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# JURISPRUDENCE ON REPARATIONS AT THE INTERNATIONAL CRIMINAL COURT: BETWEEN RHETORIC AND PRACTICE

## ABSTRACT

20 years ago, when the International Criminal Court (ICC) started functioning, victims of atrocity crimes were promised that the ICC would not only punish the perpetrators, but also deliver ‘justice for victims’, *inter alia*, through reparations. After 20 years, only four cases – *Lubanga*, *Katanga*, *Al Mahdi* and *Ntaganda* – have reached the reparations stage. ICC’s reparation regime, which deservedly attracts praise as an unprecedented and historic step, was designed with inherent limitations – it excluded state responsibility and developed the conviction-based regime. Yet, the rhetoric surrounding the ICC’s reparation system and the promises of more victim-centred justice created a wave of unreasonably high expectations among the victims. Drawing on the ICC’s emerging practice on reparations, this article intends to analyse the main judicial developments and practical challenges the ICC faces in fulfilling its promise of victim-centred justice through reparations. It is submitted that ICC’s structurally constrained and carefully negotiated reparation mandate, its implications and other impeding factors brought to light by the case law, should always be taken into account when ascertaining the success of the ICC in repairing the harm suffered by victims. Otherwise, the rhetoric accompanying the ICC’s reparative justice will always lead to the unrealistic expectations.

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## INTRODUCTION

The International Criminal Court ('ICC' or 'the Court') is often referred to as the institution of "many firsts" in international criminal law. For the purposes of this article, suffice it to say that the ICC's one of the key distinctive aspects from its predecessor *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda is that the Court's founding treaty - the Rome Statute<sup>1</sup> ('Rome Statute' or 'Statute') brought into existence a wide spectrum of victims' rights,<sup>2</sup> including right to reparation.

In the context of international crimes, reparations frequently make promises that they cannot keep, because in case of mass criminality demand for reparations is far greater than there is a capacity.<sup>3</sup> Individual victim's right to reparation had never been a feature of international criminal trials as they focused solely on delivering punitive or retributive justice.<sup>4</sup> Against this backdrop, embedding the framework of reparative justice in the Rome Statute was and is being praised as an unprecedented, historic, or breakthrough step in international criminal justice. While the fact itself is unquestionably commendable, the rhetoric surrounding the ICC's reparation system and promises of more victim-centred justice, generated by those epithets, created a wave of unreasonably high expectations among the victims towards the Court's capabilities. The meaningful realization of the Rome Statute's reparative scheme in practice proves to be distant from that rhetoric.

After 20 years since the Court became operational, only four cases – *Lubanga*, *Katanga*, *Al Mahdi* and *Ntaganda* – have reached the reparations stage, with convictions confirmed by the appeal judgments. All the convicted persons have been declared as indigent. Among the 17 situations under investigation before the ICC, encompassing 15 States Parties to the Rome Statute, the four cases relate to only two situations: *Lubanga*, *Katanga* and *Ntaganda* all are connected to the crimes committed in the Democratic Republic of the Congo (DRC), while *Al Mahdi* concerns the situation in Timbuktu, Mali.

Drawing on the practice of reparations, this article intends to analyse the main judicial developments and practical challenges the ICC faces in fulfilling its promise to victims "to make justice a meaningful reality" through reparations.<sup>5</sup> The article proceeds in five parts. The first part provides a brief overview of the main features of the ICC's reparations regime under Article 75 of the Statute. Second part summarizes the key elements of the reparations regime, including notion of victim and

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1 Rome Statute of the International Criminal Court, 2187 UNTS 3 (date of adoption: 17 July 1998, entry into force: 1 July 2002).

2 Under the Rome Statute, victims' rights encompass three core directions: 1) protection, 2) participation and 3) reparations.

3 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2019), 402, 411.

4 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (New York: Cambridge University Press, 2012), 1. See also M. Cherif Bassiouni, "International Recognition of Victims' Rights", *Human Rights Law Review* 6(2) (2006): 203–279.

5 TFV, "Statement by Trust Fund for Victims Board of Directors: Under the Rome Statute, Reparative Justice Provides Undeniable Value to Victims", 14 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180914-stat-tfv> (19.08.2022).

modalities and types of reparations. It also discusses the role and mandate of the Trust Fund for Victims ('TFV' or 'Trust Fund'), a unique administrative body established pursuant to Article 79 of the Statute. Third part identifies and analyses the main judicial and procedural findings made in the context of reparation proceedings in *Lubanga*, *Katanga*, *Al Mahdi* and *Ntaganda* cases. The next part focuses on the interplay between the Court and the TFV in light of implementation of reparation orders, in particular with regard to identification of eligible victims and complementing reparation awards. The final part summarizes and ascertains the limits of reparative justice under the Rome Statute and proposes that the rhetoric accompanying the ICC's victim-centred justice should be balanced by explaining the inherent limitations of the ICC's reparations regime.

## 1. AN OVERVIEW OF THE ROME STATUTE'S REGIME FOR REPARATIONS

The reparation scheme inserted in the Rome Statute is not only a distinctive aspect of the Court, but a crucial component, the efficient realisation of which, to some extent, defines the overall performance of the Court.<sup>6</sup> The objective of reparations is not to punish convicted persons but to oblige them to redress the harm caused by their crimes.<sup>7</sup> The reparations proceedings are not part of the trial *strictu sensu* in light of substance and procedure and remains distinct process.<sup>8</sup> Although the Rome Statute's reparative dimension was inspired by and developed based on international human rights law, it has been significantly narrowed in the Statute, resulting in "a selective borrowing of the right to reparation developed in human rights law."<sup>9</sup> Two main factors played important role in the limited scope of reparations in the Rome Statute: exclusion of state responsibility and making reparations contingent upon the final conviction of a person.

### 1.1. Exclusion of State Responsibility

The issue of state responsibility was the most arduous point of reparations regime for delegations to accept. Negotiating history of the ICC's reparations mandate shows that state delegations

<sup>6</sup> *Lubanga*, Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC-01/04-01/06-I-US-Exp-Con, Pre-Trial Chamber I, 10 February 2006, para. 150.

<sup>7</sup> *Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red, Appeals Chamber, 9 March 2018, para. 184. This is further evidenced by the place of Article 75 in the Rome Statute - Article 75 is inserted in Part 6 (Trial) and not under Part 7 (Penalties).

<sup>8</sup> *Katanga*, Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra, The Presidency, 16 April 2014, ICC-01/04-01/07-3468-Anxl, para. 8.

<sup>9</sup> Luke Moffett, Clara Sandoval, "Tilting at Windmills: Reparations and the International Criminal Court", *Leiden Journal of International Law* 34 (2021): 751-752.

purposefully outlined the precise boundaries on the extent to which international criminal law and human rights law could overlap, particularly with regard to state responsibility.<sup>10</sup> Initially, due to fears and confusion, even the general proposal to bestow on the Court the competence to adjudicate on reparations failed to attract universal support by states at the Rome Conference. Their concerns ranged from suitability of a criminal court to determine reparations to the risk that paying reparations at some point would become responsibility for states.<sup>11</sup> The most plausible legal argument to exclude awarding reparations directly against states was the incompatibility of state responsibility with individual criminal responsibility for which the Court was being created.<sup>12</sup> Even “subsidiary State responsibility” for crimes committed by the State-agents acting in their official capacity was firmly opposed by the negotiating states.<sup>13</sup>

Consequently, state responsibility was completely removed from the Statute’s reparation regime. Ultimately, the Statute’s *sui generis* reparation regime, a product of various states’ compromise, was met with enthusiasm from commentators, concluding that “[t]he positive aspects of the reparations regime for the Court, as set out in the Rome Statute, definitely outweigh the negative aspects.”<sup>14</sup> However, it was observed that ICC’s reparations regime would suffer from the structural constraints of the criminal trial process that would hinder the Court’s ability to effectively deliver the victim-centred justice.<sup>15</sup> This observation, to the most extent, proved to be right in practice.

