The Reparations Regime of the International Criminal Court

Reparations or General Assistance?

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Abbreviations

ASP  Assembly of States Parties
DRC  Democratic Republic of the Congo
FPLC  Patriotic Forces for the Liberation of Congo
ICC  International Criminal Court
ICJ  International Court of Justice
ICTJ  International Centre for Transitional Justice
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for the former Yugoslavia
ILC  International Law Commission
NGO  Non-Governmental Organization
OPCV  Office of the Public Counsel for Victims
RPE  Rules of Procedure and Evidence
TFV  Trust Fund for Victims
RTFV  Regulations of the Trust Fund for Victims
UNBPG  United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UNICEF  United Nations Children's Fund
UPC  Union of Congolese Patriots
1 Introduction

1.1 Background

Questions of repairing harm suffered by victims of mass atrocity are matters that traditionally have fallen outside the scope of international criminal law. The major focal point of international criminal law has for a long period of time been the punishment of perpetrators, not questions of reparations.\(^1\) The International Criminal Court (the ICC or the Court) represents an important step forward for the rights and recognition of victims in international criminal law. The ICC is the first permanent international court with jurisdiction to try individuals responsible for grave international crimes, i.e., the crime of genocide, crimes against humanity, war crimes and the crime of aggression.\(^2\) The Rome Statute of the ICC, which entered into force on 1 July 2002, contains several innovative provisions dealing with the concerns and rights of victims of crimes under its jurisdiction. The ICC is the first international criminal tribunal to award victims the right to actively participate in international criminal proceedings. In addition to victim participation, the Rome Statute grants victims the right to claim reparations before the Court.\(^3\)

The designing of reparations regimes for harm resulted by mass atrocity are characteristically accompanied by difficulties; the number of victims is often great and the resources often limited.\(^4\) In order for a reparations regime to provide justice and adequate reparations to victims, Professor Theo van Boven\(^5\) stresses the importance of criminal prosecution:

> In devising strategies of justice it must be borne in mind that lack of reparation for victims and impunity for perpetrators are two sides of the same coin [...] Therefore, all efforts and strategies aimed at strengthening the normative framework in the quest for peace and justice must reveal the clear nexus that exists between impunity of perpetrators and the failure to provide just and adequate reparation for the victims.\(^6\)

This is reflected in the Rome Statute, which gives the ICC power to make a reparations order directly against a convicted person specifying appropriate reparations to, or in respect of

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\(^1\) McCarthy, 2012, p. 1.

\(^2\) Article 5 of the Rome Statute; Noting that the Statute is complementary to national criminal jurisdictions in accordance with Article 1.

\(^3\) Leyh, 2011, p. 225.

\(^4\) Vasiliev et al., 2013, p. 1368.

\(^5\) Van Boven is a highly regarded specialist in human rights and has fulfilled many functions in the framework of the UN.

\(^6\) Van Boven in Daneli, et al., 1999, p. 16.
victims.\textsuperscript{7} The Trust Fund for Victims (the TFV or the Fund) and its twofold mandate is a further crucial element of the Court’s reparations regime. The first important aspect of the TFV’s mandate is its responsibility of implementing Court-ordered reparation awards.\textsuperscript{8} In cases where the financial resources of the convicted person are not sufficient to provide reparations to the victims, the TFV can use its resources deriving from voluntary contributions to supplement Court-ordered reparations. The other important aspect of the Fund is to provide assistance to victims outside the scope of Court-ordered reparations. The TFV’s voluntary contributed resources are also to fund its general assistance mandate.\textsuperscript{9}

