

The International Criminal Court and Reparations for Child Victims of Armed Conflict

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**By Elena Birchall, Evie Francq and Annick
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Edited by Dr. Clara Sandoval

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Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparation Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

Briefing paper 1: Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

Briefing paper 2: Collective Reparations and the International Criminal Court (By Sylvain Aubry and María Isabel Henao)

Briefing paper 3: Prioritising Victims to Award Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

Briefing paper 4: The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

Briefing paper 5: The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

Briefing paper 6: Adverse Consequences of Reparations (By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel)

In the area of reparations for children, the VPRS provided the ETJN with the following questions: What relevant jurisprudence exists (from international or domestic tribunals) or experiences from transitional justice mechanisms on providing reparations to children who are ex-child soldiers or have been subjected to sexual slavery? How do Courts like the Inter-American Court of Human Rights quantify damages? What is harm to “proyecto de vida” or “Life plan”? And what is considered as “lost opportunities”? This briefing paper provides important insights into these questions.

For more information on the ETJN, please visit <http://www.essex.ac.uk/tjn/>

Clara Sandoval

Colchester, July 2011

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The International Criminal Court and Reparations for Child Victims of Armed Conflict

By Elena Birchall,¹ Evie Francq,² Annick Pijnenburg.³

I. Introduction: Children in Conflict

1. The need to design and implement reparations programmes that “effectively target children who are ex-child soldiers or have been subjected to sexual slavery” results from the unfortunate reality that with the changing nature and proliferation of armed conflict, children have increasingly become the victims of modern warfare.⁴
2. Today, armed conflict frequently takes place within civilian communities, villages, fields and homes. The proximity of children to such violence sharply increases their exposure to serious, and in many cases fatal, harm. Those who are not killed by weapons are left to suffer the catastrophic impact of the conflict on their homes and community. Many die from lack of access to food, healthcare and the inability to maintain a livelihood.⁵
3. Children who do survive in war-torn communities suffer both from violations that are directed against themselves as physical, sexual, gendered and ethnic beings as well as from violations that target their parents, siblings and care givers.⁶
4. Children, particularly girls, are especially at risk of gender related abuse such as abduction, forced marriage, rape and other sexual violence. The forced recruitment, enlistment or conscription of girls and boys into armed forces or groups has similarly been recognised to constitute a significant risk for children living in war-torn communities.⁷
5. In a context such as this, the International Criminal Court (ICC or Court) faces a considerable challenge in order to effectively fulfil its reparations mandate. Exposure to the cruelties of war and the battlefield can have serious implications for the physical and emotional well-being of all children involved in armed conflict, which, in many cases, can never be repaired.
6. What is more, in most cases, children who were made victims during a conflict will no longer be children by the time the Court begins to address the issue of appropriate

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⁴ For more information on the impact of armed conflict on children see; G. Michel, ‘The Impact of Armed Conflict on Children’, (G. Michel, *The Impact of Armed Conflict*), United Nations, A/51/306, 26 August, 1996.

⁵ ‘Children and Truth Commissions’, (UNICEF Innocenti Research Centre, August 2008), 3.

⁶ *Ibid.*

⁷ For more information on the use of child soldiers see; Coalition to Stop the Use of Child Soldiers, ‘Child Soldiers Global Report 2008’, 9, available at: www.childsoldiersglobalreport.org (last accessed 15 June 2011).

reparations awards. This may also have a significant impact on the type of awards that can and should be made by the Court.

7. While serving as combatants, ex-child soldiers are deprived of significant portions of their early life, in which to grow, develop, mature and be educated. It is impossible to give these lost years back to a victim. As a result, the Court must find a tool for the measurement of these damages when seeking to design effective reparations awards. It is here that the Court may look to the activities of other institutions such as the Inter-American Court of Human Rights (IACtHR or Inter-American Court), where the concepts of lost opportunities and “proyecto de vida”, or “life plan”, have been developed.

a) Brief Outline

8. This legal brief highlights a number of ways in which the ICC can utilise its reparations mandate to implement child-sensitive reparations programmes which adequately deal with the impact of such violations against girls and boys living in post-conflict communities. The issues related to this question will be dealt with in three parts.
9. The first part will address the question of ‘how’ the Court can implement its reparations mandate effectively, examining some of the important practical and conceptual challenges presented by the reparations mandate of the Court and how these might be overcome.
10. The second part will focus upon applying this mandate to child victims, particularly those who have been recruited as child soldiers and/or subject to sexual slavery and gender related crimes, looking especially at the practical problems that may arise when seeking to design reparations programmes that effectively target this type of victim.
11. The third part of this brief will explore the solutions which may be employed by the Court in order to fulfil its reparations mandate. This section will first look closely at the concept of “proyecto de vida” or “life plan”, established by the Inter-American Court and how this concept can be translated into practical awards by the Court. The second part of this section will seek to explore a number of other practical reparations solutions which effectively target ex-child soldiers and children who have been sexually abused and how these may be utilised by the International Criminal Court.

II. The Reparations Mandate of the ICC: Practical Considerations When Seeking to Implement Effective Reparations

12. The reparations mandate of the ICC is set out in the provisions of the Rome Statute of the International Criminal Court 1996, (the Rome Statute), which entered into force on 1 July 2002.⁸
13. Article 75(1) of the Rome Statute obliges the Court to fashion a body of principles that will form the future basis of any reparation orders it may make. The article states:

⁸ The Rome Statute for the International Criminal Court (The Rome Statute), entered into force 1 July 2002, A/CONF.183/9.

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

14. In recent years, significant developments have been made in international law as regards the right to reparation of victims of international crimes.⁹ The introduction of this component in the Rome Statute, to a considerable extent, bows to the practice of the regional systems of human rights protection, especially that of the Inter-American Court of Human Rights, where victims not only participate actively in the proceedings but where they may obtain a favourable judgement on reparations, with the potential to be enforced.¹⁰
15. However, there are some differences between the powers of the International Criminal Court and these regional structures, which must be taken into account when seeking to interpret and comply successfully with Article 75 of the Rome Statute.

a) Victim Participation and Outreach

16. Firstly, unlike the regional systems, victims may not initiate proceedings before the International Criminal Court, except to the extent that they may submit a communication or complaint to the Prosecutor pursuant to Article 15.¹¹ In this way, the Rome Statute was drafted carefully to ensure that the ICC does not become a civil tribunal that settles private claims lodged by litigants. Pursuant to Article 15, the decision to initiate an investigation or issue an arrest warrant against the accused is within the power of the Prosecutor, in conjunction with the Pre-trial Chamber of the Court. Reparations can only be granted by the Court subject to a judgement of guilt and the criminal conviction of the accused.
17. Victims may apply to the Court to be recognised as a victim for the purposes of reparations at any time.¹² However, they are not required to do so and pursuant to Article 75 (1) the Court may choose to examine the scope and extent of any damage, loss or injury to, or in respect of persons that it considers to be victims, on its own motion.¹³ Nonetheless, the operation of an application procedure implies a responsibility to ensure its effective functioning and as wide and equal participation as possible by those victims who qualify for reparations.

⁹ See, for example; 'The Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law', 16 December 2005, E/CN.4/RES/2005/35, §§ 15-23.

¹⁰ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press 2010), 879.

¹¹ The Rome Statute, Article 15 allows victims to make representations before the pre-trial chamber during the assessment phase of a situation before the Prosecutor.

¹² To apply for reparations, victims must make a written application to the Registry, which must contain the evidence laid down in Rule 94 of the Rules of Procedure and Evidence (Rules of Procedure and Evidence), adopted by the Assembly of State Parties, 3-10 September 2002, ICC-ASP/1/3.

