

Eligibility of Victims of International Crimes for Reparations before the International Criminal Court: A Critique

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Abstract

The adoption of the Rome Statute of the International Criminal Court on 17 July 1998 and the establishment of the International Criminal Court (ICC or the Court) on 2 July 2002 marked a significant turn for international criminal justice. Notably, the Court established a platform for bringing justice to victims of international crimes, whilst putting the victims at the centre of proceedings. One way in which this is evident is the framework for awarding reparations to victims of the core crimes of genocide, crimes against humanity, war crimes and the crime of aggression. This not only serves to acknowledge the victims' pain and suffering but also to remedy the harm they have suffered. The Court's mandate to award reparations to victims of international crimes is provided for in Article 75 of the Rome Statute. The purpose of this article is to examine the Court's reparations regime with respect to the eligibility of victims to receive reparations as provided for in the Rome Statute, and as seen through the lens of the Court's jurisprudence on this subject. The article asserts that whilst the reparations regime is an innovative way to deliver justice to victims of atrocities, its effectiveness remains subject to debate due to challenges associated with the interpretation of the meaning of 'victims' for purposes of reparations, and the eligibility criteria for victims to be awarded reparations. It concludes that the Court must consider amending its procedural laws to allow flexibility and place more prominence on the content of reparations delivered in individual cases.

Keywords: International Criminal Court; victims of international crimes; reparations; meaning of victims; eligibility jurisprudence; challenges



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Introduction

The Rome Statute of the International Criminal Court (Rome Statute), which was adopted on 17 July 1988, came into effect on 2 July 2002,¹ paving the way for the establishment of the International Criminal Court (ICC or the Court). The Court has jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression.² One of the notable features of the Rome Statute is that it places victims at the centre of international criminal justice proceedings by, *inter alia*, providing for the awarding of reparations as outlined in Article 75.³ As observed in the *Lubanga* case, Article 75 of the Rome Statute is not only innovative, but it is also an integral aspect of the success of the Court in accomplishing its obligation to bring justice for international crimes.⁴ Rule 98 of the Court's Rules of Procedure and Evidence,⁵ and the establishment of a Trust Fund for Victims (TFV),⁶ reaffirm the victims' right to reparations against convicted individuals.

The ICC's reparations regime resonates with African victims because of the continent's history of the prevalence of armed conflict, during which atrocities are committed. For instance, on 4 February 2021, Dominic Ongwen, one of the leaders of the Lord's Resistance Army (LRA), was convicted by the Court of sixty-one counts of crimes against humanity and war crimes committed between July 2002 and December 2005 in northern Uganda.⁷ On 30 March 2021, the ICC's Appeals Chamber upheld Bosco Ntaganda's conviction on five counts of crimes against humanity and thirteen counts of war crimes committed in the Democratic Republic of Congo (DRC) between 2002 and 2003.⁸ All these crimes were committed during armed conflicts within the respective countries. Currently, there are five cases that serve as the Court's jurisprudence with respect to reparations, all from Africa. These are *The Prosecutor v Thomas Lubanga Dyilo*,⁹ *The Prosecutor v Germain Katanga*,¹⁰ *The Prosecutor v Ahmad Al Faqi Al*

1 Rome Statute of the International Criminal Court (last amended 2010) adopted 17 July 1998.

2 *ibid*, Art 5.

3 Rome Statute, Art 75; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012) 86.

4 *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-1, Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest Article 58, para 150.

5 International Criminal Court Rules of Procedure and Evidence (2002).

6 *ibid*; Art 79 of the Rome Statute.

7 *The Prosecutor V. Dominic Ongwen*, Public Redacted Trial Judgment ICC-02/04-01/15-1762-Red 04-02-2021 1/1077 4 February 2021, para 3116.

8 *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2359 (Trial Chamber VI Judgment, 8 July 2019).

9 *The Prosecutor (on Behalf of Legal Representatives of the Victims) v Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations ICC-01/04-01/06-2904 (7 August 2012).

10 *The Prosecutor (on the Application of Victims) v Katanga (Germain)*, Order for Reparations Pursuant to Art 75 of the Statute ICC-01/04-01/07-3728-tENG (24 March 2017), para 268.

Mahdi,¹¹ *The Prosecutor v Bosco Ntaganda*,¹² and *The Prosecutor v Dominic Ongwen*.¹³ These cases that have already resulted in orders of reparations indicate that the Court has made some laudable progress in terms of developing guidelines and principles for reparations. However, of these five cases, only one has been completed with respect to implementation. This is the *Katanga* case, wherein the order for reparations was delivered by the Court's Trial Chamber II in 2017 and confirmed on appeal in 2018.¹⁴ The reparations were implemented between 2017 and April 2024, with 297 beneficiaries in the DRC.¹⁵

The question as to who is considered to be an entitled victim for reparations and for what harm is a main basis of dispute at the Court. In the *Katanga* case, for instance, the judgment excluded victims of rape and sexual and gender-based crimes.¹⁶ The Court's mandate to provide reparations to victims of international crimes is an important aspect that fulfils victims' hope for justice and therefore, its effective implementation is critical. A number of scholars have commented on the Court's reparations regime, including the meaning and purpose of reparations,¹⁷ the nature and structure of reparations,¹⁸ the challenges and different interpretations of the reparations regime at the ICC,¹⁹ and the jurisdiction of the Court on reparations.²⁰ This article seeks to

- 11 *The Prosecutor (on the application of Victims) v Ahmad Al Faqi Al Mahdi*, Reparations Order ICC-01/12-01/15-236 9 (12 August 2017).
- 12 *The Prosecutor v Bosco Ntaganda* (on the application of Victims) Reparations Order ICC-01/04-02/06-2659 (8 March 2021).
- 13 *The Prosecutor v Dominic Ongwen*, Judgment on the Appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 28 February 2024 entitled 'Reparations Order' ICC-02/04-01/15-2108(7 April 2025).
- 14 *The Prosecutor v. Germain Katanga Public Redacted Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017* entitled 'Order for Reparations Pursuant to Article 75 of the Statute' ICC-01/04-01/07 A3 A4 A5(8 March 2018).
- 15 International Criminal Court, 'Symbolic Ceremony Marks End of ICC-Ordered Reparations for Victims in the Case of *The Prosecutor v. Germain Katanga in the Democratic Republic of Congo*' <<https://www.icc-cpi.int/news/symbolic-ceremony-marks-end-icc-ordered-reparations-victims-case-prosecutor-v-germain-katanga>> accessed on 3 April 2026.
- 16 *Katanga* case (n 10) paras 176 and 177.
- 17 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012) 75.
- 18 Tomas Hamilton and Goran Sluiter, 'Principles of Reparations at the International Criminal Court: Assessing Alternative Approaches' (2022) 25 Max Planck Yearbook of United Nations Law 272–315, 274; Christos Papachristopoulos, 'On the Punitive Nature of ICC Reparations Orders' (2024) 37(3) LJIL 737–754.
- 19 Eric Posner, 'A Minimalist Reparations Regime for the International Criminal Court' in Steinberg Richard (ed), *Contemporary Issues Facing the International Criminal Court* (Brill 2016) 264–270; Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29(3) Int. Crim Justice Rev 221–248; Luke Moffet and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 LJIL 749–769.
- 20 Juan-Pablo Perez-Leon-Acevedo, 'The Emerging Reparations Case-Law of the ICC Appeals Chamber in Comparative Perspective' (12 June 2015) EJIL Talk <<https://www.ejiltalk.org/the-emerging-reparations-case-law-of-the-icc-appeals-chamber-in-comparative-perspective/>>accessed

contribute to the available literature on the work of the Court on reparations by examining the reparations system of the Court with respect to the meaning of victims and eligibility from a critical perspective. Through an analysis of the Court's jurisprudence, including the *Ongwen* case, the article argues that whilst the ICC ought to be commended for the progressive reparations regime, there are structural and practical challenges that impede the effective implementation of the reparations framework. In section two, the article outlines the legal and institutional basis for the reparations framework as provided for in Article 75 of the Rome Statute. In section three, the article provides a brief overview of the ICC's reparations framework, including the meaning of 'victims.' In section four, the ICC's jurisprudence on reparations is examined, and it is asserted that there is a gap between the Court's doctrinal aspirations on the one hand and the practical implementation challenges, including convicted persons' indigence and insufficiency of resources in the Trust Fund for Victims and interpretational challenges with regard to the meaning of 'victims' and eligibility criteria, on the other hand. In section four, the article also suggests some recommendations for effective implementation of the ICC's reparations framework and gives some concluding remarks in section five.