The Pre-Trial Chamber\textsuperscript{10} has stated that: “[...] the reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. In the Chamber’s opinion, the success of the Court is, to some extent, linked to the success of its reparation system.”\textsuperscript{11} Would a success be possible when the Court-ordered reparations are linked to the ability of the convicted person to pay for such? Particularly noting the character of crimes under the Court’s jurisdiction. The reliance on individual criminal responsibility does undoubtedly pose great challenges to the ICC’s reparations regime. It is highly unlikely that a single convicted person has accumulated such personal wealth enabling him or her to provide reparations for thousands of victims. The only way to overcome this issue is to rely on the voluntary contributed resources of the TFV. The notion of reparations is, as stated by van Boven, tied to issues of criminal responsibility. This could appear to rule out the possibility of perceiving the general assistance of the TFV as reparations. How can the difference between reparations and general assistance be explained to victims if they are distributed alongside each other and financed by the same resources? The dual mandate of the TFV undoubtedly raises both practical and conceptual challenges to the ICC reparations regime.

\textsuperscript{7} Article 75(2) of the Rome Statute.
\textsuperscript{8} Article 75(2)(2) of the Rome Statute.
\textsuperscript{9} McCarthy, 2012, pp. 2–3.
\textsuperscript{10} The judiciary of the Court is composed of three Divisions; the Appeals Chamber (AC), the Trial Chamber (TC) and the Pre-Trial Chamber (PTC).
\textsuperscript{11} ICC-01/04-01/06-8, PTC1, Decision concerning Pre-Trial Chamber I’s decision of 10 February 2006 and the Incorporation of documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 136.
1.2 Purpose and Delimitations

The purpose of this research paper is to analyse the implementation of Court-ordered reparations through the TFV from a reparative justice perspective. In order to fulfil this purpose, the following questions need to be answered:

1. What are Court-ordered reparations within the ICC regime?
2. What is assistance under the TFV?
3. What is the difference between Court-ordered reparations and assistance under the TFV from a reparative justice perspective?

Noting that reparative justice is concerned with victims’ perceptions of the overall justice process, this research paper will not concern victims’ right to actively participate in proceedings. It will further be limited by only addressing the case of the Prosecutor v. Thomas Lubanga Dyilo.

1.3 Method and Material

This research paper is largely based on a legal method in regard to interpreting and systemizing legal norms regulating the legal framework of the ICC reparations regime. It has been argued that international criminal law form part of public law. The ICC reparations regime additionally draws upon basic principles of international law and international human rights. Hence, the sources of international law must be adhered to. Article 38 of the Statute of the International Court of Justice (the ICJ) is generally referred to as the sources of international law. The relevant sources provided in the ICJ Statute are international conventions, international custom, general recognized principles of law, judicial decision and the teaching of the most highly qualified publicists. Yet, no specific hierarchy among these sources is expressed. Conventions, customary law and principles of law are, however, considered more important. These sources refer to obligations, whereas judicial decisions and teachings do not.

The sources of international law include teachings of the most highly qualified publicists as stated in the ICJ Statute. To be able to gain a deeper understanding of the legal framework of

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13 Article 38(1) of the ICJ Statute.
the ICC’s reparations regime, this research paper includes writings of acknowledged scholars. When interpreting the legal framework, the author has predominantly relied upon the work of two recognized scholars worth commenting. The work of Eva Dwertmann and her book *The Reparations System of the International Criminal Court*, which is referred to throughout the first reparations decision\(^\text{15}\) of the ICC. Furthermore, the work of Conor McCarthy and primarily his book *Reparations and Victim Support in the International Criminal Court*. McCarthy has acted as an expert consultant for the ICC; analysing the Court’s reparations mandate and providing advise to issues that may follow the implementation of reparation awards.\(^\text{16}\)

The Rome Statute codifies sources of international criminal law and provides that the Court in the first place shall apply its Statute, the elements of crimes and the Rules of Procedure and Evidence (the Rules or RPE). Second, applicable treaties and the principles and rules of international law shall be applied where appropriate. Lastly, the Court shall apply general principles of law deriving from domestic legislation, provided that those principles are not inconstant with the Rome Statute, international law, or internationally recognized norms. The Rome Statute provides that the Court may use principles of law as interpreted in its previous decisions and the application and interpretation of law in the Statute must be consistent with internationally recognized human rights.\(^\text{17}\) This research paper will include judicial decisions; although they may not be a source of law, they are regarded as a form of evidence of law.\(^\text{18}\) The Rome Statute, the RPE and the Regulations of the TFV (the Regulations or the RTFV) have been given the most attention when trying to ascertain the meaning of relevant provisions regarding the ICC reparations regime. This is in accordance with the norm hierarchy expressed in the Statute.

Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention) provide general rules of interpretation concerning the task of determining precisely what is meant by a certain provision or wording set out in either the Rome Statute, the Rules or the Regulations.\(^\text{19}\) The justification of using the Vienna Convention for interpretation purposes is that

\(^{15}\) ICC-01/04-01/06-2904, TC1, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012 (the Lubanga reparations decision).


\(^{17}\) Article 21 of the Rome Statute.


\(^{19}\) The interpretation of a treaty includes its preamble and annexes as provided in Article 31(2) of the Vienna Convention.
instruments such as the Rome Statute derives from a treaty, the UN Charter.\textsuperscript{20} Interpretation shall be made in good faith in accordance with the meaning of the term in the light of its object and purpose.\textsuperscript{21} Article 31(3)(a) of the Vienna Convention further provides that subsequent agreements between the parties regarding the interpretation or application shall be taken into consideration. In accordance with the Vienna Convention, the drafting process of the various reparations provisions as well as relevant rules of international law has been taken into account throughout this research paper.

The ICC reparation regime draws on the ideas of reparative justice. Apart from victim participation, the Court has the right to create reparation principles and order reparation awards. The Court has been given a wide range of powers in order to ensure victims’ rights to reparations, all in line with reparative justice thinking. The purpose of this research paper includes a reparative justice perspective to be able to provide a platform for evaluating the contents of applicable law. This perspective will furthermore help the author to understand the balance between judicial and non-judicial types of reparations and how far these different types can repair harm caused to victims. The perspective of reparative justice is essentially used to provide a victim-oriented approach to reparations, in order for the reader to get a more accurate picture of the reparations regime of the ICC.

The theoretical framework of reparative justice composes a multidisciplinary and holistic conception of justice for victims. Crimes under the Court’s jurisdiction often equals massive trauma; to be able to describe what reparative justice is, several disciplines, which may overlap and interact need to be taken into consideration. Hence, this study includes academic writing in the field of victimology. This material will include the use of empirical data, although the use of that data mostly is used to highlight issues under review. It is important to apply an approach of the interplay of disciplines such as biology, sociology, economics, law, anthropology and philosophy in order to understand the true meaning of justice for victims.\textsuperscript{22} No such explicit methodology will be explored in detail as this study refers to already conceptualized models of what constructs reparative justice.

\textsuperscript{20} Heikkilä, 2004, p. 9.
\textsuperscript{21} Article 31(1) of the Vienna Convention.
\textsuperscript{22} Daneli in Wemmers, 2014, pp. 7 and 19.
Case law is imperative in order to be able to analyse the implementation of reparations in practice. Due to the lack of ICC jurisprudence, the first decision establishing the principles and procedures to be applied to reparations in the case of the *Prosecutor v. Thomas Lubanga Dyilo* will be of great importance. As the appeals in the Lubanga case are ongoing, the author has taken all relevant material up to 3 December 2014 into consideration in this research paper.

### 1.4 Theoretical Framework

In order to be able to evaluate contents of applicable law regarding the implementation of Court-ordered reparations through the TFV, it is essential to adopt a victim-oriented perspective to reparations. Reparative justice provides a platform for analysing the ICC’s reparations regime without avoiding issues of accountability and victim classification.