## 1.2. Conviction-Based Regime

According to Article 75(2) of the Statute, the ICC “may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” Two observations can be made from this wording. First, the Court *may* make an order of reparations. This permissive language suggests that in specific cases the Court may deem it inappropriate to order reparations at all. Thus, reparations may not be taken for granted in every finalised conviction by the ICC. To date, the Court has never made such determination in practice.

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10 Christoph Sperfeldt, “Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court”, *International Criminal Law Review* 17 (2016): 351-377.

11 Christopher Muttukumaru. “Reparations to Victims”. In *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, edited by Roy S. Lee, 263-264. The Hague: Kluwer Law International, 1999.

12 *ibid.*, 268.

13 Donat Cattin, “Article 75”. In *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, edited by Kai Ambos, 2255, n7. 4th ed. München: C.H. Beck / Oxford: Hart / Baden-Baden: Nomos, 2021.

14 Fiona McKay. “Are Reparations Appropriately Addressed in the ICC Statute?”. In *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, edited by Dinah Shelton, 173. Ardsley, NY: Transnational Publishers, 2000).

15 Luke Moffet, *Justice for Victims before the International Criminal Court* (London and New York: Routledge, 2014), 143. See also Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Leiden: Martinus Nijhoff Publishers, 2010), 299-302.

Second, and more importantly, Article 75(2) of the Statute stipulates that only *convicted* individuals may be held liable to make reparations. This means that awarding reparations to victims are conditional upon the *final conviction* of person – even if a person is initially convicted by the Trial Chamber (TC) but is subsequently acquitted by the Appeals Chamber (AC), the ICC will be unable to order reparations, as it came off in *Bemba*.<sup>16</sup> Besides, ordering reparations order directly against a convicted person creates a difficulty of “asymmetry between the individual convicted person and the hundreds and thousands of victims with potential claims for reparation.”<sup>17</sup> This challenge of “asymmetry” is exacerbated when the convicted person are declared indigent, as it is the case in all four cases that reached the reparations stage.

To conclude, exclusion of state responsibility and conviction-based regime are the basic characterizing features of the ICC’s framework of reparations, which should be always born in mind while examining the ICC’s reparative capabilities.

### 1.3. The Trust Fund for Victims

The TFV is a non-judicial entity, which operates within the institutional environment of the Court, but is not the Court’s organ as such.<sup>18</sup> Pursuant to Article 79 of the Statute, it was established in 2002 by the Assembly of States Parties,<sup>19</sup> “for the benefit of victims within the jurisdiction of the Court, and of the families of such victims”.<sup>20</sup> The TFV is a unique body in international criminal law, since it is an example of “administrative organ linked with judicial process” that has potential and is suitably designed to deal with the high number of victims seeking reparations.<sup>21</sup>

The Statute framed the relationship between the Court and the TFV in a following way: “the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.”<sup>22</sup> One may assume that the drafters of the Statute understood the role of the TFV as a mere “repository of funds, rather than as an implementation body on

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16 *Bemba*, Final Decision on the Reparations Proceedings, ICC-01/05-01/08, Trial Chamber III, 3 August 2018.

17 Moffett, Sandoval (2021), supra note 9, 752.

18 In addition to the TFV, there are several dedicated bodies under the Registry, an administrative neutral organ of the Court, who are responsible for different aspects of the Rome Statute’s victims’ regime: The Victims Participation and Reparations Section (VPRS) is responsible for assisting victims to apply for participation in proceedings, and to apply for reparations in case of a conviction; The Victims and Witnesses Section (VWS), who is mandated to provide support and protection to witnesses and to victims who appear before the Court; and the Office of Public Counsel for Victims (OPCV), who assists victims in their legal representation in the Court.

19 Resolution ICC-ASP/1/Res.6. Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002.

20 Rome Statute, Art. 79(1).

21 For a comprehensive analysis, see Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (New York: Cambridge University Press, 2020), 126-149.

22 *ibid.*, Art. 79(2).

the ground”.<sup>23</sup> However, practice of reparations showed that during the last decade the Trust Fund is playing the role of “the lead agency” for implementation of reparations.<sup>24</sup>

The Trust Fund is granted with two-fold mandate: (i) to implement reparations which are ordered by the Court directly against a convicted person (reparations mandate)<sup>25</sup> and (ii) to provide physical, psychological, and material support to victims and their families by “other means” (assistance mandate).<sup>26</sup> The main difference between these mandates is that the former is contingent on the final conviction by the Court, is subject to the Court’s judicial oversight and parameters of a reparation order. On the other hand, assistance mandate is related to a ‘situation’ before the Court rather than ‘case’. The existence of specific charges or final conviction is not a prerequisite for the Trust Fund to initiate assistance programs. Assistance mandate can also be activated in case of acquittal of the accused. Following acquittal by the AC of Jean-Pierre Bemba, former president and Commander-in-chief of the *Mouvement de Libération du Congo*, the TFV announced to accelerate the launch of a program under its assistance mandate for the benefit of victims in the *Bemba* case.<sup>27</sup> In other words, assistance mandate is situation-level remedial activities and reparation mandate a case-level one.

To further illustrate a situation-level character of the TFV’s assistance mandate, the Situation in Georgia is a good example. On 1 December 2020, the TFV announced opening assistance program in Georgia, including “medical treatment, psychological rehabilitation such as trauma counselling, as well as material support including livelihood assistance.”<sup>28</sup> By that time, no individual suspects were identified by the Prosecutor in course of the investigation, meaning that there was no “case”. Thus, the TFV’s assistance mandate was activated when the investigation was purely on situation-level stage. Although in 2022 the Court issued arrest warrants for three individuals in the context of the situation in Georgia,<sup>29</sup> it will likely take many years before those cases reach to reparations stage. And “many years’ is the most optimistic scenario: first, the suspects shall be surrendered to the Court; secondly, their conviction shall be confirmed by the AC; and finally, implementation of reparations order will not start at once.

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23 Moffett, Sandoval (2021), supra note 9, 14.

24 Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, para. 924.

25 ICC Rules of Procedure and Evidence, Rule 98(1)–(4).

26 *ibid.*, Rule 98(5).

27 TFV, Communication from the Chair of the Board of Directors of the Trust Fund for Victims to the President of the Assembly of States Parties, 13 June 2018, <https://www.trustfundforvictims.org/en/news/press-release-following-mr-bemba%E2%80%99s-acquittal-trust-fund-victims-icc-decides-accelerate-launch> (19.08.2022).

28 TFV, “Trust Fund for Victims to Open Assistance Programme in Georgia, Press Release”, 1 December 2020, <https://www.trustfundforvictims.org/en/news/trust-fund-victims-open-assistance-programme-georgia> (19.08.2022).

29 TFV, “Situation in Georgia: ICC Pre-Trial Chamber delivers three arrest warrants”, 30 June 2022, <https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants> (19.08.2022).

## 2. KEY NOTIONS OF THE ICC'S REPARATION SYSTEM

### 2.1. Victim

Although the drafters of the Court's legal framework eschewed elaboration on principles of reparations,<sup>30</sup> they still introduced the definition of "victim". According to the ICC Rules of Procedure and Evidence, the primary notion of victims include individual who "have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."<sup>31</sup> Victims may also include certain legal persons (organizations or institutions).<sup>32</sup> This definition of "victims" is broad enough to effectively address the different manifestations of mass victimhood.<sup>33</sup> The main precondition of qualifying as a victim in the Rome Statute system is existence of personal harm, either direct or indirect. While in respect of an individual victim harm may be both direct and indirect (yet, it must be of personal nature), organisations are required to demonstrate direct harm to their properties.<sup>34</sup> For indirect victims, merely being a family member or close relative to direct victim is not enough, the existence of harm is still required.<sup>35</sup> Thus, direct victims are those who inflicted harm as a direct consequence of crimes for which a person is convicted. In contrast, an indirect victim is affected by harm suffered by the direct victims.

