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Violations against the six grave violations of children's
rights in armed conflict and the right to reparation

An analysis of the judicial development of the right to reparation by the ICC

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Summary

Children's rights have consistently been abused during armed conflicts. There have been more than 266,000 grave violations against children's rights between 2005 and 2020, even though the real number probably is higher. The UN has identified six grave violations against children's right during armed conflict. The thesis aims to highlight how the reparation for violation of the six grave violations against children's rights during armed conflicts has developed with the ICC cases *the Prosecutor v. Lubanga* and *the Prosecutor v. Ntaganda*. The thesis uses the legal dogmatic method and an international and critical perspective. The material used is a mix of cases from the ICC, treaties and resolutions, literature from researchers with legal expertise in the field as well as various reports that are ICC or UN related.

The thesis covers how the ICC is reasoning regarding the reparation mechanism. ICC have a broad long-term perspective and highlights the importance of a flexible and included reparation mechanism with an individual perspective. The Court also separates the reparation mechanism for children and includes additional factors to take into consideration when deciding the appropriate reparation mechanism for child victims.

The thesis concludes that the two cases from ICC contributes to developing the reparation mechanism when violations of the six grave violations against children's rights during armed conflicts occur. The Court gives the individual victim rights and stresses the importance of finding appropriate reparation mechanisms for each situation, which might vary from situation to situation. The Court also takes on a special child perspective.

Sammanfattning

Barns rättigheter har konsekvent missbrukats under väpnade konflikter. Det har skett mer än 266 000 allvarliga kränkningar av barns rättigheter mellan 2005 och 2020, även om det verkliga antalet förmodligen är högre. FN har identifierat sex allvarliga kränkningar av barns rättigheter vid väpnade konflikter. Avhandlingen syftar till att belysa hur upprättelse för kränkningar av de sex allvarliga kränkningarna av barns rättigheter vid väpnade konflikter har utvecklats med ICC-fallen, *åklagaren vs. Lubanga* och *åklagaren vs. Ntaganda*. Avhandlingen använder den rättsdogmatiska metoden och ett internationellt och kritiskt perspektiv. Materialet som används är en blandning av fall från ICC, fördrag och resolutioner, litteratur från forskare med juridisk expertis inom området samt olika rapporter som är ICC- eller FN-relaterade.

Avhandlingen tar upp hur ICC resonerar angående reparationsmekanismen. ICC har ett brett långsiktigt perspektiv och lyfter fram vikten av en flexibel och inkluderande skadeståndsmekanism med ett individuellt perspektiv. Domstolen separerar också skadeståndsmekanismen för barn och inkluderar ytterligare faktorer att ta hänsyn till när man beslutar om lämplig skadeståndsmekanism för barn som är offer.

Avhandlingen drar slutsatsen att de två fallen från ICC bidrar till att utveckla skadeståndsmekanismen när kränkningar av de sex allvarliga kränkningarna av barns rättigheter vid väpnade konflikter inträffar. Domstolen ger det individuella offret rättigheter och betonar vikten av att hitta lämpliga skadeståndsmekanismer för varje situation, som kan variera från situation till situation. Domstolen har också ett särskilt barnperspektiv.

Preface

Throughout these three years of law studies, a lot of things have changed in this world. From a personal point of view, it has been a new experience studying the first two years from home due to the pandemic. Therefore, this thesis feels important since it covers an important area of the law and reminds us of the power of law and how it can change people's life.

I want to thank my close family and my amazing friends for your support throughout the years. It means a lot and you have been an important part of this marathon. A special thanks to Matilda for all the pep-talks and laughter throughout this education, it sure made it easier.

I also want to thank my supervisor, Mariya Senyk for interesting discussions and good advice.

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Emma Engfelt Telhag

Abbreviations

CAAC	Children and Armed Conflict
DRC	Democratic Republic of Congo
FPLC	Force Patriotique pur la Libération du Congo
ICC	International Criminal Court
ICJ	International Court of Justice
RCD	Rassemblement Congolais pour la Démocratie
SRSR-CAAC	Special Representative of the Secretary-General on Children in Armed Conflict
TFV	Trust Fund for Victims
UN	United Nations
UNICEF	United Nations Children's Fund
UPC	Union des Patriotes Congolais
UPDF	Uganda People's Defense Force

1 Introduction

1.1 Background

In a groundbreaking report from 1996 by Graça Machel, an expert of the UN's Secretary-General, it came to attention for the first time how exposed and deeply affected children were by war and armed conflict.¹ The report showed how children's rights were consistently abused during armed conflict.² The report has since then been the foundation of the work regarding children and armed conflict.³

The UN has verified over 266,000 grave violations against children in armed conflicts between 2005 and 2020, which has been committed by parties in conflicts in more than 30 conflict situations around the world.⁴ The real number is probably much higher due to fear, shame and pain that hamper reporting, documentation, and verification. The annual number of violations has increased during 2005 to 2020 and the children often suffered from several violations.⁵ This clearly shows that our children lack protection in armed conflicts. The UN Secretary-General has identified six grave violations against children's rights during armed conflict,⁶ that are regulated in a diverse framework.⁷

There have been significant advances in the concept of state responsibility for serious violations of human rights and humanitarian law in the past decades.⁸

¹ UN, 'Impact of armed conflict and children', 1996, paras 314, 316 p. 89.

² UN, 'Impact of armed conflict and children', 1996, para 314 p. 89.

³ Parmar, S., Roseman, M J., Siegrist, S and Sowa, T. 2010, p. 4.

