

A woman with a red headscarf and a white and red patterned top is sitting on a pile of yellowish-brown debris. She is looking directly at the camera with a thoughtful expression, her hand resting on her chin. She is wearing a blue and red patterned wrap around her waist. The background is a textured, yellowish wall with dark spots.

**NO  
TIME  
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**Realising  
Reparations  
for Victims  
before the  
International  
Criminal Court**

**REDRESS**

Ending Torture, Seeking Justice for Survivors



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**Photo cover by Sven Torfinn/PANOS:** Bukavu, South Kivu, Democratic Republic of Congo. Josephine M'Kanga sits at her home in a small village just outside Bukavu. She has received treatment at Panzi Hospital for sexual violence. She now lives on her own after her husband left her. An estimated 250,000 women have been victims of rape during the Democratic Republic of Congo's civil war.

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## About REDRESS

REDRESS is an international human rights organisation that represents victims of torture to obtain justice and reparations. We bring legal cases on behalf of individual survivors, and advocate for better laws to provide effective reparations. Our cases respond to torture as an individual crime in domestic and international law, as a civil wrong with individual responsibility, and as a human rights violation with state responsibility. Through our victim-centred approach to strategic litigation we can have an impact beyond the individual case to address the root causes of torture and to challenge impunity. We apply our expertise in the law of torture, reparations, and the rights of victims, to conduct research and advocacy to identify the necessary changes in law, policy, and practice. We work collaboratively with international and national organisations and grassroots victims' groups.

REDRESS supports the progressive development of the International Criminal Court (ICC or Court) as an institution that complements national trials to deliver justice for victims of international crimes, with a focus on victims' rights, including participation, protection, legal representation, and reparations. We intervene directly before the ICC<sup>1</sup> and engage with the Registry and the Trust Fund for Victims (Trust Fund or TFV) to progress their policies and implement reparations for victims. We also engage with domestic and hybrid war crimes trials under the principle of complementarity, and coordinate the Victims' Rights Working Group, an informal global network of experts and advocates working to promote justice for victims of international crimes.

<sup>1</sup> See for example, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Queen's University Belfast Human Rights Centre and the Redress Trust Observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/12-01/15-188 (2 December 2016); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/05-01/08-3448 (17 October 2016); *The Prosecutor v. Germain Katanga*, Redress Trust Observations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3554 (15 May 2015); Redress, "Moving Reparation Forward at the ICC: Recommendations" (November 2016), at [https://redress.org/wp-content/uploads/2017/12/1611REDRESS\\_ICCReparationPaper.pdf](https://redress.org/wp-content/uploads/2017/12/1611REDRESS_ICCReparationPaper.pdf).

## About the Reparations Project

In February 2018, REDRESS began a review of the system of reparations at the ICC with the kind support of the Ministry of Foreign Affairs of Finland. Over a period of 10 months, the REDRESS team conducted research and extensively reviewed ICC filings, decisions, and policy documents as well as journal articles on ICC reparations. We also interviewed ICC staff; the Executive Director, Chair of the Board and staff of the TFV; Legal Representatives of Victims; legal experts; academics and representatives of civil society.

In October 2018, REDRESS convened an Expert Roundtable meeting on reparations in The Hague. Participants included staff of the ICC Registry, Office of the Prosecutor, legal representatives of victims (legal representatives), Office of Public Counsel for Victims (OPCV), case managers, academics, legal experts from the Democratic Republic of Congo (DRC), and representatives of civil society organisations. In addition, in December 2018, REDRESS organised a side-event on reparations during the 17th Assembly of States Parties (ASP) meeting in The Hague co-hosted by Finland, Sweden, Switzerland and Chile. The rich discussions from both events have informed the findings and recommendations for this report.

The report was prepared by Lorraine Smith van Lin, REDRESS Legal Adviser. REDRESS is grateful to programme interns Magdalena Legris, Marie-Charlotte Beaudry and Chiara Chisari for providing research support at different stages of the project. The report was reviewed by Dr. Luke Moffett, Senior Lecturer, Queens University Belfast; and a team of REDRESS staff including Rupert Skilbeck, Director, Alejandra Vicente, Head of Law, Chris Esdaile, Legal Adviser, and Eva Sanchis, Head of Communications.

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## Acronyms (in order of appearance)

International Criminal Court	ICC
Trust Fund for Victims	TFV
Office of Public Counsel for Victims	OPCV
Democratic Republic of Congo	DRC
Appeals Chamber	AC
Assembly of States Parties	ASP
Central African Republic	CAR
Rules of Procedure and Evidence	RPE
Draft Implementation Plan	DIP
Public Information and Outreach Section	PIOS
International Criminal Tribunal for the former Yugoslavia	ICTY
International Criminal Tribunal for Rwanda	ICTR
Trial Chamber I	TC I
Trial Chamber II	TC II
Committee on Budget and Finance	CBF
Victims Participation and Reparations Section	VPRS



# Executive Summary

*“These long and tiring years of waiting for justice have been for victims a succession of hopes and disappointments, fears and joys<sup>2</sup>”*



*Outreach session for local authorities in Bimbo, CAR, on the mandate, functioning and activities of the ICC/@ICC-CPI.*

<sup>2</sup> Bemba, ICC-01/05-01/08-3649, 12 July 2018, *Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings*, para 17

## Executive Summary

The reparations mandate of the ICC is a critical component of its overall framework for giving victims a voice and allowing them to exercise their rights within the international criminal justice system. The promise of reparations set out in Article 75 of the Rome Statute, the ICC's founding treaty, reflects the consensus in international law that reparation is essential to address the terrible consequences experienced by victims of international crimes and gross human rights violations.

The ICC reparations system includes an independent TFV, established by the Assembly of States Parties – the ICC's governing body – with a dual mandate to implement reparations awards and provide assistance to victims of situations before the ICC even if not directly linked to a case.

Three cases are currently at the reparations phase before the Court: *The Prosecutor v Thomas Lubanga Dyilo (Lubanga)* and *the Prosecutor v Germain Katanga (Katanga)*, both arising from the situation in the Democratic Republic of Congo (DRC); and *the Prosecutor v Ahmad al-Faqi Al Mahdi (Al Mahdi)*, from the situation in the Republic of Mali. Preparatory reparations proceedings had also commenced in the case of *the Prosecutor v Jean-Pierre Bemba Gombo (Bemba)*, which arose from the Prosecutor's investigations in the Central African Republic (CAR), but these proceedings were abruptly discontinued following the AC's acquittal of Mr Bemba in June 2018.

### Methodology and findings

Over a period of 10 months, REDRESS canvassed the views of key stakeholders in the reparations process including ICC staff, staff of the Trust Fund, (legal representatives) and the OPCV, academics, civil society and legal experts. REDRESS also extensively reviewed the ICC legal texts, filings, judicial decisions, policy papers and academic commentary on reparations at the Court. No victims were directly consulted for this report. The perspectives of victims were indirectly provided via their legal representatives.

Our research and consultations reflect mixed views concerning the effectiveness of the ICC's reparations system to date. On the one hand, there were positive views regarding the inclusion of a reparations regime within the Rome Statute system to redress the harm suffered by victims within its jurisdiction. The Court was applauded for trying in each case to ensure a victim-centric, consultative approach to determining adequate and appropriate reparations awards.

It was generally felt that the ICC has made considerable progress in consolidating its case law on reparations. This is a significant development given the uniqueness of the ICC system which cannot fully be compared to similar regional or national mechanisms which are based on states' responsibility to repair the harm suffered by victims. The ICC's system is, by contrast, based on the individual responsibility of the convicted person to repair the harm suffered by victims of his crime. Important rulings have clarified, among other things, the nature and content of reparations orders; the scope of reparations principles; the responsibility of the convicted person for reparations and eligible beneficiaries for reparations.

The creation of a TFV is also viewed as an important mechanism for ensuring the effective implementation of reparations. The Trust Fund's assistance mandate is considered vital to repairing the harm suffered by a significant number of victims unconnected to a specific case. In countries such as Uganda and the DRC where the assistance mandate has been in operation for several years, the Trust Fund has provided necessary physical rehabilitation and psycho-social support for victims.

On the other hand, despite the progress made so far, the actual realisation of the right to reparations has become a complicated and protracted process that has delivered little by way of tangible results. In the *Lubanga* case, 15 years after the commission of the crimes in 2003, victims are yet to receive the reparations they have been waiting for, even though the first reparations decision was handed down in 2012.

REDRESS' findings point to a combination of factors which are negatively impacting the ICC's ability to deliver reparations to victims in a timely manner. Four of the most concerning challenges are discussed below:

### 1. Inconsistent judicial decisions

Inconsistent judicial decisions on key procedural issues have created uncertainty for victims and legal actors and delayed the proceedings. Judges have a duty, as a general principle of law, to ensure a degree of certainty and consistency between themselves, and to assist applicants and potential applicants to know the basis upon which decisions regarding their claims are determined.

The procedure for *determining access to reparations* is one clear example of this inconsistency. There are currently two procedures for accessing reparations at the ICC: firstly, an individual applications procedure under Rule 94 of the ICC's Rules of Procedure and Evidence (RPE) where victims complete a standard application form to apply to participate in proceedings or for reparations or to apply for both; and secondly, a process initiated by the Chamber to determine the eligibility of additional potential beneficiaries who had not previously applied for reparations.

While the individual applications procedure could potentially be empowering for victims, its individualised nature which requires specific information from each applicant, could present a challenge for some applicants, such as victims of sexual violence. Furthermore, for various reasons, fewer victims often apply to receive reparations than are potentially eligible. However, determining how to identify additional potentially eligible beneficiaries has proven challenging for the Court.

It is currently unclear: *who* should be responsible for the identification and screening of beneficiaries (the Trust Fund, the Office of Public Counsel for Victims or the Registry, or all three); *what* the process should look like (should there be general questioning or more-in depth assessment); and *why* individual

screening is necessary where collective awards will ultimately be made.

The Court's difficulty is finding the right balance between ensuring a predictable system that provides certainty to victims and those involved in the process, while maintaining some flexibility to allow victims that had not previously applied to be included in the reparations process. The case-by-case approach has left many procedural questions unanswered and those interacting directly with victims are unclear about what to expect and how to advise their clients.

Chambers also tend to settle on a procedure at a very late stage in the proceedings, leaving victims in the dark with respect to almost every aspect of the process for identifying victims until the reparations order itself.

The second issue concerns *the determination of monetary liability*. All the Chambers have adopted different approaches to determining the monetary liability of the convicted person based on the specificities of each case. In several cases, the amounts awarded did not correspond to any of the submissions of the parties or experts and the methodology by which the Chamber arrived at the amount was unclear. Chambers have also failed to issue detailed instructions in advance concerning the type and level of documentation that should be submitted to substantiate victims' reparation claims and the evidentiary standard that they will apply in assessing them. In addition, little advanced guidance is provided concerning whether the Chamber or the Trust Fund will take the lead in assessing and reviewing claims and whether/how the Registry, legal representatives or external bodies as appropriate can assist in that regard.

In general, determining the monetary liability of convicted persons remains a contested issue. For example, in *Katanga*, the Chamber first identified the victims that it determined had suffered harm, calculated the totality of their harm and assessed Mr. Katanga's liability of US\$1million as proportionate to the harm and his level of participation in the crimes. A different approach was adopted in *Lubanga* and *Al Mahdi*. Defence counsel

are concerned that reparations orders are disproportionately high and far outweigh the ability of indigent convicted persons to pay.

The diverse approaches to identifying eligible beneficiaries and determining monetary liability raise questions as to whether a more structured procedural framework is necessary to guide the approach and set standards by which each Chamber would be required to operate. The *Lubanga* Principles are not prescriptive concerning the approach that should be adopted. Application of the *Lubanga* Principles are not mandated and thus each Chamber may disregard, augment or modify them as they deem appropriate. Decisions by the AC on the issue of monetary liability have also not been consistent. The issue is currently on appeal in the *Lubanga* case and it is hoped that more specific guidance by the AC will provide much-needed clarity and certainty.

## 2. The effectiveness of the Trust Fund

The Trust Fund is central to the success of the reparations system at the ICC. Its approach to the implementation of its dual mandate for reparations and assistance could have significant reputational implications for the Court.

The Trust Fund's *assistance mandate* has proven to be a critical source of help for victims of crimes within the Court's jurisdiction. It has been active in the DRC since 2008, and for several years in Northern Uganda providing physical and psychological rehabilitation to victims. The Fund has recently launched another competitive bidding process to start a new programme with new implementing partners in Uganda.

While a full assessment of the Fund's assistance mandate is outside the scope of this report, our consultations and research indicate that there is a high level of expectation among court staff and external actors about the potential of the assistance mandate to alleviate some of the suffering experienced by victims at the ICC. While the Trust Fund's decision to accelerate the launch of its assistance mandate in CAR following the acquittal

of Jean-Pierre Bemba was warmly welcomed, it is unclear whether the same position would be adopted in other cases in the event of an acquittal. It was also felt that the Trust Fund should commence its assistance mandate much earlier than it currently does to ensure that victims do not have to await the outcome of a protracted trial before receiving reparations.

In relation to *reparations*, the Trust Fund's decision to complement reparations awards made by the Chambers against convicted persons has ensured that meaningful reparations can be provided for victims. To date the Trust Fund has fully complemented the US \$1 million awarded against Germain Katanga (through earmarked funding from the Netherlands), has provided €800,000 to complement the €2.7 million awarded in the *Al Mahdi* case, and has provided €3 million to complement the award of €10 million in the *Lubanga* case. Nevertheless, the Trust Fund faces challenges in relation to the implementation of its reparations mandate.

Firstly, the Trust Fund is not effectively managing the *demands of the judicial process* associated with the implementation of reparations. Due to staffing gaps, the Trust Fund has found it challenging to respond to judicial requests in a timely manner and repeatedly seeks extensions for court filings.

Secondly, the Trust Fund appears to have challenges in *preparing draft implementation plans* (DIPs) which meet the Chambers' standards. The Trust Fund's role in preparing DIPs which set out the proposed activities, budget, and process for implementing reparations orders is a crucial part of the reparations process. The DIPs submitted by the Trust Fund have been criticised by the judges for lack of specificity and non-compliance with the Reparations Order, failure to outline concrete proposals, incompleteness and inaccuracy.

Thirdly, the ability of the Trust Fund to successfully fulfil its mandates depends on its *ability to attract sustained funding*. The Trust Fund aspires to raise €40 million in voluntary contributions and private donations by 2021, to complement reparations awards,

to implement reparations orders and to expand its assistance programmes in as many situations as possible before the Court. The Fund has enjoyed some measure of success with several earmarked and multi-year donations from major states including Finland, Sweden, the Netherlands, the United Kingdom, Germany and others allowing it to complement reparations awards. The Fund must however diversify its funding sources as the current dependence on voluntary donations is unsustainable. Raising funds from public and private sources must become one of the Trust Fund's priorities. The Trust Fund's efforts to raise funds must be complemented by more focused attention by States to the tracing, freezing and seizing of the assets of convicted persons for the benefit of reparations. States have a duty to support the Court and the Trust Fund in this regard and must give effect to the Paris Declaration.

### 3. Lack of court-wide strategy on reparations

There are encouraging signs of increased synergies between the key actors working on reparations, namely, the Registry, the legal representatives and the Trust Fund. However, the ICC Victims Strategy is outdated and there are no clear indications when the Court will develop a new strategy that is coherent, comprehensive and which sets out its strategic goals for realising victims' rights including the right to reparations.

The last interim update of the Court's strategic plan of 2013-2017 was in 2015 and the Court indicated that it intended to review its structure and content to provide a simpler high-level strategy complemented by more detailed organ-specific plans. The revision process is still ongoing and is expected to be completed in 2020.

The Trust Fund's own 2014-2017 Strategy was extended into 2018 and is also expected to be updated in 2019. The new Strategy will be developed during a period of significant activity for the Trust Fund in relation to its reparations mandate, whereas most of the previous activity had been focused on its assistance programmes.

The absence of updated strategic plans for the Court and the Trust Fund to provide guidance on how each organ will approach reparations is a major gap in the Court's planning process which contributes to a lack of coordination and misunderstanding concerning different roles, duplication and delays.

### 4. Absence of a clear timetable for implementing reparations

There does not appear to be a timetable or calendar for the implementation of reparations decisions at the ICC. The *Al Mahdi* Chamber, for example, created a reparations calendar in the pre-reparations order phase to provide a timetable for experts, the parties and the Trust Fund to make relevant filings as instructed by the Chamber within a specified period. However, once the DIP is approved, there is no timetable for implementation of the decision. In *Al Mahdi*, the Trust Fund provides monthly updates to the Chambers concerning the updated implementation plan.<sup>3</sup> It is unclear however, when the process will move beyond monthly updates to the actual implementation of the plan.

### Conclusions

Despite significant effort on the part of the Judges and the Trust Fund to give effect to the reparations' provisions in the Rome Statute, the delivery of reparations to victims has been unduly protracted. The timely implementation of reparations is crucial to ensuring that victims can begin to reconstruct their lives. It is critical that the ICC moves beyond protracted procedural debates, overcome hurdles and move towards implementation of reparations for victims as quickly as possible.