¹³ This may subsequently lead to an award in reparations following a request, made by the victim and recognition by the Court of the harm suffered, pursuant to Rule 95 (2)(a) of the Rules of Procedure and Evidence.

18. This creates some complex and intractable problems which the Court must deal with. The first of these is concerned with accessibility to the Court. From a practical perspective, due to the mass nature of the crimes encompassed in ICC jurisdiction, there are likely to be a great number of potential claimants. However, even at a domestic level, when some legal systems seek to deal with massive and systematic crimes, they find it difficult to ensure that all victims have equal access to the Courts. It is often the case that wealthier, better educated and urban victims have a better chance of obtaining justice.¹⁴ Also, female victims face specific obstacles when accessing justice, such as having to take care of children. This will be similar before the ICC and it is likely that the problem will be exacerbated by the increased number of child victims who do not have the education, knowledge or assistance to make an application to the Court for reparations.
19. One of the first steps the Court must take in ensuring the effective implementation of reparations programmes for victims is to recognise the importance and centrality of outreach programmes. Effective reparations awards can only be made if victims are aware of the Court's powers and their right to benefit from them. In this regard, attention may be given to the Integrated Strategy for External Relations, Public Information and Outreach, an internal document approved by the Coordination Council in 2005, which sets out the goals, framework and mechanisms for the external communication activities of the Court.¹⁵
20. The outreach and coordination activities which are recommended within this document should focus on developing effective strategies to reach the victims of war crimes, crimes against humanity and genocide, especially those who are still children or who were children at the time the violation was committed, within their home communities. Special attention should also be paid to reaching female victims. Raising awareness of the Court's functions and its accessibility for victims who may be unable to read and write or do not have access to the internet or any other means of communication is an important challenge, which should be addressed as a priority in any situation under investigation by the ICC.
21. The Court may seek to operate through the External Communication Working Group, which is a standing inter-organ external communication group comprised of representatives from the Presidency, the Office of the Prosecutor and The Registry, to ensure that victims are provided with the relevant information and assistance they need in order to make an application for reparations before the Court. The working group should seek to enhance cooperation with existing donor agencies and NGO's who have the resources and specific knowledge capabilities to operate assistance programmes within the Country itself, in addition to continued communication with State Parties and the United Nations (UN).¹⁶

¹⁴ Marieke Wierda and Pablo de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims', Report for the International Center for Transitional Justice, January 2004, available at: <http://ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf> (last accessed 15 June 2011).

¹⁵ Available at: http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf (last accessed 15 June 2011).

¹⁶ For more information on the Working Group see the relevant pages of the ICC website: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/> (last accessed 15 June 2011).

22. The working group should continue to make use of the relevant communication tools available to the Court, through its own budget, and in cooperation with other independent and impartial organisations, including the UN. Already employed by the working group is the use of print, broadcast media, pamphlet and poster campaigns, seminars, and workshops, for the purpose of promoting awareness of the Court's role. The group should continue to use these tools to encourage the participation of victims in Court proceedings, especially the participation of those children who qualify for reparations.

b) The Trust Fund for Victims

23. The second set of practical challenges relates to the means by which the Court is mandated to exercise its power to award reparations. This is governed by Article 75(2) of the Rome Statute, which states:

The Court may make an order against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

24. The Trust Fund for Victims (TFV or Fund) operates under the legal framework of the Court's Statute, Rules of Procedure and Evidence, and the Regulations for the Trust Fund for Victims.¹⁷

25. Governed by these Rules, the TFV is authorised to make awards in the following situations;

- a) Directly against a convicted person (Rule 98(1)),
- b) Upon a Court order against a convicted person where at the time of making the award it is impossible or impractical to make individual awards directly to each victim (Rule 98(2)),
- c) Upon a Court order where the number of victims and the scope, forms and modalities or reparations makes a collective award more appropriate (Rule 98(3)),
- d) Following consultations with interested states and the TFV, upon a Court order for an award of reparations to an intergovernmental, international, or national organisation approved by the TFV (Rule 94(4))
- e) Apart from that, other resources from the Trust Fund can be used "to the benefit of victims" (Rule 98(5)).

26. The development of a relationship between the Court and the TFV may therefore progress in a number of ways. At its most straightforward, the Court may order reparations directly from a perpetrator to the victim, meaning that the TFV is by-

¹⁷ The Rules of Procedure and Evidence, and The Regulations for the Trust Fund for Victims, adopted by the Assembly of States Parties, 3 December 2005, ICC ASP/4/Res.3.

passed completely. In other situations, (Rules 98(2)-(4)), the Court may order awards to be made through the TFV. This can either take the form of a specific order of the Court, specifying the nature of the reparations and the identities of the victims to whom reparations should be made, or the order could take on a more general form, and may simply lay out a framework of “principles”, which need to be filled out. In the latter case, the TFV will have more discretion in designing an approach but it would have to report back to the Court on implementation.¹⁸

27. Given the mass nature of the crimes dealt with by the Rome Statute, there are likely to be a great number of potential claims against few resources before the Trust Fund of the ICC. It is true that in these cases the Court may simply be unable to provide a mechanism for the distribution of individualised reparations for all but a miniscule number of victims, by virtue of its nature, structure and purpose.
28. If it attempted to do so, it is not clear how the Court could avoid creating invidious differences between the awards it grants to those lucky enough to have their cases tried by the Court and all other victims of the same perpetrators and the same crimes, who may receive benefits through the TFV instead.
29. Some commentators have suggested that by assessing those applications that do make it to the Court, on an individual, case-by-case basis, this may result in the disaggregation of victims, wrongly based on the belief in a hierarchy of harm.¹⁹
30. Whether or not it is appropriate to assess each victim’s case for reparations on its individual merits, it has been suggested that the Court should instead pass over the responsibility for designing and awarding reparations to the TFV. The value of this approach is that it would allow the Court to avoid the administrative time and cost needed to carry out the process of designing reparations schemes itself. Meanwhile it would also avoid the duplication of roles, when the TFV is already mandated to investigate and provide assistance to victims generally.²⁰ However, caution must be exercised to avoid blurring the distinction between assistance and reparation, which are different in nature, although their practical benefits may be similar.
31. The nature of the TFV means that the Fund enjoys more flexibility to design reparations programmes than the Court, leaving it better placed to design approaches to reparations for mass crimes which may include collective measures that benefit a wider scope of victim.
32. The Court will therefore need to decide whether it wishes to pursue individual reparations awards, designed and awarded on a case-by-case basis through a specific order of the Court, or if it prefers to transfer the responsibility for designing and implementing effective reparations programmes that have the ability to reach a wider portion of victims, through the TFV. This should be considered in respect of each trial that is heard by the Court, depending on the situation in question, the funds available and the number of victims involved.

¹⁸ Wierda and de Greiff, 4.

¹⁹ *Ibid*, 6.

²⁰ *Ibid*, 9-11.

33. If the Court chooses to pursue the first option, it will need to develop much stronger outreach initiatives in order to ensure that as many victims as possible are able to make an application for reparations before the Court. It will also need to develop the principles Article 75 calls for so as to establish clear standards to assess the extent and nature of the harm suffered by each victim, and to award adequate reparation.

c) Conceptual Challenges

34. One of the remaining challenges facing the Court is how these programmes ought to be conceptualised.

35. Governed by Article 97 of the Rules of Procedure and Evidence, the Court may award reparations on an individualised basis or, where it deems appropriate, on a collective basis, or both.

36. The award of collective reparations could offer the Court the chance to recognise the fact that massive and systematic crime harms individuals in many ways, including on a societal plane. In other words, what needs to be redressed in the aftermath of systematic crime is not only individual harm but also human and social relations that have been violently destroyed. Reparations of this kind may, for example, take the form of the construction of schools or hospitals, the establishment of memorials or the renaming of streets.

