

IMPLEMENTING INTERNATIONAL CRIMINAL COURT-ORDERED COLLECTIVE  
REPARATIONS: UNPACKING PRESENT DEBATES

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## ABSTRACT

*A debate at the International Criminal Court (ICC) between the Trial Chamber and Trust Fund for Victims (Trust Fund) regarding reparations in the case against Thomas Lubanga Dyilo has stalled aspects of the reparations process and threatens to prevent some prospective beneficiaries from receiving reparations at all. Recently, the Trial Chamber ordered the Trust Fund to determine eligibility of individual beneficiaries as a prerequisite to determining Lubanga's monetary liability for collective reparation awards. It also ordered the Trust Fund to secure consent of victims to disclose their identities to Lubanga as a precondition to obtaining reparations. The Trust Fund has refused to comply with both orders, citing concern for victim safety among other reasons. In October 2016, the Trial Chamber approved a plan submitted by the Trust Fund on symbolic collective reparations, moving elements of the reparations process forward. However, key issues central to implementing service-based collective reparation awards remain unaddressed, and victims continue to wait for reparations they have been led to expect.*

*This article focuses on disputes about two specific procedural matters that have arisen in the current stage of reparations proceedings: a) whether it is necessary for the Trial Chamber to determine the eligibility of individual beneficiaries of collective reparation awards as a prerequisite to determining a convicted person's monetary liability for collective reparations that move beyond symbolic reparation initiatives, and b) relatedly, whether the convicted person should have the opportunity to review prospective reparation beneficiaries as part of this process—requiring disclosure of victim identities to both the Trial Chamber and the convicted person. The article suggests that the Trial Chamber's interpretation of the recent Appeals Chamber judgment clarifying principles governing reparations processes at the ICC, and the Trust Fund's reaction to Trial Chamber orders, reflect fundamental tensions within the very notion that criminal court-ordered reparations might provide reparative justice for victims of humanity's gravest crimes. It argues that the Trial Chamber could comply with principles outlined by the Appeals Chamber in a way that would be more appropriately responsive to victim rights and concerns, and that the Trial Chamber should reconsider its approach.*

*Specifically, this article suggests that the Trial Chamber should grant the Trust Fund's request to reconsider the Trial Chamber-mandated individual victim eligibility and harm assessment process, set out in the Trial Chamber's order of 9 February 2016. Reviewing prospective beneficiaries should not be viewed as a necessary pre-requisite to determining the monetary liability of the convicted person for collective reparations, nor is Trial Chamber review of prospective beneficiaries a preferable—even if permissible—division of labor between the Trial Chamber and Trust Fund. Additionally, this article argues that the Appeals Chamber judgment should not be read as requiring disclosure of victim identities to the Trial Chamber and convicted person at the reparations implementation stage.*

*The article begins by introducing conceptual and socio-legal tensions inherent to integrating reparations as a transitional justice measure within a legal regime bound to protect both the rights and scope of liability of the convicted person. It then presents an overview of recent court decisions and filings regarding reparations in the Lubanga case. It outlines how these tensions filter into the Court's legal framework governing reparations; analyzes two legal questions emerging in the context of the present debate between the Trial Chamber and Trust Fund; and situates these legal debates in a broader, socio-legal frame.*

## I. INTRODUCTION: EMERGING ISSUES, DIFFICULT CALCULATIONS

The International Criminal Court (ICC) is debating key questions central to implementing the Court's first-ever reparations award, in the case against *Thomas Lubanga Dyilo*.<sup>2</sup> The ICC has already ordered<sup>3</sup> and upheld on appeal<sup>4</sup> authorization for collective reparations for victims in the case against Lubanga.<sup>5</sup> Now, the ICC's Trial Chamber II is working to ensure that the mechanisms underpinning the actual calculation and delivery of these reparations are compatible with the Court's governing legal framework. In the process, evolving procedural requirements are coming into tension with concomitant institutional and principled obligations to do no harm to victims,<sup>6</sup> realize some semblance of effective "reparative justice," or provide comprehensive, meaningful reparation at all.

Disagreements about two specific procedural matters have arisen in the current stage of reparations proceedings, as the Trial Chamber responds to the recent Appeals Chamber reparations judgment. First, the Trial Chamber, Trust Fund for Victims (Trust Fund) and other institutional actors within the Rome Statute system have begun to debate whether it is necessary for the Trial Chamber to determine the eligibility of individual beneficiaries of collective reparation awards as a prerequisite to determining a convicted person's monetary liability for service-based collective reparations. Second, and relatedly, a debate has emerged as to whether the convicted person should have the opportunity to review the applications of prospective reparation beneficiaries as part of this process—requiring disclosure of victim identities to both the Trial Chamber and the convicted person.

In today's procedural debates lie substantive socio-legal questions and barriers to realizing the reparations for which victims have waited, and continue to wait. These debates involve institutional actors with different mandates giving rise to different visions of what might make the ICC reparations regime effective. What does it mean, various actors are now asking, to require that a convicted person's liability be proportional to the harm caused to victims, when many victims have not participated in proceedings? How should the Court's obligation to limit a convicted person's scope of liability be reconciled with other institutional obligations to meaningfully repair multidimensional experiences of harm among victims ostensibly served by the ICC, and the communities they comprise?

<sup>2</sup> Thomas Lubanga Dyilo was convicted in 2012 of the war crime of conscripting or enlisting children under the age of fifteen years into the armed forces and using them to participate actively in hostilities. *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute' [ICC-01/04-01/06-2842](#), 14 March 2012, para 1358.

<sup>3</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision establishing the principles and procedures to be applied to reparations' [ICC-01/04-01/06-2904](#), 7 August 2012.

<sup>4</sup> *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.

<sup>5</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute' [ICC-01/04-01/06-2842](#), 14 March 2012.

<sup>6</sup> The Trust Fund for Victims (TFV) highlighted in May 2016 that if the TFV were to comply with Trial Chamber orders to conduct upfront harm assessments without counseling services, the TFV would be put "in conflict with its own independent duty to "do no harm" in its interactions with victims because of the re-traumatizing effect" that such assessments would have. *Prosecutor v. Thomas Lubanga Dyilo*, 'First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only' [ICC-01/04-01/06-3208](#), 31 May 2016, para 50.

The Rome Statute system is breaking new legal ground as its actors engage in an effort to order, fund, and implement collective reparations that extend beyond symbolic measures, under the umbrella of international criminal law.<sup>7</sup> Core socio-legal questions arise as transformative visions of reparation—a victim-centric transitional justice measure impacting both individual victims and the communities they form—run up against models of court-ordered justice that frame liability, harm and redress in terms that are individualized and quantifiable. Few reparation beneficiaries have been identified thus far through Court-mandated processes; fewer still have given consent to disclose their information to the convicted person pursuant to Trial Chamber orders; and the reparations process is moving forward by pausing to take stock. In the Court’s search for answers, the stakes are high. The approach that the Court takes in addressing these procedural issues will profoundly impact victims’ perceptions of and interactions with the ICC, in addition to framing possibilities for integrating reparative and retributive justice under the umbrella of international criminal law.

The article suggests that the Trial Chamber’s interpretation of the recent Appeals Chamber judgment clarifying principles governing reparations processes at the ICC—and the Trust Fund’s reaction to Trial Chamber orders—reflects fundamental tensions within the very notion that criminal court-ordered reparations might provide reparative justice for victims of humanity’s gravest crimes. The Court’s need to respect the rights and scope of liability of the convicted person does not necessarily accord with visions of justice that entail proactive work to foster comprehensive physical, psychological, and social repair for individuals and the conflict-affected societies they comprise. This article argues that it is nevertheless possible to comply with principles outlined by the Appeals Chamber in a way that would be more appropriately responsive to victim rights and concerns. The Court should aim to reconcile its need to protect the rights and obligations of the convicted person with the goal of ensuring that victims’ interactions with the Court are more reparative than detrimental.

This article argues that to accomplish this aim and move the reparation process forward, the Trial Chamber should reconsider its present approach to determining Lubanga’s monetary liability for Court-ordered collective reparation awards. Specifically, the Trial

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<sup>7</sup> The TFV’s Reparations Plan envisions a combination of symbolic reparations, psychosocial support, and livelihood support. See Wairagala Wakabi, ‘Reparations Plan for Lubanga Victims Takes Shape’ (*International Justice Monitor*, 14 October 2016) <<http://www.ijmonitor.org/2016/10/reparations-plan-for-lubanga-victims-takes-shape/>>, accessed 17 October 2016. Reparations will be funded by the Trust Fund in the ICC’s *Lubanga* and *Katanga* cases, though this may not hold true for other cases. For example, Bemba’s assets have been frozen and may be used to fund reparation awards. See Benjamin Duerr, ‘Beer and Bemba: how ICC big fish links to Heineken’ (*International Justice Tribune*, 13 April 2016) <<https://www.justicetribune.com/blog/beer-and-bemba-how-icc-big-fish-links-heineken/>>, accessed 31 August 2016 (saying, “According to media reports, Bemba possesses at least 6 million US dollars (5 million euros)... In case of a conviction, ICC judges can order reparations. In the Bemba case, the issue will come up in the next months after the judges [have] handed down the sentence... Thomas Lubanga and Germain Katanga, have been declared indigent.”). The Extraordinary Chambers in the Courts of Cambodia (ECCC) are authorised to award collective and moral reparations, but such reparations may not be monetary. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 8, as revised 3 August 2011), rule 23(1–2).

Chamber should grant the Trust Fund's request to reconsider the Trial Chamber-mandated individual victim eligibility and harm assessment process, set out in the Trial Chamber's order of 9 February 2016.<sup>8</sup> Reviewing prospective beneficiaries should not be viewed as a necessary pre-requisite to determining the monetary liability of the convicted person for collective reparations, nor is Trial Chamber review of prospective beneficiaries a preferable—even if permissible—division of labor between the Trial Chamber and Trust Fund. Additionally, the Appeals Chamber judgment should not be read as requiring disclosure of victim identities to the Trial Chamber and convicted person at the reparations implementation stage.

## II. VICTIM-CENTRIC CONCEPTS IN A PERPETRATOR-FOCUSED INSTITUTION

The term “reparation” draws upon distinct if interlocking conceptual frameworks for considering repair as a component of justice processes.<sup>9</sup> In one sense, court-ordered reparation is a concept familiar to many domestic legal systems that require individuals to pay monetary compensation to others, as a means to redress harm caused by personal actions or omissions. In another sense, recourse to the term “reparation” in reference to war crimes and crimes against humanity—crimes codified within international law—evokes principles derived from a distinct legal tradition addressing state responsibility for repairing breaches of international law.<sup>10</sup> Because war crimes and crimes against humanity describe breaches of international law committed by individuals, the notion of “reparation” at the International Criminal Court inevitably comes to embody dimensions of both frames,<sup>11</sup> notwithstanding an express refusal to anchor the International Criminal Court's reparations mandate in principles of state responsibility at the time of the Rome Statute's drafting.<sup>12</sup>

<sup>8</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](https://www.iccnv.org/en/investigations/indictations/01-04-01-06-3208), 31 May 2016 para 9.

<sup>9</sup> REDRESS defines “reparation” as “the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained.” REDRESS, *Reparation: A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law* (2003) 8 <<http://www.redress.org/downloads/reparation/SourceBook.pdf>>, accessed 27 August 2016.

<sup>10</sup> “The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Case concerning the Factory at Chorzow* (Claim for Indemnity, Merits), PCIJ, Series A, No. 17, 1928, p 47. See also Rama Mani, ‘Reparation as a Component of Transitional Justice: Pursuing “Reparative Justice” in the Aftermath of Violent Conflict’ in Koen Feyter (ed), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia NV, 2005) 71.

<sup>11</sup> For an academic treatment of this very topic in the context of the ECCC, see Elisa Hoven, Mareike Feiler & Saskia Scheibel, *Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia*, *Cologne Occasional Papers on International Peace and Security Law* (Cologne Occasional Papers on International Peace and Security Law, September 2013) 68 (stating, “The study revealed difficulty drawing a clear-cut line between the two concepts: (1) Judicial reparations for a wrong committed by an individual, (2) and redress for the violation of Human Rights instruments that generally address states.”).

