

# Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System

Alina Balta<sup>1</sup>, Manon Bax<sup>1</sup>,  
and Rianne Letschert<sup>2</sup>

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## Abstract

Twenty years ago, the International Criminal Court (hereinafter ICC or the Court) was established holding the aim of placing victims at the heart of international criminal justice proceedings and delivering justice to them through, among others, reparations. Article 75 of the Rome Statute lays out the reparations regime, and, in practice, court-ordered reparations are a means of delivering such justice. Focusing on Court decisions on reparations, our analysis takes stock of all developments before the ICC and attempts to highlight the mismatch between characteristics inherent to the objectives of international criminal trials such as providing accountability and punishment of the accused and delivering justice for victims of mass crimes—the so-called procedural challenges. We also submit that the Court is facing conceptual challenges, related to an apparent misunderstanding of the various concepts at stake: reparations as such and the various modalities and channels of enforcing them. We conclude that although the ICC's reparation regime may not be the best reparative response to provide justice to victims in conflict situations affected by mass victimization, we suggest that improving the ICC's approach includes, at a minimum, tackling these challenges.

## Keywords

International Criminal Court, international criminal proceedings, mass victimization, justice for victims, reparations, reparative justice

## Introduction

The International Criminal Court (ICC) came into existence with the novel approach of complementing international criminal justice proceedings with “justice for victims.” Before the ICC emerged, the then existing international criminal justice proceedings, depending on their respective

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<sup>1</sup> Tilburg Law School, Tilburg University, Tilburg, the Netherlands

<sup>2</sup> Maastricht University, Maastricht, Limburg, the Netherlands

## Corresponding Author:

Alina Balta, Tilburg Law School, Tilburg University, Warandelaan 2, 5037 AB Tilburg, the Netherlands.

Email: [a.d.balta@uvt.nl](mailto:a.d.balta@uvt.nl)

mandates, were solely accused orientated; their objectives included the prosecution of those responsible for the most serious crimes of concern to the international community, holding them accountable and putting an end to impunity (for instance, United Nations [UN] Security Council, 1993, 1994). When the ICC was established, the negotiators aimed to invest its mandate with a dual purpose to maintain the accused-orientated character of an ICC, while at the same time placing the victims of international crimes at the heart of proceedings (ICC. Final report by the focal points [Chile and Finland], para. 15; The Office of Public Counsel for Victims, 2010) and delivering justice to them.<sup>1</sup> Indeed, the ICC is the first Court that moved away from an exclusively accused-oriented model as to include an extensive package of victims' rights under its mandate, such as the right to present victims' views and concerns (see also Evans, 2012; UN General Assembly, 1998) as well as the right to claim and receive reparations.<sup>2</sup> To be precise, Article 75 of the Rome Statute lays out the reparations regime and, in the practice of the Court, delivering justice to victims is intended to be achieved, among others,<sup>3</sup> through reparations awards ordered by the Court.<sup>4</sup> The meaning and content of justice for victims is not easy to clearly delineate, as victims do not form a homogenous group with similar justice perceptions. After all, perceptions of justice are informed by personal (for instance, prior victimization or earlier justice experiences), social, religious, or cultural experiences and perspectives and, in addition, may change over time (Moffett, 2014a).<sup>5</sup> Reparations, for that matter, are often generally directed at redressing the victims' harm and aiming to contributing to their perceptions of justice (McCarthy, 2012a; Pemberton, Letschert, de Brouwer, & Haveman, 2015). Moreover, as often cited, "justice is seen to be done when it is seen in the eyes of the victimized population."<sup>6</sup> Simply put, it is the victims who should determine whether reparations have contributed to their achievement of justice.<sup>7</sup> Thus, while it may be impossible to bring justice to all victims falling within the ICC's jurisdiction, in this article, we argue that the Court should, according also to its own ambitions put forward in the Statute, play an important role in contributing to justice. We believe that justice before the ICC should include, at a minimum, the enforcement and implementation of the rights attributed to victims according to the Statute, including the right to reparation which aims to redress their harm and while doing so, avoid further harm and secondary victimization (Groenhuijsen & Pemberton, 2011).

As this article will expose, 20 years after the ICC was established, achieving justice for victims through ICC interventions appears to be extremely intricate. At this moment, there are three cases at the ICC in the reparations phase: the cases against Thomas Lubanga Dylio, Germain Katanga, and Ahmad Al Faqi Al Mahdi. As will be contended, the Court's novel mandate incorporates two purposes difficult to reconcile. A close examination of the three cases illustrates the complexities involved in the process of, on the one hand, navigating the international criminal justice objectives of accountability and punishment of the accused, and on the other hand, delivering victims' justice through reparations. To be precise, the Court's attempt to strike a balance between the two purposes, results, more often than not, in a compromise at the expense of justice for victims. In the cases where reparation awards are eventually ordered, each of the chambers within the ICC seems to have conflicting ideas on what reparations should entail and how they should be implemented. Moreover, the Trust Fund for Victims (hereinafter TFV) and the Court define and apply reparations differently. This incoherent approach appears to be mainly generated by the different interpretations, meanings, and priorities attached to the reparations regime, by both the TFV and the chambers within the ICC. In practice, this toing and froing within the ICC system tends to extend the length of the trial unreasonably, with serious implications for the parties in the trial, including the victims and potentially negatively affecting their justice needs and rights.<sup>8</sup>

Against this background, we argue that the enforcement of reparations, which plays an important role in providing justice for victims at the ICC, is hampered by two sets of challenges: procedural and conceptual. Procedural challenges refer to challenges arising out of a disconnect between procedural intricacies inherent to international criminal justice and the goal of bringing justice to

victims. For the purpose of our study, we identify three such challenges in the ICC case law on reparations: (1) the narrowly defined charges against the accused which in turn dictate reparations; (2) the low numbers of beneficiaries, in contrast with the large number of victims; and (3) accountability of the accused, aimed to be achieved, *inter alia*, through reparations. Conceptual challenges relate to an apparent misunderstanding of the various concepts at stake: reparations and the various modalities and channels of enforcing them. To be precise, it appears that the bodies responsible for designing and implementing meaningful reparations possess different and at times clashing ideas of reparations and the ways they should be implemented. In this study, we refer to three such conceptual challenges: (1) the inclination toward either individual or collective reparations, (2) the different views on the relation between the TFV's reparations and assistance mandate, and (3) the level of specificity of the reparations implementation plan.

In order to substantiate our claims, the second section of the article will touch upon the normative assumptions attached to justice for victims in situations of mass victimization, such as those before the ICC and then provide a short introduction of the reparations regime within the ICC system, including also the developments made so far through the Reparation Principles and Orders on Reparations.<sup>9</sup> It, in the third section, drawing on the ICC's decisions on reparations in the cases against Lubanga, Katanga, and Al Mahdi, the analysis highlights how strict international criminal justice rules may compromise justice for victims. In addition, fourth section illustrates how the disconnect between the ICC goals is further complicated by conceptual limitations, which hamper the implementation process and may cause secondary victimization.<sup>10</sup> Drawing on this critical analysis, this article will conclude by reflecting on the potential implications of these findings on the current reparations regime at the ICC and offer recommendations. It is our hope that, by means of this analysis, this article will contribute to a wider discussion in the academic debate regarding the reparations regime at the ICC.

## Reparations Within the ICC

### *Justice for Victims*

Justice for victims has long been used as a rhetoric to strengthen the legitimacy of ICC or to justify the importance of trials for mass victimization (McCarthy, 2012b).<sup>11</sup> The ICC itself was similarly established holding the same ambition (Stover, Crittenden, Koenig, Peskin, & Gurd, 2010), and, to this end, it has expanded upon the mere symbolic value of accountability of the offender to grant<sup>12</sup> victims with rights within the trial such as the right to participation, information, and reparation (Justice for Victims, 2011).<sup>13</sup> As the Assembly of State Parties put it, bestowing such powers upon the ICC "reflects growing international consensus that participation and reparations play an important role in achieving justice for victims."<sup>14</sup> Furthermore, the decision of the Rome Statute drafters to recognize the importance of victims is rooted in an understanding of the devastating effects of international crimes on victims and their families and, to this end, acknowledged that positive engagement with victims, through the judicial process, can have a significant effect on how victims experience and perceive justice.<sup>15</sup> How the court is to achieve these goals and provide victims with meaningful reparations, participation, and information, among others, is furthermore detailed in a court's six-objective strategy in relation to victims.<sup>16</sup> The ICC thus aims to deliver justice to victims by employing a rights-based perspective which reconfirms and empowers the victim as a vital actor in the justice process and interestingly enough,<sup>17</sup> this rhetoric is repeatedly reinforced with each new case arriving in the dock of the Court (see Coalition for the ICC, 2008; ICC Prosecutor, 2017). Academically, the inclusion of victims' rights in international criminal justice was both applauded and critiqued by many commentators before us (see, for instance, Baumgartner, 2008; Rauschenbach & Scalia, 2008; Schabas, 2016; Stahn, 2015a; Zegveld, 2010). They raised