The ICC's Reparations Framework: A Brief Overview

The Rome Statute provides in Article 75 (1) that the Court is mandated to establish principles with respect to reparations for victims of international crimes, including the principle of restitution, compensation and rehabilitation. The decision of the Court on the scope and extent of reparations may be made at the request of victims or at its own initiative in exceptional circumstances, and the Court is required to state the principles upon which its decision is based.²¹ Significantly, an order for reparations can only be made against an individual who has been convicted.²² This is in line with the principle of individual criminal responsibility, as there is no basis for reparations if there is no conviction which establishes individual criminal responsibility.²³ It is pertinent to note that the Court's reparations mandate is not aimed at further punishing convicted offenders but at compensating the harm suffered by victims of international crimes.²⁴

What sets the Rome Statute apart from the statutes of international tribunals that preceded it, including the Nuremberg and Tokyo tribunals, and the ad hoc tribunals of

4 April 2026 >; Juan-Pablo Perez-Leon-Acevedo, 'Reparation Principles at the International Criminal Court' in Andenas Mads and others (eds) *General Principles and the Coherence of International Law* (Brill 2019); Britta Redwood and others, 'Reparations Jurisprudence of the International Criminal Court: A Distillation' (May 27, 2024) <SSRN: <https://ssrn.com/abstract=5013785>> accessed 3 April 2026.

21 Art 75 (1) Rome Statute.

22 *ibid*, Art 75 (2).

23 *Lubanga* case, Appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court para 65; *Katanga* case (n 10) paras 15, 251.

24 Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 IJTJ 250–252.

Yugoslavia (International Criminal Tribunal for the former Yugoslavia-ICTY) and Rwanda (International Criminal Tribunal for Rwanda-ICTR), is that the Rome Statute recognises the rights of victims before the ICC. The Nuremberg and Tokyo Tribunals, as well as the ICTY and ICTR, did not recognise victims as an independent aspect of, and as participants of the trials with rights, but confined their role to that of testifying witnesses.²⁵ The statutes of the Nuremberg and Tokyo tribunals did not offer the possibility of reparations for victims.²⁶ Similarly, the ICTY and ICTR statutes did not provide for a stand-alone right for victims to make reparations claims from convicted individuals within international criminal trials.²⁷ Instead, they provided for victims' compensation for offences within the jurisdiction of the tribunals in a narrow way of restitution for illegally taken property.²⁸

The ICC's reparative framework draws from the concept of reparative justice, which focuses on atoning for the harm suffered. The concept of reparative justice can be divided into three components. The first component is the reparations component, which entails awarding victims as a practical way of atoning for the harm they suffered, and is the main focus of this article.²⁹ The second component focuses on procedural aspects, including the victims' right to protection, right to access proceedings and right to receive support during proceedings, including psychosocial support. The third and final component focuses on victims' perceptions of justice, including victims' perceptions of the justice system as being fair and as one that restores their dignity.³⁰

In the *Chorzow Factory* case, the Permanent Court of International Justice explained that the purpose of reparations is to restore the victims to the position that they would have been in had the criminal conduct not been perpetrated against them.³¹ Further, in *Ntaganda*, the ICC explained that the primary factors that should guide the determination of the amount of reparations to be awarded are the nature of the harm suffered and what it would cost to repair the said harm.³² In this vein, reparative justice

25 Paulina Vega Gonzalez, 'The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court' (2006) 5 (3) SUR-International Journal of Human Rights 18–41.

26 Yael Danieli, 'Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law' (2005) 27 Cardozo Law Review 1633–1649.

27 Carla Ferstman and Mariana Goetz, 'Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings' in Carla Ferstman and others (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Nijhoff 2009) 313–350, 315.

28 Art 24 (3) Statute of the International Criminal Tribunal for the Former Yugoslavia (Adopted 25 May 1993 by Resolution 827); Art 23 (3) Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994; Ferstman and Goetz, *ibid*.

29 As provided for by Art 75 of the Rome Statute.

30 Jo-Anne Wemmers (ed.) *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 54.

31 *Chorzow Factory* case, Merits, 1928, P.C.I.J., Sr. A, N°17 (September 13), at 47.

32 *Ntaganda* case (n 12), para 98.

incorporates and acknowledges the significance of criminal prosecutions, unlike restorative justice, which focuses on finding alternatives to prosecutions.³³

Meaning and Categorisation of Victims

At the centre of the reparations framework are the victims of atrocities, in respect of whom reparations are awarded. The Rome Statute does not expressly define a victim, and Article 75 (1) refers to awarding reparations ‘to, or in respect of, victims.’ The wording of Article 75 (1) is evidence that the Rome Statute recognises family members and successors of victims. Rule 85(a)-(b) of the Rules of Evidence and Procedure defines victims as:

natural persons who have suffered harm as a consequence of the perpetration of any offence within the jurisdiction of the Court and may consist of institutions or organisations that have suffered direct damage to their property which is intended for education, religion, art, charitable purposes or science, and to their hospitals, historic monuments and other spaces and items for humanitarian purposes.³⁴

This definition is wide-ranging in comparison to the definitions provided in different international instruments, including the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims as

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.³⁵

This is a narrower definition in that it only encompasses natural persons and does not include other harm, including damage to property. The wide-ranging definition of victims was adopted to ensure inclusive victim participation at the ICC.³⁶

33 Wemmers (n 30), 222.

34 Rule 85 (n 5).

35 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted on 29 November 1985 by General Assembly resolution 40/34 define a victim as ‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.’

36 Deborah Ayedemo, ‘The Rights of Victims of Core International Crimes to Reparation in Nigeria’ (2021) 21 AHRLJ 1058–1079, 1073.

Direct Victims

Victims have been categorised as direct or indirect victims for purposes of reparations. For one to be considered a direct victim before the ICC, four conditions must be met as outlined in the *Katanga* case. Firstly, the claimant must be a natural or juristic person; secondly, the claimant must have suffered harm; thirdly, the offence which instigated the harm must be within the Court's jurisdiction, and lastly, there must be a causal link between the harm suffered and the offence.³⁷ These conditions are, however, not set in stone in determining who is eligible to be a direct victim for the purpose of receiving reparations.

The ambit of eligible victims is determined on a case-by-case basis, concerning the potential victims' situations.³⁸ When ascertaining whether there is causation, the determining factor is that 'but for' the conduct constituting an international crime, the victim would not have suffered any harm.³⁹ Only actions that are directly related to the outcome of the unlawful conduct and that significantly support a determination of responsibility are considered proximate causes.⁴⁰ Applications for reparations for direct victims need to be supported by documentation and other supporting evidence.⁴¹ In the *Ongwen* case, the Court explained that natural and legal persons are eligible for reparations as direct victims if they can sufficiently demonstrate that they suffered harm resulting from the defendant's conduct that constitutes a crime.⁴² As the discussion below highlights, however, the ICC's jurisprudence in considering the eligibility of victims as direct victims has not been consistent. This creates an interpretational gap regarding the eligibility of victims to be awarded reparations and, in turn, might deprive genuine victims of the chance to be considered for reparations for harm suffered.