37. The danger with this kind of reparations award is that without the combined support of specific and targeted individual reparations, these acts alone may easily lose their reparative objective, becoming humanitarian or developmental in nature. The Court must therefore be careful to ensure that it continues to fulfil its mandate to provide reparations which, at the very least, address the principles of restitution, compensation and rehabilitation.

38. On the other hand, a brief analysis of the suitability of the terms used in Article 75 of the Rome Statute reveals some conceptual and practical challenges too. For example, it is very often the case that the harm caused by serious and widespread international crimes such as genocide, or crimes against humanity can never be fully repaired, thus rendering the principle of restitution, in the reparative context of the International Criminal Court, an impossible objective.

39. Meanwhile, the notion of compensation may similarly be considered to be somewhat fictitious. The important question being, in the face of systematic, mass violence, when the number of victims is large, where should the funds for full, individual compensation awards come from?

40. Subject to Article 75(1) the Court is to “establish principles” relating to reparations for victims. However, no such “principles” have yet been established even though different attempts have been made within the Court to draft such principles.²¹

41. As the Court approaches its first decision in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, it therefore faces a foray into the unknown. There are currently no established norms relating to the reparation purposes of a body similar to the

²¹ Schabas, 881.

International Criminal Court and, therefore, nothing to guide the conceptual underpinning of any decision on the awards to be given by the Court.

42. Given the unique and serious challenges facing the Court in trying to adequately deal with the rights of vast numbers of victims to receive reparations for the crimes they have suffered, it would be wise for the Court to seek to develop a standardised set of 'principles', which would address some of these challenges, both conceptually and practically.
43. As it currently stands, the present lack of established principles creates uncertainty as to how the Court will decide to interpret its reparations mandate, which in turn leaves room for considerable disappointment among victims and the potential inequality of reparations awards between cases. If, over time, it seems that the Court is unable to provide effective and just reparations, this may lead some to rethink the value of Article 75 altogether.

d) Financial Considerations and Cooperation

44. As noted above, one of the most significant problems to face the implementation of effective reparations programmes is how the Court is to finance such undertakings.
45. Subject to Article 75(2) of the Rome Statute, the ICC can only make an award against an individual convicted perpetrator. Unlike the regional human rights courts, which have the power to hold a State responsible and order it to comply with the reparations they have ordered, the ICC must rely heavily on the international cooperation of States Parties to secure assets from an individual perpetrator, or to make donations to the TFV, in order to fund an award for reparations. While international organisations and individuals can aid the TFV by providing their own financial donations, the assistance of State Parties in the collating of funds is of particular importance and significance.²²
46. Article 93(1) of the Rome Statute obliges States Parties to comply with requests by the Court for the execution of searches and the identification, freezing or seizure of proceeds, property and assets and instrumentalities of crimes, for the purpose of forfeiture proceedings. Unfortunately, implementation of this provision is not widespread and many States have expressed unwillingness to accept such obligations before the Court.
47. In cases of non-cooperation, where a State Party has fully accepted this provision of the Rome Statute, the Court is authorised to make findings of non-cooperation and refer the matter to the Assembly of State Parties (ASP) or the Security Council.²³ While the Rome Statute does not go any further than this, it is clear that the ASP or the Security Council may take measures to ensure cooperation by States Parties. However, as such

²² However, international experience in recovering funds from individual perpetrators is dismal. For example, most of the large awards ordered by the US courts in the ATPA cases remain unpaid. Such procedures are also complex to operate and take some time to put into place. For instance, in the cases of perpetrators with known assets, *Milosevic* and *Taylor*, although their assets were already frozen by the ICTY and the Special Court of Sierra Leone respectively, upon indictment, these can only be seized post conviction and even so, it is a complex process. This area may take the ICC several years to systemize and in any case perpetrators are not likely to be a significant source of funds. Experience with other international criminal tribunals shows that perpetrators will often be bereft of assets by the time they are arrested and many declare indigence.

²³ Rome Statute, Article 87(7).

measures can only be political or exhortatory in nature, the real effect remains uncertain.

48. The ICC must continue to make efforts to develop expertise in tracking, freezing and the seizing of assets, to ensure that, as far as possible, the assets of a convicted perpetrator can either be used directly by the Court, or through the Trust Fund for Victims, to contribute to an award of reparations. In this regard, the Court must also continue to work in close connection with States Parties to develop effective mechanisms to monitor and follow up its requests for the identification, tracking, freezing or seizure of property and assets.

49. In the absence of recoverable assets, the Court must rely on the contributions from States Parties. Governed by Article 117 of the Rome Statute these contributions:

[...] shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

50. The Court must continue to encourage and support these and other voluntary donations by States Parties, especially supporting the work of the Bureau on the Arrears of States Parties, to ensure that no assessed contributions to the Court remain outstanding, and to seek ways of cooperating with States Parties who have not met their financial obligations in order to reverse any outstanding balances.

51. In order to ensure that reparations programmes are sustainable and feasible, the Court may also consider reparations awards for children that fit into existing programmes that are currently being implemented by donor agencies and NGO's within that country itself.²⁴ The Court must therefore work closely with State Parties, to ensure that they continue to support and facilitate the work of such organisations to rehabilitate children associated with armed conflict, so that they might faithfully execute the awards made by the Court.

III. Challenges to Effective Reparations for Ex-Child Soldiers and Children Who Have Been Sexually Abused

a) Child Soldiers: Conceptual Problems

52. The crime of "...conscripting or enlisting children under the age of 15 into the national armed forces or using them to participate actively in hostilities" is included by Article 8(2)(b)xxvi and 8(2)(e)vii of the Rome Statute, within its definition of "war crimes".

53. According to written commentary following the Rome Conference, the terms "conscripting or enlisting", can be defined by their ordinary specifications:

Conscription refers to the compulsory entry into the armed forces.
Enlistment... refers to the generally voluntary act of joining armed forces by

²⁴ REDRESS, 'Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court' (Victims, Perpetrators or Heroes?), September 2006, 60, available at: <http://www.redress.org/downloads/publications/childsoldiers.pdf> (last accessed 15 June 2011).

enrolment, typically on the 'list' of a military body or by engagement indicating membership and incorporation into the forces.²⁵

54. It follows that the consent of a child is not a valid defence to the war crime of conscripting or enlisting child soldiers. This reflects the fact that the recruitment of child soldiers is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival, to put food in their stomach. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role model they have.²⁶
55. In most conditions of child recruitment even the most "voluntary" acts are undertaken in a desperate attempt to survive, by children with a limited number of options. Children who "voluntarily" join armed groups often come from families who were victims of murder and have lost some or all of their family or community protection during the armed conflict. Many "volunteer" recruits soon become disillusioned, but are not able to leave due to fear of being killed. Many children who try to escape are executed in order to serve as an example to the other children. The line between voluntary and forced recruitment is therefore not only legally irrelevant but also practically superficial in the context of children in armed conflict.²⁷
56. Translated into the principles of reparation, it follows that such a line between the voluntary and involuntary acts of enlistment and conscription should be deemed equally irrelevant when seeking to design programmes of reparations which intend to effectively target all child soldiers. Reparations which do not make this distinction are more likely to maximise the positive effects of these awards on the successful reintegration of former child combatants and minimise the negative impact of stigma and blame which are often found within return communities.
57. The Rome Statute also includes within its definition of war crimes, the crime of "using them [children] to participate actively in hostilities." The words "using" and "participate" create a much broader category of criminal liability that has been interpreted to include direct participation in combat as well as active participation in military activities linked to combat, including scouting, spying, sabotage, the use of children as decoys, couriers or at military checkpoints.²⁸
58. It is important to note that how the Court chooses to determine which activities qualify under the term "participate actively", can have a significant impact on the number of children who qualify for reparations within the scope of this provision.
59. The Confirmation of Charges Decision made by the Pre-Trial Chamber in the case of *Thomas Lubanga Dyilo*, for example, purports to establish a bright-line rule to determine which activities qualify under the "participate actively" standard. The

²⁵Otto Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2008), 261.

