unwaivable right not to be enslaved', on this point see N. MacCormick, 'Rights in Legislation', in P. Hacker et al., *Law, Morality and Society: Essays in Honour of H.L.A Hart* (Oxford: Oxford university Press, 1977): 192.

³⁸⁰ J. Raz, 'Legal Rights', in *Oxford Journal of Legal Studies* 4(1984):1-21.

their incapability of exercising sovereignty over someone else's duties.³⁸¹ Nevertheless, the interest theory, like the will theory, presents relevant failings, as it appears to be misaligned with the common understanding of rights and it equates them to mere interests.³⁸²

4.2.2 Applying the will and the interest theories to children

As pointed out in the previous paragraph the will theory affirms that all rights consist in the protection of an individual's choice. The core of the theory lays in the assumption that the right-holder possesses the ability to waive or demand the right's enforcement. Since the will theorists significantly restrict the class of potential rights holders, including only those who have certain capacities (namely 'the capacities to exercise choice in controlling their own actions and the duties of others'),³⁸³ children, alongside animals and incompetent adults, are plainly excluded. On the other hand the interest theory firmly argues that all rights consist in the protection of individual interests, broadening the group of legitimate rights holders, but at the same time, according to its detractors, 'cheapening' the notion of right itself.

MacCormick, an upholder of the interest theory, uses children's rights as a 'test case' to demonstrate the fallacy of the will theory.³⁸⁴ In particular, according to his analysis, the will theory asserts the centrality of remedies: the existence of a right is subordinated to the possibility to enforce someone else's correlative duty, *ubi remedium, ibi ius*. On the contrary, he affirms that it is because children have rights that the imposition of legal provisions compels the adults to fulfill their duties towards them, *ubi ius, ibi remedium*.³⁸⁵ In particular, MacCormick points out that, at least since birth, children do

³⁸¹ See J. Thomson, *The Realm of Rights* (Cambridge, Mass: Harvard University Press, 1990) and also J. Waldron, *Theories of Rights* (Oxford: Oxford University Press, 1984).

³⁸² See in general D. Lyons, *Rights, Welfare and Mill's Moral Theory* (Oxford: Oxford University Press, 1994).

³⁸³ L. Wenar, 'The Analysis of Rights', in M. Kramer ed, *Essays in Honour of H.L.A. Hart* (Oxford: Oxford University Press, 2008).

³⁸⁴ See N. MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982): 154.

³⁸⁵ On this point see Fortin *supra* n362 at 14.

have the rights to be nurtured and cared for until they are capable of caring for themselves; such rights can be labeled as moral rights which do not need to be enshrined in law. Therefore, he concludes that the only possible solution is to reject the will theory since it appears unequivocal that children have rights, both moral and legal ones.

Hart, a prominent advocate of the will theory, was fully aware of the fact that ‘one of the most arresting theses to which the will theory commits its upholders is the verdict that children and mentally incapacitated people have no rights’.³⁸⁶ In order to overcome such criticism, Hart suggests to consider children as possessors of rights, although autonomously incapable of exercising choices. Nevertheless, choices can be made for them and exercised by their representatives, most obviously children’s parents and guardians. Hart’s recognition of children as rights-possessors, but not as fully legitimate holders, ensues from their ‘uniqueness’. According to him, the comparison with comatose or mentally impaired adults is erroneous because ‘not all humans are mentally impaired, but all humans were once children’³⁸⁷, meaning that, as adults *in fieri*, children cannot be completely excluded from the class of rights holders identified by the will theorists. Both rights’ theories can be, hence, ‘adjusted’ to accord (at least some) rights to children, nevertheless children’s rights do not represent a ‘straightforward test-case to determine which theory of rights is correct’ and neither the will theory nor the interest theory are capable of playing a crucial role in the affirmation of children as rights bearers.³⁸⁸

4.2.3 The gradualist approach towards children’s rights

Feinberg defines a right as ‘something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame’.³⁸⁹ In other words, Feinberg identifies rights with claims, asserting that ‘to have a right is to have a valid claim against someone whose recognition as valid is called for by some set of governing Rules or moral principles’.³⁹⁰ Such a statement has been supported by several authors, who agree on the

³⁸⁶M. Kramer et al., *A Debate over Rights* (Oxford: Oxford University Press, 1998):69.

³⁸⁷Please see Wenar, *supra* n373.

³⁸⁸*Ibid.* at5.

³⁸⁹ See Feinberg, *supra* n346 at58.

³⁹⁰J. Feinberg, ‘The Nature and Value of Rights’, in *Journal of Value Inquiry* 4(1970):243-257.

strong connection existing between rights and claims. In particular Skorupski argues that the aim of rights is to specify what the right holder is entitled to demand of others, underlying that ‘demand’ implies the permissibility of compelling performances or exacting compensation for non-performance.³⁹¹ With regard to children, Feinberg identifies certain categories of rights which pertain to them and over which they are legitimized to lay claims. He distinguishes amongst:

‘A’ rights that belong exclusively to adults, ‘A-C’ rights that can be exercised by both adults and children and finally ‘C’ rights, namely the rights that only children possess. ‘A’ rights include mainly the so-called liberty rights (the right to vote, to practice a religion etc.), ‘A-C’ rights are mostly welfare rights that protect bodily integrity, health and privacy, whilst ‘C’ rights can be further divided in two broad categories.³⁹²

The first one comprises all the rights which protect children because of their special status and vulnerability, the second one, instead, includes the ‘rights in trust’ (defined by the author himself as ‘the rights to an open future’). This second group of ‘C’ rights are ‘anticipatory autonomy rights’, meant to impose ‘limits on the parental authority and duties on the part of the state to protect (and foster) these rights’.³⁹³ Eekelaar draws on Feinberg’s intuition of ‘rights in trust’ arguing that children hold some ‘developmental rights’, depictable as the rights which allow children to cultivate their full potential.³⁹⁴ Such rights, that a child exercises to enter the adulthood, presuppose the attribution of a certain degree of autonomy. According to LaFollette it is possible to discern between two different kinds

³⁹¹ J. Skorupski, *The Domain of Reasons*(Oxford: Oxford University Press, 2010). Skorupski consider ‘demand’ and ‘claim’ as synonyms, whilst Feinberg affirms that claims can clearly be distinguished from demands, in particular ‘claims presuppose legitimate entitlements even if they are not recognised, while demands do not necessarily do so, since claims are founded on rights and demands can be grounded on might.’ See J. Feinberg, ‘The Nature and Value of Rights’, in *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980): 315.

³⁹² See Wenar supra n373.

³⁹³See J. Feinberg, ‘A Child’s Right to an Open Future’, in *Whose Child? Parental Rights, Parental Authority and State Power*, W. Aiken, H. LaFollette et al. (Totowa, NJ: Littlefield, Adams and Co, 1980):126-127.

³⁹⁴See J. Eekelaar, ‘The Emergence of Children’s Rights’, in *Oxford Journal of Legal Studies* 6(1986):161-182.

of autonomy, the first one called ‘descriptive autonomy’, which pertains to children’s volitional and intellectual skills, the second one known as ‘normative autonomy’, concerning the issues of how the state and the parents ought to deal with children.³⁹⁵ He suggests that children should be granted circumscribed normative autonomy that needs to be gradually increased in proportion to the growth of their descriptive autonomy. This ‘gradualist’ approach has been adopted also by Brennan, who sharply uses it to legitimize the possession and the exercise of rights by children. In place of the interest theory and the will theory, which failed to cope with the issue of children’s rights, Brennan affirms that the scope of having rights is to protect both interests and choices. Due to well established physiological and sociological factors, namely physical and mental immaturity, children in the early stage of their lives can exercise the rights they hold to protect their interests, but as their abilities (and autonomy) develop, they become capable to wield the same rights to protect their choices.³⁹⁶ The identification of such rights has been extensively debated by the doctrine, as pointed out already with regard to the classification proposed by Feinberg. Nevertheless, the argument supported is that, once the theoretical grounds for children’s rights have been established, it is advisable to rely on legal instruments to determine which rights then pertain to children. Therefore, the following sections will deal with the international framework that ‘governs’ children’s rights in general and their right to reparation in particular.

4.3 Children’s rights within the international law framework

The enter into force of the CRC ‘suggests that the idea of children entitled as adults to demand recognition for their rights is *nowadays widely accepted*,³⁹⁷ however international

³⁹⁵S. Brennan, ‘Children’s Choices or Children’ Interests: Which do their Rights Protect?’, in *The Moral and Political Status of Children: New Essays*, D. Archard and C.Macleod (Oxford: Oxford University Press, 2002):61.

³⁹⁶According to Brennan children’s rights evolve and the rights that protect their interests are different from those that protect their choices, on the contrary I support the idea that children’s rights are always the same, what changes is the way children exercise them throughout the diverse stages of their lives.

³⁹⁷ Emphasis added.

documents are not able *per se* to legitimise the conviction that children do enjoy rights'.³⁹⁸ It may be worth mentioning here that already before the drafting of the Convention on the Rights of the Child the international community questioned itself about the possibility to enshrine the rights of the children in a proper document.³⁹⁹ To a certain degree the 'sudden' interest towards children's rights and freedoms can be ascribed to the growing awareness of the existence of human rights pertaining to all human beings and to the urge to identify within the mankind different sub-groups, or clusters, of individuals in need of extra safeguard and *ad hoc* provisions. The International Bill of Human Rights, combined with all the related human rights treaties, did lay down the grounds for a comprehensive set of rights from which each and every man in the world should benefit, nevertheless, how the struggle to defeat discrimination against women has utterly proved that some categories of people required the international community to deploy special efforts. In the case of children, the fact that they were particularly affected by both the 'Great War', WWII and the respective aftermaths did spread the awareness they were no longer just bystanders, but victims of serious crimes and as such in need of extensive protection by the international community.⁴⁰⁰

4.3.1 The two Declarations of the Rights of the Child

The first global attempt to draft a document entirely devoted to children is dated back to 1924, when the Fifth Assembly of the League of Nations adopted the Declaration of the Rights of the Child, better known as the Declaration of Geneva.⁴⁰¹ The declaration was 'brief and aspirational', since its aim was to invite the state parties to follow its principles

³⁹⁸ See Fortin *supra* n362 at 39.

³⁹⁹ 'The earliest instruments focused on the protection of children, but providing only a piecemeal protection from specific forms of economic and sexual exploitation. In 1919 the International Labour Conference adopted the Minimum Age Industry Convention followed two years later by the adoption by the League of Nations of the International Convention for the Suppression of Traffic in Women and Children.' See G. Van Bueren, *International Documents on Children* (The Hague: Martinus Nijhoff Publishers, 1993).

⁴⁰⁰ See Freeman, *supra* n347 at 19.

⁴⁰¹ For a more detailed description of the history of the Declaration of Geneva, see Van Bueren *supra* n339 at 9.

to promote children's welfare. It contained only five principles focused on the urge to guarantee children's wellbeing by feeding them, encouraging by all means their normal development and stressing the urge to relief them in times of distress.⁴⁰² Moreover, the declaration was not concerned with states' obligations, but it rather placed duties upon 'the men and women of all nations', underlying that the Assembly's intention was not to create a binding instrument, but rather to shed light on children's special needs. The 1924 declaration was followed by a second one, adopted by the Temporary Social Commission of the Economic and Social Council of the United Nations ('Social Commission') in 1959. Instead of writing a brand new charter, the Social Commission decided to maintain the form, the structure and the contents of the previous declaration, but adding the amendments needed to transform it into a more comprehensive text.⁴⁰³ The preparatory work for the new declaration started in 1949 and it took ten years before the Draft Declaration was finally submitted to the General Assembly. Again, the declaration contained no binding obligations towards states parties and there were a number of additional rights proposed by both states and international organizations which failed to be incorporated.⁴⁰⁴

In particular, during the drafting stage a number of states, above all Poland, did express their preference in favour of the adoption of a convention rather than of a second declaration. As an alternative they supported the idea that the declaration should contain at least an appeal to the governments, requesting them to adjust their domestic legislation to the principles enshrined.⁴⁰⁵ The majority of states, however, opposed these requests mostly because 'the time had not yet come for the conclusion of a convention' nor to oblige state parties to translate their abstract commitment to the cause of children's rights into practice.⁴⁰⁶ On 29 November 1959 the Declaration was adopted by the General Assembly

⁴⁰²The Declaration's preamble states 'By the present Declaration [...], men and women of all the nations, recognizing that mankind owes to the child the best it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.'

⁴⁰³See ECOSOC, 3rd year, 7th Session, Supplement no 7, 31.

⁴⁰⁴See Van Bueren supra n344 at 11.

⁴⁰⁵UN Doc E/CN.4/780.

⁴⁰⁶See Van Bueren, supra n344 at 15: '[...]The great economic, social and cultural differences and the greatly divergent view on morality and religion prevailing in the various member states would give rise to many problems which must, at least for the time being, be considered to be insoluble.'

without abstentions, unlike the Universal Declaration of Human Rights. Although the Declaration of the Rights of the Child was not a binding legal instrument, its unanimously adoption accords it a greater weight than other General Assembly's resolutions as it suggests that it was characterized by a strong moral force and that its principles were widely accepted and recognized by the international community. Notwithstanding its status of 'manifest rights' the 1959 Declaration represented a step forward towards the enhancement of children's rights, especially if compared to its predecessor. Within the 'new' Declaration children eventually (and slowly) began to be perceived as subjects of international law and not as only mere recipients, in particular since they were finally recognised as being capable to 'enjoy the benefits of specific rights and freedoms'.⁴⁰⁷

The United Nations designed 1979, the twentieth anniversary of the Declaration of the Rights of the Child, as the International Year of the Child.⁴⁰⁸ Such a designation according to Van Bueren acted as 'an emotional magnet' which drew states towards the idea that the time was ripe to draft a Convention on the Rights of the Child.⁴⁰⁹ Poland was probably the most motivated upholder of the Convention, in fact it submitted a first draft to the Commission on Human Rights in 1978 with the hope to see the treaty concluded in 1979 and properly 'celebrate' the International Year of the Child. The text proposed by Poland did not match the wishes neither of the Commission nor of the other member states, willing to expand the contents of the Convention and its impact. The preparatory works started when the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was still in the negotiation phase. The Convention on the Rights of the Child at the beginning of its drafting stage was 'pushed into the background' since states delegates were required to attend both treaty working groups and priority was

⁴⁰⁷See UN Doc E/CN.4/L.52.

⁴⁰⁸'[...] The International Year of the Child does not belong to the tradition of child liberation. Its values, its whole ethos, harked back to an earlier era of concern for children [...] Almost every country in the world took part in the International Year of the Child in some way or other. Lip-service at least was paid to the ideal entrenched in the United Nations Declaration.' On this point see Freeman *supra* n347 at 24. See also J. Harris, 'The Political Status of Children' in K. Graham, *Contemporary Political Philosophy: Radical Studies* (Cambridge: Cambridge University Press, 1982).

⁴⁰⁹See Van Bueren, *supra* n344 at14.

given to the CAT.⁴¹⁰ Notwithstanding its initial ‘impasse’ the Convention developed far beyond the original expectations as it did not just focus on economic, social and cultural rights like it was originally foreseen in the first draft.

4.3.2 Children’s rights under the CRC

Since its adoption in 1989, the Articles embodied in the CRC have been classified in several ways. One possible approach is to identify ‘welfare rights’ and ‘agency rights’ as the main groups of rights within the Convention. The first ones guarantee to children certain forms of treatment such as the minimum standard of health care, education and protection from violence and cruelty; whilst the second ones require the children to take action and choose whether to exercise them or not, such as the right to participation.⁴¹¹ For other authors, *in primis* Archard, the ‘summa divisio’ within the CRC has to be drawn between ‘participation rights’ and ‘protection rights’. The first ones consider children as independent agents capable of making their own choices, whilst the second cluster of rights qualifies children as vulnerable and dependent beings in need of protection against harms.⁴¹² This distinction, compared to the previous one, probably has the merit to offer a wider understanding of what ‘participation’ means since it directly connects the principle embodied in Article 12 to other provisions of the CRC, such as Articles 5, 13,14,15.⁴¹³

⁴¹⁰See in general S. Detrick et al., *The United Nations Convention on the Rights of the Child: a Guide to the Travaux Préparatoires* (Dordrecht: Martinus Nijhoff Publishers, 1992).

⁴¹¹On this point see J. Hart, ‘Children’s participation and international development: Attending to the political’, in *International Journal of Children’s Rights*, 16 (2008) 407–41. ‘For some, participation is a means either to ensure the greater relevance, efficiency and impact of development projects or to achieve democratic and inclusive processes of governance. For others, it is an end in itself: through the processes understood as participatory practice, the poor and marginalized acquire influence, skills, knowledge, networks and experience that they can use to improve their lives. Overall, participation is conceptualized as ‘empowering’, oriented towards the transformation of lives and societies.’

⁴¹²D. Archard, *Children, rights and childhood* (London: Routledge, 2004):70-84.

⁴¹³*Ibid.* at 10, ‘If participation is interpreted more broadly, meaning any involvement in activities, other rights such as those to physical integrity (articles 19 and 37) and to a name and identity (article 7) might belong to this cluster as well.’

Hammarberg, instead, proposes a classification based on the so-called four ‘P’s: participation of children in decisions involving their own destiny; protection of children against discrimination and all forms of neglect; prevention of harm to children and provision of assistance for their basic needs.⁴¹⁴ LeBlanc, otherwise, divides the rights in ‘survival rights, membership rights, protection rights and empowerment rights’. The survival rights include not only the right to life, but also the right to all those rights which sustain life, e.g. the rights to an adequate standard of living and to health care. Membership rights are those which regulate the role of the child within his or her community and family. Protection rights are in charge of safeguarding the child against abuses perpetrated by the State or individuals. Empowerment rights secure respect for children as affective members of the communities they live in, fostering their freedom of thought and conscience and encouraging their capacity for self-determination.⁴¹⁵ All the classifications proposed, hence, emphasise the existence and the relevance within the CRC of provisions which trigger and protect children's direct involvement in every social dynamic that might affect them, including also the ones which take place in transitional justice contexts.

4.3.3 Children’s right to participation

Article 12 of the CRC is represented as one of the most innovative of the Convention and it is considered as a unique provision in human rights treaty law.⁴¹⁶ Its scope is to address the legal and social status of children, who, on the one hand lack the adults' full autonomy but, on the other hand, are allegedly recognized by the CRC as subjects of rights. Paragraph 1

⁴¹⁴T. Hammarberg, ‘The UN Convention on the Rights of the Child and how to make it work’, in *Human Rights Quarterly* 25 (1990) 97-115

⁴¹⁵L.J. LeBlanc, *The Convention on the Rights of the Child: UN Law-making on Human Rights*, (Lincoln: University of Nebraska Press, 1995): 28.

⁴¹⁶Article 12 of the CRC establishes that: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural Rules of the national law.

assures to every child capable of forming his or her own views the right to express those views freely. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.⁴¹⁷

The importance of this Article has been constantly stressed by the Committee on the Rights of the Child (the Committee). In the fulfilment of its duty to respond to each state's periodic reports on the progress made to implement the Convention, the Committee often underlines that the principle contained in Article 12 'should be given greater priority'. The right of all children to be heard and taken seriously constitutes a fundamental value amongst those expressed by the CRC, therefore the Committee has identified it as one of the four general principles enshrined in the Convention, the others being: the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests.

The main purpose of Article 12 is not just to establish a right, but also to be considered as a 'source' for the interpretation and implementation of all other provisions.⁴¹⁸ As the Committee itself stated in the General Comment on Article 12, since the adoption of the Convention in 1989 remarkable progresses, although not yet sufficient, have been achieved at different levels in the development of legislation, policies and methodologies to promote the implementation of Article 12. A widespread practice has emerged in recent years, which has been broadly conceptualized by the principle embodied in Article 12 as 'participation', even if the term 'participation' does not appear in the text. The meaning of 'participation' has evolved and it is nowadays widely used to describe on-

⁴¹⁷The Committee on the Rights of the Child, Fifty-first session, Geneva, 25 May-12 June 2009, General Comment No. 12 (2009), The right of the child to be heard, Para.3.

⁴¹⁸On the contrary some authors, Fortin in particular, state that this role appertains to article 3 of the UNRC. 'In theory, none of those four principles is more important than any other, nevertheless article 3. Requiring a commitment to child's best interest underpins all the other provision. The Committee always emphasizes that article 3 must be used as a guiding principle when interpreting all convention's provisions. Consequently it should be reflected in all legislative and policy matters affecting children, including legislation on health, education and social security. Furthermore, it should underwrite all obligations regarding the allocation of resources. In other words, all children's rights should be interpreted in accordance with their best interests.' J. Fortin., *Children's rights and the developing Law* 3rd ed. (Law in Context), (Cambridge: Cambridge University Press, 2009), 40.

going processes, which include information-sharing and dialogue between children and adults based on mutual respect. The notion of participation, thus, captures an essential feature of the CRC; according to Krappmann 'the Convention highlights that every child has the right to be recognized as a “unique individual”’, capable of expressing his/her own views and personal intentions, by all the other human beings and also *by the State and its institutions*.⁴¹⁹ Children’s involvement should not be only a momentary act, but rather the starting point for an intense exchange between children and adults on the purpose to develop policies, programs and measures in all relevant contexts of children’s lives.

The provision ends as follows: ‘the views of the child being given due weight in accordance with the age and maturity of the child’, such a conclusive remark might imply a sort of paternalistic restriction, which decries the goals set in the Article, but the Committee has strongly criticized all the attempts to interpret these words in a way that downsizes the relevance of children’s participatory rights. Furthermore, Article 12 has the merit of dismissing the imposition of any age limitation from the exercise of the right to take action and express personal views, meaning that every case should be subjected to a valuation of the child's own capacities.⁴²⁰ It is worth to observe here, in addition to what has been affirmed so far, that children’s status as active subjects within the international law framework gained further legitimation by the combined reading of Article 12 and Article 15 of the CRC. Whilst Article 12 represents the general principle according to which children’s participation is guaranteed and fostered, Article 15, enshrining the right to freedom of association, promotes the establishment and operation of all the activities connected to the notion of 'coming together to achieve a common goal'.⁴²¹

⁴¹⁹L. Krappmann, ‘The weight of the child’s view’ (Article 12 of the Convention on the Rights of the Child), *in International Journal of Children’s Rights* 18(2010): 502-513, (emphasis added).

⁴²⁰On the relationship between children’s right to participation and children’s right to freedom of expression, see Van Bueren, *supra* n344 at 144.

⁴²¹P. Sieghart, *The International Law of Human Rights* (New York: Oxford University Press, 1983).

4.4 From Participation to Reparation?

According to what has been argued in the previous sections, children are legitimate rights holders within international human rights law, and their actions as individuals who benefit of a certain degree of autonomy, especially with regard to matters which significantly affect their lives (and their future), is enshrined and fostered within the CRC. The Convention protects and encourages what have been called ‘children’s agency rights’, and in particular their right to participation. Participation represents a logical precondition to the exercise of the right to reparation (and all the procedural rights connected to it) and therefore Article 12 needs to be read together with Article 39, which, as already mentioned in Chapter 2, enshrines children’s right to reparation under international law. Nevertheless, Article 39 does not make any reference to the capability of children to actively participate in the process which allegedly should lead to the award of reparations, and the only subjects that appear in the text of the provision are the States, which are obliged to take all the ‘appropriate measures to promote physical and psychological recovery and social reintegration of child victims’.

Notwithstanding the absence of a clear mention to the concepts of ‘remedies’ or ‘reparations’, Article 39 is constantly depicted as the one and only legal tool that explicitly connects children (affected by wars, abused or neglected) to the right to reparation. The same lack of specific provisions can also be discovered throughout the Optional Protocol on the involvement of children in armed conflicts. Art 7 of the Optional Protocol takes into consideration the consequences of the acts contrary to the document, obliging the state parties to cooperate in order to achieve the full rehabilitation and social reintegration of the victims of misconducts, but it does not go any further.⁴²² The effective implementation of

⁴²² Article 7 states: 1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations. 2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the Rules of the General Assembly. <http://www2.ohchr.org/english/law/crc-conflict.htm> (accessed December 2011).

Article 39, in a way which may have a concrete impact on children's lives, is intimately tied to the enhancement of the provision enshrined in Article 12 of the Convention. A concrete example of how children's participation can affect children's reparation has been recently found in the transitional justice system set up by the Colombian government, as it going to be better explained in the subsequent paragraphs.⁴²³

4.4.1 The Colombian experience

In Colombia, during the nearly 50 years of dreadful conflict, the main crimes committed against children have been: forced recruitment, kidnapping and displacement.⁴²⁴ In spite of what occurred in other Latin American countries, in Colombia a comprehensive scheme of transitional justice's mechanisms has been set up before the end of the conflict and without the advent of a real political transition.⁴²⁵ In particular with regard to the failed cessation of the hostilities, it is important to mention that only from 2010, with the election of the current President Juan Manuel Santos, the State officially recognised the existence of an armed conflict within the country.⁴²⁶

Nevertheless, the previous government's strategy was focused on two particular issues: demobilization of the guerrilla and empowerment of victims' rights. In order to achieve the dismantling of the illegal armed groups and the fulfilment of victims' needs at

⁴²³ Colombia ratified the CRC in 1991 and the Optional Protocol on the Involvement of Children in Armed Conflicts in 2005.

⁴²⁴ The words of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: 'The challenges faced by the Government of Colombia in providing peace, justice, security and economic opportunity to its citizens cannot be underestimated. Colombia has endured decades of armed conflict and gross human rights violations that have caused a protracted humanitarian crisis, social and political polarization and uneven economic growth.' A/HRC/14/24/Add.2, 31 March 2010.

⁴²⁵ J. Garcia-Godos and K.A. O.Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia*, in *Journal of Latin American Studies*, 42(2010): 487-516. See also N. Offstein, 'An Historical Review and Analysis of Colombian Guerrilla Movements: FARC, ELN and EPL', in *Revista Desarrollo y Sociedad*, 52(2002): 99-142.

⁴²⁶ 'The existence of an armed conflict in Colombia is the subject of some controversy. The Government's position is that Colombia is not engaged in an armed conflict and that the FARC and ELN are terrorists, not belligerents under IHL.' See Alston *supra* n424 at7.

the same time, in 2005 the Law of Justice and Peace (Law 975) was approved.⁴²⁷ The Law 975 represents the final legislative attempt to end the conflict and realize the ambitious twofold transition's plan.⁴²⁸ The efforts officially started in 1997 with the entry into force of the so-called Law 418, which provided the government with a temporary legal instrument to seek a peaceful coexistence with the paramilitary forces.⁴²⁹ The legal actions taken since 1997 have been triggered by the powerful demonstrations of the local social movements, in particular the Children's Peace Movement which operated according to the provision enshrined in Article 12 of the CRC.

On the wake of the enthusiasm produced by Graca Machel's visit, in 1996 the Children's Peace Movement organized an unprecedented vote. UNICEF, together with the National Civil Registry Office, helped to set Colombia's first democratic voting by children. On the purpose to properly advertise the 'elections', children used full-page ads in the daily papers and promoted capillary events across the country. The children appealed to both the army and the guerrillato observe a truce during the day of voting. 'Don't kill anyone when we vote for peace' was their main plea, which surprisingly was heard since no one was killed or injured.⁴³⁰ The 'candidates' in the election were children's own rights and all the twelve rights selected were illustrated with a white hand to symbolize peace. When the votes were counted the result was that in 300 municipalities almost three million

⁴²⁷Law 975 created the Colombian National Reparation and Reconciliation Commission, on the purpose of providing the victims with the right to truth, justice and reparation. The Commission's mandate does not include the task to analyze the economic, social, and political roots of the conflict. Salvador Herencia Carrasco, *Transitional Justice and the Situation of Children in Colombia and Peru*, UNICEF, Innocenti Research Centre Working Paper, 2010, http://www.unicef-irc.org/publications/pdf/iwp_2010_16.pdf (accessed December 2011).

⁴²⁸Internal Displacement Monitoring Centre (IDMC), *Colombia: Land rights activist killed as restitution law comes into force*, 10 June 2011, available at: <http://www.unhcr.org/refworld/docid/4df9ce2e.html> [accessed December 2011]. On 10 June 2011, the law on property restitution (aka the Victims' Law) has been ratified by the Colombian President Juan Manuel Santos, for more details please see the next Paragraph.

⁴²⁹Law 418 has been effective only for a period of two years and in 1999 its validity was prolonged through the entry into force of Law 548. In 2002 Law 548 was replaced by Law 782, which gave the government the legal mandate to eventually start a negotiation with the armed groups. *Ibid.* 496.