⁴ UNICEF, '25 years of children and armed conflict: taking action to protect children in war', 2022, p. 13.

⁵ UNICEF, '25 years of children and armed conflict: taking action to protect children in war', 2022, p. 13.

⁶ Report of the Secretary General, 'Children and armed conflict', 2005, p.68.

⁷ Office of the Special Representative of the Secretary-General on Children and Armed Conflict, 'The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation', 2009, p.17.

⁸ Evans, 2012, p. 1.

Codification of victim's participatory rights in the criminal process has developed such as the possibility to participate in the proceedings.⁹ However, victims of ordinary crimes are more likely to receive redress than victims of human rights and humanitarian law violations, especially when there are numerous victims such as in armed conflicts.¹⁰ Children and women are most affected by the lack of reparation, and absence of reparations affect their ability to move beyond the trauma. There is a need of identifying the gaps in their legal protection and how to address their situation in practice.¹¹

Sustainable justice for victims of armed conflicts requires truth, reparations, and judicial accountability.¹² Accountability is one important mechanism and has developed throughout the years. However, the monitoring and reporting mechanism is not working efficient partly since it is affected by politics and government's view, which sometimes has other interests.¹³

1.2 Purpose and research question

The purpose with the thesis is to explore the developing legal norms that relates to victims of violations against the six grave violations of children's right during armed conflict. The thesis focus will be on the reparation mechanism in relation to two cases from the International Criminal Court (ICC), *the Prosecutor v. Lubanga* and *the Prosecutor v. Ntaganda*.

The research question is the following:

How has the right to reparation for violation of the six grave violations against children's rights during armed conflicts developed with the ICC cases the Prosecutor v. Lubanga and the Prosecutor v. Ntaganda?

1.3 Method and material

⁹ Spiga, 2012, pp. 1380–1382.

¹⁰ Evans, 2012, p. 2.

¹¹ Evans, 2012, p. 3.

¹² UN principles to Combat Impunity, p. 5.

¹³ Nilsson, 2013, p. 1027.

1.3.1 Method

To answer the research question, the thesis uses the legal dogmatic method. The term is used as a denomination of a subject that together with legal history, sociology and philosophy constitutes jurisprudence.¹⁴ The legal dogmatic method reconstructs valid law, the legal system, and its limitations. The method is internal to a legal system, in contrast to other methods. The method can be used to understand, criticize the current legal situation, and propose changes to achieve more optimal solutions.¹⁵ The doctrine of sources and acceptable legal arguments are central to the use of the legal dogmatic method.¹⁶ The norm focus, instead of focus on the application is considered one of the weaknesses with the method.¹⁷ Other downsides with the legal dogmatic method is that the analysis plays a crucial role, leading to a more subjective character of the method instead of a scientific one. The method can often be seen as vague and sometimes contradictory,¹⁸ but is still considered suitable to answer the research question in the thesis.

The thesis uses an international perspective since it covers international law, as well as a critical perspective by critically analyzing the development of the reparation mechanisms for violations against children's rights in armed conflicts by two cases from the ICC. International law will be analyzed according to *de lege lata*, the law as it is.

1.3.2 The doctrine of sources in international law

The doctrine of sources in international law differs from Swedish law. The doctrine's explanatory power has been challenged by the rapid development and codification of international law and are not straight forward to understand.¹⁹ International conventions, such as multilateral and bilateral treaties,

¹⁴ Olsen, 2004, p. 105.

¹⁵ Jareborg, 2004, p. 4.

¹⁶ Kleineman, 2019, p. 28.

¹⁷ Kleineman, 2019, p. 24.

¹⁸ Kleineman, 2019, p. 31.

¹⁹ Cohen, 2007, p. 65.

together with customary international law, is seen accepted as the two main sources of international law²⁰ and is stated in the Statute of the ICJ.²¹

When it comes to treaties, they enter into force by states ratifying the treaty. When a nation has ratified a treaty, it is bound to comply fully with the treaty's terms.²² Treaties are today often considered the most authoritative source²³, but did carry less weight in earlier days.²⁴ However, the role of treaties is challenged by empirical evidence showing that treaties are poor predictors of state practice. Some states that have ratified a treaty still do not fulfill their requirements, when other states do not ratify, but abide by the treaties rules.²⁵ Customary international law requires; 1) general practice of states together with 2) evidence that the practice arises from legal obligation rather than coincidence or self-interest. The second part is known as *opinio juris*, meaning that states have a subjective obligation to be bound by the law in question.²⁶ *Jus cogens* is a peremptory norm that is considered so fundamental that it overrides all other sources of international law. It is also a norm from which no derogation is permitted.²⁷ Identifying customary law can be difficult and disagreements over rules are not uncommon.²⁸

General principles of law are also one source of international law but is more controversial. It includes legal principles that are recognized by civilized nations.²⁹ Lastly, judicial decisions and teachings of the most highly qualified publicists works as subsidiary means for the determinations of rules of law.³⁰

Today, one challenge with the doctrine of sources regarding international law is new sources such as declarations that fall short of the formal requirements

²⁰ Setear, 2005, p. 716.

²¹ Statute of the ICJ art. 38(1)(a) and (b).

²² Setear, 2005, p. 717.

²³ Cohen, 2007, p. 77.

²⁴ Cohen, 2007, p. 79.

²⁵ Cohen, 2007, p. 108.

²⁶ Cohen, 2007, p. 75.

²⁷ Vienna Convention art. 53.

²⁸ Cohen, 2007, p. 76.

²⁹ Statute of the ICJ art. 38(1)(c).