²⁶'Situation in the Democratic Republic of the Congo in the Case of Thomas Lubanga Dyilo', Written Submissions of the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, submitted in application of Rule 103 of the Rules of Procedure and Evidence, 17 March, 2008, available at: <http://www.un.org/children/conflict/documents/AmicuscuriaeICCLubanga.pdf> (last accessed 15 June 2011).

²⁷*Ibid.*

²⁸Triffterer, 261.

Special Representative of the Secretary-General on Children and Armed Conflict has submitted, however, that this effort is ill-conceived and threatens to exclude a great number of child soldiers - particularly girl soldiers – from coverage under the crime of “using” children.²⁹

60. She argues that the exclusion of girls from the definition of child soldiers would be an insupportable break from well-established international consensus. The definition of child soldier auxiliary in the *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*,³⁰ for example, recognises that the term "child soldier" includes "girls recruited for sexual purposes and for forced marriage." This was recently reaffirmed by the *Paris Principles on Children Associated with Armed Conflict* in February 2007.³¹

61. In order to ensure that effective reparations are fairly available to all ex-child soldiers, the Court must therefore ensure that it rejects any interpretation of this article which excludes the use of girls to “participate actively in hostilities”. Instead the Court should adopt an inclusive interpretation of this provision, which would ensure that as many children as possible, including girls, could receive the recognition as victims that they deserve, in addition to the benefit of any reparations that the Court may award.

b) Child Soldiers: Practical Considerations

62. It is often the case that the successful re-integration of former child soldiers balances on a delicate set of social circumstances. Child combatants represent only a small percentage of the overall number of children whose lives have been impacted by armed conflict and who are striving, with their families and communities, to recover from the war’s grave effects. If former child soldiers are seen to receive benefits that are not available to other children living in these vulnerable communities, this can breed resentment and tension that will not facilitate their reintegration. This can be exacerbated by the stigma and blame which is regularly attached to those children associated with the armed conflict, because they took part in hostilities or because they have been subjected to sexual violence.

63. Often, the only way to assist a child in this context is by addressing the family or community which surrounds him or her. With this in mind, some recent disarmament, demobilisation and reintegration (DDR) programmes have used this approach to enlarge their scope to address the needs of other war-affected groups, not just ex-combatants. This has been found to “lessen distrust and increase tolerance between the different conflict-affected groups thus to support the reconciliation and reintegration process”.³²

²⁹ Written Submissions of the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, 8.

³⁰ UNICEF, 1997.

³¹ Written Submissions of the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, 8.

³² Irma Specht, ‘Jobs for Rebels and Soldiers’, in *Jobs After War: A Critical Challenge in the Peace and Reconstruction Puzzle*, ed. Eugenia Date-Bah (Geneva: International Labour Organisation, 2003), 96.

64. Reparations to victims, as Pablo de Greiff argues, may contribute to reintegration in much the same way. Thus, of particular importance for the reintegration of former child combatants may be the reparations provided to other child victims.³³
65. These may be provided by the Court in the form of larger, community-based reparation programmes which seek to benefit categories of “war-affected children” collectively. These may take the form of “collective” and/or “symbolic” measures which will be discussed in more detail below.
66. When designing reparations awards, the Court should further consider the cultural and ethnic realities of former child soldiers and their social environment. Field research has shown that the charges concerning child soldiers in relation to the *Lubanga* case, for example, have been met with surprise as most people in Eastern DRC are unaware that recruitment of children into armed groups is a war crime.³⁴
67. Most child victims of Thomas Lubanga belong to the Hema population. Their recruitment, therefore, must also be understood in the context of a tribal war that was exacerbated by Ugandan actors and aggravated by the broader international war in the Democratic Republic of Congo.³⁵ Some of the Hema children allegedly “voluntarily” joined the *Forces patriotiques pour la libération du Congo* (FPLC) or their parents “volunteered” them, out of a desire for revenge after the loss of a close relative allegedly killed by the militias which were fighting the FPLC.³⁶
68. Community feelings towards the returning child soldiers will be influenced by the political/ethnic relationship the community had with the armed group in which the combatant served.³⁷ When awarding reparations the Court must be cautious not to reinforce the artificial sense of ethnic identity that has been used as a weapon of war in the past.
69. It is therefore important that the Court considers the cultural environment of victims in order to award reparations which are adequate in the context of each particular case. Many societies have developed their own forms and understandings of justice and accepted forms of reparations, which may include official apologies, symbolic punishment by the society, or gifts from the perpetrator to the victim in the form of animals, for example. The Court should take this cultural context into account as it may help inform what would be considered adequate reparations in a given context. It is also crucial to bear in mind that cultural differences between countries, regions and even population groups or tribes may mean that what is considered an adequate reparation measure in one case is not necessarily considered likewise in a different context.

³³ Pablo de Greiff, ‘Establishing Links Between DDR and Reparations,’ in *Disarming the Past: Transitional Justice and Ex-combatants*, ed. Ana Cutter Patel, Pablo de Greiff and Lars Waldorf, (New York: Social Science Research Council, 2009), available at: <http://www.ictj.org/en/research/projects/ddr/thematic-studies/3502.html#REPS> (last accessed 15 June 2011).

³⁴ Victims, Perpetrators or Heroes?, 18-22.

³⁵ Human Rights Watch, Ituri: ‘Covered in Blood,’ Ethnically targeted violence in Northeastern DRC, July 2003, 2, available at <http://www.hrw.org/en/reports/2003/07/07/covered-blood> (last accessed 14 June 2011).

³⁶ Decision on the confirmation of the charges in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, 29 January 2007.

³⁷ Victims, Perpetrators or Heroes?, 18.

c) Children and Sexual Violence

70. Victims of sexual violence such as rape, sexual slavery, enforced prostitution, sexual exploitation, forced marriage, or sexual torture may suffer from many diverse and devastating impacts. When designing reparations awards for child victims of sexual violence, the ICC must consider the broad range of these impacts, including those of a physical, emotional and material nature.³⁸
71. It is equally important, however, that the Court must also consider the impact of gender on victims of sexual violence. Not all sexual violence is directed at girls and, in many cases, boys are equally subjected to the traumatic experiences of sexual violence during armed conflict. The design of reparations programmes must address the issue of gender and why it matters for children. Too little is known about how gender-just reparations might be provided to boys, yet all violations affect girls and boys in ways that have gender specific consequences. Much more work and analysis should be conducted for the purposes of designing reparations programmes by the Court, which adequately address the needs of male victims of sexual violence.
72. The physical impact of sexual abuse is often exacerbated by the violence and degree of aggression that permeates the war context.³⁹ Physical harm from sexual violence against girls will, in many cases, result in traumatic fistulas, scarring, difficulties conceiving or carrying a child full-term, as well as complications during birth. All forms of vaginal injury lead to a higher likelihood of contracting a sexually transmitted disease, including HIV.⁴⁰
73. The emotional trauma and the psychological consequences of sexual violence, as well as its social consequences, can often be as severe as the physical. These may include deep experiences of shame and guilt, stigmatisation, ostracism, and rejection, which can lead to destructive patterns of behaviour, including alcoholism, substance abuse, compulsive gambling, domestic violence, incest, and intergenerational problems, such as the inability to parent.⁴¹
74. Victims who are shunned from society often suffer from denied access to productive channels of social networking and income generation. Victims of sexual violence and mutilation may also lose their chances of marriage and, as a result, may lose their chance of reaching the social status which is given to wives and mothers within many traditional communities. Without this status they also lose access to material goods such as land and property that go with this status as a matter of law.⁴²

³⁸ The effects of sexual violence, especially on women and girls and the needs of victims in terms of reparations in the Democratic Republic of Congo have been documented in the Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011. Available at:

http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf (last accessed 15 June 2011).