<sup>12</sup> “[A] significant number of delegations were not prepared to accept the notion of State responsibility to, or in respect of, victims. However, this refusal does not diminish any responsibilities assumed by States

In 2004, a landmark International Court of Justice (ICJ) advisory opinion determined that a State was obliged to compensate individuals directly for a breach of international law.<sup>13</sup> Today, a growing consensus may be emerging that victims have a right to reparation in some form following gross violations of human rights and grave violations of international humanitarian law.<sup>14</sup> Restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition are all internationally recognized modalities of reparation, which find expression in the *UN 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* [hereinafter UN Basic Principles].<sup>15</sup> As is indicated in their title, the UN Basic Principles elaborate upon modalities of reparation in the context of presenting a *right* to reparation following grave breaches of international

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under other treaties and will not – self evidently – prevent the Court from making its attitude known through its judgments in respect of State complicity in a crime.” Christopher Muttukumaru, ‘Reparations to Victims’ in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Martinus Nijhoff Publishers 1999) 267.

<sup>13</sup> The 2004 ICJ advisory opinion determined that Israel was obligated to pay reparation directly to individuals damaged by Israel’s construction of a wall in the Palestinian territories; the only parties considered in this reparations decision were Israel and individual people, as opposed to two States. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Summary of the Advisory Opinion of 9 July 2004) [2004] ICJ Summary 2004/2, 13 (stating, “Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.”). Notably but distinctly, earlier ICJ decisions involving disputes between states did make reference to arguments that State compensation for breaches of international law should reflect damage suffered by nationals. See, e.g., *Case Concerning the Barcelona Traction, Light, and Power Company, Limited (New Application: 1962) (Belgium v. Spain) Second Phase* (Judgment of 5 February 1970) [1970] (“Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up...”). See also Liesbeth Zegveld, ‘Victims’ Reparations Claims and International Criminal Courts: Incompatible Values?’ (2010) 8 J Int Crim Justice 79, 82 (explaining that essential principles governing reparation under international law were believed to apply only to States until the ICJ’s 2004 advisory opinion regarding Israel’s construction of the wall in occupied Palestinian territories).

<sup>14</sup> See Zegveld (n 13) 83–84 (stating, “Under international humanitarian law, so far, states have been reluctant to recognize, explicitly and in general, a right for victims of violations of international humanitarian law to claim reparation...An empirical investigation into these conventions shows, however, that a number of rules refer explicitly to concepts such as ‘rights’, ‘entitlements’ or ‘benefits’. It may be argued that individuals do have rights under at least some provisions of international humanitarian law, a supposition that finds support in the longstanding cross-fertilization of international humanitarian law and human rights law.”). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, [UNGA Res 60/147](#) (21 March 2006) (UN Basic Principles) (codifying a right to remedy and reparation); Emanuela-Chiara Gillard, ‘Reparation for violations of international humanitarian law’ (2003) 85 Int Rev Red Cross 529, 534 (stating, “violations of *all* rules of international humanitarian law give rise to an obligation to make reparation, and not only violations of the grave breaches provisions for which there is individual criminal responsibility” noting also that “[i]nvestigation of alleged violations and access to justice for the victims are remedies for the violations.”).

<sup>15</sup> UN Basic Principles (n 14) para 18 (stating that “victims of gross violations of international human rights law and serious violations of international humanitarian law should...be provided with full and effective reparation...which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”).

humanitarian law. Scholars note that there is “at least a strong tendency to acknowledge the entitlement of the individual to reparation under modern international law.”<sup>16</sup> At the same time, even the most “comprehensive” or “effective” reparation are unlikely to ever fully repair harm associated with crimes as serious as war crimes or crimes against humanity.<sup>17</sup>

Reparations have become a recognized component of transitional justice processes designed to address legacies of large-scale human rights abuses,<sup>18</sup> where harms perpetrated against individuals and violations of international law may converge. Reparation as a transitional justice tool differs from an understanding of reparation-as-compensation that might find analogues in many domestic legal proceedings. First, social meaning assumes a unique definitional role in thinking about reparation with respect to international law violations, and grave violations of human rights specifically. Social meaning—and the communication of that social meaning to victims—is part of what transforms a monetary transfer into effective “reparation” following crimes associated with conflict or oppression.<sup>19</sup> Relatedly, effective reparation as a transitional justice measure need not necessarily be monetary,<sup>20</sup> in contrast to the nature of many domestic awards.

Participation in justice processes themselves may serve a reparative function,<sup>21</sup> in domestic and international contexts alike.<sup>22</sup> Scholars also call attention, however, to

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<sup>16</sup> Friedrich Rosenfeld, ‘Collective reparation for victims of armed conflict’ (2010) 92 Int Rev Red Cross 731, 731.

<sup>17</sup> See Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press 1998) 93 (noting that monetary compensation may seem inadequate compared to the enormity of violation suffered; that neither compensation nor apology can bring back what was lost; and that constructive engagement with reparation processes themselves nevertheless may renew dignity to some extent).

<sup>18</sup> “Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.” ICTJ, ‘What is Transitional Justice?’ <<https://www.ictj.org/about/transitional-justice>>, accessed 14 August 2016.

<sup>19</sup> See, e.g., Minow (n 17) 110 (“Social and religious meanings rather than economic values lie at the heart of reparations.”). When awards intended to serve a reparative function are not presented in such a way as to communicate acknowledgment of responsibility for harm caused—thus lending the award itself social meaning in the context of violation and repair—reparations may fail to be perceived as effective, or even as reparation at all. For example, one ICTJ report explored local responses to the implementation of collective reparation programs aimed at responding to economic and social needs of communities in Peru; it found that while projects were well-received by communities, which “considered them as concrete benefits to communities that have little resources and precarious infrastructure,” at the same time 29 percent of respondents “did not know that the projects were a form of reparation.” Cristian Correa, *Reparations in Peru: From Recommendations to Implementation* (ICTJ 2013) 14 <[https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Peru\\_Reparations\\_2013.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf)>, accessed 16 April 2016.

<sup>20</sup> Examples of non-monetary reparations have included official apologies or listing names of individuals victimized by a person convicted for international crimes, alongside an apology by the convicted person. See ICTJ, ‘Reparations’ <<https://www.ictj.org/our-work/transitional-justice-issues/reparations>>, accessed 14 August 2016.

<sup>21</sup> “[I]t is traditionally recognized that victims’ participation serves three main purposes: judicial, reparative and symbolic... allowing victims to convey the extent of their suffering ... and to be heard at every crucial stage of the proceedings should contribute to their rehabilitation and the restoration of their dignity.”

dangers posed by justice processes that allow for victim participation but fail to adequately foster “subtle but fundamental postures” that would frame victims’ interaction with justice processes as empowering, thus potentially “reinforce[ing] ongoing traumatic experiences of social exclusion, isolation and stigma.”<sup>23</sup>

Today, comprehensive and effective reparation is generally understood to comprise one component of efforts to achieve “reparative justice,” which situates a notion of “constructive building” of survivors’ lives alongside retributive accountability for perpetrators.<sup>24</sup> Reparative justice seeks to ensure that victims’ experiences with justice processes writ large contribute to repairing the harms they suffered.<sup>25</sup>

International criminal tribunals have not historically recognized reparation in the context of court-ordered justice, and have been critiqued for framing a vision of international criminal justice as one focused wholly on retributive prosecution at the expense of other conceptualizations of justice and accountability.<sup>26</sup> In this sense, the very inclusion of a reparations mandate within the International Criminal Court can be read as an effort to expand the ambit of international criminal justice broadly<sup>27</sup>—a project expansive in both scope and significance.

At the same time, the International Criminal Court’s reparations mandate is part and parcel of a system designed to focus on individual persons’ culpability for specified crimes.

Jérôme de Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’ (2010) 8(1) *J Int Crim Justice* 165, 168.

<sup>22</sup> “Studies in both domestic and international jurisdictions have repeatedly shown that fair procedures, as well as fair outcomes, are extremely important to participants, and that being granted a voice and being treated with dignity and respect are considered particularly valuable.” *Prosecutor v. Germain Katanga*, ‘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’ [ICC-01/04-01/07-3551](#), 14 May 2015, para 17.

<sup>23</sup> Mariana Goetz, “Reparative Justice at the ICC: Best Practice or Tokenism?” in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The healing role of reparation* (Routledge 2014) 54. UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Greiff has said, “Whether those [positive] consequences occur depends on the way in which victim participation mechanisms are designed. The track record seems to be mixed, but highlights the relative dearth of institutionalized mechanisms.” As a result, de Greiff called “for support for systematic studies of victim participation measures, particularly in domestic processes, and, given their promise, of ways of turning potential into reality more effectively.” Human Rights Council, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,’ [A/HRC/27/56](#), 27 August 2014, para 95.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Willan 2005) 283.

<sup>27</sup> See ‘Order for Reparations (Amended)’ [ICC-01/04-01/06-3129-AnxA](#), 3 March 2015, paras 1,3 (‘Order for Reparations (Amended’) (stating, “The Statute and the Rules of Procedure and Evidence introduce a system of reparations that 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 is more inclusive, encourages participation and recognises the need to provide effective remedies for victims...The reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.”).

The International Criminal Court's ability to exert influence in the world is dependent upon its ability to ensure that individuals are convicted—and are instructed to provide a corresponding remedy—for only those crimes that may be legally attributable to them. This legal need for boundedness is necessarily at odds with a vision of justice that entails proactive work to foster comprehensive physical, psychological, and social repair for individuals and the conflict-affected societies to which they belong. The project of strengthening the legitimacy of an international criminal court that adequately protects the rights and obligations of the accused is different from, even if related to, the project of advancing transitional justice in part through the provision of effective reparation.<sup>28</sup>

Constituencies both within the Rome Statute system and outside it are invested in protecting and strengthening different aspects of the International Criminal Court's reparations project. Conceptual, procedural, and institutional tensions will inevitably emerge amidst efforts to square the promise of a mandate evoking broad notions of reparative justice with the Court's need to ensure that a convicted person is not held responsible for remedying harm he did not cause.

### III. FRAMING THE PRESENT DEBATE

#### A. *Introduction to reparations in the context of Lubanga*

In 2012, the ICC's Trial Chamber I delivered its first-ever decision on reparations pursuant to article 75 in the case against Thomas Lubanga Dyilo,<sup>29</sup> authorizing collective reparations<sup>30</sup> and making this order “through” the Trust Fund. Making an order through

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<sup>28</sup> Criminal trials themselves are recognized as one important component of efforts to achieve comprehensive transitional justice. See U.S. Department of State, ‘Transitional Justice Overview’ (16 May 2016) <<http://www.state.gov/j/gcj/transitional/257566.htm>>, accessed 18 September 2016 (“The investigation and prosecution of crimes—including genocide, crimes against humanity, war crimes, and other crimes related to human rights violations and abuses—are important components of TJ [transitional justice].”). For a concise introduction to how reparations are conceived of within a transitional justice framework and how this intersects with the reparations mandate of the International Criminal Court, see Peter Dixon, ‘Reparations and Assistance for Victims: Lessons from the ICC and Colombia’ (*Beyond The Hague*, 14 January 2016) <<https://beyondthehague.com/2016/01/14/reparations-and-assistance-whats-the-difference/#more-1183>>, accessed 28 August 2016. For a detailed examination of efforts to incorporate a more victim-centric focus into international criminal justice generally, see Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014), ‘Introduction’ (in which Moffett describes academic treatment of victim participation at the international criminal court as representing “a struggle between trying to find a role for victims while ensuring a fair trial and upholding the rights of the defendant.”).

<sup>29</sup> Thomas Lubanga Dyilo was convicted in 2012 of the war crime of conscripting or enlisting children under the age of fifteen years into the armed forces and using them to participate actively in hostilities. *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment pursuant to Article 74 of the Statute’ [ICC-01/04-01/06-2842](https://www.iccnij.org/icc-01/04-01/06-2842), 14 March 2012, para 1358.