concerns, among others, regarding the relationship between victims' rights and the rights of the accused, the meaningfulness of the rights for victims and the sustainability of an international criminal system that includes (extensive) victims' rights (van den Wyngaert, 2011). At the same time, scholars hailed the inclusion of victims' rights within an international criminal justice system and saw it as a way to overcome the shortcomings of previous tribunals by delivering a more inclusive vision of justice for victims (Moffett, 2015). Studies have furthermore documented the benefits associated with granting victims with such rights.<sup>18</sup> For instance, outreach and information is an essential element for granting victims access to justice, keeping them informed with regard to the case they may be involved with and acknowledging their victimization (International Federation for Human Rights, 2007; Pemberton et al., 2015; Wemmers, 2008). Further, victim participation may help to contribute to victims' healing, rehabilitation, and empowerment (McKay, 1998), in addition to providing a form of "truth" of the events under adjudication (Garbett, 2013). Similarly, as exemplified by research, providing reparations is an essential means to achieve justice for the benefit of individuals and collective victims by offering redress for the harm done. The importance of such rights has been furthermore confirmed by research with victims of international crimes, who reported that participating in trials gave them confidence that their experiences would become known (Cody, Stover, Balthazard, & Koenig, 2015). It made victims feel that they can contribute to the establishment of the truth and that their suffering is acknowledged (ICC. Final report by the focal points [Chile and Finland], para. 13"). At the same time, they stated that the prospect of receiving reparations was the primary motivation for taking part in trials (Cody et al., 2015). In fact, Yael Danieli, leading psychologist in the field, put forward a supporting theory, recognizing that justice for victims can be realized through both the outcome of the process and the process itself (Danieli, 2014). She calls such justice reparative justice, hinting at the potential reparative value of the entire process through which reparations are requested and granted, in addition to the reparations measures through which the right to reparation is fulfilled (Danieli, 2009). Put this way, justice, in addition to respecting the rights of the accused, means enabling the voices of victims to be heard in a courtroom where they express what happened to them, what they need to rebuild their lives and, as a corollary, being afforded reparations—the actual means which might help them achieve what they had before their victimization (Ferstman, Goetz, & Stephens, 2009). Therefore, at a conceptual level, the different rights bestowed upon victims through the ICC statute, including reparations, bear the promise of delivering justice to victims and as observed above, at a theoretical level, it very well fits the ICC strategy in regard to victims.

However, the extent to which the Court should utter such high ambitions toward victims merits some further reflections. Responding to victimization caused by international crimes and providing justice comes with its own challenges (Pemberton et al., 2015). These stem from the very nature of these particular crimes, relating mainly to their magnitude, whereby "the enormity of evil explodes the limits of the law" (Arendt, 1970). The fact that international criminal justice is largely accompanied by triumphant rhetoric about its impact on war-torn societies seems to suggest that one of the basic lessons of victims' rights in the criminal justice system has yet to be learned: That the benefits of including victims' rights are as much related to practice as to principle. Victims' rights, including the right to reparation, will only benefit victims when their implementation is secured in practice. In addition, when talking about justice for victims, as indicated before, one has to realize that victims are not a homogenous group and that one must be careful in generalizing about victims' justice needs with regard to a judicial process. To complicate things further, these needs may also change over time (Letschert, 2012).

This contribution does not aim to delve into the various contested justice conceptions; however, it aims to signalize some of the potential challenges, which may hamper justice through reparations at the ICC. We acknowledge that doing justice in these situations is a thorny matter. In fact, as concluded elsewhere, we believe that no justice reaction can ever undo the harm and the recurrent

and awful memories of suffering through international crimes (Letschert, 2017).<sup>19</sup> However, international criminal justice, at best, can and should acknowledge its limitations and complexities inherent to doing justice in situations of mass victimization,<sup>20</sup> as well as put more efforts into maximizing the victims experience with international criminal justice, through meaningful reparations and participation.

At the ICC, in addition to actually guaranteeing the rights it has statutorily bestowed upon victims, justice could be strengthened by acknowledging the Court's limitations in this endeavor, communicating to victims what it can and cannot offer, and second, by paying more attention to tailoring its justice responses to the justice needs of the victimized society.<sup>21</sup> It is with this understanding of justice for victims that the current article sets out to analyze the case law of the ICC and the reparations it has awarded so far.

### *Short Overview of the ICC Reparations Regime*

The basic framework of the ICC's reparations regime is provided in Article 75 of the Rome Statute and involves two separate institutions: the ICC and the TFV. The Court is authorized to order reparations by means of a decision, only after it has issued a conviction against an accused person.<sup>22</sup> These reparations are then to be implemented by the TFV (see Note 21). To be precise, the TFV is first tasked with drafting an implementation plan and only after the Court approves the plan, the actual implementation by the TFV can start. Interestingly, the TFV implementation responsibility vis-à-vis Court-ordered reparations represents only half of the TFV's 2-folded mandate with regard to reparations. Thus, on the one hand, the TFV has to implement the Court-ordered reparations, while, on the other hand, it has to provide general assistance. The differences between the two mandates are that the general assistance may be provided prior to a conviction, to all victims of the crimes that are within the jurisdiction of the Court, while the Court-ordered reparations are linked to a conviction and are only provided afterward.<sup>23</sup>

As hinted at above, the ICC and the TFV are connected in their goal of providing justice to the victims by means of reparations. However, they are two different institutions; their mandates, objectives, and context of work are distinctive. On the one hand, in advancing its objectives, the Court is attempting to strike a fair balance between the rights of the accused and the novel aim of delivering justice to victims. In other words, it has both an accused- and a victim-focused mandate. On the other hand, the TFV has two equal, victim-focused mandates: a reparations and an assistance mandate. Furthermore, the ICC is active in a "legal reality" that is dictated by law and rules created by a political body, whereas the TFV deals with the situation on the ground; the reality of war-torn societies where there is a lack of resources and infrastructure, a high number of victims and perpetrators, tension within the communities, and conflicting needs and interests.<sup>24</sup> As will be further explained in the fourth section, the different mandates, objectives, and context of work of the two institutions of the ICC's reparations regime lead to conflicting interpretations of reparations.

Moreover, the Rome Statute is not very detailed in its provisions on the reparations regime which merely confers upon the Court the responsibility to design principles on reparations relating to the scope of the harm and the content of the reparations (see Note 23, Article 75(1)). Thus, the Court is given leeway in defining the substance of the reparations. For instance, Article 75(1) of the Rome Statute includes restitution, compensation, and rehabilitation as reparations, while Article 97 of the Rules of Procedure and Evidence (hereinafter RPE) states that these reparations might be provided on an individual or collective basis, or as a combination of the two. However, it is up to the Court to further define reparations within the ICC in the principles on reparations. These principles on reparations as established by the Trial Chamber and amended by the Appeals Chamber primarily repeat the Statute and the RPE; reparations can be individual, collective, or a combination and in addition to restitution, compensation, and rehabilitation, other modalities such as symbolic and

transformative measures may be awarded.<sup>25</sup> The specific reparative modalities that are awarded are established on a case-by-case basis.

Thus, the ICC's basic framework of the reparations regime is further defined in the principles on reparations, as drafted by the Court. These principles were developed after the first conviction. Subsequently, the Court established for the first time the principles relating to reparations in the Trial Chamber decision in the Lubanga case.<sup>26</sup> The decisions on the reparation principles, both in first instance and in subsequent appeal,<sup>27</sup> extensively address various issues of reparation; the beneficiaries of reparations, the bearer of responsibility for providing reparations, the types of reparations, issues of evidence and burden of proof, and supervision and implementation of the reparations award. In addition to the principles, the Court also issued an order of reparations (see Note 26). As established, an order for reparations should at least entail five elements: It must be directed against the convicted person, establish the liability of the convicted person in regard to the reparations awarded, clarify the forms of reparations awarded, define the harm suffered by the victims as a result of the established crimes, and specify which victims are beneficiaries of the awarded reparations (see Note 26, para. 1).

The Court has subsequently issued an Order on Reparations in the Lubanga case (see Note 26, para. 1). After the Order on Reparations was issued, the TFV was requested to draft an implementation plan for the reparations. It was only in April 2017, 5 years after its first decision on reparations that the first step of the implementation plan for reparations was finally approved by the Trial Chamber (*The Prosecutor v. Thomas Lubanga Dyllo*, April 6, 2017). Similarly, the Trial Chamber ordered reparations in the cases against Katanga and Al Mahdi, yet no settled implementation plan for these cases exists at this moment (*The Prosecutor v. Germain Katanga*, July 5, 2017).<sup>28</sup> Furthermore, in some other cases before the ICC, the proceedings were terminated due to a lack of sufficient evidence to the requested standard (*The Prosecutor v. Uhuru Muigai Kenyatta*; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*; *The Prosecutor v. Jean-Pierre Bemba Gombo*). In the latter situation, the chances are that the potential victims will never receive reparations through the ICC.

## **International Criminal Justice Objectives of Accountability and Punishment of the Accused Versus Victims' Justice Through Reparations**

The previous section above touched upon the normative assumptions attached to providing justice to victims, inter alia, by means of reparations and then outlined the ICC mechanism of reparations, involving two institutions: the Court itself and the TFV. Following up on the discussion above, it is imperative to take stock of the extent to which reparations, as provided by the ICC in its judgments, can contribute to justice for victims as well as to highlight the potential challenges which may hinder this process.