Unlike the definition of "victim", ICC's statutory framework does not include definition of "harm", which is *condicio sine qua non* for granting a victim status. However, the Court has clarified in its case law that the notion of "harm" in its ordinary meaning "denotes hurt, injury or damage".<sup>36</sup> It may be material, physical, psychological<sup>37</sup> and/or moral.<sup>38</sup> Harm may also be transgenerational in nature, meaning that "social violence is passed on from ascendants to descendants with traumatic consequences for the latter."<sup>39</sup> And lastly, important element of qualifying as a victim is a causal

<sup>30</sup> See *infra*, Section 3.

<sup>31</sup> ICC Rules of Procedure and Evidence, Rule 85(a).

<sup>32</sup> *ibid.*, Rule 85(b). They include those legal persons that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

<sup>33</sup> Moffett (2014), *supra* note 15, 94 (noting that "the Court's definition of victims is far more comprehensive than the ad hoc tribunals by including direct and indirect victims, certain legal persons, and a greater coverage of crimes.").

<sup>34</sup> *Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, para. 43.

<sup>35</sup> *Katanga* Judgment 2018, *supra* note 7, para. 115. See also *Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, Trial Chamber VI, 8 March 2021, para 36, which distinguishes four categories of indirect victims: 1) family member of direct victim; 2) persons who attempted to prevent the crimes; 3) persons who were harmed while helping direct victim; 4) anyone, who suffered personal harm as the result of crimes committed.

<sup>36</sup> *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 33.

<sup>37</sup> *Lubanga*, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA, Appeals Chamber, 3 March 2015, para. 10.

<sup>38</sup> See *supra* note 33.

<sup>39</sup> *Ntaganda* Order 2021, *supra* note 34, para 73. See also *Katanga*, Order for Reparations pursuant to Article 75 of the Statute, with one public annex (Annex I) and one confidential annex *ex parte*, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II), ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017, paras. 274-275.



link between the harm and the crimes. As established in the *Lubanga* case, the crimes must be the ‘proximate cause’ of the harm.<sup>40</sup>

## 2.2. Modalities of Reparations

In general international law, reparations are measures intended to fix the damage caused to an injured party.<sup>41</sup> In international criminal law, they are means to promote justice to individual victims by redress.<sup>42</sup> Under the Rome Statute, reparations ensure that convicted persons are found liable for the harm caused to the victims and that they account for their acts.<sup>43</sup> In the Rome Statute, ‘modalities’ of reparations are “the specific methods identified to address the kinds of harm requiring reparations.”<sup>44</sup> Article 75(2) of the Statute gives a non-exhaustive list of modalities, including restitution, compensation and rehabilitation. However, this list is not exclusive and in practice the Court may deem it appropriate to order different forms of reparations with “a symbolic, preventative or transformative value.”<sup>45</sup> Symbolic reparations (e.g. satisfaction or non-repetition) are not explicitly included in the Statute.<sup>46</sup> However, the Court has found that symbolic reparations may be particularly appropriate to repair harm caused to a community.<sup>47</sup>

Restitution is the remedy which the Court orders with the aim of restoring a condition of victims, as far as possible, as it existed before the crimes were committed.<sup>48</sup> Compensation in principle is monetary redress and it should meet certain requirements to be considered an appropriate relief.<sup>49</sup> Rehabilitation is aimed to support victims to deal with suffering caused by crimes and may include provision of psychological, psychiatric, economic, social, medical or legal services.<sup>50</sup> Other types of “modalities” may encompass the conviction and the sentence of the Court, or their wide publication, recognition of victims harm by certificates, awareness raising programs in local commu-

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40 *Lubanga Amended Order* (2015), supra note 36, para. 59.

41 *Factory at Chorzow (Germany v. Poland)*, PCIJ, Series A, No. 17, 13 September 1928, para 125. According to the PCIJ, reparations are to ‘as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.’

42 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA, A/RES/60/147, 21 March 2006, Principle 15.

43 *Lubanga*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, para 179.

44 *Al Mahdi Order* 2017, supra note 33, para. 46.

45 *Lubanga Decision* 2012, supra note 42, para. 222.

46 See Frédéric Mégret, “The International Criminal Court and the Failure to Mention Symbolic Reparations”, *International Review of Victimology* 16(2), (2009): 127–147 (arguing that “this omission has its roots in the difficulty of transferring a regime of reparations devised for state responsibility to the situation of individuals who have committed international crimes”).

47 *Al Mahdi Order* 2017, supra note 33, paras. 47–49.

48 *Lubanga Decision* 2012, supra note 42, paras. 223–225.

49 *ibid.*, para 226: “Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) the available funds mean this result is feasible”.

50 *ibid.*, para. 233. *Al Mahdi Order* 2017, supra note 33, para 48.

nities, outreach activities for victims about the result of criminal proceedings, a voluntary apology by convicted person to victims and etc.<sup>51</sup>

### 2.3. Types of Reparations

The Court may order both individual and collective reparations.<sup>52</sup> As they complement each other, they can be awarded separately or simultaneously. Individual reparations ensure that an individual is afforded directly to the benefit to which the person is exclusively entitled, for example, monetary compensation payed into the bank account of the person.<sup>53</sup> Collective reparations, on the other hand, is awarded for the benefit of the community as a whole, but it may address the harm suffered both on an individual and collective basis.<sup>54</sup>

Hence, two types of collective reparation may be distinguished: the first one, which is awarded for the benefit a community as whole (*non-personalised collective reparation*), and the second one, an individualised collective reparation, which to some extent focuses on individual members of community, but for the benefit of the community as a whole (*personalised collective reparation*).<sup>55</sup>

The difference between an individual reparation and personalised collective reparation may be subtle in practice. However, from a legal viewpoint, the main difference between them is an element of ‘exclusiveness’.<sup>56</sup> Put differently, whereas an individual victim is exclusively entitled to a certain modality of reparations, it is an individual reparation. On the contrary, when an individual victim benefits from reparation as a member of a group, this leads to a conclusion that a victim is awarded a collective reparation, but on a personal basis.

## 3. ICC’S JURISPRUDENCE ON REPARATIONS

ICC’s jurisprudence on reparations is still emerging, clarifying different set of issues on case-by-case basis. At the same time, the Court endeavours to develop consistent approaches and methods

51 Lubanga Decision 2012, supra note 42, paras. 237-241.

52 ICC Rules of Procedure and Evidence, Rule 97(1).

53 Katanga Order 2017, supra note 38, para. 271.

54 *Lubanga*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015, para. 33

55 Katanga Order 2017, supra note 38, para 278. See also Ntaganda Order 2021, supra note 34, para. 81.

56 Katanga Order 2017, supra note 38, paras 277-279.

of conducting reparations proceedings. Under Article 75(1) of the Statute, the Court “shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”. The wording “shall establish” meant that drafters of the Statute distanced themselves from an in advance enumeration of such principles *in abstracto*. Instead, this task was left to the Court for its future deliberation in the context of specific cases. The first time the Court developed the principles on reparations was in 2012, after 10 years it started functioning.