In *Katanga*, legal representatives for five applicants argued based on the proximate principle that children born between 24 February 2003 and 24 November 2009, after the massacre carried out by the defendant in the eastern DRC in February 2003, must be admitted to the collective rehabilitative psychological amenities. This was on the basis that there was a possibility that the parents of these children had passed on transgenerational trauma to them.⁴³ The Court's Trial Chamber II dismissed this submission⁴⁴ and held that with respect to transgenerational harm, the closer the date of

37 *Katanga* case (n 10) para 46.

38 *ibid* para 38.

39 *The Prosecutor v Thomas Lubanga Dyilo* Judgment on the appeal against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' ICC-01/04-01/06 A7 A8(18 July 2019) para 162.

40 *Katanga* case, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07-3804-Red-tENG, (19 July 2018), para. 16.

41 *Katanga* case (n 10) para 122.

42 *The Prosecutor v Dominic Ongwen*, Order for Reparations ICC-02/04-01/15-2074 (28 February 2024), para 97.

43 *Katanga* case, ICC-01/04-01/07-3788-Conf (16 April 2018), para 29.

44 *Katanga* case (n 10), paras 29–31.

birth of the applicant to the date of the attack, the higher the likelihood that the attack effected them, particularly if no other possible traumatic events took place between 24 February 2003 and the date of the applicant's birth.⁴⁵ This decision followed an Appeals Chamber ruling in which it held that in its initial decision rendered in 2017,⁴⁶ the Trial Chamber had failed to provide proper reasoning for the rejection of reparations based on transgenerational trauma in respect of the five applicants in question. The Appeals Chamber ordered that the Trial Chamber should re-examine the transgenerational trauma claims, which it did and arrived at the same decision as the initial 2017 decision.

This was the first time that the Court was dealing with a case involving transgenerational trauma, which represented an opportunity for the ICC to clarify guidelines with respect to eligibility for reparations. The Court arguably missed an opportunity to clarify this important aspect by not providing nuanced reasons for finding that there was no evidence of causal nexus with respect to the five applicants, despite the opportunity to re-examine the claim pursuant to the Appeals Chamber decision. The decision in *Katanga* is also a departure from the jurisprudence of other international tribunals, including the Inter-American Court of Human Rights (IACtHR). The IACtHR had ruled in a case that preceded *Katanga* that children born after the death of one of their biological parents who was a victim of human rights violations are entitled to reparations as they are susceptible to suffering psychological and material injury, rendering them eligible for various methods of reparations, among other things, rehabilitation and compensation.⁴⁷

In *Ntaganda*, however, the Court took a different and more progressive approach from *Katanga* and accepted that children born as a consequence of sexual violence and rape must be considered to be direct and not indirect victims because of the particular injury they experience.⁴⁸ The Court further held that other children who were born not as a result of rape and sexual slavery, but of women and girls who were victims of rape or sexual slavery within the ambit of the crimes for which Ntaganda was convicted, may be considered as indirect victims of such crimes, as they may have suffered harm as a consequence of the harm suffered by the direct victims.⁴⁹ This approach is better than the *Katanga* approach because it recognises the vulnerability of children born of victims of rape and sexual slavery and the intergenerational trauma caused by the stigma suffered by children born as a consequence of rape and/or sexual slavery.

The inconsistency of the Court's jurisprudence on the meaning of victims for purposes of reparations can be attributed to the wording of Article 75 of the Rome Statute, which as explained above, provides for the Court to apply principles of reparations on a case-

45 *ibid* para 29.

46 *Katanga* case (n 10) paras 131–134.

47 *G'omez-Palomino v. Peru*, Merits, Reparations and Costs, IACtHR, Series C No. 136, 22 November 2005, para 119.

48 *Ntaganda* case (n 12) paras 121–123.

49 *ibid* para 190.

by-case basis. As aptly observed by Hamilton and Sluiter, this was not meant to give the ICC judges a free rein to design a reparation scheme of its own kind.⁵⁰ There is, however, a risk that this might end up happening due to the lack of clarity on the scope and eligibility for reparations, as shall be discussed in more detail in section four below.

Indirect Victims

An indirect victim is an individual who has not directly suffered harm but who shares a close relationship with the direct victim. The word ‘indirect victims,’ therefore, is used to denote individuals who incur injury as a consequence of harm committed against direct victims.⁵¹ In *Katanga*, the Trial Chamber explained that psychological suffering caused by the sudden passing away of a family member or the financial difficulty that is experienced as a result of the loss of the deceased family member’s contribution are two illustrations of the injury suffered by indirect victims.⁵² The Court reiterated this position in the *Ongwen* case, explaining that instances of indirect victimhood consist of close relatives of victims and individuals who suffer harm while intervening to help victims of international crimes generally directed at the civilian population.⁵³ The intervention referred to in this instance must have been carried out to stop the commission of the crime in question for the individual to qualify as an indirect victim.⁵⁴ Legal entities such as hospitals in the *Ntagada* case,⁵⁵ schools in the *Lubanga* case,⁵⁶ and international organisations and corporations in the *Al Mahdi* case,⁵⁷ have also been accepted as victims.

One of the challenges associated with the ICC’s reparations regime is the high threshold that needs to be met for one to qualify as a direct or indirect victim. Although the high threshold ensures that only those people who suffered harm are awarded reparations, it might result in the unintended consequences that some legitimate victims might miss out on the reparations process, as happened to the five applicants in *Katanga* who were seeking reparations for transgenerational trauma.⁵⁸

A more progressive approach has been adopted by the Extraordinary Chambers in the Courts of Cambodia (ECCC). It is pertinent to note at this point that both the ECCC and the ICC recognise the right of victims to reparations, with the distinction that whilst the ICC is a permanent court, the ECCC was established to deal with atrocities stemming

50 Hamilton and Sluiter (n 18), 274.

51 *Ongwen* case (n 13), para 128; William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2017) 343.

52 *Katanga* case (n 10) para 19.

53 *Ongwen* case (n 13) para 128.

54 *The Prosecutor v Thomas Lubanga Dyilo* Redacted version of ‘Decision on “Indirect Victims”’ ICC-01/04-01/06-1813 (8 April 2009) para 51.

55 *Ntagada* case (n 12) para 32.

56 Rule 85(b) (n 5); Situation in the Democratic Republic of Congo, *The Prosecutor v Thomas Lubanga Dyilo*, Order for Reparations ICC-01/04-01/06-3129-AnxA (3 March 2015), para 8.

57 *Al Mahdi* case (n 11) para 41.

58 *Katanga* case (n 40) para 16.

from a specific conflict, the 1975 to 1975 conflict. This conflict claimed the lives of approximately 1.7 million people, about twenty-one percent of the population at that time.⁵⁹ The ECCC is a hybrid court whose operation is guided by its Internal Rules. The Internal Rules are based on the Cambodian Criminal Procedure Law, with international law filling the gap created by any lack of clarity in the Cambodian law or where Cambodian law is at odds with international law.⁶⁰ Similar to the ICC, the ECCC reparations regime is based on a convicted individual as a starting point for responsibility for reparations.⁶¹ The main difference between the reparations framework at the two courts is that an amendment of the Rome Statute provisions requires the consent of the Assembly of States Parties as provided for in Article 121, whereas the reparations framework at the ECCC can be reviewed by the Court itself through an amendment of Internal Rules as provided in Rule 2 and Rule 3. Notwithstanding this, the wording of Article 75 of the Rome Statute still allows flexibility on the part of the judges when determining the amount and scope of reparations.