<sup>30</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision establishing the principles and procedures to be applied to reparations’ [ICC-01/04-01/06-2904](https://www.iccnij.org/icc-01/04-01/06-2904), 7 August 2012, paras 220–21. See also *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](https://www.iccnij.org/icc-01/04-01/06-3129), 3 March 2015, para 143 (“The Appeals Chamber therefore considers that the Trial Chamber ordered reparations on a collective basis pursuant to rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence.”)

the Trust Fund ensured that reparations could be funded despite the indigence of the convicted person.<sup>31</sup> Lubanga<sup>32</sup> and Victims<sup>33</sup> separately appealed the decision. The Appeals Chamber's March 2015 judgment reviewed and partially overturned the Trial Chamber's decision, amending the order for reparations; the Appeals Chamber considered the order for reparations incomplete because it did not include five elements that, according to the Appeals Chamber, the legal framework requires.<sup>34</sup> The Appeals Chamber clarified that every reparations order:

1) [M]ust be directed against the convicted person; 2) must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) must identify the victims eligible to benefit from the awards for reparations *or set out the criteria of eligibility* based on the link between the harm suffered by the victims and the crimes for which the person was convicted [emphasis added].<sup>35</sup>

The Appeals Chamber also clarified that making a reparations order through the Trust Fund, as the Trial Chamber did, “does not exonerate the convicted person from liability.”<sup>36</sup> In this way, the Appeals Chamber clarified a vision of the ICC's reparations regime as one tethered to the scope of liability of the convicted person; a victim's ability to claim reparations became presented as dependent on both a criminal conviction and the

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<sup>31</sup> Rules 98(3) and 98(4) provide: “(3) The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. (4) Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.” ICC [Rules of Procedure and Evidence](#), rule 98 (2013).

<sup>32</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation rendered on 7 August 2012’ [ICC-01/04-01/06-2917-t-ENG](#), 6 September 2012.

<sup>33</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations of 7 August 2012’ [ICC-01/04-01/06-2909-t-ENG](#), 24 August 2012; *Prosecutor v. Thomas Lubanga Dyilo*, ‘Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012’ [ICC-01/04-01/06-2914-t-ENG](#), 3 September 2012.

<sup>34</sup> “In conclusion, the Appeals Chamber now holds that the Impugned Decision contains sufficient elements to be an order for reparations within the meaning of article 75 of the Statute, subject to the amendments detailed in this judgment.” *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 38.

<sup>35</sup> *ibids* 1, 32.

<sup>36</sup> *ibid* 5.

existence of a causal link between the harm being redressed and the specific crime for which a person was convicted.<sup>37</sup> Even if reparations were to be externally funded, the Court would be required to act as if the convicted person were being held monetarily responsible.

Prior to the Appeals Chamber judgment, not all stakeholders understood the Court's reparations mandate as quite so perpetrator-centric, bound up in the Court's overarching need to protect the rights of the accused (the ICC Office of the Prosecutor included).<sup>38</sup> In fact, as late as 2010, scholars such as Salvatore Zappalà—writing on the very issue of balancing rights of victims with the rights of the accused—noted that when “victims are considered for the purpose of obtaining reparation from a convicted person” pursuant to article 75 of the Rome Statute, “[t]here is no need to preserve the rights of the accused since the establishment of guilt or innocence has already occurred.”<sup>39</sup> In the context of reparations, persistent tensions inherent to balancing the rights of victims with the rights of the accused have become extended to address the scope of liability of the accused, in new and indeterminate ways.

### B. *Understanding collective reparation in the context of Lubanga*

There is no international legal definition of “collective reparations.”<sup>40</sup> The term “collective reparation” has been used to structure reparation awards in several ways with respect to violations of international law, including by reference to the types of reparations distributed or the mode of delivering reparations, by reference to violation of a right held by a group, or by reference to violation of rights that have impacted communities or collectives.<sup>41</sup>

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<sup>37</sup> “[T]he Appeals Chamber articulates the principle that: In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. In this sense, what is the “appropriate” standard of proof and what is “sufficient” for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case. For purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand.” *ibid* 81.

<sup>38</sup> *See, e.g.*, ICC OTP, ‘Policy Paper on Victims’ Participation’ (April 2010) p 9 (“Third, for the reparations stage, the Office favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution. Any other approach would be overly restrictive and unfair, since the Prosecution must *necessarily* limit the incidents selected in its investigation and prosecution. Accordingly, the Office will support reparations applications, as appropriate, by a broader range of individuals and entities than those who are linked to the charges for which the accused is ultimately convicted.”).

<sup>39</sup> Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’ (2010) 8 JICJ 137, 143.

<sup>40</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Observations of Team V02 on the draft implementation plan for reparations submitted by the Trust Fund for Victims (TFV) to Trial Chamber II on 3 November 2015’ [ICC-01/04-01/06-3195-t-ENG](https://www.iccnv.org/~/media/ICC-01/04-01/06-3195-t-ENG), 1 February 2016, para 22(c).

<sup>41</sup> Sylvain Aubry and Maria Isabel Henao-Trip, ‘Collective Reparations and the International Criminal Court’ (University of Essex Reparations Unit, Briefing Paper No.2, August 2011) 2–3 <[http://www.essex.ac.uk/TJN/DOCUMENTS/PAPER\\_2\\_COLLECTIVE\\_REPARATIONS\\_LARGE.PDF](http://www.essex.ac.uk/TJN/DOCUMENTS/PAPER_2_COLLECTIVE_REPARATIONS_LARGE.PDF)>, accessed 28 August 2016.

Human rights courts have developed an evolving jurisprudence addressing the way individuals' right to reparation may accord with community-level victimization.<sup>42</sup> The international community has looked to the Inter-American Court of Human Rights (IACtHR) in particular for its "innovative" awards taking the form of "collective reparations,"<sup>43</sup> which have entailed granting reparation "to the members of the community as a whole"<sup>44</sup>—notably, without a corresponding need to identify individual victim beneficiaries. However, scholars have noted that the IACtHR has more discretion than criminal courts in determining reparations beneficiaries, owing in part to the IACtHR's rights-focused approach as compared to a criminal court's injury-focused approach.<sup>45</sup> The IACtHR has also determined that "[i]nternational case law and, in particular, that of the [Inter-American] Court, has established repeatedly that the judgment constitutes *per se* a form of reparation."<sup>46</sup>

The Extraordinary Chambers in the Courts of Cambodia (ECCC) allow victims to participate in proceedings as civil parties seeking "collective and moral reparations," which have generally comprised symbolic measures that do not entail granting monetary awards to victims.<sup>47</sup> However, reparations claimants at the ECCC are civil parties to proceedings,<sup>48</sup> unlike prospective reparation beneficiaries at the ICC who may qualify for reparations but may not have applied for reparations or participated in the context of proceedings that precede authorization of an award.<sup>49</sup>

<sup>42</sup> See, e.g., Gabriella Citroni, 'Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts' (2012) 5 Inter-Am & Eur Hum Rts J 49, 57 ("The jurisprudence of the Inter-American Court concerning violations of human rights suffered by indigenous communities is of a particularly advanced character. The measures of reparation ordered seize the dimension of collective violations and take into account the needs expressed by the communities involved.").

<sup>43</sup> Diana Contreras-Garduño, 'Defining Beneficiaries of Collective Reparations: The experience of the IACtHR' (2012) 4 Amst L Forum 40, 50.

<sup>44</sup> Inter-American Court of Human Rights *Case of the Plan de Sánchez Massacre v. Guatemala*, 'Judgment of November 19, 2004 (Reparations)' (2004) para 86.

<sup>45</sup> "[T]he IACtHR has a higher margin of discretion than do the criminal courts when determining reparations beneficiaries. The IACtHR's rights-focused approach gives more discretion because it uses a more relaxed standard and burden of proof concerning, *inter alia*, causality in reparations. Also, under the injury-focused approach, the ICC and ECCC must as criminal courts limit the reparable harm only to that linked to the crimes for which the accused was found guilty." Juan Pablo Pérez-León, 'The Emerging Reparations Case-Law of the ICC Appeals Chamber in Comparative Perspective' (*EJIL: Talk!*, 12 June 2015) <<http://www.ejiltalk.org/the-emerging-reparations-case-law-of-the-icc-appeals-chamber-in-comparative-perspective/>>, accessed 28 August 2016.

<sup>46</sup> Inter-American Court of Human Rights *Case of García Lucero et al. v. Chile*, 'Judgment of August 28, 2013 (Preliminary objection, merits and reparations)' (2013) para 224.

<sup>47</sup> For an analysis of the ECCC collective reparation mandate in practice, see *Victims' Right to Remedy: Awarding Meaningful Reparations at the ECCC* (Access to Justice Asia, The Centre for Justice & Accountability (CJA) & Berkeley Law International Human Rights Clinic 2011) <<https://www.brandeis.edu/ethics/pdfs/internationaljustice/Remedy.pdf>>, accessed 28 August 2016.

<sup>48</sup> The Rules of The Extraordinary Chambers in the Courts of Cambodia provide that: "(1) If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties." Rule 23 quinquies. Civil Party Claim (Adopted on 9 February 2009 and amended on 17 September 2010).

<sup>49</sup> See *Prosecutor v. Germain Katanga*, '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' [ICC-01/04-01/07-3551](https://www.icc-justice.org/sites/default/files/2015-05/ICC-01/04-01/07-3551), 14 May 2015, para 14 ("It is vital that this opportunity is given to as many victims as possible, including those who have not yet applied, but may qualify for reparations."); see

When Trial Chamber I initially authorised collective reparations in *Lubanga*, it presented its vision of collective reparation as in keeping with the far-reaching aim of “contributing more broadly to the communities that were affected.”<sup>50</sup> The Appeals Chamber, however, narrowed the scope of who may permissibly benefit from collective Court-ordered reparations. Responding to an argument advanced by Lubanga that the “collective” reparation of individually suffered harm should not mean the granting of reparation to a “community” where not every member is identified as a victim of crimes committed by the convicted person,<sup>51</sup> the Appeals Chamber determined that the ICC reparations regime would not support the ordering of a collective award to unidentified beneficiaries.<sup>52</sup> Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria would be eligible<sup>53</sup> and community members would be entitled to reparations only “in so far as the harm they suffered meets the criterion of eligibility in relation to the crimes” for which the convicted individual was found guilty.<sup>54</sup> By restricting the scope of who might permissibly claim the benefits of a collective reparation award, the Appeals Chamber judgment problematizes the ability of Court-ordered collective reparation to realize the Trial Chamber-iterated goal of contributing “broadly” to affected communities.

The *Lubanga* case is unique in its authorization of collective reparation awards to victims who are neither a definable group of civil parties nor a geographically identifiable community. In fact, many victim participants in proceedings before Trial Chamber I argued *against* collective reparations, because “they did not believe that they had sufficient connection with each other to benefit from collective awards.”<sup>55</sup> Trial Chamber I’s

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also *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, ‘Chapter IV: Participation’ (FIDH 23 April 2007) p 5 <[https://www.fidh.org/spip.php?page=article&id\\_article=4208](https://www.fidh.org/spip.php?page=article&id_article=4208)>, accessed 5 September 2016 (“Victims do not have to participate in pre-trial or trial proceedings in order to make a claim for reparations”).

<sup>50</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision establishing the principles and procedures to be applied to reparations’ [ICC-01/04-01/06-2904](https://www.iccnw.org/CaseDocuments/ICC-01/04-01/06-2904), 7 August 2012, para 179.

<sup>51</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Mr Thomas Lubanga’s appellate brief against the Decision establishing the principles and procedures to be applied to reparations issued by the Trial Chamber on 7 August 2012’ [ICC-01/04-01/06-2972-tENG](https://www.iccnw.org/CaseDocuments/ICC-01/04-01/06-2972-tENG), 5 February 2013, paras 138–41.

<sup>52</sup> *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](https://www.iccnw.org/CaseDocuments/ICC-01/04-01/06-3129), 3 March 2015, paras 32, 34 (in which the Appeals Chamber determined that a reparations order “must *either* identify the victims eligible to benefit from reparations, *or set out the criteria of their eligibility for reparations*” [emphasis added]).

<sup>53</sup> *ibid* 211.

<sup>54</sup> *ibid* 214. The Appeals Chamber did provide an important caveat when it also determined that, “if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which Mr Lubanga was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims. Therefore, an award of collective reparations to a community is not necessarily an error. However, the Appeals Chamber considers that the scope of the convicted person’s liability for reparations in respect of a community must be specified.” *ibid* 212.