#### 1.4.1 Reparative Justice

The concept of reparations, the making amends for wrongs, is an ancient, universal and basic institution of justice. Despite this, reparative justice theory has not received the same recognition as the retributive justice theory has. The focal point of modern forms of criminal justice have, for a significant period of time, been prosecuting offenders and protecting interests of society. The needs of victims of crime, originating from the harm they suffered, have oftentimes been overlooked in the criminal justice process. The focal point of judicial retributivism is the emphasis on punishing only those individuals who have committed a wrong. Retributive justice often strictly adheres to concepts of state punishment and fair procedures for the accused. The notion of impartiality is often stressed as one of its strengths, this however, will also lead to the consequence of the legal process becoming depersonalised. This distances justice for the victims of crime when they never hold a central role in the legal process, which focus completely on the wrong that has been done. It is out of the marginalization of the needs of victims that reparative justice theory has emerged, aiming towards making the victim a central figure in the criminal justice process. To ensure that the needs of victims are met, they have to be granted a degree of ownership of the on-going conflict between them and the perpetrator. There is a need for victims to play a more central role in the legal process and courts need to be able to apply more flexible measures to seek to

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repair the harm caused to victims. It has been argued that, to properly fulfil criminal justice, the legal process should refocus on victim reparation and recognize the ineffectiveness of the major focus of criminal punishment.  

Reparative justice should, however, be seen as distinct from its better-known neighbour restorative justice. It similarly emphasizes repairing victims’ harm caused by crimes, although it focuses on ensuring that the offenders take responsibility for the harm they have caused. Restorative justice seeks to promote victim offender mediation to discuss the aftermath of the crime; it seeks to restore both victims and offenders and it is expected that offenders take necessary steps to repair the harm they have caused. This process is usually separated from the judicial process, although they could coincide. It should further be noted that a reparations process could have restorative goals without the process being restorative itself.

Reparative justice on the other hand, is concerned with how victims experience the justice process in terms of how far the specific harm they have suffered is repaired. It can be broken down in to three main components; first, the notion of reparations, which encompasses the substantive outcome of an award aimed at repairing harm suffered by victims. The second component focuses on victims’ procedural rights such as rights to access proceedings and rights to protection and support in the judicial process. The final component of reparative justice focuses on more nuanced and complex aspects of victims’ perceptions of the overall justice mechanism such as fairness and the restoration of dignity. Reparative justice recognizes the importance of criminal prosecution in contrast to restorative justice, which can be viewed as an alternative to prosecution. In conclusion, the concept of a reparative justice perspective in this research paper corresponds to a victim-centred approach to the ICC reparations regime.

The notion of reparations constitutes an important part of reparative justice, adding to the symbolic value of reparations. To be able to convey recognition over the dispute between the perpetrator and victim, those responsible for wrong need to offer acts of reparations. They

28 Letschert et al., 2010, pp. 498–499.
29 Goetz in Wemmers, 2014, p. 54.
need to acknowledge the reality of the wrongs done as well as the harm the victim has suffered. It is the perpetrator who needs to affirm repairs to the victim as a requirement of justice. For the perpetrator to express a sincere apology is often the best way to convey this message. An apology is, however, not always sufficient in largescale cases of mass violence and systematic oppression; material reparation may then be imperative. What reparation that is fitting is determined by the connection to the victim’s sense of justice rather than acts of goodwill or charity.\textsuperscript{31} The nature of harm suffered by the victim has to be evident in the offered reparations to make them fitting.\textsuperscript{32}

Justice for victims affirms their dignity by acknowledging the wrongs they have suffered and remedying their harm. Owing to the scale and gravity of international crimes, victims’ emotional, practical and informational needs are often acute. They may require medical rehabilitation, public acknowledgement as well as supportive measures in legal proceedings to cope with their trauma and to ensure that they are not re-victimised. Given the scale of harm caused by international crimes victims may, in practical terms, need protection, provision of basic necessities and financial support. Victims of large scaled atrocities may also be in need of knowledge of the wider context of violation as to why they were targeted, who were responsible, to see them punished and knowing how to access redress. Justice for victims encompasses the access to redress as well as a fair treatment when interacting with the criminal justice system.\textsuperscript{33} Judicial mechanisms should enable victims to obtain redress and make perpetrators make fair reparations to victims. Provisions of procedural justice, such as legal representation and support to claim reparations can provide the victim with satisfaction of the justice process.\textsuperscript{34} Denying victims of crime a legal status as a victim and not remedying the harm they have suffered are factors that could lead to secondary victimisation.\textsuperscript{35}