The ECCC modified its rules in September 2010, including Rule 12 bis, so that victims could be ‘afforded the status of civil parties as long as they proved that the harm visited on them was directly related to the factual circumstances set out in the Introductory and Supplementary Submissions.’⁶² The effect of this is that proof that international crimes were committed is not a prerequisite for the awarding of reparations but rather dealt with at a later stage. This, in turn, lowers the threshold on the link between the convicted crime and the harm suffered by victims when compared to the ICC’s requirements.

The victims who opt for reparations awarded through third parties are then accepted into the ECCC Victims Support Section to participate in the framing of the reparations’ implementation strategy.⁶³ This is akin to the Trust Fund for Victims’ current practice of raising funds through donors to execute its reparation mandate.⁶⁴ It is suggested that the Court should consider adopting a similar system and this would give claimants two options. The Court ordered reparations against indigent persons which has to follow the stringent procedural guidelines to protect the rights of the accused, or reparations delivered through donations by third parties, which may be more meaningful regarding the delivery of important justice to victims, which will not be dependent on proof and

59 Article 1, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). See also Balta and others (n 19), at 18.

60 *ibid.*

61 *ibid.*, 24; ECCC, Internal Rules, rev. 6, September 17, 2010, Rule 23.

62 *ibid.* (n 19), 235.

63 *ibid.*, 231.

64 The Trust Fund for Victims (Trust Fund) is one of the most important and innovative aspects of the Rome Statute’s provisions for victims. It was established pursuant to Art 79 (1) of the Statute, Rule 98 of the Rules of Procedure and Evidence, and Resolution 6 of the Assembly of States Parties, 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.’

conviction of international crimes. Broadening the context of who may be recognised as victims eliminates the criticism that the Court only delivers selective justice.⁶⁵

Collective Victims

Article 75 (1) of the Rome Statute provides that ‘the Court shall establish principles relating to reparations to, or in respect of, victims...’ This ostensibly refers to indirect and collective victims. Reparations may, for instance, be granted ‘in respect of’ victims who have died, where the individual making the reparations application can be granted reparations on behalf of the dead victim.⁶⁶ In most instances, reparations encompass a large number of victims, which, however, due to the passage of time as well as the extensive and systematic occurrence of the crimes, makes it hard to ascertain the precise number of victims.⁶⁷ In such instances, the Court usually makes orders of collective reparations.

Trial Chamber II in the *Katanga* case, when ascertaining what establishes a group of victims for collective reparations, held that a group or category of people may be connected by a common experience or identity, on the other hand, by victimisation as a result of the same harm or the same offence within the Court’s jurisdiction. Therefore, collective reparations may assist a group, including a racial, political, ethnic, religious or social group which pre-existed the offence, but also any other group joined by collective injury and distress because of the international crime(s) perpetrated by the convicted individual.⁶⁸ In *Lubanga*, the Court indicated that reparations must have a collective focus to guarantee that they cover the victims who were unknown at the time.⁶⁹ On the recommendation of the Trust Fund for Victims, the Court also agreed that the collective approach would be a preferable mode in comparison with individual awards, which would be a very expensive and resource-demanding process.⁷⁰ In *Al Mahdi*, the Court decided that collective reparations were the most appropriate means to remedy the harm caused, and regarding the modalities, it held that the harm incurred as a result of the destruction of the Protected Structures would be adequately remedied by measures for their maintenance and protection.⁷¹ Observing that renovations had already been done by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Court decided that the fitting modality of reparations shall

65 Simon Robins, ‘Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations’ 9(2017) 9 (1) Human Rights and International Legal Discourse 41–58, 45.

66 See, for example, ‘Situation in the Democratic Republic of Congo, in the Case of *The Prosecutor v. Germain Katanga* Decision on the Application for Resumption of Action Submitted by a Relative of Deceased Victim a/0265/09 and the Appointment of a New Representative for Victim A/0071/08, 12 December 2016, ICC-01/04-01/07-3721-tENG (12 December 2016),’ para 7, *Ongwen* case (n 42) para 40.

67 *Ntaganda* case (n 12) para 8.

68 *Katanga* case (n 10), paras 29–30; *Al Mahdi* case (n 11), para 275.

69 *Lubanga* case (n 9), para 219.

70 *ibid*, para 274.

71 *Al Mahdi* case (n 11) para 67.

be measures meant for rehabilitating the structures with active measures to guarantee non-repetition of attacks against them in the future.⁷²

In *Ntaganda*, the Court noted that 2,121 victims took part in the trial proceedings, amongst which 1,837 were victims of the attacks and 284 victims of offences against child soldiers and further acknowledged that potentially, more victims could still come up.⁷³ Moreover, it found that collective reparations with individualised elements were the most fitting form of reparations to properly remedy the harm incurred by the victims of the crimes for which Ntaganda was found guilty.⁷⁴ However, the Court emphasised that eligible victims for reparations in this case were not restricted to the persons who applied for reparations or those permitted to take part in the court proceedings. Rather, it included a much bigger number of prospective victims, given the findings in the judgement with regard to the extent and especially the widespread and systematic nature of the offences perpetrated.⁷⁵

In *Ongwen*, the Court considered the large number of victims of Ongwen's crimes estimated to be 49,772 and, on this basis, decided to award collective community-based reparations. The Court noted that the large number of victims rendered individual reparations not feasible for quick implementation, and the Court can only deliver reparations if there is a reasonable guarantee of, or at a minimum, likelihood of implementation.⁷⁶

Eligibility and Modalities for Reparations: Opportunities and Challenges

As explained above, to be eligible for reparations, victims must have suffered harm as a result of the offence the perpetrator has been convicted of, which in turn must be within the scope of the exact places and dates specified by the Court.⁷⁷ The question of eligibility is significant because victims at the Court are not positioned as just witnesses in the proceedings, as is the practice in domestic trials, but they participate as prospective recipients of reparations, which are owed to them because of the harm they suffered. This was reiterated by the Trial Chamber in the *Katanga* case, where it was indicated that the Court must do its utmost to guarantee that victims receive meaningful reparations and that, as far as possible, such reparations are prompt, appropriate and adequate.⁷⁸

The category of victims who may possibly benefit from reparations orders largely depends on the prosecutor's approach regarding the cases, persons and charges

72 *ibid.*

73 *Ntaganda* case (n 12), para 234.

74 *ibid.*, para 186.

75 *ibid.*, para 190.

76 *Ongwen* case (n 13) paras 577–579.

77 *Lubanga* case (n 9) para 32; *Katanga* case, (n 10) 38–40, *Al-Mahdi* case (n 11), para 42.

78 *Katanga* case (n 10), para 15.

preferred for prosecution. Numerous victims within a certain situation will fall outside the limited cases designated by the Court for prosecution and will, as a result, be unable to get reparations through court orders. This is one of the situations where the independent role of the Trust Fund becomes most important through its assistance mandate, which provides reparative value to the most vulnerable victims, their families and their communities.⁷⁹ However, the Trust Fund's lack of resources renders it incapable of providing the necessary assistance in most instances.