³⁹ Colleen Duggan and Ruth Jacobson, 'Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation' (Duggan and Jacobson), in *The Gender of Reparations, Unsettling Social Hierarchies while Redressing Human Rights Violations*, Ruth Rubio-Marín (ed.), (Cambridge University Press, 2009), 126.

⁴⁰ TRC for Sierra Leone-Final Report, §134.

⁴¹ Duggan and Jacobson, 128.

⁴² *Ibid*, 129.

75. Of a high priority to nearly all victims of violent sexual violation is the serious need for access to free primary, secondary and tertiary physical health care.⁴³ This should be provided on an as needed basis, depending on the degree of their injury.
76. However, given the additional damage sexual violence can cause to the future prospects of victims of this violation, the Court must also contemplate how best to repair their social networks and relationships within the community. Income-generating and skills-building initiatives, for example, could help empower the victims of sexual violence, and improve their ability to become functioning members of the community.
77. Particularly pertinent to the experiences of girl victims of sexual abuse is the issue of continued gender discrimination. It will often be the case that by the time the Court begins to consider the reparations needs of these victims, they will no longer be girls, but young adults, living within their home communities.
78. It is important for the Court to recognise that, when designing reparations awards, these young women are often the victims of additional discrimination, marginalisation, and violence from their neighbours and local community, both during and after conflicts.
79. Restoring victims to such a situation cannot be considered adequate under international law and the Court must measure harm to female victims not with regard to what they had before the violation, but to what they ought to have had in a situation of non-discrimination.⁴⁴
80. Indeed, Article 21(3) of the Rome Statute stipulates that the application and interpretation of law by the Court must be consistent with internationally recognised human rights and in particular it should be without any adverse distinction founded on grounds such as gender (as defined in Article 7(3)), age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. It would be unacceptable for the Court to award reparations which ignore the reality that certain victims continue to be discriminated against on grounds of gender long after the conflict has ended.
81. When designing reparations awards, the Court can also draw upon other authoritative documents. In particular, it should consider the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparations to inform its reparation orders.⁴⁵ Whilst this declaration is not legally binding, it is based on the international legal principles embodied in *The Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law*. The Nairobi Declaration has been referred to by the African Commission on Human and Peoples' Rights as providing guiding principles for the implementation of programmes intended to achieve reparation for

⁴³ *Ibid*, 144.

⁴⁴ R. Rubio-Marín & P. de Greiff, 'Women and Reparations' 1 IJTJ 318 (2007), 332.

⁴⁵ International Meeting on Women's and Girls' Right to a Remedy and Reparation, March 2007, available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php (last accessed 15 June 2010).

crimes of sexual violence perpetrated in times of conflict.⁴⁶ Thus, it can be argued that it is not devoid of certain legitimacy and as such may serve to guide bodies awarding reparations.

82. Finally, reparations programmes must recognise and address the fact that the complicated status of girls in armed conflict may often make them an invisible victim. During DDR programmes, Commanders will often prefer to ‘keep’ their women, who are usually the mothers of their children, their sexual slaves and their cooks. Thus, even when these the girls have also performed as combatants, they are not brought forward or released with the rest. Outreach and assistance initiatives provided by the Court will particularly need to target these girls, recognising their increased vulnerability and enhanced levels of need.⁴⁷

IV. Reparations Solutions for Child Victims of Armed Conflict: Practical Considerations

a) The Concept of “Life Plan”

83. Recent case law from the Inter-American Court of Human Rights has shown an increased willingness to recognise the more subtle, harmful impact of serious human rights violations on a victim. The Court has referred to this harm as “non-pecuniary damage”, which cannot be assessed in purely monetary terms.⁴⁸

84. Ruling in the 2008 case of *Bayarri v. Argentina*, the Inter-American Court described non-pecuniary damage to include:

[...] both the suffering and grief caused to the direct victims and their close relations, and detriment to very significant values of the individuals, as well as non-pecuniary changes in the conditions of existence of the victim or the victim’s family.⁴⁹

85. Developed alongside the assessment of non-pecuniary damages for harm, the IACtHR also introduced the idea of “proyecto de vida” or “life plan”, in order to help assess the damages of certain serious human rights violations, in particular torture.

86. The first case in which the Inter-American Court developed this concept was the case of *Loayza Tamayo v. Peru* in which a Peruvian university professor was severely tortured during her incommunicado detention and sentenced to imprisonment

⁴⁶ ACHPR, Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, Doc. ACHPR /Res.111 (XXXII) 07, 28 November 2007, available at: http://www.achpr.org/english/resolutions/resolution111_en.htm (last accessed 15 June 2011).

⁴⁷ Written Submissions of the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, 9.

⁴⁸ C. Sandoval and M. Duttwiler, ‘Redressing Non-pecuniary Damages of Torture Survivors: The Practice of The Inter-American Court of Human Rights’ in G. Gilbert, F. Hampson and C. Sandoval (ed.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley*, (Routledge, 2010),114-136.

⁴⁹ IACtHR, *Bayarri v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 30 October 2008, §164.

following an unfair trial.⁵⁰ In this case the Court explained the concept of “life plan” to be:

akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself.⁵¹

87. The IACtHR went on to state:

[...] acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual’s development. In other words, the damage to the ‘life plan’, understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person’s prospects of self-development.⁵²

88. Since *Loayza Tamayo*, the IACtHR has used the concept of “life plan” in three other cases including *Cantoral Benavides v. Peru* (2000), *Tibi v. Ecuador* (2004), and *Gutiérrez Soler v. Colombia* (2005). In all three of these cases it held that the violations in question had caused a serious alteration in the life plan of the victims, which led to additional non-pecuniary damage.

89. In the case of *Tibi*, the IACtHR calculated the damage to the victim’s “life plan” in the form of a monetary award, while in the case of *Cantoral Benavides*, where the victim was a student who had suffered arbitrary detention, torture and unfair trial, the Inter-American Court was careful to make a more specific reparation award. In this case it ordered the State to:

[...] provide him with a fellowship for advanced or university studies, to cover the costs of a degree preparing him for the profession of his choosing, and his living expenses for the duration of those studies, at a learning institution of recognised academic excellence, which the victim and the State select by mutual agreement.⁵³

90. In the later case of *Gutiérrez-Soler v. Colombia*, the IACtHR recognised the damage done to the life plan of Wilson Gutiérrez-Soler and his family.⁵⁴ After being arbitrarily arrested and tortured, Mr. Gutiérrez-Soler and his brother had been living in exile in the United States for ten years. His wife and children, who continued to live in Colombia, were separated from him throughout this time and were subjected to threats, harassment and aggression. In this case the IACtHR decided not to compensate for this damage financially but indicated that the complex and all-encompassing nature of damage to the life plan called for action securing satisfaction and guarantees of non-repetition that go beyond the financial sphere.⁵⁵ In all these cases, where the concept of

⁵⁰ IACtHR, *Loayza-Tamayo v Peru (Merits)*, Judgment of 17-9-1997, Series C No. 33

⁵¹ IACtHR, *Loayza-Tamayo v Peru (Reparations and Costs)*, Judgment of 27-11-1998, Series C No. 42, §148

⁵² *Ibid.*, §150

⁵³ IACtHR, *Cantoral-Benavides v Peru (Reparations and Costs)*, Judgment of 03-12-2001, Series C No. 88, §80