Certainty in regards to reparations is of importance in order to avoid secondary victimisation, also known as victim re-traumatization.\textsuperscript{36} Predictability and clarity can be considered an imperative for certainty. If reparations are based on a case-by-case basis rather than on pre-established and court wide principles there is a risk of reparation procedures being plagued by

\textsuperscript{31} Walker, 2010, pp. 20–22.
\textsuperscript{32} Ibid., p. 43.
\textsuperscript{33} Moffet, 2014, ICD Brief 6, pp. 2–3.
\textsuperscript{34} See principles 12–14 of the UNBPG.
\textsuperscript{35} Moffet, 2014, ICD Brief 6, p. 3.
\textsuperscript{36} REDRESS, 2011, pp. 24–25.
uncertainty. When victims are allowed to claim reparations, the procedure should be clear and accessible. In relation to cases of mass atrocities, courts can expect large numbers of reparation claims. Provisions regarding reparation should therefore clearly regulate queries such as who can apply, in what form and at what time in the legal process. Reparation procedures that are characterized by uncertainty are predisposed to cause victim dissatisfaction.

Adding to the importance of the notion of reparations are situations where societies have been struck by mass atrocities and reparations consequently focus on development aid, albeit the goal is to achieve reparative justice. It is important to note that according to general human rights law, basic social services are to be provided anyway. Reparations should not substitute goals that could be achieved on other grounds, reparations are meant to focus on achieving justice for victims by redressing the harm they suffer. Although it could be enticing to perceive development programmes as reparations and consequently avoiding complex issues of accountability and victim classification, they lack the notion of reparations as achieving justice. Adding to the understanding of this view, the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation stipulates that ”Governments should not undertake development instead of reparation. All post-conflict societies need both reconstruction and development, of which reparation programmes are an integral part [...]”

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37 Vasiliev et al., 2013, pp. 1371–1374.
39 Letschert et al., 2010, pp.177–178.
40 Principle 3B of the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation.
The Right to Reparations in International Law

The very nature of harm caused by international crimes is often irreparable. Financial resources available for reparations as a consequence of international crimes are often inadequate as these crimes characteristically leave large numbers of victims. Entire societies are left traumatized and reparations should therefore aim to reach beyond individual compensation.41

2.1 State Responsibility and Reparations

States and domestic legal systems have the main responsibility for the enforcement of humanitarian and international human rights law. The key element of providing justice for victims and accountability for violations is the duty of the State to provide reparations.42 State reparations rest on a basic principle of international law, which states that an act of internationally wrongful character is governed by international law.43 Reparations for the harm caused by the internationally wrongful act shall, singly or combined, take the form of restitution, compensation and satisfaction.44 The ICJ originally laid out some of these principles in the Chorzów Factory Case 1928. The Court stated that an essential principle incorporated in the notion of illegal acts is that “[…] reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”45 This type of reparation is often referred to as the principle of full reparation or restitutio in integrum and has been widely applied by courts and tribunals in international law. The harm caused by international crimes are oftentimes not amenable to the principle of full restitution and human rights jurisprudence have therefore developed a range of other modes of innovative reparations principles where full restitution is not possible.46 These principles have come to comprise anything from commemoration to atonement and apology.47

42 Bassiouni, 2006, p. 231.
44 Ibid., Article 34.
2.2 State Reparations to Individuals

Victims are increasingly taking place in international criminal law.\textsuperscript{48} This interest does not however originate from the international criminal law tradition; a focus on victims’ rights originally developed within the field of international human rights law.\textsuperscript{49} Reparations under international law were for a long period of time not victim oriented and they were not formed to provide reparations for human beings; the main subject of reparations were inter-state relations. It is only in more recent times that a process of humanization of international law has started to evolve.\textsuperscript{50}