### **3.1. *Lubanga*: Laying Foundation for the ICC’s Reparations System and Awarding Collective Reparations**

*Lubanga*, the ICC’s first conviction, was also the first occasion when the Court was given an opportunity to discharge its obligation under Article 75(1) of the Statute to develop the principles of reparations. Mr. Lubanga, a former leader of rebels in the DRC, was the first person tried and convicted by the ICC. In 2012, the TC I found him guilty of the war crimes, namely of the enlistment, conscription and use of children below the age of 15 to participate actively in hostilities, committed in the non-international armed conflict from 1 September 2002 to 13 August 2003, in the eastern Ituri region of the DRC. He was sentenced to a total period of 14 years of imprisonment (both conviction and sentence were confirmed by the AC in 2014). On 15 March 2020, he was released after having served 14 years of imprisonment.

Following Mr. Lubanga’s conviction, on 7 August 2012, the TC I delivered the first decision on reparations in the history of the ICC.<sup>57</sup> It was followed by the judgment of the AC in 2015, which amended the 2012 Decision and further elaborated on the principles of reparations. However, due to the additional litigations, the issue of reparations was not settled until 2019. In addition to being precedent-setting, *Lubanga* remains ICC’s most complex reparations case to date in terms of decisions rendered.

In 2012, relying upon the UN Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>58</sup> and the UN Basic Principles on Reparations for Victims,<sup>59</sup> the TC I established the following principles on reparations: a) the applicable law; b) dignity, non-discrimination and non-stigmatization; c) the beneficiaries of reparations (including direct and indirect victims); d) accessibility and consultation with victims (including a gender-sensitive approach); e) principles relating to victims of sexual violence and child victims; f) the scope of reparations and the modalities thereof (including individual and collective reparations); g) the principle of proportional and adequate reparations; h) causation; i) standard and burden of proof; j) principles relating to the rights of the defence; k) ques-

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<sup>57</sup> Lubanga Decision 2012, *supra* note 42.

<sup>58</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34, UN Doc. A/RES/40/34, 29 November 1985.

<sup>59</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, UN Doc. A/RES/60/147, 21 March 2006.

tions relating to States and other stakeholders; l) publicity of the Principles established therein.<sup>60</sup> The AC later stated that these principles could be applied, modified or expanded upon by the future TCs.<sup>61</sup> This opportunity was availed of by the TC in *Ntaganda*, adding six new principles.<sup>62</sup>

The TC I found Mr. Lubanga indigent since no assets or property were identified for the purposes of reparations. Thus, it decided that reparations could not be ordered against Mr. Lubanga and only non-monetary, symbolic reparations (e.g. a public or private apology to the victims) were viable, but only with Mr. Lubanga's consent. Finally, the TC I refused to examine individual applications for reparations.<sup>63</sup> In light of Mr. Lubanga's indigence, the TC decided to outsource the reparations to the TFV and determined that reparations were to be implemented through the Trust Fund, within the limits of its resources.

With this decision, the reparations mandate of the Trust Fund was activated for the first time in its history. The TC I determined that when the convicted person was declared indigent, and if a reparations award was made "through" the Trust Fund, this meant that not only the seized assets, but the Trust Fund's own resources might be used.<sup>64</sup> Moreover, the TC I found that the TFV was *obliged* to complement the funding of a reparations award within its available funds.<sup>65</sup> It also tasked the TFV to assess the harm and identify the potential victims to include them in reparations programme.<sup>66</sup> While the TC I considered that implementation process would be dealt with *principally* by the TFV, it found that monitoring and supervision of reparations, as well as reviewing contested decisions of the TFV, was a matter of judiciary.<sup>67</sup> The principal role of the TFV meant that the Court would make use of the TFV's logistical and financial resources, the latter encompassing not only the funds and assets seized and deposited with the TFV, but also its own resources, to complement the funding of a reparations award.<sup>68</sup> Put differently, the chamber replaced the indigent convicted person's liability with the TFV's financial resources, including "other resources", i.e. voluntary contributions made to the TFV.

The TC I's findings were reversed, clarified and further developed by the AC in its judgment of 3 March 2015, which is considered the landmark judgment. The AC established the detailed framework of the ICC reparation system for its future use in other cases. In AC's opinion, principles relating to reparations "should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future trial

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60 *ibid.*, 64–85.

61 Lubanga Judgment 2015, *supra* note 53, para. 55.

62 See *infra*, Section 3.4.

63 Lubanga Decision 2012, *supra* note 42, paras. 269, 289(b).

64 *ibid.*, paras. 271–272.

65 *ibid.*, paras. 271–273.

66 *ibid.*, paras. 283–284.

67 *ibid.*, paras. 260–262, 287.

68 *ibid.*, paras. 270–273.

chambers.”<sup>69</sup> The AC examined whether the TC I’s decision of 2012 was an order for reparations under article 75 of the Statute. In the absence of instructions in the Rome Statute as to which decision may be qualified as an order for reparations, the AC established at least five essential elements:

“1) it [an order for reparations] must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.”<sup>70</sup>

Applying these elements to the TC I’s decision of 2012, the AC found that it could not be qualified as an order for reparations. Hence, it used its amendment power to correct the TC I’s decision to transform it into the valid order for reparations for the purposes of Article 75 of the Statute.<sup>71</sup> Consequently, the AC issued an Amended Reparations Order.<sup>72</sup>

Among other clarifications, the AC found that the TC I erred when it did not hold Mr. Lubanga liable for the reparations awarded and clarified that person’s indigence is of no relevance to held him or her liable for reparations.<sup>73</sup> The underlying rationale is that the person found to be criminally responsible for crimes is in any case liable for reparations. Besides, the AC articulated new principle on the scope of a convicted person’s liability for reparations, which was not established by the TC I, that “a convicted person’s liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.”<sup>74</sup> It follows that liability for reparations is determined by considering specific circumstances of each person’s conviction. For example, liability for reparations may not be the same on the one hand, for a principal perpetrator, and on the other hand, for an abettor or aider.

Given the number of victims involved, the AC agreed with the TC I that reparations should have been ordered only on a collective basis and did not award individual reparations.<sup>75</sup> Furthermore, the AC ruled that TC I erred when it did not assess the harm suffered by the victims, when it delegated

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69 Lubanga Judgment 2015, supra note 53, paras. 3, 53.

70 *ibid.*, para. 32.

71 *ibid.*, paras. 35-37.

72 Lubanga Amended Order 2015, supra note 36.

73 Lubanga Judgment 2015, paras. 99, 102.

74 *ibid.*, paras. 99, 118.

75 *ibid.*, paras. 140-143.

this task to the Trust Fund,<sup>76</sup> and when it did not identify eligible victims contrary to the fifth element of an order for reparations.<sup>77</sup> The AC itself defined the harm to direct and indirect victims<sup>78</sup> and obliged the TC I to identify modalities of reparations.<sup>79</sup>

Overall, the AC corrected and clarified numerous critical issues of the reparative regime. The AC's decision was also noteworthy for its findings on the relationship between the TC and the Trust Fund, specifically with regard to the Court's authority over the Trust Fund. The AC did not uphold the TC I's view that it could use Trust Fund's collected resources, including "other resources", to complement award of reparations. According to the AC, allocation of those resources fell exclusively within the discretion of the Trust Fund and not the Court.<sup>80</sup> Thus, the TC I's approach to use the Trust Fund's "other resources" instead of imposing liability on Mr. Lubanga was reversed. The AC's decision was a positive development since it established the general framework of principles to be used in future reparations proceedings.

The AC's decision of 2015 did not settle every issue. It was only in 2017 that the newly constituted TC II determined Mr. Lubanga's liability for collective reparations. In its 2017 decision of 2017, the TC II established that Mr. Lubanga was liable at a total of USD 10,000,000 in respect of 425 victims and any possible victims which might be identified in future.<sup>81</sup> The decision completed the amended order for reparations of 3 March 2015. Due to Mr. Lubanga's indigence, the TC II invited the TVF to raise additional funds. Following the appeal of the TC II's decision of 2017, the final order for reparations was issued only in 2019,<sup>82</sup> when the AC confirmed Mr. Lubanga's liability of USD 10 million.