⁵⁴ IACtHR, *Gutiérrez-Soler v. Colombia*, Judgment of 12-09-2005, Series C No. 132, §89

⁵⁵ *Ibid.*

a life plan was employed, the victims had suffered from serious trauma during an ongoing violation.

b) The Concept of the “Life Plan” in the ICC

91. The translation of this approach into the reparative context of the International Criminal Court may provide a creative means by which to expand the scope of the Court’s reparations mandate, allowing it to address the more subtle harms to a victim’s prospects of self-development or their “life plan”. This is particularly relevant in the context of ex-child soldiers and children who have been sexually abused.
92. Child soldiers who are actively involved in conflict suffer many serious, ongoing violations which continue to create trauma long after their involvement in the conflict has ended. In some cases, the negative impact of their experiences as a child soldier can be life-long and may in turn cause further suffering and human rights violations in the future. Ex-child soldiers, who suffer severe injury or psychological trauma, may experience a much greater disruption to their “life plan”, preventing them from finding work, or being able to marry and have a family in the future. Nearly all those recruited at a young age will have been deprived of vital aspects of their childhood, such as education and family life, which may have improved the quality of their “life plan” in the future.
93. This is a particular concern for children who have been subject to sexual abuse, especially girls. A girl who is raped during armed conflict and consequently becomes pregnant, faces major disruptions to her “life plan”. She may be rejected by her family and the wider community, which means she has no family or other social support. She may be unable to marry, which also deprives her of emotional, financial and material security. She may be denied access to productive activities such as communal farms or local markets, which forces her to live in poverty. She may be prevented from attending school, which deprives her of the opportunity to raise herself out of poverty. She may suffer from HIV/AIDS or other sexually transmitted diseases as a consequence of the rape, which have very serious implications for her health and hence her life plan.⁵⁶
94. A girl who is repeatedly raped and kept in sexual slavery will suffer similarly, if not more severely. Many girls are kept in sexual slavery long after conflict has ended and in many cases, may never return to their home community.
95. It is generally understood that participation in conflict seriously disrupts the normal development of a child and that the concept of a “life plan” can be used as an effective tool to assess damages of this kind and to contribute to victims’ future development. It is therefore important that the reparations awards made by the ICC seek to recognise this and provide the restitution of conditions which would allow ex-child combatants and victims of sexual violence to reconstruct their “life plan”. The most important conditions which these victims need in order to reconstruct their life plan are: reintegration into society, physical and mental health care, the provision of some form of education or vocational training and sustainable work opportunities.

⁵⁶ See C. Duggan and A. Abusharaf, ‘Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice’ in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford, Oxford University Press, 2006), 623-49.

96. The remaining part of this brief will explore some of the key reparations solutions which focus on these reconstructive needs and which the Court may employ, in conjunction with an assessment based on the “life plan” concept, in order to provide effective reparations for ex-child soldiers and children who have been sexually abused. This analysis will focus on the practical benefits of awarding reparations in the form of individual cash awards, social service care packages, education, access to healthcare, restoration of family relationships and symbolic awards.

c) Cash Benefits

97. Compensation is one of the most common forms of individual reparation given to victims and has been used in many cases before the IACtHR and other international and national justice mechanisms, to redress pecuniary loss and non-pecuniary damage, including harm to a victim’s “life plan”.

98. Typically, however, awards will rarely recognise the violations and abuse experienced directly by the children themselves.⁵⁷ As a result, little is known about the relative benefits of providing one time lump sum payments to children as an effective means of reparation for the harms they have suffered. However, one of the few areas where studies do exist on cash given to child victims is in reintegration programmes that seek to assist children who have been part of fighting forces or groups that participated in the armed conflict or political violence. These studies have found that giving cash to children may lead to a number of negative outcomes.⁵⁸

99. In many cases, particularly where there is great stigma attached to the violation, in the case of former child soldiers and children who have been sexually abused, for example, the payment of money may be seen as a “reward” for carrying out or supporting those who carried out atrocities. This can lead to resentment and increased tension and disharmony between children and their return community.⁵⁹

100. When money is brought home, there may also be conflicting ideas about how that money should be spent. This is exacerbated by the societal roles which are often attached to children and the demands on them to submit to the will of their family, especially of their father. In these circumstances, the monies awarded to children will often end up in the hands of their mother and father, who will spend it to pay off debts.⁶⁰

101. Moreover, few boys and girls have the skills to properly manage, save or invest money. Few have access to a bank account, or a private safe location in which to keep their money. In many countries, minors are not allowed to open bank accounts.

⁵⁷ Dyan Mazurana and Khristopher Carlson, ‘Reparations as a means for Recognizing and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflict and under Authoritarian and Dictatorial Regimes’ (Mazurana and Carlson), in Ruth Rubio Marin (ed.), *The Gender of Reparations, Unsettling Social Hierarchies while Redressing Human Rights Violations*, (Cambridge University Press, 2009), 190.

⁵⁸ *Ibid*, 193.

⁵⁹ Studies by UNICEF have found that giving cash to children leads to a number of negative outcomes. See, for example, UNICEF, ‘The Disarmament, Demobilisation and Reintegration of Children Associated with the Fighting Forces: Lessons Learned in Sierra Leone, 1998-2002,’ New York, 2005.

⁶⁰ Mazurana and Carlson, 194.

102. Furthermore, in the case of victims who were children during the conflict but are adults by the time they receive reparations, specific attention must be paid to gender. In particular, many women who were victims of sexual violence when they were girls, although they are adults now, have no bank account and may struggle to hold on to cash benefits they may receive, given gender stereotypes in many societies. For example, there are those who believe that women cannot manage their own money, which may force women to hand awards over to their partners or other male family members. One way of avoiding this would be to provide cash benefits in the form of microfinance rather than lump sum awards.⁶¹
103. It follows that if the Court decides that cash payments are to be made to individual victims, then an appropriate arrangement may be needed in which either part or all of the money is held in a trust fund until the child reaches an appropriate age of maturity to make financial decisions. The Inter-American Court has thus regularly ordered compensation awards for minors to be placed in a solvent banking institution until they reach the age of majority.⁶²
104. In conjunction with this, courses should be offered to help young people understand money management and accounting and the money should be paid out in smaller amounts over time to the child or young adult.
105. Rural children, poor urban children and linguistic minority children would likely require additional assistance in setting up and understanding how to manage bank accounts.⁶³ This also holds true for many female adult victims.

d) Social Service Care Packages

106. Given the problematic nature of providing cash benefits to children, the Court may consider that child beneficiaries of reparations should instead be given access to education and health services, since it is doubtful whether the cash given to children would result in their access to these services.
107. These services can be provided as part of a social service care package, which seeks to address children's physical and psycho-social health; the provision of education or organised learning opportunities such as vocational training and social care, in order to help restore family relationships.⁶⁴ These will be explored in more detail below.
108. In practical terms, however, the Court is limited in how it might deal with implementing reparations awards of this kind. As previously explained, the ICC may only order reparations awards against an individual perpetrator who has committed crimes under its jurisdiction. It is unlikely, however, that any assets recovered from an individual perpetrator would suffice to fund the provision of health care and education benefits for a large number of victims or even for fewer of them. Meanwhile, reparations programmes of this size and nature must be designed in careful

⁶¹ A. Bernstein, 'Tort Theory, Microfinance and Gender Equality Convergent in Pecuniary Reparations' in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge, Cambridge University Press, 2009), 291-323.

⁶² See for instance *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 31 Janvier 2006, Series C No. 140, § 292.

⁶³ Mazurana and Carlson, 194

⁶⁴ For an example of a social services care package see the TRC for Sierra Leone-Final Report.

consultation with victims themselves and the State Party in which they are to be implemented, all of which requires additional time and resources.