As a start, the Court should expeditiously establish general principles to guide the reparations process in

<sup>3</sup> *Al Mahdi*, ICC-01/12-01/15-305-Red, 14 December 2018, *Public redacted version of "Fifth monthly update report on the updated implementation plan including information concerning further details relevant to the Board of Directors' complement decision"*. The Trust Fund's submissions are extensively redacted and it is difficult to see what is proposed and the timing of each proposal.

a consistent and coherent manner. The extensive jurisprudence on specific procedural issues in the first three reparations cases, including from the AC, should be used as a basis for developing reparations principles that are more definitive and concrete in scope than the current Lubanga Principles.

The centrality of the Trust Fund to the process requires a *strong programmatic framework and detailed planning* for the effective and timely delivery of reparations. This requires ensuring that there is adequate staff capacity and expertise to respond to the demands of the pre-reparations order phase. This includes responding in a timely manner to judicial filings; preparing concrete, detailed and accurate draft implementation plans; carrying out administrative screening of potential beneficiaries; and conducting outreach, in collaboration with the Public Information and Outreach Section (PIOS) where appropriate. More importantly, the Trust Fund will have to strategically plan how to implement reparations as quickly as possible once DIPs have been approved. Continuous judicial oversight in this phase will be crucial to ensure an effective and efficient process.

Beyond the important need to streamline procedures and develop strategies, the success of the ICC reparations system depends on a more holistic look at reparations within the broader context of complementarity. As the Trust Fund begins the process of implementation, increased state cooperation will be required. In addition, more focus will have to be placed on the broader obligation of States to repair the harm suffered by victims within their countries as complementary to the ICC's efforts in this regard.

The *complementary role of national reparations programmes* could significantly enhance the success of the ICC reparations system. Irrespective of the ICC's approach to reparations, States Parties have a responsibility to provide redress to all victims within their territory that have suffered egregious abuses.

To ensure sustainability and effectiveness of reparations, the ICC and the Trust Fund should engage

with national reparations programmes and work to build links or strengthen existing links with *local and international institutions* that operate such programmes such as the International Organisation on Migration and the Office of the United Nations High Commissioner for Human Rights.

## Recommendations

### To the Court

>> **Create a two-step reparations process** with clearly delineated responsibilities and built in oversight, with detailed procedural steps for each phase as appropriate.

- First, a **procedural verification and valuation phase**, which includes all steps that precede a reparation order, such as identification of the pool of potential beneficiaries, identification and assessment of harm suffered, identification of appropriate forms of reparations and quantification of the convicted person's liability.
- Second, a **monitoring and oversight phase**, with a clear system for monitoring and oversight of implementation of reparations orders. This system could include: requiring reporting by the TFV on measures taken to implement decisions and setting deadlines for the submission of such reports; requiring further information and follow-up reports or taking additional corrective action; keeping a case open until the reparation awards have been implemented in full.

>> **Establish procedures** that provide criteria for the identification of victims, determination of harm suffered, assessment of the scope of harm, consideration of appropriate modalities for reparations and quantification/assessment of the scope of liability. Ensure that victims are not arbitrarily or unfairly excluded from accessing reparations because of complicated and convoluted procedures which effectively deny them access.



>> **Revise and update** the Lubanga Principles and make them Court-wide reparations principles which draw on the recent jurisprudence, as well as the lessons learned in the cases to date. Develop these principles as part of a consultative effort involving all relevant stakeholders including Chambers, the Trust Fund, the Registry, legal representatives of victims and the defence. The Court-wide reparations principles should be developed by drawing on the existing legal framework and recent jurisprudence, as well as the lessons learned in the cases to date.

>> **Treat victims** who choose to apply both to participate and to obtain reparations in the same way as those who choose to only request reparations. Given the nature and impact of the types of victimisation and levels of trauma victims suffer, remain flexible in assessing applications which may not appear to be completed to the requisite standard.

>> **Increase and enhance synergies** through regular consultation between the Registry, the Trust Fund and Legal Representatives of victims at several levels including in the identification and mapping of beneficiaries, victims' consultation and implementation of reparations awards to make the reparations process more efficient and effective.

>> **Produce and implement** an up-to-date Court wide strategy including clear provisions on reparations as well as a Victims' Strategy with concrete and measurable goals.

#### To the Trust Fund

>> **Develop and manage** the capacity needed to respond to the demands of the judicial process (including the timely preparation of DIPs) and take concrete steps to implement reparations orders in a timely and effective manner.

>> **Develop** (together with the Registry, where appropriate) a clear communications and outreach strategy to become more visible and

better understood by donors as well as the victim communities that the Trust Fund serves.

>> **Begin the assistance mandate** earlier in countries within the Court's jurisdiction where investigations are ongoing and where victims have not received assistance. In cases where the trial proceedings are protracted, implement the assistance mandate to provide a measure of interim relief to victims. Ensure that the activities planned under the assistance programme provide tangible rather than purely symbolic benefits to victims and are properly planned and assessed.

>> **Develop a clear** plan for diversifying funding options including identifying private funding sources.

>> **Monitor trials** and consider the range of roles that might be played by the Trust Fund in advance of reparations awards, enabling the scaling up and down of activities.

>> **Establish standards** and modalities for cooperation with intergovernmental, international or national organisations or State entities, including national reparations programmes to ensure sustainability of projects that are implemented.

#### To States Parties

>> **Support the Court** in enforcing the implementation of reparations orders, providing such cooperation as is necessary to allow for effective implementation.

>> **Provide the Trust Fund** and the other relevant sections of the Court with the budget necessary to develop the capacity to implement reparations orders.

>> **Continue to support** the Trust Fund through voluntary donations and earmarked contributions.

>> **Support the Court and the Trust Fund's** efforts in relation to the tracing and seizure of assets and give effect to the Paris Declaration.

>> **Support national reparations programmes** particularly in countries under the ICC's jurisdiction. Promote such schemes as part of bilateral discussions on complementarity as well as within the Assembly of States Parties.

>> **Reiterate the importance** of reparations in declarative resolutions on victims during the ASP as well as in the Omnibus Resolution.

# Introduction



*Judges in the Katanga case noted that the Court must strive to ensure that reparations are meaningful to the victims/©ICC-CPI.*

## Introduction

Providing reparations to victims of international crimes and gross human rights violations is an important way to redress the terrible consequences of such crimes. Reparation is a moral imperative which aims to mend what has been broken and contribute to individual and societal aims of rehabilitation, reconciliation, consolidation of democracy and restoration of law.<sup>4</sup>

These are the underlying aims of the ICC's reparations provisions. Modelled on important developments in international law which recognise victims' right to an effective remedy and reparations, the ICC is a step above its counterpart international tribunals in granting victims the right to reparations as part of a progressive package of victim-centric provisions enshrined in its legal texts.

That victims enjoy extensive rights at the ICC is slowly becoming more clearly understood. In 2018 the Court celebrated twenty years of the Rome Statute- its founding instrument. The Court is only now beginning to work out what reparations really means at the ICC.

Judges in the *Katanga* case noted that "the Court must strive [...] to ensure that reparations are meaningful to the victims and that, to the extent possible, they receive reparations which are appropriate, adequate and prompt."<sup>5</sup> This is consistent with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) which provide that:

"remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access

to relevant information concerning violations and reparation mechanisms."<sup>6</sup>

However, providing meaningful reparations in a timely manner has proven to be a challenge for the Court. To date, only a fraction of the victims that have either applied for or are eligible to receive reparations have actually seen any tangible benefits, despite reparations awards of millions of euros or US dollars and draft implementation plans of hundreds of pages. The fundamental question is, how can the ICC translate the promise into a tangible and meaningful reality for victims, many of whom have been waiting for several years to obtain justice and reparations?

This is a report about the significant potential of the ICC's reparations system to redress the harm suffered by victims of crime within its jurisdiction. The report highlights the steps taken by the Court to date in consolidating its case law on reparations. It acknowledges that the jurisprudence of the Court has advanced significantly in clarifying important procedural and substantive aspects of reparations including the content of a reparations order, the relevant beneficiaries of reparations and the respective roles of the Trust Fund and Chambers. However, the ICC is struggling to translate the promise of reparations into reality.

Throughout this report, we explore how the ICC has been working to operationalise the complex procedural framework that governs the system of reparations. Our consultations and research provided the basis for the discussion of the issues raised in this report.

Those consulted raised concerns about the progress of the ICC's reparations system. It was felt that despite an elaborate framework, there was a sense that the Court was not achieving its goal of ensuring meaningful and timely reparations for victims. It was suggested that this may be due to several factors including inconsistent ju-

<sup>4</sup> C. Ferstman, M. Goetz & Alan Stephens, *Reparations for victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers, 2009), p. 8.

<sup>5</sup> *Katanga*, ICC-01/04-01/07-3728-tENG, 24 March 2017, *Order for Reparations pursuant to Article 75 of the Statute*, para 15.

<sup>6</sup> United Nations General Assembly, UNGA Res 60/147, 21 March 2006, 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, Principle 11.

dicial approaches; capacity challenges at the Trust Fund; lack of court-wide strategic direction on reparation; and the absence of general guiding principles that help to foster coherence and consistency of approach.

This report is aimed at exploring these concerns. REDRESS acknowledges that this report may not fully reflect the diversity of views that exist on this issue, including on whether a reparations scheme at the ICC is even viable. The report is aimed at bringing attention to this critical issue which in our view will be a key determinant of the ICC's success.

The issues are discussed in seven chapters:

- 1. Case Overview and Key Procedural Developments.** This chapter sets out the legal framework and reviews the way that the reparations procedure has developed at the Court. We identify and discuss some of the main decisions by the AC which have helped to clarify procedure and practice in the cases.
- 2. The Trust Fund for Victims.** This chapter examines the central role of the Trust Fund in the reparations process and assesses the strength and weaknesses in its approach to its dual reparations and assistance mandate.
- 3. Accessing Reparations.** This chapter explores the different systems in place to allow victims to access reparations (request-based approach and identification of eligible beneficiaries) and discusses some of the systemic and procedural obstacles to victims' effective and timely access to reparations at the ICC.
- 4. Adequacy of Reparations.** This chapter looks at how the Court has assessed harm for the victims of the crime(s) for which the accused was convicted and the approach of the Chambers to determining the liability of the convicted person.
- 5. Appropriate Reparations.** In this chapter we consider some of the challenges that the judges of

the ICC face in determining the appropriate types and modalities of reparations to be awarded in each case.

- 6. Prompt Reparations.** This chapter considers the procedural and structural barriers at the Court to delivering reparations in a timely manner.
- 7. Conclusions.** The report concludes with a discussion and recommendations on ensuring effective reparations at the ICC. These include monitoring and oversight at both the pre-order and the implementation phases and revision of the Lubanga Principles to make Court-wide, relevant principles which could guide all cases before the ICC.



# 1. Case Overview and Key Procedural Developments



*The first reparations principles were developed in the Lubanga case/©ICC-CPI.*

# 1. Case Overview and Key Procedural Developments

## 1.1 The legal framework

The reparations mandate of the ICC set out in Article 75 of the Rome Statute, is a critical component of its overall framework for giving victims a voice and allowing them to exercise their rights within the international criminal justice system. The inclusion of reparations provisions in the Rome Statute and in the Court's RPE, as well as the creation of the Trust Fund are major advancements in international criminal justice and an improvement on the ad hoc criminal Tribunals which preceded the ICC.<sup>7</sup>

The right to reparation is a well-established principle of international law, both in terms of States between themselves and for individual victims.<sup>8</sup> Redress for victims of gross human rights violations is a feature of numerous international human rights conventions such as the International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention)<sup>9</sup> as well as soft law instruments, including the UN Basic Principles.<sup>10</sup>

As the Trial Chamber (TC) in the case of Thomas Lubanga Dyilo noted, the inclusion of a system of reparations in the Statute "reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which [...] recognises the need to provide effective remedies for victims."<sup>11</sup>

<sup>7</sup> There is no direct reference to reparations in the Statutes of either the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR) other than for restitution. The Tribunals have no power to award compensation but may decide on cases relating to restitution.

<sup>8</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011.

<sup>9</sup> Enforced Disappearance Convention, <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>, Article 24(4) and (5).

<sup>10</sup> United Nations General Assembly, UNGA Res 60/147, 21 March 2006.

<sup>11</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 177.

The reparations framework of the ICC is based on the principle of individual criminal responsibility. Article 75(2) of the Statute provides that the Court may make an order directly against a convicted person. Rule 98(1) of the Rules of Procedure and Evidence (RPE) provides that individual awards of reparations shall be made directly against an accused person. Reparations thus fulfil two main purposes: they oblige those responsible for serious crimes to repair the harm they caused to the victims; and they enable the Court to ensure that offenders account for their acts.<sup>12</sup>

However, the Court's legal texts provide relatively little guidance on how the reparations mandate is to be implemented. Chambers are given 'a real measure of flexibility' to address the consequences of a perpetrator's crimes.<sup>13</sup> This flexibility has yielded positive and negative results. The reparations regime has effectively developed on a case-by-case basis with some inconsistency. While aspects of the law remain unsettled, there have been some progressive developments in the emerging jurisprudence. Significant AC rulings have clarified, among other things, the nature and content of reparations orders; the scope of reparations principles; the responsibility of the convicted person for reparations and eligible beneficiaries for redress.

### 1.1.1 Reparations orders

According to the AC in the *Lubanga* case, the reparations process takes place in 2 phases: a pre-reparations order phase (the proceedings leading to the issuance of an order for reparations) and the implementation phase (during which the implementation of the order for reparations takes place, which the

<sup>12</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 179; *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Order for Reparations (Amended)*, para. 2 ('Amended Order for Reparations').

<sup>13</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 180.



## Case Overview and Key Procedural Developments

Trust Fund may be tasked with carrying out).<sup>14</sup> During the first part of the proceedings, the Trial Chamber may, *inter alia*, establish principles relating to reparations to, or in respect of, victims. This first part of the reparations proceedings concludes with the issuance of the reparations order under article 75(2) of the Statute or a decision not to award reparations.<sup>15</sup>

A reparations order under article 75 must contain, at a minimum, five essential elements:

- (1) it must be directed against the convicted person;
- (2) it must establish and inform the convicted person of his or her liability with respect to reparations awarded in the order;
- (3) it must specify, and provide reasons for, the type of reparations ordered (either collective, individual or both);
- (4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, and identify the modalities of reparations considered appropriate;
- (5) it must identify the victims eligible to benefit from the awards for reparations or set out criteria of eligibility based on the link between the harm suffered and the crimes (the causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case).<sup>16</sup>

<sup>14</sup> *Lubanga*, ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, para. 53.

<sup>15</sup> *Ibid*, para. 54. The proceedings before the Trial Chamber in this first phase are regulated by articles 75 and 76(3) of the Statute and by rules 94, 95, 97, and 143 of the Rules of Procedure and Evidence.

<sup>16</sup> *Rules of Procedure and Evidence*, Rule 85; *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, Decision Establishing the Principles and Procedures to Be Applied to Reparations, para. 179; *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, Order for Reparations (Amended), para. 2 ('Amended Order for Reparations').

The AC noted in *Lubanga* that the inclusion of these five elements in an order for reparations is vital to its proper implementation.<sup>17</sup> As part of the reparations order, the Court may rule that reparations be implemented through the Trust Fund under Article 75(2) of the Statute and Rule 98 of the RPE. This will occur in cases of collective awards; awards made to an intergovernmental, international or national organisation; and individual awards, where it is impossible or impractical to make awards directly to each victim.

## 1.1.2 Reparations principles

The Court has declined to establish general principles governing reparations, as required under Article 75, opting instead to develop the principles through its jurisprudence despite strong urgings from civil society and States to the contrary.<sup>18</sup> The first reparations principles were developed in the *Lubanga* case and have come to be known as 'the Lubanga Principles'.<sup>19</sup> The Chamber drew guidance from international instruments and principles on reparations as well as national, regional and international jurisprudence. The principles address a range of issues, from non-discrimination and non-stigmatisation to modalities, causation and the standard of proof. The AC clarified the scope of the Lubanga Principles, noting that they should be general concepts that can be applied, adapted, expanded upon or added to by future TCs.<sup>20</sup>

<sup>17</sup> *Lubanga*, ICC-01/04-01/06-3129, 03 March 2015, 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, para. 33.

<sup>18</sup> ICC, *Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries*, ICC-ASP/12/38, 15 October 2013, para. 9. ICC, *Report of the Court on principles relating to victims' reparations*, ICC-ASP/12/39, 8 October 2013, para. 4; REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011, p 24-28; *Victims' Rights Working Group, Establishing effective reparation procedures and principles for the International Criminal Court*, September 2011.

<sup>19</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, Decision Establishing the Principles and Procedures to Be Applied to Reparations.

<sup>20</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, 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 ('Appeals Judgment on Reparations'). These Principles have since been adopted/developed in subsequent trial and appeals decisions on reparations.

The Lubanga Principles are admittedly an important starting point for determining how reparations should be approached. Indeed, they have been applied without modification to the *Katanga* and *Al Mahdi* cases.<sup>21</sup> However, as will be seen elsewhere in this report, the absence of general guiding principles that are applicable to all Chambers has contributed to the level of inconsistency in the court's approach to reparations.