As mentioned above, including reparations for victims of crimes within the ICC jurisdiction is considered a novelty in the Rome Statute with a potential to deliver justice for victims. Yet they had to be accommodated to an international criminal justice system, known to focus on the accountability and punishment of the accused, while respecting his rights (Shelton & Ingadottir, 1999). Hence, before the ICC, the right of the victims to express their views and concerns is to be exerted "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>29</sup> As Zappalà (2010) suggested, "in international criminal procedure there is widespread recognition of the primacy of the rights of the accused over any other conflicting interest" (p. 144). In addition, victims may claim reparations via an Order on Reparations only *after* a person has been convicted in separate proceedings.<sup>30</sup> Faced with potential numerous victims participating in a

trial, safeguarding the rights of the accused as to ensure that the accused person benefits from an expeditious trial (see Note 29, Article 64(2)), is justified on procedural grounds (Moffett, 2014b). A contrario, if only one of the accused's rights is violated, the whole process loses credibility and risks to fail in its objective of establishing the truth and imposing just punishment.<sup>31</sup>

However, equally important, and as asserted by the Court itself, is the enforcement of its reparations' mandate; the Court must "strike a fair balance between the divergent rights and interests of the victims on the one hand, and those of the convicted person on the other."<sup>32</sup> This has been confirmed by commentators of the Rome Statute, who viewed the balance as a compromise between two conflicting purposes (Triffterer & Ambos, 2016). It follows that the Court should equally observe the fulfillment of the accused's rights as well as safeguard the right to reparation of victims. As repeatedly emphasized by the Court, reparations before the ICC aim "to afford justice to the victims by alleviating the consequences of the wrongful act."<sup>33</sup> What is more, the Court expressed that "the success of the Court is linked to the success of its reparation system."<sup>34</sup> However, as our analysis will show, the striking of that balance seems to be tilted toward respecting the sacrosanct rule of guarding the rights of the accused. Against this background, our analysis of the ICC case law on reparations aims to assert that the goal of delivering justice to victims is subjected to three procedural challenges: (1) charges against the accused, (2) scope of liability proportional to harm, and (3) accountability through reparations.

### *Charges Against the Accused*

At the ICC, victims are defined either as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court or as organizations or institutions with a specific profile such as charity organizations, churches, or schools (ICC, 2013, Rule 85 RPE). Furthermore, a victim may make a request for reparations after an accused person has been convicted (ICC, 2013, Rule 94 RPE). Indeed, reparation orders are intrinsically linked to a criminal conviction and in its absence, reparation orders do not have a legal standing.<sup>35</sup>

In the Lubanga case, referring to reparations, the Trial Chamber held that in addressing the consequences of the crimes Lubanga committed in this case, the Court should have a real measure of flexibility<sup>36</sup> and established that direct and indirect victims<sup>37</sup> are entitled to reparations, that is, beneficiaries. Further, at its appeals level, the Court held that only those victims who suffered harm as a result of the crimes for which Lubanga *was found guilty* are eligible to claim reparations against him.<sup>38</sup> It furthermore endorsed the Trial Chamber I's "Decision on Indirect Victims," which clarifies who are considered the direct and indirect victims in this case.<sup>39</sup> Thus, the direct victims of these crimes are the children below the age of 15 who were conscripted, enlisted, or used actively to participate in hostilities under Lubanga's control (*The Prosecutor v. Thomas Lubanga Dylio, Case Information Sheet*), and the indirect victims are the parents of the child soldiers and the persons who intervened to prevent one of the crimes against the accused.<sup>40</sup> The Court excluded from the indirect victims' category those who suffered harm as a result of the conduct of direct victims.<sup>41</sup> To be precise, the person attacked by a child soldier is not an indirect victim because this loss, damage, or injury is not linked to the harm inflicted on the child soldier.<sup>42</sup> Furthermore, the Appeals Chamber excluded the victims of sexual- and gender-based violence from the category of beneficiaries.<sup>43</sup>

A similar approach was followed in the Katanga Order on Reparations, which heavily relied in its argumentation on the Appeals Chamber Decision on Reparations in the Lubanga case. As per Katanga Order,<sup>44</sup> a victim must show that he or she suffered harm ensuing from one or more of the crimes of which Katanga was convicted.<sup>45</sup> Furthermore, the Court clearly stated who it considered to be victims falling outside of the scope of reparations. Against submissions that victims of the crimes of rape and sexual slavery should also benefit from reparations,<sup>46</sup> the Court declined the request.<sup>47</sup> To this end, physical and psychological harm incurred by rape and/or sexual violence or

gender-based violence cannot be attributed to Katanga and thus cannot represent a basis for reparations claims (see Note 46, para. 152). Similarly, child soldiers under the age of 15 who have allegedly been integrated into the Ngiti militia during the hostilities connected to the battle under review and who participated directly in the crimes committed (*The Prosecutor v. Germain*, March 7, 2014) could not be considered victims for the purpose of reparations, since Katanga was acquitted of these crimes.<sup>48</sup>

In addition, in the Al Mahdi Order on Reparations, the Court stood by its previous holdings; to be eligible for reparations, a victim must have suffered harm as a result of the commission of the crime of which Al Mahdi was convicted.<sup>49</sup> The Court also stated that his crimes, that is, the destruction of the protected buildings, affected not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community (see Note 48, para. 52). However, for the purpose of reparations, the Court limited the assessment of the various kinds of harm to the harm suffered by or within the community of Timbuktu (see Note 48, para. 56). It furthermore excluded several categories of victims from the scope of reparations. Several victims' allegations of bodily harm—suffered by either their families or themselves—as a result of the attack were not considered as such by the Chamber. It held that it was not sufficiently foreseeable as to conclude that Al Mahdi was guilty of these crimes (see Note 48, paras. 98–99). By the same token, against victims' allegations of property damage while the attack on the protected buildings was ongoing, the Chamber stated that it cannot conclude to the requisite standard of proof that Al Mahdi is liable for other kinds of property loss or damage (see Note 48, para. 108). In this regard, the Chamber acknowledged the limited scope of the case relative to wider human rights violations alleged to have occurred in Timbuktu and elsewhere in Mali (see Note 48).

In all three cases, the Court has excluded several categories of victims from the scope of court-ordered reparations<sup>50</sup>: In the Lubanga case, the Court has excluded the victims of child soldiers' crimes and the victims of sexual- and gender-based violence; in the Katanga case, it has excluded the victims of rape and/or sexual violence or gender-based violence; and in the Al Mahdi case, it has excluded the victims who suffered bodily harm or had their property damaged during the attack on the protected buildings. The underlying reason for the exclusion, as seen above, lies in the delineation of harm suffered by the victims, which must be *the result* of the crimes for which the accused is convicted.<sup>51</sup> Further exclusion is justified by the evidential failure to establish to the *required standard of proof* the criminal responsibility of the accused for certain crimes.<sup>52</sup> The final layer of exclusion consists in the interpretation of what it takes to qualify as an indirect victim: The harm suffered has to be *a consequence* of the harm suffered by the direct victim. The rationale of these choices was elucidated by the Court itself: “[i]n order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted [ . . . ].”<sup>53</sup> It follows that the Court appears to be doing its utmost to protect the rights of the accused and conduct a fair trial for all the parties, that is, if we measure them against the Rules whereby they are provided, their interpretation as laid out in the Orders on Reparations and the justification provided by the Court.

However, as mentioned at the beginning of this section, delivering justice to victims is an equally important goal of the Court, aimed to be fulfilled by means of reparations. If justice is measured by the extent to which reparations, as awarded in the three Orders on Reparations, reach the respective beneficiaries, then we can contend that some justice may indeed be delivered to victims, that is, if the reparations awards are indeed successfully implemented. Nevertheless, the cases at hand involve mass victimization and the victims' population includes, at the very least numerous victims excluded from the scope of court-ordered reparations. As reparations aim to redress the harm caused by the crimes, providing reparations to just a fraction of the victimized population is far from equal to delivering justice to victims. As demonstrated above with the layers of exclusion, this justice is at best partial justice, as it aims to address only some part of the harm.<sup>54</sup> Moreover, the judgments fail

to address the point that it is not always easy to distinguish victims from offenders in situations of large-scale and, in particular, of long-term conflict. Remedial action aimed at such a distinction, as illustrated in the cases above, runs the risk of causing a further division in society, with all the consequences that might follow (see Mani, 2005; see also Ndahinda, 2016).

In all cases before the ICC so far, the Court was tasked to interpret the Rules and the Rome Statute and balance between the goals in its mandate. After all, the Trial Chamber itself, when deciding upon which standard of causation to apply to the “damage, loss, and injury”—which forms the basis of a reparations claim and must have resulted from the crimes of the accused—hinted at the lack of an agreed upon standard of causation in international law or a specific standard identified in the Court’s legal texts.<sup>55</sup> It went on to conclude that, in order to determine the applicable standard, the appropriate standard needed to take into account the competing interests and rights of the victims and the convicted person (see Note 54, para. 249). Taking into account the outcome of the Orders on Reparations, it can be asserted that, when balancing the two goals, the outcome appears in many cases to be detrimental to victims falling under ICC jurisdiction. As observed above, due to insufficient evidence or narrow selection of charges,<sup>56</sup> justice delivered to victims is hampered by procedural and evidentiary barriers, on the grounds of respect for the rights of the accused. This is not to assert that the rights of the accused should be limited or violated, but justice for victims should not be compromised either. In situations of mass victimization, justice provided, if at all, to a handful of beneficiaries whose beneficiary status may in certain circumstances also be contested, cannot be labeled as delivering justice.<sup>57</sup>

### *Scope of Harm and the Assessment of the Accused’s Liability*

The section above exemplifies how justice for victims at the ICC, is partial, inasmuch as reparations have the potential to reach only a fraction of the total victimized population, including victims that fall outside the scope of the ICC, if at all. The ICC’s approach to justice is further complicated by a narrow interpretation of key aspects of reparations which could have amplifying, and not limiting, implications for justice for victims.