⁴³⁰Please see <http://www.korubo.com/Colombia/mouvement.htm> (accessed January 2012).

children participated in the election. As the most important right the majority of children voted for the right to life, followed by the right to peace, the right to love, the right to have a family, whilst the right to justice was the least voted. The ambition behind such initiative was to have an impact on the choices made by the government and, in the first place, to rouse the rest of the society out of its apathy. The latter goal has been achieved when the Citizen's Mandate for Peace, Life and Liberty was launched in October 1997.⁴³¹ A little less than 10 million people voted in a 'peace ballot', expressing their favour towards a politically negotiated solution of the armed conflict and the need to fully respect human rights and humanitarian law.⁴³²

A final clarification is needed, since in Colombia many different associations of citizens are active on the territory. The above mentioned social movements, including of course the children movement, have to be distinguished from the relevant number of victims' organizations. First of all because victim's organizations are 'a really homogeneous group in terms of composition, background, outlook and interests', whilst the main feature of a social movement is its capability to involve a more heterogeneous portion of the community, then, obviously, because the immediate goal pursued by victims' association would be the satisfaction of all the range of rights connected to their status and then eventually the achievement of a long lasting peace.⁴³³ However, due to the active participation of a large part of society, the Colombian experience represents a unique case of transitional justice from below, in the sense that the input for 'change' came clearly from ordinary people, and in particular from the extraordinary efforts made by children.

The youngest members of the Colombian population have also been the victims of the serious crimes perpetrated by the parties involved in the conflict and in particular by

⁴³¹It is worth noting here that the Citizen's Mandate for Peace preceded of only two months the first legal instrument adopted by the government on 26 December 1997.

⁴³²According to the organizers the number of votes was three times that received the next year by all the presidential candidates.<http://www.c-r.org/our-work/accord/colombia/political-peacebuilding.php> (accessed January 2012).

⁴³³Garcia-Godas and Lid, *supra* n 425 at 13 'In Colombia the victim's organizations are based in geographical jurisdictions or on specific characteristics of the victim group, such as the type of violation experienced. The Association of the Mothers of the Candelara-Paths of Hope, The Peaceful Path of Women, The National Indigenous Organization of Colombia represent some significant examples of victims' organizations.'

the guerrilla. In December 2011, 309 former child-soldiers unlawfully recruited by the paramilitaries were identified as the beneficiaries of the reparations awarded as the outcome of a criminal proceeding pending before a national court. The landmark ruling, which is going to be further discussed in the coming paragraph, represents a milestone in the struggle to foster child victims right to reparation and it is allegedly the results of years of children's active participation in the transitional justice process established throughout the country.

4.4.2 The Colombian ambition to issue a 'comprehensive reparations' plan

As already mentioned, the current section of Chapter three focuses on the efforts set up by the government of Colombia since they represent a positive, and yet isolated, example of how children can be regarded as legitimate holders of the right to reparation and, as such, they can be identified as active stakeholders in the struggle towards reconciliation and peace. The existence of a Children Movement and the attention that has been placed on children and youth in the past decade may be seen as the prelude to the ground-breaking ruling recently issued by the Supreme Tribunal of Bogota judiciary district.⁴³⁴ The previous paragraph and the reference to the children's vote already showed children's involvement in the transitional justice process which slowly started taking place in Colombia under the precedent administrations.

Since 2010 the official recognition of the on-going conflict helped creating a deeper awareness of the pain suffered by the victims as it contributed to the establishment of a comprehensive reparation plan, disciplined by the so-called Victims' Law which was finally approved in June 2011. The law focuses in particular on the issue of land restitution, but it also lays down the basis for a renewal of the national institutions in charge of dealing with victims' rights.⁴³⁵ The aims of the Victims Law are manifold, although it pursues

⁴³⁴ In Spanish: Tribunal Superior del Distrito Judicial de Bogota. All the translations from Spanish to English are by the author, who is responsible for any mistakes or inaccuracies that might remain.

⁴³⁵ See Articles 154 et ss. of the Victims' Law which govern the creation of the victims' registry and the procedure for the registration. It is worth to note here that victims have four years starting from the enter into force of the Victims' Law to register.

especially the integration of all the existing plans and programs and the restoration of victims' dignity. The main innovations of the Law are its ambition to adopt a holistic reparative approach, which includes all the five forms of reparation enshrined in the Van Boven-Bassiouni Principles and Guidelines; and the clear distinction made amidst reparations and 'development strategies' (which can be also described as the reinstatement of the fundamental rights jeopardised during the conflict).⁴³⁶ With regard to the first point the Law, after defining the concept of 'victim', affirms his/her right to obtain *reparación integral*, understood as 'adequate, differentiate, transformative and effective' and, above all, implemented according to the violations suffered and the characteristics of the misconduct which led to the victimization.⁴³⁷ In particular reparations can be awarded as the outcomes of administrative proceedings, triggered by the victims' registration in the *Registro Unico de Victimas*, or as the results of judicial proceedings. According to Article 20 the compensation received through administrative meanings cannot be added to the ones issued during a criminal or civil trial, nevertheless the Law affirms that the costs borne by the State to guarantee the additional assistance needed by the most vulnerable victims (notwithstanding the remedial potential attributable to the assistance rendered) will never be deducted from the reparations obtained by them in other contexts.⁴³⁸

<http://www.mij.gov.co/Ministerio/Library/Resource/Documents/ProyectosAgendaLegistaliva/LeyV%C3%A9ctimas420.pdf> (accessed on January 2012).

The government's official website specifies that 'the Victims' registration is a free and fast procedure created to save the victims from the task of turning to different offices to gain the due attention'. http://wsp.presidencia.gov.co/Prensa/2011/Diciembre/Paginas/20111220_09.aspx (accessed on January 2012).

⁴³⁶ Such a distinction is not so sharp-cut, especially in post-conflict settings, see for example Carranza supra n50, 'From Relief to Reparations: Listening to the Voices of the Victims'.

⁴³⁷ See Article 25 of the Victims' Law, entitled 'Derecho a la Reparación Integral'.

⁴³⁸ Ibidem Article 20. See also Article 25 Para1 'Notwithstanding its reparative effects the additional assistance cannot replace the other forms of reparation. Therefore, the costs borne by the state when performing such benefits in no case will be deducted from the administrative or judicial compensation issued in favor of the victims'.

4.4.3 Integral reparation and children

The Victims' Law focuses its seventh title on children and adolescents, stating that, as victims of the conflict, they are legitimately entitled to obtain truth, justice and reparation.⁴³⁹ In addition to that children have the right to be protected from every form of violence or abuse including unlawful recruitment, forced displacement and sexual assault.⁴⁴⁰ The Law explicitly recognises children's right to reparation in general and in Article 182 it specifies children's right to receive the whole range of reparative measures provided for adult-victims according to the 2005 Van Boven-Bassiouni Principles and Guidelines. The Law identifies also the institutions responsible for the design and the implementation of the procedures meant to achieve the process of holistic reparation relating to children and adolescents.⁴⁴¹ In case of monetary compensation issued throughout administrative or judicial proceedings the Law envisages the creation of a trust fund to which child victims will have access when they enter the adulthood.⁴⁴² The Victims' Law, finally, devotes its attention to the child victims of one of the most brutal and widespread violations perpetrated during the Colombian conflict, namely the unlawful and forced recruitment of children. Article 190 establishes that until they reach the majority girls and boys who experienced such a crime are entitled to the same reparation regime (whose enforcement has been assigned to the Colombian Institute of Welfare Service) as all the other child victims, once they turn eighteen years old they can be eventually included in the process of reintegration led by the High Council for the Social and Economic Reintegration of the People and Groups who joined the Guerrilla.⁴⁴³

The pattern on which the Colombian government embarked itself culminated with the issuing of a landmark ruling on 16 December 2011.⁴⁴⁴ The sentence represents a

⁴³⁹ 'Title 7 (of the Victims' Law): Integral Protection of child-boys, child-girls and adolescents victims'.

⁴⁴⁰ See Article 181 et ss.

⁴⁴¹ The competent authorities designated by the Law are the Executive Committee for the Care and Reparation of the Victims together with the Colombian Institute of Welfare Service. (See Article 182 Para2).

⁴⁴² See Article 185.

⁴⁴³ See Article 190 Paragraph 2. The precondition to access the process of reintegration is the possession of a certificate to prove the occurred dissociation from the armed group.

⁴⁴⁴ Tribunal Superior del Distrito Judicial de Bogota, Sala de Justicia y Paz, Radicación: 110016000253200782701, 16 Diciembre 2011.

milestone in the struggle towards reparations for child victims and its beneficiaries are 309 young adults who, as children, were unlawfully recruited by Fredy Rendon Herrera, known as El Aleman, the leader of one of the groups engaged in the armed conflict.⁴⁴⁵ In paragraph 742 of the sentence, the first one in the world that mandates reparations to be paid for the recruitment of minors, the right to reparation is defined as ‘a fundamental right, recognised either nationally and internationally, which overcomes the old economic dimension’. The ruling takes into account, and makes clear reference to, the Van Boven-Bassiouni Principles and Guidelines (which already guided the 2011 Victims’ Law), Article 63 of the Inter-American Convention on Human Rights and the Paris Principles on Children and Armed Conflict, stressing that children are the legitimate bearers of the right to reparation and as such they are entitled to benefit from all the five forms of reparative measures identified by the international instruments, both individually and collectively.⁴⁴⁶ The sentence distinguishes amongst direct and indirect victims, specifying that the former child-soldiers are the direct victims of the crime and their family members the indirect ones. For each of them the judges have quantified the due compensation upon a calculation of the material and moral damages suffered as a consequence of the recruitment. While the sections related to the so-called ‘indemnizaciòn’ appear to be extremely detailed,⁴⁴⁷ the ones concerning the rehabilitation, the satisfaction and the guarantees of no-repetition do not present any innovative feature since they mostly rely on the above mentioned Articles contained in the Victims’ Law, which establish the institutions responsible of implementing and designing the reparative measures provided for children. To use the words of the experts who supported the former child-soldiers during the trial ‘all the forms of reparation

⁴⁴⁵ El Aleman was the leader of the so-called ‘Élmer Cárdenas’ Paramilitary group.

⁴⁴⁶ The Paris Principles can be defined as ‘A significant political-level initiative is the strong commitment expressed by 76 Member States, including a number of conflict-affected countries, to the Paris Commitments and the Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, which provide guidelines on the disarmament, demobilization and reintegration of all categories of children associated with armed groups.’ <http://www.un.org/children/conflict/english/parisprinciples.html> (accessed on February 2012). The Principles focus in particular on former child-soldiers’ reintegration within the society and they make no references to reparation, nevertheless they offer some important insights on the rehabilitation of the minors unlawfully recruited by the armed forces.

⁴⁴⁷ Please see Para 813 et ss. of the ruling.

awarded need to be seen as a long-term process rather than as a “moment” of recognition and immediate satisfaction’.⁴⁴⁸ The judgment in question has been widely referred to as a relevant example of reparations awarded to child victims. In particular the International Center for Transitional Justice (‘ICTJ’) in its observations addressed to the ICC Trial Chamber 1 in the conclusive phase of the *Lubanga case* has underlined that:

There are two important aspects of the El Alemán case that we respectfully ask the Court to note. First, the Colombian court did not grant collective material reparations to the victims of forced recruitment. Compensation and rehabilitation was awarded to individual victims and their relatives. The court did not consider as a reason to treat victims as a ‘collective’ their having been commonly recruited into the same paramilitary group. The court did not think that the experience of each victim was the same or that the impact on each of them could be ‘collectivized.’ On the other hand, the court’s ‘request’ to the State for reparations and guarantees of non-repetition were meant to benefit communities from which the victims were recruited. It is inherently a community-based request for reparations. The Colombian court also ‘requested’ the State to investigate the complicity of a corporation that appears to have financially supported the paramilitary group involved in the El Alemán case. The court requested the government to identify and seize assets of a corporation (“Chiquita Brands), with the objective of using those assets to fund reparations for victims of the paramilitary groups operating in the Urabá region, where the El Aleman group operated.⁴⁴⁹

The approach followed by the Bogota Tribunal raises many questions related to both the issue of collective reparations (a term that, as underlined in Chapter 2, still lacks a legal definition) and the thorny issue of non-state actors’ liability, including private corporations and illegal armed groups. However, what is first and foremost remarkable about the ruling is certainly the recognition of children as legitimate holders of the right to reparation.

4.5 Conclusions

The Chapter aimed at building up the theoretical framework that supports the recognition of children as legitimate rights holders. It did so by taking into account the most prominent movements and theories which have dealt so far with the issue of children as capable stakeholders within the society. It also underlined the strong and binding relationship

⁴⁴⁸Interventions of Dr N. Winkler, Dr. Rubio Serrano, Dr. Zuescun, see supra n105 at 444.

⁴⁴⁹ See ICTJ, ‘Submission on Reparation Issues’, ICC-01/04-01/06-2879 14-05-2012 1/22 CB T, at Para 45-46.

between the right to participation and the right to claim for reparation. In particular the final section, focused on Colombia, served the purpose to provide the reader with an example of a national strategy which recognised and encouraged the exercise of both rights by children victims of violations perpetrated during an armed conflict. The following Chapter will provide an overview of how and to what extent the main actors entitled to award reparation to child victims of armed conflicts have so far accomplished their tasks, highlighting in particular the difficulties and the main issues that children have to cope with when they seek justice and redress in the aftermath of gross human rights violations and serious violations of humanitarian law.

5. Assessing child victims' right to reparation

5.1 Introduction

The aim of this Chapter and of the following one, is to provide the reader with an overview of the specific 'exercise' of children's right to reparation. Since the focus of the present work is on child victims of war, this part will introduce and discuss only settings, judicial and non, which have dealt so far with the consequences of gross human rights violations and serious violations of humanitarian law perpetrated against children during or in the aftermath of national and international conflicts. The actors involved in the process, which are responsible to satisfy children's right to reparation, are traditionally national and international criminal courts dealing with individual perpetrators, regional human rights bodies, States, truth commissions, trust funds and transitional justice instruments. They can act in concert as 'lashed' parts of a holistic justice process or they can behave independently when no such process of integral transformation has been set up in the country.

The previous Chapter served the purpose to lay the theoretical framework that governs children's right to reparation, from both a philosophical and a legal point of view. Therefore, the present and the next one will deal with the concrete issues arising when children 'face' the actors entitled to award reparations as the outcomes of judicial proceedings or as the results of national strategies. In order to ensure comprehensiveness, the current Chapter will be divided in two main parts, the first one exploring the right to reparation as exercised before international criminal courts and tribunals, in charge of establishing individual perpetrators criminal responsibility, and the second one focussing on the Inter-American Court of Human Rights as it is the only regional judicial body that has dealt with the kind of violations addressed in this thesis, which gave rise to international state responsibility. Each section, then, will be particularly 'devoted' to a specific 'actor', describing how and to what extent it allows children's participation and how it satisfies children's right to reparation as enshrined under international law.

5.2 Children's right to reparation before international tribunals and courts

With the emergence of the international criminal justice system, accountability for the crimes under international law has been sought through a relevant number of judicial means.⁴⁵⁰ As already pointed out in Chapter 3, during the last decade the international community had to cope with large-scale human rights and humanitarian law violations often perpetrated against children. The primary responsibility for prosecuting those crimes, which due to their gravity constitute a treat to international peace, is borne by national courts.⁴⁵¹ Nevertheless, since in many countries affected by armed conflicts the infrastructure of the judicial system is often non-existent or inadequate, the international community has been charged with assisting states to end the culture of impunity and pursue justice.

The work of the first international tribunal set up to deal with war crimes was already referred to in Chapter 3, especially with regard to its legacy in terms of 'scant' victims' participation. Therefore, the following section will discuss to which degree the international (and hybrid) tribunals and courts comply with children's right to participation and reparation. Since the number of judicial bodies dealing with violations of humanitarian law and human rights law has significantly grown over the years they will be introduced and discussed in chronological order.

5.2.1 A glance at the ICTY and the ICTR

The ICTY and the ICTR were both created to determine responsibility for the crimes committed during armed conflicts.⁴⁵² They have jurisdiction over natural person without

⁴⁵⁰ See *International Criminal Justice and Children*, No Peace without Justice and UNICEF Innocenti Research Centre, released on September 2002.

⁴⁵¹ See in general C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', in *Virginia Journal of International Law* 42(2001):81-162.

⁴⁵² It does not fall within the purpose of the present work to explore the effectiveness of the *ad hoc* tribunals in fulfilling their mandate. For further reference, see L.A. Barria and S. D.Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', in *The International Journal of Human Rights* 9(2005): 349-368. And also M. A. Drumbl, 'Punishment Post-Genocide: From Guilt to Shame to Civis in Rwanda', in *New York University Law Review* 75(2000): 1212-1236.

references to their age, unlike the ICC, since Article 26 of the Rome Statute clearly states that the court shall have no jurisdiction over people who were under the age of 18 at the time of the alleged commission of the crime.⁴⁵³ None of the *ad hoc* tribunals has ever considered to prosecute children, although they both focus their resources and efforts on prosecuting the persons responsible of serious violations of humanitarian law and their jurisdiction is not limited by reference to the degree of responsibility of the accused.⁴⁵⁴

Therefore, children could only play a role as witnesses and victims in the proceedings held before the *ad hoc* tribunals. In the first place it is worth to mention that all the international courts and tribunals have some form of a victims and witnesses unit ('VWU'), though the level of support they are able to provide varies considerably. In the case of the ICTY and the ICTR the 'significance' of those units has been defined as 'quite modest'.⁴⁵⁵ They have been established with delay and hesitation by including *ad hoc* provisions in the tribunals' RPE and their early functioning has been fully based on voluntary contributions.⁴⁵⁶ Only at a later stage the expenditure for these units has finally been incorporated in the overall regular budget, although voluntary contributions are still relevant. The majority of sentences issued by the *ad hoc* tribunals make clear that their primary scopes are 'deterrence and punishment', consistently with the scant attention paid to the implementation of the VWUs and therefore to the victims' role. Nevertheless, as

⁴⁵³ C. Van de Voorde and R. Barbaret, 'Children and International Criminal Justice', in M. Natarajan eds, *International Crime and Justice* (Cambridge MA: Cambridge University Press, 2011): 41.

⁴⁵⁴ As it is going to be better addressed in the coming paragraphs, the Special Court for Sierra Leone instead only tries the people who bear the greatest responsibility and since children usually did not occupy position of leadership such a limitation can effectively prevent the prosecution of child perpetrators.

⁴⁵⁵ T. Ingadottir, F. Ngendahayo and P. Sellers, 'The Victims and Witnesses Unit', in T. Ingadottir (ed.), *The International Criminal Court: Recommendations on Policy and Practice* (New York: Transnational Publishers, 2003): 5.

⁴⁵⁶ 'The VWU at the ICTR was established from resources available in the Tribunal's Voluntary Trust Fund[...], the ICTY's VWU was financially and professionally supported by the European Union and the Danish Rehabilitation and Research Centre for Torture Victims from 1995 to 1998, when the Tribunal assumed financial responsibility for the salaries of the staff participants. The ICTY and the ICTR's VWUs relied heavily on gratis staff on their early years'. Ibid. at 10.

Evans has pointed out ‘the experiences of victims in the *ad hoc* tribunals have provided an impetus for advocacy towards recognition of victims’ rights’.⁴⁵⁷

5.2.1.1 Children as witnesses before the ad hoc tribunals

According to Rule 90 of the Rules of Procedure and Evidence of the two *ad hoc* tribunals,⁴⁵⁸ a child witness who does not understand the significance of the solemn oath declared before giving evidence is allowed to testify without taking the oath if the Chamber believes the child sufficiently mature to report the facts within his/her knowledge.⁴⁵⁹ Nevertheless, the judgment cannot be based only on the unsworn testimony of the child. As it has to comply with the human rights standard on the right to a fair trial, the child’s testimony needs to be further corroborated in order to be considered reliable, however, no corroboration is required in case of child victims of sexual assault.⁴⁶⁰

Besides Rule 90, the RPE of both Tribunals do not contain any child-specific provisions, hence, in case of a child-witness willing to testify before the ICTY or the ICTR the general provisions regarding the protection of witnesses and victims shall be the only ones to apply. So far children did not testify before the *ad hoc* tribunals, and most likely it will never happen in the future since both tribunals investigate crimes perpetrated more than 15 years ago. None of the *ad hoc* tribunals is statutorily required to hire staff with proper expertise on child protection and children’s rights as they simply refer to ‘qualified staff’; however both tribunals have dealt with cases involving crimes committed against children. In particular with regard to crimes of sexual violence that targeted also children and that have been discussed before either the ICTY or the ICTR, the testimony of the adult-witnesses have been considered sufficient and minors have not been

⁴⁵⁷ *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998, para. 288; and also *Prosecutor v. Nikolić*, Case No. IT-02-60/1, Judgement, 2 December 2003, para. 86.

⁴⁵⁸ ICTY Rules of Procedure and Evidence, rule 90(b), ICTR rule 90(c).

⁴⁵⁹ There is no reference on the way such maturity is eventually tested by the Chamber.

⁴⁶⁰ See Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence.

heard.⁴⁶¹ Nevertheless, in the Krstić case held before the ICTY a witness aged 22 gave evidence of what occurred in Srebrenica when he was 17 years old and in the Foča trials two girls, who were minors when they suffered from mass rape, also testified.⁴⁶² According to Bakker, in the ICTY jurisprudence the age and sex of the victims of crimes against humanity have been specifically taken into account as an *aggravating factor* in the process of sentencing. The author referred in particular to the Tribunal's judgment in the *Kunarac case*, where the Trial Chamber considered that the relatively youthful age of one victim, who was twenty years old, and the very young age of another, who was twelve years old, when the offences of rape and sexual enslavement were committed against them, have been considered as aggravating circumstances.⁴⁶³

5.2.1.2 The right to reparation before the ICTY and the ICTR

As already underlined above, the primary concern of the drafters of the Statute and the RPE of the ICTY and the ICTR is to punish the individuals who committed serious violations of international criminal law and international humanitarian law.⁴⁶⁴ Whilst in some civil law jurisdictions the victims have *locus standi* to initiate civil claims within criminal proceedings,⁴⁶⁵ the *ad hoc* tribunals are mainly based on the adversarial system

⁴⁶¹ See for instance *The Prosecutor v. Jean Paul Akayesu* (ICTR-96-4), 2 September 1998, Para 416 et ss. And also *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Foča case, IT-96-23 and IT-96-23/1, 22 February 2001).

⁴⁶² Before the ICTY approximately four per cent of witnesses were aged 18-30.

⁴⁶³ C. Bakker (2010), 'Prosecuting International Crimes against Children: the Legal Framework', Innocenti Working Paper No. 2010-13. Florence, UNICEF Innocenti Research Centre,; 6: 'The Trial Chamber also held that "The fact that his offences were committed against particularly vulnerable and defenceless girls and a woman is a matter considered in aggravation." These considerations were confirmed on appeal. The Appeals Chamber also held that the Trial Chamber has "*an inherent discretion* to consider the victim's age as an aggravating factor"'.

⁴⁶⁴ This is clear from the words used in the Resolution 827(1993), which established the ICTY and stated that this was set up 'for the sole purpose of prosecuting persons responsible for serious violations of international law'. UN Doc. S/RES/827 (1993).

⁴⁶⁵ See in general de Brouwer, *supra* n27.

where the victims are represented by the Prosecution at any stage of the trial and their role is solely to appear as witnesses.

The forms of reparations, mentioned in the Statute and its RPE, are compensation, restitution and rehabilitation. As for the first kind of reparation, according to Rule 106 victims shall seek compensation before the national courts or other competent body, meaning that the *ad hoc* tribunals have left to municipal *forums* the cumbersome task to deal with victims' requests.⁴⁶⁶ Restitution instead can be provided directly by the ICTY and the ICTR in a special hearing as stated in Rule 105.⁴⁶⁷ According to de Brouwer 'the most direct and accessible way for victims to receive restitution of property or the proceeds thereof seems to be by order of the Trial Chamber upon the determination of the rightful owner on the balance of the probabilities'.⁴⁶⁸ Such a determination can be made by the Chamber only through a proper level of investigation, conducted mostly by the prosecution, during the pre-trial or the trial stages. If the Chamber fails in determining the legitimate ownership, the competent national authorities are required to take over the identification of the owner, upon which the Trial Chamber will order the restitution of the property. In both cases the Registrar is responsible for the transmission to the competent national authority of the orders for the restitution of the property and its proceeds, since the national authority is the one in charge of the orders' enforcement. With regard to the third and last form of reparation, namely rehabilitation, it is enshrined in Rule 34 of the ICTR's RPE; whilst in case of the ICTY the correspondent Rule 34 merely alludes to the mandate to provide 'counselling and support for them (the victims), in particular in cases of rape and sexual assault'. According to the ICTR's Rule 34 the establishment of the Victims and

⁴⁶⁶ Rule 106(b): 'Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation'. On this point please see 89 'In the drafting process of the RPE of the Tribunals, some attempt was made to address the issue of compensation. However, as noted by Cassese, this possibility was compromised due to the absence of a corresponding provision in the Statutes.' See Cassese *supra* n7 at 429.

⁴⁶⁷ See also Article 24(3) of the ICTY Statute, mirrored by Article 23(3) of the ICTR: '[I]n addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, the rightful owner'.

⁴⁶⁸ See *supra* de Brouwer *supra* n27 at 396.

Witnesses Support Unit serves the purpose of ensuring that victims receive relevant support, including *physical and psychological rehabilitation*.⁴⁶⁹

Unlike the ICTY, the ICTR has tried to address at least the most immediate and concrete necessities of the victims, in particular of those who suffered from sexual violence and found themselves in need of rehabilitative measures. In fact, some of the victims who appeared as witnesses before the ICTR have been provided with medical assistance, including antiretroviral treatment in case of persons positive to HIV.⁴⁷⁰ The assistance, lavished also after the trial, has been granted only and exclusively to the victims who testified before the tribunal, stressing again that the ICTR, and the ICTY as well, do not separate the concepts of ‘victim’ and ‘witness’.⁴⁷¹

It is noteworthy that there have been a few attempts to change the victims’ situation and ensure due respect for their right to reparation. In particular, in November 2000 the Prosecutor, addressing the UN Security Council, advocated for the creation of a Claim Commission to compensate the victims.⁴⁷² At the same time, to endorse and enforce the request of the Prosecutor, the judges of the ICTY submitted a report to the Security Council through the Secretary General of the UN. The report underlined the existence of a general trend under international law towards the recognition of an individual right to demand reparations and it recommended the creation of a body which could operate as an

⁴⁶⁹ Emphasis added.

⁴⁷⁰ See A. de Brouwer, ‘Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and their Families’, in *Leiden Journal of International Law* 20(2007): 207-237.

⁴⁷¹ See Evans, supra n207 at 89: ‘As recognised by the former President Jorda of the ICTY, victims have largely been considered as “object-matter or an instrument” in the proceedings of the ad hoc Tribunals.’

⁴⁷² Address by the Prosecutor of the ICTY/ ICTR, Carla del Ponte, to the Security Council on 21 November 2000, ICTY Press Release JL/P.I.S./542-e, www.un.org/icty/pressreal/p542-e.htm : ‘[I]t is regrettable that the Tribunals’ statutes [...] make only a minimum of provision for compensation and restitution to people whose lives have been destroyed...my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it [...] I would therefore respectfully suggest to the Council that the present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna.’

international compensation commission.⁴⁷³ Moreover, the report has affirmed that the victims of the crimes under the ICTY's jurisdiction are entitled to compensation and that, to avoid further delays in the proceedings, the best solution would be not to amend the Tribunal's mandate, but rather to set up an external mechanism. The 'appeals' of the Prosecutor and the judges have simply remained unheard as no official reply from the Security Council was ever received. Nevertheless, these initiatives demonstrate the growing awareness of a strong necessity to broaden the scope of international criminal law and to create room for the exercise of victims' rights, especially their right to participate and ask for reparations.