³⁰ Statute of the ICJ art. 38(1)(d).

of treaties. Both declarations and non-ratified treaties can be seen as codification of customary law and can help identify customary law already in place.³¹

1.3.3 Material

The thesis will focus on the cases *the Prosecutor v. Lubanga* and *the Prosecutor v. Ntaganda* since the cases cover some of the six grave violations against children's rights during armed conflict.

The material used will consist of a mix of cases from the ICC, treaties and resolutions, literature from researchers with legal expertise in the field as well as various reports that are ICC or UN related.

1.4 Limitations and outline of thesis

The thesis will not cover all regulations regarding the six grave violations of children's rights during armed conflicts due to its complexity and the limited space of this thesis. The thesis will also not cover reparation mechanisms for all the six grave violations due the limitations of cases in ICC that only cover some of the violations. The thesis will also not cover the used reparation mechanisms in other cases from the ICC. The focus is going to be on the reparation mechanisms in the two chosen cases from ICC and its most important parts with an extra focus on the child perspective. The thesis will have a broader perspective and focus more on what the cases adds to the right to reparation, rather than study specific reparation mechanisms in detail. There are numerous other interesting aspects of the cases to cover, but since the two cases consist of an enormous number of documents and reasoning from the Court, it is not possible to cover every part of it in this thesis.

The thesis starts with give an overview of the subject and the research question and then goes through the legal framework, the reparation mechanism, the six grave violations, UNs work on the matter and ICCs role and function.

³¹ Cohen, 2007, p. 88.

Then, the cases are presented before moving forward to the analysis part of the thesis.

2 The legal framework

The legal framework for international law is complex and a violation can be regulated in more than one treaty. Human rights and humanitarian law are *lex specialis*, meaning that it overrides general international law.³² Human rights are also considered *jus cogens*, meaning that it cannot be derogated.³³ The legal and normative framework regarding children's rights in armed conflicts encompasses international legal documents on human rights and humanitarian law, case law from international criminal tribunals and lastly, Security Council resolutions.³⁴

When deciding on reparations, the Statute states that the Court shall apply the Statute, Elements of Crime and its Rules of Procedure and Evidence.³⁵ When appropriate, they shall consider treaties and rules of international law such as principles regarding armed conflicts.³⁶ If that is not possible, general principles derived from national laws of States that would normally exercise jurisdiction should be applied.³⁷ It must also be consistent with internationally recognized human rights.³⁸

2.1 The right to reparation and its regulation

The right to individual reparation has acquired at least a degree of recognition as part of customary law. Some scholars argue that it is already well-grounded customary law³⁹ and others argue that it is an emerging rule.⁴⁰ Since individuals are right bearers and subjects in general international law, there is a need

³² Evans, 2012, p. 2.

³³ Evans, 2012, p. 30.

³⁴ Nilsson, 2013, p. 893.

³⁵ Rome Statute art. 21(1)(a).

³⁶ Rome Statute art. 21(1)(b).

³⁷ Rome Statute art. 21(1)(c).

³⁸ Rome Statute art. 21(2).

³⁹ Shelton, 2015, p. 238.

⁴⁰ Pisillo Mazzeschi, 2003, p. 347.

that consequences of breaches, such as reparation, favour individual victims.⁴¹

Reparation fulfils two main purposes; 1) to ensure offenders account for their acts and 2) those responsible for crimes to repair the harm they have caused the victims.⁴² Numerous articles in the Rome Statute relates to victims' participation and protection as well as their right to reparation.⁴³ The Statute provides ICC with a broad discretion of authority to award reparations in favour of victims such as restitution, compensation, and rehabilitation⁴⁴, but the list is not exclusive.⁴⁵ ICC uses the more detailed UN Basic Principles when deciding which reparation that is appropriate for the case, which could be, *inter alia*, a public apology,⁴⁶ compensation for moral damage⁴⁷ and psychological rehabilitation.⁴⁸

The ICC has a policy on children, where they state the importance of having a child-sensitive approach to reparations and promote reparations that are transformative in nature and will contribute to the best interest of children.⁴⁹ Collective reparations may provide the greatest benefit to groups of victims and give community reconciliation, but individual reparation is important as well.⁵⁰

Since there are potential overlaps between jurisdiction of the ICC and other human rights mechanisms, the relationship between state and individual responsibility must be taken into consideration, even though there is no state responsibility reflected in the Statute.⁵¹ The defendant in international tribunals often claim indigence.⁵²

⁴¹ Evans, 2012, p. 30.

⁴² Dwertman, 2010, p. 43.

⁴³ Evans, 2012, p. 99.

⁴⁴ Rome Statute art. 75(1).

⁴⁵ *Lubanga case*, 7 August 2012, para 222 p.75.

⁴⁶ UN Basic Principles art. (22)(e).

⁴⁷ UN Basic Principles art. (20)(d).

⁴⁸ UN Basic Principles art. (21).

⁴⁹ ICC, 'Policy on Children', 2016, para 106, p. 42.

⁵⁰ ICC, 'Policy on Children', 2016, para 107, p. 42.

⁵¹ Evans, 2012, p. 101.

⁵² Schabas, 2004, p. 175.