Overall, *Lubanga* is the foundational case for the ICC's reparations system. It established principles of reparations, identified minimum requirements for reparation orders, developed key elements of reparations and clarified number of procedural and substantive aspects of holding the convicted person liable for reparations. It established the legal irrelevance of indigence of convicted persons to award reparations directly against them. Furthermore, *Lubanga* delineated roles of the Court and the TFV in several aspects, including identification of eligible victims and usage of the TFV's funds to complement the reparation orders. At the same time, reparation proceedings in *Lubanga* was notoriously lengthy. It involved numerous time-consuming submissions, appeals and decisions rendered, which significantly postponed the implementation of reparations order.

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76 *ibid.*, para. 184.

77 *ibid.*, para. 211.

78 *ibid.*, para. 191.

79 *ibid.*, para. 200.

80 *ibid.*, paras. 106, 112, 114.

81 *Lubanga*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" With Corrected Version of One Public Annex (Annex I); of One Public Annex (Annex III) and One Confidential Annex, EX PARTE, Registry, Trust Fund for Victims, Legal Representatives of the V01 and V02 Groups of Victims, and Office of Public Counsel for Victims (Annex II); and Confidential Redacted Version of Annex II, ICC-01/04-01/06-3379-Red-Corr-tENG, Trial Chamber II, 21 December 2017.

82 *Lubanga*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, Appeals Chamber, 18 July 2019.

### **3.2. Katanga: ICC's First (Symbolic) Individual Reparations**

*Katanga* was the second case from the DRC, concerning an attack on the village of Bogoro in 2003.<sup>83</sup> Germain Katanga was convicted by the ICC on 7 March 2014, as an accessory to one count of a crime against humanity and four counts of war crimes committed in 2003. He was sentenced to a total of 12 years' imprisonment.<sup>84</sup> Although this judgment was initially appealed by the parties, they withdrew their appeals on 25 June 2014. In *Katanga*, the Court relied heavily on principles established in *Lubanga*. Similar to Mr. Lubanga, Mr. Katanga was also declared indigent. However, *Katanga* was the remarkable case since the ICC awarded individual reparations for the first time to the victims, together with collective reparations.

The TC II rendered its order for reparations on 24 March 2017.<sup>85</sup> To award individual reparations, the chamber examined 341 individual applications and found that 297 of them were eligible. It determined that monetary value of the harm suffered by those 297 victims was USD 3 752 620 and decided to award symbolic individual compensation of USD 250 to each victims.<sup>86</sup> In total, the chamber found Mr. Katanga liable for USD 1 million.<sup>87</sup> As regard the collective reparations, the TC II ordered four collective awards for: 1) support for housing, 2) support for an income-generating activity, 3) support for education and 4) psychological support.<sup>88</sup> It had also to address the claims by five applicants to be awarded reparations for "transgenerational harm", a term that the TC used to describe "a phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter."<sup>89</sup> However, the TC II rejected these requests due to the lack of sufficient evidence that the causal nexus existed between the trauma suffered and the corresponding crimes.

On 8 March 2018, the AC largely confirmed the TC II's findings.<sup>90</sup> The AC did not agree with the TC II's approach which involved individual assessment of each application for such approach resulted in delays to award reparations.<sup>91</sup> According to the AC, while this approach may have been feasible in case of a very small number of individuals, for the benefit of expeditiousness of the proceedings "this is neither necessary nor desirable" when there are large number of victims.<sup>92</sup> The AC also found that the convicted person's responsibility to make good any harm caused by the offenses

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83 Initially, the case was initiated as *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. However, cases were severed on 21 November 2012 and Mathieu Ngudjolo Chui was later acquitted on 18 December 2012.

84 The sentence was subsequently reduced by 3 years and 8 months. *Katanga*, Decision on the review concerning reduction of sentence of Mr. Germain Katanga, ICC-01/04-01/07-3615, Appeals Chamber, 13 November 2015.

85 Katanga Order 2017, supra note 38.

86 In regard of this amount, the AC subsequently noted that amount of USD 250 "should not be viewed as a precedent or indication of quantum when it comes to the determination of awards in future cases." See Katanga Judgment 2018, supra note 7, para. 149.

87 Katanga Order 2017, supra note 38.

88 *ibid.*

89 Katanga Order 2017, supra note 38, para. 132.

90 Katanga Judgment 2018, supra note 7.

91 *ibid.*, However, the Appeals Chamber noted that Trial Chamber's approach did not amount to an error of law.

92 *ibid.*, para. 71.

for which they were found guilty is unaffected by the possibility that other people may have also contributed to it.<sup>93</sup> In other words, it is not always improper to hold the individual accountable for the whole amount required to repair the injury, even though a reparations order must not go above the overall cost to remedy the harm. This determination is in contrast to the *Lubanga* principle that liability for reparations must be proportionate to the harm caused and the degree and mode of participation in the commission of the crimes.

The AC reversed the TC II's order for reparations to the extent that it concerned rejection the claims of transgenerational harm by the chamber. The AC considered it appropriate that these applications be assessed anew by the TC II by looking into the question of the causal nexus between the crimes for which Mr. Katanga was convicted and their psychological harm and whether they should be awarded reparations. The remainder of the order was confirmed.

*Katanga* played an important role to explore new areas of reparations and to crystalize the ICC's reparation system. It acknowledged the relevance of *Lubanga* principles and modified them in the context of different factual and legal aspects present in *Katanga*. For the first time in the Court's practice, the victims were granted individual reparations, together with collective reparations. Moreover, unlike *Lubanga*, *Katanga* examined individual applications for reparations and determined the monetary value of harm suffered by victims, thus did not abstain from quantifying the harm.

### 3.3. *Al Mahdi*: Reparations for Crimes against Cultural Heritage

Ahmad Al Faqi Al Mahdi was convicted of the war crime of intentionally directing attacks against historic monuments and buildings, including nine mausoleums and one mosque in Timbuktu, Mali, in 2012. All but one of the targeted buildings were UNESCO World Heritage Sites. Following an admission of guilt, which considerably expedited the proceedings, he was sentenced to nine years of imprisonment in 2016.<sup>94</sup> On 17 August 2017, the TC VIII delivered an order for reparations.<sup>95</sup> It found Mr. Al Mahdi responsible for paying 2.7 million euros for both individual and collective reparations for the population of Timbuktu. Similar to the previous cases, Mr. Al Mahdi was declared as indigent.

Despite the fact that the case at hand concerned crimes against cultural heritage, the chamber nonetheless affirmed the applicability of the *Lubanga* reparation principles to this case.<sup>96</sup> In the

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<sup>93</sup> *ibid.*, para. 178.

<sup>94</sup> On 25 November 2021, the Appeals Chamber reduced the nine-year sentence of imprisonment by two years. The date for the completion of his sentence is set to 18 September 2022. See ICC, Case Information Sheet: Situation in the Republic of Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-PIDS-CIS-MAL-01-09/22\_Eng (Updated: January 2022), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf> (19.08.2022).

<sup>95</sup> Al Mahdi Order 2017, *supra* note 33.

<sup>96</sup> *ibid.*, paras. 26-38.