Although not classifiable as reparations or redress measures, both Tribunals, years after their establishment, set up an Outreach Program. The outreach programs have been created as trust funds outside the main Tribunal budgets, which put them 'in a situation where they must constantly fight for their financial survival and divert resources to fundraising rather than outreaching'.⁴⁷⁴ The ICTR's outreach program started in 1998 and the activities carried on so far include broadcasting proceedings of the Tribunal in the Rwandan national television and radio, arrange travel facilities to the Tribunal and a monthly newsletter. The ICTY's outreach program began its work in 1999, by translating the Tribunal's website and documents into Bosnian, Croatian and Serbian. Its range of activities appears to be much wider than the one accomplished by the ICTR's outreach program, as it encompasses also the organization of conferences, roundtables and training seminars across the former Yugoslavia, including events specially crafted for high school and university students meant to fulfil the Tribunal's mandate to contribute to lasting peace and reconciliation.⁴⁷⁵ The activities of the ICTY's Outreach Program with a focus on education and information represent the only concrete effort made by the Tribunal towards

⁴⁷³ See generally Evans supra n 207.

⁴⁷⁴ See *Effective Public Outreach for the International Criminal Court*, Lawyers Committee for Human Rights (January 2004).

<http://web.undp.org/comtoolkit/whycommunicate/docs/Best%20Practices/EffectivePublicOutreachfortheInternationalCriminalCourt.pdf> (accessed February 2012).

⁴⁷⁵ For further details see <http://www.icty.org/sections/Outreach/OutreachActivities> (accessed March 2012).

the young people who live in a country that has been extensively affected by war and ethnic conflicts.

5.2.2 The Special Court for Sierra Leone and child victims

The conflict in Sierra Leone from 1991 to 2002 was marked, probably more than any other conflict, by the brutality and overabundance of the crimes committed against children. The Special Court was set up in 2002 as part of the international agreement between Sierra Leone and the UN, and found itself in the difficult position of dealing with the prosecution of heinous crimes that most of all affected the civilian population. In response to the escalation of violence and terror perpetrated throughout the country for more than ten years, a complex transitional justice process has been established, which included the Truth and Reconciliation Commission, charged of investigating the roots of the conflict and making recommendations for the future, and the Special Court, a so-called ‘hybrid’ retributive judicial body, characterized by extensive national involvement, both in substantive and in practical terms. Unlike the ICTY and the ICTR, the efforts of the SCSL are explicitly directed towards the people who bear the greatest responsibility for the crimes committed during the war. Nevertheless, in the light of the significant number of child-perpetrators involved in the hostilities,⁴⁷⁶ the Statute of the Court affirms its jurisdiction over persons aged 15 at the time of the alleged commission of the crimes.⁴⁷⁷ Notwithstanding the wordings of its mandate, the Court has never contemplated to prosecute people who were minors when the conflict occurred, partially due to its mandate which targets unequivocally the ‘leaders’, partially due to the acknowledgment that child-

⁴⁷⁶UNICEF estimates that 15,000 to 30,000 children were involved in combat activities during the conflict in Sierra Leone. While some of these children may have been used as spies, labourers or sex slaves, many of them played a key role in combat as well.’ See K. Sanin and A. Stirneman, *Child Witnesses at the Special Court for Sierra Leone*, War Crimes Study Centre University of Berkeley, (March 2006).

⁴⁷⁷ See Article 7(1) of the Statute of the SCSL: ‘The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child’.

perpetrators are above all victims.⁴⁷⁸ Therefore the Statute specifically sets out two crimes for which the victimization of a child is a material element, namely conscription and enlistment of children younger than 15 into armed forces or their use as active participants in the hostilities and the abuse of girls under the 1926 Prevention of Cruelty to Children Act, including abuse of girls younger than 14 and abduction of girls for immoral purposes.⁴⁷⁹ With regard to the first crime, the charge of conscription and enlistment of children, the Court has been extensively questioned about its authority and jurisdiction to prosecute the accused of this crime. The issue arose during the first trial held before the SCSL, the *Hinga Norman case*, which started in June 2004. Prior to the beginning of the proceeding the defence team argued that the recruitment of child-soldiers was not a crime under international law at the time of the alleged commission of the offence, and, since Article 1(1) limits the Court's authority to deal only with the crimes committed in the territory of Sierra Leone since 30 November 1996, the indictment violated the principle of non-retroactivity of criminal law, traditionally expressed with the Latin maxim *nullum crimen sine lege*.⁴⁸⁰ The Appeals Chamber, in response, stated that the prohibition to recruit children to take part in the hostilities has become part of customary international law even before 1996. To support this statement the Court cited the UNCRC, the Geneva Conventions and the African Charter on the Rights and Welfare of the Child, and it stressed that, even though none of these conventions expressly prohibits the recruitment of

⁴⁷⁸ See Special Court for Sierra Leone, public affair office (press release November 2002): 'While some of these children may have been used as spies, labourers or sex slaves, many of them played a key role in combat as well'. <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2BaVhw%3D&tabid=196> (accessed March 2012).

⁴⁷⁹ See Special Court Statute Article 4(c) and 5(a). See V. Oosterveld, 'The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?', in *Human Rights Review* 10(2009):73-98, 'An estimated 215,000–275,000 women and girls may have been subjected to one form of gender-based violence during the Sierra Leonean conflict'.

⁴⁸⁰ See *Sam Hinga Norman's Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment*, 26 June 2003, Case No SCSL-2003-08-PT.

child-soldiers, ‘a norm does not need to be explicitly stated in an international treaty for it to crystalize as a crime under customary international law’.⁴⁸¹

As for the second offence for which the victimization of a child is a material element of the crime, namely the abuse of girls under 14, it is worth mentioning here that it constitutes a domestic crime under Sierra Leonean law but so far the prosecutor did not bring any charges under this provision.

5.2.2.1 Children’s participation during the SCSL’s trials

So far only a few children appeared as witnesses before international and hybrid tribunals, nevertheless the SCSL distinguished itself in this field by adopting several procedures and measures to ensure witness protection for young people seeking to refrain from re-traumatization. According to UNICEF, at present all the international and hybrid judicial bodies require children to testify during the trial and to be subject to cross-examination, and the child is not allowed to give pre-recorded testimony and no courts consent the use of intermediaries to rephrase the questions in a simpler language.⁴⁸²

The issue of balancing the fair trial standard enshrined under human rights law with the need to give voice to the most vulnerable victims, who are often accused of giving tainted evidences and of being influenced by the adults, has emerged also with regard to the work of the Special Court for Sierra Leone. In the first place it is interesting to note that the Court confers to the notion of ‘child’(witness) a broad significance in the sense that the prosecution’s principal criteria to determine whether or not a witness can be regarded as a ‘child-witness’ is his/her past as child-soldier; therefore the individual’s current age does not appear into the calculus, meaning that the Court mostly focuses on the witness personal history and vulnerability. The prosecution teams decide to include a witness in the child-witnesses’ category (named category B) if one of the following circumstances occur: when

⁴⁸¹ Case No.SCSL-2004-14-AR72(E). The assumption that individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability was already made clear in the *Tadic case* held before the ICTY, please see *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (“Tadic Jurisdiction Decision”), Para.94.

⁴⁸² Please see UNICEF and No Peace without Justice, supra n445 at 16.

the witness him/herself claims to know his/her age, the age has been determined during the demobilization process, the legal guardian knows the alleged child-witness age, or, as already mentioned, the person was a child-soldier.

Once a witness has been classified as ‘child-witness’ he/she is entitled to benefit from the special measures set up by the SCSL. Article 16(4) of the Statute established the Witnesses and Victims Services Unit (‘WVSU’) within the Registry and according to it the Unit shall provide counselling and assistance to all the witnesses, including children. Rule 34 of the Rules of Procedure and Evidence further states that the WVSU is in charge of developing both short and long term plans for witnesses’ protection and support. According to Rule 69(b) the Trial Chamber shall consult the WVSU with regard to the protective measures needed during the trial, which may encompass the non-disclosure of victim’s identity and testimony via video link from a different room.⁴⁸³

The accomplishment of child-witnesses’ protection required the Special Court to design, relying on UNICEF’s expertise, a set of guidelines able to promote children’s participation without jeopardizing their efforts to overcome the traumatic events occurred. In the first place the WVSU, the Office of the Prosecution (‘OTP’) and the experts from UNICEF identified the suitable child-witnesses amongst those who were more resilient and already resettled with their families or communities. Secondly, UNICEF provided a ‘training’ to both prosecution and defence investigators in order to make them able to interrogate the child-witnesses, taking into account their best interests and accordingly the guidelines developed. The exercise of children’s right to participation, as enshrined in Article 12 of the UNCRC, is subjected to the full consent of the child and his/her parents or legal guardian. Since many children were still displaced when the Court started its work and the first witnesses were selected, the consent was often given by the child and the child protection agency (‘CPA’) responsible for taking care of him/her during the process of demobilization. Once the child-witness is ‘confirmed’, he/she is brought to Freetown, where the Special Court is located, and comes under the care of the WVUS. Child-

⁴⁸³ See also Rule 75 and 85 of the SCSL’ RPE, amended May 2005. The option to testify in camera or via video link is available for all vulnerable witnesses, including children, nevertheless neither the Statute nor the RPE specify children’s vulnerability. However the Trial Chambers have ruled that child-witnesses under 18 have always the opportunity to testify using these methods instead than appearing in the courtroom.

witnesses, although separated from adult-witnesses, are accommodated into the so-called ‘safe-houses’, assigned also to the adult-witnesses who, according to the investigators, may be under a threat under their community.⁴⁸⁴ Immediately after the arrival the WVUS’s qualified staff provides the children with psychosocial support and relevant information about the process and the procedures thereof.⁴⁸⁵

Children, exactly like adult-witnesses, are entitled to an allowance for their service before the Court, allowance which corresponds to 16,000 Leones per day, the equivalent of 5.25 USD.⁴⁸⁶ Notwithstanding the fact that the amount of the allowance is in line with the witness compensation scheme adopted at the ICTY and the ICTR, the payments made by the Special Court to its witnesses have attracted much criticism, mostly due to the ‘chronic poverty’ of the country and the huge gap existing between the allowance and the average salary received by workers of the public and private sectors. In particular with regard to children one of the concerns expressed by UNICEF pertains to the individualistic approach followed by the Court, which privileges the payment of benefits to each child-witness rather than the development of a comprehensive strategic plan able to trigger the reintegration and rehabilitation of many child-witnesses. Another point raised by UNICEF is that the child-witnesses after the trial appear ‘ill-equipped for the reality of the life in Sierra Leone’, as they normally come back to school with clothes and supplies that prompt the classmates to think that the child in question is a former child-soldier who is taking advantage of his/her demobilization efforts.⁴⁸⁷ However, it is important to point out that the

⁴⁸⁴ R. Horn, S. Vahidy and S. Charters, ‘Testifying in the Special Court for Sierra Leone: Witness Perceptions of Safety and Emotional Welfare’, in *Psychology, Crime & Law*, 17 (2011): 435-455. ‘The witness remains in the safe house until after they have testified. Following their testimony, some are relocated within Sierra Leone, and others are relocated abroad within the West Africa region. WVUS covers the expenses of relocation and provides the witness with a one-off “start-up” payment. In practice, the vast majority of witnesses are not deemed as being under a high “perceived threat”, although their security status is always open to review. Most witnesses receive no services until the testimony date is imminent,’ at 443.

⁴⁸⁵ *Ibid.* at 444.

⁴⁸⁶ The allowance corresponds to the daily salary of a UN General Service 1, step 1 level employee in Sierra Leone.

⁴⁸⁷ *Ibidem.*

benefits and allowance granted to the witnesses, and especially to the child-witnesses, cannot be seen as reparative measures.

5.2.2.2 Assessing children's right to reparation before the SCSL

As underlined in the previous paragraph, children's participation has so far not only been allowed and endorsed before the SCSL, but to some extent the Court has boosted children's active involvement designing a new path immediately followed also by the ICC. Nevertheless, unlike the International Criminal Court, whose contribution is going to be analysed in the coming section, the Special Court for Sierra Leone did not seek to fulfil victims' right to reparation, focussing mostly on the prosecution of the people who borne the greatest responsibilities for the crimes committed during the civil war and to access to justice for the child victims, who were finally enabled to confront their perpetrators before an international judicial forum in order make their voice heard.

Children's right to reparation will not be satisfied solely by giving the possibility to take part in the proceedings as witnesses and to benefit from the facilities thereof, in particular from the hefty allowance lavished by the SCSL that cannot (and shall not) be regarded as a compensation for the heinous offences experienced. The Statute of the Special Court does not contain any provision that entitles the victims to claim for reparations. The only exception is represented by Article 19(3) of the Statute that affirms:

[I]n addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

As it is going to be addressed in the next Chapter which deals with non-judicial mechanisms, the transitional justice process set up in Sierra Leone in the aftermath of the conflict has assigned to other actors the task of issuing reparations to the victims, including child victims.

5.2.3 The 'International Children Court'?

As Bakker underlined 'the international recognition of the abhorrence of the crime of recruiting and using children in armed conflict and the determination to prosecute their perpetrators are also confirmed by the ICC'.⁴⁸⁸ According to its Statute the Court has jurisdiction over the most serious crimes of concern to the international community as a whole and, on the wake of the SCLS' statute it explicitly includes crimes committed *against* children amongst those.⁴⁸⁹

The definition of 'victim' provided by Rule 85(a) of the ICC's RPE simply affirms that 'victims mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.'⁴⁹⁰ A child victim according to this definition is every human being under the age of 18 who has suffered from genocide, crimes against humanity and war crimes.⁴⁹¹ Although so far no sentences, and no reparations orders, have been issued by the Court it is significant that great priority has been given to the prosecution of crimes committed against children and also that, for the first time, an international tribunal has explicitly denied its jurisdiction over people under the age of 18.⁴⁹² In the first case brought before the ICC, *Prosecutor v. Thomas Lubanga Dyilo*, the accused was charged, and on March 14th 2012 unanimously found guilty, with the war crimes of conscripting and enlisting children under the age of 15 into the Force Patriotique pour la Libération du Congo ('FPLC') on the purpose of using them actively in the hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003.⁴⁹³ The Pre-Trial Chamber I, which confirmed the

⁴⁸⁸ See in general Bakker supra n463.

⁴⁸⁹ See Article 6(e) of the Rome Statute 'Forcibly transferring children of the group to another group', Article 8(2)(b)xxvi and Article 8(e)(2)vii, these are according to the Rome Statute the crimes for which the victimization of a child is a material element of the crime.

⁴⁹⁰ See also Rule 85(b): 'Victims may include organizations or institutions that have sustained direct harm to any of their property which 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.'

⁴⁹¹ See Hamzei supra n73 at 2.

⁴⁹² See Article 26 of the Rome Statute.

⁴⁹³ Mr Lubanga Dyilo was the President of the Union des Patriotes Congolais ('UPC'), the Commander-in-Chief of its military wing, the FPLC, and its political leader.

charges in January 2007, in the first place distinguished between the commission of the crimes in the context of international armed conflict and in the context of non-international armed conflict, using the pertinent Articles to ground two different charges. Secondly it clarified the notions of conscription and enlistment, separating the forcible recruitment from the voluntary one.⁴⁹⁴ As for the definition of the terms ‘participation in the hostilities’ the Court followed the approach adopted by the SCSL, recurring to a broad definition of ‘participation’, which incorporates activities such as ‘spying, scouting and sabotaging’, and lowering the threshold of the accused responsibilities.⁴⁹⁵

Just like the SCSL, the ICC has fully recognised the abhorrence of the crimes committed against children, but differently from the other international tribunals, and also from the Special Court, the ICC has stressed the need to *empower* the children affected by those offences, making them not only able to testify, but also to apply for the so-called ‘victim status’ and to claim for reparations.

5.2.3.1 Children as ‘victims’ before the ICC

As already mentioned, through the conferment of the ‘victim status’ the ICC offers an ‘alternative and innovative mechanism which may be less stressful for a child and is less-likely to cause re-traumatization’.⁴⁹⁶ Nevertheless to be granted the victim status, which consents the participation in the trial without being a witness, some requirements need to be met. In the first place a child victim, like the adult-victims, must have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights through acts or omissions that constitute gross violations of human rights law or serious violations of humanitarian law.⁴⁹⁷ Secondly, according to Article 68(3) of the Rome Statute, in order for the views and concerns of the victim to be legitimately presented and considered (at stages of the proceedings determined to be

⁴⁹⁴ In case of voluntary recruitment the perpetrator is guilty when he knew (or must have known) that the children had not attained yet the age of 15.

⁴⁹⁵ See generally on this point Bakker, *supra* n463.

⁴⁹⁶ See UNICEF and No Peace without Justice, *supra* n477 at 18.

⁴⁹⁷ *Ibidem*. See also Rule 85(a) of the RPE.

‘appropriate’ by the Court) his/her personal interests have to be affected.⁴⁹⁸ The way the provision was formulated during the negotiations phase, which led to the adoption of the Court’s Statute, has left the concept of ‘personal interests’ undefined and, therefore the task to shed light on the scope of victims’ participation has been entirely deferred to the bench’s decisions.⁴⁹⁹ The findings of the Court can be summarized by affirming that the procedural status of victim, in case of natural persons, may be assigned to the applicants who have suffered harm if the crime from which the harm resulted falls within the jurisdiction of the Court and if it is included in the charges being tried.⁵⁰⁰ In particular with regard to the last point, namely the necessary existence of a link between the harm alleged by the victims and the charges against the accused person, it is noteworthy that the ICC in its first case had originally adopted a broader approach allowing the potential participation of all the victims ‘of the crimes under the Court’s jurisdiction’ perpetrated in DRC and not only of those crimes contained in the charges brought against Thomas Lubanga. Writing in dissent, the Honorable René Blattmann pinpointed how such a ploy transgressed the fundamental principles of criminal law, in particular the principle of legality according to which the victim status and the consequent rights of participation and reparation have to be linked to the charges confirmed against the accused person. In his view the full respect of criminal

⁴⁹⁸ See A. Zammit Borda, ‘The Role of Victims in the First Trial of the International Criminal Court’, in *Trinity College Dublin Journal of Postgraduate Studies* 9 (2010): 20-34. According to the author the configuration of Article 68(3) is based on paragraph 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the GA of the UN in November 1985.

Available at: http://works.bepress.com/aldo_zammitborda/2.

⁴⁹⁹ See on this point C.H. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ in *Northwestern Journal of International Human Rights* 6(2008):459-545. Please see with regard to the Lubanga case: ICC, Decision on Victims' Participation, Doc. ICC-01/04-01/06-1119, 18 January 2008, p58. See also Situation in the Democratic Republic of Congo, the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07-579 10-06-2008 1/54 VW PT, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case".

⁵⁰⁰ On the ICC reparations regime see in general ‘Justice for Victims: the ICC’s Reparations Mandate’, Redress Report issued on May 2011.

http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf

(accessed March 2012).

justice's principles is instrumental to the recognition of victims as right holders rather than as mere beneficiaries of the Court's concession and in order for the victims' participation to be meaningful it has to be strictly regulated in accordance with the Rome Statute.⁵⁰¹ The ICC's current orientation, corroborated by the Appeals Chamber, has definitely leaned toward a restricted interpretation of Rule 85(a) which, read together with Article 68(3) of the Rome Statute, admits exclusively the participation of the victims, direct or indirect, who can demonstrate a nexus between the harm experienced and the particular crimes charged.⁵⁰²

If the above mentioned conditions are satisfied, a child, *or* someone acting on his/her behalf, can finally apply.⁵⁰³ The status of victim bestowed on the child to have a highly qualified legal representative who advocates for him/her before the Court, to benefit from the same protective measures prescribed for child-witnesses and to claim for reparations.

5.2.3.1.1 The issue of children's identity

The procedure to attain the victim status requires the completion of the paperwork and the proof of the child's identity. According to Regulation 86 of the Court's Regulations all the victims have to submit a written application to the Registrar. If the application is successful, in the sense that the applicant has been acknowledged as a victim, then he/she can participate in the trial and/or claim for reparations. The acquirement of the victim status, which can be relatively easy for an adult, according to Hamzei, is still very

⁵⁰¹ See *Prosecutor v. Thomas Lubanga Dyilo*, supra n445, Separate and Dissenting Opinion of Judge René Blattman to Decision on Victim's Participation, Public, at Para 21.

⁵⁰² See ICC, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Doc. ICC-01/04-01/06-1432, 11 July 2008.

⁵⁰³ In the *Lubanga case* the ICC has accepted applications submitted on behalf of the child victims by community leaders, civil society organizations and teachers. Whoever acts on behalf of the child needs to obtain the child's informed consent and, due to the fact that children during the conflicts are often separated from their families or left orphans, in the Rome Statute there is no requirement that the legal representative has to be a parent or the legal guardian. See ICC decision No ICC-01/04-01/06 21/41, 15 December 2008, at Para.67.

complicated in the case of child victims. The first difficulty, in fact, arises when the child has to prove his/her identity. In some countries obtaining a document gets similar to an obstacle race, which goes far beyond the efforts sustainable by a child. Pre-Trial Chamber II in the Situation of Uganda asked the Victims Participation and Reparation Section ('VPRS') to carefully examine the concrete availability of identification documents under the Ugandan law. The results are enshrined in a Report that address all the main concerns, especially with regard to children who are unable to travel on their own and to bear the expenses related to the document's release.⁵⁰⁴ According to the wording of the application form the proof of identity can be generally established through the submission of different documents such as passport, driving licence, letters from local authority or even tax document. Since for many children it may be really difficult, or even impossible, to obtain one of the documents listed above, the ICC's Chambers have decided to admit as proof of identity also family registration booklets, pupil identity cards, school documents and documents issued in rehabilitation centres for children associated with armed groups.⁵⁰⁵

Notwithstanding the circumstance that both Pre-Trial Chambers and Trial Chambers are well aware of the troubles that children have to face in order to 'gain' the victim status, there is a lack of homogeneity in the way they have approached so far the question of 'who' can submit a child's application. Pre-Trial Chambers I and II interpreted Rule 89(3) of the ICC's RPE in a restrictive manner, affirming that children's applications have to be submitted by an adult acting with the consent of the child and that, to be complete and not subjected to immediate rejection, the application must contain a proof of

⁵⁰⁴ See the 'Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda' (prepared by the Victims Participation and Reparations Section on 12 October 2007), 17 March 2008, ICC-02/04-125-Anx, 10. Cited by Hamzei supra n 73 at 4. '[...] An applicant must fill in an application form, seek endorsement from different prescribed offices, pay a processing fee of not less than 30 US Dollars and undergo a waiting period of not less than three months'.

⁵⁰⁵ Situation in the Democratic Republic of Congo, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, 18.

kinship or guardianship.⁵⁰⁶ In other words this ‘reading’ of the Rule prevents children from applying by themselves. Trial Chamber I has endorsed the idea that in principle children’s application to be recognized as victims shall be submitted by an adult acting on his/her behalf, though it removed the barrier of kinship, or guardianship, for the adults acting on behalf of children close to 18. Trial Chamber II, instead, has adopted an indulgent approach towards the applications submitted by children, as it stated that Rule 89(3) of the RPE does not refrain children from submitting the application on their own. Therefore, Trial Chamber II affirmed that the admissibility of children’s applications filled without the support of an adult shall be evaluated on a case-by-case basis.

The lack of a streamlined practice within the Chambers concerning children’s applications risks to downsize the Court’s efforts to strengthen children’s participation. The unique distinction made by the ICC between ‘witness’ and ‘victim’ can shed light on the pattern to follow in order to overcome the limits of a retributive justice system that, as it has been suggested in the previous paragraphs, to some extent ‘uses’ the victims to gain evidence and does not pay attention to their needs. In particular with regard to children the chance of an active participation in the trial, which does not necessarily have to ‘dovetail’ with testifying in a courtroom, might concretely produce positive effects both in terms of trauma recovering and reparations’ awards.

5.2.3.2 Reparations before the International Criminal Court: the general framework

The ICC reparation regime is laid down in Articles 75 and 79 of the Rome Statute and it is further elaborated in Rules 94-99 of the Court’s RPE.⁵⁰⁷ According to Article 75, which can be regarded as the key provision:

The Court shall establish principles relating to reparations or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either

⁵⁰⁶ Pre-Trial Chamber I: ‘the application must contain the consent of the next-of-kin or legal guardian that an application has been made on the minor’s behalf.’ Situation in the Democratic Republic of Congo, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, 31.

⁵⁰⁷ See de Brouwer *supra* n470 at 218.

upon request or on its own motion in exceptional circumstances, determine the scope and the extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which is acting.

Subject to this Article the ICC can only order reparations, after conviction, either directly against the convicted person or through the Trust Fund for Victims. The last option is going to be analysed and discussed in the coming Chapter, which deals with reparations issued through non-judicial mechanisms, whilst with regard to the first one it is clear that the reparations would be strictly related to the liability established at the trial. In this sense, the case ‘built’ by the prosecutor and the charges tried provide the framework for future reparations directly claimable against the convicted person.⁵⁰⁸ As stressed in the recent report launched by Redress, the Prosecutor has focused his work on the ‘most serious crimes’ as stated under Article 5 of the Rome Statute, and this restricted investigation strategy has resulted in ‘almost token cases being brought, with limited charges raised.’⁵⁰⁹ It was already pinpointed how the limitation of the charges impacts, in a significant way, victims’ participation before the Court and in the next paragraphs this thorny issue will be better addressed with regard to the Lubanga case.

Unlike the Inter-American Court of Human Rights and the other regional human rights judicial bodies, which have indeed the power to hold a state responsible and to impose on it an obligation to compel with the reparations ordered, the ICC must primarily rely on the international cooperation of the state parties either to secure assets from an individual perpetrator or to finance, through donations, the Trust Fund for Victims.⁵¹⁰ It has been extensively underscored that in the international criminal law’s domain the responsibility for violations attaches to individuals and not to states. As McCarthy has sharply noted under international law there are no secondary rules that require the individual-perpetrators to remedy the harms caused by their unlawful conduct, meaning

⁵⁰⁸In other words, the persons entitled to apply for the victims’ status would be also the persons legitimated to claim for the reparations awarded directly against the perpetrator found liable of the crimes charged.

⁵⁰⁹ See Redress Report, supra n500 at 29.

⁵¹⁰ See Briefing Paper 4 ‘The International Criminal Court and Reparations for Child Victims of Armed Conflict’, supra n87, :9.

that there is no existing body of international legal principles upon which the Court can rely on when imposing reparations.⁵¹¹ Article 75, thus, attributes to the ICC itself the challenging task to establish reparations principles and to operate a significant change in the way international criminal law has been perceived so far. In fact, to think that the ICTY and the ICTR will make a shift in their compensation regime before the expected, and constantly postponed closure, according to de Brouwer, is no longer a realistic option, and probably it never was.⁵¹² As the ICC's Pre-Trial Chamber has stated when called to decide on the arrest warrant against Mr Lubanga Dyilo '[t]he success of the Court is to some extent, linked to the success of its reparation regime'. It follows that the recognition of victims' rights and needs is not just one of the ICC's characteristics, but it represents a unique and unprecedented feature that distinguishes the Court from the other international criminal justice bodies.⁵¹³

Article 75, moreover, confers to the Court a high degree of discretion as it establishes that reparations shall include, but are not limited to, restitution, compensation and rehabilitation. In May 2011, the Court's President Sang-Hyun Son has officially announced that the reparations principles will be developed through the ICC's jurisprudence rather than prepared and agreed on in advance, as expected and suggested by many actors, in particular NGOs.⁵¹⁴ In crafting its own principles on reparations the Court is encouraged to look at both international public law and international human rights law, nevertheless as it deals with the liability of individual-perpetrators and not with states international responsibility the ICC is 'required to fashion a range of reparation principles that are appropriate for the distinctive legal context in which it operates'.⁵¹⁵

⁵¹¹ See C. McCarthy, *Reparations and Victims' Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012).

⁵¹² See de Brouwer *supra* n470 at 215.

⁵¹³ Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC-01/04-01/06, 10 February 2006, at Para. 136 (annexed to ICC-01/04-01/06, 24 February 2006).

⁵¹⁴ See Redress Report *supra* n500,;24, footnote 120: Opening Address, Reparations before the ICC: Issues and Challenges, Conference organized by Redress and Leiden University/Grotius Centre, Peace Palace, The Hague, 12 May 2011.

⁵¹⁵ See McCarthy *supra* n 511 at 256.

5.2.3.2.1 From 'application' to 'implementation'

As 'advertised' in the Court's website, victims before the ICC may apply for reparations at any time.⁵¹⁶ More precisely, applications for reparations may be submitted 'spontaneously' by the alleged victims according to Rule 94 or they may be triggered by the notification of reparation proceedings made by the Registrar at the request of the Chamber acting on its own initiative as stated in Rule 95(1). The timing of the notification is nowhere specified, nevertheless, since it depends on the Chamber's decision to start the reparations proceeding, it is likely to take place at the normal stage when reparations are addressed, that is, according to Article 75(2), after a judgment on guilt has been issued.⁵¹⁷ The applications triggered under Rule 95(1) and the ones which have been transmitted earlier and submitted according to Rule 94, shall be considered concurrently.