<sup>55</sup> Luke Moffett, ‘Justice for Victims in Lubanga Case?’ (*Justice Hub*, 4 March 2015) <<https://justicehub.org/article/justice-victims-lubanga-case/>>, accessed 28 August 2016. Moffett also highlights two other concerns regarding the decision to award collective reparation in the *Lubanga* case: “The two victims groups in the Lubanga case rejected this community-based approach, as it was the community which had actively supported child recruitment during the conflict. Many of those who

decision to award collective reparation despite some victim opposition did not go unnoticed, and commentators have suggested that logistical considerations alone might propel the Court to prefer collective over individual reparations generally; such considerations include limitations on available resources (implying that collective awards may be more cost-effective), and the notion that “[i]n dealing with a large number of victims, forms of collective reparations are likely to generate economies of scale.”<sup>56</sup>

#### IV. DUAL FRAMES INHABIT THE COURT’S LEGAL FRAMEWORK FOR REPARATIONS

##### A. *Mandate to consider reparations*

Article 75 of the Rome Statute empowers the Court to authorise reparation for victims of crimes within the Court’s jurisdiction. Separately, the ICC Rules of Procedure and Evidence outline procedures governing victim applications and Court motions for reparations (rules 94 and 95); publication of reparation proceedings (rule 96); assessment of reparations (rule 97); and the role of the Trust Fund (rule 98). Together, the Rome Statute and ICC Rules of Procedure and Evidence provide a general framework guiding the authorization of reparations. The Rome Statute itself does not outline specific principles governing reparations, and the Court has not established any guiding principles on reparations outside of case law.<sup>57</sup> This means that the recent Appeals Chamber

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committed crimes would benefit from such awards. The TFV community-based approach misconceives the notion of harm, in that it was the community that suffered, rather than responding to the suffering of individual victims.” See also *Prosecutor v. Thomas Lubanga Dyilo*, ‘Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10’ [ICC-01/04-01/06-2864-tENG](#), 18 April 2012, paras 15–16 (saying, “Unsurprisingly, twelve of the fourteen interviewees consider that individual financial compensation, even though limited, would be useful to them or even necessary. Nonetheless, two former child soldiers stated clearly that this form of reparation would be useless to them. At first glance, it is difficult to award collective reparations to child soldiers because they do not form a collective. Those child soldiers participating in the current proceedings are often in conflict with their own communities (the Hema ethnic group in Ituri). Whilst from an objective standpoint, this community did suffer from the enlistment of its youth in the militia and the use of its children in hostilities, it also accepted this behaviour for the most part and supported the leaders who engaged in it. Many even collaborated. An award for reparations to the Hema community as a whole would therefore not be reasonable and might be perceived as unjust by other communities.”). Note, however, that the above reactions of victims relate to an understanding of collective reparations that, while endorsed by Trial Chamber I, was not necessarily endorsed by the Appeals Chamber, which required a link between the harm suffered and the crime for which the convicted person was convicted. See *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 211.

<sup>56</sup> Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP 2012) 253. Notably, McCarthy also suggests that, “from an administrative perspective, collective awards tend to minimize the transaction costs involved, since individual awards tend to require more intensive assessment processes and a greater degree of oversight.” *ibid.* In actuality, present proceedings regarding collective reparations in *Lubanga* have not borne out this distinction.

<sup>57</sup> Former President of the International Criminal Court Song Sang-hyun reportedly said that judges discussed establishing principles on reparations during the 2005 and 2007 plenary meetings, and it was decided these principles would be formed solely through jurisprudence in individual cases, including

decision in *Lubanga* is important both for establishing the legal architecture to guide delivery of reparations for Lubanga's victims specifically and for establishing principles and procedures that will be applied to reparations proceedings in other cases.

Article 75(1-3) of the Rome Statute establishes the Court's mandate to consider reparations. Article 75(1-3) provides that:

- (1) The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting; (2) The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation; (3) Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.<sup>58</sup>

Article 75 of the Rome Statute presents modalities of reparation using the same terms that describe appropriate modalities of reparation in the UN Basic Principles: "restitution," "compensation," and "rehabilitation."<sup>59</sup> This linguistic symmetry implies some degree of connection between the ICC's reparations regime and a vision of reparations derived from the legal tradition that frames a right to remedy for those victimized by grave breaches of international law. At the same time, article 75 of the Rome Statute describes no right to reparation *within the bounds of the Rome Statute*. The court *may* order reparations awards. It *may* do so through a Trust Fund established by article 79 of the Rome Statute. Further, any reparation award shall be made on the basis of the *Court's principles* governing reparation—not on the basis of any other principles that would conflict with the Court's legal mandate.<sup>60</sup>

#### B. *Legal architecture governing work of the Trust Fund*

Article 79 of the Rome Statute provides for the existence of a Trust Fund.<sup>61</sup> The Trust Fund for Victims was created by a resolution of the Assembly of State Parties (ASP) in

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appeals. *Conference Report: Reparations before the International Criminal Court: Issues and Challenges* (REDRESS, Grotius Centre for International Legal Studies and Leiden University 2011) 5 <<http://www.redress.org/downloads/publications/SUMMARYreport.pdf>>, accessed 28 August 2016.

<sup>58</sup> Rome Statute of the International Criminal Court 17 July 1998, [UN Doc A/CONF.183/9](#), adopted 17 July 1998, entered into force 1 July 2002, art 75(1–3) (Rome Statute).

<sup>59</sup> Restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition are identified as appropriate modalities of reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in the UN Basic Principles. UN Basic Principles (n 14) para 18.

<sup>60</sup> At the same time, article 75(6) clearly states, "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law." Rome Statute (n 58) art 75(6).

<sup>61</sup> Article 79 says: "(1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. (2) The Court may order money and other property collected through fines or forfeiture to be transferred, by

September 2002, after the Rome Statute's entry into force.<sup>62</sup> The Trust Fund identifies itself as “an independent body from the Court, established by and accountable to the Assembly of States Parties,”<sup>63</sup> though this characterization of the Trust Fund as a body independent from the Court is subject to some disagreement.<sup>64</sup> The Trust Fund presents itself as part of a legal ecosystem “in which the elements of retributive and restorative justice aim to be reconciled.”<sup>65</sup> The Trust Fund does not share the Trial Chamber's express obligations to the accused, and its mission is framed in terms that are wholly victim-centric and victims' rights-responsive.<sup>66</sup>

The Trust Fund possesses a dual mandate to provide formal reparations as well as “assistance activities” to victims of mass crimes.<sup>67</sup> Whereas the Trust Fund's reparations mandate is linked to the accountability of a convicted person, the Trust Fund's assistance mandate allows the Trust Fund to direct resources to victims outside of any judicial process. The Trust Fund describes its assistance mandate as facilitating victim assistance “1) in a timelier manner than the judicial process may [have] allowed, and 2) to a more extensive range of victims who are affected by the broader situations before the Court, regardless of whether the harm they suffered stems from particular crimes charged in a specific case.”<sup>68</sup>

Rule 98(1–4) of the Rules of Procedure and Evidence address the Trust Fund's reparations mandate, while rule 98(5) refers to the Trust Fund's assistance mandate, which allows the Trust Fund to leverage “other resources” for the benefit of victims.<sup>69</sup> The full text of rule 98 says:

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order of the Court, to the Trust Fund. (3) The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.” Rome Statute (n 58) art 79.

<sup>62</sup> *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*, ICC-ASP/1/Res.6, 9 September 2002.

<sup>63</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ‘Request for leave to submit observations in relation to the issues raised under the heading ‘Questions concerning reparation’ in the “Decision on Defence Applications for Judgments of Acquittal” ICC-01/09-01/11-2036, 22 June 2016, para 6.

<sup>64</sup> “Even when indicating such independence, the Statute did not go so far as to speak of independence ‘from the Court’. In particular, even in its independence, the Office of the Prosecutor remains within the overall authority of the judges, for the necessary purposes of the administration of justice. Finally, in paragraph 7 of the ASP resolution establishing the Trust Fund, it is clearly contemplated that ‘the activities and projects of the Trust Fund and the allocation of the property and money available to it’ are ‘subject to the decisions taken by the Court.’ All these and more are factors to be borne in mind when asserting that the Trust Fund is ‘an independent body from the Court.’” *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ‘Dissenting Opinion to Decision on the Requests regarding Reparations’ ICC-01/09-01/11-2038-Anx, 1 July 2016, para 32.

<sup>65</sup> ‘Legal Basis’ (*The Trust Fund for Victims*) <<http://trustfundforvictims.org/legal-basis>>, accessed 1 August 2016.

<sup>66</sup> The Trust Fund's mission is “To support programs which address the harm resulting from the crimes under the jurisdiction of the ICC by assisting victims to return to a dignified and contributory life within their communities.” ‘About Us’ (*The Trust Fund for Victims*) <<http://trustfundforvictims.org/about-us>>, accessed 1 August 2016.

<sup>67</sup> ‘The Two Roles of the TFV’ (*The Trust Fund for Victims*) <<http://www.trustfundforvictims.org/two-roles-fv>>, accessed 1 August 2016.

<sup>68</sup> *ibid.*

<sup>69</sup> ‘Legal Basis’ (n 65) (explaining that rule 98(5) reflects the Trust Fund's assistance mandate).

(1) Individual awards for reparations shall be made directly against a convicted person. (2) The Court may order that an award for reparations against a convicted person 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 victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible. (3) The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. (4) Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund. (5) Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

Separately, in December 2005, the Assembly of States Parties to the Rome Statute adopted the Regulations of the Trust Fund for Victims.<sup>70</sup> These regulations provide guidance on when the Trust Fund should consider itself “seized” of a matter involving reparations,<sup>71</sup> and outline specific procedures and considerations with which the Trust Fund is expected to comply in the implementation of reparation awards. The Rome Statute, ICC Rules of Procedure and Evidence, and Regulations of the Trust Fund for Victims provide distinct and interlocking guidance on how the Trust Fund is to interact with other organs of the Court following a Court order for reparations.<sup>72</sup>

The *Lubanga* Appeals Chamber suggested that the Trust Fund’s reparations and assistance activities mandates may interact dynamically in practice,<sup>73</sup> in situations where the “meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr

<sup>70</sup> Regulations of the Trust Fund for Victims, [ICC-ASP/4/Res.3](#) (3 December 2005).

<sup>71</sup> *ibid* 50(b).

<sup>72</sup> See *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, paras 46, 48 (stating, “The Appeals Chamber recalls that article 21 of the Statute provides a hierarchy of the applicable law for the Court, stating that the Court shall first apply the Statute and the Rules of Procedure and Evidence, and, ‘in the second place’, applicable treaties and the principles and rules of international law. Article 21 of the Statute does not include official actions taken by the Assembly of States Parties as a source of applicable law. However, article 79 (3) of the Statute stipulates that the Trust Fund is to be managed according to determinations made by the Assembly of States Parties. Thus, this statutory provision is unambiguous that the management of the Trust Fund does not lie with the Court...the Appeals Chamber considers that, for purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers.”).

<sup>73</sup> For a detailed examination of the relationship between reparations and assistance activities at the International Criminal Court and comparatively, see Peter J. Dixon, ‘Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo’ (2015) 10(1) *Intl J of Transitional Justice* 1 (noting, for example, the tensions “between the supposed symbolic power of reparative justice and victims’ actual experience of reparations in practice.”). *ibid* p 89.

Lubanga was found guilty”—while the legal restrictions governing reparations would make their inclusion in *reparations* programs impossible.<sup>74</sup> Assistance activities outside of court-ordered reparations have taken the form of physical and psychological rehabilitation or material support<sup>75</sup>—activities not dissimilar to what the Trust Fund may implement in the context of collective reparations.

C. *Reconciling delimited and expansive visions of reparative justice*

The International Criminal Court focuses on individual persons’ culpability for specific crimes, and has tied its reparations mandate to its need to protect the rights of the convicted person. At the same time, Trial Chamber I and the Appeals Chamber have invoked the discourse of “transformative reparation” in discussing the Court’s power to order and deliver reparations. “Transformative reparation” has been defined as reparation capable of “redressing both the single violation as well as the context of inequality” that makes individuals “vulnerable to violence and informs the consequences and impacts of this violence.”<sup>76</sup>

The discourse of transformative reparation takes a more expansive view of both the harm that reparation would seek to remedy, as well as any proposed form of redress. The “context of inequality” in which violations of law occur is presented as causally linked to a perpetrator’s ability to violate the rights of the victimized; contexts of inequality become part and parcel of the violation being redressed, viewed holistically. Re-casting effective reparation as “transformative” reparation becomes a means to redirect attention paid to victims because of *certain* experiences of victimization into a focus also on victims’ *more expansive* experiences of victimization, inevitably tied to socioeconomic circumstance. This discourse of transformative reparation defines itself *against* a circumscribed focus on decontextualized harm, instead invoking broader structural inequalities that do not fit neatly into a liability regime.