### 1.1.3 Beneficiaries of reparations

The Court's jurisprudence has also progressively determined the beneficiaries that may be eligible for reparations. According to Principle 6 of the Lubanga Principles, reparations may be granted to direct and indirect victims, including the family members of direct victims; to anyone who attempted to prevent the commission of one or more of the crimes under consideration; individuals who suffered harm when helping or intervening on behalf of direct victims;<sup>22</sup> and to other persons who suffered personal harm as a result of these offences.<sup>23</sup> Reparations can also be granted to legal entities, as laid down in Rule 85(b) of the Rules of Procedure and Evidence.

The Court has interpreted the concept of "family" to reflect cultural variations and applicable social and familial structures, including the 'widely accepted

presumption' that an individual is succeeded by his or her spouse and children.<sup>24</sup>

The AC in the *Katanga* case has further clarified some aspects of the law concerning family members' entitlement to reparations. Mr Katanga had challenged the TC's definition of indirect victims, suggesting that the interpretation of 'close' family members was too broad because it went beyond the nuclear family (which, he argued, consisted of spouses, their children, and siblings) and included grandparents and grandchildren.

The AC held that the definition of "victims" is not restricted to any specific class of person or categories of family members. Rather, the definition emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim, which can be satisfied by demonstrating a close personal relationship with the direct victim.<sup>25</sup> The Court considered that the term "family members" should be understood in a broad sense to include all those persons linked by a close relationship, including the children, the parents and the siblings.<sup>26</sup>

Importantly, the AC in *Katanga* found that individuals may claim reparations for psychological harm suffered due to the loss of a family member caused by the crimes for which a conviction has been declared. In such cases, they must demonstrate both the existence of the psychological harm and that the harm resulted from the loss of the family member. One way in which an indirect victim may satisfy these requirements is by demonstrating a 'close personal relationship' with the direct victim, supported by evidence and established on a balance of probabilities. Establishing a close personal relationship may prove both the harm and that this resulted from the crimes committed.<sup>27</sup>

<sup>21</sup> See e.g. *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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'*, paras. 174-180 ('Appeals Judgment on Reparations'); *Al Mahdi*, ICC-01/12-01/15-259-Red2, 8 March 2018, *Judgment on the Appeal of the Victims against the 'Reparations Order'*, paras. 54-72, 78-96 ('Appeals Judgment on Reparations').

<sup>22</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, paras. 194-196; *Lubanga*, ICC-01/04-01/06-1432, 11 July 2008, *Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*; *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Amended Order for Reparations*, para. 6. For example, in *Lubanga*, victims included both child soldiers, as well as those who had a close personal relationship with a child soldier (such as a parent) and anyone who attempted to prevent the recruitment of children.

<sup>23</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 194; *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Amended Order for Reparations*, para. 8.

<sup>24</sup> *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Amended Order for Reparations*, para. 7.

<sup>25</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2018 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, para 113-121.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2018 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, para 116.

## Case Overview and Key Procedural Developments

## 1.2 Cases at the reparations phase

Three cases are currently at the reparations phase before the ICC: *The Prosecutor v Thomas Lubanga Dyilo* and *The Prosecutor v Germain Katanga* both arising from the situation in the DRC and *The Prosecutor v Ahmad al-Faqi al-Mahdi*, from the situation in the Republic of Mali. Preparatory reparations proceedings had also commenced in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*, which arose from the Prosecutor's investigations in the CAR. Those proceedings were abruptly discontinued following the AC's acquittal of Mr. Bemba in June 2018.

1.2.1 The *Lubanga* case

Lubanga was convicted by TC I in March 2012 for the conscription, enlistment and use of children under the age of 15 years to participate in hostilities in relation to the conflict in Ituri, DRC in 2002-2003. The first reparations decision in the case was issued in 2012 by TC I. The reparations order was amended by the AC in March 2015, and the amended reparations order transmitted to TC II. In late 2016, the Chamber approved a plan for symbolic reparations and collective reparations in the form of construction of community centres and a mobile programme to reduce stigma and discrimination against former child soldiers submitted by the Trust Fund. The programmatic framework for collective service-based reparations was approved in April 2017.

In December 2017, the Chamber issued its reparations award, setting Mr Lubanga's liability for collective reparations at USD 10,000,000. The Chamber found that, of the 473 applications received, 425 met the requirements to benefit from the collective reparations ordered. It found that there was evidence of hundreds or even thousands of additional victims affected by Lubanga's crimes, and thus allowed for the additional victims to be identified during the implementation phase by the Trust Fund.<sup>28</sup>

This approach is consistent with that of the Inter-American Court of Human Rights and other human rights bodies.

<sup>28</sup> *Lubanga, Case Information Sheet*, ICC-PIDS-CIS-DRC-01-016/17\_Eng.

The *Lubanga* case is significant for being the first-ever decision on reparation before the ICC. The *Lubanga* AC established the minimum elements required for a reparations order, and clarified the principles governing reparations to victims. The AC also confirmed that reparations needed to be made against the convicted person and only for the crimes he was convicted of. Unfortunately, the case is also known for the protracted disagreement between TC II and the Trust Fund concerning the identification of beneficiaries. After more than 10 years since the commission of the crimes and more than five since the conviction of the perpetrator, the *Lubanga* victims are still waiting for the full implementation of the reparations award.

1.2.2 The *Katanga* case

Germain Katanga was found guilty as an accessory in March 2014 of one count of crime against humanity and 4 counts of war crimes committed on 24 February 2003 during an attack on the village of Bogoro, in the Ituri region of the DRC.

In March 2017, TC II awarded individual as well as collective reparations to the victims of the crimes committed by Mr Katanga. The judges assessed each application and found that 297 of the 345 applications met the criteria for the award of reparations. The judges assessed the total monetary value of the harm suffered by the 297 victims at US\$ 3,752,620 and set Mr Katanga's liability at US \$1,000,000. Each of the 297 victims were individually awarded a symbolic compensation of US\$250 as well as collective reparations in the form of support for housing, support for income generating activities, education aid and psychological support.

The Trust Fund decided to complement the payment of the individual and collective awards in the amount of USD 1,000,000. The Board also received a voluntary contribution of €200,000 by the Government of The Netherlands, which included earmarked funding to cover the cost of individual awards in the case. In March 2018, the reparations award was upheld by the AC. The AC also considered the interesting

and novel issue of reparations for victims of transgenerational harm raised by five applicants who alleged that they had suffered harm because of their parents' experience during the attack. Katanga was convicted of. The AC requested the TC to reconsider the matter since no reasons had been given for rejecting the applicants' claim.<sup>29</sup> The TC reconsidered the matter and determined that the claimants had failed to establish the causal nexus between the psychological harm they had personally suffered, and the crimes for which Mr Katanga was convicted. While taking note of the progress of scientific studies on the transgenerational transmission of trauma and, in particular, of two theories – epigenetic transmission, which is biological, and social transmission, which is learned, the Chamber determined that the legal requirement of a link between the harm and the crime had not been met.<sup>30</sup>

The *Katanga* case is significant because it was the first time that the ICC had awarded reparations to individual victims. Victims participating in the proceedings had overwhelmingly expressed their preference for obtaining financial compensation or indemnity to help them address the harm they suffered, including physical and psychological harm, material losses, lost opportunities and costs of medical as well as psychological care. At the end of the process, they each obtained symbolic monetary compensation, in addition to housing and income generation support as well as collective reparations. Though criticised for the delay caused by the individual assessments of the victims' applications, the approach taken by TC II in this regard could also be viewed as an important acknowledgement of the harm suffered by each victim in the case.

### 1.2.3 The *Al Mahdi* case

In the *Al Mahdi* case, the Court ordered a combination of individual, collective and symbolic measures

of reparation for economic and mental harm suffered by victims and the community of Timbuktu as a whole. The case concerned the destruction of 10 mosques and mausoleums in the ancient city of Timbuktu during the 2012 conflict in Mali. The individual victims whose livelihood exclusively depended on the sites were awarded compensation for the economic harm suffered because of the destruction of the protected sites. Collective reparations, including community-based education, return and resettlement programmes as well as a microcredit system, all aimed at rehabilitating the community of Timbuktu, were also ordered.

Collective reparations were also awarded for the mental harm suffered by the community of Timbuktu. The descendants of those whose family members were buried in the damaged mausoleums were also found to be entitled to compensation for mental harm. This was an important recognition by the Court that the destruction of the sites resulted in mental pain and anguish to individual victims, and the community of Timbuktu. Symbolic compensation of €1 was awarded to Mali and to UNESCO for harm to Mali and the international community. The Court set Mr Al Mahdi's liability at €2.7 million. It requested the TFV to implement the reparations ordered, and to complement the reparation measures through assistance programmes to be made available to the broader community in Timbuktu.

Mr Al Mahdi also made an apology during the trial which was videotaped and made available in different languages on the Court's website. The Court ordered the Registry to provide victims with a physical copy of the apology if requested. The *Al Mahdi* case offered the first opportunity for the Court to articulate how property, people and heritage are connected through culture and to identify appropriate measures to address the harm caused to individuals and communities by the destruction of cultural heritage.<sup>31</sup>

<sup>29</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *Judgement 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"*.

<sup>30</sup> ICC Press Release, *Katanga* case, 19 July 2018 Trial Chamber II dismisses the reparations applications for transgenerational harm.

<sup>31</sup> REDRESS, Queen's University Belfast Human Rights Centre, *ICC Reparations Award for Destruction of Cultural Heritage in Mali, An Important Step to Acknowledge and Remedy the Award Caused to Individuals and Communities*, Press Release, London, 17 August, 2017.

REDRESS considers that while acknowledgement of the harm is important, continued engagement of the victim community during implementation is key to successful execution of the reparations award. As we previously noted:

UNESCO and the Malian government [...] prioritised community engagement in the reconstruction and rehabilitation of the sites. The ongoing participation of those communities and individuals affected must continue to be a priority during the implementation of the reparations awarded [...]. Victims must be able to articulate their needs and set their priorities, so they remain engaged in the rehabilitation of the sites and do not feel disconnected to them.<sup>32</sup>

#### 1.2.4 The *Bemba* case

On 21 March 2016, Mr Jean-Pierre Bemba was convicted under Article 28(a) of the Rome Statute as a person effectively acting as a military commander of the crimes of murder and rape as crimes against humanity, and murder, rape and pillage as war crimes. On 8 June 2018, the Appeals Chamber by majority reversed Mr Bemba's conviction, discontinuing the proceedings in relation to certain crimes, and acquitting him of all remaining charges brought against him. The reparations proceedings which had commenced prior to the Appeals Decision were discontinued.

The Bemba acquittal decision raises several legal issues which are beyond the scope of this report. However, the decision of the divided Appeals Bench (3-2 majority) was undoubtedly a disappointing blow to victims who had waited for several years for the completion of trial proceedings to obtain justice and reparation. Given the conviction-based reparations system at the ICC, the possibility for victims to receive reparations at the ICC was effectively terminated. To mitigate the devastating impact of the

decision, the legal representatives proposed a novel idea to the Reparations Chamber to issue a decision recognising the scope and extent of the victimisation and the harm suffered by the victims for use in future reparations proceedings elsewhere. They invited the judges to establish principles in this regard.<sup>33</sup> The Chamber however declined to do so.<sup>34</sup>

Importantly, the Trust Fund decided to accelerate the launch of its assistance mandate in CAR following the acquittal of Mr Bemba. Previous attempts in 2003 to commence the assistance mandate in CAR were thwarted due to security concerns. While this decision has been warmly welcomed, it is unclear whether the same position will be adopted in other cases in the event of an acquittal.

As will be discussed in Chapter 6 of the report, the *Bemba* decision also raises questions concerning the timing of reparations proceedings. More specifically, whether it is prudent to begin a reparations' hearing prior to a determination of the final issues on appeal.

<sup>33</sup> *Bemba*, ICC-01/05-01/08-3649, 12 July 2018, *Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings*, para. 45.

<sup>34</sup> *Bemba*, ICC-01/05-01/08-3653, 3 August 2018, *Final decision on the reparations proceedings*.

<sup>32</sup> *Ibid.*



## 2. The Trust Fund for Victims



*The Trust Fund is carrying out assistance programmes in the DRC and Northern Uganda/©ICC-CPI.*

## 2. The Trust Fund for Victims

The Trust Fund is one of the most important and innovative aspects of the Rome Statute's reparation system for victims. It was established pursuant to Article 79 (1) of the Statute, Rule 98 of the RPE, and Resolution 6 of the ASP, adopted on 9 September 2002, "for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims."<sup>35</sup> The Trust Fund has a dual mandate: to implement Court-ordered reparations and to provide physical and psychosocial rehabilitation or material support to victims of crimes that fall within the jurisdiction of the Court.

The Trust Fund describes its relationship with the Court as a...

...partnership covering three different dimensions – as an independent expert body (during judicial proceedings), and as the implementing and (potential) funding agency, depending on the Court's needs. This role is the same for all cases resulting in a conviction and an order for reparations at the Court.<sup>36</sup>

The Trust Fund is central to the reparations process. This implies that, though independent, the success of reparations at the Court depends to a large extent on the effective and efficient function of the Trust Fund.

This Chapter explores the role and work of the Trust Fund and how its approach to its dual reparations and assistance mandate has impacted the delivery of reparations at the Court.

### 2.1 The assistance mandate

Rule 98 (5) of the RPE provides that the Trust Fund may use its "other resources" (resources it has ob-

<sup>35</sup> *Assembly of States Parties*, Resolution ICC-ASP/1/Res.6, 9 September 2002, *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*.

<sup>36</sup> *Lubanga*, Trust Fund for Victims, *Observations pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-01/04-01/06-3430, para. 19.

tained through voluntary contributions or fundraising rather than seized from the suspect or accused) to undertake specific activities and projects, if its Board of Directors considers it necessary to provide physical, psychological rehabilitation or material support for the benefit of victims and their families. This assistance mandate enables the Trust Fund to undertake projects independent of cases, but also enables the Fund to complement reparations beyond the immediate scope of awards, which may be limited by the criminal process.

The Trust Fund's assistance mandate is aimed at providing victims with physical and psychological rehabilitation and/or material support. Assistance is directed at situations on the ground in a particular country in which there are ongoing investigations by the ICC. Assistance activities may commence once a situation comes under investigation, and after the Trust Fund notifies the Pre-Trial Chamber of its intent to undertake such activities.

To date, the Trust Fund is carrying out assistance programmes in the DRC and Northern Uganda and is planning further programmes in Côte d'Ivoire. Following the acquittal of Mr Bemba and the obvious disappointment to victims, the Trust Fund announced that it would commence its assistance mandate in CAR including activities that would benefit the victims in the *Bemba* case. According to the Trust Fund, in 2018, the assistance programmes in the DRC and northern Uganda are entering a new five-year implementation cycle. The assistance programme in Côte d'Ivoire includes a capacity-building component to strengthen the national government's performance in implementing domestic reparation initiatives.<sup>37</sup>

There is generally positive feedback concerning the Trust Fund's assistance mandate and its potential to positively enhance the ICC's reparations system. Assistance activities have the potential to reach a wide range of victims, as they are not limited to harm stem-

<sup>37</sup> *Assembly of States Parties*, ICC-ASP/17/10, 1 August 2018, *Proposed Programme Budget for 2019 of the International Criminal Court*.



ming from the crimes charged in a particular case. Rather, assistance activities may be directed at any victim who suffers harm as a result of a crime within the Court's jurisdiction, as well as their families. The ability to provide assistance to victims during on-going processes corresponds to international standards on victims' rights, which recognise that victims have a right to assistance which is integral to their right to a remedy and reparation.<sup>38</sup>

The most consistent criticism of the Trust Fund's approach to its assistance mandate concerns the need for timelier commencement of assistance activities and the limited number of countries where assistance projects have so far been implemented. While the Trust Fund's decision to commence its assistance mandate in CAR is generally applauded, concern has been expressed that it could have acted more proactively to mitigate the suffering of CAR victims pending a final determination on reparations.

The Trust Fund has highlighted that while it has every desire to more effectively implement its assistance mandate, there are potential challenges in doing so with respect to victims of a case rather than in relation to those in a 'situation' under investigation. The Trust Fund noted that under the current framework of their assistance mandate, implementing partners identify victims based on crimes in a situation under investigation. Thus, they do not know which victims are connected to a specific case; victims' information is not tracked nor is their information recorded and passed on to the Trust Fund. The Trust Fund also noted that one practical benefit of the assistance mandate is that victims can participate and benefit from valuable help without being engaged in a case involving a specific perpetrator.

Concerns have also been expressed that the Trust Fund needs to diversify its implementing partners and take a more hands-on approach to overseeing how the projects are implemented. It was also felt

that the Trust Fund should conduct more outreach activities in the countries in which it was implementing its assistance mandate to ensure greater visibility.