All the victims who decide to claim for reparations *proprio motu*, may fill their applications at the commencement of the trial and send it to the Registrar. To be complete, the application must contain all the information listed in Rule 94 of the RPE, on the purpose of making the procedure easier and more accessible for the victims the VPRS has prepared a standard application form through which victims may demand 'participation or reparations', or both.⁵¹⁸ In order to claim for reparations, victims may be legally

⁵¹⁶See on this point the Second Report of the Registry on Reparations ICC-01/04-01/06 submitted to the Trial Chamber I on 1st September 2011 (and reclassified as Public on 19/03/2012), at Para166: 'The transmission of reparation requests should, under Article 94(2), normally take place at commencement of the trial, subject to any protective measures. This timing largely depends on the moment when applications under Rule 94 are received by the Court. Article 94(1) does not provide any guidance, but it should be noted, that in practice the Registry continues to receive applications for reparation throughout the trial.'

⁵¹⁷ See Rule 95(2): 'If, as a result of notification under sub-rule 1: (a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94; (b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.'

⁵¹⁸See Redress Report supra n500,:17: 'A new "combined" participation and reparation application form has been devised by the Registry and approved by the Presidency in 2010, replacing the somewhat unpopular and lengthy first set of Standard Application Forms. The forms are available from the Court's website in English and French, though not in Arabic despite the Darfur and Libya Situations. According to the provisions, the Registry is to make the forms available to victims, groups of victims or intergovernmental and non-governmental organisations, which may assist in disseminating the forms as widely as possible.'

represented and they have the faculty to choose the person who is going to stand for their interests in the proceeding. When the number of victims is large the Chamber may request them to appoint a common representative, as stated in Rule 90(2) of the Court's RPE. If the victims are unable to select a common representative, the Chamber can ask the Registrar to do so. According to Rule 90(4) in appointing a common representative the Chamber and the Registrar have to ensure that the diverse interests of the victims are adequately represented. The Rule refers to Article 68(1) of the Rome Statute which clarifies that, in taking all the suitable measures to protect victims and witnesses, the Court shall consider relevant factors such as the *age* and the gender of the victims and the nature of the crimes.⁵¹⁹

As stated in Rule 97 which regulates the assessment of reparations, the Court, taking into account the scope and the extent of any damage, loss or injury, may award individual or collective reparations, where it deems it appropriate. Experts, upon request of the victims, their representatives or the convicted person, can be appointed to suggest types and modalities of reparations and to assist the judges in 'quantifying' the damages. Being this the theoretical framework which governs the ICC's reparation regime, it is opportune to delve also into the four possible forms of implementation that, according to Rule 98 of the RPE, can be ordered by the Court, separately and/or in combination. According to Article 75(2) first sentence and to Rule 98(1), in case of conviction the Court may order reparations to the victims disposing the transfer of the individuals' awards directly from the assets of the perpetrator.

The second case scenario is described in Rule 98(2) of the RPE, which regulates the instances when the Court issues individual reparations' orders, but it is 'impossible or impractical' to make the award directly from the convicted person. Therefore, the Court

⁵¹⁹ See Article 68 of the Rome Statute: 'The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'

may establish the award to be deposited with the Trust Fund, creating a holding account separated from its ‘other resources’, as the latter are meant to fulfil the TFV’s humanitarian function. The Regulations of the Trust Fund shed light on the two circumstances when the award is deposited rather than transferred straight to the victims. In the first place this could happen in those cases in which the information at the Court’s disposal is incomplete, although the victims have been identified and recognized as legitimate beneficiaries. As suggested in the report issued by the TFV to provide guidance and assistance to the Chamber in the Lubanga case, the forms submitted by the victims may be defective because details are missing or have changed since they have filed the claim. In such a situation, according to Regulation 59, the Trust Fund is required to draft an implementation strategy to trace the victims and forward the award to them as soon as possible.⁵²⁰ The second case in which the TFV is called to step in for the distribution of the reparations concerns the Court’s ‘failure’ in identifying the beneficiaries. As enshrined in Regulation 60 and 61 in such event the Trust Fund has to determine, recurring to both statistical and demographic data, who are the eligible victims.

The third possible way to implement reparations is depicted by Rule 98(3). According to it the Chamber may order the award for reparation to be made through the Trust Fund when the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate. Regulations 69 to 72 of the TFV provide further details about the procedure: in such cases, in fact, the Trust Fund has to determine the nature of the collective award and to establish the methods for its implementation. In this case the pivotal role of the Trust Fund is self-evident; nevertheless in order for the reparations to be put into effect the approval of the Court is needed. As set forth in its Regulations the Trust Fund may identify (local) intermediaries or partners which can contribute to the drafting stage with their proposals and/or be consulted at a later phase for the implementation of the awards.

The fourth and last option to frame the reparation award is enshrined in Rule 98(4) of the Court’s RPE. This Rule, which is expanded upon in Regulations 73-75, establishes

⁵²⁰See on this point the Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations, at Para 261 et ss.

that the Court may order the award for reparations to be made through the TFV to an intergovernmental, international or national organization patronised by the Trust Fund itself. The tasks of the Trust Fund in this case encompass both endorsing the approved organization and developing a detailed implementation plan. Moreover Rule 98(4) can be applied in combination with rule 98(2) in the event of individual reparations which, due to impossibility or impracticability, cannot be made directly from the convicted person to the beneficiaries.

5.2.3.3 Reparations in the Lubanga case: preliminary considerations

As already mentioned, on March 14th 2012 the first verdict of the ICC was issued by the Trial Chamber I, which found Thomas Lubanga Dyilo guilty of the war crimes of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities.⁵²¹ Upon request of the convicted person and according to Article 76(2) of the Rome Statute both sentencing and reparations have been deferred to a separate hearing and on 7th August 2012 the first decision establishing the principles and procedures to be applied to reparations was issued.⁵²² Before discussing more in detail this landmark decision, some preliminary clarifications are needed. In the first place the identification of the victims in the instant case has rightly raised many questions and criticism. As a result of the procedural strategy pursued by the OTP, the Court has identified as the only direct victims the children who have been conscripted, enlisted or actively used in the hostilities,⁵²³ without including in the criminal charges the victims of

⁵²¹ Article 8(2) (e)(vii) of the Rome Statute.

⁵²² See R. Carranza, 'Reparations and the Lubanga Case: Learning from Transitional Justice', ICTJ briefing, April 2012.

<http://ictj.org/sites/default/files/ICTJ-DRC-Reparations-Lubanga-ICC-Briefing-2012-English.pdf> (last accessed May 2012).

⁵²³ In the *Lubanga case* the following categories were identified as victims: besides the child-soldiers recruited by the UPC, the children's parents or next of kin who are capable to demonstrate harm suffered on account of the recruitment of their children and the individuals who may have suffered as a result of intervening to prevent the commission of the crimes. See Appeals Chamber, *supra* n447, at Para.31.

sexual violence, who experienced abuses as a result of their conscription or enlistment.⁵²⁴ In May 2009 the victims' legal representative had filed a request before the Chamber in order to change the legal characterization of the facts and include inhuman and cruel treatment and sexual slavery. The request has been rejected by the Appeals Chamber on procedural grounds and, notwithstanding the strong evidence of sexual enslavement and other kinds of sexual abuses widely perpetrated by the FPLC's members against the girls and the boys recruited in its armed forces, these crimes have not been embedded in the charges. The lack of what can be called a 'proper legal justification', which would have allowed the Chamber to directly address the victims of gender-based and/or sexual violence, represents, indeed, a limitation that the Trust Fund for Victims in its first report on reparations has strongly recommended to overcome through the order of collective reparations.⁵²⁵

The formulation of the charges and the establishment of the case have posed numerous questions also with regard to the victims who have been excluded from the proceedings and in particular from the reparations process. In the first place it is important to underline that the narrow definition of 'victim' adopted has been identified as a factor that may exacerbate the conflict in Ituri; the DRC's region affected by the crimes ascribed to Lubanga and his supporters.⁵²⁶ Ituri is populated by eighteen different ethnic groups, the Hema/Gegere and the Lendu/Ngiti being the main ones.⁵²⁷ As the UPC and its armed wing are predominantly a Hema party, the majority of the child-soldiers enlisted or conscripted share the same ethnicity of their commanders and have been instigated to commit heinous

⁵²⁴ See supra n462, at Para 156-159. In response to the request made by the victims' legal representative the Trial Chamber affirmed that a re-characterization of the charges against Lubanga would be possible under Regulation 55 of the Regulations of the Court. This approach has been proven wrong by the Appeals Chamber, which stressed first that Regulation 55 has been misinterpreted by the Trial Chamber and second that the 'justification for permitting changes in the legal characterization of the facts was extremely thin since no details on the elements of the offences to be considered were included, nor was there any analysis on how such elements might be covered by the facts described in the charges'.

⁵²⁵ Ibid. at Para 169.

⁵²⁶ See Human Rights Watch, 'Ituri covered in Blood: Ethnically Targeted Violence in Northeastern Congo', Vol. 15, No. 11 (A) - July 2003.

⁵²⁷ Ibid. at 18.

atrocities against the opposing factions, in particular the people belonging to the Lendu group. Consequently, as pinpointed by the ICC's Registrar, reparations are going to be awarded exclusively to the benefit of one side of an ethnic conflict in which both sides suffered harm, increasing the likelihood of further conflicts.⁵²⁸ Moreover, the ethnic dimension may have also an impact on the recognized victims' claims for reparations as coming forward to the Court may trigger reprisals by their own communities, that will probably feel betrayed, and at the same time by the ones which underwent the FPLC's attacks. In particular, the excluded victims may, indeed, perceive the beneficiaries of the reparations as offenders rewarded, rather than punished, for the pillages, rapes and killings committed while serving the FPLC. Another issue that has been firmly stressed both by the Court's organs and by some specialized NGOs which have submitted their observations to the Court prior to the decision, is the lack of assets of the convicted person. This problem is common to the majority of cases brought before the Court and, as punctually underlined by the Registrar, the early experience of the ICTY and the ICTR has already shown that, since the convicted persons were found eligible for legal aid as a result of the absence of identified assets, 'should the *ad hoc* Tribunals have had a reparation scheme comparable to the ICC's system, the accused would similarly have had no assets to support these'.⁵²⁹ As the reparations ordered by criminal courts are by definition of a judicial nature, in respect of the principle of individual criminal responsibility, the prominent liability to pay for the harm caused, in theory, should lie with the convicted person.

5.2.3.4 The ICC first decision on reparations

After Mr Lubanga's conviction the first decision on reparations has been awaited with great expectation. However, it should be noted that the process is still far from being concluded and that the scope of the decision is solely to shed light on the principles and procedures which will be applied in the coming phases. First and foremost it is important to remark that the Trial Chamber in illustrating the principles on reparations has extensively relied both on the submissions received by the Trust Fund for Victims, the Registrar, UNICEF, the International Center for Transitional Justice ('ICTJ'), Women's

⁵²⁸See Registry's Second Report on Reparations, supra n 516 at Para7.

⁵²⁹ See the Registry's Second Report on Reparations, supra n516, at Para121.

Initiatives and other NGOs and on the practice of the Inter-American Court of Human Rights to which the Chamber has constantly made references. It has been rightly emphasized that the principles enunciated within the decision have been circumscribed to the specific case and therefore they do not represent necessarily the principles that will guide the future decisions of the Court on reparations.⁵³⁰ On the contrary, other Chambers could decide to adhere to different principles, triggering a potential lack of uniformity and coherence to the detriment of the victims. Nonetheless, the Court has, finally, clarified its approach to reparations and the clear intention to abide by the principles of, inter alia, non-discrimination, causation, non-stigmatization, proportionality etc...⁵³¹ With regard to children, the Trial Chamber has underlined that the age of the victims represents one of the key factors to be taken in due consideration, in particular:

In reparations decisions concerning children, the Court should be guided, inter alia, by the Convention on the Rights of the Child and the fundamental principle of the "best interests of the child" that is enshrined therein. Further, the decisions in this context should reflect a gender-inclusive perspective.⁵³²

Moreover, the Court has made explicit reference to Article 39 of the UN CRC, which, as pointed out in the previous Chapters, requires states parties to promote the recovery and reintegration of child victims, including child victims of war, and, implicitly, recognize

⁵³⁰ See, for instance, Carla Ferstman, Director of Redress, speaker at the rapid response seminar on ‘Reparations to Victims: the Recent international Criminal Court Decision and beyond’, hosted by the British Institute of International and Comparative Law in London on 12th September 2012. The Report of the seminar is available at http://www.biicl.org/files/6103_icc_7_august_2012_decision_-_rapid_response_seminar_report.pdf (last accessed October 2012).

⁵³¹ See ICC ‘Decision establishing the principles and procedures to be applied to reparations’, at Para 182 et ss.

⁵³² Ibid at Para 211. With regard to the principle of the “best interest of the child” in its submission to the Court UNICEF has clarified that “it refers to the core children’s rights principle to protect, respect and ensure the well-being of the child as a primary consideration when decisions are made on his or her behalf by taking into account the child’s age, gender, experience, level of maturity, presence or absence of a parent, opinion and the context.” See UNICEF, Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, ICC-01/04-01/06, 10 May 2012, Guiding Principles, at Para 4.

children's right to reparation. In the decision under consideration the Court has also stressed the importance of reckoning with the views of the child victims, which 'are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind and their circumstances, age and level of maturity.'⁵³³ The Court highlighted the urge to rehabilitate former child soldiers, identifying in the provision of education and vocational training the means to reintegrate them into society and to achieve a meaningful role.

As for the procedural issues, which are dealt with in the second part of the decision, the Trial Chamber has stated that reparations are an integral part of the overall trial process and, since the Rome Statute does not specify which body of the Court is in charge of monitoring and supervising the reparation order, the Chamber has explained that such tasks fall within the responsibilities of the judiciary. The Trial Chamber has also clarified that during the reparations proceedings new judges will be appointed to substitute the current bench,⁵³⁴ giving legitimate raise to the, unanswered, question of what impact the replacement of the judges will have on the victims.

The core of the decision lies, though, in the role assigned to the Trust Fund for Victims, which has been appointed by the Chamber as the designated body to deal with the overarching implementation of a five steps reparations plan. In fact, the indigence of the convicted person and his lack of private assets made the Court able to draw on the logistical and financial resources of the TFV, in particular:

the Chamber is of the view that when the convicted person has no assets, if a reparations award is made "through" the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources. This interpretation is consistent with Rule 98(5) of the Rules and Regulation 56 of the Regulations of the TFV. Rule 98(5) of the Rules provides that the Trust Fund may use "other resources" for the benefit of victims.⁵³⁵

⁵³³ Ibidem at Para 215.

⁵³⁴ Ibidem at Para 262 and 263.

⁵³⁵ Ibidem at 271.

Concerning the identification of the beneficiaries and the distribution of the benefits, the Chamber has adopted a broader approach by affirming that reparations should be awarded to those who suffered personal harm as the result of the offences, regardless whether they participated in the trial.⁵³⁶ Notably the Court has included also victims of gender violence amongst those who can have access to reparations,⁵³⁷ showing that the decision went beyond the restricted notion of victim inferred by the highly criticized prosecutorial strategy and the limited charges tried. As for the distribution of the reparations the Court has not excluded *tout court* the possibility of individual reparations and, therefore, the Trust Fund for Victims will receive from the Registry all the individual applications for reparations submitted by the victims. However, as the Trial Chamber has stressed throughout its decision, given the scarcity of resources available and the relevant number of potential beneficiaries collective reparations seem more adequate and effective, implying that most likely individual reparations are going to remain unconsidered. Since Mr Lubanga's lawyers have appealed against his conviction and against the sentence, the Trust Fund for Victims is unable to fulfil its mandate according to the principles and procedures established by the Trial Chamber. Only when the appeal process will be completed the first ICC decision on reparations could be, finally, implemented.

5.3 Preliminary considerations about the Inter-American Court of Human Rights

Since the human rights regime goes beyond the traditional inter-state responsibility for breaches of international law, some preliminary remarks are needed prior to discussing children's right to reparations before the Inter-American Court of Human Rights. As already pinpointed in Chapter 3, the legal basis for state responsibility for violations of human rights law derives from breaches of human rights treaties or a human rights norm of customary international law. States parties to a human rights treaty are compelled to

⁵³⁶ Ibidem at Para 194: 'Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.'

⁵³⁷ See Para 207 et ss .

respect and guarantee the rights recognized, to use Shelton's words 'a formulation that imposes a due diligence obligation to respond to violations committed by private persons as well as to abstain from state-authored violations'.⁵³⁸ The ICJ in a famous passage of the *Barcelona Traction case* underlined that 'an essential distinction should be drawn between obligations of a State towards the international community as a whole and those arising *vis- a-vis* another State in the field of diplomatic protection. By their very nature the former concern all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.⁵³⁹

Therefore, when bound to a human rights treaty a state commits itself to a legal order whose purpose is not just the creation and regulation of reciprocal relations between states. The obligations which ensue from the treaty are not limited to the other contracting parties since they are established also towards the individuals within their jurisdiction.⁵⁴⁰ As underlined in Chapter 3 when the concepts of 'remedies' and 'reparation' were discussed, in case of state responsibility for violations of international law the injured state in retaliation for the breach traditionally may take proportionate countermeasures. With regard to human rights violations the recourse to countermeasures would simply not be possible, hence the human rights system has developed 'innovative compliance

⁵³⁸ See D. Shelton 'Private Violence, Public Wrongs and the Responsibility of States', in *Fordham International Law Journal* 13(1990): Article 1.

⁵³⁹ *Barcelona Traction Light and Power Company, Limited* (Belgium v. Spain), 1970 ICJ, 3 Separate opinion of Judge Ammoun, at 32. On this point, see also Judge R. Nicto-Navia, 'International Peremptory Norms (jus cogens) and International Humanitarian Law' available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf>.

'These erga omnes obligations have been defined as obligations of State towards the international community as a whole, in the vindication of which all States have a legal interest. They are rules which accord a right to all States to make claims. As stated by Brownlie such rules are "[o]pposable to, valid against, 'all the world', i.e. all other legal persons, irrespective of consent on the part of those thus affected.'" It should be noted however that although all norms of jus cogens are enforceable erga omnes not all erga omnes obligations are jus cogens.' (Moreover: not all norms of human rights are part of jus cogens, but *under jus cogens States are obliged to respect human rights*).

⁵⁴⁰ The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75) (1982) 2 Inter-Am.Ct.H.R. (ser.A), in Shelton supra n14 at 98.

mechanisms that respect the unique character of human rights treaties'.⁵⁴¹ The *erga omnes* nature of human rights obligations is reflected in the remedies provided to the victims. In particular, redressing human rights violations has a twofold aim: protecting the individuals affected and at the same time upholding the legal order enshrined in the treaty. This means that, when called to award reparations, the human rights judicial bodies have to take into account also the potential victims by prompting the state to refrain from future violations.

The right to a remedy in order to be legitimately exercised before a regional or international forum requires that the domestic remedies have been exhausted. The obligation to exhaust local remedies is part of international customary law and it is embedded in both regional human rights treaties and universal treaties.⁵⁴² Nevertheless, as pinpointed by the European Court of Human Rights in *Akdivar v. Turkey* and by the Inter-American Court of Human Rights in its first judgement and in the following advisory opinion, applicants are absolved from the obligation to exhaust local remedies when special circumstances subsist, namely 'such circumstances include the passivity of national authorities in the face of serious allegations of misconduct or infliction of harm by state agents'.⁵⁴³ Moreover, it is noteworthy that both the IACtHR and the ECHR when judging over the admissibility of a claim apply a shifting burden of proof with regard to the rule of the prior exhaustion of domestic remedies, meaning that the applicant has to indicate the efforts made to compel with the rule, but then is the duty to the defendant-state, when it claims the non-exhaustion, to demonstrate the existence of an effective remedy within its judicial system.

5.3.1 The IACtHR treaty interpretation

The Inter-American Court of Human Rights since the beginning of its activity has delivered ground-breaking rulings directly related to children's rights. Unlike the European

⁵⁴¹ Ibid. at 99.

⁵⁴² See Article 35 of the European Convention on Human Rights, Article 41(1) of the International Covenant on Civil and Political Rights and Articles 2 and 5 of the Optional Protocol thereto, Article 46 of the American Convention on Human Rights and Article 50 and 56 of the African Charter on Human and Peoples' Rights.

⁵⁴³ See Shelton supra n 14 at 124. To develop a new flexibility to the rule of exhaustion of local remedies the ECHR relied upon the *Advisory Opinion on exception to the exhaustion of local remedies* issued by the Inter-American Court of Human Rights, (1990) 11 Inter-Am.Ct.H.R. (ser. A).

Convention on Human Rights, the American Convention contains a specific provision for the protection of children, which is enshrined in Article 19.⁵⁴⁴ The norm promotes children's special protection on the basis of their peculiar condition as minors and it imposes on 'the family, the society and the state' the duty to guarantee it. What makes Article 19 so relevant in the field of children's rights is not the text itself, but rather the way the Court applies and interprets its wording.

Over the years the IACtHR has implemented several judicial decisions characterized by a strong focus on children's rights in both times of peace and war. Since some of the countries which accepted the Court's jurisdiction are affected by armed conflicts and since such contexts are 'marked' by the use of unspeakable violence against children, the IACtHR had to deal with cases concerning the protection of children in war-times. The relationship between human rights law and international humanitarian law, already briefly discussed in Chapter 3, has given rise to some questions with regard to the direct applicability of international humanitarian law by the organs of the Inter-American system.⁵⁴⁵ In particular in the famous *La Tablada v. Argentina case*⁵⁴⁶ the Inter-American Commission declared the legitimate applicability of international humanitarian law on the basis of five reasons,⁵⁴⁷ the most important of which was the last, based on the fact that in

⁵⁴⁴ Article 19: Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. See 'The American Convention on Human Rights', 22 November 1969, OEA/ser.L/V/II.23.

⁵⁴⁵ Throughout the present section the Inter-American Commission on Human Rights can be referred to as 'IACHR', 'the Commission' and throughout the thesis as 'the Inter-American Commission', whilst the Inter-American Court of Human Rights can be indicated with the acronym 'IACtHR'. On the relationship between the two organs see in general C. Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture', in *Human Rights Quarterly* 12(1990):439-464.

⁵⁴⁶ *Tablada case or Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Case No.11.137, Report No.55/97, 30 October 1997, Annual Report of 1997, Para. 157 et seq.

⁵⁴⁷ See L. Zegveld, 'The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case', in the *International Review of the Red Cross* 324(1998):505-511.

one of its advisory opinions the Court established that other treaties different from the American Convention could be analysed in the exercise of its jurisdiction.⁵⁴⁸

Nevertheless, the Commission misinterpreted the opinion issued by the Court, as it referred only to its advisory competence. The ‘mistake’ was eventually amended in the Court’s decision on preliminary objections in the *Las Palmeras v. Colombia case*.⁵⁴⁹ The Commission in its report on the merits stated that Colombia had violated common Article 3 to the Geneva Conventions and therefore, when submitting the case, it requested the Court to share the same findings.⁵⁵⁰ The Court, instead, clarified that it felt outside its mandate, and *ergo* its jurisdiction, to analyse alleged violations of other treaties, however, common Article 3 could be used *to interpret* the provisions of the American Convention.⁵⁵¹ As punctually reported by Lixinski, in the case of *Bámaca-Velásquez v. Guatemala* the Court has further elaborated on this issue, reckoning that the Articles of the American Convention can be applied in light of common Article 3 of the Geneva Conventions, as it imposes upon states several obligations which overlap with the provisions of the ACHR.⁵⁵²

5.3.1.1 The Corpus iuris of the human rights of children and adolescents

More recently the IACtHR has confirmed this interpretative pattern in the *Vargas Areco v. Paraguay* judgement, the first case brought before the Court which concerned the recruitment of children into military forces.⁵⁵³ Due to the temporal limitations to the

⁵⁴⁸ See Inter-American Court of Human Rights, *Other treaties subject to the advisory jurisdiction of the Court*, Art. 64 of the American Convention on Human Rights, Advisory Opinion OC-1/82 of 24 Sept. 1982, ser.A No1.

⁵⁴⁹ I/A Court H.R., *Case of Las Palmeras v. Colombia*, Preliminary Objections, Judgment of 4 Feb. 2000, Series C No. 67.

⁵⁵⁰ See L. Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’, in the *European Journal of International Law* 21(2010):585-604.

⁵⁵¹ See Article 29 of the American Convention on Human Rights which regulates its interpretation.

⁵⁵² See Lixinski supra n546 at 592. See also I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*, Merits, Judgment of 25 Nov. 2000, Series C No. 70, at Para 209.

⁵⁵³ The facts on which the judgement is based are the following: on January 26, 1989, the boy, Gerardo Vargas Areco, 15 years of age, was recruited into the military service in Paraguay. On December 30, 1989, the boy was arrested in punishment for not having returned to the military establishment on time after being on leave to visit his family. Allegedly, when the boy tried to run away to avoid the punishment, a non-

exercise of the Court's jurisdiction, the recruitment of children could not be considered *per se* a human rights violation, nevertheless the IACtHR made clear references to international humanitarian law, to the UNCRC and its Optional Protocol on Children in Armed Conflict, to several reports and soft law instruments in order to demonstrate that there was an international tendency to avoid the enlistment of child-soldiers. As showed in the present paragraph, the Court, although not intending yet to expand its jurisdiction to breaches of international humanitarian, 'has brought' into some of its judgments a different legal regime 'to give meaning to the provisions of the American Convention' and extra-legal support to the petitioners' claims. This leads to the consequence that Article 19 of the American Convention can be read in combination with provisions in other fields, in particular international humanitarian law, potentially conferring to children affected by human rights violations a broader and more specific protection.

Both the Commission and the Court did not limit the expansion of their treaty interpretation to the law of war. The Commission in the case *Minors in detention v. Honduras* noted that 'to interpret the obligations of the state vis-à-vis minors, in addition to the provisions of the American Convention, the Commission considers it important to refer to other international instruments that contain more specific provisions pertaining to the protection of children, including the Convention on the Rights of the Child and various declarations of the United Nations on the subject.'⁵⁵⁴ The Court in its advisory opinion on the *Juridical Condition and Human Rights of the Child*, not only confirmed the view expressed by the Commission, but it went further emphasizing the existence of a so-called *corpus iuris*. The notion of *corpus iuris* is the result of the evolution of international human rights law in matters related to children, which focuses on the recognition of children and adolescents as persons with legal rights.⁵⁵⁵ Therefore, in cases affecting minors, the legal

commissioned officer at the military post shot him in the back, causing his death. The body of the boy was found the next day, 100 meters from the military post. The State acknowledged international responsibility in this case. See I/A Court H.R., *Case of Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgment of 26 Sept. 2006. Series C No. 155.

⁵⁵⁴IACHR, Report N° 41/99, Case 11.491, detained minors (Honduras), March 10, 1999, Para 72.

⁵⁵⁵I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17.

framework set to protect their human rights is not confined to the provisions enshrined in Article 19 of the American Convention. In fact, it also includes (for purposes of interpretation and not of direct application and in addition to other international instruments on human rights in general) the terms of the Declarations on the Rights of the Child of 1924 and 1959, the 1989 Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the 1985 Beijing Rules, the Standard Minimum Rules for Non-Custodial Measures, known as the 1990 Tokyo Rules, and the United Nations Guidelines for the Prevention of Juvenile Delinquency, known as the 1990 Riyadh guidelines.⁵⁵⁶

5.3.1.2 Children's access to the Inter-American Human Rights system

As already anticipated in the introductory Chapter, victims' access to the human rights bodies is not streamlined. The Inter-American Court of Human rights cannot be resorted to by individuals, in fact the Inter-American system for the protection of human rights has a dual institutional structure formed by the Inter-American Commission, which has evolved from the Charter of the Organization of the American States in 1948, and the Inter-American Court of Human Rights established through the entry into force of the American Convention on Human Rights in 1969.⁵⁵⁷ The Inter-American Commission, located in Washington DC and composed by seven members, receives the communications from individuals and groups alleging a breach of the obligations contained in the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights.⁵⁵⁸

⁵⁵⁶Ibid. at Para 26. The Court specifies that 'at least 80 international instruments adopted during the 20th century are applicable to children in various degrees. Among them, the ones mentioned stand out.'