TC VIII's opinion, in light of the specific nature of the crime of the destruction of cultural heritage, not only the Malian community, but also the international community as a whole suffered harm. However, it limited its harm assessment only to the Timbuktu community to maximize the effect of the reparations awarded.<sup>97</sup> Bearing in mind the importance of the cultural heritage, the chamber considered the collective reparations as the most appropriate type of reparations to address the damage caused.<sup>98</sup> The chamber also found that Mr. Al Mahdi's crimes caused the economic harm to the community in Timbuktu. While stating that the economic impact of destruction of cultural sites was predominantly collective in character, the chamber decided to award individual reparations to certain identified group of the victims "whose livelihoods *exclusively* depended" on the destroyed heritage.<sup>99</sup> Thus, the Court deemed it appropriate to award both individual and collective reparations.

As for the modalities, the chamber decided to award compensation for individual reparations and to implement community-wide collective reparations to address the economic harm suffered by the community of Timbuktu, including educational and financial assistance programs.<sup>100</sup> As for the moral harm caused, the chamber decided to address individual and collective reparations through compensation and rehabilitation respectively, the latter including symbolic measures – such as a memorial, commemoration or forgiveness ceremony.<sup>101</sup> The chamber also considered the possible liability of Mr. Al Mahdi for bodily harm alleged by victims or damage to property other than the Protected Buildings.<sup>102</sup> However, it did not award reparation for this kind of harm as they were essentially outside the scope of Mr. Al Mahdi's conviction.

Notably, the Court awarded symbolic reparation of non-repetition of attacks against renovated cultural sites.<sup>103</sup> As a symbolic gesture, the chamber granted one symbolic euro to Malian State as part of the reparations award and one symbolic euro to the international community, represented by UNESCO given the specific nature of the case.<sup>104</sup> As for the scope of Mr. Al Mahdi's liability for each kind of harm, the chamber set Mr. Al Mahdi's liability for damage to the Protected Buildings at 97,000 euros, for consequential economic loss at 2.12 million euros and for moral harm at 483,000 euros.<sup>105</sup> Adding up Mr. Al Mahdi's liability across the various kinds of harm caused, his total liability was set at 2.7 million euros.<sup>106</sup> On 8 March 2018, the AC, for the most extent, confirmed the TC VIII's reparations order and amended it on two procedural points.<sup>107</sup>

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97 *ibid.*, paras. 51-56.

98 *ibid.*, paras. 60-67.

99 *ibid.*, para. 81 (emphasis in original).

100 *ibid.*, para. 83.

101 *ibid.*, paras. 84-90.

102 *ibid.*, paras. 93-103.

103 *ibid.*, para. 67.

104 *ibid.*, paras. 106-107.

105 *ibid.*, paras. 118, 128, 133.

106 *ibid.*, para. 134.

107 *Al Mahdi*, Public redacted Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2, Appeals Chamber, 8 March 2018 (The AC adjusted the screening process by deciding that applicants were not required to disclose their iden-

To put it succinctly, while *Al Mahdi* relied on *Lubanga* principles, it enhanced the Court's reparation framework by dealing with the new set of challenges,<sup>108</sup> including identification of victims.<sup>109</sup> *Al Mahdi* became another "first-time" case not only on account of specific nature of the crime, but also due to the chamber's decision to prioritise individual reparations over collective ones. Moreover, *Al Mahdi* reparations order singles out by the Court's openness to the symbolic measures.

### 3.4. *Ntaganda*: Expansion of *Lubanga* Principles through the ICC's First Conviction for the Sexual Crimes

While the Rome Statute incorporates a variety of sexual crimes, the ICC's track record of prosecuting the sexual and gender based violence (SGBV) is a disappointing one, full of missed opportunities.<sup>110</sup> In this regard, *Ntaganda*, the third case from the DRC, is a progressive development in two regards: it is the ICC's first-ever final conviction for sexual crimes, namely rape and sexual slavery, and the first such case that reached the reparations stage.

Bosco Ntaganda, former Deputy Chief of the Staff and commander of operations of the *Forces Patriotiques pour la Libération du Congo* (FPLC), was found guilty on 8 July 2019 of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002-2003. He was sentenced to a total 30 years imprisonment, the maximum imprisonment for specified number of years under Article 77 of the Rome Statute. Both verdict and sentence were confirmed in appeals on 30 March 2021.

On 8 March 2021, the TC VI delivered the reparations order against Mr. Ntaganda and set the total liability at USD 30,000,000,<sup>111</sup> the highest so far. The reparations order was issued before the judgment on conviction has become final through the decision of the AC.<sup>112</sup> Focusing on the need of more tailor-made principles for the victims of the SGBV, *Ntaganda* expanded *Lubanga* principles of reparations and introduced more "victim-centred" framework,<sup>113</sup> compared to principles established in *Lubanga* which set out "more implementation-focused basis for reparations at the

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tity to Mr. Al Mahdi and that any applicant whose application was rejected was entitled to request that the TC review that assessment).

108 See Francesca Capone, "An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage", *Journal of International Criminal Justice* 16(3) (2018): 645–661.

109 *ibid.*, 652-653. See also Marina Lostal, "Implementing Reparations in the *Al Mahdi* Case: A Story of Monumental Challenges in Timbuktu", *Journal of International Criminal Justice* 19 (2021): 838-844.

110 Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality", *German Law Journal* 22(5) (August 2021): 878 – 893.

111 *Ntaganda* Order 2021, *supra* note 34, para 247.

112 *ibid.*, para. 5 (The Court explained that the reparation order was issued prior to the appeals judgment in order to expedite reparations proceedings and because the mandate of two of the chamber's judges would come to an end before the AC would deliver its judgment).

113 See Marina Lostal, "The *Ntaganda* Reparations Order: A Marked Step Towards a Victim-Centred Reparations Legal Framework at the ICC", EJIL: Talk!, entry posted 24 May 2021, <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/> (19.08.2022)

Court.”<sup>114</sup> The chamber adopted additional six new principles: 1) ‘do no harm’; 2) gender-inclusive and sensitive approach to reparations; 3) principle related to sexual and gender-based violence; 4) prioritisation; 5) transformative reparations; 6) no over-compensation.

The Court qualified the children born out of rape and sexual slavery as direct victims, whereas children of women and girls who were victims of rape or sexual slavery were considered as indirect victims.<sup>115</sup> As for the types and modalities of reparations, the TC VI issued “collective reparations with individualised components” for the benefit of both direct and indirect victims.<sup>116</sup> In the Court’s opinion, this synthesis of individual and collective reparations are best suited to address the multiple harms suffered by the large number of victims, especially the harm caused by rape and sexual slavery. In respect of modalities, the Court combined different modalities, including restitution, compensation, rehabilitation, trauma-based counselling, satisfaction measures, symbolic reparations, voluntary apology by Mr. Ntaganda (with prior consultation with victims).<sup>117</sup>

*Ntaganda* succeeded where *Lubanga* failed. *Lubanga*, which remains the ICC’s landmark judgment in several ways, has been criticized due to the Prosecutor’s decision not to include charges of the SGBV against Mr. Lubanga.<sup>118</sup> Despite not being convicted for the SGBV, the TC I considered that Mr. Lubanga would still be liable for reparations in respect of the harm of the SGBV. However, the AC reversed this finding and held that the TC I couldn’t hold Mr. Lubanga liable for reparations of such harm, while noting that the victims of the SGBV could benefit from TFV’s assistance mandate.<sup>119</sup> Nevertheless, inability of victims of the SGBV to seek reparations at the ICC has been described as “the gender injustice cascade”.<sup>120</sup> *Ntaganda* is a step-forward, which opened the door for victims of the SGBV from Ituri to seek reparations at the ICC.

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114 Moffet, Sandoval (2012), supra note 9, 751.

115 Ntaganda Order 2021, supra note 34, paras. 120-123.

116 *ibid.*, paras. 7, 9.

117 *ibid.*, paras. 197-211.