The three Orders on Reparations stress that the reparations awards should be proportionate to the harm caused by the crimes as established by the Court.<sup>58</sup> Similarly, a convicted person’s liability for reparations is also limited and proportional to the harm caused by his crimes.<sup>59</sup> On the basis of evidence, the Court is seized to assess the extent of harm caused by the crimes of the convicted persons, in view of ordering proportionate reparations. As held in the Lubanga case, due to the nature of reparations at stake—only collective—the Chamber is not required to rule on the merits of individual applications, including the assessment of harm.<sup>60</sup> It furthermore held that in the circumstances of the present case, it is not appropriate for it to determine the scope of Lubanga’s liability for reparations (see Note 59, para. 239). In its latest decision in this case, the Court dramatically revised its previous approach, and it eventually determined the scope of Lubanga’s responsibility as well as set the amount of Lubanga’s liability for reparations (*Le Procureur c. Thomas*, 15 décembre 2017). In addition, against initial TFV’s estimations that 3,000 direct and indirect victims could be eligible for reparations,<sup>61</sup> the Court proceeded to examine a sample of 473 applications representative of all of the victims potentially eligible for reparations, of which 425 were found eligible. However, tremendously important, the Court held that further evidence established the existence of up to thousands of additional victims affected by Lubanga’s crimes.<sup>62</sup> In setting the monetary liability of Lubanga, in addition to the harm caused to the 425 beneficiaries, which was estimated to 8,000 euro per victim, in a first of its kind, the Court also factored in the harm caused to nonidentified victims (see Note 61, para. 280). Lubanga’s liability was estimated to US\$10,000,000 (see Note 61, para. 281). Furthermore, in the Katanga case, which was decided before the latest decision in the Lubanga’s case, the Chamber took the view,

that the extent of the harm suffered by the victims for the purposes of reparations in the case, with due regard for the 341 applications for reparations put before it, is the sum total of the harm which the Chamber has found to be established<sup>63</sup>

The Court assessed the monetary value of each head of harm caused to the 297 beneficiaries<sup>64</sup> and then set the financial value of the individual and collective reparations award for which Katanga is liable. In the Al Mahdi case, the Court changed its approach again; the beneficiaries' category is not limited to the number of applications before the Court. The Chamber itself noted that "it has received only 139 applications during the reparations phase, despite determining that collective harm was suffered across Timbuktu (a city of approximately 70,000 people around the time of the attack)."<sup>65</sup> The Court then set the categories of beneficiaries who could benefit from individual and collective reparations, respectively,<sup>66</sup> mentioning that regarding collective reparations, the Chamber is not limited to the number of reparations applicants before it (see Note 65, para. 59).

Against this background, asserting that the scope of liability of the convicted person is proportional to the harm caused by his crimes is problematic for the following reasons. In the Lubanga case, the harm could initially not be defined by the Court, only to take an inclusive approach and include in the category of beneficiaries not only those who applied for reparations at a later stage in the proceedings but also potentially nonidentified beneficiaries; in the Katanga case, the harm is equal to the sum total of the harm caused to the 297 beneficiaries; and in the Al Mahdi case, the harm could not be limited to the number of applications, as the crimes have a ripple effect throughout the communities of Timbuktu. As can be inferred from the different approaches, the Court itself appears to grapple with the notion of harm. Limiting the liability of the convicted person to the harm caused to the people who get access to a Court, which is already criticized for its remoteness relative to the location of victims (Dixon, 2015a), is a huge misrepresentation of reality (Clark, 2011; Goetz, 2014).<sup>67</sup> In addition, seeing to the low number of beneficiaries as established by the Court, in contrast for instance to the estimated number put forward by the TFV raises concern that the Court may disproportionately limit the reparative function of the reparations mandate (Brodney, 2016). The Court, however, appeared to recognize this caveat and moved to a more inclusive approach in the latest decision on reparations in the Lubanga case. This is important because the harm experienced by victims of international crimes can only be described in terms of its enormity (see Note 66, p. 349). Therefore, the Court's approach in the Katanga case—to limit the harm and subsequent liability to a sum of money as a result of an arithmetic operation, based on an already limited number of beneficiaries—trivializes harm (Minow, 1998) and ignores layers of complexity posed by the daunting challenge of delivering justice for victims in these situations. Although all three Orders on Reparations epitomize three different approaches to awarding reparations, the Court appears to be moving toward a more inclusive approach, as to recognize indeed, the enormity of harm caused by international crimes.

### *Accountability Through Reparations?*

For the purpose of reparations, linking the liability of the convicted persons to the harm caused by their crimes appears to also be distanced from practical relevance in the situations at hand. As will be shown, the remainder of this section will tackle the current ICC accountability model in relation to reparations.

According to the Lubanga Conviction judgment, reparations "ensure that offenders account for their acts."<sup>68</sup> The Appeals Chamber in the Lubanga case furthermore held that the aforementioned accountability principle properly reflects the system of reparations at the ICC.<sup>69</sup> It went on to assert 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 (see Note

69).” The same was restated in the cases against Katanga<sup>70</sup> and Al Mahdi.<sup>71</sup> However, for the purposes of reparations, all three convicted persons whose cases have reached the reparations phase are declared indigent and the reparations ordered by the Court are to be funded at the moment by the TFV.<sup>72</sup>

Against this background, the ICC model of reparations that is rooted in the individual criminal responsibility of the convicted can at best satisfy victims who seek an explicit judicial acknowledgment of accountability, independent of the perpetrator’s indigence (Stahn, 2015b). The Court itself held that the accountability of the accused is expressed by the order against the convicted person, although in fact reparations are ordered “through” the TFV.<sup>73</sup>

Therefore, although it is asserted that reparations ensure that the offenders account for their acts, the extent of accountability is at the moment limited to an apology, as was ordered by the Court in all three cases. On the other hand, in light of the reality of the convicted person’s indigence, victims have real needs that need to be attended to, through other channels, such as the TFV. Against this background, the Court should adopt a more down-to-earth approach to reparations, which could adapt itself to the reality facing the victims. One cannot help but wonder to what purpose the Court is so adamant regarding the rules on reparations, relative to the accountability of the convicted, and why not acknowledge their limitations in the face of mass victimization and interpret them accordingly. In addition, why not adopt a flexible standard of harm and standard of proof by the victims, as to allow as many victims as possible to benefit from the TFV funded reparations, through its reparations mandate. To this end, the ICC could learn from the Extraordinary Chambers in the Courts of Cambodia (ECCC)’s reparations regime adopted in the case 002/01.<sup>74</sup> The ECCC amended its Internal Rules to overcome its limitations in the case 001, whereby the victims hardly received any reparations due to the indigence of the guilty person.<sup>75</sup>

Through this amendment, the Court allowed the civil parties to choose between reparations awarded against the accused or reparations through third parties. In the latter case, the Lead Civil Parties Co-Lawyers must ask the Chamber to recognize that specific reparations measures, designed or identified in cooperation with the ECCC Victims Support Section, are appropriate for implementation using external funding. In addition, the judges deciding on the merits of case 002/01 were only seized with deciding on reparations and not on the admissibility of victims as civil parties (see Note 75, Rule 23 *bis* (3)). The victims were afforded the status of civil parties as long as they proved that the harm visited on them was directly related to the factual circumstances set out in the Introductory and Supplementary Submissions.<sup>76</sup> Thus, the standard of proof relating to harm enabled as many victims as possible to become civil parties and benefit from reparations, while the crimes for which the accused were convicted were determined at a later stage. Against the indigence of the accused, reparations funded through external parties were later revised and endorsed by the ECCC in its judgment (Case 002/01 Judgment). By the same token, this approach is comparable to the ICC-ordered reparations and funded by the TFV, which draws its budget from donors too. It may be wise to learn from the ECCC’s experience in this sense,<sup>77</sup> whereby victims are not subjected to unreasonable standards of proof, and their entitlement to receive reparations is not limited to the link with the crimes the accused are guilty of. Giving the victims at the ICC the same two options: Reparations ordered against indigent accused, which must abide by strict procedural rules to safeguard the rights of the accused, or through donations by third parties, might be more worthwhile in terms of delivering meaningful justice to victims.

## **The Conflicting Interpretations of the Concept of Reparations Between the ICC and the TFV: Conceptual Challenges**

The section above highlighted the procedural challenges faced by the Court in balancing its two competing goals: On the one hand, international criminal justice focuses on the rights of the accused,

high standards of proof, and inflexible rules, and on the other hand, aiming to provide justice for victims in situations of mass victimization. It pointed out that several layers of complexity are not properly addressed and the end result is often detrimental to victims. In addition to the challenges of balancing the two goals of the ICC, further challenges arise with the interpretation of the concept of reparations. The institutions responsible for designing and implementing the reparations, the ICC and the TFV, have different views on what meaningful reparations are and how they should be awarded through the ICC. These conflicting interpretations further complicate the reparations process. Moreover, their different competencies result in conflicting ideas about how to fulfill the aim that they share: providing reparations to the victims. For instance, the ICC judges and the TFV's struggle to settle on a reparations program—which led to tensions between the two parties and subsequent delays in the implementation of the reparations—represents a stark illustration of their clash. This clash is especially apparent in the Lubanga case, yet it can also be identified in the cases against Katanga and Al Mahdi. Therefore, this section will discuss three interconnected elements that underlie this struggle: (1) the modalities of reparations, especially the in- or exclusion of individual reparations such as compensation; (2) the relation between the two mandates of the TFV; and (3) the specificity of the implementation plan.