Professor Theo van Boven was in 1989 assigned by the UN Commission of Human Rights to undertake a study on the right to restitution, compensation, rehabilitation and redress for victims of gross human rights violations.\textsuperscript{51} His study involved keeping a dialogue with governments, organizations, other highly respected experts as well as doing extensive research of existing law norms.\textsuperscript{52} After years of working with van Boven’s draft resolution\textsuperscript{53}, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the UNBPG) was approved by the UN Commission on Human Rights in 2005.\textsuperscript{54} The UNBPG distinguish five types of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\textsuperscript{55}

2.3 Reparations Provided by Individual Perpetrators

There is a clear distinction in international law between the responsibilities of states versus individuals regarding the obligation to provide reparations. It is only in more recent years individuals have gained increased recognition as a subject under international law and also have been obliged to make reparations.\textsuperscript{56} Notwithstanding it being a soft-law instrument, the

\textsuperscript{48} Schabas, 2007, p. 323.
\textsuperscript{49} Ibid., p. 326.
\textsuperscript{50} Letschert et al., 2010, p. 154.
\textsuperscript{51} Bottiglieri, 2004, p. 179.
\textsuperscript{52} Bassiouni, 2006 p. 248.
\textsuperscript{54} Bassiouni, 2006, pp. 249–250.
\textsuperscript{55} Principles 19–23 of the UNBPG.
\textsuperscript{56} Dwertmann, 2010, p. 22.
UNBPG reflect international standards regarding treatment of victims.\textsuperscript{57} Apart from the obligation of states to provide reparation for victims, it also includes the possibility for other entities to make reparations. The UNBPG expresses that individual violators also could be obliged to make reparations by stating that “\textit{In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.}”\textsuperscript{58} In line with the UNBPG, the provisions in the Rome Statute clearly reaffirm the obligation of placing the convicted persons under an obligation of providing reparations to their victims.\textsuperscript{59}

### 2.4 Learning from Old Mistakes

The reparations regime of the ICC is partly based on domestic practice and international human rights provisions. The unableness of other international courts and tribunals to remedy harm caused to victims has additionally inspired the Court’s reparations provisions.\textsuperscript{60} Both the International Criminal Tribunal for the former Yugoslavia (the ICTY) and the International Criminal Tribunal for Rwanda (the ICTR) were created along retributivist lines. The rules of these two ad hoc tribunals envisage a system where victims would seek reparations in domestic courts, but it is questionable if these kinds of resources ever will exist in national bodies.\textsuperscript{61} On the basis of Rule 106(b) of the Rules of Procedure and Evidence of the ICTY and ICTR, victims may bring actions in a national court to obtain compensation. Although, damages awarded in Rwanda as a result of proceedings in national law have yet not been enforced due to lack of funds domestically.\textsuperscript{62} These previous mistakes underscore the importance of the ICC’s reparations regime and it is momentous that the Court learns from the previous missed opportunities of the ICTY and the ICTR in regards of reparations.

\textsuperscript{57} Dwertman, 2010, p. 22.
\textsuperscript{58} Principle 15 of the UNBPG.
\textsuperscript{59} Vasiliev et al., 2013, pp.1366–1367.
\textsuperscript{60} REDRESS, 2011, p. 21.
\textsuperscript{61} Heikkilä, 2004, pp. 175–176.
\textsuperscript{62} REDRESS, 2011, p. 21.
3 Legal Framework of ICC Reparations