The Court's Appeals Chamber established five important elements that have to be present at a minimum in a reparations order in *Lubanga*, which will be examined in detail below.⁸⁰ These principles were unconditionally used in the *Katanga*⁸¹ and *Al Mahdi*⁸² cases and further expanded in the *Ntaganda*⁸³ and *Ongwen* cases.⁸⁴

Requirement for Conviction as a Starting Point for Granting Reparations

Firstly, the order must be granted against a convicted individual.⁸⁵ An additional requirement is that the reparations order must establish and advise the convicted individual of the amount of his or her liability regarding the reparations order granted.⁸⁶ This is in line with Article 75 (2) of the Rome Statute. It is pertinent to note that the convicted person cannot rely on their indigence as a defence against claims for reparations.⁸⁷ In circumstances where the convicted individual is incapable of quickly complying with a reparations order due to indigence, Regulation 56 of the Trust Fund Regulations provides that the Trust Fund for Victims may loan its 'other resources'.⁸⁸ However, this does not exonerate the convicted individual from monetary responsibility for reparations. The Trust Fund for Victims' role is complementary as it offers reparations for victims on the basis of obtainable resources within the parameters of its

79 Rome Statute of the International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3 Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3.

80 *Lubanga* case (n 9), paras 32; 118.

81 *Katanga* case (n 10), paras 29–30.

82 *Al Mahdi* case (n 11), paras 26–50.

83 *The Prosecutor v. Bosco Ntaganda*, First Decision on Reparations Process, ICC-01/04-02/06-2547(26 June 2020), para 46.

84 *Ongwen* case (n 13), para 71.

85 *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art 19 (2) (a) of the Statute of 3 October 2006 ICC-01/04-01/06-772 (13 December 2006), paras 65, 76.

86 *ibid*, paras 32 and 118.

87 *ibid*, paras 102–105.

88 According to Regulation 56 of the Regulations of the Trust Fund for Victims: The Board of Directors shall determine whether to complement the resources collected through awards for reparations with 'other resources of the Trust Fund' and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.

assistance responsibility in meeting reparations grants.⁸⁹ For that reason, the Trust Fund for Victims does not substitute for the obligation of the convicted individual against whom the Court has issued a reparations order.⁹⁰ This understanding is supported by the Basic Principles and Guidelines, which provide that in situations where an individual, a legal person, or other body is found liable for reparations to a victim, they must deliver reparations to the victim.⁹¹

The Trust Fund for Victims must be refunded by the convicted individual, who remains liable until the full amount is paid.⁹² This is not practical because the convicted individuals who have been declared indigent are sentenced to serve time in prison and have no means of generating income for this obligation. In *Lubanga*, because Lubanga was declared indigent and there were no financial assets identified to facilitate the reparations, the Court stated that his participation in the reparations would only be symbolic.⁹³ Regarding reparations being completed through the Trust Fund for Victims, the Court determined that where a convicted person is declared indigent, the reparations award is not restricted to the seized resources deposited with the Trust Fund for Victims but the award can be facilitated by the Fund's own resources in line with Rule 98(5) and Regulation 56. In *Al Mahdi*, after declaring that Al Mahdi was indigent, the Court noted that it was within the Trust Fund for Victims' discretion to complement any individual or collective reparations and, as a result, encouraged the Trust Fund for Victims to complement the individual and collective awards to the extent possible and to start fundraising means to the amount needed to complement the full amount of the award.⁹⁴ This reiterates the point mentioned above that the reliance on individual criminal liability for reparations hinders effective implementation.

In *Ongwen*, the Court noted Ongwen's indigence and the inadequate resources in the Trust Fund for Victims, which made the awarding of individual reparations impractical.⁹⁵ The Court in this case drew from its previous experiences and considered the Trust Fund for Victims' inadequate resources, thus deciding on a calculated approach which concedes the challenges in delivering reparations practically, as exposed by other reparations cases. After accepting the Trust Fund for Victims' insufficiency of adequate resources, the Court established prioritisation elements in the judgment, stating that the priority people to get reparations should be victims who are 'in serious need or urgent assistance' to survive. The second priority group comprises

89 *Lubanga* case (n 9), para 141.

90 *ibid.*

91 Guideline 15 (n 32).

92 *Lubanga* case (n 85), para 5.

93 *Lubanga* case (n 56), para 269.

94 *Al Mahdi* case (n 11), para 138.

95 *Ongwen* case (n 13) para 579.

‘vulnerable direct participating victims,’ then by other direct or indirect vulnerable victims.⁹⁶

However, the Court has shed light in this instance by holding that the convicted offender’s financial obligation for reparations is not affected by his/her indigence.⁹⁷ The challenge with this stance is that it becomes difficult to guarantee that the reparations order is executed if the economic responsibility of the convicted individual is not carefully considered. Furthermore, it may be impossible to seize and freeze the individual’s property because they do not have any. As the Court indicated in the *Mahdi* case, the financial situation of the convicted individual will have an effect on how the order for reparations is implemented, including whether compensation is delivered in instalments or whether properties are seized or frozen.⁹⁸

In light of this position, the Court’s model of reparations, which is founded on the criminal responsibility of the convicted person, can arguably only be effective for victims who seek an unequivocal judicial acknowledgement of liability, independent of the offender’s indigence. Therefore, even though it is stated that reparations guarantee that the perpetrators account for their international crimes, the level of accountability is currently restricted to an apology. In contrast, given the reality of the indigence of the convicted individuals and the lack of adequate resources within the Trust Fund for Victims, victims have genuine needs that must be attended to. It is against this background that it is suggested that the Court should assume a more practical approach to reparations, which can become adaptable to the challenges faced by victims.

The ECCC has adopted a more progressive and practical approach, aiming to address the challenge of indigence on the part of the convicted individual by allowing victims to decide *between* the reparations it has ordered and reparations that may be received through third parties.⁹⁹ In the first case before the ECCC, the Court had ordered the convicted person, Kaing Guek Eav alias *Duch*, who was indigent, to pay the reparations. Due to this indigence, the reparations were restricted to including the names of the civil parties in the judgment, and the publication of the acknowledgement of wrong and remorse by Duch.¹⁰⁰ Civil society and the victims criticised this decision, and in response, the Internal Rules were amended by the Judges’ Plenary in September 2010. The amendment provided for a broader mandate for reparations for the ECCC, including that the court could order the payment of reparations to be externally *funded*.¹⁰¹ This is a more progressive approach than that at the ICC in that the victims have the option to

96 *Ongwen* case (n 13) para 633.

97 *Lubanga* case (n 9), paras 103–104; *Katanga* case (n 10), para. 189; see also *Ntaganda* case, (n 12) para 223.

98 *Al Mahdi* case (n 11), para 136.

99 ECCC, Internal Rules, Rev. 6, September 17, 2010, Rule 23 quinquies (3).

100 Balta and others (n 19), at 26; *The Prosecutor v. Kaing Guek Eav alias Duch* 001/18-07-2007/ECCC/TC (case 001 Duch), Judgment of 26 July 2010, para 667–668.

101 *ibid*, 26; ECCC, Internal Rules, Rev. 6, September 17, 2010, Rule 23 quinquies (3).

decide whether to follow the more stringent rules of the Court or the more flexible option for reparations through third parties.

Nature of Reparations Must be Specific

The order must specify and provide reasons for the nature of reparations granted and whether they are collective, individual or both in accordance with rules 97(1) and 98 of the Rules of Procedure and Evidence.¹⁰² Article 75(1) of the Rome Statute, as indicated above, provides for methods of reparations, including compensation and rehabilitation. However, these are not restricted, as the Court may award reparations with preventative, transformative, or symbolic value.¹⁰³ The Appeals Chamber in the *Lubanga* case emphasised that appropriate methods of reparations must guarantee that victims achieve redress for the harm they have experienced.¹⁰⁴

The different methods of reparations that are provided for under international law consist of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁰⁵

The Rome Statute only expressly mentions restitution, compensation and rehabilitation as forms of reparations. However, this list is not complete as the wording of Article 75 (2) makes it clear that the Court can grant an order directly against a convicted individual stipulating suitable reparations in respect of victims, including restitution, compensation and rehabilitation. Additionally, the 1998 Working Group on Procedural Matters of the Rome Conference specifically mentioned and noted with approval the meaning of reparations found in the Van Boven/ Bassiouni principles, which embrace two further forms of reparations: satisfaction and guarantees of non-repetition. These have also been adopted by the Court in different cases.¹⁰⁶

¹⁰² *Lubanga* case (n 85), para 32.