118 See e.g. Gabrielle Louise McIntyre, “The Pace of Progress: Addressing Crimes of Sexual and Gender-Based Violence in the Generation after Rome”, *AJIL Unbound* 112 (2018): 177–178. Anja Wiersing, “*Lubanga* and its Implications for Victims Seeking Reparations under the International Criminal Court”, *Amsterdam Law Forum* 4(3) (2012): 22-23, 29-30.

119 *Lubanga* Judgment 2015, supra note 53, paras. 196-199.

120 Louise Chappell, “The Gender Injustice Cascade: ‘Transformative’ Reparations for Victims of Sexual and Gender-Based Crimes in the *Lubanga* Case at the International Criminal Court”, *The International Journal of Human Rights* 21(9) (2017): 1223-1242.

## 4. IMPLEMENTATION OF REPARATION ORDERS: INTERPLAY BETWEEN THE COURT AND THE TFV

The most notable challenge in respect of the ICC's reparation orders is their implementation, in particular due to the indigence of the convicted persons. All the convicted persons against whom the Court has issued reparations orders are indigent. In *Lubanga*, the TC refused to make reparations against Mr. Lubanga by reason of his indigence and only non-monetary and symbolic reparations were deemed appropriate to be ordered against him.<sup>121</sup> However, it is now firmly established by the AC that a convicted person's indigence is not obstacle to the imposition of liability for reparations.<sup>122</sup> This finding has been subsequently adopted throughout all reparation orders issued by the Court in *Katanga*, *Al Mahdi* and *Ntaganda*. Albeit this is the correct interpretation of legal provisions, victims face "practical absurdity" as the convicted persons are highly unlikely to be able to comply with the reparations orders during or after serving their sentences.<sup>123</sup> Nevertheless, due to the TFV's efforts, it is still possible to complement reparations orders to mitigate "practical absurdity".

### 4.1. Identification of Eligible Victims for Reparations

Identification of eligible victims for reparations is a difficult task for the Court. In appraising the number of victims, both in trial and reparations stage, the ICC heavily relies on approximate numbers or minimum estimates. Determination of exact numbers of victims in case of mass criminality is a challenging exercise for an international court. The ICC's individual trial chambers enjoy significant autonomy and authority to decide what is the most appropriate approach to take in reparations proceedings, considering specific characteristics of cases and the need for expeditious proceedings.<sup>124</sup> Thus, the methodology employed by the Court to identify individual victims and assess their eligibility is short of consistency and varies from chamber to chamber, with different degree of involvement of the TFV.

In *Lubanga*, the TC decided not to examine the individual application forms and transmitted all of them to the TFV for consideration.<sup>125</sup> The TC's approach was endorsed by the AC, pointing to the fact that ruling on each individual request for reparation was not required when only collective reparations were awarded.<sup>126</sup> However, they were examined on individual basis by the newly consti-

121 *Lubanga Decision 2012*, supra note 42, para. 269.

122 *Lubanga Judgment 2015*, supra note 53, paras. 102-105.

123 Owiso Owiso, "The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?", *International Criminal Law Review* 19 (2019): 524-526.

124 *Katanga Judgment 2018*, supra note 7, para. 64.

125 *Lubanga Decision 2012*, supra note 42, para. 284.

126 *ibid.*, para. 152.

tuted TC to assess the monetary liability of Mr. Lubanga. The chamber has undertaken an analysis of each of the applications for reparations and found that 425 of the 473 alleged victims were entitled to receive the collective reparations.<sup>127</sup> The chamber also found that the 425 beneficiaries were only small part of Mr. Lubanga's victims, as "hundreds and possibly thousands of other victims" could also be affected by his crimes.<sup>128</sup> Thus, the TC instructed the TFV to screen for eligibility of those persons who had not had the opportunity to submit an application for reparations.<sup>129</sup>

In *Katanga*, the TC examined each of 341 individual applications itself, the approach which was criticized by the AC.<sup>130</sup> In *Al Mahdi*, the TC considered that it was not required to rule on each individual reparations request received when awarding individual or both an individual and collective reparations. Referring to "impracticability" of identifying all the eligible victims for individual reparations, the chamber delegated this task to the TFV to conduct eligibility screening of the 139 applicants as well as any future applicants to determine their entitlement to reparations. While the chamber gave the TFV discretion to determine the full details of this screening process, it outlined general framework for such screening process to secure the rights of both the victims and the convicted person and maintained a high level of control over the activities of the TFV.<sup>131</sup> The AC also affirmed the permissibility of such delegation by the chamber, since victim applicants could request judicial review of administrative decisions of the TFV before the TC.<sup>132</sup> Thus, the Court retained judicial oversight on the determinations of the TFV made in the process of administrative screening.

In *Ntaganda*, the chamber decided it desirable to start process of the identification of the eligible victims for reparations before the issuance of the reparations order.<sup>133</sup> The TC chose new option: relying on the AC's pronouncement in *Lubanga* regarding the elements of reparations order,<sup>134</sup> rather than identifying the eligible victims itself, it decided to set out the eligibility criteria for the TFV.<sup>135</sup>

## **4.2. The Role of the TFV in Complementing Reparations Order**

The Court's jurisprudence transformed the TFV into the central implementing body whereas it was envisaged as mere depositary for funds to be used for reparations. Pursuant to second part of Article 75(2), "where appropriate, the Court may order that the award for reparations be made

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127 Lubanga Decision 2017, *supra* note 80, para. 190.

128 *ibid.*, para. 194.

129 *ibid.*, para. 293.

130 See *supra*, Section 3.2.

131 *Al Mahdi* Order 2017, *supra* note 33, paras. 142-146.

132 *Al Mahdi* Judgment 2018, *supra* note 106, para. 72.

133 *Ntaganda*, First Decision on Reparations Process, ICC-01/04-02/06-2547, Trial Chamber VI, 26 June 2020, para 26.

134 *Lubanga* Judgment 2015, *supra* note 53, para. 205 ("as a fifth element, the reparation order must either identify the victims eligible to benefit from reparations, or set out the criteria of their eligibility for reparations.").

135 *Ntaganda* Order 2021, *supra* note 34, para. 105.

through the Trust Fund.” In case of indigence, the Court seeks the assistance of the TFV “to complement the reparation awards to the extent possible and engage in additional fundraising efforts to the extent necessary to complement the totality of the award”, at the same time noting that it is difficult if not impossible to fully complement the award by fundraising.<sup>136</sup> This does not relieve the convicted person from the obligation to reimburse the TFV.<sup>137</sup>

The issue of relationship of the Court with the TFV, particularly in respect of indigent convicts was a substantial issue in *Lubanga*. To implement an award, the TC asserted authority over “other resources” of the TFV,<sup>138</sup> defined as “resources other than those collected from awards for reparations, fines and forfeitures”<sup>139</sup>, i.e. resources collected through, *inter alia*, voluntary contributions, as opposed to “resources collected through fines or forfeiture or awards for reparations”.<sup>140</sup> However, the AC reversed the TC’s findings and determined that appropriation of “other resources” for reparations fell under discretion of the TFV.<sup>141</sup> Through this finding the AC secured decision-making autonomy of the TFV in relation to the Court.

When the Court issues reparation orders, the TFV is ordered to prepare a draft implementation plan (‘DIP’) and submit it for chamber’s approval.<sup>142</sup> The TC may then approve, reject or modify the DIP. Thus, ultimately it is the Court and not the TFV who gives the green light to implementation of reparations orders. The Court requires that the DIP shall be specific in terms of objectives, results and necessary steps to efficiently implement the reparations order.<sup>143</sup> The TFV is thus required to provide a detailed description of the reparation projects, including information about the types and modalities of reparations the TFV deems appropriate for redressing each harm. The TFV should also provide the expenses and timeframe for implementation of the projects.