### *Modalities of Reparations*

According to Article 75(1) of the Rome Statute, reparations include restitution, compensation, and rehabilitation, while Article 97 of the RPE state that these reparations might be provided on an individual or collective basis, or as a combination of the two. However, it is up to the Court to further define reparations within the ICC. The principles on reparations as established by the Trial Chamber and amended by the Appeals Chamber primarily repeat the Statute and the RPE; reparations can be individual, collective, or a combination, and in addition to restitution, compensation, and rehabilitation, other modalities such as symbolic and transformative measures may be awarded.<sup>78</sup> The first time the Court was more specific was when it drafted its first reparations order, whereby the Trial Chamber supported the TFV's suggestion to provide reparations on a collective basis.<sup>79</sup> The TFV argued that the limited number of victims participating in the trial and the time- and resources-consuming process of locating other victims was cumbersome for the purpose of individual reparations.<sup>80</sup> In addition, considering the limited resources and the collective harm to the communities of the child soldiers, the TFV believed that collective reparations consisting of community-based programs and rehabilitation are most effective in this situation.<sup>81</sup>

In its first Order on Reparations, the ICC followed the recommendations of the TFV, thus excluding individual reparations. In its second and third, the ICC no longer conformed to the TFV's instructions. Instead, a combination of individual reparations, in the form of compensation, and a wider range of collective reparations was awarded in the cases against Katanga and Al Mahdi.<sup>82</sup> The Trial Chamber went even further in its third reparations order when it stated that the implementation of the individual reparations should be prioritized.<sup>83</sup>

This shift of the ICC and its subsequent variance between the perceptions of the required modalities of reparations appears to be motivated by a difference in weighing the demands in the situation at hand. Whereas the TFV is focusing on the context of the conflict situation facing a lack of resources and high number of victims, the Court is considering the requests submitted by victims themselves. Already in the Lubanga case, the victims participating in the proceedings requested individual reparations instead of collective reparations.<sup>84</sup> The ignored requests for individual reparations of the participating victims created frustration and, a year after the first Order on Reparations, some victims withdrew from victim participation in Court. They were extremely opposed to collective reparations and wanted individual compensation instead (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, September 5, 2013). Furthermore, the victims claimed that collective

reparations in the form of community-based services, such as the opening of a school or hospital, would also benefit the perpetrators who lived in the same community. Therefore, they asked for compensation, even if the lack of funding would imply that the compensation would be limited to a small symbolic amount (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, September 5, 2013). In the cases that followed, the participating victims reiterated requests for individual reparations in the form of compensation.<sup>85</sup> The Trial Chamber took into account these requests and ordered compensation, stating that

the order for reparations would, for the most part, be missing its mark—delivery of justice to and reparation of the harm done to the victims as a result of the crimes committed by Mr. Katanga—were it to disregard their almost unanimous preference, by awarding only collective reparations<sup>86</sup>

In its turn, the TFV agreed that the wishes of the victims regarding the modality of reparations should be respected and taken into account in an order on reparations, however, it remained bound by criteria of feasibility, asserting that the implementation of collective reparations has priority over individual reparations (*The Prosecutor v. Germain Katanga*, May 17, 2017).

The aforementioned difference in views on the precedence of either individual or collective reparations reflects the complexity of the reality of many conflict situations; it is more feasible to provide reparations collectively so that more victims can be reached, yet the individual victims echo wishes for compensation. One of the underlying reasons for these conflicting views is the difference in mandates relating to reparations for victims; the ICC is only mandated to repair the victims who were harmed by the crimes of which the offender was convicted, while the TFV has to *repair* harm of a limited group of victims and *assist* a wider group of victims.<sup>87</sup> The attitude toward the relation between the two mandates of the TFV is particularly relevant for justifying its preference for collective reparations. This will be further discussed below. Although the TFV operates on the ground and serves the best interest of victims, granting the beneficiaries their requests for compensation, as done by the Court in Katanga and Al Mahdi, may lead to greater satisfaction with the ICC system and the justice it delivers among the beneficiaries.<sup>88</sup> However, these beneficiaries are only a fraction of the total group of victimized population. Consequently, this may lead to tensions within the communities and feelings of exclusion. This is the result of the distinction that is made before the Court between the victims of the crimes that the offender is convicted for and the victims of the conflict. Herein, a small group of victims get reparations, including compensation, while the rest of the victims receive nothing or may only benefit from the assistance mandate of the TFV.<sup>89</sup>

### **Reparations Versus Assistance Mandate**

Both of the TFV mandates aim to support victims, however, they differ in scope, objective, and funding. As mentioned above, the reparations mandate is linked to criminal accountability, as it is dependent on the ICC's conviction and subsequent Order on Reparations. The scope of beneficiaries is linked to the conviction. Moreover, the reparations, both individual and collective, are ordered against the offender and the reparative programs are consequently designed and implemented after the conviction. Under the assistance mandate, the TFV may potentially provide assistance prior to a trial and to all victims of crimes of a situation that is within the jurisdiction of the Court.<sup>90</sup> These assistance projects are of a collective nature, yet they may target individual victims<sup>91</sup> and are funded by the resources of the TFV. The distinction between the two mandates, as set forth in their respective provisions, is straightforward, yet their interpretation and implementation in practice was left to the ICC and TFV. For clarification on the execution of its reparations mandate and the subsequent relation between the two mandates, the TFV is dependent upon the ICC's interpretation,

as set forth in the principles and Orders on Reparations. However, a closer scrutiny of the case law appears to indicate that the line between the two mandates is not as rigid as one would assume.

One potential explanation may be that it is likely that most offenders will be declared indigent meaning that they cannot fund the reparations themselves.<sup>92</sup> Article 75 of the Rome Statute states that “Where appropriate, the Court may order that the award for reparations be made *through the Trust Fund* [emphasis added].” Uncertainty over the meaning of the term “through the TFV” led to discussion regarding the true intention of the ICC drafters, whether it was intended that the TFV had to fund the reparations or whether the TFV had to act as an intermediary through which the Court could channel reparations (Dannebaum, 2001).<sup>93</sup> In the first instance, the Pretrial Chamber and the Trial Chamber claimed that this meant that the TFV had to fund the reparations in case the offender was indigent. However, the Appeals Chamber asserted that an order was always issued against the convicted person, which could, in addition, be made through the TFV.<sup>94</sup> As mentioned above, at this moment, all the offenders are indigent and therefore the financing of the reparations is left to the TFV.<sup>95</sup> The TFV is in control of its resources, except for the awards for reparations, fines, and forfeitures, and it may decide upon its discretion whether it will use them for the reparations mandate (see Note 95, para. 113). Consequently, the TFV has to balance the funding of the two mandates, which might lead to the coalescence of the two mandates in practice and subsequently to different views on the relation between the two.

Furthermore, it appears that the ICC perceives the assistance mandate as a safety net for the reparations mandate. As illustrated above, the Court is aware of the limited group of beneficiaries, which leads to the exclusion of many victims from the reparations mandate (see third section). Consequently, the Chambers call upon the TFV to use its assistance mandate for the victims outside the scope of beneficiaries, as their harm resulted from crimes that were linked to a case before the court but did not lead to a conviction.<sup>96</sup> In other words, the Court’s approach—famously known in the literature as the “Swiss cheese” model (Dixon, 2015b)—attempts to counterbalance the gaps left by a legally limited reparations process with reparations provided by means of assistance (as can be seen in *Prosecutor v. Jean-Pierre Bemba Gombo*, August 3, 2018). Against this background, it can be asserted that the ICC may prioritize the reparations mandate over the assistance mandate. On the other hand, the TFV’s approach to its mandates leans toward dismissing a hierarchical distinction between the two, to the extent of even merging them. For instance, in (post-)conflict situations before the ICC, whereby the TFV, with its strained budget, is facing the challenge to provide both reparations and assistance to large group of victims, the TFV considers rehabilitation to be the most effective.<sup>97</sup> For both mandates, the TFV has to operate in similar or even the same situations; they might be active within the same areas, communities, or for the same groups of victims under the aegis of the reparations and the assistance mandate simultaneously. Therefore, the TFV is capitalizing on its experiences and expertise in designing and executing its assistance projects, in the development of the proposed reparations programs under the reparations mandate (see Note 98). As a matter of fact, in the Lubanga case, the TFV proposed reparations projects were very similar to the assistance projects that were already operational.<sup>98</sup> Moreover, it is likely that these projects will be implemented by the same, often local, organizations and disbursed from the same funding.<sup>99</sup> This ties into the above discussion, whereby the TFV is prioritizing collective reparations, even when victims request compensation. The group of victims that may be awarded reparations by the ICC is remarkably smaller than the group of victims that may profit from assistance by the TFV. In fulfilling its mandates, it appears that the TFV is following a pragmatic approach: It can help more victims, within both mandates, in case it uses collective reparations such as community-based assistance and symbolic projects that pursue reconciliation. On the other hand, the ICC has the liberty to be less pragmatic as the group of victims that have to benefit from the reparations it orders is rather small vis-à-vis the broad victimized community and consequently prioritizes compensation when victims request it.<sup>100</sup>

However, the lack of agreement between the ICC, on the one hand, and the TFV, on the other, as well as the apparent overlap of the two TFV mandates have consequences for the victims. For instance, the group of victims that participates in the proceedings and becomes beneficiaries of the reparations might feel entitled to reparations, which might lead to negative feelings toward the reparations and the ICC in general, especially if others receive access to the same rehabilitation projects through the assistance mandate (Wiersing, 2012). This is especially prevalent in the situations where the TFV is active at this moment, as the conflicts in Northern Uganda and the Democratic Republic of the Congo involve fluid categories of victims and offenders. In these situations, there is not a clear distinction between offenders and victims, as many people can be considered both (Moffett, 2015).<sup>101</sup>

### *Specificity of the Implementation Plan*

As stressed above, the reparations mandate is the common denominator between the ICC and the TFV; the ICC awards reparations and sets the framework, including the criteria for victims to become a beneficiary as well as the modalities of reparations, while the TFV has to design and implement them. Upon the Court's order, the TFV is instructed to draft an implementation plan that has to be accepted by the Trial Chamber before the reparations can actually be provided. To date, an implementation plan for reparations has only been approved in the case against Lubanga. As discussed before, the ICC and the TFV have different views of reparations, which were also reflected in the long and difficult process of developing the final implementation plan.