¹⁰³ *Lubanga* case (n 9) para 222.

¹⁰⁴ *Lubanga* case (n 85), paras 211–212.

¹⁰⁵ See Chapter I, The Evolution of Victims' Access to Justice and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Van Boven/ Bassiouni Principles), E/CN.4/2005/L.48; see also, for example, the Draft Articles on State Responsibility Adopted by the International Law Commission in 2001 (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001); Principles 8–10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985; the Universal Declaration of Human Rights (Art 8); International Covenant on Civil and Political Rights (Art 2.3); the Convention against Torture and Other Cruel Inhuman and Degrading Treatment (Art 14); the International Convention on the Elimination of All Forms of Racial Discrimination (Art 6); the Convention on the Rights of the Child (Art 39); the American Convention on Human Rights (Art 25, 63.1); the European Convention of Human Rights (Arts 5, 13, 41); the African Charter on Human and People's Rights (Arts 7, 21.2).

¹⁰⁶ Art 73 On Reparation to Victims in Working Group Report A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998. In that footnote, the Working Group makes reference to Van Boven / Bassiouni Principles 12 to 15, of the original 1996 expert report (which define five forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition). Principles

Restitution

Restitution must, wherever conceivable, restore the victim to the state they would have been in had the harm not taken place.¹⁰⁷ Restitution encompasses, but is not limited to, enjoyment of human rights, restoration of liberty, family life and citizenship, identity, return to one's place of habitation, return of property and restoration of employment.¹⁰⁸ In the *Ntaganda* case, the Court acknowledged that the multiple and diverse harms suffered by the victims in the case rendered it impossible to restore them to the situation they would have been in had the harm not occurred. The Court therefore held on this basis that a combination of the different modalities of reparations available needed to be applied.¹⁰⁹ Restitution is conventionally regarded as the primary method of reparations because it aims to re-establish the position of the victim as it was before the crimes were committed. However, because of the serious nature of the crimes that the Court has jurisdiction over, it would usually be impossible to restore victims to their previous state before the violations happened.¹¹⁰ Restitution alone, therefore, becomes inadequate for numerous victims before the Court. In the *Ongwen* case, the Court noted that restitution and compensation as forms of individual reparation would not be appropriate due to the extremely high number of victims in the case.¹¹¹

Compensation

Compensation must be delivered for any economically quantifiable damages and should be fitting and proportional to the seriousness of the violation and the context of each case that is a result of harm from serious crimes.¹¹² The damages suffered may comprise physical or mental injury, lost opportunities including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage and legal costs or expert assistance, medicine and medical services, as well as psychological and social services.¹¹³ Compensation can be granted

12–15 correspond to principles 19–23 of the last and final version of the expert report that was adopted by the Commission on Human Rights on 19 April 2005 and by the UN General Assembly on 16 December 2005. For example, in the *Ntaganda* case, Order for reparations, paras 78–88 and *Ongwen* case, Order for reparations, para 612.

107 *Ntaganda* case (n 12), para 201.

108 Principle 19, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

109 *Ntaganda* case (n 12) para 198.

110 Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission on its Fifty-Third Session, GA; Supplementary No. 10 (A/56/10); Ch. IV.E (November 2001), at 244. See also Draft Articles of State Responsibility, Art 35 and 36.

111 *Ongwen* case (n 13) para 614.

112 *The Prosecutor v Thomas Lubanga Dyilo*, judgment on the appeals against the 'decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 ICC-01/04-01/06-3129 (3 March 2015) para. 40, *Ntaganda* case (n 12) para 85.

113 Principle 20, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

as a substitute for restitution, and its purpose is to fill in the gaps to guarantee full reparations for the harm suffered.¹¹⁴

The Court in the *Ntaganda* case confirmed that compensation is a substitute remedy awarded as a method of redress when there is no way to undo the impacts of the harm by other measures. Compensation on its own cannot reinstate or replace victims' rights that have been violated.¹¹⁵ *Ntaganda* was held to be liable for reparations awards amounting to USD 30 million, the highest financial responsibility for reparations delivered by the Court at the time.¹¹⁶ However, after acknowledging *Ntaganda*'s indigence, the Court encouraged the Trust Fund for Victims to complement the reparations awards by engaging in fundraising to the amount required to complement the full amount of the award.¹¹⁷ The Court reiterated that, as explained by the Appeals Chamber in the *Lubanga* case, the indigence of the convicted individual when the order of reparations is issued is neither an impediment to the imposition of liability for reparations nor does it offer the convicted individual any leeway to get reduced liability.¹¹⁸

Ntaganda's liability of USD 30 million became the highest at the time, as in *Lubanga* it was USD 10 million, *Katanga* USD 1 million, and *Al Mahdi* EUR 2, 700 000. In arriving at this amount, the Court expounded that the primary factors that should be considered when determining an individual's monetary liability are the harm and the costs of repairing it.¹¹⁹ It explained that modes of liability, seriousness of the offences, or extenuating factors are immaterial for the determination of the amount.¹²⁰

This altered the *Lubanga* principle on liability, which provided that the convicted individual's liability for reparations had to be proportional to the injury caused and, *inter alia*, the defendant's participation in the perpetration of the offences for which he or she was convicted, in the particular circumstances of the case.¹²¹ In essence, the *Ntaganda* case incorporated a victim-centred approach whose objective is to repair the damage caused to victims, not as caused by the defendant. This is consistent with the non-punitive characteristic of reparations regimes, where the extent of the person's liability should be insignificant to enquiries of economic liability. It is asserted that this is a positive development because it shows that the Court has taken steps to address

114 Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission on its Fifty-Third Session, GA; Supplementary No. 10 (A/56/10); Ch. IV.E (November 2001), at 245, referring to the *Chorzów Factory* Case, 1928, P.C.I.J., Sr. A, N°17 (September 13), at 47–48.

115 *Ntaganda* case (n 12), para 84.

116 *ibid*, para 247.

117 *ibid*, para 257.

118 *ibid*, para 257.

119 *ibid*, para 98.

120 *ibid*, para 98.

121 *Lubanga* case (n 9), para 21.

concerns and improve the delivery of reparations that prioritise the victims' rights, needs, and dignity.

The Court in *Katanga* received 341 applications for reparations in total and determined that 297 applicants were able to show on a balance of probabilities that they were victims of the offences for which Katanga was convicted and therefore entitled to reparations.¹²² On 24 March 2017, Trial Chamber II delivered an Order for Reparations of USD 1 million against Katanga in line with Article 75 of the Rome Statute.¹²³ The Chamber awarded reparations to 297 identified victims, consisting of USD 250, which was an individual symbolic compensation to each victim and four collective reparations to all victims, encompassing education assistance, housing assistance, revenue-generating undertakings, and psychological therapy.¹²⁴ The Trust Fund for Victims was ordered to submit a draft implementation strategy and was tasked with implementing the individual and collective awards provided in the reparations order.¹²⁵

In light of Katanga's indigence, the Trial Chamber sought that the Trust Fund for Victims' Board of Directors should complement the payment of both the individual and collective awards delivered against the defendant.¹²⁶ Consequently, the Trust Fund for Victims' Board in May 2017 provided USD 1 million for the reparations awarded to victims in the *Katanga* case, covering all the expenses of the reparations awards ordered by the Trial Chamber. The Board also received a generous contribution of EUR 200,000 from the Government of the Netherlands, which comprised reserved funding to facilitate the cost of individual awards. The Trust Fund for Victims presented its draft implementation strategy to the Chamber on 25 July 2017, and the Appeals Chamber upheld, for the most part, the Reparations Order on 8 March 2018.