The process for a case to proceed to ICC often takes several years since the complexity of the cases. Together with the need of a conviction for the victims to get reparation, the reality is often different from the intention by international law of giving victims more opportunities to get reparation nowadays.⁵³

2.2 The six grave violations against children

The UN Secretary-General has identified six grave violations against children's rights during armed conflict that are to be given priority under the monitoring and reporting mechanism. The violations are the following: recruitment or using child soldiers, killing or maiming children, rape or other grave sexual violence against children, attacks against schools or hospitals, abduction of children and lastly, denial of humanitarian access for children.⁵⁴

The six grave violations can amount to a grave breach of the Geneva Convention and their Additional Protocols, a war crime against humanity under the Rome Statute, a violation of customary norms of international law and a violation of obligations contained in the Convention on the Rights of the Child or other international and regional human rights treaties.⁵⁵

Perpetrators, their commanders, and political leaders can be held accountable under international criminal law and by the ICC or under national laws and military codes of justice.⁵⁶

⁵³ Evans, 2012, p. 105.

⁵⁴ Report of the Secretary General, 'Children and armed conflict', 2005, p. 68.

⁵⁵ Office of the Special Representative of the Secretary-General on Children and Armed Conflict, 'The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation', 2009, p. 17.

⁵⁶ Office of the Special Representative of the Secretary-General on Children and Armed Conflict. 'The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation', 2009, p.17.

3 Monitoring, reporting, accountability, and reparation mechanisms

3.1 The work of the UN on children and armed conflict

The work regarding children and armed conflicts has intensified during the last thirty years. The report by Graça Machel, an expert of the UN Secretary-General, in 1996 regarding how exposed and deeply affected children were by war and armed conflict is seen as a ground-breaking report and was the start of a new era.⁵⁷ The Security Council which is the main international body responsible for peace and security has formally put children affected by armed conflicts on the agenda since 1998 which made the topic linked closer to the rest of the peace and security work and was followed by a series of resolutions upcoming years.⁵⁸

The UN plays a critical role regarding monitoring the violations of children's rights and the resolution 1612 has been seen as an important step. It states the responsibility of monitoring and reporting for the UN as well as it established the Security Council Working Group on children in armed conflicts.⁵⁹ One of the challenges the working group faces is the politization of the issues and that the dynamics of the group change each year with new members of the Security Council.⁶⁰ Some of the things the working group does is monitoring, assist and direct actions.⁶¹ They also issue reports on the work regarding the six grave violations. The situation in the Democratic Republic of Congo (DRC) was the first where the six violations were included in a report, but no specific actions were requested.⁶² Several actors such as UNICEF and the

⁵⁷ Nilsson, 2013, p. 859.

⁵⁸ Nilsson, 2013, pp. 879–880.

⁵⁹ Nilsson, 2013, pp. 887–888.

⁶⁰ Nilsson, 2013, p. 914–915.

⁶¹ Nilsson, 2013, p. 924.

⁶² Nilsson, 2013, p. 902.

Special Representative of the Secretary-General on Children in Armed Conflict (SRSG-CAAC), engages in systematic dialogues with parties of armed conflicts.⁶³ Even though there is a lot of work going on, child right violations still continue and perpetrators are not held accountable. Some of the explanations are due the politization⁶⁴ and that CAAC is considered a “soft” issue and targeted sanctions often are linked to “hard” issues such as hostilities or exploitation of natural resources.⁶⁵ Some argues that SRSG-CAAC could be more proactive in forwarding information to international criminal tribunals.⁶⁶

3.2 Jurisdiction and the function of the ICC

ICC is an independent body that differs from the International Court of Justice (ICJ), that is the principal judicial organ of the UN that settle disputes between member states.⁶⁷ ICC was established by the Rome Statute that entered into force on 1 July 2002 and gives the Court jurisdiction over individuals⁶⁸ that commit crimes within the jurisdiction of the Court.⁶⁹ The jurisdiction of the Court is limited to the most serious crimes: crimes of genocide and aggression, war crimes and crimes against humanity.⁷⁰ States party to the Rome Statute submit it’s jurisdiction of the ICC. The Court can exercise jurisdiction in a situation where the alleged perpetrator is a national of a State Party or if the crime was committed in the territory of a State Party.⁷¹ In situations where crimes referred to in article 5 of the Statute appears to have been committed, both State Parties⁷² and the UN Security Council can refer the situation to the Prosecutor.⁷³ The Prosecutor can also initiate investigations itself.⁷⁴

⁶³ Nilsson, 2013, p. 904.

⁶⁴ Nilsson, 2013, p. 955.

⁶⁵ Nilsson, 2013, p. 952.

⁶⁶ Hyllested and Nylund, 2010, p. 90.

⁶⁷ ICC ‘Understanding the International Criminal Court’, 2020, p.10.

⁶⁸ Rome Statute art. 25(1).

⁶⁹ Rome Statute art. 25(2).

⁷⁰ Rome Statute art. 5.

⁷¹ ICC ‘Understanding the International Criminal Court’, 2020, p.11.

⁷² Rome Statute art. 13(a).

⁷³ Rome Statute art. 13(b).

⁷⁴ Rome Statute art. 13(c).

ICC consist of four organs: the Presidency, the Pre-Trial, Trial and Appeals Division, the Office of the Prosecutor and the Registry.⁷⁵ The first organ is the Presidency, which is responsible for the administration, external relations, and judicial activities such as organizing the Chambers' work.⁷⁶ The other organ is the Chambers, which is divided into three Divisions.⁷⁷ The Pre-Trial Division works with matters such as jurisdiction, decides about if an investigation should be initiated and issues warrants of arrest. If the charges are confirmed by the Pre-Trial Division, the Presidency will then constitute a Trial Chamber to try the case. The Trial Chamber then decides whether the accused is innocent or guilty of the charges and do also impose the sentence if the accused is convicted. The judges in the Trial Chamber cannot be the same as the judges in the Pre-Trial Division.⁷⁸ The last Division is the Appeals Division that deals with appeals from a convicted person, the Prosecutor, or legal representatives of the victims. The Appeals Division also revises the final judgement of the conviction or the sentence.⁷⁹ The Office of the Prosecutor is independent from the Chambers. It is responsible for receiving referrals and information about crimes within the jurisdiction of the Court and examining it and conduct investigations and prosecutions before the Court.⁸⁰ The Registry is responsible for all the non-judicial administration.⁸¹

3.3 Victims' status and participation

The Chamber of the Court reserves full discretionary power over who grants victims status since the ICC framework do not define the burden of proof and the examination criteria of the applications in granting victim status.⁸² The victims may apply to participate in any stage of the trial, but the Court decides

⁷⁵ Rome Statute art. 34.