There are also concerns regarding the sustainability of the Trust Fund's assistance mandate. In a report on a monitoring visit to Northern Uganda organised by the Embassy of Ireland in the Hague and the Trust Fund, it was noted that while the Trust Fund is doing vital work in Northern Uganda, it had no specific way of assessing how many additional victims would require support going forward.<sup>39</sup> The monitoring team stressed that it was important for the Trust Fund to be able to reasonably project the volume of potential beneficiaries in relation to the overall situation of residual harm, a methodology that would be relevant for future Trust Fund programming in other countries.<sup>40</sup>

The report also noted that given the need for long term assistance of most victims, and the temporal nature of Trust Fund programmes, there was a need for enhanced engagement by State officials to ensure the sustainability of programmes.<sup>41</sup>

REDRESS considers that the Trust Fund's assistance mandate is a critical way to fill the gap that currently exists regarding reparations at the ICC. The fact that assistance is not linked to a particular case ensures that victims, who may be excluded for legal or technical reasons from applying for reparations, may nevertheless receive some measure of redress for the harm suffered. The Trust Fund does need to move beyond the countries where it has focused its attention for several years and expand into others. Naturally, an expansion of its assistance mandate

<sup>38</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011., p. 19, fn. 104.

<sup>39</sup> Embassy of Ireland, the Hague, Report of Ireland-Trust Fund for Victims monitoring visit to Northern Uganda (Monitoring Visit Report), para 5(i). The mission, organised by the Embassy of Ireland and the Trust Fund, facilitated the visit of eleven states parties and the President of the Assembly of States Parties to Northern Uganda in February 2018 to assess the Trust Fund's work in that area. The report was shared with REDRESS during the 17th ASP meeting in The Hague. More information about the visit can be found [here](#).

<sup>40</sup> *Ibid*, Monitoring Visit report.

<sup>41</sup> *Ibid*, Monitoring Visit report, para 5(ii).

will require proper planning and assessment and an increased fundraising drive by the Trust Fund.<sup>42</sup>

## 2.2 The reparations mandate

Once the Court has issued a reparations order, the Trust Fund is required to prepare a DIP setting out proposed activities corresponding with the modalities identified by the relevant Chamber.<sup>43</sup> The plan is based on consultations with the Registry, the Legal Representatives of victims, the defence, local authorities and experts (as needed). After hearing from the parties, the Trial Chamber may then approve, reject or modify the plan. When the DIP is approved, the Trust Fund launches an international competitive bidding process to select implementing partners on the ground. The Trust Fund is required to submit periodic progress reports to the Chamber throughout the implementation phase.

The Trust Fund's role in preparing and delivering DIPs is a crucial part of the reparations process. The DIPs submitted by the Trust Fund have been criticised by the judges for lack of specificity and non-compliance with the Reparations Order, failure to outline concrete proposals, incompleteness and inaccuracy.<sup>44</sup> TC II in *Lubanga* was critical of the Trust Fund's first DIP in November 2015 for 'presenting only a summary description of the prospective programs as well as questions relating to their development and management.'<sup>45</sup> The *Al Mahdi* Chambers noted that despite requesting two additional months to complete the DIP, the Trust Fund's

<sup>42</sup> Having been informed of the Trust Fund's plans to expand its assistance mandate in CAR, Kenya, Georgia and Mali, the Committee on Budget and Finance noted that proper planning and anticipation matched with the available resources should be considered before expanding assistance programmes. *Assembly of States Parties, ICC-ASP/17/15*, 29 October 2018, *Report of the Committee on Budget and Finance on the work of its thirty-first session*, para 134-135.

<sup>43</sup> *Regulations of the Trust Fund for Victims*, Regulations 54 and 57.

<sup>44</sup> See for example, *Al Mahdi*, ICC-01/12-01/15-273-Red, 12 July 2018, Public Redacted Version of '*Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations*', para 18 where the Chamber noted that it expected that the Updated Implementation Plan would not just be 'broad ideas' but would contain 'concrete, thought-through, budgeted and staffed specific projects.'

<sup>45</sup> *Lubanga*, ICC-01/04-01/06-3198-tENG, 9 February 2016, *Order instructing the Trust Fund for Victims to supplement the draft implementation plan*, para. 20.

proposal was flawed, incomplete and contained errors.<sup>46</sup> In *Al Mahdi*, where proposals in the DIP were sufficiently substantiated, the Chamber approved them with appropriate amendments, and ordered that more specific measures were to be submitted in an updated plan.<sup>47</sup>

The process for preparation and approval of the DIPs raises both procedural and substantive questions which merit debate. First, how prescriptive should the reparations orders issued by the judges be in terms of setting the parameters of the DIP? Second, should the judges provide more guidance in assisting the Trust Fund to prepare a concrete DIP or allow the latter to use its discretion? Finally, what level of detail should be included in a DIP?

REDRESS considers that the importance of the DIP to the successful implementation of reparations requires that the judges provide specific guidance to the Trust Fund from the outset concerning the detail required. In our view, a comprehensive reparations order forms the basis of a well prepared DIP. Once the order has been issued and the beneficiaries identified by the Chamber, the Trust Fund should put together a DIP for the judges' approval which includes concrete, detailed and fully-substantiated proposals based on the reparation order and information obtained from the victims themselves or via their Legal Representatives. The Trust Fund needs to ensure that a consultative approach is taken to the development of the DIPs. In this regard, the continued collaboration between the LRVs, the Registry and Trust Fund is crucial.

## 2.3 A matter of capacity

The Trust Fund's challenges in preparing DIPs and implementing its reparations mandate appear to be impacted by two important considerations. The first is prevailing security problems in the countries

<sup>46</sup> *Al Mahdi*, ICC-01/12-01/15-273-Red, 12 July 2018, *Public Redacted Version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations*, paras. 12-14.

<sup>47</sup> *Ibid*, paras. 17-18.

where it works which impedes sustained field work. More fundamentally, the TFV has struggled with insufficient capacity to meet its rising workload. In its submissions as part of the process for approval of the programme budget for 2019, the Trust Fund pointed to a 'significant surge' in workload related to its legal work, field activities, monitoring and evaluation, and fundraising. The Trust Fund noted that the number of cases at the reparations phase and the imminent conclusion of the trial of Bosco Ntaganda in the DRC situation, had significantly stretched its legal capacity to lay the foundation for and guide the implementation of reparations awards, including victim identification and verification, as well as overall functional steering of quality control and reporting to Trial Chambers.

The Trust Fund further noted that field activities had also increased due to the need to support the preparation of DIPs and provide oversight for operations and the administration of programme implementation in connection with reparations awards.<sup>48</sup> It complained that the increasing workload had eroded both its responsiveness to proceedings – including its ability to submit filings by the requested deadlines- and its ability to exercise the desired levels of quality management and control throughout the drafting process for complex filings.<sup>49</sup>

Despite its admitted capacity deficit, the Trust Fund appears not to have prioritised the recruitment of staff to fill much-needed vacancies in a timely manner. The Committee on Budget and Finance (CBF) – a subsidiary body of the ASP responsible for making recommendations concerning the Court's budget – expressed concern at 'the high number of vacancies

<sup>48</sup> *Assembly of States Parties*, ICC-ASP/17/10, 1 August 2018, *Proposed Programme Budget for 2019 of the International Criminal Court*.

<sup>49</sup> *Ibid.* See also *Lubanga*, ICC-01/04-01/06-3428, 10 October 2018, *Decision on Trust Fund for Victims' request for time extension*. The Chamber noted that 'In support of its Request, the TFV indicates that due to relevant staff being on mission and 'pressing deadlines in other proceedings', its staff 'was not able, for reasons outside its control, to work on the requested observations' until 1 October 2018. The TFV further indicates that its limited staff is 'currently occupied with a major submission due on 2 November 2018 in another reparations proceedings.'

in the TFV, including the position of a Fundraising and Visibility Officer (P-3).<sup>50</sup> The CBF noted that:

"... over recent years, the STFV has significantly underspent its approved budget (Major Programme VI) with budget implementation rates as low as 90 per cent or less, dropping to 78.4 per cent in 2017, due in good part to the fact that approved posts were left vacant."<sup>51</sup>

It called upon the Trust Fund to ensure proper planning in order to finish the ongoing recruitment processes with a view to completing its organizational structure.<sup>52</sup>

REDRESS considers that, given the pivotal role played by the Trust Fund in implementing reparations and assistance to victims, it is critical that its internal structure (including its staffing and management) is organised to ensure that it has the capacity to fulfil its mandate. This is particularly important given the election of a new Chair of the Board in December 2018 who will have a critical role to play in leading the Trust Fund during its most active phase.

## 2.4 Funding of reparations awards

Under the ICC reparations system, the convicted person is liable for the cost of reparations. As a secondary option when the convicted person is indigent, reparations may be funded through the Trust Fund's 'other resources'.<sup>53</sup> Without the Trust Fund, there would be little chance of enforcing reparations awards at the ICC

<sup>50</sup> *Assembly of States Parties*, ICC-ASP/17/15, 29 October 2018, *Report of the Committee on Budget and Finance on the work of its thirty-first session*, para. 136. Though independent for operational purposes, the Trust Fund falls under the administrative framework of the ICC and as such is included in the overall Court structure in respect to staffing and other administrative matters. In consultations with REDRESS, the Executive Director indicated that the Trust Fund is now at the final stage of recruitment of the fundraising and visibility officer.

<sup>51</sup> *Assembly of States Parties*, ICC-ASP/17/5, 31 May 2018, Report of the Committee on Budget and Finance on the work of its thirtieth session, para 125.

<sup>52</sup> *Ibid.*

<sup>53</sup> REDRESS, *Intervention on the occasion of the 8th Annual Meeting of the Board of Directors of the ICC Trust Fund for Victims*, 21 March 2011.

since all the accused in the current cases have been found to be indigent. Thus, tracing, freezing and seizing of assets of convicted persons for eventual reparations orders must be a priority for the ICC and states.

The Regulations of the Trust Fund provide for multiple sources of funding.<sup>54</sup> They are also quite prescriptive concerning how and in what circumstances funds can be used. For example, it is for the Trust Fund's Board of Directors to determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and to advise the Court accordingly.

At the heart of the issue of funding the Trust Fund is the question of sustainability. The ICC reparations system is almost completely dependent on the Trust Fund's ability to secure funding. The Trust Fund aspires to raise a total of €40 million in voluntary contributions and private donations by 2021, to implement and complement the payment of reparations orders and to expand the implementation of assistance programmes in as many situations as possible before the Court. Each year, the Trust Fund has only a fraction of what it needs to fulfil its mandates.

The CBF has urged the Trust Fund to diversify its funding sources and develop its fundraising capacity, as the current dependence on voluntary contributions from ICC State Parties is unsustainable.<sup>55</sup> Thus, in order to develop a more diverse fundraising strategy, the Trust Fund should enhance its communications capacity, to become a more visible and well-known institution.<sup>56</sup>

<sup>54</sup> Regulations of the Trust Fund, Article 21.

<sup>55</sup> Assembly of States Parties, ICC-ASP/17/15, 29 October 2018, Report of the Committee on Budget and Finance on the work of its thirty-first session. The Trust Fund had proposed to issue a TFV bond as part of its fundraising strategy and to diversify its funding sources. However, the CBF was not in favour of the plan. It noted that, 'As for the fundraising initiative by the TFV through issuing "TFV Bonds" in the amount of €1 billion with a maturity of 20 years, the Committee was of the opinion that such a project would have unforeseeable implications transcending the TFV and which could affect the Court, not only in legal and budgetary terms but also in terms of reputation. The Committee doubted that the bond initiative is effectively tailored to the current and long-term needs of the TFV and questioned whether it should be part of its immediate priorities.

<sup>56</sup> *Ibid*, para. 14.

Raising funds from public and private sources must become one of the Trust Fund's priorities.

It is easier for the Trust Fund to fundraise to complement reparations awards in a particular case once the Chamber has decided on the parameters of a reparations award and approved the implementation plan submitted by the Trust Fund. This approach would also be helpful to raise funds from private sources, including individuals, foundations and private profit and non-profit organisations.<sup>57</sup> As an example, the Trust Fund was able to successfully fundraise for the total amount of the individual reparations awards to victims in the *Katanga* case once the amount was known.

However, to complement the Trust Fund's efforts, more strategic attention must be paid to tracing, freezing, seizing and transfer of the assets of convicted persons for the benefit of reparations. Despite the existence of the 2017 Paris Declaration, which includes detailed recommendations for advancing co-operation between the ICC and States Parties in financial investigations and asset recovery, there is little indication that real progress has been made in this area.

The Paris Declaration is not legally binding and its language has not been effective in pushing States to act.<sup>58</sup> However, it is encouraging that the issue has remained on the ASP agenda. In its 2018 *Resolution on Strengthening the International Criminal Court and the Assembly of States Parties* (Omnibus Resolution), the ASP reiterated the importance of effective procedures and mechanisms that enable States Parties and other States to cooperate with the Court in relation to the identification, tracing and freezing or seizure of proceeds, property and assets as expeditiously as

<sup>57</sup> *Lubanga*, Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, para. 247.

<sup>58</sup> *Ibid*, para 1. The Paris Declaration invites the States Parties [...] to consider the possibility of setting up, reviewing or strengthening the implementation of domestic cooperation laws, procedures and policies, to increase the ability of States Parties to cooperate fully with the ICC in the area of financial investigations and asset recovery, in accordance with the Rome Statute. There is no procedure for follow-up in the Declaration.

possible.<sup>59</sup> To this end, the Bureau of the Assembly was mandated, through its Working Groups, to continue discussion on financial investigations and the freezing and seizing of assets as set out in the Paris Declaration.<sup>60</sup>

## 2.5 Synergies and strategies

The Trust Fund's effectiveness depends to a large extent on its ability to work effectively with other actors who play a role in the reparations process at the Court. Indeed, coordination amongst the different actors ensures a more efficient and effective system. For example, Legal Representatives and the Registry work closely with the Trust Fund to ensure the availability of relevant data and information from victims for the purposes of preparing draft implementation plans as well as for the execution of reparations awards.

REDRESS consultations with Registry staff indicate that there is potential for greater collaboration and cooperation between the Trust Fund and relevant sections of the Registry such as the Victims Participation and Reparations Section (VPRS) and the Public Information and Outreach Section in implementing reparations. It was suggested that more attention should be paid to utilising existing structures rather than on additional resources that were needed.<sup>61</sup> It was further suggested that there should be a mapping exercise of the existing resources and areas of potential cooperation between the Registry and the Trust Fund. Both should then formally agree concerning an appropriate division of labour.<sup>62</sup>

In addition to ensuring effective synergies amongst relevant actors, REDRESS considers that the Court as a whole would benefit from clear strategic direction

governing reparations at the Court. The last interim update of the Court's Strategic Plan of 2013-2017 was in 2015 and the Court indicated that it planned to 'review the structure and content of its strategic plan with a view to having a simpler high-level court-wide plan, complemented by more detailed organ-specific plans.'<sup>63</sup> The revision process is still ongoing and is expected to be completed in 2020.

The ICC's Victims Strategy is outdated and there are no clear indications when the Court will develop a new strategy that is coherent, comprehensive and which sets out its strategic goals for realising victims' rights including the right to reparations.<sup>64</sup> The Trust Fund's 2014-2017 Strategy was extended into 2018 and is also due to be updated. The new Strategy will be developed during a period of significant activity for the Trust Fund in relation to its reparations mandate, whereas most of the previous activity had been focused on its assistance programmes.

The absence of updated strategic plans for the Court and the Trust Fund to provide guidance on how each organ will approach reparations is a major gap in the Court's planning process which is likely to contribute to lack of coordination, misunderstanding concerning different roles, duplication and delays.

## 2.6 Reparative complementarity

To be truly effective and meaningful, reparations at the ICC should be viewed more holistically. The ICC and the Trust Fund are limited in terms of what can realistically be achieved through the reparations' framework and with limited resources. The complementarity regime on which the ICC is built places the primary obligation on states to investigate and prosecute (and, by extension, deliver justice in) international crimes, with the ICC only assuming jurisdiction where States have failed to act or are unwilling or unable to act. This complementary relationship arguably extends to reparations.

<sup>59</sup> *Assembly of States Parties*, Resolution ICC-ASP/17/Res.5, 12 December 2018, *Strengthening the International Criminal Court and the Assembly of States Parties*.

<sup>60</sup> *Ibid*, para 3 (h).

<sup>61</sup> REDRESS consultations with senior Registry staff member.

<sup>62</sup> *Ibid*. A mapping exercise of the areas of synergy between the Trust Fund and the Registry was carried out for submission to the CBF. The results of that exercise are referred to in the CBF's report of its 31st session but is not publicly available.

<sup>63</sup> ICC, *International Criminal Court Strategic Plan 2013-2017 (interim update July 2015)*, p. 2.

<sup>64</sup> ICC, *ICC-ASP/11/38, Court's Revised strategy in relation to victims*.

State Parties under the Rome Statute are obliged to cooperate with the Court in the enforcement of reparations orders. However, the Rome Statute does not give the ICC jurisdiction over states for reparations and thus the Court can only invite states to complement reparations ordered in each case.<sup>65</sup> Irrespective of the ICC's approach to reparations, States Parties have a general responsibility to afford redress to victims within its borders that have suffered egregious abuses.

In the *Katanga* case, the legal representative of victims submitted that the DRC should establish a national reparations programme that would complement any reparations award handed down by the ICC. This makes sense given the limited scope of ICC reparations awards. It has been suggested that national reparations programmes can be more inclusive in terms of eligible victims and forms of reparations than the ICC.<sup>66</sup>

The Trust Fund's engagement with national governments in countries in which it operates will be critical to the sustainability of programmes under both the assistance and reparations mandate. Building a clinic for example, without support and commitment from the government that it will be maintained will result in short-lived efforts to redress the harm suffered by victims.