The underlying reason of the clash on the final implementation plan was that the Trial Chamber and the TFV did not agree on the required level of specificity. According to the Trial Chamber, the plan should consist of a list of potential beneficiaries, an evaluation of the harm suffered by the victims, proposals for the reparative projects, the expected costs of these projects, and the monetary amount that the TFV could potentially allocate to the reparations (*The Prosecutor v. Thomas Lubanga Dyilo*, August 14, 2015).<sup>102</sup> The ICC is bound in its specificity by respect for the rights of the offender, which need to be taken into account, particularly in view of his liability for reparations.<sup>103</sup> However, the TFV operates under "limited procedural and operational realities from which the Trust Fund cannot deviate" (*The Prosecutor v. Thomas Lubanga Dyilo*, June 7, 2016, para. 9), making it impossible to reveal the requested details." In particular, the detailed scrutiny of the individual victim eligibility process makes it cumbersome to identify the beneficiaries of the collective reparations. Many victims are afraid to reveal their identity to Lubanga or to conduct a harm assessment outside of a safe counseling setting, which leads to a limited group of beneficiaries, especially in comparison to the actual number of victims (*The Prosecutor v. Thomas Lubanga Dyilo*, June 7, 2016, para. 25). In addition, this burdensome procedure to identify the beneficiaries involves extensive financial resources, which have to be paid from the same funds as the reparations, resulting in even less resources for the actual reparations.<sup>104</sup> As pointed out above, the TFV encountered several challenges in preparing a list of the potential beneficiaries that included an assessment of their harm, which made it impossible for it to propose specific projects that also included a cost estimation, as requested by the Court. Consequently, the TFV proposed a new, two-step strategy for the implementation plan to better accommodate the challenges on the ground. Therefore, instead of a specific implementation plan that meets the strict requirements, in the first stage, the implementation plan should consist of a programmatic framework that is based on an estimated number of eligible victims.<sup>105</sup> This framework should consist of objectives, outcomes, and essential activities that should be organized by the TFV. After the Chamber has approved the framework, the second stage can unfold, whereby the TFV can commission local services providers to submit proposals for specific projects that fit within the framework (*The Prosecutor v. Thomas Lubanga Dyilo*, February 13, 2017). Two years after the appeal on the reparations order has been handed down, the ICC finally

approved the framework for collective reparations.<sup>106</sup> The long process, although justifiable on bureaucratic grounds, took toll on the victims' patience; they repeatedly expressed frustration with protracted history of the process and reparations still lagging behind.<sup>107</sup>

## Conclusion

Two decades ago, the ICC was established bestowing upon victims an extensive package of rights, including the right to reparations and holding the lofty aspiration of delivering justice to victims. Reparations ordered by an international criminal tribunal represented, at that time, the unique feature of the ICC, though it faced the challenge of being set up in a traditional accused-orientated criminal justice system. The ICC has so far ordered reparations in three cases: Lubanga, Katanga, and Al Mahdi. Our analysis shows that the reparations regime at the ICC is still a work in progress.

Against this background, our analysis takes stock of the developments before the ICC and attempts to highlight the mismatch between the characteristics inherent to international criminal trials such as the accountability and punishment of the accused and delivering justice for victims of mass crimes through reparations—the so-called procedural challenges. Firstly, as apparent in our analysis of the Orders on Reparations, we submit that while trying to protect the accused persons' rights, the number of victims benefiting from reparations is excessively limited, rendering at best partial justice. Secondly, our analysis reveals that the interpretation by the Court of the proportionality between the liability and the harm caused by the crimes for which the accused is found guilty, scales down the harm caused by mass crimes to a handful of beneficiaries and often trivializes it. Finally, we assert that the principle according to which reparations hold the guilty accountable for their crimes, lacks applicability in the reality of the accused's indigence.

Furthermore, we also submit that the ICC reparations system is facing conceptual challenges: First, the ICC and the TFV have different objectives. This results in clashing views on the interpretation of the reparations mandate, the relation between the TFV's reparations and assistance mandates, as well as the connected differences between the prioritization of either individual or collective reparations. In addition, the ICC's emphasis on the protection of the accused and his liability results in stringent requirements for the implementation plan, whereby the TFV is compelled to conform with impossible requirements, such as providing a list with the beneficiaries and their assessed harm, as well as specific programs and estimation of the costs. The TFV operates on the ground where it has proved both time- and money-consuming and detrimental to the victims to get such specific information in a war-torn context. These differing views result in lengthy reparations proceedings, which follow lengthy criminal proceedings and generate everlasting uncertainty for victims.

Taking into account its objectives, challenges in enforcing it, as well as the (limited) impact on the ground, we contend that the ICC's reparation regime may not be the best reparative response to address victims' needs in (post)-conflict situations, especially those affected by long and complicated conflicts, mass victimization, and fluid groups of victims and offenders. As suggested, improving the ICC's approach toward reparations and justice for the victimized population necessarily includes, at a minimum, tackling both the procedural and conceptual challenges posited above.

One suggestion could be that during the reparations process, the Court adopts a new standard of proof when balancing between the rights of the accused and the interests of victims, to the benefit of the latter. The standard of proximate cause could be used to establish that. In fact, the victims of crimes committed by child soldiers are *due* to the crimes Lubanga committed in the first place. Furthermore, the Court should apply a consistent methodology when deciding upon the manner in which it aims to quantify the harm caused by the crimes at stake and the number of beneficiaries, in order to better manage the victims' expectations vis-à-vis the outcome of the decision. In addition, the Court's requirement of linking and limiting reparations to the accountability of the accused could be altered, as to enable more victims to benefit from reparations, if provided.<sup>108</sup>

In addition, it is suggested that the ICC could be more perceptive about the context of the violations by reevaluating the provision of individual reparations, such as compensation, or rehabilitation that is only accessible for the direct victims of the crimes for which the accused is convicted. The Court is dealing with crimes that are committed during a broader conflict which do not happen in isolation. These conflicts often include several fighting parties, a high number of victims across the different fighting parties and fluid lines between victims and offenders, while the conflicts are at times not over yet. In order to prevent that one group of victims receives reparations, while other groups of victims are excluded, it might be advisable for the ICC to be more pragmatic in its reparations decisions. Considering the lack of resources and the great number of victims—a number that would increase if the more lenient standard of proof and linking the requirements for reparations to the accused' crimes be adopted—providing collective reparations might be a better solution.<sup>109</sup> These collective reparations aim to benefit the entire community and might be of a symbolic nature, for instance, in the form of monuments and memorials<sup>110</sup> or of a more material nature, such as communal rehabilitation via education that is available for all the children in a community, independent of their victim status. These measures have the ability to reach a larger group of victims without drawing lines within the community.

A possible downside of this approach could be the lack of acknowledgment of victimization, since the measures proposed above could also be considered as mere developmental aid and not as a measure to repair the harm (see, for instance, Correa, 2011; Van Boven & Letschert, 2011).<sup>111</sup> It is here that we believe a Court procedure and judgment could play a pivotal role, if the other rights, such as the right to information or the right to express voice and concerns meet victims' expectations. Even when substantive individual reparations are absent, the victims' satisfaction and experience with international criminal justice may still be enhanced by improving the experience with the other procedural rights.<sup>112</sup> This can be done through the existing ICC outreach programs, before participating in a trial, by informing victims of their rights and engaging them in processes that fit their needs, offering them a forum to testify and express feelings, treating them with respect before and during proceedings, and offering psychological and medical support to avoid secondary victimization. Finally, we contend that in order to avoid incurring additional harm, a realistic acknowledgment and communication of the ICC limitations—in terms of the justice it can indeed provide, the actual reparations for which it has the budget and jurisdiction to order, and the beneficiaries who can be reached—is equally paramount.