⁵⁵⁷ See Shelton, *supra* n14 at 208.

⁵⁵⁸ The Commission can receive petitions from people or nongovernmental entities legally recognized in one or more of the member states of the OAS, but it can refer to the Court only the cases where the state involved has ratified the American Convention and it has accepted the Court jurisdiction. Please see Articles 18-19-20 of the Commission's Statute. *Statute of the Inter-American Commission on Human Rights*, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80.

According to Article 23 of the Commission's Rules of Procedure ('Rules'),⁵⁵⁹ any person or group of persons or nongovernmental entities legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, *on their own behalf or on behalf of third persons*.⁵⁶⁰ The Executive Secretariat of the Commission is in charge of the study and the initial processing of petitions lodged before the Commission.⁵⁶¹ In order to be *considerable* a petition must include information on the individual or individuals filing it: name, nationality, profession or occupation, postal address, and signature of the person submitting the petition, whilst nongovernmental entities must include the legal address and the legal representative's signature.⁵⁶² The petitions must also include certain facts and state the exact place where the violation occurred, the date on which it happened, the names of the victims, and the names, when it is feasible, of the perpetrators. Relevant for a petition to be eligible is the submission of an accurate description of the government's responsibilities in the human rights abuse, as the state may be involved either directly, by committing the abuse, or indirectly, by failing to prohibit, prevent, or stop private human rights abuses.⁵⁶³ It is worth noting here that two different types of petitions may be filed: a general petition and a collective petition. A general petition is filed when a widespread form of human rights violations, that is not limited to just one group of people or just one incident, has occurred. A collective petition is filed

⁵⁵⁹ See Rules of Procedure of the Inter-American Commission on Human Rights (Approved by the Commission at its 109^o special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions, held from October 7 to 25, 2002). Article 23 of the Rules of Procedure mirrors Article 44 of the American Convention on Human Rights. According to Article 24 of the Rules of Procedure 'The Commission may also, *motu proprio*, initiate the processing of a petition which, in its view, meets the necessary requirements'.

http://www.oas.org/xxxivga/english/reference_docs/Reglamento_CIDH.pdf (accessed February 2012).

⁵⁶⁰ Emphasis added, petitions submitted on behalf of third persons include also children.

⁵⁶¹ See Article 26 of the Rules of Procedure.

⁵⁶² See in particular Article 28 of the Rules of Procedure which enlists all the criteria for the petition to be taken under consideration.

⁵⁶³ Article 28(f): the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated.

when there are numerous victims of a specific incident or practice violating human rights.⁵⁶⁴ According to Article 29(1)(b) of the Rules of Procedure ‘if a petition or communication does not meet the requirements called for in these Rules of Procedure, the Executive Secretariat may request that the petitioner or his or her representative satisfy those that have not been fulfilled’.

When the petition meets the requirements set in Article 28 of the Rules of Procedure, the Commission, still acting through the Executive Secretariat, shall start processing its admissibility. In order to do so the relevant parts of the petition are forwarded to the state, which shall, within two months, submit its response containing the relevant information on the alleged violation. Before deciding upon the admissibility of the petition the Commission may invite both parties to present additional observations, either in a written form or during an oral hearing. Once the additional observations have been submitted, or the period set has elapsed with no further observations, the Commission shall verify whether the grounds for the petition exist or subsist. If it considers that they do not exist or subsist, the case is archived.⁵⁶⁵ When the IACHR finds out that all the requirements are met and that the petition is based on valid grounds, eventually the admissibility procedure begins. In order to decide on the admissibility of a matter, the Commission in the first place is called to verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.⁵⁶⁶ Then the Commission has to determine whether the petition has been lodged within the prescribed time and if it duplicates a previous or current petition. The procedure eventually ends with the issue of a report on the admissibility, or inadmissibility, of the petition, which is included in the Annual Report to the General Assembly of the OAS.

⁵⁶⁴ The consequences of a collective petition are stated in Article 29(d): if two or more petitions address similar facts, involve the same persons, or reveal the same pattern of conduct, they may be joined and processed together;

See also http://www.hrea.org/index.php?doc_id=413#bodies (accessed February 2012).

⁵⁶⁵ See Article 30(6).

⁵⁶⁶ See Article 31 of the Rules of Procedure. The issue of the exhaustion of domestic remedies, especially with regard to the burden of proof has been discussed in paragraph 4.3 of the present work.

The declaration of admissibility is then followed by the opening of the case and from that moment on the petitioner is granted two months to submit additional information regarding the merits. Such information is then transmitted to the state, which has also two months to reply. Prior to making its decision on the merits of the case, the Commission shall set a time period for the parties to express whether they have an interest in initiating the friendly settlement procedure provided for in Article 41 of the Rules of Procedure. When no friendly settlement is pursued the Commission deliberates on the merits of the case. If it is established that there has been one or more violations of the American Convention, the IACHR writes a preliminary report with the proposals and recommendations it deems pertinent and transmit it to the State in question. In doing so, the Commission has to set a deadline by which the responsible State must report on the measures adopted to comply with the recommendations. The petitioner is informed of the adoption of the report and, depending on the acceptance by the state of the contentious jurisdiction of the Court, within one month he/she can present to the Commission his or her position as to whether the case should be submitted to the Court. According to Article 43 of the Rules of Procedure of the IACHR, the petitioner interested in resorting to the Court jurisdiction, as stated in Article 43(3) of the Rules of Procedure, has to provide the following: 'the position of the victim or the victim's family members, if different from that of the petitioner; the personal data relative to the victim and the victim's family members; the reasons he or she considers that the case should be referred to the Court; the documentary, testimonial, and expert evidence available; and the claims concerning reparations and costs'.

Since the recommendations issued by the Commission in its reports on the merits are not binding and therefore also the remedial measures identified, it is quite evident the interest of the petitioner in pursuing a lawsuit before the Inter-American Court. Moreover, with regard to reparations, the two bodies not always share the same view.⁵⁶⁷ Well-representative in this sense is the report on the merits filed by the Commission about the

⁵⁶⁷See Inter-American Commission on Human Rights, Report 'The Rights of the Child in the Inter-American Human Rights System' second edition, OEA/Ser.L/V/II.133 Doc. 34, 29 October 2008.

case *Bulacio vs. Argentina*⁵⁶⁸, in which the IACHR stated that, in order to determine the amount of compensation for material damage due to the family of the boy killed, the state should consider his income as caddie in a golf camp.⁵⁶⁹ The case was then brought before the IACtHR, and in its judgment, referring to the same issue of reparations, the Court affirmed that ‘it is reasonable to assume that youth Bulacio would not have carried out this activity the rest of his life, but there is no certain fact that makes it possible to ascertain the activity or profession that he would have exercised in the future, that it, that there are insufficient grounds to establish the loss of a definite chance, ‘which must be estimated on the basis of certain damage with sufficient grounds to establish the probable realization of said damage’.⁵⁷⁰ According to Shelton: ‘the Commission has begun to make more detailed comments on reparations and to report on the measures states have taken in response to the recommendations in Article 50.’⁵⁷¹ It is important to note here that Article 50 of the Rules refers to the procedures applicable to member states of the OAS that are not part of the

⁵⁶⁸ I/A Court H.R., Case of *Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100. During the proceedings before the IACtHR a friendly settlement was reached and was validated by the Court itself. Facts: Walter David Bulacio a 17 year old boy was detained by the Federal Argentinean Police on April 19, 1991, during a massive detention operation called “razzia”. He was taken to the Police station 35, room for children where he was tortured by police officials. The detention was not informed to the competent judge or his relatives. On April 21, the adolescent Walter Bulacio was taken to the Mitre hospital, where a doctor examined him and denounced the registration of a young guy with injuries. On April 26, the adolescent Walter Bulacio died. In April a judicial process was initiated to punish the alleged responsible. Ten years after the arbitrary detention and the death of Walter Bulacio, domestic proceedings had not been concluded. On November 21, 2002 the VI Section of the Chamber of Appeals ruled the prescription of the criminal action. (As reported in http://www.cidh.org/countryrep/infancia2eng/Infancia2Cap2.eng.htm#_ftnref29)

⁵⁶⁹ *Ibid.* at Para 85 (*reparations for pecuniary damages*) ‘With respect to inheritance of the right to compensation in favour of Walter David Bulacio, this Court has developed applicable criteria to the effect that: the children, spouses and parents must receive the compensation. This Court points out that in the instant case, the victim was an adolescent and had neither children nor spouse; therefore, the compensation must be given to his parents.’

⁵⁷⁰ *Ibid.* at Para 84, the Court cited I/A Court H.R., *Castillo Páez Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, Para. 74.

⁵⁷¹ See Shelton *supra* n13,:212.

American Convention. This explains the greater attention that the Commission dedicates to the issue of reparations when the claims are lodged against states exempted from the Court's jurisdiction. Reparations are also better addressed in cases where the Commission has successfully encouraged the conclusion of a friendly settlement.⁵⁷² The function of the Commission in the friendly settlements is to ensure that the agreement is compatible with the values embedded in the American Convention and in the American Declaration, hence the agreement reached by the parties in order to be considered valid must be approved by the Commission. The issue of compensation is faced in nearly all the settlements and also non-monetary reparations are normally included in the agreement.⁵⁷³

As underlined in the current paragraph, the role of the Commission as 'filter' between the individual-complaints and the Inter-American Court of Human Rights encompasses a variety of tasks, some of them directly related to its quasi-judicial power when deciding on the admissibility and the merits of the petitions received. Over the years the Commission has dealt with an increasing number of complaints based on alleged violations perpetrated against children and adolescents. Therefore, in 1998 the IACHR created the Rapporteurship on the Rights of the Child, according to Article 15 of the Rules of Procedure which enables the Commission to establish rapporteurships to better fulfil its functions.

With regard to what can be called access to the Inter-American Human Rights system (rather than to the Court), the Rapporteur's role is limited to 'provide specialized advice to the Commission in the proceedings of petitions filed to the IACHR regarding violations of the rights of the child'. Given the lumbering and complex procedure required to present a successfully petition to the Inter-American Commission, it is quite evident that

⁵⁷² Friendly settlements are often discouraged by various factors such as the lack of cooperativeness of the states, the demand of justice by the victims and the scant resources of the Commission. For example in 2008, the IACHR only facilitated a total of 4 friendly settlements out of a total of 1323 complaints received. See R. K. Goldman 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights', in *Human Rights Quarterly* 31 (2009): 856-882.

⁵⁷³ See Shelton *supra* n14 at 210: 'Common non-pecuniary reparation measures included a public acknowledgment of the agreement at official ceremonies, publication of the settlement in local media, an official apology by state officials and other public acts designed to restore the victims' reputation and dignity.'

children, although recognized as legitimate rights holders within the American human rights system, have little room to actively participate in the submission and their interests are most likely to be represented by non-governmental entities.

5.3.1.3 Children's participation in the proceedings before the Inter-American Court of Human Rights

Article 8 of the American Convention on Human Rights notes that every person has the right to be heard by a tribunal in the determination of his or her legal rights. Article 25 'completes' the provision guaranteeing the right to a simple and prompt judicial remedy for violations of rights.⁵⁷⁴ Nevertheless, as already specified, the possibility to directly resort to the Inter-American Court of Human Rights is reserved to the states parties of the American Convention that have recognized the Court's contentious jurisdiction and to the Inter-American Commission.⁵⁷⁵ The Commission's role changes before the IACtHR's proceedings and it can be described as being similar to that of a prosecutor since the Commission maintains an active function defending the public interest against the state.⁵⁷⁶

Originally, the rules of procedure of the Inter-American Court limited the victim's participation only to the reparation phase. Nevertheless, since 2001 when the rules have been amended, the victims have been granted the power to actively participate, along with the Commission, during all the phases of the trial, namely admissibility, merits, and reparations. In order to effectuate the full participation of the victims, including those who cannot afford the legal expenses related to the proceedings, in 2008 the OAS's General Assembly established a Fund for the Legal Assistance. On June 2010 the Court approved a

⁵⁷⁴ See D. Cassel, 'The Inter-American Court of Human Rights', in *Victims Un-silenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, Due Process of Law Foundation, July 2007 <http://www.dplf.org/uploads/1190403828.pdf> (accessed April 2012).

⁵⁷⁵ See Articles 48, 50 and 61 of the American Convention on Human Rights, *supra* n448.

⁵⁷⁶ On the role of the Commission, see A.A.Cancado Trindade, *The Access to Individuals to International Justice* (Oxford: Oxford University Press, 2011), see also his Separate Opinion in the *Castillo Paez v. Peru* case 1997, 34 Inter-Am.Ct.H.R. (ser.C), Para. 16-17. According to him in the proceedings before the IACtHR the Commission is reserved the role of defender of the public interest and an undesirable ambiguity is created if the Commission has the additional function of defending the interests of the alleged victims.

document to regulate access to the fund for the victims interested in bringing a case before the IACtHR.⁵⁷⁷

According to Article 40 of the Court's Rules of procedure, from the day when notice of the case's presentation has occurred, the alleged victim(s) or their representatives have a non-renewable term of two months to submit to the Court a brief containing pleadings, motions and evidence, including all the claims and also those relating to reparations and costs. As stated by the Court itself in the case *Goiburú et al. v. Paraguay*:

during the investigation and judicial proceedings, the victims or their next of kin must have *ample opportunity to take part and be heard*, both in the elucidation of the facts and the punishment of those responsible, and in the quest for fair compensation, in accordance with domestic law and the American Convention.⁵⁷⁸

Up to now it has not been clarified whether such procedural participation constitutes an autonomous right under international law or whether, instead, victims' participation can be barred by municipal laws. Since the Latin American states which have accepted the IACtHR jurisdiction provide victims with participatory rights in the domestic legislations, the issue has not yet been submitted to the Court. Alleged victims can be heard during the proceedings before the Court, alongside witnesses and expert witnesses. According to Article 51(5) unlike the witnesses and the expert witnesses the alleged victims shall not take the solemn oath before rendering their statements. Moreover, as stated in the same Article at paragraph 11 'the Court may receive the statements of witnesses, expert witnesses, or alleged victims through the use of electronic audio-visual means'; this provision may apply to all the people called to testify and there is no special provision for children.

⁵⁷⁷ See Resolución de la Asamblea General de la Organización de Estados Americanos (OEA) AG/RES/ 2426 de 3 de junio de 2008.

⁵⁷⁸ *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006, Ser. C, No. 153, Para 117. Cited by Cassel supra n 574, :159.(Emphasis added).

5.3.2 Discussing the reparations awarded by the IACtHR: general observations

With regard to reparations, the most relevant provision to take into consideration is Article 63 of the American Convention.⁵⁷⁹ Shelton reported that the drafting history of the American Convention reveals no debate about conferring broad remedial competence to Article 63.⁵⁸⁰ The Inter-American Commission was in charge of preparing the first draft of the American Convention and originally the power to award reparations was enshrined in Article 52(1). The Commission used as basis three documents submitted by the Inter-American Council of Jurists, the government of Chile and the government of Uruguay. These earlier drafts mirrored Article 50 of the European Convention and thus conferred to the IACtHR a more restricted power. In the end the Commission adopted a text ‘which is broader and more categorically in defence of the injured party’ as it enables the Court to order measures that ensure the victim’s enjoyment of future respect for the right and freedom that have been violated, remedy the consequences of the violations occurred and compensate the harm suffered.⁵⁸¹ According to the Court itself Article 63(1) expresses a principle of customary international law as regards states’ responsibility for the commission of an unlawful act against individuals.⁵⁸² The Court went further explaining in the next passage of the same judgment that:

reparation for damages caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which is to reinstate the situation that existed prior

⁵⁷⁹Article 63(1) states: ‘[T]hat if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

⁵⁸⁰ See Shelton *supra* n14 at 217.

⁵⁸¹ *Ibid.*

⁵⁸²*Cantoral Benavides Case*, Judgment of December 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 88 (2001), at Para 40: ‘The Court has held that Article 63(1) of the American Convention embodies a rule of customary law that is one of the basic principles of contemporary international law as regards the responsibility of States. When an unlawful act imputable to a State occurs, that State immediately becomes responsible in law for violation of an international norm, which carries with it the obligation to make reparation and to put an end to the consequences of the violation’.

to the commission of the violation. If, as in the instant case, full restitution is not possible, an international court must order a series of measures that will safeguard the violated rights, redress the consequences that the violations engendered, and order payment of compensation for the damages caused.⁵⁸³

The series of measures to which the Court referred to encompass both pecuniary and non-pecuniary reparations and, although the IACtHR initially refrained from awarding non-monetary remedies, over the years it has fully utilized Article 63 potential to develop an extensive interpretation as to what can be legitimately considered as a remedy under international law.⁵⁸⁴ The first point which needs to be properly addressed with regard to the Court's dynamic and expansive application of Article 63(1) is the identification of the 'injured party'. The term refers to both the victim and his/her next of kin, who can also be considered as victims of the violation occurred. As the Court has stressed in the *Myrna Mack Chang case* the notion of kinship, enshrined in Article 2 of the Rules of procedure, applies to the immediate family, i.e. the direct ascendants and descendants, siblings, spouses or permanent companions, but it can be interpreted also in a broader way since the judges have assimilated the victim's first cousin to her siblings as there was evidence of a close and intimate relationship existed between them.⁵⁸⁵

To use the words of the President of the Court in the *case of the Ituango Massacres v. Colombia*:

⁵⁸³ Ibid. at Para 41.

⁵⁸⁴ See B. Mayeux and J. Mirabal, 'Collective and Moral Reparations in the Inter-American Court of Human Rights', Report Human Rights Clinic, The University of Texas School of Law, November 2009,: 9. http://www.utexas.edu/law/clinics/humanrights/work/HRC_F09_CollectiveReparations.pdf (accessed April 2012).

⁵⁸⁵ *Case of Myrna Mack Chang v. Guatemala* Judgment of November 25, 2003(Merits, Reparations and Costs), at Para 243: 'The provision of Article 2(15) of the Rules of Procedure should be underlined, as regards the necessary breadth of the concept of "next of kin of the victim." Said concept includes all persons linked by close kinship, including the parents, children and siblings, who might have the right to compensation, insofar as the fulfil the requirements set forth in the case law of this Court. Regarding this point, we must highlight the criterion followed by the Court of assuming that the death of an individual causes non-pecuniary damage to the closest members of the family, especially those who were *in close emotional contact with the victim.*'(Emphasis added).

the victim or injured party is the possessor of the legally protected interest safeguarded by the rights established in the American Convention: life, liberty, safety, property, integrity etcetera. Thus the victim is who suffered the harm of the respective right.⁵⁸⁶

Furthermore, he punctually distinguished between direct victim, namely the individual against whom the illegal conduct of the State agent is directed immediately, explicitly and deliberately, and indirect victim, the individual who does not suffer this illegal conduct in the same way (immediately, directly and deliberately) but who also sees his own rights affected or violated from the impact on the so-called direct victim.⁵⁸⁷ Although the distinction conserves its importance, both direct and indirect victims flow together into the notion of injured party and, therefore, are entitled to participate in the proceedings and claim for reparations. As established under Article 51(5) of the Rules of Procedure, during the first hearing the identities of the alleged victims must be determined, hence it follows that the injured party has to stand before the Court in order to take part in the trial and demand reparations. Nevertheless, the IACtHR has been flexible regarding the concept of ‘standing before the Court’ and the issue of victims’ identification. Concerning the first point, in *Bamaca-Velasquez v. Guatemala* the Court has allowed one of the beneficiaries of the non-pecuniary damages, namely the victim’s sister, to be added later in the judgment as complex circumstances have delayed her inclusion in the case.⁵⁸⁸ Also in the *Mack Chang case* the victim’s sister did not participate in the proceedings, but nonetheless was deemed a beneficiary of reparations.⁵⁸⁹

As for the second point, which concerns victims’ identification, in the case *Mapiripàn Massacre v. Colombia* the IACtHR did not exclude the possibility to obtain

⁵⁸⁶ *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006 (Preliminary Objections, Merits, Reparations and Costs) Ser.C, No 148, Separate Concurring Opinion of Judge S. Garcia Ramirez at Para 10.

⁵⁸⁷ *Ibid.* at Para 11.

⁵⁸⁸ See *Bamaca-Velasquez v Guatemala*, Reparations and Costs, 22 February 2002, IACHR. Series C No. 91, at Para 36.

⁵⁸⁹ See *supra* n489 at Para 245.

justice and reparations for the unidentified victims and their next of kin.⁵⁹⁰ The same flexible approach has been followed in the case *Moiwana Community v. Suriname* where individuals already listed as beneficiaries in the proceedings have been granted the possibility to prove their identity providing birth certificates and family books. Moreover, the victims who have not been properly identified through the submission before the Court of birth certificates or family books could appear within 24 months following the notification of the instant judgment and provide ‘sufficient means of identification’, which entail either an official document attesting the person’s identity or a statement before a competent state official by a recognized leader of the Moiwana community members, as well as the declarations of two additional persons, all of which clearly attest to the individual’s identity.⁵⁹¹ These two points have been raised to underline the Court’s strong concern for victims and its attitude towards a broad inclusion of ‘who’ is reckoned as injured party. Such factors clearly have an impact also on child victims as they benefit from the informal approach adopted by the IACtHR especially with regard to the issue of identification.

5.3.2.1 Children and reparations before the IACtHR: indirect victims

Many of the judgments issued by the Inter-American Court of Human Rights have related to violations of the right to life, enshrined in Article 4 of the American Convention, or to cases of forced disappearance. Therefore, when the direct victims have not survived the breaches or are still missing, complaints have been brought forward by their family members. The family members, who are indirect victims and injured parties according to

⁵⁹⁰ ‘The Court will apply the provision set forth in the Chapter on beneficiaries to the next of kin of the victims who have not been individually identified in this proceeding, which is that to receive the respective payments they must appear before the officials in charge of the official mechanism established for that purpose within 24 months of the date when the State notifies them that their next of kin has been individually identified, and they must prove their relationship to or kinship with the victim, by means of adequate identification or of two attesting witnesses, as were the case’. See Case of the “Mapiripán Massacre”. Judgment of September 15, 2005. Series C No. 134, at Para 257 et 287.

⁵⁹¹ See *Case of the Moiwana Community v. Suriname*, 15 June 2005, Inter-American Court of Human Rights, Serie C No. 124, at Para 178.

Article 63(1) of the American Convention, have sought remedies for the harms experienced by the deceased prior to death, for the death itself and for the consequential damages suffered in their own right.⁵⁹²

The Court has consistently held that both pecuniary and non-pecuniary claims survive and pass to the victims' heirs. Pecuniary damages, or material damages, refer to economic loss, whilst non-pecuniary, or moral, damages clearly encompass the intangible injuries, such as 'pain and suffering'.⁵⁹³ Remarkably, rather than apply the national law of the state concerned or rely on the victim's testament, the IACtHR has developed its own 'law on succession' and, thus, in case of human rights violations the beneficiaries of the reparations do not need to be regarded also as the legitimate heirs under the municipal law of the state involved in the proceeding.⁵⁹⁴ Both pecuniary and non-pecuniary damages, according to the Court's succession law, are divided between the spouse and the children of the victim. According to Shelton the awards are usually distributed in a way that provides less to the spouse in comparison to what would happen in many national legal systems, consequently the offspring receive a larger sum.⁵⁹⁵ Already in the first case heard before the IACtHR, *Velasquez-Rodriguez v. Honduras*, great attention has been paid towards the future of the victim's children. With regard to pecuniary damages, in fact, the Court drew a clear distinction between the calculation of loss of earnings in the case of a victim who is totally and permanently disabled and the calculation of compensation made in cases where the victim is deceased or disappeared and the beneficiaries are the family members. The case in question fell within the second scenario and therefore the IACtHR decided not to adhere to rigid criteria to establish the amount of damages, but rather to provide a 'prudent estimation' of the sum.⁵⁹⁶ Through such estimation the Court has assigned three-fourths of

⁵⁹² See Shelton *supra* n14 at 212.

⁵⁹³ See D. Cassel, 'The Expanding Scope and Impact of the Inter-American Court of Human Rights, in de Feyter *supra* n14 at 198.

⁵⁹⁴ The Court clarified this point already in its first case *Velásquez Rodríguez v. Honduras*, Compensatory Damages, 1990, Ser. C, No4 at Para54.

⁵⁹⁵ Shelton *supra* n14 at 244. See the cases *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989) and *El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28.

⁵⁹⁶ See *Velasquez-Rodriguez v. Honduras*, *supra* n498, at Para 47-48: '[In that case] the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life

the indemnity to the victim's children and one-fourth to his wife. In particular, the Court deemed appropriate to order the institution of a trust fund, under the most favourable conditions permitted by Honduran banking practice, on the purpose to distribute to each child a monthly payment until the age of twenty-five years.⁵⁹⁷

This approach, so attentive towards children's future and education, has been constantly followed by the Court also with regard to cases which involved a relevant number of indirect victims. For instance in the *Aloeboetoe v Suriname case* the IACtHR has specified that:

the compensation fixed for the victims' heirs includes an amount that will enable the minor children to continue their education until they reach a certain age. Nevertheless, these goals will not be met merely by granting compensatory damages; it is also essential that the children be offered a school where they can receive adequate education and basic medical attention.⁵⁹⁸

Concerning 'moral reparations', also known as 'symbolic' or simply 'non-monetary measures', the Court has utterly shown its creative attitude and its deep understanding of cultural differences. The principles which govern the Court's moral reparations are mainly 'the restoration of the victim's dignity' and the 'prevention of future violations'.⁵⁹⁹ According to the IACtHR the judgment *per se* constitutes a form of reparations for the victims, nevertheless the Court itself has clarified that the victims cannot be entirely satisfied by the issuing of a judicial decision which acknowledges their sufferance and

expectancy. In that circumstance, the only income for the victim is what he would have received, but will not receive, as earnings. If the beneficiaries of the compensation are the family members, the situation is different. In principle, the family members have an actual or future possibility of working or receiving income on their own. The children, who should be guaranteed the possibility of an education which might extend to the age of twenty-five, could, for example, begin to work at that time. It is not correct, then, in these cases, to adhere to rigid criteria, more appropriate to the situation described in the above paragraph, but rather to arrive at a prudent estimate of the damages, given the circumstances of each case.'

⁵⁹⁷ Ibid. at Para 58.

⁵⁹⁸ *Aloeboetoe et al. v. Suriname* (Reparations), Judgment (September 10, 1993) Inter. Am. Ct. H.R. (Ser. C) No. 15, at Para 96. Please see also S. Davidson, 'Remedies for violations of the American Convention on Human Rights', in *International and Comparative Law Quarterly*, 44(1995): 405- 414.

⁵⁹⁹ See Mayeux and Mirabal *supra* n584,:13.

recognizes them as the party injured by the state's misconduct.⁶⁰⁰ The same 'constraint' applies to the state's admission of responsibility for the human rights violations concerned. As Antkowiak underlined, since 1991 states have begun to recognize their legal responsibility for the violations attributed to them before the Inter-American Court.⁶⁰¹ Depending on the characteristics of the declaration made by the state, the Court can either examine the merits of the case or move directly to the reparations' phase. Commonly the Court opts for the first solution since the discussion on the merits represents a form of reparation for the victims, although, as mentioned above, it is far from being an exhaustive remedy.⁶⁰² The most significant moral reparations issued by the Court include public ceremonies performed with the participation of local leaders and state's authorities; the construction of memorials; the duties to publicize the Inter-American Court's judgments in national newspapers; the imposition on the state of structural changes to domestic law.⁶⁰³ The children, as indirect victims or simple members of the community where the remedies are enforced, are amongst the beneficiaries of these collective and moral forms of reparations awarded by the Court.

5.3.2.2 Reparations awarded to children as direct victims

As already explained in the previous paragraph, in a large number of cases the Inter-American Court of Human Rights has dealt with tragic infringements of the right to life. The same can be said with regard to many of the cases where children have been indicated as the direct victims. The focus of this work is on the reparations awarded in favour of children and on the potential impact that the measures addressed may have on their lives

⁶⁰⁰ See for instance *Myrna Mack Chang v. Guatemala*, supra n585, Para 260.

⁶⁰¹ See Antkowiak, supra n 64.

⁶⁰² Ibid., at 378, footnote 145. To support this point the author refers to 'the case *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006) (a judgment's Chapters on the merits, proven facts and witness testimony all contribute to the "collective memory" and are forms of reparation) and the case *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006)'.