Amongst those who were not successful in getting reparations orders were applicants who alleged to have suffered from transgenerational trauma and loss of standard of living and/or loss of opportunity, where the Court determined on a balance of probabilities that there was no causal nexus between the trauma sustained and the attack on Bogoro.¹²⁷ Significantly, some applicants were those claiming reparations for the sexual violence, rape, or gender-based violence they suffered during the attack in Bogoro. The Court, having regard to the decision of Trial Chamber II of acquitting the defendant of rape and sexual slavery as crimes against humanity, concluded that it cannot determine that the harm was a result of one or more of the offences for which Katanga was convicted.¹²⁸

122 *Katanga* case (n 10) para 168.

123 *ibid*, para 264.

124 *ibid*, para 300.

125 *ibid*, para 307.

126 *ibid*, para 328.

127 *ibid*, paras 176 and 177.

128 *Katanga* case (n 10), para 179.

This is so far the only reparations award by the Court that has been successfully implemented completely. It is therefore an important milestone for the reparations regime of the Court but most importantly for the victims of Katanga. As a result, the ICC and the Trust Fund for Victims held a ceremony on 24 April 2024 in Ituri, DRC, to signify the completion of the implementation process of the Lubanga reparations order.¹²⁹ There is, however, still a long way for the Court to go in its efforts to fulfil its mandate of reparations, and more needs to be done, such as addressing some of the procedural and substantive challenges for it to eventually be more effective.

In *Al Mahdi*, the Court awarded individual reparations for the resulting economic harm only to those whose income solely depended upon the Protected Buildings.¹³⁰ For the total reparations, the Court set Al Mahdi's liability for harm at EUR 2,7 million.¹³¹ The reparations order was substantially upheld by the Appeals Chamber on 8 March 2018.¹³² After declaring that Al Mahdi was indigent, the Court noted that it was within the Trust Fund for Victims' discretion to complement any individual or collective reparations and, as a result, encouraged the Trust Fund for Victims to complement the individual and collective awards to the extent possible and to start fundraising means to the amount needed to complement the full amount of the award.¹³³ This reiterates the argument above that the reliance on individual criminal liability for reparations hinders effective implementation.

Rehabilitation

Rehabilitation measures are aimed at assisting in the reintegration of victims into society, taking into consideration the different impacts crimes have on victims of different genders.¹³⁴ Rehabilitation must consist of medical and psychological care as well as social and legal services.¹³⁵ Rehabilitation seeks to lessen as far as possible the psychological suffering as well as physical and social consequences of the offences perpetrated.

129 International Criminal Court, 'Symbolic Ceremony Marks End of ICC-Ordered Reparations for Victims in the Case of *The Prosecutor v. Germain Katanga* in the Democratic Republic of Congo' <<https://www.icc-cpi.int/news/symbolic-ceremony-marks-end-icc-ordered-reparations-victims-case-prosecutor-v-germain-katanga>>accessed on 3 April 2026.

130 *Al Mahdi* case (n 11), para 81.

131 *ibid*, para 134.

132 *The Prosecutor (on the application of Victims) v Al Mahdi* (Ahmad Al Faqi), Public Redacted Judgment on the Appeal of Victims against the 'Reparations Order' ICC-01/12-01/15 A (8 March 2018), para 98.

133 *Al Mahdi* case (n 11) para 138.

134 *Ntaganda* case (n 12) para. 203; *The Prosecutor v Thomas Lubanga Dyilo* judgment on the appeals against the decision establishing the principles and procedures to be applied to reparations of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2 ICC-01/04-01/06 A A 2 A 3 (3 March 2015). Amended Reparations Order, para 6 *Ongwen* case (n 13) para 616.

135 Principle 21, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

In *Ongwen*, the emphasis on rehabilitation programmes at the community level was necessitated by the multi-layered injuries suffered by victims.¹³⁶ Significantly, the Court recognised the serious and lasting physical, moral and material injury incurred by direct victims of sexual and gender-based crimes, children born of forced pregnancy, former child soldiers and victims of attacks in Internally Displaced Persons camps. It also accepted that indirect victims of these crimes suffered moral and material injury, the whole community suffered, and children of direct victims of sexual and gender-based crimes sustained transgenerational damage.¹³⁷

As a result, the Chamber decided that such programmes are the most suitable method of reparations to comprehensively deal with the diverse forms of injury and cover a greater number of victims. Particularly, it emphasised that the principal aim of rehabilitation is to restore victims' independence, nurture inclusion and involvement in the community, and rebuild or improve their mental, social, physical and vocational skills.¹³⁸ The order underlined the need for designing and implementing these programmes in discussion with survivors and victims, and can be perceived as a positive step because the recipients have ownership of it stemming from the prior consultations.

Satisfaction

The Court has defined satisfaction measures as reparations intended to acknowledge the damages and safeguard the dignity and standing of the victims.¹³⁹ These include measures designed to effectively end violence, search for disappeared individuals, bodies of those murdered and support in their retrieval, a public apology which includes an acknowledgement of evidence of events and taking responsibility, and commemorations and tributes to victims.¹⁴⁰

In the *Ntaganda* case, the Court decided to, amongst others, order satisfaction for the victims, citing that it will contribute to the communities' awareness of the offences committed by Ntaganda, promote better attitudes towards offences of this nature and guarantee that victims perform an active role in their communities.¹⁴¹ In *Ongwen*, the order included community-based symbolic or satisfaction measures, covering ceremonies, memorials and apologies.¹⁴²

Guarantees of Non-Repetition

Guarantees of non-repetition must encompass measures which are aimed at contributing to the prevention of similar atrocities in the future. These measures include but are not

¹³⁶ *Ongwen* case (n 13), para 613.

¹³⁷ *ibid*, para 617.

¹³⁸ *ibid*.

¹³⁹ *Ntaganda* case (n 12) para. 207. *Ongwen* case (n 13) para 620.

¹⁴⁰ Principle 22, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

¹⁴¹ *Ntaganda* case (n 12), para 207.

¹⁴² *Ongwen* case (n 13), paras 663–664.

limited to guaranteeing the effective control of military and security forces by a civilian government, promoting tools for the early detection, warning and prevention of social conflicts and their resolution, and reviewing legislation which potentially leads to serious violations of human rights as provided for in international human rights law and international humanitarian law.¹⁴³

In the *Al Mahdi* case, the Court, after observing that renovations of the buildings with which the defendant had been charged with destroying had already been implemented by the United Nations Educational, Scientific and Cultural Organization (UNESCO), held that the fitting modality of reparations shall be measures directed at rehabilitating the protected sites with effective measures to guarantee non-repetition of the attacks directed against them.¹⁴⁴

Guarantees of non-repetition have been incorporated in reparations decisions of international bodies such as the UN Committee on Human Rights and Inter-American Court of Human Rights.¹⁴⁵ The Joinet/Orentlicher principles denote guarantees of non-repetition as encompassing demobilisation of parastatal armed forces, reform of state institutions, disbandment and social reintegration of former child soldiers, and reform of legislation and bodies that might perpetuate impunity.¹⁴⁶

The Reparations Order Must Outline Injury Suffered by Victims

The reparations order must outline the injury caused to both direct and indirect victims as a consequence of the offences for which the individual was convicted. This entails that in its reparations order, the Court must stipulate the crimes for which the individual was convicted that resulted in the harm suffered by both direct and indirect victims.¹⁴⁷ Instances of harm to direct victims include: physical injury and trauma; psychological damage and the appearance of psychological disorders, including suicidal tendencies, depression, and anti-social behaviour; difficulty in connecting to family or community members; struggle in controlling aggressive instincts; and the shortage of development of civilian literacies.¹⁴⁸ With regard to harm to indirect victims, the Court indicated in *Lubanga* that loss, injury, or damage suffered by intervening individuals while trying to

143 Principle 23, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

144 *Al Mahdi* case (n 11), para 67.