Article 75(1) and (2) of the Rome Statute outlines modalities of reparation “*including* restitution, compensation and rehabilitation” [emphasis added],<sup>77</sup> implying that the Court may consider other modalities of reparation. The *Lubanga* Trial Chamber determined that the Court’s mandate to consider reparations does indeed extend to “[o]ther types of reparations,” determining specifically that Court-authorized modalities of reparation may include “for instance those with a symbolic, preventative or transformative value”.<sup>78</sup> The March 2015 amended Reparations Order issued after the

<sup>74</sup> *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](https://www.icc-ct.org/doc/1930202.pdf), 3 March 2015, para 215.

<sup>75</sup> ‘The Two Roles of the TFV’ (n 67). See also The Trust Fund for Victims, *Assistance & Reparations Achievements, Lessons Learned, and Transitioning* (September 2015) 11–48 (presenting information about the TFV’s various assistance activities, including information on implementation).

<sup>76</sup> ‘Turning the tide on sexual violence in conflict, new UN guidance on reparations launched’ (*UN Women*, Press Release 2014) <<http://www.unwomen.org/en/news/stories/2014/6/new-un-guidance-on-reparations-launched>>, accessed 2 May 2015.

<sup>77</sup> Rome Statute (n 58) art 75(1–2).

<sup>78</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision establishing the principles and procedures to be applied to reparations’ [ICC-01/04-01/06-2904](https://www.icc-ct.org/doc/1930202.pdf), 7 August 2012, para 222.

Appeals Chamber’s final decision on reparations in *Lubanga* embodies a transformative ethos when it says, “[r]eparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes”.<sup>79</sup> The March 2015 Order also makes reference to reparation awards with “transformative objectives.”<sup>80</sup>

There are fundamental tensions inherent to situating transformative visions of reparative justice in a court designed to safeguard the rights and scope of liability of the accused and convicted person. Where criminal law promotes boundedness, the socio-legal discourse of transformative reparation frames the act of repair as itself interventional, and forward-looking—as a vector not only for healing, but also for addressing and potentially modifying broader socioeconomic structures that enable violence and perpetuate abuse.

In *Lubanga*, the Appeals Chamber clarified a vision of International Criminal Court-ordered collective reparation as aiming to fulfill a distinct, two-pronged objective: according to the Appeals Chamber, reparations primarily “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>81</sup> Even if the Appeals Chamber may have encouraged transformative effect within the limitations it set for the Court’s reparations regime, the Appeals Chamber judgment indicates that such transformative effect would remain secondary. Tensions thus emerge between the Court’s evolving legal framework surrounding reparations, and evolving notions of what might constitute *effective* reparation for individuals and transitioning societies. These tensions likely amplify disconnects that commentators note are emerging between expectations victims may have of the ICC reparations regime, and the realities of what may be deliverable in practice.<sup>82</sup>

## V. RECENT PROCEDURAL HISTORY REGARDING REPARATIONS IN *LUBANGA*

Following the March 2015 Appeals judgment and pursuant to the orders of a newly constituted Trial Chamber II,<sup>83</sup> the Trust Fund submitted a Draft Implementation Plan for reparations in November 2015.<sup>84</sup> The newly composed Trial Chamber was

<sup>79</sup> ‘Order for Reparations (Amended)’ (n 27) para 17.

<sup>80</sup> “Programmes that have transformative objectives, however limited, can help prevent future victimisation, and symbolic reparations, such as commemorations and tributes, may also contribute to the process of rehabilitation.” *ibid* 67(5).

<sup>81</sup> *ibid* 2.

<sup>82</sup> See, e.g., Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2012) 109 (stating, “the reactions of victims and their organisations with regard to the reparations regime of the ICC are likely to be marred by disappointment due to their high expectations.”).

<sup>83</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the ‘Request for extension of time to submit the draft implementation plan on reparations’ [ICC-01/04-01/06-3161-t-ENG](#), 14 August 2015, paras 6–7.

<sup>84</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Filing on Reparations and Draft Implementation Plan’ [ICC-01/04-01/06-3177-Red](#), 3 November 2015; see also ‘Annex A: Trust Fund for Victims Draft Implementation Plan for collective reparations to victims submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06)’ [ICC-01/04-01/06-3177-AnxA](#) (‘Draft Implementation Plan’). Additional Annex ICC-01/04-01/06-3177-Conf-Exp-AnxI is classified as “confidential ex parte, available to Trust Fund for Victims, Registry and Office of Public Counsel for Victims only.” *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Registry to reclassify document ICC-01/04-01/06-3177-Conf-Exp-AnxI’ [ICC-01/04-01/06-3203-t-ENG](#), 7 March 2016.

authorised to monitor and oversee the reparations implementation stage of reparations proceedings in *Lubanga*, with the authority to approve a draft implementation plan for reparations to be submitted by the Trust Fund.<sup>85</sup> The Appeals Chamber did not itself determine Lubanga's monetary liability in its judgment, leaving this determination to the newly constituted Trial Chamber because "a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process."<sup>86</sup> In general, this amount would appear in any given reparations order; once Trial Chamber II determines this amount in the *Lubanga* case, it will also be appealable.

In February 2016, the Trial Chamber determined that the Trust Fund's Draft Implementation Plan was "incomplete" and so deferred approval of the proposed plan,<sup>87</sup> on account of the plan's failure to identify beneficiaries for reparations<sup>88</sup> and its provision of only a summary of reparation modalities and forms.<sup>89</sup> Even though the Trust Fund's Draft Implementation Plan outlined a procedure for screening prospective reparation beneficiaries,<sup>90</sup> the Trial Chamber recalled that in a previous decision, the Chamber had specified that the Draft Implementation Plan was to contain: "1) *A list of the victims potentially eligible to benefit from the reparations*, including the requests for reparations and the supporting material; 2) An evaluation of the extent of the harm caused to the victims; 3) Proposals for the modalities and forms of reparations; 4) The anticipated monetary amount [of Mr Lubanga's liability]; and 5) The monetary amount which could potentially be advanced [by the Trust Fund]" [emphasis added].<sup>91</sup> The Trust Fund did indicate in its Draft Implementation Plan that it was "prepared to complement an amount of 1 million Euros from its reparations reserve for funding collective reparation awards in the present case."<sup>92</sup>

Trial Chamber II determined that it would not be able to rule on the monetary amount of Lubanga's liability, as the Appeals Chamber's amended Reparations Order asked it to do,<sup>93</sup> until individual potential victims were identified and assessed with respect to their

<sup>85</sup> "The newly composed Trial Chamber shall monitor and oversee the implementation stage of the present order, including having the authority to approve the draft implementation plan submitted by the Trust Fund. The Chamber may be seized of any contested issues arising out of the work and the decisions of the Trust Fund." 'Order for Reparations (Amended)' (n 27) para 76.

<sup>86</sup> *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 237.

<sup>87</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Order instructing the Trust Fund for Victims to supplement the draft implementation plan' [ICC-01/04-01/06-3198-t-ENG](#), 9 February 2016, para 10.

<sup>88</sup> "The Chamber notes that the TFV has not identified any potential victims." *ibid* 12.

<sup>89</sup> "The Chamber is of the view, however, that the TFV has presented only a summary description of the prospective programmes and how they will be developed and managed. This information is insufficient for the Chamber to approve the implementation of the Proposed Plan." *ibid* 20.

<sup>90</sup> See 'Draft Implementation Plan' (n 84) paras 29–31, 41–64.

<sup>91</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Order instructing the Trust Fund for Victims to supplement the draft implementation plan' [ICC-01/04-01/06-3198-t-ENG](#), 9 February 2016, para 9.

<sup>92</sup> 'Draft Implementation Plan' (n 84) para 174.

<sup>93</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Order instructing the Trust Fund for Victims to supplement the draft implementation plan' [ICC-01/04-01/06-3198-t-ENG](#), 9 February 2016, para 9, *citing* 'Order for

eligibility for reparations and the extent of the harm they suffered.<sup>94</sup> In this context, the Trial Chamber determined that the Defense must have an opportunity to submit observations on the eligibility of each victim to receive reparations,<sup>95</sup> citing reasoning it employed in the *Katanga* case<sup>96</sup>—which is, notably, at an earlier stage of reparations proceedings.<sup>97</sup> Accordingly, the Trial Chamber ordered the Trust Fund to compile copies of identification documents, interviews, and descriptions of all factual allegations being made—and secure victim consent to submit all of this identifying information to the Defense.<sup>98</sup>

The Trust Fund requested leave to appeal the Trial Chamber’s February 2016 Order,<sup>99</sup> and was denied for lack of standing.<sup>100</sup> Subsequently, in two Court filings in May<sup>101</sup> and June<sup>102</sup> of 2016, the Trust Fund pushed back strongly on Trial Chamber II’s interpretation of Appeals Chamber directives. Specifically, the Trust Fund requested that Trial Chamber II “reconsider the individual victim eligibility and harm assessment

Reparations (Amended)’ [ICC-01/04-01/06-3129-AnxA](#), 3 March 2015, para 242 (“The Trial Chamber’s determination of the amount of Mr Lubanga’s liability for the awards for reparations constitutes a part of the order for reparations within the meaning of article 75 (2) of the Statute and is therefore appealable, pursuant to article 82 (4) of the Statute”).

<sup>94</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Trust Fund for Victims to supplement the draft implementation plan’ [ICC-01/04-01/06-3198-tENG](#), 9 February 2016, para 14.

<sup>95</sup> *ibid.*

<sup>96</sup> *Prosecutor v. Germain Katanga*, ‘Decision on the ‘Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve’ and future stages of the proceedings’ [ICC-01/04-01/07-3546-tENG](#), 8 May 2015, para 21.

<sup>97</sup> The cited reasoning came from a Decision issued at a stage of reparations proceedings governed by article 75 of the Rome Statute and rule 94 of the Rules of Procedure and Evidence, prior to the issuance of a reparations order. *See Prosecutor v. Germain Katanga*, ‘Decision on the ‘Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve’ and future stages of the proceedings’ [ICC-01/04-01/07-3546-tENG](#), 8 May 2015; *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, para 105 (“The Trust Fund also wishes to highlight that the Katanga reparations proceedings are currently in the first stage of proceedings, which is to say “the proceedings leading to the issuance of an order for reparations”, whereas the Lubanga proceedings are in the implementation stage”) *citing 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 240.

<sup>98</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Trust Fund for Victims to supplement the draft implementation plan’ [ICC-01/04-01/06-3198-tENG](#), 9 February 2016, para 17.

<sup>99</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘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’ (9 February 2016)’ [ICC-01/04-01/06-3200](#), 15 February 2016.

<sup>100</sup> “In the light of the above, it is the Chamber’s view that the TFV does not have locus standi to request leave to appeal, under article 82(1)(d) of the Statute, against the Order of 9 February 2016. Consequently, the Chamber considers that it is not necessary to examine the other arguments put forward by the TFV.” *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016’ [ICC-01/04-01/06-3202-tENG](#), 4 March 2016, para 17.

<sup>101</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016.

<sup>102</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Additional Programme Information Filing’ [ICC-01/04-01/06-3209](#), 7 June 2016.

process set out in its order of 9 February 2016,<sup>103</sup> arguing that there exists a negative “methodological impact of the individual victim eligibility process on the further development of collective reparations programmes for the victims of the crimes for which Mr Lubanga was convicted.”<sup>104</sup>

The Trust Fund used data collected from interviews with prospective reparation beneficiaries in Ituri, a region in the DRC where Lubanga committed crimes for which he was convicted,<sup>105</sup> to conclude that the Trial Chamber-mandated individual eligibility process “damages and re-traumatizes victims.”<sup>106</sup> The Trust Fund communicated that of 31 potential reparations beneficiaries interviewed as of its May 2016 filing, all 31 reported wanting to participate in Trust Fund reparations programs. However, 22 did not consent to have their identities shared with the convicted person and only 9 expressly consented to sharing their identities and information with the convicted person.<sup>107</sup> The Trust Fund transmitted 12 files of victims who were potentially eligible to benefit from reparations to Trial Chamber II in May 2016,<sup>108</sup> communicating that nine of these victims “could not consent to the prerequisite requirement because of their deeply felt fear of reprisal and concern for their safety.”<sup>109</sup> The Trust Fund informed the Trial Chamber that it would provisionally suspend its participation in all future planned victim identification missions,<sup>110</sup> despite Trial Chamber directives.