109. The effective use of the TFV could, in these circumstances, play an important role in materialising such reparations, using money gathered through international cooperation. With the TFV's mandate to investigate and provide assistance to victims generally, the Fund is better informed and situated to aid in the design of reparations programmes. Meanwhile, the money that is collected by the Fund would better facilitate and make possible the implementation of specific reparations ordered by the Court.

110. When considering the possibility of the reparations programmes outlined below, it is therefore crucial for the Court to consider how it might make effective use of the TFV to ensure their successful implementation.

e) Education

111. Education can play a major role in facilitating the return and reintegration of children into families and communities. The most vulnerable groups – former child soldiers, out-of-school children, children with disabilities, victims of sexual violence – frequently need additional assistance to overcome the obstacles they face in restarting their education. Reparations awards that include support for back-to-school programmes and vocational training can address these issues and act as a catalyst for reintegration.

112. Schools can also become a useful platform for introducing new and essential educational components in post-conflict communities, such as landmine awareness, HIV and AIDS prevention, life-skills training, child rights and sports and recreation.

113. Children have a right to education, including free primary education, under the Convention on the Rights of the Child (CRC).⁶⁵ This means that educational reparations programmes for children would have to go above and beyond what the state is already obliged to provide.

114. The Court must therefore consider educational benefits that include full access to primary and secondary education or accelerated programmes of education for child victims before the Court. However, as already stated, the individual perpetrator will not be in a position to make possible such reparations and, therefore, the cooperation of the state where they crimes took place, as well as of third states, would be essential.

115. Considering a gender sensitive approach to reparation, the Court should also work to ensure the equal participation of girl victims in primary and secondary schools and even universities. This was done in the case of Chile, where children of victims were given access to education benefits up until the age of 35 including free university education.⁶⁶

⁶⁵ Convention on the Rights of the Child, United Nations General Assembly, 20 November 1989, UN Treaty Series, Vol. 1577, p.3, entered into force 2 September 1990, Articles 28 and 29.

⁶⁶ Law 19.123, "Establishes the National Corporation for Reparation and Reconciliation and Grants Other Benefits to Persons and Indicated," Title IV, Articles 29,30,31, reproduced and translated into English in *The Handbook of Reparations*, 758.

116. The Court should bear in mind that a significant number of female victims of sexual violence have to take care of children born out of rape. Very often, such victims suffer from stigmatisation and ostracism and may be rejected by their families. Therefore, they lack family support to take care of their children. This may prevent them from attending school, as they cannot rely on other family members to look after their children when they study. This problem is particularly serious for mothers of children who are still young and require extra care. The Court should therefore consider the use of childcare facilities for girls who are single mothers to be able to attend school.
117. The Court may also consider awarding former child soldiers with access to 'catch-up' education, using specially trained teachers and small classes to help these children regain confidence and recover hidden stores of knowledge, which many children feel to be lost or forgotten. This may additionally allow former child soldiers to join more age-appropriate classes, and can make a significant difference to whether or not they rejoin school at all.⁶⁷
118. Yet, practical considerations will need to be given to the real possibility of implementing such reparations programmes. It is often the case that following severe cases of armed conflict the necessary resources required to provide access to education, may no longer exist within the local community. School buildings may have been destroyed, whilst trained teachers may have been killed or no longer able to work as a result of the conflict. In cases where vast groups of the population have been made homeless or have been displaced, it will be equally difficult to provide children with access to local schooling. Without the existence of a functioning education system, it will be impossible for the Court to provide reparation in the form of access to free education. The Court must therefore undertake a case-by-case assessment of the local communities to which the victims belong, in order to determine whether the provision of 'access' to education, would not only require the waiving of school fees, but the provision of school buildings, and the training of staff as well. In these cases, the Court should consider whether, subject to resource constraints, it is feasible to include such measures in the design of a reparation programme. International cooperation and assistance would be crucial in such an endeavour.
119. To avoid any risk of corruption or the diversion of resources, the financing of any such project should be dealt with through independent monitoring bodies.

f) Access to Health Care

120. In the context of armed conflict, those children who survive are often in very serious need of access to health care facilities and treatment. Former child soldiers returning directly from ongoing war are usually exhausted, ill and malnourished. Some have serious untreated diseases and disabilities. They may also have drug and alcohol dependency.⁶⁸

⁶⁷ See, Coalition to Stop the Use of Armed Soldiers, 'Crossing Bridges and Negotiating Rivers, Rehabilitation and Reintegration of Children Associated with Armed Forces', E. Jareg, Save the Children, Norway (2005) available at http://www.child-soldiers.org/psycho-social/Crossing_Bridges_and_Negotiating_Rivers_-_Rehabilitation_and_Reintegration_of_Children_Associated_with_Armed_Forces_2005_by_Dr_Elizabeth_Jareg_-_Save_the_Children.pdf (last accessed 15 June 2011).

⁶⁸ G. Michel, *The Impact of Armed Conflict*, 41.

121. The interruption of food supplies, the destruction of food crops and agricultural infrastructures, the disintegration of families and communities, the displacement of populations, the destruction of health services and programmes and of water and sanitation systems all take a heavy toll on the health of those children who are trying to survive in war affected communities.⁶⁹
122. Post-traumatic reactions and mental health problems are also common among children who have been directly involved in armed conflict, especially former child soldiers, and can be debilitating.⁷⁰ Meanwhile, girls are at particular risk from violent sexual abuse during armed conflict, which can result in much more extensive health needs including surgery or long-term medical care.⁷¹
123. The UN *Basic Principles and Guidelines on the Right to a Remedy*, which inform the reparations mandate of the Court, include within their definition of victims those who have suffered “physical or mental injury, emotional suffering”.⁷² The Guidelines call for attention to mental health needs as part of compensation, which should address “physical or mental harm”, and to rehabilitation, which should include “medical and psychological care”.⁷³ It is therefore essential that the Court addresses the issue of access to physical and psychological health care benefits for children, especially former child soldiers and those who have been abducted and/or sexually abused, when making reparations awards.
124. The Court should bear in mind the limitations it faces when considering health programmes. As with education, the individual perpetrator will be, in most cases, unable to contribute financially to them, and will lack the necessary capabilities to implement them. Therefore, the Court should be creative in the way it calls for the adoption and implementation of such services. States assistance and cooperation would be crucial to make health services a reality.

g) Restoring Family Relationships: Community Based Reparations

125. Many returning children, who have been active in fighting for many years and who have become accustomed to military hierarchies, may encounter many psychological and social challenges upon family reunion. Some may be shocked to find changes in their family such as new siblings or separated or re-married parents. Parents may be faced with challenges to their authority and some children face resentment stemming from circumstances connected to their recruitment. Children may also blame their parents for their inability to protect them. Some will encounter rejection from their families, or from particular members, thus splitting the family.⁷⁴
126. As Elizabeth Jareg identifies in her paper on the rehabilitation and reintegration of children associated with armed forces, all of these potential difficulties point to the

⁶⁹ *Ibid.*

⁷⁰ Dr. Elisabeth Schauer, as part of her expert testimony in the case of Thomas Lubanga, explained the occurrence of posttraumatic stress disorder (PTSD) among former child soldiers, which she linked directly to the experience of traumatic events. Elizabeth Schauer, ‘The Psychological Impact of Child Soldiering’, 25 February 2009, available at: <http://www.icc-cpi.int/iccdocs/doc/doc636752.pdf> (last accessed 15 June 2011).

⁷¹ G. Michel, *The Impact of Armed Conflict*, 29.

⁷² *Basic Principles*, § 8.

⁷³ *Ibid.*, §§ 20, 21.