⁷⁶ ICC, 'Presidency and Chambers', 2018, p. 1.

⁷⁷ ICC, 'Presidency and Chambers', 2018, p. 1.

⁷⁸ ICC, 'Presidency and Chambers', 2018, p. 2.

⁷⁹ ICC, 'Presidency and Chambers', 2018, p. 2.

⁸⁰ Rome Statute art. 42(1).

⁸¹ Rome Statute art. 43(1).

⁸² Greco, 2007, p. 540.

modalities of participation for each applicant in which they take into consideration the stage of the proceedings, protection needed and effectiveness of the process.⁸³

3.4 The ICC Trust Fund for Victims

Experiences from other international tribunals indicates that the defendant often claims indigence.⁸⁴ Since there is no state responsibility reflected in the Rome Statute, ICC has an alternative mean to be able to ensure reparation for victims and their families.⁸⁵ The alternative is called the Trust Fund for Victims (TFV) and is regulated in the Statute.⁸⁶ The Trial Chamber of the Court has the alternatives to either make an order directly to the convicted person specifying appropriate reparations or let the TFV do it instead.⁸⁷ The TFV was created when the Rome Statute entered into force in 2002. It is independent from the ICC⁸⁸ and managed by the Assembly of State Parties.⁸⁹ The Statute only states that the TFV can be financed by ICC transferring fines and forfeitures⁹⁰ they have collected.⁹¹ However, the TFV can also receive voluntary contributions from individuals, governments, international organizations, corporations and other entities.⁹²

⁸³ Greco, 2007, p. 541.

⁸⁴ Schabas, 2004, p. 175.

⁸⁵ Jorda and Hemptinne, 2002, p. 1408.

⁸⁶ Rome Statute art. 79(1).

⁸⁷ Rome Statute art. 75(2).

⁸⁸ Evans, 2012, p. 105.

⁸⁹ Rome Statute art. 79(3).

⁹⁰ Rome Statute art. 109(1).

⁹¹ Rome Statute art. 79(2).

⁹² Bitti and Gonzales Rivas, 2006, pp. 315–316.

4 ICC cases

4.1 The Prosecutor v. Thomas Lubanga

The Ituri conflict is a conflict that has been going on for decades and is still an ongoing conflict between two ethnic groups, Lendu and Hema and it takes place in Ituri, a province in the DRC.⁹³ The dispute concerns land disputes, natural resource extraction and ethnical tension. The main conflict took place between 1999-2003.⁹⁴ The Hema has historically been the landowning and business elite. When they tried to evict Lendu inhabitants from their land in 1998/1999 the violence spread through the district, leading to armed confrontation between the Lendu and Hema communities. The Lendu then created self-defense forces which attacked the Hema villages.⁹⁵ There were also involvement of other national and foreign players such as the Ugandan and Rwandan armies which made the conflict more complex.⁹⁶ In 1999, the rebel group *Rassemblement Congolais pour la Démocratie* (RCD) that had nominal control over Ituri at the time, split into two fractions, one supported by Uganda, and one supported by Rwanda.⁹⁷ The invading Uganda People's Defense Force (UPDF) that had supported the RCD rebels⁹⁸, decided to create a new province in 1999. They appointed a Hema activist as the leader, which lead to an escalation of the Ituri conflict.⁹⁹

The *Union des Patriotes Congolais* (UPC), with its military wing *Force Patriotique pur la Libération du Congo* (FPLC), is a rebel group that was created in 2000. They took power in Ituri 2002 when Mr. Lubanga occupied the position of Minister of Defense in the RCD-ML that controlled Ituri at the time.¹⁰⁰ Mr. Lubanga was one of UPCs founding members and its first president.¹⁰¹ He was prosecuted for being involved in the military affairs and that

⁹³ *Lubanga case*, 14 March 2012, paras 67, 71 pp. 41, 43.

⁹⁴ *Lubanga case*, 14 March 2012, paras 67, 71 pp. 41, 43.

⁹⁵ *Lubanga case*, 14 March 2012, paras 74–75 pp. 43–44.

⁹⁶ *Lubanga case*, 14 March 2012, para 76 p. 45.

⁹⁷ *Lubanga case*, 14 March 2012, para 77 p. 45.

⁹⁸ *Lubanga case*, 14 March 2012, para 72 p. 43.

⁹⁹ *Lubanga case*, 14 March 2012, paras 78–79 p. 45–46.

¹⁰⁰ *Lubanga case*, 14 March 2012, paras 81, 86 p. 46–47.