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<sup>65</sup> *Katanga*, ICC-01/04-01/07-3728-tENG, 24 March 2017, *Order for Reparations pursuant to Article 75 of the Statute*, para 324.

<sup>66</sup> *Ibid*, para 321 and accompanying footnote. See also *Katanga, Requête des victimes sollicitant par l'entremise de la Chambre l'intervention de la République Démocratique du Congo au processus des réparations*, ICC-01/04-01/07-3674, para. 12.

### 3. Accessing Reparations



*People watch a screening of the start of the trial of Dominic Ongwen in Gulu, Uganda, as part of the ICC outreach activities/©ICC-CPI.*

### 3. Accessing Reparations

Ensuring effective and timely access to reparations has proven to be complicated for the Court and challenging for victims. Currently, there are two possibilities available to ensure that victims that have suffered harm can access reparations. Victims may request reparations by completing an application form (individual applications procedure) or the Court may determine eligibility on its own motion ('identification of beneficiaries' procedure). In the latter case, the Chamber would invite the Registry, OPCV or the Trust Fund to identify and screen other potential beneficiaries. Both approaches have been used in the cases so far with varying degrees of success and some challenges, and no general principles exist to guide individual chambers on the most appropriate procedure to be employed.

The problem with the diverse approach to ensuring victims access to reparations is the lack of certainty for victims before the Court. Furthermore, there is a risk of differential treatment amongst victims even within the same case. As will be discussed in this Chapter, inconsistency of approach has potentially allowed for factors unrelated to an individual's victimisation to affect their eligibility.

#### 3.1 The individual applications procedure

Rule 94 of the RPE sets out the requirements for individual applications for reparations. The application must be made in writing, filed with the Registrar and should include, among others, a description of the injury, loss or harm; information about the applicant's identity; a description of the assets of the alleged perpetrator (if restitution is sought); claims for compensation or rehabilitation where relevant; location and date of the incident and where possible, of the person the victim believes is responsible for the injury, loss or harm.

VPRS is responsible for ensuring the availability of the standard application forms for victims' participation in proceedings and for requesting reparation. It receives applications from victims and is involved in collecting missing information in accordance with Regulation 88(2) of the Regulations of the Court. VPRS

then processes and presents victims' applications to the relevant Chamber with an accompanying report.

An individual applications process has benefits as well as potential drawbacks for victims. In some cases, the process of submitting a reparations' request itself may be empowering; however, the process can also potentially be very distressing, particularly in cases involving crimes of sexual violence. Victims are often unable to furnish proof of the harm they have suffered — evidence may have been destroyed or lost in the years that have elapsed since the crimes were committed. Likewise, ongoing conflict, corruption, absence of government services, prohibitive costs, displacement or customary practices may also make it difficult to obtain documentation.

Engaging in this sort of process with a representative of the Court necessarily raises victims' expectations.<sup>67</sup> If the eventual award is directed only at the group or community level, victims will naturally be frustrated. In addition, being identified as a victim may involve a risk of retaliation or lead to stigmatisation. As observed by one legal representative during REDRESS consultations, protective measures can mitigate but not entirely eliminate this risk. In addition to the impact on victims, engaging in an individualised application process has obvious implications for the Court's resources in terms of processing the requests.

Another important issue is whether the application for participation in the trial and for reparations should be integrated into one procedure. The Appeals Chamber made it clear in the *Lubanga* principles, that all victims should be treated fairly and equally concerning reparations, "irrespective of whether they participated in the trial proceedings."<sup>68</sup> Nevertheless, in practical terms

<sup>67</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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'*, paras. 66-69; *Lubanga*, ICC-01/04-01/06-3396-Corr-Red-ENG, 5 April 2018, *Appeal Brief against the 'Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu' Handed Down by Trial Chamber II on 15 December 2017*, paras. 29-30.

<sup>68</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 187, affirmed by *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Amended Order for Reparations*, para. 12.



there are a number of ways in which the exercise of these rights may be connected. The submission of a formal request for reparations to the Registry under Rule 94 of the RPE is very similar in substance to the procedure for applying to participate in proceedings.<sup>69</sup> As such, some actors have advocated for integrating these procedures, at least when it comes to the forms themselves.<sup>70</sup>

An integrated procedure would have several benefits. First, as the Single Judge of the Pre-Trial Chamber in *Al Hassan* explained, requiring victims to give an account of their victimisation once, for both purposes, “obviat[es] the need for them to revisit the traumatic events, which they may not necessarily wish to relive.”<sup>71</sup>

Second, allowing VPRS to begin collecting such requests at the pre-trial phase may reduce any potential delays during the reparations phase (provided information collected is detailed enough and is kept up-to-date).

Third, there are fears since the *Bemba* case, that allowing victims to register their interest in reparations at an early stage in the proceedings may be the only way to ensure they are not later excluded from the process. During the course of the *Bemba* reparations proceedings, it was proposed that reparations might be limited to those who had engaged in the proceedings *prior* to the commencement of the reparations phase.<sup>72</sup>

<sup>69</sup> Article 75(1) of the Statute provides that reparations proceedings can be triggered either by requests filed by victims or on the Court’s own motion. Rule 94 of the RPE sets out the procedure for making such a request: requests must be filed in writing with the Registrar and must provide information relating to the harm suffered, the cause of that harm, the form of reparation sought, along with supporting documentation.

<sup>70</sup> See e.g. *Independent Panel of Experts Report on Victim Participation at the International Criminal Court* (The Hague, April 2013), para. 64(v); *Al Hassan*, ICC-01/12-01/18-28, 9 May 2018, *Registry Observations on Aspects Related to the Admission of Victims for Participation in Proceedings*, paras. 7-9.

<sup>71</sup> *Al Hassan*, ICC-01/12-01/18-37-tENG, 24 May 2018, *Decision Establishing the Principles Applicable to Victims’ Applications for Participation*, para. 23.

<sup>72</sup> The panel of experts proposed that no new period should be opened for the identification of additional potentially eligible victims. They did suggest, however, that the Court consider making an exception for surviving victims of rape and children born of rape given the particularly severe consequences for these victims. *Bemba*, ICC-01/05-01/08-3575-Anx-Corr2-Red, 30 November 2017, *Expert*

The justification was that allowing new requests in the reparations phase would have involved a number of ‘practical challenges’, such as difficulties in reaching additional victims and the possibility of a significant delay in delivering reparations.<sup>73</sup> If implemented by the Chamber, this approach could have excluded a significant number of victims who had not yet had the opportunity—often for reasons “beyond their control”<sup>74</sup>—to access the Court.

There are however several disadvantages involved in making a procedural link between participation and reparations processes. First, there are serious concerns about the possibility of heightened expectations and the ability of the relevant Court staff to manage this. The impact of the *Bemba* acquittal on victims in CAR appears to have heightened fears concerning expectation management.

Second, from a practical perspective, a victim’s situation evolves over time. Given the protracted nature of ICC proceedings, information gathered in the pre-trial phase may not reflect victims needs and wishes at the time the reparations phase gets underway. One LRV cited the example of child soldiers who only appreciate the full extent of the harm they have suffered many years later. Other forms of harm, such as transgenerational harm, may not become apparent until many years afterwards.

*Report on Reparation*, paras. 47-50. A total of 5229 victims were authorised to participate in the trial. The deadline for applications to participate in the trial was set by the Chamber at 16 September 2011 (i.e. part-way through the trial). *Bemba*, ICC-01/05-01/08-3343, 21 March 2016, *Judgment pursuant to Article 74 of the Statute*, paras. 18-19.

<sup>73</sup> *Bemba*, ICC-01/05-01/08-3575-Anx-Corr2-Red, 30 November 2017, *Expert Report on Reparation*, paras. 45-46.

<sup>74</sup> The experts acknowledged that the reasons why some victims may not have submitted forms for participation and/or reparations included: the suspension of public information and outreach activities relating to victim participation and reparations in 2012 for security reasons; the psychological impact of the crimes, which left victims ‘too numb and paralyzed to act in response to outreach of any kind’; ongoing insecurity and population displacement which made it difficult to gain access to information and submit forms; and the fact that victims had been told they would have the opportunity to apply for reparations later, upon conviction. *Bemba*, ICC-01/05-01/08-3575-Anx-Corr2-Red, 30 November 2017, *Expert Report on Reparation*, paras. 42-43.

Third, when a reparations request is prepared at this early stage without the involvement of a lawyer, it can potentially damage a victim's chances of accessing reparations. As REDRESS learned from legal representatives who had received application forms that had been filled in by intermediaries or VPRS staff, the information collected during the pre-trial phase may often be inaccurate, incomplete or unreliable. Despite efforts to ensure accuracy, certain factors including reluctance on the part of victims to give extensive details of their victimisation at an early stage (for example victims of sexual violence);<sup>75</sup> or poorly trained intermediaries who lack details and understanding about the scope of the case could impact the accuracy or completeness of the forms. In addition, it is often the case that victims may not be given the opportunity to correct mistakes, either at the time they complete the form or at a later stage in the proceedings and unavailability of interpreters may result in miscommunication. Despite these issues, the Court often treats these forms as if they have been prepared as rigorously as a witness statement. Thus, if the information contained therein is inaccurate or incomplete, providing it to the Court at this early stage may ultimately harm a victim's chances of accessing reparations.<sup>76</sup>

Irrespective of the approach adopted, it is important that victims are not unfairly excluded from accessing reparations if they choose not to participate in the trial proceedings. Victims should certainly not be excluded arbitrarily based on flaws in the application form which may be attributable to several factors beyond their control.

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<sup>75</sup> See e.g. *Bemba*, ICC-01/05-01/08-3575-Anx-Corr2-Red, 30 November 2017, *Expert Report on Reparation*, para. 48 (stating 'victims of rape often find it very difficult to participate in a legal process or to submit an application for reparations, given the sensitivity of the information they will have to provide, the trauma associated with reviving the memory of the events, and the risk of further stigmatisation and scorn'). See also *Bemba*, ICC-01/05-01/08-3581, 1 December 2017, *Soumissions conjointes des Représentants légaux des victimes d'éléments d'informations supplémentaires en vue de l'Ordonnance en réparation*, paras. 27-28.

<sup>76</sup> *Lubanga*, ICC-01/04-01/06-3396-Corr-Red-tENG, 5 April 2018, *Appeal Brief against the 'Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu'* Handed Down by Trial Chamber II on 15 December 2017. Similarly, for victims who also appear as witnesses, there is a risk that such forms will be disclosed to the Defence who might use any inconsistencies to impugn their credibility at trial.

### 3.2 Identifying reparations beneficiaries: flexibility versus predictability

Applying a purely request-based procedure at the ICC would exclude a significant number of potential beneficiaries of reparations. However, devising the most effective procedure for identifying additional beneficiaries reflects the tension between ensuring judicial flexibility to respond to the specifics of each case and predictability for the victims concerning the approach that will be taken.

The ICC's legal framework gives judges discretion to develop a procedure for identifying reparations beneficiaries. Some degree of flexibility is necessary given the uniqueness of each case. Moreover, as discussed in more detail below, the procedure adopted is dependent on the type and modalities of reparations envisaged and the nature of the beneficiary group involved. For example, an individual award for compensation necessarily involves identifying *each* beneficiary before payment is made. Collective service-based awards which benefit individual members of a victim group may require a less rigorous screening process. Chambers therefore need to be able to tailor the procedure to the case at hand.

However, the flexibility accorded to Chambers has resulted in divergent approaches to identifying beneficiaries in the cases to date. The *Katanga* case involved rigorous analysis of formal reparations requests by the Trial Chamber itself. There, the Chamber assessed all 341 requests and allowed no possibility for additional victims to come forward during the implementation of the award.<sup>77</sup> In contrast, the *Al Mahdi* case involved administrative screening during the implementation of the reparations order. There, the Chamber considered that the 139 reparations requests before it

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<sup>77</sup> *Katanga*, ICC-01/04-01/07-3728-tENG, 24 March 2017, *Order for Reparations pursuant to Article 75 of the Statute*; *Katanga*, ICC-01/04-01/07-3804-Red, 19 July 2018, *Décision relative à la question renvoyée par la Chambre d'appel dans son arrêt du 8 mars 2018 concernant le préjudice transgénérationnel allégué par certains demandeurs en réparation*. See also *Katanga*, ICC-01/04-01/07-3436-tENG, 7 March 2014, *Judgment pursuant to Article 74 of the Statute*, para. 36.

'pale[d] in comparison to the number of persons who were harmed'. It therefore ordered that the Trust Fund determine eligibility to benefit from individual awards, ensuring that additional victims could still come forward.<sup>78</sup> The *Lubanga* case involved a combination of both these approaches.

The unpredictability caused by these divergent approaches has been exacerbated by two factors. The first is that different options for identifying beneficiaries have been developed in an *ad hoc* manner by individual Chambers, often with the need for adjustments on appeal and many procedural questions remaining unanswered.<sup>79</sup> The second is the tendency of Chambers to settle on a procedure at a very late stage in the proceedings.

REDRESS considers that reparations principles could usefully outline some of the possible procedures a Chamber could adopt for identifying beneficiaries and their practical implications. For example, if the

<sup>78</sup> In light of Mr. Al Mahdi's guilty plea, only eight victims had been accepted to participate at the time of the verdict and only 139 had had the chance to submit requests for reparations by the time of the reparations order. Statistics provided by VPRS on 23 August 2018; *Al Mahdi*, ICC-01/12-01/15-171, 27 September 2016, *Judgment and Sentence*, para. 6; *Al Mahdi*, ICC-01/12-01/15-190-Red-tENG, 3 January 2017, *Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation*, para. 8. In light of the small number of requests, as well as the security situation in Mali which made outreach and victim engagement extremely difficult, the Chamber considered it would be impracticable for it to attempt to identify and assess all potential beneficiaries itself. *Al Mahdi*, ICC-01/12-01/15-236, 17 August 2017, *Reparations Order*, paras. 5, 141-146; *Al Mahdi*, ICC-01/12-01/15-259-Red2, 8 March 2018, *Judgment on the Appeal of the Victims against the 'Reparations Order'*, paras. 54-72. See also *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012*, para. 150. The administrative screening process was only just getting underway at the time of the publication of this Report. See e.g. *Al Mahdi*, ICC-01/12-01/15-275, 10 August 2008, *First Registry Report on Applications for Individual Reparations*.

<sup>79</sup> For example, the Appeals Chamber is currently considering in the *Lubanga* case whether a Trial Chamber is itself permitted to assess individual eligibility to benefit from collective reparations programmes, or whether this must be left to Trust Fund during the implementation phase. See *Lubanga*, ICC-01/04-01/06-3396-Corr-Red-tENG, 5 April 2018, *Appeal Brief against the 'Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu' Handed Down by Trial Chamber II on 15 December 2017*.

Chamber is contemplating individual awards, the identification process with respect to those awards will be primarily request-based.<sup>80</sup> Where only a small number of beneficiaries is anticipated, and if they are easily identifiable, the Chamber may choose to assess those requests itself and make a final determination as to the eligibility of each applicant. As noted above, this occurred in *Katanga*, where the pool of potentially eligible victims was limited to the inhabitants of one village.<sup>81</sup>

If the Chamber considers it impossible or impracticable to identify all individual beneficiaries prior to issuing its reparations order, it may choose to rely upon the Trust Fund to do this during the implementation of the award (with the support of VPRS).<sup>82</sup> This may be the case where the Chamber cannot be confident that all potentially eligible victims will have an opportunity to submit a request in the time available (as was the case in *Al Mahdi*, where the guilty plea meant victims had a very short time in which to come forward). This may also be the case where the number of potentially eligible victims is so high that it is too time-consuming and expensive for the Chamber to conduct individual eligibility assess-

<sup>80</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012*, para. 149. The Chamber is also permitted by Article 75(1) to act 'on its own motion in exceptional circumstances'. In such cases, Rule 95 requires that potential beneficiaries be notified that the Court intends to proceed on its own motion, in order to allow them either to make a request for reparations or to request that the Chamber not include them in the order.

<sup>81</sup> The procedure adopted by Trial Chamber II was nevertheless heavily criticised by the Appeals Chamber, which stated that 'when there are more than a very small number of victims, [individual findings in respect of every request] is neither necessary nor desirable', in particular in circumstances where a subsequent individual award 'bears no relation to that detailed analysis'. *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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'*, paras. 63-73.

<sup>82</sup> Rule 98(2) of the RPE provides that the Court may order that an award for reparations be deposited with the Trust Fund where at the time of making the order it is 'impossible or impracticable to make individual awards directly to each victims'. In such circumstances, the Trust Fund will identify and verify members of the beneficiary group in accordance with its Regulations. See Regulations of the Trust Fund for Victims, Regulations 60-64.

ments itself, as was arguably the case in *Lubanga*.<sup>83</sup> In such cases, the Trial Chamber will set out precise eligibility criteria in its reparations order and will merely supervise the administrative screening process conducted by the Trust Fund.<sup>84</sup>

If the Chamber is contemplating collective awards, a request-based process involving identification of individual beneficiaries might not be necessary or appropriate. For example, symbolic awards—such as the commemorative initiatives envisaged in *Lubanga* or the publication of Mr Al Mahdi’s apology—can be implemented without the need to assess individual requests. The same applies to awards aimed at benefiting a particular group or the community as a whole, such as the rehabilitation of protected buildings ordered in *Al Mahdi*. On the other hand, if the collective award is service-based and will therefore benefit

individuals, some form of screening may be required to determine who should benefit from such services. Examples include provision of medical treatment, mental health services, physical rehabilitation or vocational training. In some cases, the Chamber may wish to rely on the Trust Fund to conduct an administrative screening process. Alternatively, the Chamber may allow for the implementing partners involved in providing such services to determine eligibility, under the overall supervision of the Trust Fund.