⁶⁰³ See the case of *the Moiwana Community v. Suriname* supra at n495, the case of *Myrna Mack Chang v. Guatemala* supra n489, the case of the *Serrano-Cruz Sisters v. El Salvador*, Serie C No. 118 (November 2004), the case of *Ticona-Estrada et al. v. Bolivia* Merits, Reparations and Costs (November 2008) Series C No. 191.

and their future. Bearing this in mind, the current paragraph will consider the most relevant developments achieved by the Court's jurisprudence on children's rights related to cases where child victims have been affected by gross human rights violations perpetrated in the context of an internal armed conflict; it does not matter whether such violations were directly related to the conflict or not. In particular, this section will address the reparative measures issued by the Court that have a strong impact also on children other than victims, namely changes in the domestic legislation and other forms of collective reparations.

In the case *Villagràn-Morales et al. v. Guatemala*, where five young men, amongst who three were still minors, were extra-legally executed by members of the Guatemalan National Police as part of a systematic pattern of violence carried on against the so-called 'street-children', the Court has elaborated fundamental concepts with regard to the enhancement of children's rights.⁶⁰⁴ In the judgment under consideration the Inter-American Court referred to the notion of an international *corpus iuris* for the protection of the rights of children, specifying that states are obliged to set special protective measures in order to guarantee not only the child's survival and development, but also the social rehabilitation or reinsertion of *all children* who are victims of abandonment or exploitation.⁶⁰⁵ In particular in the current case the state had violated its duties towards children by exposing them to a 'situation of double violation'; in the first place because Guatemala did not prevent the children from living in the streets and secondly because, through its policies of neglect it deprived them of the minimal conditions for a decent life.⁶⁰⁶ Moreover, the children have been denied the possibility to realize their 'project of life', which according to the Court can be described as 'the victim's reasonable expectation

⁶⁰⁴ The crimes were committed in 1990, the civil war that affected the country for 36 years officially ended in 1996.

⁶⁰⁵ See the Inter-American Commission on Human Rights, Report 'The Rights of the Child in the Inter-American Human Rights System', supra n.471.

⁶⁰⁶ See IACtHR, *Case of the "Street Children" (Villagràn-Morales et al.) v. Guatemala*, supra n.35 at Para184: 'The Commission described the three child victims of the facts of this case as persons who lived in extremely precarious socio-economic conditions and who fought to survive alone and fearful of a society that did not include them, but rather excluded them. Furthermore, it stated that, as the State abstained from taking effective measures to investigate and prosecute the perpetrators, it exacerbated the risk of violations of the rights of "street children" in general, and the victims of this case, in particular.'

for the future'.⁶⁰⁷ In the judgment on reparations the IACtHR took into account the concept of 'life plan' for the calculation of the compensation due to the victims' families and imposed on the Government of Guatemala the duties to:

adopt in its domestic legislation, the legislative, administrative and any other measures that are necessary in order to adapt Guatemalan legislation to Article 19 of the Convention' and 'to designate an educational centre with a name allusive to the young victims in this case and place in it a commemorative plaque with their names.'⁶⁰⁸

In the case *Molina Theissen v. Guatemala* the Court has dealt with the forced disappearance of Marco Antonio Molina Theissen, a fourteen year old boy, who was kidnapped from his father's home by members of the Guatemalan Army. The IACtHR in its judgment reasserted the state's duty of special protection towards children, specifying that the state's responsibility for the breaches occurred is 'compounded because what happened to the child Marco Antonio Molina Theissen was part of a practice of forced disappearance of persons, carried out by the State during the domestic armed conflict and carried out primarily by agents of its security forces, and children were also victims of this

⁶⁰⁷ The notion of project of life (or life plan) has been introduced in the Court's jurisprudence during the case *Loyaza Tamayo v. Peru* as the victim petitioned the Court for a ruling on the compensation, which might be due to her in the form of damage to her "life plan" and enumerated a number of factors that, in her judgment, should be taken into account to establish the scope of this head of damages and measure its consequences. The Court accepted the claim in principle and agreed on that the applicant has suffered harm to her project of life, nevertheless the Court did not make an award under this heading and, instead, invited the future victims and their representatives to elaborate a methodology able to calculate this new kind of damage. See *Loyaza Tamayo v. Peru*, Reparations (November 27, 1998) Inter-Am. Ct. H.R. (Ser. C) No. 42, at Para 147: 'The head of damages to a victim's "life plan" has been examined both in recent doctrine and case law. This notion is different from the notions of special damages and loss of earnings. It is definitely not the same as the immediate and direct harm to a victim's assets, as in the case of "indirect or consequential damages." The concept of lost earnings refers solely to the loss of future economic earnings that can be quantified by certain measurable and objective indicators. The so-called "life plan," deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.'

⁶⁰⁸ *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, see supra n 35, Reparations, at Para 123(5)(7).

practice, as a means of torturing and frightening their families.’⁶⁰⁹ In awarding collective reparations the Court in the instant case has been particularly creative as it ordered to create a ‘Hall of the Rights of the Child: Marco Antonio Molina Theissen’ with the aim of honouring the memory of the boys and the girls who suffered violence during the armed conflict, and specifically that there should be a constant exhibit in remembrance of the victim; to establish a radio program on the national radio station to discuss issues pertaining to children’s rights, to dedicate a national day to the missing children who were victims of the domestic armed conflict in Guatemala; to grant a scholarship for children’s development and, specifically, one named after Marco Antonio Molina Theissen to provide access to a career in engineering for low-income youths since the victim was about to conclude his third year of secondary school, therefore he was only two years away from obtaining his high school diploma and he planned to study civil engineering.⁶¹⁰

In the judgment of the case *Gomez Paquiyauri vs. Peru* the Court finally crystalized the concept of ‘aggravated state responsibility’. The responsibility of the Peruvian government for the systematic practice of human rights violations and extra-legal executions conducted by state’s agents against persons suspected of belonging to armed groups, in that instance was regarded as ‘aggravated responsibility’ because the victims, two brothers, were children.⁶¹¹ The aggravated responsibility of the state had a quantitative impact on the reparations awarded by the Court, although, quite surprisingly, no mention was made in this case to the brothers’ project of life.⁶¹² In the same case the Court applied also its own law on succession determining that the state should facilitate the registration of the name of the victim’s daughter, who was born outside the wedlock after the death of her father and

⁶⁰⁹ See *Case of Molina Thiessen v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 108. (July 3, 2004), Reparations and Costs, at Para 41.

⁶¹⁰ Ibid. at Para 76 (d, e, f, g).

⁶¹¹ See *Caso de los Hermanos Gomez Paquiyauri vs. Peru*, (8 de julio de 2004) Corte I.D.H., (Ser. C) No. 110, at Para 76.

⁶¹² See M. Feria Tinta, *The Landmark Rulings of the Inter American Court of Human Rights on the Right of the Child* (Martinus Nijhoff Publishers: Leiden, 2008): 427. ‘Nevertheless the award in the Gomez Paquiyauri case amounted to \$ 740,500.00 in total. Whilst the Court awarded \$240,500.00 for pecuniary damages, it was the award for moral damages that reflected more evidently the Court’s view of the gravity of the violations incurred by the State of Peru in the said case.’

therefore could not be recognized by him as requested under the Peruvian domestic legislation.⁶¹³ As a symbolic form of reparation, the Inter-American Court imposed on the state the obligation to officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, in a public ceremony and in the presence of the next of kin of the victims.⁶¹⁴

The *Serrano Cruz Sisters case v. El Salvador*, concerning the kidnapping and forced disappearance of Ernestina and Erlinda Serrano Cruz (aged 7 and 3 years) perpetrated in 1982 by members of the ‘Salvadoran Army Battalion’ during a military operation known as ‘Operation Clean Up’, represents another landmark judgment in the jurisprudence of the IACtHR.⁶¹⁵ In this case the Court has done more than establishing the state’s aggravated responsibility for the violations occurred. Noting that under the domestic law of El Salvador ‘forced disappearance’ was not classified as a crime, the Inter-American Court considered that El Salvador should include this crime appropriately in its national legislation and should adopt the necessary measures to ratify the Inter-American Convention on the Forced Disappearance of Persons.⁶¹⁶ The Court has punctually indicated further measures to be taken in order to find the two sisters and other many missing children. In particular the Court ordered the establishment of a national commission to trace, with the active participation of civil society, the ‘young people who disappeared when they were children during the armed conflict’, the creation of a search web page and the setup of a genetic information system to contribute to the identification of disappeared children.⁶¹⁷ In addition to that the Inter-American Court requested the State to designate a

⁶¹³Please see supra n512, Para253(13): ‘The State must establish a scholarship up to university level, in favour of Nora Emely Gómez Peralta, and facilitate her registry as the daughter of Rafael Samuel Gómez Paquiyauri, under the terms set forth in paragraphs 237 and 238 of the instant Judgment.’ See also Para253(17).

⁶¹⁴ Ibid. at Para 253(12).

⁶¹⁵ Please see *Case of the Serrano-Cruz Sisters v. El Salvador*, Serie C No. 118, IACtHR (23 November, 2004). Merits, Reparations and Costs.

⁶¹⁶ Ibid. at Para 174.

⁶¹⁷ Ibid at Para 189: ‘This Court considers that a database should be established by creating a web page for tracing the disappeared children. The database should be set up with the given names and surnames, possible

day dedicated to the children who, for different reasons, disappeared during the internal armed conflict ‘in order to make society aware of the need for all Salvadorans [...] to work together to find the best solutions [...] leading to the truth about the whereabouts of the children.’⁶¹⁸ In terms of states’ compliance with the judgments of the Court, it is noteworthy that the overall rate of compliance is quite high. In fact, according to Camilleri and Krsticevic:

In contrast with their response to Commission rulings, it is quite rare for States to completely fail to comply with Court judgments, and most States advance significantly over time toward implementing these judgments. Monetary compensation, for example, is almost always paid. Symbolic measures—public apologies, naming of schools and parks, publication of the Court’s sentence, and so on—are also usually implemented. Compliance with legal reforms ordered by the Court is likewise quite strong, perhaps surprisingly so. More difficult, but often at least partially implemented, are measures of rehabilitation such as health and education benefits, and guarantees of non-repetition such as the training of public officials.⁶¹⁹

The results of the above mentioned study show that, despite a remarkable level of compliance, states parties to the IACtHR are less keen to fully implement the forms of reparation, such as guarantees of non-repetition and rehabilitation, that have been issued by the Court in the majority of its case law involving child victims.

5.4 Conclusions

As indicated in the introductory Chapter and further discussed in the current one, there is an important distinction to draw between international criminal courts and tribunals on the

physical characteristics and any other existing information about the Serrano Cruz sisters and their next of kin.’

⁶¹⁸ Ibid. at Para 196.

⁶¹⁹ See M. J. Camilleri and V. Krsticevic, ‘Making International Law Stick: Reflections on Compliance with the Inter-American Court of Human Rights Judgments’, in *Derechos Humanos, Relaciones Internacionales Y Globalizacion*, (2009): 235-247, available at: <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/events.htm> See also J. L. Cavallaro and E. J. Schaffer, ‘Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’, *Hastings Law Journal* 217 (2004): 217-281.

one hand and regional human rights judicial bodies on the other. Traditionally, the first ones deal with individual criminal responsibility and focus on the punishment of the perpetrators rather than on the victims, instead the second ones, as constantly showed by the Inter-American Court of Human Rights through its innovative jurisprudence, can play a key role in repairing the misconduct of the states which have neglected or consciously breached their obligations under international law. The Court itself has stressed several times that the judgment is *per se* a form of reparation, nevertheless it cannot be regarded as a sufficient remedy for the victims.

Up to now the Inter-American Court has developed a set of concepts and principles able not only to promote the protection of children's rights, but also to qualify as 'aggravated' the responsibility of the state that has committed, or allowed the commission, of crimes against the most vulnerable part of the population. Such recognition, as demonstrated in the previous paragraph, has an impact on the legal consequences deriving from the unlawful acts perpetrated and in particular on the reparative measures imposed by the Court. Instead, in the international criminal law arena the commission of crimes against children has been identified as an 'aggravating factor' which may be *discretionally* taken into account in the process of sentencing and does not lead to the award of heftier compensation for the victims nor to specific forms of reparations. This has been the 'classic approach' followed by the international tribunals until the establishment of the International Criminal Court and the entry into force of the Rome Statute. Very recently the ICC has issued its first judgment and a separate decision crafting the principles and procedures to be applied to reparation in the Lubanga case. As underlined in the previous paragraphs the decision has set forth the existence and the recognition of children's right to reparation, making explicit reference to the UN CRC and in particular Article 39, which enshrines the states' obligation to reintegrate and rehabilitate child victims. By analogy such right applies also in the international criminal justice context when individual criminal responsibility is the only kind of liability that can legitimate the award of reparations. The decision adopted by the Trial Chamber I takes in due account the best interest of the child, children's right to express their views and the particular vulnerability of girls, however, it delegates entirely to the Trust Fund for Victims all the practical and procedural issues. The Trial Chamber 1, newly composed, will, hence, only exercise

‘monitoring and oversight’ functions during the implementation of the reparations, without providing the TFV with further orders or instructions and, in the end, confirming that international criminal justice is not yet ready to fully embrace a victim-centred approach and play a prominent role in supporting victims, and in particular children, in their struggle to receive adequate, prompt and effective redress.

6. Reparations through non-judicial mechanisms

6.1 Introduction

Highlighting the shortcomings of the international judicial mechanisms almost automatically leads to an analysis of the alternative methods to deal with the issue of reparations for child victims of wars. The present Chapter, thus, pursues the aim of looking at processes set up as a response to an armed conflict in order to foster reconciliation and to provide the victims with redress measures not subjected to the fulfilment of the duty to prosecute nor to the establishment of criminal or human rights based proceedings. The real potential of reparations, in fact, can be retrieved in their ability to build trust and restore the dignity of the victims ‘through a felt and public commitment to human rights.’⁶²⁰ It is a truism that reparations are more effective when they are understood and implemented as a long-term process which involves the entire community rather than when they are awarded through a limited case by case approach before a national or international criminal court. Nevertheless, such a broad overture leaves the door open to many theoretical and practical issues that are going to be discussed in the following paragraphs.

6.2 Truth Commissions and reparations

According to Teitel a Truth Commission (TC) is ‘an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time.’⁶²¹ The general aim of a TC is to provide a comprehensive record and analysis of the violations committed during the conflict or the military dictatorship.⁶²² From 1974 to 2007 at least 32 TCs have been established in 28

⁶²⁰ See L. Magarrel, ‘Reparations in Theory and Practice’, International Centre for Transitional Justice, Reparative Justice Series, 2007 at 2.

<http://ictj.org/publication/reparations-theory-and-practice> (accesses March 2012)

⁶²¹ R. G. Teitel, ‘Human Rights in Transition: Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16(69)(2003):69-94.

⁶²² G.G. J. Knoop, ‘Truth and Reconciliation Commission Models and International Tribunals: a Comparison’, Symposium on *The Right to Self-Determination in International Law*, organized by

countries worldwide and, according to Heyner, in 2011 their number has increased up to 40.⁶²³

Although each TC has a different mandate, it is feasible to trace a common pattern; for instance it is indeed correct to affirm that normally TCs are required to make recommendations to the government on the purpose to help preventing relapses and further abuses. These recommendations are embodied in a final report, which can also contribute to the establishment of a reparation policy designed for the victims. The relationship between the TC and the people who suffered from the heinous violations occurred tends to be really strong, because the TC represents the first *forum* where the victims have the opportunity to finally tell their stories and catch a ‘glimpse’ of justice. States are amongst the actors entitled to award reparations as they are the recipients of the TCs’ final recommendations and the ones in charge of implementing them.

Even if it may be difficult, sometimes impossible, to achieve *in toto* the goals set in the TC’s report, its content has to inspire and guide the government throughout the institutional reform, fostering reconciliation and, when expected by the TC’s mandate, the reparation plan. The scope of this section is to investigate how, and the degree to which, the work of the truth and reconciliation commissions can concretely affect the states’ reparation programs, especially when they target children. It will take into account in particular the outcomes of six of the TCs established worldwide in post-conflict settings in order to verify whether children’s right to participate in (and benefit from) the transitional justice process has been fulfilled and their right to reparation satisfied.⁶²⁴

Unrepresented Nations and People Organization (UNPO), 29 September-1 October 2006, The Hague, The Netherlands.

<http://www.unpo.org/downloads/ProfKnoops.pdf> (accessed March 2011).

⁶²³ Data available at <http://www.amnesty.org/en/international-justice/issues/truth-commissions> (accessed March 2011).

⁶²⁴ This section will consider in particular the work of the TCs in South Africa, Sierra Leone, Liberia, Timor-Leste, Guatemala and Peru, because all of them, adopting different modalities and notwithstanding the limits and the shortcomings, gave space to the complex issue of reparation for war-affected children. This cluster has been identified by a recent study prepared by the UNICEF Innocenti Research Centre in cooperation with the International Centre for Transitional Justice and launched on August 2010. <http://ictj.org/sites/default/files/ICTJ-Global-Children-Truth-2010-English.pdf> (accessed July 2011).

6.2.1 Material and symbolic reparations

As already stressed throughout the previous Chapters, ‘it is important that reparations programs acknowledge children as rights holders who suffered specific violations in light of their vulnerability’; in order to do so a TC has to identify the kind of reparative measures which might better pursue the scope to improve children’s conditions.⁶²⁵ Reparation benefits are usually distinguished between ‘material’ and ‘symbolic’. Material reparations provide a physical benefit or service to victims. As indirect victim, e.g. affected by the loss of a relative, children may receive compensation, for example in the form of a percentage of a deceased parent’s pension (as the TC in Chile recommended to the Chilean government). Also as direct victims, children might be awarded cash, scholarships, access to health care and reintegration programs. Symbolic reparations, instead, may include measures such as public apologies, the creation of public memorials and monuments, artwork, learning centers and museums.⁶²⁶ Since TCs collect important information their contribution can be instrumental to the construction of a collective memory and it can help improving children human rights education.⁶²⁷ Both material and symbolic reparations can be provided individually or collectively, e.g. in Sierra Leone in 2009, the government started giving individual payments to the most affected victims of the conflict, including children.⁶²⁸ The lump-sum liquidated was the equivalent of less than 100 US dollars, in contrast with the TC’s report which recommended instead of granting life pensions. The

⁶²⁵C. Aptel and V. Ladisch, *supra* n101.

⁶²⁶See ‘Children and Truth Commissions’ *supra* n120. See the report launched on 24 February 2012 by the Truth and Reconciliation Commission of Canada ‘*Canada, Aboriginal children and Residential Schools: They came for the children*’, in the preface to the report one reads ‘The Truth and Reconciliation Commission of Canada is publishing this history as a part of its mandate to educate the Canadian public about residential schools and their place in Canadian history.’

⁶²⁷*Ibid.* at 52.

⁶²⁸‘Because of the state’s inability to provide for the needs of all victims, the commission decided to prioritize reparations for certain categories of victims. It used the concept of ‘vulnerability’ to do so, judging that amputees, other war wounded, victims of sexual violence, children and war widows were the victims in most dire need of urgent care.’ J. King, ‘Gender and Reparations in Sierra Leone: The Wounds of War Remain Open.’ In Rubio-Marin *supra* n15 at 5.

Guatemalan TC (Historical Clarification Commission), rather than focusing on compensation, recommended the government to reform the fiscal sector according to La Paz agreement and the National Reparation Plan in order to gain long-term benefits for the entire population, including children.⁶²⁹ The same collectivistic approach was shared by the Liberian TC with regard to reparations. In the final report, in fact, the Commission stated that:

reparations should aim at repairing the consequences of violations borne by children during the Liberian conflict. There should be symbolic and material reparations for Liberia's children and young adults. Ideally, any reparation schemes will target *entire communities and children as a group* rather than single out individual child.⁶³⁰

The six TCs worldwide which have dealt so far with war-affected children present some common patterns, but also several differences. In the first place one should identify the 'moments' when children were involved in the TCs' work. As previously pointed out children can be specifically mentioned in the TC mandate and/or they can be listened to as witnesses in the statement-taking process and in the public hearings. However, sometimes their needs and rights are taken into account only during the latest stage of the TC activities, namely throughout the drafting of the final report where they are indicated as recipients of some recommendations and/or beneficiaries of reparations policy.⁶³¹

6.2.2 Children included in the TC's mandate

Amongst the TCs which dedicated part of their efforts to the enhancement of children's rights, only three adopted a specific focus on children in their mandates. The first TC to include children in its mandate was the one established in Sierra Leone. According to the

⁶²⁹ 'Que el Estado costee, poniendo en marcha la reforma tributaria globalmente progresiva establecida en los Acuerdos de Paz, el Programa Nacional de Reparación. Para ese efecto, resulta conveniente una reorientación de los gastos de inversión social y la disminución de los gastos militares. Estas acciones han de constituir sus fuentes principales de financiación.' Guatemala: Memory of Silence, Final Report of the Commission for Historical Clarification, Conclusions and Recommendations, 63.

⁶³⁰ Appendices to the Liberian TC Final Report, Volume Three: 'Children, the Conflict and the TC Children Agenda'. http://TCofliberia.org/resources/reports/final/volume-three-2_layout-1.pdf (accessed August 2011): 107.

⁶³¹ See 'Children and Truth Commissions' Supra n120 at 9.

Truth Commission Act 2000 amongst the TC's tasks there was also a commitment 'to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the *experiences of children* within the armed conflict.'⁶³²

On the wake of Sierra Leone's openness towards a child-friendly approach, also the Timor-Leste TC and the Liberian one finally realized the necessity to officially acknowledge the difficult situation of children affected by the conflicts occurred, mentioning them as a particularly vulnerable group in their mandates and stressing the importance to 'adopt specific mechanisms and procedures to address the experiences of women, children and vulnerable groups, paying particular attention to gender based violations as well as to the issue of child soldiers, providing opportunities for them to relate their experiences, addressing concerns and recommending measures to be taken for the rehabilitation of victims of human rights violations in the spirit of national reconciliation and healing.'⁶³³

6.2.3 Children's statement taking and public hearings

Children's involvement in the TCs' activities related to truth finding can be limited to the initial stage of statements' collection and/or can be extended to the public hearings that take place after the information is gathered. According to a recent study conducted by UNICEF and the International Center for Transitional Justice (ICTJ) four TCs gave children the possibility to actively participate in the statement taking phase, namely the ones established in Peru, Sierra Leone, Liberia and Timor-Leste. As for the public hearings, including special hearings conducted exclusively on children's issues, the

⁶³²Truth and Reconciliation Commission Act 2000 [Sierra Leone], Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9, dated 10 February 2000, Part III, 6(2)(b).

⁶³³An Act to Establish the Truth and Reconciliation Commission (TC) for Liberia, approved 10 June 2005, Ministry of Foreign Affairs, Monrovia, 22 June 2005. United Nations Transitional Administration in East Timor – Regulation No. 2001/10, UNTAET, Dili, 13 July 2001, Article IV, sec. 4(e).

number of TC remains unaltered, although the South African TC ‘replaces’ the Peruvian.⁶³⁴ Statement taking refers to meetings and interviews held between commission staff and victims, perpetrators and witnesses. This moment can be considered as crucial to delve into the memory of what happened. The average number of statements collected by each TC normally goes from 7,000 to 22,000; in order to include children, most likely already traumatized by the experience of the conflict, it is hence necessary to adopt specific measures and seek to limit the risk of second victimization. For example, statement takers in charge of collecting children’s stories need to be properly trained and require the support of child protection agencies and NGOs with a specific focus on children. In Sierra Leone a child-friendly statement taking form was used to guide the interaction between the interviewer and the child, the same tool was set in Liberia, but in the end it was not adopted due to mere technical reasons, meaning that the statements were provided by more than 300 children in 13 districts without recurring to any *ad hoc* measures.⁶³⁵ Children’s participation in the public hearings is even more challenging than including them in the statement taking process. The testimony, in the first place, can lead to a threat to child’s safety or to his/her stigmatization, especially when he/she has been sexually abused; therefore it requires special efforts and precautions. In alternative, in some cases children have been allowed to publicly share their experiences only in thematic hearings held in a child-friendly environment and without the solemnity and the pressure that allegedly characterize the official TC’s sessions. In particular, with regard to the TC established in South Africa, which still represents a model for the other truth commissions, it is worth to note here that, after long and deep consultations with UNICEF and other child protection agencies, the TC decided not to admit in the public hearings testimonies of people under

⁶³⁴See ‘Children and Truth Commissions’ supra n120 at9.

⁶³⁵See Aptel and Ladish supra n101 at16 ‘a special children’s statement-taking form was prepared—it omitted leading questions, emphasized the need for a child-friendly environment and psychosocial support, and encouraged considerations of a wider range of violations including social, economic, cultural, as well as civil and political. However, since its categories did not match the standard form and the data coding system, it was not used.’

the age of eighteen.⁶³⁶ This was meant, of course, to protect them, even though it was difficult to forget that children not only were directly engaged in the resistance and the struggles against the apartheid, but they were also a specific target of many of the crimes occurred. Eventually, the TC's Human Rights Violation Committee convened six special hearings exclusively focused on the experiences of children and young people; these took place in Bloemfontein, Cape Town, Durban, East London, Johannesburg and Pietersburg in May and June 1997. During the hearings, young people aged from 19 to 24 years old expressed their views and shared their stories, whilst children, still not allowed to bring their testimonies, were involved in workshops and in cultural and dramatic arts presentations that were undertaken in parallel with the truth telling process.⁶³⁷ The hearings were widely attended by children and adolescents, nevertheless concerns were raised, in particular after the one held in Durban due to scant participation of adults. The same lack of involvement has been discovered in Liberia during the children's special hearings. In that occasion, notwithstanding the great attention given by the national media to the events, a representative of the Children's Parliament publicly underscored the little interest that the Liberian society as a whole dedicated to the thematic hearings.⁶³⁸

⁶³⁶P. Pigou., 'Children and the South African Truth and Reconciliation Commission', in *Children and Transitional Justice*, Parmar S. Roseman et al., (Cambridge MA: Harvard University Press, 2009). 'Responding to advice from many children's rights activists and professionals, the Commission decided not to take statements from children (anyone under the age of eighteen), which in turn meant that no children's testimonies would be available for the public hearing process. This automatically removed any immediate need to give special attention to the difficulties associated with securing children's testimony. Under the circumstances, this may have been unavoidable, but to a certain extent it marginalized the direct participation of children and thereby children's voices.'

⁶³⁷Ibid. at142.

⁶³⁸See Aptel and Ladish supra n101 at9. See also T. Sowa 'Children and the Liberian Truth and Reconciliation Commission,' In *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Parmar et al. supra n 636 at11.

6.2.4 Children as beneficiaries of reparations

The truth and reconciliation commissions taken into account decided to cope with the issues related to children in different ways and at different levels, nevertheless all of them included children in their final reports and recognized them as beneficiaries of the national reparations policies. After the report is launched, normally the government has to translate into actions what has been identified by the TC as the best strategy to achieve accountability, reconciliation and reparation. Depending on several factors, very often the lapse of time between the end of the TC's work and the beginning of the implementation's phase is considerable.⁶³⁹

The recommendations of the TCs established in Liberia and in Timor-Leste, for instance, have not been enforced so far. As for the first one, it is anyway worth notice here that, notwithstanding the child-friendly approach proclaimed in its mandate, only a marginal part of the final report has been dedicated to recommendations concerning reparations for children. Namely, the TC recommended the establishment of a Trust Fund for Victims (TFV) and free access to primary and secondary education and to some selected disciplines at the college level.⁶⁴⁰ Similar comments can be made about the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), which released its monumental report, *Chega!*, in October 2005. In its more than 2500 pages the report analyses the roots and the consequences of the conflict, the possible ways to approach reconciliation and the measures that the government *in primis* has to set in order

⁶³⁹ This was the case of Peru: 'to the outrage of victim-survivors' organizations and the human rights community, President Alejandro Toledo waited several months before responding to the TC's Final Report, and then promised only a program of social development thereby sidestepping reparations.' L.J. Laplante and K. Theidon, *Truth with Consequences: Justice and Reparations in Post Truth Peru*, in *Human Rights Quarterly* 29 (2007): 228-250.

⁶⁴⁰ 'The TC recommends free education to all Liberians from primary to secondary education and for certain disciplines at the college level. Said disciplines are medicine, nursing, education, teachers training, agriculture, science and technology and according to the human development resource needs of the country.' See the final report of the Liberian TC at 277.