¹⁰¹ *Lubanga case*, 14 March 2012, para 81 p. 46.

he personally took part in recruiting child soldiers, trained them, and used them in armed conflicts during September 2002 to August 2003.¹⁰² 146 persons was granted the status of victims authorized to participate in the case.¹⁰³ Mr. Lubanga was later unanimously found guilty by the Trial Chamber I of the Court on 14 March 2012 of the war crime of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostiles.¹⁰⁴ This is punishable under article 8(2)(e)(vii) of the Rome Statute.¹⁰⁵ He got sentenced to 14 years of imprisonment.¹⁰⁶

4.1.1 Reparation

The principle of reparations in the case is issued pursuant to art. 75(1) of the Rome Statute.¹⁰⁷ The Trial Chamber states that the success of the Court is partly linked to the success of its reparation system¹⁰⁸ and that there is a need to go towards a solution that is more inclusive, encourages participation and that provides effective remedies for victims.¹⁰⁹ Reparations should be applied in a broad and flexible manner.¹¹⁰ The Chamber stresses that principles used are limited to special circumstances in the specific case¹¹¹ and should not prejudice the rights of victims.¹¹²

The conviction is important since it was the first ever trial of the ICC and that it also concerned the six grave violations against children's rights during armed conflict.¹¹³ In the case of Lubanga, the victims got collective reparation instead of individual reparation. The Court had limited resources and finances, but the TFV drafted a reparation plan included most of the victims' requested reparations, except financial compensation.¹¹⁴ The reparations was

¹⁰² *Lubanga case*, 14 March 2012, paras 91, 1358 pp. 49, 591.

¹⁰³ *Lubanga case*, 'Case info', p. 3.

¹⁰⁴ *Lubanga case*, 14 March 2012, para 1358 p. 591.

¹⁰⁵ Rome Statute art. 8(2)(e)(vii).

¹⁰⁶ Nilsson, 2013, p. 1149.

¹⁰⁷ *Lubanga case*, 7 August 2012, para 289(a) p. 93.

¹⁰⁸ *Lubanga case*, 7 August 2012, para 178 p. 64.

¹⁰⁹ *Lubanga case*, 7 August 2012, para 177 p. 64.

¹¹⁰ *Lubanga case*, 7 August 2012, para 180 p. 65.

¹¹¹ *Lubanga case*, 7 August 2012, para 181 p. 65.

¹¹² *Lubanga case*, 7 August 2012, para 201 p. 71.

¹¹³ Nilsson, 2013, p. 1148.

¹¹⁴ Yogendran, 2017, pp. 82–83.

financial, and an extensive collective service-based program aimed at improving the social-economic situation. Ten years after the verdict, the reparation part of the case is still ongoing and the latest decision was taken in 2021.¹¹⁵ Reparations may be granted to both direct and indirect victims.¹¹⁶ When it comes to if the reparation for the victims should be collective or individual, the TFV argued funding through the TFV implies a collective approach while funding through the convicted person implies an individual approach.¹¹⁷ Since Mr. Lubanga was declared indigent,¹¹⁸ TFV will fund the reparations instead.¹¹⁹

When the Chamber was to determine reparations for the victims, they first let the victims answer a questionnaire based on the 14 March order¹²⁰ and the views were divergent.¹²¹ The meaningfulness of reparation is seen as much about the process as it is about the award.¹²² The needs for children and victims of sexual or gender-based violence should be particularly considered¹²³ and priority should be given to victims in particularly vulnerable situations such as children and victims of sexual or gender-based violence.¹²⁴ Age-related harm should be taken into account¹²⁵ and reparation decisions concerning children should be guided *inter alia* by the Convention on the Rights of the Child.¹²⁶ The Court shall reflect the importance of rehabilitating former child soldiers and reintegrating them into society.¹²⁷ TFV together with various organizations within the DRC has established a local system which creates a community of support.¹²⁸ There must also be a causation between the damage, loss and injury and the crime.¹²⁹

¹¹⁵ *Lubanga case*, ‘Case info’, p. 4.

¹¹⁶ *Lubanga case*, 7 August 2012, para 194 p. 69.

¹¹⁷ *Lubanga case*, 25 April 2012, paras 17–19 p. 13.

¹¹⁸ *Lubanga case*, 7 August 2012, para 269 p. 69.

¹¹⁹ *Lubanga case*, 7 August 2012, para 274 p. 89.

¹²⁰ *Lubanga case*, 18 April 2012, para 10 p. 88.

¹²¹ *Lubanga case*, 18 April 2012, para 12 p. 4.

¹²² *Lubanga case*, 7 August 2012, para 30 p. 12.

¹²³ *Lubanga case*, 7 August 2012, para 189 p. 68.

¹²⁴ *Lubanga case*, 7 August 2012, para 200 p. 70.

¹²⁵ *Lubanga case*, 7 August 2012, para 210 p. 73.

¹²⁶ *Lubanga case*, 7 August 2012, para 211 p. 73.

¹²⁷ *Lubanga case*, 7 August 2012, paras 216, 275 pp. 74, 89.

¹²⁸ *Lubanga case*, 7 August 2012, para 275 p. 90.

¹²⁹ *Lubanga case*, 7 August 2012, para 247 p. 82.