Trial Chamber II has not yet granted reconsideration of the Trust Fund’s request that the Trial Chamber “revise its current procedural approach and...instead consider approving the Draft Implementation Plan of 3 November 2015 in its entirety.”<sup>111</sup> Instead, in July 2016, a seemingly frustrated Majority of the Trial Chamber directed its attention to the global community to ask for help in envisioning what collective reparations projects might look like for former child soldiers in the East of the Democratic Republic of the Congo.<sup>112</sup>

<sup>103</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016 para 9.

<sup>104</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Additional Programme Information Filing’ [ICC-01/04-01/06-3209](#), 7 June 2016 para 10.

<sup>105</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, paras 29–33.

<sup>106</sup> *ibid* 8.

<sup>107</sup> *ibid* 33(d).

<sup>108</sup> *ibid* 193.

<sup>109</sup> *ibid* 194.

<sup>110</sup> *ibid* 20.

<sup>111</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Additional Programme Information Filing’ [ICC-01/04-01/06-3209](#), 7 June 2016 para 97.

<sup>112</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order pursuant to rule 103 of the Rules of Procedure and Evidence’ [ICC-01/04-01/06-3217-t-ENG](#), 15 July 2016, para 8 (in which the Trial Chamber “invites the States concerned, as well as any organisations which so wish (collectively “the participants”), to file submissions...on current or past collective projects for former child soldiers in the East of the Democratic Republic of the Congo...[and] the Chamber invites the participants to present it with proposals for future collective projects to support the setting up of a range of collective reparation projects for the former child soldier victims of Mr Lubanga.”); *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations’ [ICC-01/04-01/06-3218-t-ENG](#), 15 July 2016 para 8 (in which the Trial

The Majority of the Trial Chamber also requested that the Trust Fund “study the feasibility of developing a concrete project aiming at providing prompt symbolic reparations,”<sup>113</sup> noting that symbolic reparations would not require previous identification of beneficiaries.<sup>114</sup> In September 2016, the Trust Fund submitted a project framework for symbolic reparations, proposing construction of a) “symbolic structures” taking the shape of “commemoration centres” intended to serve as forums for art and community dialogue in three selected communities,<sup>115</sup> and b) “mobile memorialization” in the form of activities, events, and radio programming in five communities to “promote community awareness and sensitization about the harm caused by the enlistment, conscription, and use of child soldiers in hostilities.”<sup>116</sup> In October 2016, Trial Chamber II approved the Trust Fund’s proposed plan for symbolic reparations, encouraging the Trust Fund to study possibilities for expanding mobile memorialization projects to include, “to the extent possible, the Ituri region within the confines of the proposed budget.”<sup>117</sup>

The Trial Chamber indicated its agreement with a notion advanced by the Trust Fund, that symbolic reparations, “provide for an enabling environment to develop and implement service-based collective reparations awards.”<sup>118</sup> However, the Trial Chamber has yet to address key issues inhibiting implementation of service-based collective reparations. While forward movement in the reparations process is certainly welcome, the Trust Fund has indicated that implementing symbolic reparations without also addressing problems related to service-based collective reparations may be problematic because of resulting dangers that: a) momentum and victim engagement with respect to service-based reparation schemes could be lost as a result, and b) “any inadvertent disconnect between the implementation of symbolic and service-based collective reparations projects will greatly diminish the value and efficiency and effectiveness of both.”<sup>119</sup> As a result, the

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Chamber determines “that the search for victims potentially eligible for reparations in the instant case should continue” and “considers, therefore, that the Registry must provide the TFV and the Legal Representatives of victims with all the assistance necessary for this purpose.”). For a critique of the Trial Chamber’s decision to seek external input and forestall implementation of reparation awards, see *Prosecutor v. Thomas Lubanga Dyilo*, ‘Annexe Opinion de Mme la Juge Herrera Carbuccia’ [ICC-01/04-01/06-3217-Anx](#), 15 July 2016.

<sup>113</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Request Concerning the Feasibility of Applying Symbolic Collective Reparations’ [ICC-01/04-01/06-3219](#), 15 July 2016 para 12.

<sup>114</sup> *ibid* 11.

<sup>115</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, ICC-01/04-01/06-3223-Conf [ICC-01/04-01/06-3223-Red 20-09-2016](#), 19 September 2016, paras 30–37.

<sup>116</sup> *ibid* 38.

<sup>117</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations’ [ICC-01/04-01/06-3251](#), 21 October 2016 para 16.

<sup>118</sup> *ibid* 12.

<sup>119</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, ICC-01/04-01/06-3223-Conf [ICC-01/04-01/06-3223-Red 20-09-2016](#), 19 September 2016, para 14 (stating too that, “It will therefore be important to resolve the victim screening or identification process in the service-based reparations projects.”).

ICC reparations regime hangs in limbo, caught between competing claims to define how the collective reparations process may permissibly proceed.

#### IV. PRESENT PROCEDURAL IMPASSES: ANCHORED IN DUAL FRAMES

Present debates regarding reparations in the *Lubanga* case involve institutional actors with different mandates, giving rise to different visions of what might make the ICC reparations regime effective. This article suggests that a) these differing visions are not irreconcilable; b) the Court should aim to reconcile the need to protect the boundedness of a convicted person's scope of liability with the goal of ensuring victims' interactions with the Court are more reparative than detrimental; and c) that to accomplish this aim and move the reparation process forward, the Trial Chamber must reconsider its present approach to determining Lubanga's monetary liability for collective reparations.

In this context, two salient questions take centre stage. First, is the Trial Chamber correct in its interpretation of Appeals Chamber instructions to determine Lubanga's monetary liability as first requiring the Trial Chamber to rule on individual reparation beneficiaries' eligibility? This article argues that an alternate interpretation is possible, and preferable. Second and relatedly, should the convicted person have the opportunity to review prospective reparation beneficiaries as part of this process—requiring disclosure of victim identities to both the Trial Chamber and the convicted person? This article answers in the negative, arguing that current Trial Chamber directives represent a misreading of the Appeals Chamber judgment.

This article concludes that the Trial Chamber should a) grant the Trust Fund's request to reconsider the Trial Chamber-mandated individual victim eligibility and harm assessment process, set out in the Trial Chamber's order of 9 February 2016; and b) determine that the convicted person does not have the right to review the identities of prospective reparation beneficiaries at the reparation implementation stage. This article suggests that the Appeals Chamber judgment should be read as requiring the monetary amount of Lubanga's liability to be proportional to the totality of the harm caused by the convicted person, rather than the harm of specific victims identified at the current stage of proceedings. This interpretation is made possible by the collective nature of the reparations awarded in *Lubanga*, because the cost of such collective awards may not need to be calculated by adding up the cost of each individual beneficiary's participation in collective reparation programs.

##### A. *Issue 1: Individual eligibility determinations as a prerequisite to determining monetary liability for collective awards?*

The Trial Chamber should shift course and determine that it need not rule on eligibility of prospective beneficiaries of collective reparation awards at the present stage of proceedings, as a prerequisite to determining a convicted person's monetary liability for collective reparations. This article argues that the Appeals Chamber did not have the Trial Chamber's present approach in mind when it issued its judgment—and in fact expressed a belief that the Trial Chamber would employ an opposite approach—even if the Trial Chamber's present approach may be legally permissible.

1. What does it mean to ensure that reparations are proportionate to the harm caused?

The Appeals Chamber judgment should be read as requiring the monetary amount of Lubanga's liability to be proportional to the totality of the harm caused by the convicted person, rather than the harm suffered by specific victims identified per Trial Chamber-required methods at the current stage of proceedings. The Trust Fund produced such an assessment in its Draft Implementation Plan, determining that approximately 3,000 direct and indirect victims could be eligible beneficiaries of collective reparations in the *Lubanga* case.<sup>120</sup> The difference in scale between this estimate and the handful of beneficiaries identified per Trial Chamber-mandated processes is striking, and raises concerns that present Trial Chamber directives may be unduly limiting the reparative function of the Court's reparations mandate. As the *Lubanga* sentencing decision noted, "the evidence [at trial] established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread,"<sup>121</sup> and "[t]he [Trial] Chamber, in passing sentence, has reflected its determination that the involvement of children was widespread."<sup>122</sup> Eligible beneficiaries would be more likely to retain access to reparations for which they may legitimately qualify if the Appeals Chamber judgment is interpreted as requiring the monetary amount of Lubanga's liability to be proportional to the totality of the harm that Lubanga caused to victims identified in aggregate by the Trust Fund.

This article's suggested approach would not require the Trial Chamber to know the exact number of victims and the precise extent of the damage caused to each of them in order to determine Lubanga's liability for the purposes of reparations. This argument is also uniquely applicable to collective reparation awards. Unlike individual reparation awards, whose aggregate cost necessarily depends on the number of individuals deemed eligible to receive reparation, collective awards, which might take the form of rehabilitation programs, for example, could potentially service a range of eligible beneficiaries at a comparable cost to the convicted person. Collective awards, by their nature, make it possible to conceive of a stable monetary figure for reparations in a given case based on a ballpark number of recipients that could conceivably fluctuate; specific beneficiaries could be screened later for access to collective reparation programming. The need to protect the scope of monetary liability of the convicted person could be satisfied by Court-managed review of such processes for estimation and screening of prospective beneficiaries (related issues are addressed with respect to this article's discussion of 'Issue 2,' analyzing the convicted person's right of review of prospective beneficiaries).

In its judgment, the Appeals Chamber distinguished between the act of *identifying* harm and "*assessing the extent* of that harm for purposes of determining the nature and/or size of

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<sup>120</sup> 'Draft Implementation Plan' (n 84) para 28.

<sup>121</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on Sentence pursuant to Article 76 of the Statute' ICC-01/04-01/06-2901, 10 July 2012, para 49.

<sup>122</sup> *ibid* 50.

reparation awards”<sup>123</sup>—terming the act of identifying harm *a necessarily legal determination that must be made in a reparations order*,<sup>124</sup> and the act of assessing the extent of harm something which may either be determined by the Trust Fund in implementation, *or by the Trial Chamber in the order for reparations*.<sup>125</sup> The original *Lubanga* Trial Chamber’s reparations order left *both* processes—identification of harm and assessment of the extent of harm—to the Trust Fund.<sup>126</sup> Only later did the Appeals Chamber deem the complete delegation of these determinations to the Trust Fund impermissible, determining that the Trial Chamber alone can and must identify “the harms to direct and indirect victims caused by the crimes for which the person was convicted.”<sup>127</sup> This means that the initial reparations order did not contain a key determination that, as has now been decided, the Trust Fund cannot determine itself. To remedy the situation, the Appeals Chamber judgment defined the harms resulting from the crimes for which Lubanga was convicted in its amended reparations order.<sup>128</sup>

The *Lubanga* Appeals judgment also explained that while the Trial Chamber would normally be required to make a determination as to estimated monetary liability in its reparations order—before the Trust Fund would be asked to present its Draft Implementation Plan.<sup>129</sup> The Trust Fund was *exceptionally* asked in this case to indicate in its Draft Implementation plan the anticipated amount that the Trust Fund considered necessary to remedy harms for the crimes for which Lubanga was convicted, “based on information gathered during the consultation period leading up to the submission of the draft implementation plan.”<sup>130</sup> The Trust Fund’s liability estimate of 1 million euros<sup>131</sup>—based on its estimate that approximately 3,000 direct and indirect victims could be eligible beneficiaries of collective reparations in the *Lubanga* case<sup>132</sup>—appears to assess the estimated totality of harm resulting from the crimes for which Lubanga was convicted, arguably “based on information gathered during the consultation period leading up to the submission of the draft implementation plan” as the Appeals Chamber requested.<sup>133</sup>

Trial Chamber II’s present approach implies that the Trial Chamber believes it cannot calculate *precisely* what Lubanga owes until it is clear exactly who will be able to claim reparation. This logic could stem from a) a belief that the cost of a collective reparation

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<sup>123</sup> *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 181.