<http://TCofliberia.org/resources/reports/final/unedited-final-report-pages-201-300.pdf> ,

(accessed August 2011). See also T. Sowa, 'Children and the Liberian Truth and Reconciliation Commission', in Parmaar et al. *supra* n 636 at 12.

to eventually repair the victims. With regard to reparations, the TC has listed the principles which should guide the national reparation plans: feasibility, accessibility, empowerment, gender and prioritization based on need. Emphasis has been placed on children affected by the war, in the sense that they have been identified as a group of particularly vulnerable victims, but there is no reference to the forms of reparations which should be exclusively directed to them.⁶⁴¹ The governments of South Africa, Guatemala and Peru so far partially implemented the recommendations made by the TCs. The South African TC, which launched the first five volumes of its report in 1998, was composed by different committees, amongst those the Reparation and Rehabilitation Committee which was in particular tasked with making recommendations to the president on the reparation policy to adopt.⁶⁴² The reparation program distinguished between ‘urgent interim reparations’ and ‘final reparations’. The first kind of reparations was meant to target the victims who needed prompt medical treatment and other forms of urgent assistance, while the second one was a long term challenge, allegedly still ongoing. As for the interim reparations, they took the form of financial support provided to help the victims to access the direst services. The cash sum reached a maximum of 713 US dollars, granted directly to the victim or, in case of deceased victims, to a relative-dependent, including children.⁶⁴³ Nonetheless, the TC did not set *ad hoc* reparations for children neither with regard to symbolic measures, focusing mostly on the communal process of commemoration rather than on the educative potential of certain rituals and public events. The Peruvian TC report was made public in 2003, and its implementation is still ongoing. The Ombudsperson and the Reparation Council have tried to follow the recommendations made by the TC, but they came up against the lack of political will and the scarcity of financial resources.⁶⁴⁴ According to the Program of Integral Reparations (PIR), adopted by the State in 2005, victims of the conflict

⁶⁴¹ See Chega!! At 41, <http://www.cavr-timorleste.org/cheгаFiles/finalReportEng/11-Recommendations.pdf> (accessed August 2011).

⁶⁴² B. Goldblatt, ‘Evaluating the Gender Content of Reparations: Lessons from South Africa’, in Rubio-Marin, *supra* n15 at5.

⁶⁴³ *Ibid* at67.

⁶⁴⁴ S. Herencia Carrasco (2010), *Transitional Justice and the Situation of Children in Colombia and Peru.*, Innocenti Working Paper No. 2010-16. Florence, UNICEF Innocenti Research Centre: 12.

should be registered to the *Registro Único de Víctimas* (RUV) in order to benefit from free health care and scholarships for orphans. The reparations plan promoted by the TC and allegedly pursued by the Peruvian government certainly represents an ambitious and comprehensive model, nevertheless since 2005 its implementation has been postponed due to the shortage of public funds constantly declared by the Ministry of Economy and Finance which, instead, seems to be perfectly able to ‘secure them for politically popular causes, such as the armed forces.’⁶⁴⁵

In February 1999 the report of the Guatemalan Commission for Historical Clarification was launched and in 2003 the National Reparation Program was finally activated. The Program was ‘inspired by the principles of equality, social participation and respect for cultural identity’ and its aim can be described as essentially twofold: compensate the economic losses and trigger the rehabilitation and the satisfaction of the victims restoring their dignity.⁶⁴⁶ Although the report clearly mentioned the necessity to include the Mayan population, aka the most affected by the war, in both the debate on the reparations’ strategy and its implementation, so far the dialogue between Mayans and the rest of Guatemalans has been unproductive, especially with regard to symbolic reparations.⁶⁴⁷ During the 36 years of conflict, Mayan children have been particularly targeted. They experienced a wide range of human rights violations and after the massacres many boys and girls, especially under five years of age, were brought to the homes of regular army’s members and used as servants or, in the best case scenario, illegally

⁶⁴⁵Laplante and Thaidon supra n639 at13.

⁶⁴⁶ See the final report of the Commission for the Historical Clarification ‘Guatemala: Memory of Silence’ <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html> (accessed August 2011).

⁶⁴⁷ See A. Issacs, ‘Confronting the Past? The Challenge of Truth, Justice and Reparations in Guatemala’, ‘Indigenous insistence on culturally appropriate reparations also drew the resistance and the scorn of ladino members who accused them of seeking to ‘indianise the process’. ‘Yes, we wanted to restore the customs of our elders, our spiritual guides, and as a memorial we want the restoration of our shrines that were destroyed by the army’, a Mayan delegate explained; ‘but they insisted on Western therapy, and for them a memorial means placing a cross or a sign in a park saying something like “a call for reconciliation”. But for us that does not mean much’.

<http://www.realinstitutoelcano.org/wps/wcm/connect/614ec9804f018693bac8fe3170baead1/Isaacs879.pdf?MOD=AJPERES&CACHEID=614ec9804f018693bac8fe3170baead1> (accessed August 2011).

adopted.⁶⁴⁸ For this serious type of crimes there has been no official amend, no public apology and definitely no reparations. From the moment it was approved, the National Reparation Program has encountered financial and logistics problems, that, together with the poor inclination towards a constructive dialogue with the indigenous members of the population, has led so far only to a scant distribution of monetary compensation.⁶⁴⁹ In Sierra Leone the National Commission for Social Action (NaCSA), established according to the TC's report, nearly 4 years after the report was launched finally started the victim's registration, which lasted from December 2008 to June 2009. The number of victims counted, verified and registered across the country was 29,783 'including children, amputees, and others wounded in the fighting, war widows, and victims of sexual violence.'⁶⁵⁰ The registration was part of the so-called Year One Program, granted by the United Nations Peace-building Fund and implemented by the NaCSA. The project was aimed at providing urgent measures to support the most needful victims, identified by the TC using the concept of vulnerability and, with regard to children, the accent was put mostly on education.⁶⁵¹ According to the program children recognized as victims, and still eligible for primary and middle education, should receive the reimbursement of school fees, uniforms and books. Although the registration process was successful in the sense that it was able to actively involve also children and people living in the rural areas of

⁶⁴⁸C. Paz y Paz Baley, 'Guatemala: Gender and Reparations for Human Rights Violations', in Rubio-Marin supra n15 at5.

⁶⁴⁹'A la fecha se ha entregado el aporte económico a unas 40 mil personas, de las 69 mil que se tienen registradas. En cuanto a las viviendas, se han adjudicado 888 y esperan entregar unas 3 mil en el resto de la actual administración.'

<http://noticias.com.gt/nacionales/20101214-programa-nacional-de-resarcimiento-podria-desaparecer-debido-a-poco-presupuesto-para-el-2011.html>(accessed September 2011).

⁶⁵⁰ Submission to the Universal Periodic Review of the UN Human Rights Council 11th Session: May 2011 International Center for Transitional Justice (ICTJ) November 1, <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Periodic-Review-2010-English.pdf> (accessed 30 August 2011).

⁶⁵¹See J. King, 'Gender and reparations in Sierra Leone: The Wounds of War remain Open', in Rubio –Marin supra n15 at5. 'The TC report categorizes children eligible under the reparations program as follows: children with physical injury, such as amputees or victims of sexual violence; children whose parents were killed as a consequence of any abuse or violation described in the report; children born out of an act of sexual violence and whose mothers are single; children who suffer from psychological harm; and war-wounded children.'

Sierra Leone, this represents only the starting point of a long term challenge which will require considerable efforts and the deploy of financial resources meant to address needs which go far beyond the distribution of school's facilities.

6.2.5 Summing up the findings on TCs and children's right to reparation

From what has been said so far, what emerges in the first place is the insufficient participation of children throughout the TCs worldwide, which clearly leads to a poor understanding of reparative measures able to significantly restore the rights violated in the course of armed conflicts. Notwithstanding the almost universal ratification of the UNCRC, the reception of the principles enshrined, in particular with regard to children's 'right to express their views in all the matters affecting them', is still far from being accomplished.⁶⁵² Only a few truth and reconciliation commissions worldwide made serious efforts to collect children's statements and include them in the general discourse on reconciliation. The scant attention paid by the adult's community towards the special hearings on children's issues held in South Africa and Liberia is a signal of the fact that children's participation is still looked at with suspicion. Children themselves appear to be skeptical when approached to give statements; according to the above mentioned report released by UNICEF and the ICTJ many of the children contacted during the statement taking phase of the Sierra Leonean TC were genuinely afraid of being deprived of their freedom when asked to tell their stories. Besides the lack of information and human rights education, another burning issue has been underscored throughout the present section, namely the difficulties faced by the selected TCs in setting the criteria which regulate children's eligibility for reparations. Clearly, due to the vulnerability's threshold reached by child victims of war, each and every TC needs to be really careful when it comes to identifying the victims who are going to be recognized as beneficiaries of the reparations policy recommended to the government. If it true that 'one size does not fit all' and it is necessary to keep a local focus, it is also true that certain crimes affect children more than adults (e.g. sexual crimes) and therefore they will always require forms of

⁶⁵²On this point please see Chapter 4.

reparations which are child-friendly and aim at the rehabilitation and reintegration of the victim. The approach should be, hence, not too broad or too narrow in order to allow the TC to examine on a case by case basis, when it is feasible, which is the best way to intervene and who are the most needful amongst the child victims of a given conflict. As for the challenges that future TCs will have to tackle in order to better assess children's demands, it is worth to underline in the first place the urge to dedicate more efforts to the outreach planning, which should avoid creating false expectations amongst the child victims who have been already traumatized by the events occurred. TC's commissioners should carefully address the financial issue in the report and distribute responsibilities and tasks to the organs in charge of implementing the recommendations, in fact the proclivity has been so far to shallowly rely on external aids and/or to underrate the necessity to consider the amount of resources concretely destined to the reparation program.

6.3 The Trust Fund for Victims of the International Criminal Court

Trust funds are traditionally defined as 'amounts of capitals which a person (the trustor) places in custody of a trustee to be administered to the advantage of the beneficiary'. The Inter-American Court of Human Rights has often imposed on states, held responsible for human rights violations, the creation of trust funds under the most favourable conditions permitted under the national banking practice.⁶⁵³ Such trust funds have been particularly used when the injured party entitled to the compensation was a minor, in order to better protect and guarantee his/her interests. At the international level trust funds have been set up under the aegis of the United Nations to help and support the victims of specific categories of crimes and abuses. For example the United Nations Voluntary Trust Fund for Victims of Human Trafficking, launched in 2010 by the Secretary General Ban Ki-moon and administered by the United Nations Office on Drugs and Crime (UNODC), pursues the scope to 'provide humanitarian, legal and financial aid to victims of trafficking in persons through established channels of assistance, such as governmental, intergovernmental and

⁶⁵³ See *Velasquez-Rodriguez v. Honduras*, supra n511.

non-governmental organizations'.⁶⁵⁴ Similarly the United Nations Trust Fund to End Violence against Women, which has been established in 1996 by the UN General Assembly and is managed by UN Women, acts as a multilateral grant-making mechanism exclusively devoted to supporting local and national efforts to end violence against women and girls.⁶⁵⁵

The establishment of trust funds has been also recommended by some Truth Commissions to implement payments minded on behalf of a large number of victims.⁶⁵⁶ According to Wierda and De Greiff criminal courts normally interpret the concept of reparation, applied to the cases they have tried, in terms of 'full restitution'; instead trust funds can provide redress to many people, including those whose claims do not reach a court.⁶⁵⁷ The co-existence of the ICC and the Trust Fund entails the dovetailing of two different approaches to reparation, one purely legal and the other one broader and more flexible.

The ICC's Trust Fund is characterized by peculiar features deriving from its unique form of 'an assistance program with a justice component'.⁶⁵⁸ As already mentioned, the TFV was established by the Assembly of States Parties ('ASP') to the Rome Statute in 2002 for the benefit of the victims of the crimes under the Court's jurisdiction and their families.⁶⁵⁹ Its Regulations were adopted by the ASP in 2005 and the TFV officially began to work in February 2007.⁶⁶⁰

⁶⁵⁴The Fund was established in accordance with resolution A/RES/64/293 Article 38 of the General Assembly on 12 August 2010.

⁶⁵⁵<http://www.unwomen.org/how-we-work/un-trust-fund/> (last accessed October 2012) .

⁶⁵⁶ See supra n553.

⁶⁵⁷ M. Wierda and P. de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims', International Centre for Transitional Justice, January 2004 <http://ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf> (accessed March 2012).

⁶⁵⁸ See E. Kristjánisdóttir, 'International Mass Claims Processes and the ICC Trust Fund for Victims', in Ferstman et al., supra n26,:168.

⁶⁵⁹ See Article 79(1) of the Rome Statute.

⁶⁶⁰ Resolution ICC-ASP/4/Res.3 Regulations of the Trust Fund for Victims.

6.3.1 Functioning of the TFV

According to Zegveld the ICC's Trust Fund has both a function in the Court's reparations regime and a humanitarian role. In its judicial capacity the TFV is called to implement the awards of reparations ordered by the ICC against a convicted person.⁶⁶¹ In particular, as stated in Rule 98 of the RPE, the Court may decide that an award for reparations against the convicted perpetrator is deposited with the Trust Fund in two circumstances: first, when at the time of the order, it is 'impossible or impracticable' to enact it directly in favor of each individual victims and secondly when 'the numbers of victims and the scope, forms and modalities of reparations makes a collective award more appropriate'.⁶⁶² It follows that the Trust Fund appears to be the preferable 'intermediary' in cases of reparations awarded collectively, whilst in case of individual's reparations the ICC will rather transfer the awards directly to the beneficiaries, bypassing the TFV.⁶⁶³

The award for reparations set out by the Court in both the above mentioned situations shall be separated from the 'other resources' of the Trust Fund, which are instrumental to fulfill its 'humanitarian function'.⁶⁶⁴ Such 'other resources' are constituted by voluntary contributions bestowed by states, international organizations, NGOs, but also by individuals and corporations.⁶⁶⁵ Until the recent Lubanga decision establishing the principles and procedures to be applied to reparations, the only function held by the Trust Fund has been its 'function of assistance' for the victims and their families.⁶⁶⁶

⁶⁶¹See Rule 98 of the ICC Rules of Procedure and Evidence.

⁶⁶²Ibid. at Para2 and 3.

⁶⁶³See de Brouwer, *supra* n470 at 227.

⁶⁶⁴ When the Board of Directors so determines, the TFV's 'other resources' can complement the awards for reparations issued by the Court. See the Trust Fund for Victims 'Spring 2010 Programme Progress Report'.

<http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Spring%202010.pdf> (accessed April 2012).

⁶⁶⁵ In addition to the voluntary contributions, the ASP may decide to allocate to the Trust Fund further resources. See de Brouwer *supra* n470 at 230. See also the Trust Fund for Victims 'Spring 2010 Programme Progress Report'.

<http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Spring%202010.pdf> (accessed April 2012).

⁶⁶⁶See also Regulation 48 of the Regulations of the Trust Fund for Victims ('Regulations').

Significantly, the Trust Fund adopts two different definitions of ‘victim’ depending on which one of its mandates it has to enforce. For the so-called Court-ordered reparations victims are defined according to Rule 85 of the RPE and are identified as those persons directly or indirectly affected by the crimes committed by the convicted persons.⁶⁶⁷ In pursuing its humanitarian function, instead, the Fund can rely on a broader definition of victim(s) which encompasses all the victims of the crimes within the Court’s jurisdiction, regardless of any order for reparations by the ICC and prior to any conviction.

6.3.2 TFV’s reparations for child victims

To use the words of its Executive Director, Pieter De Baan, ‘while the assistance mandate of the Trust Fund does not qualify as “reparations” in the technical sense of the Rome Statute, it does have a clear reparative purpose’.⁶⁶⁸ As already underlined the humanitarian mandate of the TFV ‘is not decided in a Court room’ as it enables the trust fund to intervene on behalf of victims irrespective of the judicial proceeding’s outcome. Consistently with the crimes prosecuted under the Court’s jurisdiction the TFV divides the target beneficiaries in six different categories: victims of sexual and gender-based violence (‘SGBV’), including rape, forced pregnancy, sexual slavery, also comprising girls abducted and or recruited into armed groups and forcefully impregnated; widows and widowers, namely those whose partners were killed; former child-soldiers and abducted youth, i.e. children and youth forced and or recruited into armed groups under the age of 15 (regardless of their particular role(s) played during abduction or conscription); orphans and vulnerable children, i.e. children whose parent(s) were killed or children otherwise made vulnerable by the violence; victims who suffered a physical injury and or who were psychologically traumatised by violence; family members of victims (with the exception of widows and orphans) and others who do not fall within the above categories, but are affected by violence.⁶⁶⁹ Children specifically fall within three of the six categories singled

⁶⁶⁷ See Kristjánsdóttir supra n658 at 174.

⁶⁶⁸ See The Trust Fund for Victims ‘Empowering Victims and Communities toward Social Change’, Summer 2012 Programme Progress Report, http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf (last accessed October 2012).

⁶⁶⁹ Ibid. at 5.

out by the TFV and it is therefore possible to distinguish between: sexually abused children, children who took part in the hostilities (not necessarily in the capacity of trained soldiers) and children who have lost one of both parents. Children who experienced different kinds of harms are included in the remaining groups and may as well benefit from the initiatives established by the Trust Fund and locally implemented by its international and local partners. In particular concerning child victims the Trust Fund for Victims has eloquently stressed the need to invest in education and vocational programs, for example from November 2008 until July 2012 the TFV has supported, together with Missionaires D’Afrique, a project called ‘School of Peace’ which has reached in four years more than 1,900 children and youth associated with armed conflict in addition to other 15,000 children located in Ituri and North Kivu. The main goal of the project, which targeted war orphans, former child-soldiers and adolescent-mothers who survived rape, was to diffuse amongst children and teenagers (aged between 10 and 17) the culture of peace and forgiveness. Through the collaboration of the formal education system and the national authorities the project has organized a two-day ‘Peace School’, hosted in turn by each school involved, where ‘children collectively express their trauma, construct messages of hope, and share them with the community through drawings, drama, and other forms of artwork’.⁶⁷⁰ Counseling, vocational training and education are perceived by the TFV as an indispensable support to children and young people who face complex challenges to overcome the stigmatization and the trauma stemming from the violations experienced during the conflict.⁶⁷¹ Thanks to its community based and inclusive approach the TFV is striving to achieve not only the reintegration and the well-being of victims but also long term reconciliation, underlining the limits of ‘reparation’ understood exclusively as a legal term subject to unyielding rules.

⁶⁷⁰TFV website, <http://www.trustfundforvictims.org/projects/tfvdc2007r1019> (last accessed October 2012).

⁶⁷¹For example the Trust Fund has established in DRC a program to provide 67 girls abducted by armed forces who bore children while in captivity with ‘accelerated education’. The program also includes a day care centre integrated into the school to promote the bond between girls and their babies, supply basic healthcare, and reduce the stigma of being a student and a mother.

<http://www.trustfundforvictims.org/projects/tfvdc2007r2029> (last accessed October 2012).

6.4 DDR programs

The so-called disarmament,⁶⁷² demobilization⁶⁷³ and reintegration⁶⁷⁴ ('DDR') process contributes to security and stability by disarming combatants, removing them from military structures, and socially and economically integrating them into society.⁶⁷⁵ Over the last 20 years DDR programs have been set up in more than 30 countries⁶⁷⁶ and some of them have included former child-soldiers among the beneficiaries. DDR programs are different from reparation programs as the latter focus on victims (civilians) affected by the conflict, whilst the first target ex combatants for the purpose of triggering their reinstatement as productive members of the society. DDR programs on the one hand prioritize the achievement of security, stability and peace, reparations on the other hand strive to give victims a sense of recognition and to redress the consequences of the harm(s) suffered. If in theory the distinction between these two concepts appears quite clear, in practice such distinction tends to be blurred, especially when it comes to former child-soldiers.

⁶⁷² 'Disarmament is the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants and often also of the civilian population. Disarmament also includes the development of responsible arms management programs.' United Nations. 2005. Note by the Secretary-General on Administrative and Budgetary Aspects of the Financing of UN Peacekeeping Operations. A/C.5/59/31, May 24.

⁶⁷³ Ibidem: 'Demobilization is the formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage of demobilization may extend from the processing of individual combatants in temporary centers to the massing of troops in camps designated for this purpose (cantonment sites, encampments, assembly areas or barracks). The second stage of demobilization encompasses the support package provided to the demobilized, which is called reinsertion.'

⁶⁷⁴ Ibidem: 'Reintegration is the process by which ex combatants acquire civilian status and gain sustainable employment and income. Reintegration is essentially a social and economic process with an open time frame, primarily taking place in communities at the local level. It is part of the general development of a country and a national responsibility and often necessitates long-term external assistance'.

⁶⁷⁵ See P. de Greiff, Research Brief 'Establishing Links between DDR and Reparations', ICTJ, February 2010. <http://ictj.org/sites/default/files/ICTJ-DDR-Reparations-ResearchBrief-2010-English.pdf> (last accessed March 2012). See also T. Nezam and A. Marc, 'Disarmament, Demobilization and Reintegration', note commissioned by the World Bank's Department of Social Development, No119, February 2009.

⁶⁷⁶ Ibidem.

6.4.1 Reintegration of former child-soldiers

Article 39 of the UNCRC obliges state parties to take all the appropriate measures to promote the social reintegration of child victims of war. As already explained the term ‘child victims’ of war refers to a specific category of children who have experienced human rights and humanitarian law violations as a result of an armed conflict, comprising ‘children who have been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.’⁶⁷⁷ Children associated with an armed conflict are recognized primarily as victims, also when they have actively taken part in hostilities.⁶⁷⁸ It follows that DDR programs, which sometimes add rehabilitation amongst their goals (‘DDRR’) as it was the case in Liberia,⁶⁷⁹ represent, not only a process that contributes to security and stability, but also a mean to redress the harm suffered by those children who have finally escaped from a militarized life. Unlike DDR programs focused on adult-combatants,⁶⁸⁰ the ones which target children usually start prior to the conflict’s end⁶⁸¹ and are often set up by international organizations.⁶⁸² In countries where national

⁶⁷⁷UN Children's Fund (UNICEF), *The Paris Principles, Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007. Principle 2.1, supra n 84.

⁶⁷⁸UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Article 8(b)(xxvi).

⁶⁷⁹On this point, see Drumbl, supra n82 at 168.

⁶⁸⁰ See *Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)* 1 August 2006, www.unddr.org/iddrs (last accessed October 2012). Module 5.30 Children and DDR: ‘Unlike adults, children cannot legally be recruited; therefore, measures that aim to prevent their recruitment, or that attempt to reintegrate them into their communities, should not be viewed as a routine component of peace-making, but as an attempt to prevent or redress a violation of children’s human rights. This means that child DDR is not the same as that for adults. Rather, it is a specific process with its own requirements, several of which are fundamentally different from adult demobilization programmes.’

⁶⁸¹For example in Eastern DRC. See E. Pauletto and P. Patel, ‘Challenging Child-Soldier DDR Processes and Policies in the Eastern Democratic Republic of Congo’, in *Journal of Peace, Conflict and Development* 16(2010): 35-57. See also IDDRS, Module 5.30 Children and DDR ‘Child DDR requires that the demobilization (or ‘release’) and reintegration of children, especially girls, be actively carried out at all times, even during a conflict, and that actions to prevent child recruitment should be continuous.’

reparations programs have not been established or court-ordered reparations have never been implemented,⁶⁸³ DDR programs represent the only kind of relief for many children previously attached to armed forces, or groups. The transition from the military to civilian life can be particularly complex for former child-soldiers and whilst adults' DDR programs have, especially in the past, concentrated on providing immediate transition benefits (such as compensation packages),⁶⁸⁴ in the case of children the distribution of monetary payments has been proven to be counterproductive.⁶⁸⁵ According to the UN Special Representative for Children and Armed Conflict:

In many countries, reintegration programs provided material benefits to children formerly associated with armed groups, including cash payments (Mozambique and Liberia) or 'family kits' (El Salvador). It has now been recognized that it is not in children's best interests to offer material benefits. Such benefits can be viewed as a potential incentive for children to engage in armed conflict in the future. It can also cause tension with local communities who see those responsible for the losses and harm they had suffered being rewarded, while their children receive nothing.⁶⁸⁶

As Drumbl underlines the distribution of material benefits through the DDR programs, which includes also waived school fees, household items and training, may exacerbate the disparities between former child-soldiers, rewarded with the 'blood money', and child victims, never associated with armed forces or groups, who can only rely on the creation of often inadequately resourced reparative programs.⁶⁸⁷ In Liberia, for example, children

⁶⁸²Ibidem at 42, the authors refer to the DDR programs set up by Caritas International and Save the Children UK in North Kivu.

⁶⁸³See S. Parmar and G. Mushiata, ICTJ Briefing 'Judgment Denied: The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of Congo', May 2012, <http://www.ictj.org/sites/default/files/ICTJ-DRC-Reparations-Failure-Briefing-2012-English.pdf> (accessed October 2012).

⁶⁸⁴IDDRS supra n 675.

⁶⁸⁵Ibidem at Module 5.30, :21.

⁶⁸⁶ See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Working Paper No3, 'Children and Justice During and in the Aftermath of Armed Conflict', September 2011, at 46.

⁶⁸⁷See Drumbl, supra n82 at 174.

unlawfully recruited by armed groups have been included amongst the beneficiaries of the program set up at the end of 2003 by the UN Mission in Liberia and the Liberian National Commission on DDRR.⁶⁸⁸ The program included also the payment of a cash allowance (US\$ 300) which has further increased the discrepancy between civilians and former combatants and caused community tension.⁶⁸⁹ As underlined earlier in the paragraphs devoted to the analysis of the Truth and Reconciliation Commissions, the recommendations of the Liberian TRC have not yet been implemented leaving thousands of victims empty handed and fuelling the hatred towards those who had access to the DDRR program.

In Sierra Leone more than 48,000 child-soldiers have been recruited by both sides of the conflict and roughly 12,000 of them were girls. In an attempt to acknowledge the heinous consequences of children's participation in the hostilities, the Lomé agreement included a specific provision to establish a separate DDR process for children.⁶⁹⁰ Although it was not explicitly stated that access to the program was subject to the 'combatant' status, most participants affirmed that they were required to present a weapon in order to be admitted. Such limitation has prevented the inclusion of the girls associated with armed forces or groups, who, instead of fighting, have been constrained to perform different tasks. In order to overcome the blatant discriminatory policy which hampered girls' access to the DDR programmes, in 2004 UNICEF has established a special project to reach more than

⁶⁸⁸See 'The impact on Women and Girls in West and Central Africa and the UNICEF Response' at 15, UNICEF 2005 http://www.unicef.org/publications/files/Impact_final.pdf (accessed October 2012). Seven Years of Peace. UN FOCUS, Vol. 7 No. 1 (September–November 2010): 'The National Commission on Disarmament, Demobilization, Rehabilitation and Reintegration disarmed and reintegrated more than 101 000 former fighters, of which there were 22 000 women and 11 000 children. The ex-fighters were supported in schools, colleges and vocational training centres and given monthly allowances. Some were given business start-up capital and logistical support to engage in self-employed business.'

⁶⁸⁹ P. Vinck, P.N. Pham, T. Kreuzer, 'Talking Peace: A Population-Based Survey on Attitudes about Security, Dispute Resolution, and Post-Conflict Reconstruction in Liberia', Human Rights Center, University of California, Berkeley, (2011).

⁶⁹⁰M. Gibril Sesay and M. Suma, 'Transitional Justice and DDR: The Case of Sierra Leone', ICTJ, 2009 <http://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (accessed October 2012)

1.000 young women who, as children, were associated with fighting forces.⁶⁹¹ The Girls Left Behind ('GLB') project provided the girls with different services, from family tracing and reunification to school and counselling. According to the results shared by UNICEF at least half of the girls who joined GLB after completing the programme, which lasted only a few months, decided to come back to former male ex combatants' partners or to a same sex peer group, instead of staying with their re-found families.

The ambition to remove former child-soldiers from a context of violence and place them in a safe place often collides with the reality, i.e. the case of girls who suffered sexual violence and face higher risk of being stigmatized and even rejected by their communities.⁶⁹² As Drumbl has punctually noted, many child-soldiers have joined the armed movements to pursue the opportunity to overthrow a life of poverty, therefore, when the DDR program fails to provide them with training, education and long term assistance, there is a soaring possibility of being re-recruited or abducted again.⁶⁹³ Reintegration is notably the most challenging phase of the DDR process, and when it comes to children it must be borne in mind that many of them have no family left or willing to deal with their cumbersome past. Although in theory the concepts of DDR and reparation can be easily distinguished, in practice there are many grey areas where the contours risk to be blurred. Children formerly affiliated with armed forces or groups are both beneficiaries of ad hoc DDR programs and subjects entitled to reparations, as such victims of a war crime recognised and condemned by the international community. Therefore, it is vital to combine and coordinate DDR efforts with reparative measures, adopted either thorough judicial and non-judicial mechanisms, in order to consent child-soldiers reintegration within the society and foster the full and conscious acknowledgement of their victim status.