The Appeals Chamber presented elements the judicial reparation order must contain, that is considered unique for the ICC, such as the need for specificity and protection of the rights of the convicted person.¹³⁰ The Chamber also clarified that the responsibility for reparation is different from determining criminal responsibility and that the order for reparation should be on a flexible approach regarding the link between crime and harm. Causality do not need to be established ‘beyond reasonable doubt’.¹³¹ Since the liability to reparation is established separately to the conviction, ICC places more emphasis on detailed legal analysis than victim-oriented mass claim proceedings. In all cases the Court must define the harm caused, causality, identify modalities of reparation and specify the victims eligible.¹³² The ICC reparation regime differs from civil law claims since it sees the reparations order intrinsically linked to the individual convicted and the culpability for the crimes are determined in the sentence.¹³³

When it specifically comes to child victims, the Chamber stresses the importance of the age-related harm and that differential impact between boys and girls must be taken into account according to the Paris Principle 4.0.¹³⁴ Reparation decisions should be guided *inter alia* by the Convention of the Right of the Child and the principle ‘best interests of the child’.¹³⁵ The Paris Principles and Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime are also being used by the Chamber.¹³⁶ Recovery and reintegration should take place in an environment that fosters dignity, health and self-respect of the child.¹³⁷ Programs and reparation orders should be focusing on integrating the children into the society, focusing on developing the individuals capabilities, fundamental freedom and respect for human rights. Respect for the society such as peace, tolerance, spirit of understanding, respect and equality between sexes and friendship between groups and people

¹³⁰ Stahn, 2015, p. 807.

¹³¹ Stahn, 2015, p. 808.

¹³² Stahn, 2015, p. 809.

¹³³ Stahn, 2015, p. 806.

¹³⁴ *Lubanga case*, 3 March 2015, para 23 p. 5.

¹³⁵ *Lubanga case*, 3 March 2015, para 24 pp. 5–6.

¹³⁶ *Lubanga case*, 3 March 2015, paras 26, 28 p. 6.

¹³⁷ *Lubanga case*, 3 March 2015, para 25 p. 6.

are also of importance.¹³⁸ The measures must consider level of maturity and age of the victim, as well as a having a gender-inclusive perspective.¹³⁹

4.2 The Prosecutor v. Bosco Ntaganda

The case of Mr. Ntaganda also concerns the Ituri conflict in DRC, described in the *Lubanga case*. Mr. Ntaganda served as the Chief of Staff in charge of Operations and organization in the UPC/FPLC between September 2002 to December 2003, which also is the time frame for the case.¹⁴⁰ 2,129 persons was granted the status of victims authorized to participate in the case.¹⁴¹ Mr. Ntaganda was found guilty by the Trial Chamber VI of the Court on the 7 November 2019 on 18 counts. It included crimes against humanity such as murder, persecution, forcible transfer and deportation, rape and sexual slavery. It also included war crimes such as enlisting and conscripting children under the age of 15 years and using them to participate actively in hostiles, murder, rape, sexual slavery etc.¹⁴² When it comes to the six grave violations against children, Mr. Ntaganda was guilty of enlisting and conscripting children under the age of 15 years old and using them to participate actively in hostiles. He was also found guilty of killing children, as well as rape and sexual slavery as an indirect co-perpetrator.¹⁴³ Mr. Ntaganda got sentenced to 30 years of imprisonment.¹⁴⁴

4.2.1 Reparation

When it comes to child victims, the Chamber stresses that the age of the victims is important to consider, especially those who were children by the time of the crimes.¹⁴⁵ The Chamber refer a lot to the reparation order from the *Lubanga case* that previously has been presented in this thesis, indicating the

¹³⁸ *Lubanga case*, 3 March 2015, para 26 p. 6.

¹³⁹ *Lubanga case*, 3 March 2015, para 28 pp. 6–7.

¹⁴⁰ *Ntaganda case*, 8 July 2019, para 32 p. 18.

¹⁴¹ *Ntaganda case*, ‘Case info’, p. 2.

¹⁴² *Ntaganda case*, ‘Case info’, pp. 1–2.

¹⁴³ *Ntaganda case*, 8 July 2019, para 1199 pp. 527–529.

¹⁴⁴ *Ntaganda case*, ‘Case info’, p. 3.

¹⁴⁵ *Ntaganda case*, 8 March 2021, para 53 p. 23.

judicial importance of the *Lubanga case*. The Chamber highlights the importance of taking all appropriate measures to promote the social reintegration as well as physical and psychological recovery for the child victim.¹⁴⁶

When it comes to children born out of the rape and sexual slavery in the case, they might qualify as direct victims if the harm they suffer is a direct result of the commission of rape and sexual slavery. They may count as indirect victims if they were just born out of girls that were victims of the rape and sexual slavery.¹⁴⁷ Recognizing children born out of rape and sexual slavery as direct victims could be seen as an acknowledge of the particular harm they suffered and constitute some satisfaction in the reparation process.¹⁴⁸

The Chamber defines harm suffered by victims in different categories. These are harm suffered by direct victims of the attacks, direct victims of crimes against child soldiers, direct victims of rape and slavery including child soldiers and children born out of rape and sexual slavery and lastly harm suffered by indirect victims. Some of the harm for child soldiers is, *inter alia*, psychological trauma and loss of childhood. Some of the harm for the direct sexual violence victims is, *inter alia*, physical, and economic harm. The list is extensive.¹⁴⁹ The Chamber extensively describes the reparation part of the case. Even though thousands of victims may be eligible for reparation, the Chamber stresses that the cost of repair for each victim may differ and even though a collective approach is used, there should be individualized components when deciding the repair to each victim.¹⁵⁰

¹⁴⁶ *Ntaganda case*, 8 March 2021, para 55 p. 23.

¹⁴⁷ *Ntaganda case*, 8 March 2021, para 122 p. 46.

¹⁴⁸ *Ntaganda case*, 8 March 2021, para 123 p. 46.

¹⁴⁹ *Ntaganda case*, 8 March 2021, para 183 p. 68.

¹⁵⁰ *Ntaganda case*, 8 March 2021, para 247 p. 93.