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## Notes

1. This was the first time when an international criminal justice court adopted such a model of justice. In the negotiation process, discussions have focused on addressing victims' rights and needs in the International Criminal Court (ICC) Statute, in order to deliver justice for victims (see International Commission of Jurists, 1995; McKay, 1998; United Nations [UN], 2002).
2. Rome Statute, Article 75.
3. For instance, punishing the perpetrators of crimes by rendering a sentence can also be considered a form of justice. See Spiga (2013).
4. As explained by one participant in the negotiations, Article 75 was included under the Rome Statute by its drafters with the intention to deliver "justice to victims" (McKay, 2000).
5. This idea of justice is based on Fattah's (2000) idea about victimization. We extrapolated the idea and deemed it applicable to perceptions of justice too. See also for a further theoretical elaboration of the concept of justice in the field of international criminal law: Pemberton and Letschert (2017).
6. Hearing before the Comm. on International Relations, UN (2002); see also Rabkin (2005); Pemberton and Letschert (2017); see also Drumbl (2007).
7. This article is part of the INTERVICT Reparations Initiative research project that analyses the impact of the right to reparation on the experience of victims through empirical case studies. See [www.tilburguniversity.edu/reparations](http://www.tilburguniversity.edu/reparations)
8. The frustration harbored by the victims in the Lubanga case following its protracted history has been captured in a blog post: Waiting (2016); see also Cody et al. (2015).
9. The "Principles on Reparations" are different from the "Orders on Reparations"; the former are general concepts formulated against the circumstances of a specific case but can nonetheless be amended, expanded at a later date, whereas the latter consist in Trial Chamber's holdings, determination, and findings based on those principles. *The Prosecutor v. Thomas Lubanga Dylio*, March 3, 2015, ICC, Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of August 7, 2012, with AMENDED order for reparations (annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129. Retrieved March 8, 2018, from [https://www.icc-cpi.int/CourtRecords/CR2015\\_02631.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_02631.PDF), para. 3.
10. For instance, the abrupt termination of proceedings in the case of *Prosecutor v. Jean Pierre Bemba Gombo* left all the victims deeply disappointed with the ICC process: "victims are disappointed and have lost faith in the justice process following Mr. Bemba's acquittal." See situations in the Central African Republic in the Case of *The Prosecutor v. Jean Pierre Bemba Gombo*, Final decision on the reparations proceedings, No.: ICC-01/05-01/08, August 3, 2018, at [https://www.icc-cpi.int/CourtRecords/CR2018\\_03967.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03967.PDF)
11. McCarthy (2012); Pemberton and Letschert, *supra* note 6, p. 297; see also Hoven and Scheibel (2015) and Moffett (2017).
12. ICC, final report by the focal points (Chile and Finland), *Stocktaking of international criminal justice: The impact of the Rome Statute system on victims and affected communities*, para. 17, p. 82, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-11-Annex.V.a-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf)
13. Moffett, *supra* note 11; McCarthy, *supra* note 11; see also Hoyle and Ullrich (2014).
14. Assembly of States Parties, Report of the Court on the strategy in relation to victims, November 10, 2009, ICC-ASP/8/45, para. 3.
15. Assembly of States Parties, Report of the Court on the strategy in relation to victims, 10 November 2009, ICC-ASP/8/45, para. 2.
16. Assembly of States Parties, Report of the Court on the strategy in relation to victims, November 10, 2009, ICC-ASP/8/45. See also Assembly of States Parties, Court's Revised strategy in relation to victims, November 5, 2012, ICC-ASP/11/38, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-38-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf)
17. Assembly of States Parties, Court's Revised strategy in relation to victims, November 5, 2012, ICC-ASP/11/38, para. 6, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-38-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf)

18. The realization of these rights may lead to procedural justice, different from distributive justice, which is focused on the outcome. If procedural rights are implemented, then it may at least lead to the fulfillment of procedural justice, which can be as important as the outcome Letschert (2017). See important research by (Tyler, 2006; Tyler & Lind, 1992; Wemmers, 2009).
19. Similar ideas were advocated, for instance, by Bass (2012) and Freeman (2007).
20. See Pemberton and Letschert *supra* note 6.
21. Letschert, *supra* note 18, p. 472.
22. Rome Statute, *supra* note 2, Article 75(2).
23. Trust Fund for Victims (TFV), *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, Articles. 42 and 46.
24. Letschert, *supra* note 18, p. 23; see also Roht-Arriaza (2003). For an overview of the conflict and tensions within society, see Ndahinda (2016)
25. *The Prosecutor v. Thomas Lubanga Dylio*, 7 August 2012, ICC, Trial Chamber, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, [https://www.icc-cpi.int/CourtRecords/CR2012\\_07872.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF), accessed 8 March 2018. These principles were established after Lubanga's conviction before the ICC, *The Prosecutor v. Thomas Lubanga Dylio*, 14 March 2012, ICC, Trial Chamber, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, [https://www.icc-cpi.int/CourtRecords/CR2012\\_03942.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF), accessed 8 March 2018., paras. 217–240; Lubanga Appeals' Chamber Order for reparation, *supra* note 9, paras. 33–43.
26. Lubanga Decision establishing Principles and Procedures, *supra* note 25.
27. Lubanga Appeals' Chamber Order for reparation, *supra* note 9.
28. The TFV submitted a draft implementation plan in the case of Katanga on July 25, 2017, but the Trial Chamber did not approve it yet. The order for reparations in the case against Al Mahdi was issued on August 17, 2017, after which the TFV received the task to propose an implementation plan.
29. Rome Statute, *supra* note 2, Article 68(3).
30. Rome Statute, *supra* note 2, Article 75(2).
31. Zappalà (2010), p. 145.
32. *The Prosecutor v. Germain Katanga*, 24 March 2017, ICC, Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07, para. 30, [https://www.icc-cpi.int/CourtRecords/CR2017\\_07248.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_07248.PDF), accessed 8 March 2018, para. 18.
33. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, p. 18; Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 179.
34. Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 178.
35. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 65; Rome Statute, *supra* note 2: “the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims.”
36. Lubanga Decision establishing Principles and Procedures, Rome Statute, *supra* note 25, para. 180.
37. Including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings, Lubanga Decision establishing Principles and Procedures, Rome Statute, *supra* note 24, paras. 194–195.
38. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 8.
39. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 190. Direct victims are those whose harm is the result of the commission of a crime within the jurisdiction of the Court, and indirect victims are those who suffer harm as a result of the harm suffered by direct victims. It stressed that for direct victims, a causal link must exist between the crimes charged and the victims' harm: The injury, loss, or damage suffered must be a result of the crimes confirmed against Lubanga. Moreover, the indirect victims must prove that as a result of their relationship with the direct victim, they suffered harm as a result of the loss, injury, or damage suffered by the child soldiers in *The Prosecutor v. Thomas Lubanga Dylio*, April 8, 2009,

- ICC, Trial Chamber, Redacted version of “Decision on ‘indirect victims,’” ICC-01/04-01/06, paras. 44 and 47.
40. Lubanga Decision on Indirect Victims, *supra* note 39, paras. 50–51. Furthermore, this delineation of indirect victims further ignores different conceptions of family ties in many African countries based on the extended family concept.
  41. Lubanga Decision on Indirect Victims, *supra* note 39, paras. 50–51. Furthermore, this delineation of indirect victims further ignores different conceptions of family ties in many African countries based on the extended family concept, para. 52, endorsed Lubanga Appeals’ Chamber Order for reparation, *supra* note 8, para. 190.
  42. Lubanga Decision on Indirect Victims, *supra* note 39, para. 52.
  43. Whereas the Trial Chamber I held that the Court “should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence,” the Appeals Chamber amended this Decision. See Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 207. Under the Assistance Mandate, however, the TFV developed several projects in the DRC to address the needs of victims, survivors of sexual- and gender-based violence. See TFV, *Annual Report 2016*, [http://www.trustfundforvictims.org/sites/default/files/imce/Annual%20Report-2016\\_Online\\_Revised.pdf](http://www.trustfundforvictims.org/sites/default/files/imce/Annual%20Report-2016_Online_Revised.pdf), accessed 8 March 2018, p. 11. In addition, it made reference to the Lubanga Sentencing Judgment, whereby acts of sexual violence could not be attributed to Lubanga, and neither could he be held responsible for the harm ensuing from these crimes. The Chamber referred the victims who did not meet the eligibility criteria to the assistance mandate. See Lubanga Appeals’ Chamber Order for reparation, *supra* note 9, paras. 55 and 198.
  44. Katanga Order on Reparations, *supra* note 32, para. 147.
  45. Katanga was found guilty, as an accessory, within the meaning of Article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging) committed on February 24, 2003, during the attack on the village of Bogoro, in the Ituri district of the DRC (see *The Prosecutor v. Germain Katanga*, ICC, Case Information Sheet).
  46. By the Legal Representative for Victims, Prosecution, and UN. See Katanga Order on Reparations, *supra* note 32, paras. 141–144.
  47. It stated that, although it has been established that sexual crimes have indeed been committed by Ngiti combatants, Katanga (who is of Ngiti ethnicity) was not found guilty of these crimes since the necessary evidence had not been presented to substantiate the Ngiti combatants’ criminal purpose as regards those crimes. Katanga Order on Reparations, *supra* note 32, paras. 22 and 150.
  48. Katanga Order on Reparations, *supra* note 32, para. 160.
  49. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 17 August 2017, ICC, Trial Chamber, Reparations Order, ICC-01/12-01/15, paras. 25–26, [https://www.iccpi.int/CourtRecords/CR2017\\_05117.PDF](https://www.iccpi.int/CourtRecords/CR2017_05117.PDF), accessed 8 March 2018, para. 42.
  50. Some victims could still benefit from reparations if a type of harm suffered could nevertheless be justified on other grounds linked to the crimes established.
  51. As seen above, with child soldiers in the Katanga case, and the victims of bodily harm and damaged property in the Al Mahdi case.
  52. As seen in the Katanga case, although the court established that rape and/or sexual violence- or gender-based violence did take place in the context of the conflict, it has not been proved that Katanga was responsible for them.
  53. See Lubanga Appeals’ Chamber Order for reparation, *supra* note 9, para. 184.
  54. For other interpretations concerning partial justice provided by international criminal justice proceedings, see Pemberton, Letschert, de Brouwer, and Haveman (2015).
  55. Lubanga Decision establishing Principles and Procedures, *supra* note 25, paras. 247–248; The Appeals Chamber did not amend this provision.
  56. Moffett, *supra* note 11, p. 1205.