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid* 183.

<sup>126</sup> “Accordingly, the Appeals Chamber finds that the Trial Chamber erred in delegating to the Trust Fund the task of defining the harms caused to direct and indirect victims as a result of the crimes for which Mr Lubanga was convicted. This error renders the Impugned Decision insufficiently detailed and it therefore must be amended.” *ibid* 184.

<sup>127</sup> *ibid* 181.

<sup>128</sup> *ibid* 184.

<sup>129</sup> *ibid* 237.

<sup>130</sup> *ibid* 240.

<sup>131</sup> ‘Draft Implementation Plan’ (n 84) para 174.

<sup>132</sup> *ibid* 28.

<sup>133</sup> *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 240.

award is necessarily dependent on the number of beneficiaries benefitting from it, and b) a related reading of the Appeals Chamber-delivered principle that “[a] convicted person’s liability for reparations must be proportionate to the harm caused”<sup>134</sup> as requiring a preemptive determination as to the exact size of the population harmed by the crimes for which Lubanga was convicted. This interpretation casts the need to ensure proportionality between liability and harm as an effort requiring the counting of eligible beneficiaries. This approach drastically limits the number of victims who would be able to benefit from collective reparation awards.

When the Appeals Chamber defined as a principle that “[a] convicted person’s liability for reparations must be proportionate to the harm caused,”<sup>135</sup> it left open the possibility that “harm” might refer to the totality of the harm for which a person was convicted, as opposed to the harm suffered by individually identified prospective beneficiaries. Other, parallel determinations made in other portions of the judgment support a reading that the Appeals Chamber’s ‘proportionality principle’ was not intended to be read as the Trial Chamber presently reads it. Perhaps most notably, in its judgment, the Appeals Chamber “recalls that it has already held above that ‘reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence,’” and “considers that it would contravene this principle to require that collective reparations can only be awarded on the basis of the individual requests for reparations received.”<sup>136</sup> In this way, the Appeals Chamber appears to have indicated that the Court’s need to protect the scope of the convicted person’s monetary liability in no way necessitates individual beneficiary identification antecedent to determining that monetary liability.

The Trial Chamber would only *need* to know how many people would be eligible to claim reparations before determining monetary liability *if the cost of the overall award could only be determined by adding up the monetary benefit that individuals might draw from the collective award*. Nothing in the Appeals Chamber judgment necessitates this reading of how collective reparations must be constructed or monetized, even though alternate conceptions of reparation may be less familiar. In its interpretation of the Appeals Chamber judgment, the Trial Chamber appears to conceptualize reparations analogously to the way in which damage awards are calculated in many domestic legal systems, where victims and perpetrators are parties to proceedings and the mechanisms for protecting the scope of a convicted person’s liability are familiar. *Collective* reparation, however—which may include rehabilitation programs or other modalities of reparation that may not necessarily be individually monetizable—need not be conceptualized analogously to the way in which courts may conceive of monetary damage awards for individuals.

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<sup>134</sup> *ibid* 6. The Appeals Chamber expands upon this principle later in the judgment when it states: “A convicted person’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.” *ibid* 118.

<sup>135</sup> *ibid* 6.

<sup>136</sup> *ibid* 151. The same paragraph of the judgment notes that decisions as to criminal liability and culpability of the convicted person are “decisions which are based on the evidence and factual findings relevant to the entire trial proceedings.” *ibid*.

In mid-July 2016, Trial Chamber II indicated that it might be shifting its stance on the issue of proportionality of reparations, toward an approach that looks beyond individual applications submitted to the Trial Chamber at the present stage of proceedings. In its 15 July 2016 ‘Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations,’ Trial Chamber II described its requirement that the Trust Fund submit files of potential victims to the Trial Chamber as enabling the Trial Chamber “to supplement the *sample* already available and to better assess to what extent the list of victims identified is *representative* of all potential victims” [emphasis added].<sup>137</sup> By describing requested files of potentially eligible beneficiaries as a potentially representative sample of a broader set of eligible beneficiaries, the Trial Chamber raises the possibility that it may be altering its approach to more closely approximate the approach advanced by the Trust Fund. Such movement would be welcome, and encouraging.

2. Is harm assessment an administrative process to be managed by the Trust Fund?

Prior to the issuance of its March 2015 judgment, the Appeals Chamber noted that Trial Chamber I’s decision on reparations addressed distinct aspects of reparations-related procedure “to be taken both before and after the issuance of an order for reparations.”<sup>138</sup> The Appeals Chamber presented the issuance of a reparations order itself as delineating two distinct parts of reparations proceedings, explaining that the “first part of the reparations proceedings concludes with the *issuance of an order* for reparations under article 75 (2) of the Statute or a decision not to award reparations”<sup>139</sup> and that “[t]he second part of the reparations proceedings consists of the *implementation phase*, which is regulated primarily by article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence” [emphasis added].<sup>140</sup> Because present reparations proceedings in *Lubanga* are occurring subsequent to the issuance of an order for reparations, they may arguably be described as falling squarely within the “implementation stage” of reparations proceedings.

The Trust Fund argues that Trial Chamber II oversteps its bounds when it asserts control over the victim eligibility determination process.<sup>141</sup> The Trust Fund argues that eligibility screening is an administrative procedure that happens during program implementation<sup>142</sup>—a phase of the reparations process that the Trust Fund says it is

<sup>137</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations’ [ICC-01/04-01/06-3218-t-ENG](#), 15 July 2016, para 8.

<sup>138</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘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’ [ICC-01/04-01/06-2953](#), 14 December 2012, para 58.

<sup>139</sup> *ibid* 54.

<sup>140</sup> *ibid* 55.

<sup>141</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, paras 99–101.

<sup>142</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘Additional Programme Information Filing’ [ICC-01/04-01/06-3209](#), 7 June 2016, para 15.

tasked with carrying out.<sup>143</sup> The Trust Fund makes recourse to a December 2012 Appeals Chamber decision that says that if an “award for reparations [is] deposited with the Trust Fund...the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply.”<sup>144</sup> The Trust Fund argues that by outlining in its Draft Implementation Plan the method through which victims will be screened *after* approval of the collective implementation award, it is complying with *its Regulations* and thus fulfills requirements established by the Appeals Chamber.<sup>145</sup>

This argument breaks down when considering the March 2015 Appeals Chamber judgment and the way in which the Regulations of the Trust Fund address collective reparation proceedings. In its March 2015 judgment, the Appeals Chamber clarified that the Trial Chamber—not the Trust Fund—must define harms that result from the crimes for which the convicted person was convicted.<sup>146</sup> The Appeals Chamber also clarified that the Trial Chamber has discretion as to whether it would prefer to “determine the scope, extent of any damage, loss and injury to, or in respect of, victims in the order for reparations” or instead delegate that task to the Trust Fund, which “would subsequently determine the appropriate size and nature of the reparation awards to be proposed in its draft implementation plan.”<sup>147</sup> It appears clear that while the Trust Fund’s potential role in reparations proceedings is limited to the implementation phase, the Trial Chamber’s role is not comparably restricted to a single phase of the process—at least at the time in which reparations are ordered. After an order for reparations is issued, the Trial Chamber’s ability to intervene in the “implementation phase” is left somewhat ambiguous. The Appeals Chamber’s December 2012 decision, referenced above, had highlighted that “the Regulations of the Trust Fund contemplate oversight and a certain *degree of intervention* by the Trial Chamber during the implementation phase of reparations”

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<sup>143</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, para 91 *citing* *Prosecutor v. Thomas Lubanga Dyilo*, ‘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’ [ICC-01/04-01/06-2953](#), 14 December 2012, para 53 (in which the Appeals Chamber concludes “reparations proceedings can be divided into two distinct parts: 1) the proceedings leading to the issuance of an order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out.”).

<sup>144</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, para 91 *citing* *Prosecutor v. Thomas Lubanga Dyilo*, ‘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’ [ICC-01/04-01/06-2953](#), 14 December 2012, para 55.

<sup>145</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only’ [ICC-01/04-01/06-3208](#), 31 May 2016, paras 99–101.

<sup>146</sup> *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 184.

<sup>147</sup> *ibid* 183.

[emphasis added]<sup>148</sup>—without expressly clarifying the bounds governing the scope, timing, and nature of what that intervention entails.

Additionally and interestingly, the Regulations of the Trust Fund themselves do not appear to address a key feature of the *Lubanga* collective reparations proceedings in which present debates are rooted: the Appeals Chamber has required identification of *individual* beneficiaries *in the context of collective reparation awards*—a process that the Regulations of the Trust Fund do not appear to discuss. The Regulations of the Trust Fund address separately and distinctly the Trust Fund’s role with respect to individual versus collective reparation awards. In the case of collective awards pursuant to 98(3)—as was awarded in *Lubanga*—the Regulations of the Trust Fund do not address Court approval of individual prospective beneficiaries in the context of collective reparation awards.<sup>149</sup> This is in contrast to the Regulations’ treatment of *individual* reparation awards pursuant to rule 98(2), which requires that the Trust Fund alternatively a) set out names and locations of victim beneficiaries in cases where the Court identifies each beneficiary,<sup>150</sup> or b) set out options for determining identification of such individuals.<sup>151</sup> Additionally, a 2012 Appeals Chamber assertion that “the Regulations of the Trust Fund apply” does not necessarily mean such Regulations would apply exclusively or be controlling—especially in the absence of language addressing the circumstances that characterize this case.

Trial Chamber II’s framing of the process of determining victim eligibility for reparations as a procedure that must precede program approval and implementation may therefore be understood in one of two ways: either Trial Chamber II believes that identifying eligible beneficiaries is necessary to determine monetary liability—which it alone is tasked with carrying out—or, alternatively, Trial Chamber II may view its effort to rule on individual beneficiaries’ eligibility as a permissible effort to assess the extent of harm—which the Appeals judgment does not say may *only* be carried out by the Trust Fund.

Irrespective of whether it might be permissible for the Trial Chamber to intervene in the harm assessment process as it has, however, this is not the optimal approach. First, the Trial Chamber is not as connected to victim communities as is the Trust Fund, by dint of their differing operational mandates. Second, Trial Chamber review processes are adding lengthy time delays to an already protracted process of realizing reparations for victims.

*B. Issue 2: Disclosure of prospective beneficiaries’ identities to the convicted person at the reparations implementation stage?*

A corollary question then becomes: is the Trial Chamber correct in its belief that it must require the convicted person to have an opportunity to review individual claims from prospective reparations beneficiaries—requiring disclosure of victim identities to both the Trial Chamber and the convicted person—at the implementation stage? This is a two-

<sup>148</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ‘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’ [ICC-01/04-01/06-2953](https://www.ictj.org/ga/doc/ICC-01/04-01/06-2953), 14 December 2012, para 56.

<sup>149</sup> Regulations of the Trust Fund for Victims, [ICC-ASP/4/Res.3](https://www.ictj.org/ga/doc/ICC-ASP/4/Res.3) (3 December 2005) paras 69–72.

<sup>150</sup> *ibid* 59.

<sup>151</sup> *ibids* 60–61.

fold question, which requires us to ask a) what does the convicted person have the right to review, and b) what does the Trial Chamber itself need in order to assess monetary liability?