In *Lubanga*, the TFV submitted to the Court the DIP for collective reparations in 2015, praised as “a landmark and unprecedented submission”.<sup>144</sup> Although the Court had not yet established the amount of liability of Mr. Lubanga, the TFV estimated the number of potentially eligible victims at 3,000<sup>145</sup> and expressed readiness to complement €1 million to implement the draft reparations plan.<sup>146</sup> On 9 February 2016, the TC found that the submitted draft plan was incomplete and, among

136 Al Mahdi Order 2017, supra note 33, para. 138. Ntaganda Order 2021, supra note 34, para. 257.

137 Lubanga Judgment 2015, supra note 53, para. 115.

138 Lubanga Decision 2012, supra note 42, paras. 269-275.

139 Regulations of the Trust Fund, Regulation 47.

140 *ibid.*, Regulation 43.

141 Lubanga Judgment 2015, supra note 53, paras. 106–117.

142 ICC Rules of Evidence and Procedure, Rule 98(3). Regulations of the Trust Fund, Regulations 54, 69.

143 See e.g. Ntaganda Order 2021, supra note 34, para. 249.

144 TFV, “Trust Fund for Victims submits draft implementation plan for collective reparations to victims in the Lubanga case”, 4 November 2015, <https://www.icc-cpi.int/news/trust-fund-victims-submits-draft-implementplan-collective-reparations-victims-lubanga> (19.08.2022).

145 *Lubanga*, Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, Trust Fund for Victims, 3 November 2015, para. 28.

146 *ibid.*, para. 174.

other things, instructed the TFV to commence the process of locating and identifying potentially eligible victims.<sup>147</sup> The draft plan was subsequently approved on 21 October 2016, after the Chamber was satisfied that that the draft plan sufficiently laid down the concrete parameters of the proposed future projects.<sup>148</sup> This caused significant delay in starting the implementation process.

In *Katanga*, the TFV submitted the DIP to the chamber on 25 July 2017, which included 297 identified victim eligible for an individual symbolic compensation award of USD 250, as well as concrete details of the types of activities proposed to be offered to the victims under each collective award.<sup>149</sup> In *Al Mahdi*, the DIP was presented on 20 April 2018 and was approved after two months, “despite the serious reservations [...], subject to the amendments and further directions to the TFV specified in the present decision”.<sup>150</sup> In *Ntaganda*, the chamber approved the initial DIP, “subject to the amendments and additional information to be provided by the TFV”.<sup>151</sup> This proceedings demonstrate that DIPs presented by the TFV often needs substantial changes and improvements before they are finally approved in whole by the chambers. This time-consuming process of submission and approval further postpones the practical realization of reparations awarded, in particular reparations awarded on collective basis.

As of 31 December 2021, the TFV has accumulated enough funds to fully complement reparation award of USD 1 million in *Katanga*, while half of the total liability set by the chambers in *Lubanga* (USD 10 million) and *Al Mahdi* (EUR 2.7 million) has also been raised.<sup>152</sup> By mid-2019, a symbolic compensation of USD 250 per victim for 297 had been fully disbursed in *Katanga*.<sup>153</sup> In *Al Mahdi*, the TFV launched the collective reparations and is to complete implementation of the symbolic individual reparations for more than 880 victims.<sup>154</sup> In *Ntaganda*, the TFV allocated funding to the amount 6% of USD 30 million.<sup>155</sup> The sources of funding includes the TFV’s extra-budgetary resources, reparations reserves fund and fundraising efforts, through which the TFV receives vol-

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147 *Lubanga*, Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan, ICC-01/04-01/06-3198-ENG ICC, Trial Chamber II, 9 February 2016, paras. 10-15.

148 *Lubanga*, Order Approving the Proposed Plan of the Trust Fund for Victims in Relation to Symbolic Collective Reparations, ICC-01/04-01/06-3251, Trial Chamber II, 21 October 2016.

149 *Katanga*, Public redacted document Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), ICC-01/04-01/07-3751-Red, Trust Fund for Victims, 25 July 2017.

150 *Al Mahdi*, Public redacted version of ‘Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations’, 12 July 2018, ICC-01/12-01/15-273-Red, Trial Chamber VIII, 12 July 2018.

151 *Ntaganda*, Decision on the TFV’s initial draft implementation plan with focus on priority victims, ICC-01/04-02/06-2696, Trial Chamber II, 23 July 2021.

152 TFV Management Brief Q4/2021, 1 October – 31 December 2021, 16.

153 TFV, “The Katanga Case”, <https://www.trustfundforvictims.org/what-we-do/reparation-orders/katanga> (19.08.2022).

154 TFV, “Ahmad Al Faqi Al Mahdi case: Collective Reparations Are Launched upon Completion of the Individual Reparations”, 12 July 2022, <https://www.trustfundforvictims.org/en/news/ahmad-al-faqi-al-mahdi-case-collective-reparations-are-launched-upon-completion-individual> (19.08.2022)

155 TFV Management Brief Q4/2021, 1 October – 31 December 2021, 17.

untary contributions from the States Parties to the Rome Statute, earmarked to reparations or assistance programs.<sup>156</sup>

## 5. CONCLUSION

The ICC's jurisprudence on reparations is still immature. While the Court itself is considered as a young institution of international criminal justice, its jurisprudence on reparations is twice younger, since 20-years old Court has only ten years of experience of dealing with reparations. However, unlike the situation ten years ago, when the Court had decisions on reparations, it has already established, clarified and further developed key elements, procedures and principles of its reparations mandate. General principles laid down in *Lubanga* offered guidelines to other chambers, who have modified them in context of the specific characteristic of each case. In *Al Mahdi*, the TC developed the principles of reparations to address harm caused by destruction of cultural heritage. In *Ntaganda*, the TC added six new principles to adjust *Lubanga* principles to the needs of victims of SGBV, in particular children born out of rape. The contours of the reparations at the ICC's are becoming clearer and will definitely continue to evolve in future.

The ICC's jurisprudence shows that the victim-centred justice through reparations at the ICC is not a speedy justice – victims “wait a lifetime”.<sup>157</sup> It takes many years from commission of crimes until reparation proceedings start. The crimes in *Lubanga*, *Katanga* and *Ntaganda* were committed in 2003. In *Lubanga*, TFV's draft implementation plan was not approved by the chamber until 2016. In *Katanga* and *Ntaganda*, reparations orders were issued only in 2017 and 2021. Even after that, victims are often caught in various exchanges between trial chambers and the TFV before the eligible victim are identified and the DIPs are finally approved.

Financial viability and identification of eligible victims remains a key issue for reparations. As a consequence of the indigence of the defendants, the principal burden of complementing reparations awards rests on the Trust Fund. Established as the mere depository of funds collected by the Court from the convicted persons, it has been transformed into an indispensable element of the ICC's reparative justice. The TFV plays a central role in practical implementation of all the reparations awarded by the ICC, from identification of eligible victims and preparing DIPs to financing the awards through fund-raising campaigns and working on ground with local partners.

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<sup>156</sup> *ibid.*, 16-17.

<sup>157</sup> Expert Review, *supra* note 24, para. 879.



It is of critical importance to balance the rhetoric accompanying the ICC's reparations mandate and to manage high expectations of victims. The ICC's reparations regime was created with inherent limitations which could not be overcome without fundamental revision of the Rome Statute. The Court does not have no other option but to maximise its efforts to operationalize its reparative powers within the limits of reparation framework, which excluded state responsibility and developed the conviction-based regime. These basic features of the ICC's reparation scheme and their implications should always be taken into account when assessing the success of the ICC in repairing the harm suffered by victims. Otherwise, the rhetoric that ICC has powers "to make justice a meaningful reality" for victims through reparations will always lead to the unrealistic expectations.