5 Analysis

The work regarding children's rights in armed conflicts has been evolving in a positive direction throughout the past 30 years since Graça Machel's report in 1996. The two cases from ICC covered in the thesis is of great importance for the development of the right to reparation for children's rights in armed conflicts. This since the convictions also includes extensive reparation mechanisms that is going to be life-changing for the victims in a positive way and help them move forward after the crimes they were a victim off. Reparation from the ICC can be seen as a new mechanism in the work of helping the children that are exposed to these crimes and is of great importance.

The *Lubanga case* contributes to the development of the right to reparations in international law and sets international jurisprudence on the war crime of recruiting and using children. Since *the Lubanga case* is the first case from ICC it sets the basic principles for the reparation mechanism used by ICC. Even though it is not prejudicial, the *Lubanga case* especially serves as a guideline of deciding reparation mechanism in future cases. This will be positive for the by nature complex international legal system. The Court stresses the importance of it's reparation system, which also is reflected in the extensive work with deciding appropriate reparation mechanisms for the specific victim.

Since the nature of the crimes covered in the two cases is very complex and the crimes comes out of situations where the victims were already in a vulnerable position, the reparation mechanism plays an even more crucial role. The long time between the crime committed and reparation, is however a concern, but will hopefully put pressure on ICC to make the process more efficient in the future. The guideline the two cases serve will both save time in future processes, as well as it creates a framework for which reparation mechanisms being appropriate for different situations.

One of the concerns is how the ICC is going to handle the large numbers of victims that has a right to reparation, both in the matter of workload, but also how the reparations will be financed. The duplicated procedures and overload

of information creates a huge workload for the Court, when there could be thousands of victims in a single case. However, a high number of victims should not be a reason to compromise regarding what extent the reparation mechanisms is being used. This will be one of the biggest challenges for the Court to handle in the future and the Court might need to set up new principles regarding how to handle these matters without compromising regarding which reparation each victim has the right to.

There is a possible need of a standardized harm assessment process in the future. This might create a problem since the Court stresses the importance of the reparation process to be flexible and a result of a detailed legal analysis of which reparation is suitable for the situation, that demands to hear the victims. This goes in line with a more included approach of victims that has been developed throughout the past years, which is good. Reparation decisions should not be rushed, and it is important to listen to the victim's needs. However, individualization of the harm process might create unreasonable expectations and the quality of the work might be compromised when the resources are limited.

The Court's broader perspective when it comes to the purpose of the reparation mechanism, in terms of peace, security and well-being, indicates that the reparation mechanism serves as a long-term tool beyond the actual crime committed. It is not only supposed to give the victim a compensation, but rather focusing on creating a real difference for the victim, such as helping to integrate the victim into the society, rehabilitate and give an opportunity to live a better life in the future. This perspective used by the Court is very positive and makes a great contribution in the work of children's rights being violated in armed conflicts.

Even though there is a collective approach, which is natural due the number of victims that seeks reparation, the Courts also has an individual focus in the process. This indicates that the Court find it important to stick with the flexible approach of the link between harm and crime which takes into consideration the risk of victim fatigue in the complex process.

The Court gives victims status to a broad group of individuals, both direct and indirect victims. This is positive and can be seen accurate since the crimes the victims are victims of, such as being a child soldier, highly possible have had a big effect on the surrounding of the victims as well. It goes in line with the broader perspective of reparation the Court takes on.

The extensive framework the Court is using when motivating reparation mechanisms being used creates a complex process that might be hard to predict. However, it also gives the Court space to have a more flexible approach in developing the most appropriate reparation mechanism for each victim.

Three of the six violations against children were covered in the two cases: recruitment or using child soldiers, killing and lastly rape and other grave sexual violence of children. When it specifically comes to children, the Court puts a lot of focus on recovery and reintegration. This can be seen as the more sustainable approach than if the Court was to only focus on giving out financial reparation and differs from the reparation mechanism in civil law claims. The Court takes on a big responsibility to make a difference for the child victims and to respect that age and maturity of the child plays an important role as well. This marks the importance and impact the convictions from ICC has in real life for the victims. The extensive harm categorization indicates that the Court find it important to give the appropriate reparation for each victim, since they could suffer from different harm depending on the situation.

Since children already from the beginning is vulnerable, the child-perspective the Court takes on when it comes to both choosing the right reparation mechanism to reintegrate the child into society in best possible way, as well as take extra consideration when it comes to age, maturity, and gender, plays an important role in the development of the reparation mechanism. The Court stresses that also just acknowledge the harm girls being victims for sexual crimes has suffered, is important in the reparation process. This indicates that the Court finds it important to give appropriate reparation for each crime.

Overall, the Court put special attention to child victims and that the process looks a bit different when the victim is a child. This creates legitimacy to child victims. It also creates hope that children being victims of horrible crimes as in the two cases, still can get justice and that there are mechanisms in the legal system that works and creates a difference for the children in the future in a positive way. However, it is still too early to evaluate if the extensive work regarding reparation by the ICC, really gives the long-term effects of helping these people to live a better life in the future.

6 Conclusion

The thesis concludes that the two cases from ICC contributes to developing the reparation mechanism when violations of the six grave violations against children's rights during armed conflicts occur. The Court gives the individual victim rights and stresses the importance of finding appropriate reparation mechanisms, which might vary from situation to situation. The Court also takes on a special child perspective, creating legitimacy and will serve as an important tool in helping the child victims get appropriate reparation. With the two cases presented in this thesis from the ICC, the right to reparation for violation of the six grave violations against children's rights during armed conflicts has developed in an extensive and positive way.

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