The Trust Fund has identified a series of victim-focused objections to the Court's directive to secure prospective reparation beneficiaries' consent to disclose their identities to Lubanga. First, safety concerns are acute. The *Union des Patriotes Congolais* (UPC)<sup>152</sup> retains regional popularity and prospective influence over victims' lives, and Lubanga a sense of local authority; openly identifying oneself as a victim of crimes committed by Lubanga could foreseeably result in retaliation and other negative ramifications,<sup>153</sup> leading to victims' expressed belief that their lives would be put in danger if they were to disclose their identities to Lubanga.<sup>154</sup> Second, the Trust Fund has argued that "the Trial Chamber's proscribed process establishing an adversarial eligibility proceeding for reparations between the convicted person and the victims is contradictory to the goal of reconciliation between the parties," and so is inconsistent with the aim of pursuing reconciliation between victims and the convicted person – an important objective of the ICC reparations regime.<sup>155</sup> Third, because the Trust Fund's preliminary research suggests that the vast majority of victims would likely not consent to sharing their identities with Lubanga, significant numbers of victims who would otherwise be eligible would lose access to reparations entirely.<sup>156</sup> Finally, the Trust Fund maintains that the entire Trial Chamber-mandated harm assessment process for potential reparation beneficiaries is psychologically damaging; the Trust Fund asserts that there will be a high likelihood that "those victims most affected by trauma, stigma, shame, and vulnerability will be the least likely to come forward in this process and thus they will be the ones who lose out on the redress and rehabilitation that they so urgently deserve."<sup>157</sup>

1. Convicted person does not have right to review applicants' eligibility at the implementations stage

This article argues that the Trial Chamber made an analytic leap in ordering disclosure of victim identities to Lubanga for review, which does not appear to follow from directives of the Appeals Chamber. Even if the Trial Chamber is correct in its determination that the Trial Chamber must hear from the Defense before deciding on the monetary amount

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<sup>152</sup> "The Union des Patriotes Congolais ("UPC") was created on 15 September 2000; Thomas Lubanga was one of the UPC's founding members and its President from the outset. The UPC and its military wing, the Force Patriotique pour la Libération du Congo ("FPLC"), took power in Ituri in September 2002. The UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the Armée Populaire Congolaise ("APC") and other Lendu militias, including the Force de Résistance Patriotique en Ituri ("FRPI"), between September 2002 and 13 August 2003." *Prosecutor v. Thomas Lubanga Dyilo*, 'Case Information Sheet' [ICC-PIDS-CIS-DRC-01-014/16\\_Eng](#), 10 February 2016.

<sup>153</sup> *Prosecutor v. Thomas Lubanga Dyilo*, 'First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only' [ICC-01/04-01/06-3208](#), 31 May 2016, para 68.

<sup>154</sup> *ibid* 69.

<sup>155</sup> *ibid* 70.

<sup>156</sup> *ibid* 74.

<sup>157</sup> *ibid* 75.

of Lubanga's liability, this does not necessarily mean that Lubanga must have the right to review individual applicants' eligibility for reparations at the implementation stage.

The amended March 2015 reparations order contains the following directive:

“Prior to the Trial Chamber setting the amount of Mr Lubanga's liability, the *parties shall have the opportunity to appear before the Trial Chamber or make submissions in writing on the scope of Mr Lubanga's liability, in light of the information provided by the Trust Fund in its draft implementation plan, within a time limit to be set by the Trial Chamber*” [emphasis added].<sup>158</sup>

When the Appeals Chamber suggests that parties should make submissions to the Trial Chamber on the scope of Lubanga's liability, it does not specify that such submissions must relate to individual prospective beneficiaries. In fact, the Appeals Chamber has suggested the opposite. At the same time that the Appeals Chamber has required that beneficiaries of collective reparations be identified and deemed eligible to claim access to collective awards, it also dismissed as moot an appeal that Lubanga made arguing that the “Trial Chamber denied him the opportunity to challenge the individual requests for reparations.”<sup>159</sup> The Appeals Chamber reasoned that individual requests for reparations would need to happen pursuant to rule 94 of the Rules of Procedure and Evidence, whereas the Trial Chamber's granting of collective reparations under rule 98(3) meant that the Trial Chamber was not required “to rule on the merits of the individual reparation requests.”<sup>160</sup>

The Appeals Chamber recognized too that the stage of proceedings at which victims may file *requests* to participate in reparation awards, pursuant to rule 94,<sup>161</sup> is differentiated from the stage at which it is determined whether victims may be *eligible* to participate in an award for collective reparations, pursuant to rule 98.<sup>162</sup> In addressing an argument advanced by the Defense that the rights of a convicted person might be infringed if individuals eligible to claim reparations were not challengeable at the application stage and the convicted person were to be deemed liable for harm caused to those individuals,<sup>163</sup> the Appeals Chamber concluded that the rights of the convicted person would not be infringed owing to the convicted person's ability to challenge the standard of proof and causation used to determine victims' eligibility.<sup>164</sup> Furthermore, in this case specifically, the Appeals Chamber noted that the Trust Fund indicated its willingness to allow Lubanga to review the screening process of victims at the eligibility stage, subject to

<sup>158</sup> ‘Order for Reparations (Amended)’ (n 27) para 80.

<sup>159</sup> *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](https://www.ictj.org/ga/doc/ICC-01/04-01/06-3129), 3 March 2015, paras 163–64.

<sup>160</sup> *ibid* 164.

<sup>161</sup> *ibids* 163–64.

<sup>162</sup> *ibid* 165.

<sup>163</sup> *ibid* 165.

<sup>164</sup> *ibid* 166 (“In this regard, the Appeals Chamber notes that Mr Lubanga has been able to challenge, and indeed has challenged in the present appeals, the criteria established in the Impugned Decision that are applicable to the standards of proof and causation for determining an individual's eligibility in a collective award.”).

protective measures.<sup>165</sup> This language gets incorporated into the amended order for reparations<sup>166</sup> in the form of a directive that states: “The Trust Fund shall provide Mr Lubanga with the opportunity to review its proposed screening process of victims at the implementation stage, subject to any protective measures.”<sup>167</sup>

Review of a process is something altogether different from review of specific claimants. Further, in this context, the Appeals Chamber highlighted that it would be appropriate to use protective measures to safeguard victim identities.<sup>168</sup> Together, this suggests that the Appeals Chamber foresaw limitations on the disclosure of victim identities to Lubanga at the implementation stage, and did not intend for Lubanga to have a right to access victims’ identities and factual allegations of harm at the stage when victim eligibility for reparations is determined.

Other language in the 2015 Appeals judgment supports this reading. In a section called “*The transmission of the individual applications to the Trust Fund*,” the Appeals Chamber found fault with the Trial Chamber’s failure to include a clause regarding confidentiality with respect to the submissions of victims seeking to participate in reparations programs, which is contrary to regulation 108(2) of the Regulations of the Registry<sup>169</sup> (referring to the time of victims’ applications for reparations at the first of the above-outlined two phases of the reparations process).<sup>170</sup> The Appeals Chamber then amended the order for reparations to require:

“consent to disclosure of confidential information *to the Trust Fund* for purposes of participation in the eventual collective programme(s) that are to be designed by the Trust Fund. The Trust Fund is instructed to refrain from further reviewing these requests until such consent is received and to *permanently remove any confidential information* it may have stored electronically or elsewhere in the event that consent is not granted” [emphasis added].<sup>171</sup>

In other words, the Appeals Chamber indicated sufficient concern about victim confidentiality to discuss a possible need for irreversible measures to safeguard confidential information *from the Trust Fund*. If the Appeals Chamber considered itself to have indicated that victims should be required to disclose a similar kind of confidential information *to the convicted person responsible for causing harm to them*, surely the Appeals Chamber would have mentioned this. After all, disclosure of confidential information to the convicted person is far more likely to result in grave consequences for the victim than disclosure of similar information to the Trust Fund.

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<sup>165</sup> *ibid* 167.

<sup>166</sup> *ibid* 167 (“The Appeals Chamber considers it appropriate to include the Trust Fund’s suggestion in this respect in the amended order for reparations.”).

<sup>167</sup> ‘Order for Reparations (Amended)’ (n 27) para 66.

<sup>168</sup> *ibid*.

<sup>169</sup> *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](https://www.icc-ct.org/doc/1503031010001.pdf), 3 March 2015, para 161.

<sup>170</sup> *ibid* 160.

<sup>171</sup> *ibid* 162.

2. Appeals Chamber did not oblige Trial Chamber to review Defense submissions on prospective beneficiaries to determine monetary liability

If the Trial Chamber is not required to order disclosure of victim identities to the Defense because of concerns about infringing upon the rights of the convicted person, it is likely also true that there must be a way for the Trial Chamber to determine Lubanga's monetary liability without hearing submissions from the Defense on individual victim eligibility.

As discussed above, the Trial Chamber cited reasoning employed in *Katanga* when it determined that the Defense must have an opportunity to submit observations on the eligibility of each victim to receive reparations;<sup>172</sup> the cited passage from the *Katanga* Trial Chamber decision discusses Trial Chamber review of individual requests for reparations pursuant to rule 94, prior to the implementation phase.<sup>173</sup>

The Appeals Chamber has clearly differentiated rule 94 from rule 98 proceedings. Rule 94 requests for reparations—and any accompanying review processes—are therefore not controlling at the current stage of reparations proceedings in *Lubanga*. Pending reconsideration of its February order to the Trust Fund, however, Trial Chamber II's order—replete with all of its victim identification and harm assessment directives—still stands.<sup>174</sup>

## V. CONCLUSION

The impulse to repair harm may be thought of in both legal and extra-legal terms, each bearing socio-legal consequence. In its legal guise, the notion that repairing harm might comprise a form of justice becomes conceptualized differently in frameworks that scope outward to consider socioeconomic rupture and repair, and those that focus narrowly on individual persons' accountability for causing harm to others. The *Lubanga* case has authorised collective reparations, and has given rise to questions unique to

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<sup>172</sup> “On the basis of all the documents submitted, and after considering, inter alia, the observations of the Defence, the Chamber will consider, on a case-by-case basis, whether the requests, within the meaning of rule 94 of the Rules, justify the awarding of reparations on an individual and/or collective basis.” *Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Trust Fund for Victims to supplement the draft implementation plan’ [ICC-01/04-01/06-3198-t-ENG](#), 9 February 2016, para 14, citing *Prosecutor v. Germain Katanga*, ‘Decision on the “Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve” and future stages of the proceedings’ [ICC-01/04-01/07-3546-t-ENG](#), 8 May 2015, para 21.

<sup>173</sup> *Prosecutor v. Germain Katanga*, ‘Decision on the “Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve” and future stages of the proceedings’ [ICC-01/04-01/07-3546-t-ENG](#), 8 May 2015, para 21.

<sup>174</sup> *But see Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations’ [ICC-01/04-01/06-3218-t-ENG](#), 15 July 2016, para 8 (potentially indicating that Trial Chamber II may be shifting in its approach to considering individual victim identification and harm assessments of all prospective reparation beneficiaries as a necessary prerequisite to determining the convicted person's overall monetary liability for reparations).

conceptualizing collective reparation awards; many questions regarding individual reparations at the International Criminal Court remain unasked and unanswered.

The introduction of reparations into internationalized criminal courts has broadened what it might mean for victims to seek court-ordered justice for internationally recognized crimes. Now, victims interacting with the ICC await the judgments that will give shape to those notions of victim-centric justice in practice. The *Lubanga* Trial Chamber's efforts to protect the procedural rights of the convicted person in reparations proceedings coexist alongside a growing consciousness that effective reparation might need to be in some sense far-reaching, cognizant of larger systemic inequities beyond any one convicted individual's control. At the same time, the Court must address a concern that perhaps all present conceptualizations of effective reparation may fail to reflect adequately the lived realities of child soldiers who are now years older, who may not identify collectively, and who may not find representation in current narratives presenting reparations for their benefit. As the Court navigates legal challenges inherent to implementing collective reparation awards, it must work to ensure that legal debates and conceptual advancements with respect to reparations in international criminal law do not become too disembodied from the social worlds that propel those debates into being—where real victims of serious crimes seek justice with real meaning, to them.

The International Criminal Court occupies a unique space as a forum to discuss both criminal and transitional justice, and the Court's different institutional players give voice to concerns of each field in legal debates about transitional justice measures in a criminal justice context. The Rome Statute framework is uniquely receptive to balancing the rights of victims with the rights of the accused in criminal justice processes; as Salvatore Zappalà has noted, "[a]ll the provisions [of the Rome Statute] dealing with the right of victims to submit their concerns to the Chambers imply the general accountability of ICC organs, and in particular of the ICC Prosecutor, towards victim communities."<sup>175</sup>

Reparations proceedings at the International Criminal Court extend the familiar if difficult practice of balancing the rights of victims and alleged perpetrators under the ambit of international criminal law to a need to balance the scope of a convicted person's liability with the scope of victimization associated with humanity's gravest crimes. It may be prescient to question the feasibility of ever achieving such a balance, and this is something with which the ICC's reparations project will have to grapple. In the interim, however, as the Court constructs the procedural architecture necessary to enable it to realize its first reparations award, it would benefit the Court to consider the search for balance as a guiding principle.

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<sup>175</sup> Zappalà (n 39) 142.