145 See, for instance, the Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* (compensatory damages), Judgement of 21 July 1989, Series C, n° 7, 34, 35 and *Castillo Paez v. Peru*, judgement of 3 November 1997, Series C, n° 34,90; and Human Rights Committee, General Comment 6 on Art 6,3; General Comment 20 on Art 7,8–10; *Bleir v. Uruguay*, 23 May 1978, CCPR/C/15/D/30/1978, 5; and *Blanco v. Nicaragua*, 18 August 1994, CCPR/C/51/D/328/1988,11.

146 See Joinet Louis, ‘Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/Sub.2/1997/20/Rev. 1 of 2 October 1997,’ updated in 2005 by Orentlicher, D. ‘Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102 and E/CN.4/2005/102/ Add.1,’ 8 February 2005, 35–38.

147 *Lubanga* case (n 85), para 191.

148 *ibid.*

end the perpetration of harm on the victim is included. It also encompasses psychological and/or material suffering as a consequence of the violence of the offender against the victim's relatives and communities.¹⁴⁹ It is pertinent to point out that the Court sometimes fails to acknowledge certain harms suffered by victims for various reasons, including the absence of a clear causal link between the harm and the injury sustained, and this has the consequence of restricting some victims from getting reparations awards. For example, in the *Katanga* case, the Court rejected five applicants for reparations who submitted that they were experiencing transgenerational harm, citing that, on a balance of probabilities, the causal link between the trauma experienced by the offspring of the direct victims and the Bogoro attacks could not be proven.¹⁵⁰

The Appeals Chamber in the *Lubanga* case emphasised that appropriate methods of reparations must guarantee that victims achieve redress for the harm they have experienced.¹⁵¹ The idea that reparations grants must be proportionate to the harm sustained is ripe for deliberation. The proportionality of the reparations to the harm is essential for the Court to appreciate and remedy the harm. However, one then wonders how the balance between the reparations and the harm is struck. Should the awarded reparations be equal to the liability of the offender? The jurisprudence of the Court indicates that the reparations delivered by the Court are nowhere proportionate to the harm suffered by victims in the different cases. Rather, victims have been awarded compensation of USD 250, which is not commensurate with the harm suffered. It is arguably unfair and a miscarriage of justice to award someone who has suffered as a result of grave crimes, e.g. forced pregnancy, that meagre amount as reparations. The fact that these payments have been termed symbolic, according to the author's view, is because of the realisation that the Court cannot really offer reparations that are proportionate to the harm the victims have suffered.

An additional requirement is that the order for reparations must identify victims who are eligible to benefit from reparations or set out the criteria for eligibility. If a purported victim cannot demonstrate that they were injured by one of the crimes identified in the Rome Statute, the Court may not regard them as victims and, therefore, may not grant them reparations. Consequently, the concept of harm or injury has an important role in determining who a victim is.¹⁵²

Victims in the Rules of Procedure and Evidence and Regulation of Trust Fund for Victims are defined in the context of reparations.¹⁵³ The jurisprudence also shows that victims are only eligible for reparations for harm emanating from the perpetration of

149 *ibid.*

150 *Katanga* case (n 10), para 176.

151 *Lubanga* case (n 85), paras 211–212.

152 Deborah Adeyemo, 'Reparability of Victims' Harm at the International Criminal Court: Victims' Expectations versus Reality' (2022) *International Review of Law and Jurisprudence* 66–75, 70.

153 Rule 85 (a) (n 5) and Regulation 46 of the Regulations of the Trust Fund for Victims.

international crimes for which the accused has already been found guilty.¹⁵⁴ Above and beyond proving that the crime was committed in the jurisdiction of the Court and that the victim had suffered harm because of the crime, it is similarly essential to establish that the Court has convicted the offender.¹⁵⁵

Conclusion

The article has provided an overview of the legal and institutional foundational basis for the reparations regime at the ICC. It has examined the jurisprudence of the Court to highlight the principles that the ICC has applied in determining the meaning and eligibility of victims before the ICC, and the amount and modalities of reparations to be awarded to victims of mass atrocities. Bearing in mind that the Court categorises victims into direct and indirect victims, the article highlighted the difficulties associated with the high threshold of the meaning of victims. It was highlighted that the rejection of the application by five applicants in the *Katanga* case, for reparations stemming from transgenerational trauma, shows how the doctrinal aspirations expressed in the Rome Statute are sometimes at odds with the practical application of the reparations principles by the ICC. Drawing a comparison with the ECCC, it was suggested that the ICC should adopt the same approach as taken by the ECCC, whereby victims have the option to choose to follow the Court's stringent process or the more flexible option to be awarded reparations through third parties. It was noted that it is easier to amend the Internal Rules at the ECCC than to amend the Rome Statute, which requires the agreement of the Assembly of States parties. Nonetheless, the Rome Statute's Article 75 wording allows for the Court to apply its discretion on a case-by-case basis. The jurisprudence of the ICC on reparations has not been consistent, and this contributes to interpretational challenges for future cases. This was highlighted by the contrast in the *Katanga* case on transgenerational trauma and the *Ntaganda* case on children born of rape and sexual slavery, who were considered to be indirect victims. The inconsistency of the jurisdiction might have the unintended consequences of excluding some genuine victims of atrocities from eligibility for reparations.

Although the Court has explained that the indigence of an accused person does not exonerate them from liability for reparations, it is not practical to award and implement meaningful reparations where the convicted person is indigent, owing to the scarcity of resources at the Trust Fund for Victims. In all five cases that have reached the reparations stage discussed in this article, the convicted individuals are indigent. As a result, the Court in *Katanga* awarded individual symbolic reparations of USD 250 each to the victims. This is not at all proportionate to the harm suffered by these individuals. The article hence suggested that it would be more effective for the ICC to consider expanding its mandate to grant reparations without the financial resources of the individual found guilty, as has been done by the Internal Rules of the Extraordinary

¹⁵⁴ *Katanga* case (n 10), para 39.

¹⁵⁵ *Lubanga* case (n 85), para 8; *Al Mahdi* case (n 11), para 42.

Chambers in the Courts of Cambodia. The Rules of the ECCC were amended in 2010 to allow for the payment of reparations to be externally funded by third parties.

Notwithstanding the challenges associated with the reparations regime at the ICC, the Court ought to be commended for ensuring that victims participate and are awarded reparations for harm suffered. This not only serves to acknowledge the victims' pain and suffering, but it also recognises that accountability does not end with the trial and conviction of an accused person. Reparations play a significant part in efforts to restore the victims to the position that they would have been in had the harm not been perpetrated against them. As discussed in the article, due to the gravity of the crimes perpetrated and the fact that the perpetrators are usually indigent, restitution is not always possible. It is therefore important for the Court to raise awareness of the limitations associated with the reparations process with respect to victims. It is also important for the Court to ensure that victims' procedural rights are guaranteed. The satisfaction and experience of the victims with the Court may still be enriched by improving exposure to other procedural rights.¹⁵⁶ This includes through the standing Court's outreach activities before partaking in proceedings, by advising victims of their rights and including them in processes that address their needs, giving them a platform to give evidence and express feelings, giving them respect before and during trials, and providing psychological and medical support to minimise secondary victimisation.

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¹⁵⁶ Balta and others (n 19) 237.

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