Predictability and certainty ensure that those working with victims can provide timely and accurate information on how to access reparations. Helping victims to understand what the Court’s reparations process entails—both substantively and procedurally—can reduce the risk of re-traumatisation and aid in managing expectations. Transparency and consistency in approach assists victims to understand the basis upon which decisions regarding their claims are to be determined, which in turn increases the likelihood of victims accepting negative decisions. Moreover, predictability can reduce the practical difficulties faced by victims when exercising their right to reparations and can allow the various actors in the process to plan and act accordingly.

<sup>83</sup> See *Lubanga*, ICC-01/04-01/06-3396-Corr-Red-tENG, 5 April 2018, Appeal Brief against the ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*’ Handed Down by Trial Chamber II on 15 December 2017. See also *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, Judgment on the Appeals against the ‘*Decision Establishing the Principles and Procedures to Be Applied to Reparations*’ of 7 August 2012, paras. 149-150.

<sup>84</sup> There is some debate as to the appropriate level of judicial oversight as it remains to be seen how the administrative screening process will unfold in both *Al Mahdi* and *Lubanga*.



### **Lubanga: A Case Study**

Initially, victims in the *Lubanga* case had the possibility of applying separately to participate in the trial and/or to receive reparations. Both options involved filling in lengthy forms (a 14-page form for individuals applying to participate in the trial, and a 19-page form for requesting reparations). By the time the case entered the reparations phase in 2012, only 85 individuals had submitted requests for reparations through these forms<sup>85</sup> (a figure which clearly did not reflect the widespread nature of recruitment of child soldiers in Ituri).

TC I—acknowledging the uncertainty as to the number of victims and this limited number of requests—therefore considered that a collective approach was required in order to ensure reparations would reach unidentified victims.<sup>86</sup> As such, it concluded that the identification of potential beneficiaries should be carried out by the Trust Fund.<sup>87</sup> The Legal Representatives appealed

this decision, alleging that the Chamber had erred in failing to rule on the individual requests before it. The Trust Fund, however, argued that requiring individual requests in these circumstances would be costly and would cause significant delays. The AC agreed, holding that where only collective reparations are awarded, a TC is not required to rule on the merits of individual requests for reparations.<sup>88</sup>

Following the AC Judgment, the Presidency referred the *Lubanga* case to TC II, which was also handling the reparations phase in the *Katanga* case.<sup>89</sup> The Trust Fund submitted a draft implementation plan in November 2015,<sup>90</sup> which TC II rejected, partly on

<sup>88</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012*, para. 152. The Appeals Chamber did not address the question of whether a Trial Chamber would be required to rule on each individual reparations request if it decided to award reparations on an individual basis, or to award reparations on both an individual and collective basis.

<sup>89</sup> *Lubanga*, ICC-01/04-01/06-3131, 17 March 2015, *Decision Referring the Case of The Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber II*.

<sup>90</sup> *Lubanga*, ICC-01/04-01/06-3177-Red, 3 November 2015, *Filing on Reparations and Draft Implementation Plan*; *Lubanga*, ICC-01/04-01/06-3177-AnxA, 3 November 2015, *Draft Implementation Plan for Collective Reparations to Victims*. The Trust Fund estimated the number of potentially eligible victims at 3000. It proposed that the Trust Fund (in conjunction with implementing partners) perform a screening process during the implementation phase,

<sup>85</sup> See *Lubanga*, ICC-01/04-01/06-2847, 28 March 2012, *First Report to the Trial Chamber on Applications for Reparations*. At the time of the Trial Judgment, a total of 129 victims had been granted the right to participate in the trial. *Lubanga*, ICC-01/04-01/06-2842, 14 March 2012, *Judgment pursuant to Article 74 of the Statute*, paras. 15-17.

<sup>86</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 219.

<sup>87</sup> *Ibid*, paras. 283-284, 289.

the basis that the plan did not identify victims and instead proposed that they be identified when seeking to access reparations programmes. Trial Chamber II disagreed with that approach. It instead imposed a request-based approach similar to the one it had adopted in *Katanga*, ignoring the critical differences between the two cases.<sup>91</sup> This involved ordering the preparation of files of potentially eligible victims or ‘dossiers’.<sup>92</sup>

The Trust Fund requested leave to appeal this order, arguing that the Chamber’s attempt to adopt an individualised approach of determining eligibility was at odds with the collective nature of the award. Leave to appeal was denied. For the victims who had participated in the trial, the dossiers were prepared by the Trust Fund and were based primarily on an interview with the victim (recorded in summary form) and assessments by medical and socio-economic experts. For newly identified victims, the dossiers were prepared by counsel from the OPCV. As such, the nature of those dossiers and the information contained therein differed substantially between the two groups. By June 2017, 473 dossiers had been collected in this manner.

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on entry into the programme, which would obviate the need for submitting applications and supporting documentation. Eligibility would be determined in an interview (to which the LRV or OPCV could be present for direct victims, but Prosecution and Defence would not).

<sup>91</sup> The key differences included: (i) the type of reparations awarded (purely collective in *Lubanga* versus a combination of individual and collective in *Katanga*); and (ii) the size and nature of the beneficiary group (the inhabitants of a single village in *Katanga* compared to possibly thousands of former child soldiers in *Lubanga*, most of whom were as yet unidentified).

<sup>92</sup> *Lubanga*, ICC-01/04-01/06-3198-tENG, 9 February 2016, *Order to Supplement the Draft Implementation Plan*. See also *Lubanga*, ICC-01/04-01/06-3200, 15 February 2016, *Request for Leave to Appeal against the ‘Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre’*; and *Lubanga*, ICC-01/04-01/06-3254-tENG, 28 October 2016, *Application from the V01 Group of Victims Requesting Leave to Appeal the ‘Order relating to the Request of the Office of Public Counsel for Victims of 16 September 2016’ and the ‘Order Approving the Proposed Plan of the Trust Fund for Victims in relation to Symbolic Collective Reparations’ of 21 October 2016* (expressing dissatisfaction with the victim identification process which they considered to be costly, futile and traumatising and which they argued involved applying different procedures to different victim groups, risking discrimination).

Ultimately, the Chamber admitted that the 473 dossiers constituted only a ‘sample of potentially eligible victims’ and that ‘hundreds and possibly thousands more victims’ were affected by Mr Lubanga’s crimes.<sup>93</sup> It therefore allowed for additional victims to come forward to be screened by the Trust Fund. Nevertheless, the Chamber still proceeded to conduct an individualised assessment of the existing dossiers itself and made a final determination of the applicants’ eligibility to benefit from the collective reparations programmes.

This essentially constituted a reversal of TC I’s earlier decision to leave the screening of beneficiaries to the Trust Fund. TC II concluded that only 425 of the 473 victims who had submitted dossiers were eligible to participate in the collective awards;<sup>94</sup> many of those the Chamber rejected had already been assessed as eligible by the Trust Fund. This decision remains on appeal at the time of publication of this report.<sup>95</sup>

By allowing for inconsistent approaches to identifying beneficiaries to be applied in the *Lubanga* case, TC II has raised the distinct possibility of differential treatment amongst victims. Specifically, it has allowed for factors unrelated to an individual’s victimisation to affect their eligibility (that is, when, how and by whom their request is prepared and assessed).<sup>96</sup> As the LRV has argued, this has ‘caused a loss of trust and even despair among the victims’ and has led them to ‘resent the Court because they feel they are being victimized again after so many years of waiting’.<sup>97</sup>

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<sup>93</sup> See e.g. *Lubanga*, ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, *Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable*, paras. 35, 191, 212, 231, 244, 304. See also *Lubanga*, ICC-01/04-01/06-3218-tENG, 15 July.

<sup>94</sup> *Lubanga*, ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, *Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable*.

<sup>95</sup> *Lubanga*, ICC-01/04-01/06-3396-Corr-Red-tENG, 5 April 2018, *Appeal Brief against the ‘Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu’ Handed Down by Trial Chamber II on 15 December 2017*.

<sup>96</sup> *Ibid*, paras. 33-43, 46.

<sup>97</sup> *Ibid*, paras. 15, 53.

### 3.3 Outreach

Ensuring access also implies that the Court must provide information and conduct outreach concerning reparations. If victims are to benefit from the mechanisms provided by the ICC, they must be informed that these exist and of their rights within its framework. It is important that regular, accurate and objective information about ongoing proceedings is provided to affected communities.<sup>98</sup>

Access to reparations does not begin with a procedural decision by the Chambers. To be able to access reparations, victims require information about the Court's mandate, including their right to participate and to request reparations. Effective and targeted outreach activities must address all these aspects specifically; using means adapted to the particular contexts to reach rural communities and the most vulnerable and dispossessed victims.<sup>99</sup> In all cases, attention must be given to ensuring that media used, such as television, radio, street theatre or other market place outreach are appropriate, sufficient and effective in achieving the desired two-way communication.<sup>100</sup>

Outreach is fundamental in clarifying expectations and reducing potential frustration and revictimization, particularly given the Court's distance from the location of the crimes and the challenges of communicating with affected communities in a language they understand. This continues to be a challenge despite increased ICC field presence in recent years.<sup>101</sup>

Victims may choose to apply for reparation from the time that charges are confirmed and should receive information about the process from this stage. Greater awareness of victims' needs from a trauma perspective should underpin strategies to manage

expectations more systematically. The importance of recognition, acknowledgement (through listening), compassion, and the significance of relationships that victims build in the aftermath of trauma can be factored into outreach strategies, to ensure that existing interactions are qualitatively adapted to constitute positive experiences for victims as opposed to reinforcements of injury.<sup>102</sup>

Conducting outreach is not the task of the Public Information and Outreach Section of the Registry alone. Synergies between the Registry, Trust Fund and LRVs should be developed concerning the process of informing victims and managing their expectations.

Rule 96 of the RPE provides for the wide publication of information relative to ongoing reparations proceedings. However, REDRESS considers that the Court must begin earlier to prepare victims and help them to understand the scope of the right to reparations.

As such, victim mapping could be used for the purposes of planning outreach and notification around victims' right to request reparation. This should ideally be undertaken in all situation countries at the initial stages of the Court's work, to place the Registrar in an adequate position to assist the Court with relevant demographic and other data. Proactive preparations for reparations do not impinge upon the Registrar's neutrality regarding the process; rather, this should be seen as an effective discharge of the Registrar's obligations towards victims under the Statute and Rules.<sup>103</sup>

In addition to preliminary victim mapping, a clear outreach strategy, which includes consistent messages concerning victims' right to reparations and the process for obtaining reparations at the Court, should be undertaken long before the reparations stage. Victims should be made aware of the fact that reparations at the ICC are based on individual criminal responsibility and be informed of the limitations of the process to help inform their expectations.

<sup>98</sup> REDRESS, 2011 Reparations report.

<sup>99</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011, p. 40, para 6.1.

<sup>100</sup> *Ibid.*

<sup>101</sup> ICC Office of Public Counsel for Victims, *Representing victims before the International Criminal Court*, A manual for Legal Representatives, 4th edn., p. 8.

<sup>102</sup> *Ibid.*

<sup>103</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011.





## 4. Adequate Reparations



*A man prays at dawn where a mausoleum, destroyed by radical Islamists, once stood in Timbuktu, Mali/©UN Photo by Marco Dormino.*

## 4. Adequate Reparations

The requirement for reparations to be *adequate, prompt, appropriate, effective and proportional* to the harm suffered is a central tenet of the UN Basic Principles,<sup>104</sup> and has been adopted and reiterated in the ICC jurisprudence.<sup>105</sup> Though recognised as a standard in the UN Basic Principles, there is no precise definition of the term ‘adequacy’ in the context of reparations proceedings. Instead, several criteria are referred to in order to determine adequacy in any given situation, including appropriateness, proportionality and the circumstances of each case.<sup>106</sup>

Considering the victim-centric focus of the right to reparation, adequacy can be understood to mean that the form of reparations must fully take into consideration the specificity of victim’s experiences, particularly the seriousness of violations and harm.<sup>107</sup> Determination of the adequacy of reparations involves a consideration of both the process of reparations and the substance of the award.<sup>108</sup> This includes identification and assessment of the scope of harm suffered, a determination of the cost of repairing the harm, and the liability of the convicted person.

<sup>104</sup> *United Nations General Assembly*, UNGA Res 60/147, 21 March 2006, 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.

<sup>105</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*; see also *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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”*.

<sup>106</sup> According to the UN Basic Principles, reparations should be proportional to the gravity of the violations and the harm suffered. The Lubanga principles decision reiterates this by providing that victims should receive appropriate, adequate and prompt reparations. It says further that ‘the awards ought to be proportionate to the harm, injury, loss and damage as established by the Court’ (para. 243).

<sup>107</sup> REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations, Submission to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, July 2014.

<sup>108</sup> *Bemba*, ICC-01/05-01/08, 17 October 2016, *Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules*.

This chapter examines how the ICC Chambers have approached the issue of determining reparations awards and the more contentious issue of deciding on the monetary liability of convicted persons.

### 4.1 Methodology for determining reparations awards

Determining and quantifying the harm suffered by victims and apportioning a value to that harm is a difficult exercise. Harm is not specifically defined by the Statute or Rules but has been found by the jurisprudence of the Court to include ‘hurt, injury and damage’ and may be material, physical or psychological.<sup>109</sup> While the harm need not be direct, it must have been personal to the victim.<sup>110</sup> Findings relating to harm may be based on evidence presented during the trial (whether or not that evidence was relied upon for conviction or sentencing), received during the reparations phase, or contained in any reparations requests filed pursuant to Rule 94 of the RPE.<sup>111</sup>

According to the AC in *Lubanga* and *Katanga*, the Trial Chamber has the responsibility of identifying or defining the types or categories of harm suffered by victims

<sup>109</sup> *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 228

<sup>110</sup> *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, *Order for Reparations (Amended)*, para. 10. See also *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 228. The Lubanga AC identified the following types of harm that direct and indirect victims may suffer:

- for direct victims: physical injury and trauma; psychological trauma and the development of psychological disorders (e.g. suicidal tendencies, depression, dissociative behavior); interruption and loss of schooling; separation from families; exposure to an environment of violence and fear; difficulties in socializing within their families and communities; difficulties controlling aggressive impulses; non-development of civilian life skills resulting in the victim being at a disadvantage (particularly re employment);
- for indirect victims: psychological suffering from sudden loss of a family member; material deprivation from loss of family members’ contributions; loss, injury or damage from intervening to prevent harm to the child; psychological and/or material suffering as a result of aggressiveness of re-integrated former child soldiers.

<sup>111</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Appeals Judgment on Reparations*, para. 185. See also Regulations of the Court, Regulation 56.

and these must be contained in the reparations order.<sup>112</sup> The assessment of the extent or monetary value of that harm may, on the other hand, be made either by the Trial Chamber (with or without the assistance of experts), or by the Trust Fund, based on criteria set by the Trial Chamber in its reparations order.<sup>113</sup>

The Trial Chamber may also specify the size and nature of the reparations award, or may delegate this responsibility to the Trust Fund to assess for purposes of determining the size and nature of reparation awards to be set out in the DIP.<sup>114</sup> This will protect the rights of the convicted person (ensuring reparations are not awarded to remedy harms that are not the result of his/her crimes) and the victims (ensuring their ability to appeal the exclusion of any harms that they consider were caused by these crimes).<sup>115</sup>

The Court's approach to determining the amount to be awarded as reparation has not always been clear. Chambers have taken divergent approaches to determining the amounts to be awarded, the methodology used was unclear and, in some cases, the final amount did not correspond to any of the submissions of the parties or experts.<sup>116</sup> Chambers have also failed to issue detailed instructions in advance concerning the type and level of documentation that should be submitted to substantiate victims' reparation claims and the evidentiary standard that they will apply in assessing them.<sup>117</sup> In addition,

<sup>112</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Appeals Judgment on Reparations*, para. 181-184

<sup>113</sup> *Ibid.*

<sup>114</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *Appeals Judgment on Reparations*, paras. 181, 183-184, fn. 231; Regulations of the Trust Fund for Victims, Regulations 55, 69.

<sup>115</sup> *Ibid.*

<sup>116</sup> In *Lubanga*, TC I delegated the task of assessing claims to the Trust Fund: *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, *Decision Establishing the Principles and Procedures to Be Applied to Reparations*, para. 283. Meanwhile, judges of TCII, who had oversight of the post-appeal reparations phase of *Lubanga*, rejected a full delegation of the assessment of claims to the Trust Fund, opting instead for a more individualised approach, similar to the one they took in the *Katanga* case.