⁶⁹¹ See UNICEF supra n688 at 17.

⁶⁹² See Pauletto supra n681 at 38.

⁶⁹³ Drumbl reports that in DRC, despite the existence of an official DDR program since 2004, re-recruitment of demobilized children chronically persists. See Drumbl supra n82 at 172. According to the author the reasons which lie beneath children's voluntary enlistment 'child-soldiers do not present a unitary narrative, many become associated with armed forces or groups through brutal abduction. Others are conscripted through threats. Significant numbers of child soldiers, however actively join armed forces or groups in an attempt to achieve various ends. In some cases, children are enlisted under false pretenses, through deception, or because of an impulsive snap-decision.' Ibid at 79.

6.5 Conclusions

It was stated at the beginning of this study that reparation is a term of art with a legal meaning. However, reparations do not have to be necessarily issued through judicial mechanisms. As the current Chapter has showed courts are not the only settings where the rights of victims might be recognized and enhanced. Truth Commissions, the Trust Fund for Victims and, in case of child-soldiers, DDR programs can provide key mechanisms in the reparation discourse and play a prominent role in the award and implementation of the measures crafted to redress victims of gross HR and IHL violations perpetrated in the course of an armed conflict. In particular with regard to child victims it is important to observe that non-judicial mechanisms have proved to be able to foster a higher, but not yet adequate, degree of participation and consultation in comparison with their judicial counterparts. Finally, non-judicial mechanisms can be broader in scope and promote a community-based approach to reparation which is not strictly bound to the legal notions of harm and causation. In other words, non-judicial mechanisms can reach not only those who have experienced harm as a consequence of a violation, but a larger share of people affected by armed conflicts. Nonetheless, as disclosed in the previous paragraphs, reparative measures set up through non-judicial mechanisms have been implemented only seldom. If on the one hand it is a truism that they have a great potential, on the other hand it cannot be overlooked that their existence and functioning depend largely on political and economic factors.

7. Concluding remarks

7.1 Introduction

This thesis served the important purpose of discussing and drawing attention to a complex topic: the right to reparation for child victims who experienced HR and IHL violations committed during an armed conflict. Since the ground-breaking Machel's report on children in armed conflict has seen the light in 1996, much emphasis has been laid on the atrocities perpetrated against children and much more has to be placed on the challenges to redress, to the extent to which it is feasible, the consequences of child victimization. The right to reparation is widely ascertained as a well-established principle of international law, but theory is not enough and further efforts must be achieved in order to overcome the tension between what the law 'says' and what it actually 'does'. A right is not a 'right' if it cannot be claimed by its legitimate holders and a claim is not a 'claim' if the absence of incisive mechanisms hinders its enforcement. Being 'human beings' does not automatically empower child victims neither to take part in the reparation process nor to obtain reparations.

The basic assumption behind the concept of 'reparation' is that whenever a harm is caused the victims shall be: first of all recognized as such and secondly provided with the means to go on with their lives. As the rights' election in Colombia eloquently revealed children's needs are often different from adults', if craving for justice and accountability is what unite most of the adult-victims the same thing might not be true for child victims. But what is it exactly that child victims want? The answer to this question has been left blank because children's views, despite what the CRC affirms, have not been given due weight and children's participation in the reparation process has been, almost utterly, neglected. Whilst armed conflicts around the world keep sparking off and children keep being the target of heinous violations the soaring doubt that something was deeply wrong has fuelled the present research for the past four years. It has been underlined by the Special Representative of the UN Secretary General on Children and Armed Conflict that the 'character and tactics' of armed conflicts are changing and these developments create new threats for children. When, as it often happens, the threats turn into actual crimes with a

devastating impact on victims' lives, then adequate, prompt and effective reparations *are expected to* be awarded and implemented, but as this work has shown, this rarely happens.

7.2 Towards a broader notion of international responsibility

The regime of responsibility under international law in force represents one of the main issues emerging from the analysis of the current practice of reparations for child victims of armed conflict. As underlined in the previous Chapters the traditional 'double track' of responsibility sees on the one hand the states, liable for violations of HRL and IHL, and on the other hand the individual perpetrators who committed the crimes susceptible of prosecution by national and international courts. It follows that states and individual perpetrators are identified as the main 'actors' in charge of providing reparations to the victims. Concerning the first category it is worth to note that the obligation to award reparation has been asserted both at the inter-states level through the judgments of the International Court of Justice and at the individual-state level through the judgments of regional human rights courts. As Article 2(3) of the ICCPR affirms states parties shall ensure that *any person* whose rights or freedoms as herein recognized are violated shall have an effective remedy. The provision enshrined in the ICCPR sets forth a clear and crucial obligation incumbent upon states, further stressed by the Human Rights Committee in its General Comment No 31 where it has been punctually noted that 'remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including children.'⁶⁹⁴ However, the Committee's views issued under the Optional Protocol to deal with individual complaints, including those regarding reparations, have been often neglected by the states parties on the grounds that they are not binding. In fact, as Buergenthal has rightly underlined 'the absence of an unambiguous undertaking in the Protocol requiring the state parties to comply with the Committee's

⁶⁹⁴See General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Convention, *supra* n 232.

decisions has a number of adverse consequences as far as compliance is concerned.⁶⁹⁵ The same concerns apply to the newly adopted Optional Protocol on a communications procedure to the CRC. This tool, strongly advocated for by all the specialized NGOs, has been drafted to provide children with the unique opportunity to access justice and bring their claims before the Committee on the Rights of the Child. Unfortunately, and despite the undeniable importance of this mechanism, the actual formulation of the Protocol foretells that its entry into force will not yield substantial changes to the current situation of children's right to reparation under international law.⁶⁹⁶ This happens even though a clear states' obligation to provide redress to child victims has been underlined in several occasions by the Committee on the Rights of the Child:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are *effective, child-sensitive procedures available to children and their representatives*[...] Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by Article 39.⁶⁹⁷

More specifically, as evidently emerged from the analysis conducted throughout this study, states' obligation to provide child victims with prompt and adequate redress in the aftermath of HR and IHL violations is often disregarded. Notwithstanding the political and economic reasons used to explain such lack of compliance, it is possible to detect also a

⁶⁹⁵ See T. Buerghental, 'The UN Human Rights Committee', in *Max Planck Yearbook of United Nations Law*, Volume 5(2001): 341-398.

⁶⁹⁶ Mr. Jean Zermatten, vice-chairperson of the CRC has echoed the disappointment eloquently expressed by the CRC's Chairperson, affirming: 'I have the impression that we have lowered the human rights standards for children. Allegorically speaking we have a "kids' menu"'. Moreover, according to Zermatten one of the indirect effects expected from the entry into force of the Optional Protocol is the enhancement of children's right to remedies at the domestic level. HRTD Newsletter supra n110.

⁶⁹⁷ See Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 (2003) Part V, Para 24 (emphasis added).

major legal factor: namely the fragmented inclusion of the right to reparation in all the relevant IHL, HR and ICL treaties, which is mirrored by the absence of a specific international convention able to crystallize in one comprehensive document the key provisions enshrined in the Van Boven-Bassiouni Principles and Guidelines.⁶⁹⁸ Ideally, a Convention on Reparations for Gross Violations of HR and IHL should embed ad hoc provisions for child victims, able to deal with their peculiar difficulties in accessing justice and their special vulnerability, a factor that has emerged in different contexts without giving raise to adequate actions. For example, particularly relevant is the concept of ‘aggravated state responsibility’ for gross human rights violations committed against children, which has been applied by the Inter-American Court of Human Rights to stress both the gravity of the wrongs and the special vulnerability of the victims. In *Gomez Paquiyauri vs. Peru*⁶⁹⁹ the aggravated responsibility of the state has been reflected in the greater amount of moral damaged ordered by the Court, however, a practice consistent with the findings of this case has not been established yet, neither within the IACtHR’s jurisprudence nor elsewhere. This notion, if included in a specific provision concerning violations of HR and IHL perpetrated against children enshrined in a binding international treaty, could bring to valuable outcomes in terms of states’ deterrence and enhancement of children’s rights to special protection and adequate reparations.

Concerning individual criminal responsibility, the thesis has exposed the growing role of victims in the international criminal justice discourse, from the Nuremberg Trials to the entry into force of the Rome Statute. Provisions which allow and even encourage victims’ participation have been finally included in the ICC Statute and its RPE, marking the difference between the ‘newly born’ Court and the previous *ad hoc* tribunals. The first decisions establishing the principles and procedures to be applied to reparations has been

⁶⁹⁸ ICC-01/04-01/06-2865, Registrar’s Observations on Reparations Issues’, April 2012. ‘The Registrar first observes the absence of a general convention providing a right of victims to reparations in international law. In spite of this lacuna, the Registrar has identified numerous instruments that provide for a right of victims to receive reparations or, at least, an obligation to repair falling on the person - natural person, legal person or State - responsible for the damage.’

⁶⁹⁹ See IACtHR, *Caso de los Hermanos Gomez Paquiyauri vs. Peru* supra n 611.

welcomed with enthusiasm by academics and practitioners as a historical landmark in the victims' struggle for justice. The constant references made by the Trial Chamber 1 to the Inter-American Court of Human Rights jurisprudence on the one hand suggests that the ICC is willing to embrace the same victim-oriented approach, but on the other hand highlights the absence of a more specific strategy in terms of reparations that should be, at least in theory, awarded by the individual perpetrators convicted and not by the states. The lack of perpetrators' assets to provide reparations to victims entails that in the ICC's first case the Court stressed that 'Mr Lubanga is able to contribute to this process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis.'⁷⁰⁰ Also, the cooperation of State Parties to the Rome Statute in identifying and freezing 'proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture' is a fundamental element in securing effective reparations.⁷⁰¹ When there is no cooperation, or simply no assets to trace and freeze, victims' redress depends entirely on the TFV's reserve for reparations, which at the moment amounts to a total of 1.2 million euros, originated from voluntary contributions by states.⁷⁰² Given the current regime of responsibility, which focuses exclusively on states and individual perpetrators, other non-state actors, and in particular non-state armed groups, have no obligations towards victims and no role to play in the award of reparations. As the majority of the current armed conflicts have no international character, non-state armed groups are certainly amongst those who commit gross human rights violations and serious violations of international humanitarian law.⁷⁰³ It is traditionally argued that non-state actors are bound by Article 3 common to the Geneva Conventions and by Additional Protocol II to

⁷⁰⁰ See ICC 'Decision establishing the principles and procedures to be applied to reparations', supra n16 at Para 241.

⁷⁰¹ See Article 93(1)(k) of the Rome Statute.

⁷⁰² See Trust Fund for Victims, 'Lubanga Reparations' Press statement released on 7 August 2012, www.trustfundforvictims.org/TFV_Lubanga (last accessed November 2012)

⁷⁰³ See Sassòli supra n166 at 6 'By definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, i.e. non-international armed conflicts, are non-State armed groups'.

the Geneva Conventions because they are active on the territory of a contracting party.⁷⁰⁴ Moreover, although non-state actors cannot formally become parties to international treaties, there is an increasing tendency to affirm that where non-state actors, such as the Taliban in Afghanistan, exercise *de facto* control over a territory, they are also bound by international human rights obligations.⁷⁰⁵

However, at the international level there is no enforcement mechanism able to translate the violations of the obligations to respect the minimum core of civilians' protection and the most fundamental human rights into a duty to provide reparations to the victims. The Basic Principles and Guidelines have pioneered an expanding notion of responsibility affirming that also non-state actors should be deemed liable of providing reparations.⁷⁰⁶ The only way to concretely apply this Principle is to engage non-state actors in the normative process and compel them to abide by international law, including the obligation to provide reparations that should be finally enshrined in a treaty able to denote 'a merger of wills of two or more international subjects for the purpose of regulating their (*and victims*) interests by international rules'.⁷⁰⁷ As the ICRC customary law database reports it is possible to observe a, still quite limited, practice to the effect that illegal armed groups are required to repair the harm caused by violations of HR and IHL. An example is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, which states that 'the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international humanitarian law', contemplating also the indemnification of the victims of

⁷⁰⁴ SCSL, Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber), 31 May 2004, at Para 22. The Court has affirmed that 'all parties to an armed conflict, whether states or non-state actors are bound by international humanitarian law, even though only states may become parties to international treaties'.

⁷⁰⁵ See UN Secretary-General, Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, Para. 188. Also see Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya A/HRC/17/44, 1 June 2011.

⁷⁰⁶ See supra n2 Principle 15. See R. McCorquodale, 'An Inclusive International Legal System', in *Leiden Journal of International Law* 17(2004): 477-504. See also Roberts and Sivakumaran supra n166

⁷⁰⁷ See A. Cassese, *International Law* (Oxford: OUP, 2001): 126.

violations of international humanitarian law.⁷⁰⁸ The ICRC database also provides an example of symbolic reparation lavished by a provincial arm of the ELN in Colombia, which in 2001 officially apologized for the death of three children resulting from an armed attack.⁷⁰⁹

Despite such sporadic practices, domestic and international criminal courts remain the only fora where victims can claim reparations by individual-members of armed groups. In fact, as Zegveld clarifies ‘while international bodies have given due consideration to the accountability of individual leaders of armed opposition groups, they have so far largely ignored the accountability of the groups in favour of the accountability of individual members.’⁷¹⁰ International criminal law plays a crucial role in addressing individual responsibility for IHL violations, but, given the actual morphology of armed conflicts worldwide, the well-rooted assumption that ‘crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced’ need to be, eventually, questioned.⁷¹¹

Likewise, the international human rights framework, by addressing violations committed solely by states, excludes from the equation responsibility=reparations any other counterparts. It appears, hence, that the current regime of responsibility recognized and enacted under international law leaves victims’ needs still unmet. As strongly stressed by the UN Secretary General ‘we need to more consistently and effectively engage non-State armed groups in order to improve their compliance with the law. Member States need

⁷⁰⁸J.M. Henckaerts and L. Doswald-Beck, ‘Customary International Humanitarian Law Database’, Rule 150, 2005. <http://www.icrc.org/customary-ihl/eng/docs/home> (last accessed November 2012).

⁷⁰⁹ Ibidem.

⁷¹⁰ L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002) at 223, quoted by R. Dudai, ‘Closing the Gap: Symbolic Reparations and Armed Groups’, in *International Review of the Red Cross* 93(2011): 783-808.

⁷¹¹ Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, p. 447.

to recognize and accept the fundamental necessity of this engagement.’⁷¹² Through the action plans prepared and implemented under the aegis of the UN MRM non-state actors have been actively involved in the struggle to enhance children protection in armed conflict, in particular with regard to the unlawful enlistment, conscription and use of children as child soldiers.⁷¹³ However, much more needs to be done in order to ensure that not only the violations perpetrated against children come to an end, but also that the consequences are promptly and effectively redressed. Therefore, the next step for the UN MRM should be to engage non-state armed groups in action plans specifically focused on repairing the violations committed against children.

7.3 Final observations

The international legal standing of the right to reparation for child victims of armed conflicts is one the main focuses of the current work. It can be easily argued that children, as human beings, are, by analogy, legitimate holders of the right in question. This is true in principle, nevertheless, given that children’s rights have been until recently ‘a slogan in search of a definition’,⁷¹⁴ further enquiries were needed to discuss and understand in the first place to what extent the right to reparation in general can be regarded as ‘well-established’ under international law, which are the provisions that frame children’s right to reparation in particular and finally if and how the right has been enhanced and enforced through judicial and non-judicial mechanisms. A few conclusive remarks are important with regard to the last aspect considered. At the national level many states parties have, to different degrees, complied with the provisions of the CRC, in particular Article 12 and 39, and implemented the UN Guidelines on Justice for Child Witnessed and Victims of Crime. Although domestic law deals more often, and more effectively with ‘ordinary crimes’ rather than with severe breaches of HR and IHL, the Colombian case briefly discussed in Chapter

⁷¹² Ban Ki-moon, remarks to the UN Security Council on November 9, 2011, during the open debate on protection of civilians, UN Doc. SG/SM/13932, available at www.un.org/News/Press/docs/2011/sgsm13932.doc.htm.

⁷¹³ See Chapter 1 at Para 1.4.

⁷¹⁴ See Rodham *supra* n348.

4 provides a positive example (at least in theory since it has not yet passed the implementation litmus test) of a set of efforts directed towards the recognition and the enhancement of children's right to reparation. In fact, the Colombian government in drafting its ambitious 'integral reparation plan' has taken into account children as victims and as active members of the society, developing under title 7 of the Victims' Law provisions ad hoc that aim at issuing 'adequate, differentiate, transformative and effective' reparations for child victims of the armed conflict.⁷¹⁵

At the regional and international levels children's access to remedies has been far more neglected. In the first place regional human rights courts, with the exclusion of the ECtHR, do not allow victims, including children, to submit a claim directly. International humanitarian law lacks of remedial mechanisms and the UNCC and the Claims Commission set up in the aftermath of the conflict between Eritrea and Ethiopia can be regarded, so far, as isolated experiences rather than corroborated practice. Under international criminal law the gradual and slow recognition of victims' rights has reached its positive peak with the establishment of the ICC, which has allowed for the first time victims', and child victims', participation. It appears, hence, that children's right to reparation at the international level, has found scant recognition, in particular through judicial mechanisms. Non-judicial mechanisms on the other hand have been proved themselves to be more capable of including children in the discourse (e.g. the TCs' specific recommendations regarding child victims, the ICC's Trust Fund for Victims's projects established pursuant its assistance mandate). Nevertheless the TC's recommendations have been seldom, even if, implemented and the Trust Fund's assistance mandate relies exclusively on voluntary contributions that states parties to the Rome Statute might suspend anytime. As for the DDR programmes, which receive much more financial support by the international community than justice measures,⁷¹⁶ it is worth to stress again the distinction between those that target adult former-combatants and those that, instead, focus on children. Concerning the latter, in fact, much more emphasis needs to be place on

⁷¹⁵ On the Victims Law see supra n 439 et ss.

⁷¹⁶ See de Greiff supra n675.

‘reintegration’ rather than on security and peace. According to Article 39 of the CRC states are obliged to take all appropriate measures to promote physical and psychological recovery and social reintegration of all child victims, including the ones associated with armed forces and non-state armed groups. The access to DDR programmes for children should not be subject to the ‘combatant’ status, on the contrary all categories of children ‘removed’ from armed organizations should be involved⁷¹⁷ in particular girls who tend to be excluded by traditional DDR programmes that focus on those who actively took part in the hostilities.⁷¹⁸ As stated in the IDDRS, the measures that aim to prevent children’s recruitment or seek to reintegrate them in their communities shall be seen as attempts to repair children’s rights violations and avoid their recurrence. DDR programmes should be crafted bearing in mind this essential scope.⁷¹⁹ Adding a rehabilitative component to the DDR process, as it happened in Liberia, is crucial for all those victims who, like former child-soldiers, face a higher risk to be stigmatised and marginalised. In particular, provisions of education and training can be instrumental to trigger the successfully reintegration of these victims in their communities.

The outburst of violence and terror that accompany each and every war affects the whole population, but, as clarified throughout the present work, a (legal) distinction needs to be drawn between those who suffer from violations of HR and IHL and those who do not fall directly into the category of victims. Being recognized as ‘victim’ is an essential precondition for the exercise of the right to reparation and, as discussed in the previous Chapters, in cases involving child victims access to justice is already an obstacle which requires the support and the participation of adult-counterparts, ad hoc procedures able to deal with children’s vulnerability, child-friendly mechanisms and adequately trained staff.⁷²⁰ Equally, reparations awarded as result of judicial and non-judicial mechanisms shall take into account child victims’ views and needs, shall be based on constructive

⁷¹⁷ See UN Children's Fund (UNICEF), ‘The Paris Principles’ Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, February 2007 *supra* n 84.

⁷¹⁸ See *supra* n688.

⁷¹⁹ See IDDRS *supra* n680.

⁷²⁰ See General Comment No 5 *supra* n697 at Para 24.

dialogue and mutual engagement, shall have a long term impact on children's lives and shall be closely monitored during the whole implementation phase. As reported by the present study, though, the reality departs from the 'shall-picture' and in most instances, whilst courts and tribunals are difficult to 'access', national reparations programmes overlook the situation of child victims either by excluding them from the list of beneficiaries or by including them without acknowledging that they need reparative measures tailored on their specific needs. Given the peculiar difficulties that children face in accessing justice and reparations, in cases of HR and IHL violations occurred during an armed conflict the awards of reparations should not be only in favour of the direct and indirect victims who are qualified to 'claim' and exercise their right to obtain redress, but of a broader number of children who suffered, to different extent, from violations experienced by their peers and by the whole community. Individual and collective reparations, in fact, in order to contribute to rectify the conditions that led to children's victimization in the first place shall always pursue a 'community-based' approach. The community-based approach is determined by the award of measures, e.g. construction of schools, human rights training of police and armed forces, guarantees of non-repetition, able to have an impact also on children who did not suffer direct or indirect harm caused by HR and IHL breaches.

Looking back at what has been achieved, or not, so far is the best way to move forward and to finally tackle the issues that have prevented children from the full exercise of the right to reparation, encompassing both its procedural and substantive dimensions. The recent ICC decision establishing the principles and procedures to be applied to reparations represents a milestone as it finally placed under the spotlight child victims and the urge to redress the consequences of the crimes committed against them during an armed conflict. Nonetheless, it should be borne in mind that 'too much should not be expected from the Rome Statute regime of victims' redress'.⁷²¹ This assumption stems from a number of significant factors, including the limited resources available for reparations, the selectivity of prosecutions, the remoteness of the Court, the objective difficulties that children face in accessing justice, in

⁷²¹ See McCarthy, *supra* n 511 at 359.

particular at the international level, and the pending appeals that delay the implementation of the decision(s) on reparations. It should, furthermore, be borne in mind that the ICC operates according to the principle of complementarity, and therefore states remain the first vehicles not only to prosecute the alleged perpetrators, but also to foster the right to reparation. Moreover, when the victims are children, states have the duty, as enshrined in the ‘corpus iuris’ of the international human rights of children,⁷²² to repair *and* to prevent further victimization by setting special protective measures in order to guarantee not only the child’s survival and development, but also the social rehabilitation or reinsertion of all children who have experienced violations.⁷²³ Special protective measures should encompass, first and foremost, the elimination of all the factors that have fuelled the structural context of violence, discrimination and vulnerability to finally allow children to be children again.

⁷²² As previously explained the notion of ‘corpus iuris’ has been developed by the Inter-American Court of Human Rights, see *supra* n124.

⁷²³ IACtHR, Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, *supra* n35.

Appendix 1

International and Regional Treaties and Other Relevant Instruments

General International Treaties and Instruments

1945

United Nations Charter, entered into force on 24 October 1945 and available at www.un.org/en/documents/charter/

1969

Vienna Convention on the Law of Treaties (VCLT), entered into force on 27 January 1980 and available at untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

2001

International Law Commission Draft Articles on Responsibility of States for Intentionally Wrongful Acts, available at untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

Statutes of International Courts and Tribunals

1946

Statute of the International Court of Justice, entered into force on 24 October 1945 and available at www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

1993

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute)—UN Security Council Resolution 827 adopted 25 May 1993, available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

1994

UN General Assembly Resolution Establishing the International Criminal Tribunal for Rwanda and attaching its Statute (ICTR Statute)—Resolution 955 adopted 8 November 1994,

available at www.unicttr.org/Portals/0/English/Legal/Statute/2010.pdf

1998

Statute of the International Criminal Court (Rome Statute), entered into force on 1 July 2002, available at untreaty.un.org/cod/icc/statute/romefra.htm

2002

Statute of the Special Court for Sierra Leone—pursuant to UN Security Council Resolution 1315, adopted 14 August 2000, available at www.sc-sl.org/LinkClick.aspx?fileticket=uClnDIMJeEw%3D&

2004

The Law of the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (ECCC Law), available at www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

International Human Rights Law

1948

American Declaration on the Rights and Duties of Man, adopted 2 May 1948, available at www.unesco.org/most/rr4am1.htm

Charter of the Organization of American States (“Pact of Bogota”), entered into force on 13 December 1951, available at www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

Universal Declaration of Human Rights—UN General Assembly Resolution 217A (III), adopted 10 December 1948, available at www.un.org/en/documents/udhr/

1950

European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953, available at www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

1952

Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 18 May 1954, available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

1960

Convention against Discrimination in Education, entered into force 22 May 1962, available at www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF

1961

European Social Charter, entered into force 26 February 1965, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=1&CL=ENG

1965

International Convention on the Elimination of All Forms of Racial Discrimination, entered into force 4 January 1969, available at www2.ohchr.org/english/law/cerd.htm

1966

International Covenant on Economic Social and Cultural Rights, entered into force 3 January 1976, available at www2.ohchr.org/english/law/cescr.htm

International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr.htm

Optional Protocol I to the International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr-one.htm

1969

American Convention on Human Rights, entered into force 18 July 1978, available at www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf

1979

Convention on the Elimination of All Forms of Discrimination against Women, entered into force 3 September 1981, available at www.un.org/womenwatch/daw/cedaw/text/econvention.htm

1981

African Charter of Human and Peoples' Rights (the Banjul Charter), entered into force 21 October 1986, available at www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

1984

United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987, available at www2.ohchr.org/english/law/cat.htm

1985

UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration), adopted 29 November 1985, available from www.un.org/documents/ga/res/40/a40r034.htm

1989

United Nations Convention on the Rights of the Child, entered into force 2 September 1990, available at www2.ohchr.org/english/law/crc.htm

1996

European Social Charter (Revised), available at conventions.coe.int/Treaty/en/Treaties/html/163.htm

1998

Protocol to European Social Charter Providing for a System on Collective Complaints, entered into force 1 July 1998, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=8&CL=ENG

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>

2005

UN General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA Resolution 60/147), adopted 16 December 2005, available at www2.ohchr.org/english/law/remedy.htm

2006

International Convention for the Protection of All Persons from Enforced Disappearance – entered into force 23 December 2010 available at www2.ohchr.org/english/law/disappearance-convention.htm

2009

Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) – not yet entered into force available at [au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA \(KAMPALA CONVENTION\).pdf](http://au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf)

International Humanitarian Law

1907

Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, entered into force 26 January 1910, available at www.icrc.org/ihl.nsf/FULL/195?OpenDocument

1949

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/365?OpenDocument

Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/375?OpenDocument

Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/380?OpenDocument

1954

Convention for the Protection of Cultural Property in the Event of Armed Conflict, entered into

force 7 August 1956, available at www.icrc.org/ihl.nsf/FULL/400?OpenDocument

Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, entered into force 7 August 1956, available at www.icrc.org/ihl.nsf/FULL/410?OpenDocument

1968

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, entered into force on 26 November 1968, available at untreaty.un.org/cod/avl/ha/cnslwcch/cnslwcch.html

1974

European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. Strasbourg, entered into force 25 January 1974, available at www.conventions.coe.int/Treaty/en/Treaties/Html/082.htm

1977

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978, available at www.icrc.org/ihl.nsf/FULL/470?OpenDocument

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force 7 December 1978, available at www.icrc.org/ihl.nsf/FULL/475?OpenDocument

International Criminal Law

Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), entered into force 12 January 1948, available at www2.ohchr.org/english/law/genocide.htm

Appendix 2

Case Law, Websites and further instruments

Advisory Opinion on exception to the exhaustion of local remedies issued by the Inter-American Court of Human Rights, (1990) 11 Inter-Am.Ct.H.R. (ser. A).

Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004.

Air Service Agreement of 27 March 1946 (United States v France) R.I.A.A. vol. XVIII 1978.

Al-Adsani v. United Kingdom [GC], Application No. 35763/97, Judgment of 21 November 2001, ECHR Reports 2001-XI, p. 101; ILR, Vol. 123.

Aloeboetoe et al. v. Suriname (Reparations), Judgment (September 10, 1993) Inter. Am. Ct. H.R. (Ser. C) No. 15.

An Act to Establish the Truth and Reconciliation Commission (TC) for Liberia, approved 10 June 2005, Ministry of Foreign Affairs, Monrovia, 22 June 2005. United Nations Transitional Administration in East Timor – Regulation No. 2001/10, UNTAET, Dili, 13 July 2001, Article IV, sec. 4(e).

Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict (July 2011), A/HRC/18/38.

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