57. For a discussion on the assistance mandate, see fourth section.
58. Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 243; Lubanga Appeals' Chamber Reparations Judgement, note 9, para. 79.
59. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, paras. 6 and 60; Al Mahdi Order on Reparations, *supra* note 49, para. 50; Katanga Order on Reparations, *supra* note 32, para. 264.
60. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 152.
61. *The Prosecutor v. Germain Katanga*, 5 July 2017, ICC, Trial Chamber, ICC-01/04-01/07, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, [https://www.icc-cpi.int/CourtRecords/CR2017\\_04789.pdf](https://www.icc-cpi.int/CourtRecords/CR2017_04789.pdf). p. 11.
62. *Le Procureur c. Thomas Lubanga Dyilo*, 15 décembre 2017, CPI, La Chambre De Première Instance, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, ICC-01/04-01/06, [https://www.icc-cpi.int/CourtRecords/CR2017\\_07278.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_07278.PDF), accessed 8 March 2018. para. 230.
63. Katanga Order on Reparations, *supra* note 32, para. 181.
64. The Chamber has determined that 297 Applicants have shown on a balance of probabilities that they are victims of the crimes of which Mr. Katanga was convicted and accordingly are entitled to reparations ordered by the Chamber in the case. Katanga Order on Reparations, *supra* note 32, para. 168.
65. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 78.
66. Al Mahdi Order on Reparations, *supra* note 49, para. 104.
67. Pemberton, Letschert, de Brouwer, and Haveman, *supra* note 54, p. 346.
68. Lubanga Judgement, *supra* note 25, para. 58.
69. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 65.
70. Katanga Order on Reparations, *supra* note 32, paras. 15 and 251.
71. Al Mahdi Order on Reparations, *supra* note 49, para. 27.
72. The ICC Presidency will monitor the convicted persons' financial situation and, should they acquire funding in the future, they will be seized and transferred to the TFV, in Katanga Order on Reparations, above n. 31, para. 329.
73. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 70.
74. ICC and Extraordinary Chambers in the Courts of Cambodia (ECCC) are comparable courts as they both include reparations in their mandates, rooted in the individual criminal responsibility of the accused person; before both courts, reparations are directly linked to the crimes allegedly committed by the accused, and the reparations orders are ordered against the accused.
75. Pursuant to ECCC, *Internal Rules*, rev. 6, September 17, 2010, Rule 23 (3) *quinquies*.
76. This has happened following waves of appeals before the Co-Investigating Justice.
77. This is not assert that the ECCC should be devoid of criticism vis-à-vis the manner in which it makes its awards on reparations. For a critical account of reparations at the ECCC, however, on other grounds, see Sperfeldt (2012).
78. Lubanga Decision establishing Principles and Procedures, *supra* note 25, paras. 217–240; Lubanga Appeals' Chamber Order for reparation, *supra* note 9, paras. 33–43.
79. Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 274. This was confirmed in the appeal, Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 143.
80. Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 44.
81. Lubanga Decision establishing Principles and Procedures, *supra* note 25, para. 55 (*The Prosecutor v. Thomas Lubanga Dyilo*, November 3, 2015).
82. Katanga Order on Reparations, *supra* note 32, paras. 300 and 304; Al Mahdi Order on Reparations, *supra* note 49, paras. 67, 81, and 90.
83. Al Mahdi Order on Reparations, *supra* note 49, para. 140.
84. Lubanga Decision establishing Principles and Procedures, *supra* note 25, paras. 41, 42, 51, and 52.
85. In the case against Katanga, victims requested almost unanimously individual reparations; Katanga Order on Reparations, *supra* note 32, paras. 298 and 339; Al Mahdi Order on Reparations, *supra* note 49, para. 73.

86. Katanga Order on Reparations, *supra* note 32, para. 339.
87. Moffett, *supra* note 11, pp. 1207–1208.
88. Human Rights Center study (2015).
89. Educated victims from the middle class are more likely to file a complaint before the ICC and to receive reparations, than illiterate and poorer victims; see N. Roht-Arriaza, *supra* note 24, 169.
90. TFV, *Regulations of the Trust Fund for Victims*, *supra* note 22, arts. 42 and 46.
91. Examples of assistance projects that target individual victims are surgery for victims of sexual violence, the provision of prostheses, or vocational training for former child soldiers; see for more information, TFV Annual Report 2016, *supra* note 43.
92. Lubanga, Katanga, and Al Mahdi are declared indigent.
93. See also C. Stahn (2015).
94. Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 76.
95. The convicted persons will be monitored and as soon as they have assets, these will be allocated to the TFV for the reparations; *Lubanga Appeals' Chamber Order for reparation*, *supra* note 9, para. 104.
96. See for instance, Lubanga Appeals' Chamber Order for reparation, *supra* note 9, para. 55; Al Mahdi Order on Reparations, *supra* note 49, para. 108.
97. *The Prosecutor v. Thomas Lubanga Dyilo*, 3 November 2015, ICC, Trial Chamber, ICC-01/04-01/06, Lubanga Filing on Reparations and Draft Implementation Plan, [https://www.icc-cpi.int/CourtRecords/CR2015\\_20832.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_20832.PDF), para. 204.
98. Moffett, *supra* note 11, p. 1208.
99. P. Dixon (2015), p. 9.
100. For instance, in the Katanga case, there were 297 beneficiaries, and in the Al Mahdi case, 139 victims' applications; *The Prosecutor v. Germain Katanga*, 17 May 2017, ICC, Trial Chamber, ICC-01/04-01/07-3740, Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by the Trial Chamber II in its 24 March 2017 order for reparations) para. 47; Al Mahdi Order on Reparations, *supra* note 49, para. 141.
101. See Ndahinda, *supra* note 24.
102. Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 97, para. 130.
103. The Trial Chamber claims that it is not able to rule on Lubanga's liability as long as it does not have a list with the identified beneficiaries and the extent of their harm, the specific details about the proposed programs and a precise evaluation of the costs; *The Prosecutor v. Thomas Lubanga Dyilo*, 14 August 2015, ICC, Trial Chamber ICC-01/04-01/06-3161, Decision on the "Request for extension of time to submit the draft implementation plan on reparations", paras. 14 and 22.
104. Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 97, para. 148.
105. *The Prosecutor v. Thomas Lubanga Dyilo*, 7 June 2016, ICC, Trial Chamber, ICC-01/04-01/06, Additional Programme Information Filing, [https://www.icc-cpi.int/CourtRecords/CR2016\\_04140.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04140.PDF), para. 39; Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 96, para. 253.
106. *The Prosecutor v. Thomas Lubanga Dyilo*, 6 April 2017, ICC, Trial Chamber, Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims, ICC-01/04-01/06-3289, [https://www.icc-cpi.int/CourtRecords/CR2017\\_02134.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_02134.PDF), accessed 8 March 2018.
107. See International Justice Monitor (2016)
108. This points at the ECCC's experience, whereby reparations were linked to the crimes the accused were indicted for, and not convicted. In this way, it allowed for many victims to participate in the trial and benefit from (moral and collective) reparations, although in the end the accused were not found guilty for all the crimes in the indictment.

109. However, we do acknowledge the provision of collective reparations might entail challenges, such as, for instance, determining the beneficiaries of such reparations in situations with blurred division between perpetrators and victims. See Rosenfeld (2010). See also Navarro (2018).
110. According to De Greiff (2006), monuments and memorials are considered to be collective symbolic measures. There are also individual symbolic measures, for instance, the “symbolic” compensation of US\$250 in the Katanga case; Katanga Order on Reparations, *supra* note 32, para. 300.
111. However, other researchers lend a critical lens to this debate (Duthie, 2008; Mani, 2008; Roht-Arriaza & Orlovsky, 2009).
112. However, the importance attached to the victims’ experience and satisfaction with international criminal justice, viewed through this lens, should not be overly emphasized. As we have learnt from the Bemba decision, even though victims participated in the trial, the Court’s decision to stop all proceedings on reparations negatively impacted the victims’ experience of justice at the ICC. See also Note 9 and Stover, Crittenden, Koenig, Peskin, and Gurd (2010).

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### Author Biographies

**Alina Balta** is PhD Researcher with the International Victimology Institute Tilburg (INTERVICT), at Tilburg University. She is conducting research on the right to reparation for victims of international crimes, and to this end, scrutinizing the relevant case law of the ICC, ECCC, the Inter-American Court of Human Rights, and the European Court of Human rights. Alina’s research is interdisciplinary, bringing victimological, psychological, and philosophical lens to international criminal and human rights law issues.

**Manon Bax** is a Dutch PhD student at INTERVICT (Tilburg University) and is studying collective reparations in international law and transitional justice. She uses a qualitative content analysis to map the development of collective reparations in several international criminal courts, human rights tribunals and transitional justice institutions such as truth commissions. Manon has gained a master’s degree for the Research Master in Law (LLM) and for the Master Victimology and Criminal Justice (MSc) at Tilburg University.

**Rianne Letschert** is professor in international law and victimology at Maastricht University, where she is also rector magnificus. She has written several articles and co-edited books relating to victims of international crimes and the role law may play in addressing the needs of victims and societies confronted with mass victimization. She has been expert consultant on victim issues for the Legal Representatives of Victims’ Team of the Special Tribunal for Lebanon, is Trustee of Redress The Netherlands and member of the Dutch Advisory Committee of Life-long Convicted Persons that is entrusted with the task to advice on reintegration activities of life-long sentenced convicts.