<sup>117</sup> In the *Katanga* case for example, the LRV requested that the Chamber 'provide more definite directions concerning the continuation of the proceedings, including the principles to be applied in the instant case.' *Katanga*, ICC-01/04-01/07-3507-tENG, 21 August 2014, *Request to fix a schedule for victims to submit their observations on reparations (Articles 68, 75 and 76 of the Statute)*, para. 3.

insufficient guidance is provided concerning whether the Chamber or the Trust Fund will take the lead in assessing and reviewing claims and whether/how the Registry, Legal Representatives or external bodies (as appropriate) can assist in that regard.

#### 4.2 Determining liability

The more problematic issue appears to be the determination of liability. All the Chambers have adopted different approaches to determining the monetary liability of the convicted person based on the specificities of each case. Some commentators consider that this divergence may be due to 'case-specific particularities such as the nature of the crimes and ensuing harm; geographical and temporal scope of the crimes; number of victims; and, possibly, the legal background and pragmatism of each bench.'<sup>118</sup>

For example, the first reparations ordered by TC I in the *Lubanga* case did not include an assessment of the convicted person's monetary liability. The Chamber ordered collective reparations and instructed the Trust Fund to cover the cost of implementing the award due to Mr Lubanga's indigence. Judges of TC II, who had oversight of the post-appeal reparations phase of *Lubanga*, established Mr. Lubanga's monetary liability based on the 'average' harm suffered by the victims based on its assessment without specifying the "precise ingredients" of the harm individually suffered by the victims. The Chamber determined that it need not identify all the victims or assess their specific harm to come to its conclusions about Mr Lubanga's liability for the full amount of US\$10 million, which the Chamber had set as the cost of repairing the harm to the victims.

The *Katanga* Chamber determined Mr. Katanga's liability via a 'formal means of calculating liability' similar to the approach used in civil liability proceedings.<sup>119</sup> The Chamber identified a specific number of victims that it determined had suffered harm and then calculated

<sup>118</sup> M. Brodney & M. Regue, '*Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC's 15 December 2017 Lubanga Reparations Decision*' (EJIL Talk, 4 January 2018).

<sup>119</sup> *Ibid.*

the totality of the harm suffered by these victims. Mr Katanga's liability of US\$1million was deemed to be proportionate to the harm caused and his level of participation in the commission of the crimes. The Chamber did not rely on experts to come to this assessment.

The *Al Mahdi* Chamber established his monetary liability at €2.7 million for the harm caused to specific victims and the people of Timbuktu by "reasonably approximating" costs of the harm found. The Chamber partially relied on expert reports. In assessing the scope of Mr Al Mahdi's liability for these harms, the Chamber considered that Mr Al Mahdi was convicted as a co-perpetrator and that he organised and directly participated in the attacks.<sup>120</sup>

The diverse approach to determining monetary liability raises questions as to whether a more structured procedural framework is necessary to guide the approach and set standards by which each Chamber would be required to operate. The Lubanga Principles are not prescriptive concerning the approach that should be adopted. Application of these principles are not mandated and thus each Chamber may disregard, augment or modify principles as they deem appropriate.

Several important questions on this issue are currently under review by the Appeals Chamber which will hopefully provide some clarity for future Chambers. These include: *should the Trial Chamber first determine the nature and size of the award to be made before determining the scope of the convicted person's liability?*

This is now an issue under consideration in the *Lubanga* case. The defence in *Lubanga* has challenged TC II's determination of his monetary liability for the harm suffered by victims in the case and in respect of unidentified victims who may have suffered harm.<sup>121</sup> The de-

<sup>120</sup> *Al Mahdi*, ICC-01/12-01/15-236, 17 August 2017, *Reparations Order*, para. 110.

<sup>121</sup> *Lubanga*, ICC-01/04-01/06-3388-tENG, 23 January 2018, *Notice of Appeal by the Defence for Mr Thomas Lubanga Dyilo against the "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu" Handed Down by Trial Chamber II on 15 December 2017 and Amended by way of the Decisions of 20 and 21 December 2017*.

fence has submitted that in deciding on Mr Lubanga's monetary liability, the Chamber proceeded by approximation, holding that the award had to be equal to the aggregate individual harm, without first determining the nature, cost and size of the collective reparations award to be made.<sup>122</sup> The issue, yet to be determined by the AC, is whether it is correct for the TC to determine the convicted person's liability without first deciding on the type, modalities and cost of repairing the harm (for example the cost of collective reparations if this type of reparation is awarded).

Additionally, *how should the Chamber determine the issue of proportionality?*

The *Lubanga* AC indicated that "the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility."<sup>123</sup> On the basis of that finding, the AC determined 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 crime for which he or she was found guilty, in the specific circumstances of the case."<sup>124</sup>

This issue is also currently being raised on appeal by the *Lubanga* defence. They contend that TC II violated the principle that a convicted person's liability for reparations must be proportionate to the harm caused and his/her participation in the commission of the crimes.<sup>125</sup> The defence argues that the Chamber erred in finding Mr Lubanga liable for the full amount of rep-

<sup>122</sup> *Ibid*, paras. 37-8.

<sup>123</sup> *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, *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*, para 18

<sup>124</sup> *Ibid*.

<sup>125</sup> *Lubanga*, ICC-01/04-01/06-3388-tENG, 23 January 2018, *Notice of Appeal by the Defence for Mr Thomas Lubanga Dyilo against the "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu" Handed Down by Trial Chamber II on 15 December 2017 and Amended by way of the Decisions of 20 and 21 December 2017*, para. 42.

arations without regard for the plurality of co-perpetrators, his degree of participation in the commission of the crimes, his actions in favour of the demobilization of minors or the specific circumstances of the case.<sup>126</sup>

REDRESS considers that if proportionality of the convicted person's liability is considered to mean that the total amount of reparations assessed as being due to the victims of a crime must be reduced in proportion to his or her participation in that crime, such an interpretation would have the potential to undermine the Court's reparation scheme.<sup>127</sup> As was noted in REDRESS' submissions in the *Bemba* case, the potential of this approach to undermining the Court's reparation scheme

...is particularly apposite in the context of international crimes, where hundreds or thousands of persons may be culpably complicit in or have contributed to the crimes that led to the harms inflicted on the victims. It is difficult to see how the principle of reducing reparations on the basis of concurrent responsibility can be operationalised without seriously and unjustly reducing reparations to victims. To do so would also put the unduly burdensome *onus* on the victims to pursue all of the multiple offenders who may have played a part in the crime in order to recover full reparation for the harm they suffered.<sup>128</sup>

The issue is far from settled. A differently constituted AC in the *Katanga* case took a different approach from that of the AC judges in the *Lubanga* case. *Katanga* argued before the AC that the order of US\$1 million against him was not proportionate to, and did not fairly reflect, the part he played in the crimes.<sup>129</sup> The AC held that the requirement of proportionality did not mean that the amount of reparations for

which a convicted person is held liable must reflect his/her *relative responsibility for the harm in question vis-à-vis* others who may have also contributed to that harm.<sup>130</sup> The judges opined that in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes is irrelevant to the convicted person's liability to repair that harm. Thus, while a reparations order must not exceed the overall cost of repairing the harm caused, *it may be appropriate to hold the person liable for the full amount necessary to repair the harm* (emphasis added).<sup>131</sup>

As to whether the mode of liability should be considered at the reparations stage, the *Katanga* AC noted that the focus must be on the extent of the harm resulting from the crimes and the cost of repairing that harm. The goal, in the AC's view, is not to punish the convicted person; rather, the objective is remedial. Thus, while in some cases it may be appropriate to take into account the role of the convicted person vis-à-vis others and to apportion liability for the costs to repair (for example, where more than one person is convicted by the Court for the same crimes), this is not the main focus. The AC did not, however, elaborate on how the 'cost to repair the harm' should be determined.

A third interesting issue is *whether the Trust Fund is entitled to claim reimbursement from the convicted person for sums advanced in satisfaction of the reparations award made against him, where he was found to be indigent.*

Defence counsel in the *Al Mahdi* case contended that if there was a change in the convicted person's financial status, the Trust Fund should only be authorised to seek reimbursement 'within a limited time period.' The Trust Fund objected on the basis that neither the legal texts nor the Court's jurisprudence support the Defence's arguments for the imposition of an arbitrary time limit for Mr Al Mahdi's personal liability for the

<sup>126</sup> *Ibid.*

<sup>127</sup> *Bemba*, ICC-01/05-01/08, 17 October 2016, *Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules*, paras. 21-30.

<sup>128</sup> *Ibid.*, para. 23.

<sup>129</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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'*, para. 150.

<sup>130</sup> *Ibid.*, para. 175.

<sup>131</sup> *Ibid.*, para. 178.

reparations ordered against him.<sup>132</sup> The Chamber was not persuaded by the Defence submission that it had the power to limit the period within which the Trust Fund is authorised to claim reimbursement from Mr Al Mahdi to his term of imprisonment.

The Presidency of the Court has a residual oversight role to monitor the convicted person's monetary situation for purposes of the enforcement of an order for reparations "*even following completion of a sentence of imprisonment*" (emphasis added).<sup>133</sup> The Regulations of the Court are silent concerning how this should be approached, and the Court has to date no experience in this area. This responsibility presupposes the establishment of a cooperation arrangement with states including states in which the accused has served his sentence or resides post-sentence. Cooperation between the Trust Fund and the Presidency in this regard will also be important.

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<sup>132</sup> *Al Mahdi*, ICC-01/12-01/15-22, 16 June 2017, *Trust Fund for Victims Final Submissions on the Reparations Proceedings*, paras. 28-30

<sup>133</sup> *Regulations of the Court*, Regulation 117.

## 5. Appropriate Reparations



*In the Bemba case, REDRESS noted that in some contexts individual awards might be more appropriate for large numbers of victims/©ICC-CPI.*

## 5. Appropriate reparations

Article 75(2) of the Rome Statute empowers the Court to order a convicted person to make ‘appropriate’ reparations to or in respect of victims.<sup>134</sup> Determining the most appropriate award to repair the harm suffered by victims is a complex exercise which involves consideration of the scope and extent of any damage, loss and injury to (or in respect of) victims, and the most suitable type and modalities of reparations.<sup>135</sup>

The Court *may* appoint experts to assist it in determining these issues and *shall* invite, as appropriate, victims or their Legal Representatives, the convicted person as well as interested persons and States to make observations on the reports of the experts.<sup>136</sup> In the case of collective reparations awards, the Court may order that an award for reparations be made through the Trust Fund where the number of victims and the scope, form and modalities of reparations make a collective award more appropriate than individual awards.<sup>137</sup>

Determining what constitutes ‘appropriate reparations’ in the context of the ICC framework requires careful consideration. According to the Trust Fund, the appropriateness of reparations should be assessed in line with the principles of “do no/less harm” to victims; the need for reconciliation as an underlying aim of reparations; the need to consider gender dimensions to the substance and process; and the need for reparations to be locally relevant and transformative.”<sup>138</sup>

This chapter will examine how the ICC has determined what amounts to appropriate reparations in

<sup>134</sup> The Rome Statute refers to the appropriateness of reparations rather than the adequacy of reparations. However the Lubanga Principles have adopted the terminology of the UN Basic Principles and has indicated that reparations awards should also be adequate.

<sup>135</sup> Rules of Procedure and Evidence, Rule 97(1).

<sup>136</sup> Rules of Procedure and Evidence, Rule 97(2).

<sup>137</sup> Rules of Procedure and Evidence, Rule 98(3). The procedure following the order for an award of collective reparations is elaborated in Chapter IV of the Regulations of the Trust Fund for Victims.

<sup>138</sup> *Lubanga*, ICC-01/04-01/06-2872, 25 April 2012, Observations on Reparations in Response to the Scheduling Order of 14 March 2012.

the context of each case and identify some of the challenges that the Court has faced in awarding specific types and modalities of reparations.

### 5.1 Types of reparations awards

ICC judges may grant individual or collective reparations or a combination of both.<sup>139</sup> Most victims have indicated a preference for individual reparations and some have strongly rejected the notion of collective reparations.<sup>140</sup> Individual reparations can respond more adequately to the specific experiences of each victim in terms of the harm suffered as a result of the crimes that have occurred.<sup>141</sup> Ideally, individual reparations should be awarded where the circumstances so warrant, and collective reparations should not become a substitute for individual reparations.<sup>142</sup>

The Trust Fund, for example, has pointed out that both forms of reparations have relative advantages and disadvantages depending on the context. In its view, individual measures are important because

...international human rights standards are generally expressed in individual terms. Reparation to individuals therefore underscores the value of each human being and their place as rights-holders.<sup>143</sup>

<sup>139</sup> Rules of Procedure and Evidence, Rule 97(1).

<sup>140</sup> Victims in the *Bemba* case indicated their preference for direct, individual and financial reparations, and their opposition to collective reparations. In the *Katanga* case, while noting that the legal options are both individual and collective reparations, the Registry recommended that the Chamber take into account the clear preference of the victims for receiving individual benefits from reparations measures. *Bemba*, ICC 01/15-01/08-3459-Red, 25 November 2016, Version publique expurgée des observations de la représentante légale des victimes relativement aux réparations, paras. 118 and 120.

<sup>141</sup> *Lubanga*, ICC-01/04-01/06, 1 September 2011, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations.

<sup>142</sup> See General Comment no. 3, Committee against Torture available at <http://www.refworld.org/docid/5437cc274.html>; United Nations, Guidance Note of the Secretary General, [https://www.ohchr.org/Documents/Press/GuidanceNote\\_Reparations\\_June-2014.pdf](https://www.ohchr.org/Documents/Press/GuidanceNote_Reparations_June-2014.pdf), p.7.

<sup>143</sup> *Lubanga*, ICC-01/04-01/06, 1 September 2011, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, para 18



However, it considers that individual measures are necessarily selective and could result in stigmatisation due to the preferential treatment afforded to victims receiving compensation. The potential of collective reparations to re-establish social solidarity if designed together with victim communities and include reconciliation efforts is seen as a clear advantage. From a more pragmatic standpoint, collective reparations are also seen as a means of maximising the use of limited resources available to fund reparations and to simplify the delivery process.

Despite these apparent advantages, a collective reparation award does not imply the absence of potential tensions within a group. Collective reparations could potentially be awarded to victims that are neither a definable group of civil parties or a geographically identifiable community.<sup>144</sup>

As one LRV pointed out during consultations, a collective approach was logical in a case like *Katanga* where an entire village was destroyed, and the victimisation was therefore collective; however, where the victims are former child soldiers, such as in *Lubanga*, there is no community of child soldiers *per se*, and they may be mistrusted by individuals within the very communities that they are from.

It was pointed out that levels of mistrust are high because of what the former child soldier victims have done to their own communities. In fact, many victims in the *Lubanga* case argued against collective reparations because they 'did not believe that they had sufficient connection to each other to benefit from collective awards.'<sup>145</sup>

Limitations in the Prosecutor's charging strategy, or Court decisions of conviction or acquittal, could also re-

sult in one group of beneficiaries from the same community receiving reparations to the exclusion of others.<sup>146</sup> In the DRC situation, as a result of the charges brought against Lubanga and Katanga, reparations awarded by the Court in both cases benefit mainly Hema as opposed to Lendu victims, which represents one side of an ethnic conflict in which both sides have suffered harm. In this context, there is a risk that the provision of reparation to victims could exacerbate, rather than alleviate, tensions between ethnic groups in the area.<sup>147</sup>

As REDRESS noted in its *Bemba* submissions, there may be particular contexts in which individual awards are more appropriate even for large numbers of victims, including when victims do not perceive their suffering as collective; where the relevant harms are clear and quantifiable; when the victims have moved from the locations where the harm took place and would not be able to access collective reparation; or where collective reparation programmes in the particular context reinforce stigma (though this can be problematic for individual reparations programmes as well).<sup>148</sup>

Collective awards may be more appropriate in situations of clear violations of collective rights; or to address the individualised harm of a large number of persons; or when it is the best way to remedy the harm (for example, to provide treatment facilities for victims); or when memorialisation (or other forms of satisfaction) and guarantees of non-repetition are what the victims really want.<sup>149</sup>

The practice in the cases thus far has made it clear that the preference of victims is only one of the factors that the ICC is prepared to consider in determining the appropriateness of the award and in some cases, such as *Lubanga*, it is not a determining factor at all.

<sup>144</sup> M. Brodney, 'Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates', *Journal of the Oxford Centre for Socio-Legal Studies*, July 2016, <https://joxcsls.com/2016/11/01/implementing-international-criminal-court-ordered-collective-reparations-unpacking-present-debates/>

<sup>145</sup> M. Brodney, 'Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates', *Journal of the Oxford Centre for Socio-Legal Studies*, July 2016, <https://joxcsls.com/2016/11/01/implementing-international-criminal-court-ordered-collective-reparations-unpacking-present-debates/>

<sup>146</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011.

<sup>147</sup> *Lubanga*, ICC-01/04-01/06-2879, 10 May 2012, *International Center for Transitional Justice, Submission on reparations issues*, para 65-67.

<sup>148</sup> *Bemba*, ICC-01/05-01/08, 17 October 2016, *Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules*, para. 95.

<sup>149</sup> *Ibid*, para. 96.

Whatever form reparations may take, victim inclusion in the design as well as the implementation of the process is key to satisfying their needs and ensuring that appropriate reparations are delivered.<sup>150</sup> Timely and effective consultations with victims and victim groups is an important part of this process.<sup>151</sup> This is particularly important in relation to women and child victims and other vulnerable groups.<sup>152</sup> Legal Representatives of victims are essential in the dissemination of accurate messaging in this process: relaying the wishes of victims to the Chambers and the Trust Fund and managing the expectations in relation to the limitations of the process and likely potential awards of reparations.