⁷⁴ E. Jareg, 5.

need for a community based programme that focuses on providing some form of interim care for returning children. This could provide the time needed to help both child and family adjust, before the child is fully reintegrated.⁷⁵

127. Interim care centres, created as part of a community based reparations programme, could provide a useful and neutral place to prepare the family and young person for the type of problems that may arise during reintegration. Families may need advice and support in relation to: changes in the child and family and (with their permission) any special difficulties the young person has; resolving family conflict without violence or abusive language; accepting and adjusting to the fact that their daughter returned with children, and being sensitive to the abuse she has undergone. This type of work can be undertaken in a family or group format, so that families can support each other, and young people benefit from sharing experiences with peers.⁷⁶

128. These interim care centres need some form of assessment process, especially for adolescents who have been with armed forces for a long time, to assess the child's "readiness" to go home, and the family's "readiness" to accept him/her.⁷⁷

129. Another creative approach to community based reparations, which has not yet been adopted by any programme, is the establishment of (sex-segregated) girls' and boys' centres or clubs. This idea draws heavily from the work of Judith Bruce on safe spaces for girls, which is included in the *Report of the Secretary-General on the Elimination of All Forms of Discrimination and Violence against the Girl Child*.⁷⁸

130. Girls and boys have a basic right to a community and spaces that are safe. However, physical and sexual abuse is common in many communities, and high proportions of girls, in particular, report being afraid of public spaces where their reputations and physical integrity are attacked. Harassment and physical attack starkly reduce girls' opportunities and constitute further violations.

131. Safe spaces such as girls' and boys' clubs could provide essential social platforms from which governments, international organisations and non-governmental organisations can deliver programs to promote and protect the human rights of girls and boys, as well as venues in which girls and boys can develop protective same-sex friendship networks, explore their problems, develop strategies to protect their safety and their health, practice team building, develop leadership, and play.

132. Last, the role of culture must be mentioned here. Indeed, a child's cultural environment may condition how he or she reacts to international crimes, either worsening or, on the contrary, attenuating their impact. For instance, the physical and psychological suffering of victims of sexual violence may be compounded by their cultural environment. This is especially so if victims are blamed for their experiences or rejected by their families, which, in turn, can cause additional social and material harm. Community-based reparations are therefore particularly important, insofar as they may take into account the social and cultural environment to which victims return.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ 'Elimination of All Forms of Discrimination and Violence against the Girl Child: Report of the Expert Group Meeting', Innocenti Research Center, Florence, Italy, 25-28 September 2006, 11.

h) Symbolic Reparations (Satisfaction) and Children

133. For the purpose of defining the term “reparations” used in the Rome Statute, reference may be made to the UN *Basic Principles and Guidelines on the Right to a Remedy*. Guided by these basic principles, the concept of “reparations” goes far beyond the notion of financial compensation alone and should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁹
134. According to the basic principles, satisfaction involves the provision of effective measures aimed at the cessation of continuing violations in addition to; verification of the facts and full and public disclosure of the truth; recovery, identification and reburial of bodies according to the express or presumed wish of the victims or their families; public apology; judicial and administrative sanctions against those responsible; commemorations and tributes to the victims and, lastly, the inclusion of an account of the violation in training and educational materials at all levels.⁸⁰ These are symbolic measures which can preserve the memory of what has happened during a conflict or period of repression, and most importantly, could serve as a reminder that society must not allow it to happen again.
135. Measures of satisfaction are among the most problematic forms of reparations for the Court to address in the context of individual criminal responsibility. However, some types of satisfaction are inherent to the criminal process. Cessation, for example, would normally result from the arrest, trial and conviction of the perpetrator. Disclosure of the truth should also occur during the trial.
136. In some cases, conviction of the perpetrator can alone be of important symbolic value to a society which, particularly in the case of sexual violence, may at first have laid blame on the victim, rather than the perpetrator, for those violations.
137. More difficult is the question of locating killed or missing persons and obtaining an official declaration or judicial decision restoring the dignity, reputation and legal and social rights of the victim and close associates. These forms of satisfaction require the involvement and support of the State and may not be possible forms of redress through the ICC, which is limited by its mandate to awarding reparations against the sole criminal perpetrator. Similarly, commemorations and tributes to the victims and the reworking of educational training materials could not be executed by a perpetrator alone but would require the active involvement of the State where the crimes took place either because the perpetrator lacks the necessary economic resources or lacks the capability to carry them out.
138. The resources available in the TFV could help to overcome some of the financial constraints resulting from the insolvency of the defendants. Such resources could be important to deal with some satisfaction measures.
139. In other cases it may still be possible to involve the perpetrator in the provision of satisfaction measures. This is particularly so in the case of perpetrators who may have once had a certain level of power within the affected community. The influence of such

⁷⁹ Basic Principles, §§ 8,18.

⁸⁰ Basic Principles, § 22.

a person, if he or she was to make calls for national reintegration, or community level support for reparative activities such as the building of a park, or new educational facilities, may be of significance and value to the victims of violation. However, these acts can only be carried out voluntarily by the perpetrator and cannot be ordered by the Court.

140. In most cases, the Court will therefore need to work in continued cooperation with State Parties to the Rome Statute in order to provide a minimum level of satisfaction to victims. State Parties have a general obligation to cooperate with the Court and to ensure that their national legislation facilitates cooperation.⁸¹ In relation to reparations this means that States must implement the ICC's requests for provisional and protective measures to trace and freeze assets as appropriate in addition to enforcing the reparations orders of the Court.

141. While the Rome Statute does not specify the way in which States must cooperate on issues related to the enforcement of reparations, State Parties may be encouraged by the Court to provide financial support to the TFV for the purposes of making satisfaction measures a practical reality. Meanwhile, States must additionally be made aware of the areas in which they can provide political support and assistance to the implementation of satisfaction measures ordered by the Court, for example, putting in place the relevant legislation to change education and training at all levels, to include an account of the violation, or facilitating the location and exhumation of bodies for reburial.

V. Concluding Recommendations

1. The Court should undertake outreach activities to ensure awareness of its role through the External Communication Working Group and ensure effective participation of victims in the proceedings, especially children and women.
2. The Court should make broad use of the possibilities offered by the Trust Fund for Victims when awarding, designing and implementing reparations measures. The nature of the harm at stake requires the active involvement not only of the Court but also, and in particular, of the Fund.
3. The Court should always take into account Disarmament, Demobilisation and Reintegration programmes and other reparation initiatives, where these are being implemented in parallel, in order to ensure that such programmes complement each other.
4. The Court must continue its efforts to ensure that, to the extent possible, the assets of a convicted perpetrator and donations from States Parties and others contribute to the financing of reparations.
5. To the extent possible, the Court should order collective reparations with a special focus on repairing the harm suffered by victims who were boys and girls when the violations occurred.

⁸¹ Article 93, Rome Statute.

6. When measuring what damage must be repaired in the case of children victims, the Court should give particular consideration to the concept of “life plan”.
7. When designing reparations measures, the Court should follow and adequately apply the principles of restitution, compensation, and rehabilitation, bearing in mind the specific needs of women and children.
8. While the nature of the work carried out by the Court is different to that engaged in adjudication against States for harm caused to other states or to individuals or collectivities, it could still be guided by some of the international law principles on reparations.
9. The Court should pay special attention to girls who are particularly vulnerable because of their gender and because they are minors, in particular as regards the consequences of sexual violence. Reparations should be designed with a gender perspective and adequately calculate lost opportunities for women and girls.
10. When designing reparations awards for child victims of sexual violence, the court must consider the many and long-term diverse and devastating impacts, including those of a physical, psychological, social and material nature.
11. The Court should design reparations for child soldiers which also target other child victims and the wider community to ensure that they contribute to their successful reintegration.
12. The Court should take into account the cultural environment of victims in a given case and ensure that reparations are adequate in each particular context.

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