## 5.2 Modalities of reparation

Principle 34 of the *Lubanga* Principles makes clear that reparations are not limited to restitution, compensation and rehabilitation, as listed in article 75 of the Statute. Other types of reparations may also be appropriate, for instance, those with a symbolic, preventative or transformative value. Thus, ICC judges have wide discretion in determining the most appropriate modalities of reparations for each case.

To date, individual awards have primarily taken the form of compensation, while collective awards have tended to take the form of rehabilitative services and symbolic measures. 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

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<sup>150</sup> *Katanga*, ICC-01/04-01/07-3551, 14 May 2015, *Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute*.

<sup>151</sup> *Bemba*, ICC-01/05-01/08, 17 October 2016, *Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules*, para 89. See also the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, 21 March 2007, Principles 1-3; Committee for the Elimination of Discrimination Against Women, General Recommendation No. 30: Women in conflict prevention, conflict and post-conflict situations, UN Doc CEDAW/C/GC/30, 18 October 2013, paras. 42-46 and 81; and the *United Nations Secretary General Guidelines on Reparations for Conflict-related Sexual Violence*, Principle 6 and pp. 10-12.

<sup>152</sup> *United Nations Secretary General Guidelines on Reparations for Conflict-related Sexual Violence*, Principle 6 and pp. 10-12.

and the circumstances of the case); and iii) this result is feasible in view of the availability of funds.<sup>153</sup>

However, there are limits to compensation as a form of reparation. For example, compensation could lead to stigmatisation and/or risk for some victims. Additionally, in countries where certain services are unavailable (such as medical clinics or psychosocial support), providing cash compensation to repair medical-related harm would not be feasible because victims do not have access to the services they need to repair their harm. In those contexts, more appropriate forms of reparation would involve providing programs which can deliver these services.

There are however practical considerations that make the design and implementation of specific types and modalities of awards more complex. REDRESS appreciates that collective programmes with possible individual benefits may be more challenging to design and implement.

An example might be the provision of housing assistance which can appropriately respond to the housing needs of each individual, or the provision of physical rehabilitation programmes tailored to the needs of each victim. These types of collective reparations are aimed at a group rather than at a community as a whole. Thus, in the *Lubanga* case, the implementation of the service-based collective reparations will be 'group' based, not 'community' based; that is, the services will be directed at individual members of a group—namely, child soldiers—based on criteria established by the Chamber. Although the broader community may benefit indirectly, the services are not directed at the community as a whole. This is an important distinction.

These 'individualised' collective reparations are different from collective reparations that can be referred to

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<sup>153</sup> *United Nations General Assembly*, UNGA Res 60/147, 21 March 2006, 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, Principle 20.

as a community collective,<sup>154</sup> which benefits the community as a whole, for example by building a medical facility. These measures cost time both in their design and implementation. Capacity deficits on the part of the Trust Fund makes more it difficult to respond to these demands.

The most important factor to be considered by the Court is whether the modalities reflect the circumstances and the nature of the victimisation in the case before the Court. For example, where reparation is awarded on a collective basis, the modalities of reparation should address the specific harm suffered by eligible victims without being subsumed within general humanitarian or developmental assistance.<sup>155</sup> Individual reparations awards should be in the most appropriate form to repair, as far as possible, the harm suffered.

### 5.3 Rule 98(4) awards to organisations

Besides individual and collective reparations, Rule 98 (4) of the RPE also allows for reparations to be awarded to an intergovernmental, international or national organization. Prior to the Trial Chamber making such an award, consultations need to be undertaken between different stakeholders, such as interested States and the TFV. Furthermore, Regulations 73 to 75 of the Trust Fund complement article 98 (4) of the Statute and lay down the procedure to be followed by the TFV where awards of this type are granted.

Although the Court has yet to make an award under Rule 98(4), the advantages of this possibility have been highlighted by the Trust Fund in the *Bemba* case. The Trust Fund suggested that this type of reparations would be most appropriate in those cases where the

Court or the Trust Fund do not have access to all potentially eligible victims or their locations, thus making the implementation of collective or individual awards extremely challenging.<sup>156</sup>

Where, for example, security constraints make it impossible for the Court to establish a robust presence in the situation country, organizations which fulfil certain operational and technical requirements might be a suitable alternative. In this sense, an established presence in the situation country which allows access to all potentially eligible victims, as well as proven experience regarding the provision of suitable forms of redress to those affected (such as medical, psychological or material rehabilitation), may mark out an organization as an appropriate beneficiary of reparations.<sup>157</sup>

A Rule 98(4) award could potentially address some of the limitations under which the Trust Fund operates as well as making planning and implementation easier. In Mali, for example, an award could have been made to either UNESCO and/or the relevant government department for the purposes of rebuilding/maintaining the mausoleums. The implementation of these awards could then be governed by a Memorandum of Understanding between the Trust Fund and relevant organisations. The potential advantage could be more expeditious delivery of the necessary services as these organisations are already set up on the ground.

<sup>154</sup> The Trust Fund explains the term 'community collective' in its first report in the *Lubanga* case: "There is an emerging trend in reparation theory towards "collective" or "community" reparation. Collective reparations deliver a benefit to people that suffer harms as a group which as a consequence often affects the social cohesion and community structures (especially in places with a strong sense of collective identity)." *Lubanga*, ICC-01/04-01/06, 1 September 2011, *Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations*, para. 21.

<sup>155</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 20 May 2011, p. 33.

<sup>156</sup> *Bemba*, ICC-01/05-01/08-3457, 31 October 2016, *Trust Fund for Victims Observations relevant to reparations*, para. 117.

<sup>157</sup> *Ibid*, para. 116.



## 6. Prompt Reparations

*“Unfortunately, reparations for ex-child soldiers will always come too late. When 20 years old, one cannot return to [the] primary school.”<sup>158</sup>*



*The ICC has conducted outreach sessions about ongoing proceedings to affected communities in the DRC/ICC/CPI.*

<sup>158</sup> *International Justice Monitor, Q&A With Luc Walley, Lawyer For Victims In Lubanga's Trial, 13 January 2010.*

## 6. Prompt Reparations

Victim participation at the ICC is characterised by waiting. Victims wait for several years for the outcome of protracted trials, for a conviction and sentence to be pronounced and then for reparations.<sup>159</sup> The ICC started its first reparation procedure in 2012 in the case against Mr Thomas Lubanga, and to date, the Trust Fund has yet to implement the reparations ordered by the Court.

Delays in the reparations proceedings creates feelings of frustration and disappointment for victims, some of whom may even die before the final award is implemented. As the legal representatives in the *Lubanga* case noted:

*The basic attitude of our clients today is not to say we want this or that; rather, it is that they are tired, they have been fighting for more than 10 years, they don't believe something will come, if they offer something they will take it and it is better than nothing. They just want something. This is the attitude of the participating victims.*<sup>160</sup>

REDRESS' research and consultations have identified several procedural and systemic factors which impede the ICC's ability to ensure prompt reparations proceedings for victims. We have identified gaps in some of the procedural approaches to reparations (for example the identification of beneficiaries previously discussed in chapter 3) and the process of implementation which negatively impact the timely delivery of reparations. This chapter will consider some of these factors.

### 6.1 Factors influencing the timeliness of reparations proceedings

What is prompt will depend on the circumstances of the case. The *Katanga* AC noted that while the legal framework leaves it for Chambers to decide the best

approach to take in reparations proceedings before the Court', in exercising their discretion, proceedings intended to compensate victims for the harm they suffered often years ago, must be as *expeditious and cost effective* as possible and thus avoid unnecessarily protracted, complex and expensive litigation.<sup>161</sup>

One of the factors potentially contributing to delays in the case is determining the most appropriate time to commence reparations proceedings. Should they be started prior to a final appeal or afterwards if the conviction has been confirmed?

The Trial Chambers in the *Lubanga* and *Katanga* cases considered it appropriate to commence the reparations proceedings following the decisions on conviction. According to the AC in *Lubanga*, the reparations process could commence prior to the determination of a final appeal on conviction and sentence, but the execution of the reparations order should be delayed until after the final appeal.

However, the *Bemba* case has created mixed views within the Court concerning the feasibility of starting the reparations proceedings before the appeal is finalised. TC III in *Bemba* received submissions on the procedural aspects of the reparations process over several months, including on whether to augment the *Lubanga* reparations principles. It was felt that addressing those procedural questions ahead of the final appeal would expedite the reparations process if the conviction was confirmed on appeal. Following the acquittal, the reparations process was terminated. The advanced preparations in those circumstances could be viewed by some as wasted effort.

Given the importance of prompt reparations, REDRESS considers that there are significant benefits to commencing the procedural preparations for reparations before the determination of a final appeal. It is important to manage victims' expectations at that stage, to

<sup>159</sup> Gaelle Carayon, *Waiting, Waiting, and More Waiting for Reparations in the Lubanga case*, *International Justice Monitor*.

<sup>160</sup> REDRESS consultations with Legal Representative, *Lubanga* case.

<sup>161</sup> *Katanga*, ICC-01/04-01/07-3778-Red, 8 March 2018, *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'*, para. 64.

clearly communicate that this procedural stage is not aimed at pre-empting the outcome on appeal and that an adverse outcome could end the possibility of reparations. As previously noted, in those circumstances the assistance mandate of the Trust Fund is an important way to provide interim relief for victims, thus helping to mitigate some of the disappointment in the event of an adverse outcome on appeal.

## 6.2 Timetable for implementing reparations

Challenges with the preparation and approval of DIPs (previously described in Chapter 2) have also contributed to delays in the reparations process. The issues with the DIPs foreshadow a more problematic issue concerning the absence of a publicly available timetable or calendar for the implementation of reparations in each case.

Presently, it is unclear when the approved DIPs will be fully implemented in each of the cases and whether there is a calendar guiding the Trust Fund in implementation and the Trial Chambers in overseeing the process. In the *Al Mahdi* case, the Trust Fund continues to provide monthly updates to the Chambers concerning the updated implementation plan.<sup>162</sup> The Malian Government and the parties are expected to provide submissions on the plan in January 2019. It is unclear when the process will move beyond monthly updates to the actual implementation of the plan.

In *Lubanga*, the Trust Fund has requested time to fine-tune the DIP that had been previously approved by the Trial Chamber. In a filing in April 2018, made public in December 2018, the Trust Fund noted that the reparations proceedings instituted by TC II created a different pool of victims and potential victims as well as a more detailed profile of harms suffered by potentially eligible beneficiaries for the individualised

service-based collective awards ordered in the case.<sup>163</sup> It noted that “when the Trust Fund was contemplating its programme of service-based collective reparations in its [DIP], it did not have the benefit of a detailed appreciation of the concrete needs and wishes of the victim population affected by Mr Lubanga’s crimes.”

Thus, in April 2018, the Trust Fund commenced the process of redesigning the implementation plan in light of the reparations decision of December 2017.<sup>164</sup> Whilst welcoming the decision of the Trust Fund to redesign the plan for service-based reparations awards that better suits the needs of the victims, REDRESS is concerned that this will further prolong an already protracted process. Furthermore, it is unclear when this redesigned plan will be approved by the Chamber and when the implementation will actually begin.

The legal texts of the ICC are silent concerning the timetable for implementing reparations. However, given the overarching responsibility of Chambers to monitor and oversee the implementation of reparations, it is incumbent on the judges to ensure that the Trust Fund is held to a strict timetable for implementation of reparations orders. This begins with the approval of the draft implementation plan and the establishment of a calendar to ensure compliance with the order.

<sup>162</sup> *Al Mahdi*, ICC-01/12-01/15-305-Red, 18 December 2018, *Public redacted version of “Fifth monthly update report on the updated implementation plan including information concerning further details relevant to the Board of Directors’ complement decision”*. The Trust Fund’s submissions are extensively redacted and it is difficult to see what is proposed and the timing of each proposal.

<sup>163</sup> *Lubanga*, ICC-01/04-01/06-3399-Red, 04 December 2018, *Further information on the reparations proceedings in compliance with the Trial Chamber’s order of 16 March 2018*.

<sup>164</sup> *Ibid*, para 33. The Trust Fund has identified certain potential gaps have been identified in its current programme framework, particularly in regards to appropriate and responsive activities for family members of child soldiers killed or seriously injured in combat as well as various vulnerable groups, such as former girl soldiers.





## 7. Conclusions: Ensuring Effective and Meaningful Reparations



*The system of reparations at the ICC aims to repair the harm caused to victims of unimaginable atrocities/©ICC/CPI.*

## 7. Conclusions: Ensuring Effective and Meaningful Reparations

### 7.1 Concluding remarks

The system of reparations at the ICC is designed to repair the harm caused to victims who have suffered unimaginable atrocities. However, aspects of the current system are not effective. The Court has admittedly made significant progress in consolidating its case law on procedural matters and has issued important decisions on reparations orders, the scope of reparations principles and the form and modalities of reparations. However, divergent approaches by the Chambers have led to uncertainty and inconsistency in the jurisprudence. In addition, there is need for improvement in the Trust Fund's implementation of its dual reparations and assistance mandate.

Admittedly, there will be factors outside of the ICC and Trust Fund's control that impact the effectiveness of the reparations system at the Court. Unstable security conditions in countries where reparations are to be implemented can delay the Trust Fund's ability to engage with local implementing partners and to reach victims. Persistent security challenges will require more innovative approaches to engagement with victims including "creating better local and international networks with civil society and inter-governmental organisations to increase the reach to victims."<sup>165</sup>

### 7.2 Recommendations

Ensuring effective reparations at the ICC will include clarifying the procedure for enabling victims to access reparations; improving the system for effective management and oversight; and strengthening the role and capacity of the Trust Fund to design and implement reparations plans and to effectively implement reparations awards.

<sup>165</sup> Clara Sandoval and Luke Moffett, *Reparations and the International Criminal Court: Judicial Experimentalism or Fitting Square Pegs in Round Holes*, unpublished paper on file with REDRESS.

### 7.2.1 Create more efficient procedures for each phase of the proceedings<sup>166</sup>

Create a two-step reparations process with clearly delineated responsibilities and built in oversight, with detailed procedural steps for each phase as appropriate.

- a) First, a *procedural verification and valuation phase*, which includes all steps that precede a reparation order, such as identification of the pool of potential beneficiaries, identification and assessment of harm suffered, identification of appropriate forms of reparations and quantification of the convicted person's liability.
- b) Second, a *monitoring and oversight phase*, with a clear system for monitoring and oversight of implementation of reparations orders. This system could include: requiring reporting by the TFV on measures taken to implement decisions and setting deadlines for the submission of such reports; requiring further information and follow-up reports or taking additional corrective action; keeping a case open until the reparation awards have been implemented in full.

### 7.2.2 Revise and strengthen the Lubanga Principles

Given the lack of clarity in the jurisprudence of the Court on its mandate to deliver reparations, and the limited understanding of the practicalities involved, REDRESS reiterates its call to the Court to prepare court-wide reparations principles.

Beyond providing guidance to Chambers, more detailed and functional General Principles on reparations will allow the different actors to anticipate what might be required if and when a case enters the reparations phase and to act accordingly. The cases to date have demonstrated that it is not feasible to wait until the

<sup>166</sup> These recommendations were first presented by REDRESS in its amicus submissions to the *Bemba* reparations proceedings. See *Bemba*, ICC-01/05-01/08-3448, 18 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, para 9-12.

reparations phase to begin thinking about reparations. Rather, a recurring theme in REDRESS's consultations was that reparations can and should be integrated into the pre-trial and trial process itself. Parties and participants will be able to make more targeted submissions and the Registry and Trust Fund will be able to furnish more useful information on the practicalities of the particular case at hand. Most importantly, such principles would give victims some idea of what to expect—both procedurally and substantively.

Court-wide reparations principles can be developed by drawing on the existing legal framework and recent jurisprudence, as well as the lessons learned in the cases to date. REDRESS recommends that the principles be developed through a consultative process involving all relevant actors (particularly VPRS, the legal representatives and the Trust Fund) and must be based on a detailed mapping of the roles and potential synergies between those actors.<sup>167</sup> This is an important way to ensure that the practical implications of procedural decisions are accurately identified and that the roles and responsibilities of the various actors are taken into account.

### 7.2.3 Reparative complementarity

To ensure sustainability and effectiveness of reparations, the ICC and the Trust Fund should engage with national reparations programmes and work to build links with institutions that operate such programmes and do capacity building such as the International Organisation on Migration and the Office of the High Commissioner for Human Rights. It is encouraging that the Trust Fund is pursuing this approach in Uganda by engaging directly with Health and Local Government Ministries with a view to ensure continuity of the services that it started under the assistance mandate. In Côte d'Ivoire the TFV is providing legal assistance so victims can apply to the domestic compensation programme—a positive form of reparative complementarity.

<sup>167</sup> REDRESS learned during the research for this Report that VPRS and the Trust Fund engaged in such a mapping exercise earlier in 2018. However, at the time of writing in October 2018, the report of the mapping exercise was not publicly available. We would encourage the Court to extend this exercise to other key actors in the reparations phase, such as the LRVs.


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