Although reparations under the Rome Statute can be ordered against individual convicted persons,\(^{63}\) the character of the ICC reparations regime is not intended to be considered as punitive. The purpose of reparations is to compensate victims for harm. The ordinary meaning of the term *reparation* does not connote punishment for the infliction of harm. The general meaning of the term rather confirms that reparations should be defined as making amends for a wrong, to compensate loss or to repair injury. Not treating reparations as a penalty was a conscious decision made in the negotiating process of the Rome Statute. In fact, the Rome Statute expressly distinguishes the reparations provisions, which are placed in part 7 entitled *The Trial*, from its penalty provisions under part 6.\(^{64}\) In line with reparative justice theory, the reparations provisions in the Rome Statute emphasize justice for victims by not categorizing reparations as a penalty. By letting victims hold a more central role in the legal process it can be suggested that the Statute does to a certain extent, recognize the ineffectiveness of retributive justice theory with regard to remedying harm caused to victims. Numerous elements of the Rome Statutes incorporate important aspects of reparative justice theory. By granting affected victims the right to present their views and concerns at appropriate stages of the proceedings, the ICC became the first international criminal court to affirm active victim participation.\(^{65}\) Further provisions in the Statute awards the Court the right to develop reparations principles, to issue reparations orders and award reparations through the TFV.\(^{66}\)

3.1 Establishment of Principles

Article 75 of the Rome Statute provides the basic conceptual framework of reparations to victims. The fundamental principles of reparations are left to be determined elsewhere as the Statute stipulates:

The Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury of victims and will state the principles on which it is acting.\(^{67}\)

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\(^{63}\) Article 75(2)(1) of the Rome Statute.

\(^{64}\) McCarthy, 2012, pp. 77–79.

\(^{65}\) Article 68(3) of the Rome Statute; See McCarthy, 2012, regarding the ICC being “the first”. p. 254.

\(^{66}\) Articles 75(1), 75(2), 75(2)(2) and 79 of the Rome Statute.

\(^{67}\) Article 75(1) of the Rome Statute.
The wording of Article 75(1) leaves the Court with almost unrestricted discretion in terms of establishing principles, which enables the formation of suitable reparation principles within the sphere of which the Court operates. The wording of the Statute leaves it open as to whether these principles should be established on a case-by-case basis or as more abstract court-wide document.\(^{68}\) It is also not stated what purpose the reparation principles should serve. They could be more descriptive in character or they could be binding. They could be aimed towards national procedures where victims could access reparations in the domestic legal system or they could be directed towards other neutral institutions such as state or non-state actors. On the one hand, flexibility could be considered as a fundamental necessity for the Court to make its reparations regime work. On the other hand, established principles could serve the purpose of avoiding legal uncertainty.\(^{69}\) Although principles must comply with the Rome Statute, its Rules and in line with general principles of international law, Article 75(1) leaves the Court with almost a legislative function of establishing principles relating to reparations.\(^{70}\) When the ICC develops jurisprudence in respect of reparations, it can emanate from principles developed in international law and international human rights law, but it needs to consider the distinct context of which international criminal law applies. Reparation principles arising from Article 75(1) of the Rome Statute are based on the concept of individual criminal responsibility, rather than reparations based on state responsibility.\(^{71}\)

As stated in Article 75(1)(2) of the Rome Statute, the Court may also determine the scope of damage and state the principles on which it is acting. The Court has the possibility to appoint experts to determine the extent of damage as well as to find appropriate types of reparations; which could either be formed on an individualized basis or a collective basis, if deemed appropriate.\(^{72}\) It would, however, be very ill-advised if the objective of \textit{determine the scope and extent of any damage, loss and injury} would be for the Court to engage time in procedures of damage assessment. It is more plausible that the determination of damages is intended to serve as an acknowledgement of harm or provide a foundation for reparation orders.\(^{73}\)

\(^{69}\) Ibid., pp. 45–46.  
\(^{70}\) Article 21 of the Rome Statute.  
\(^{71}\) McCarthy, 2009, p. 256.  
\(^{72}\) Rules 97(1) and 97(2) of the RPE.  
\(^{73}\) Dwertmann, 2010, pp. 64–65.
Other court-wide principles, apart from damage assessment, could preferably be established to manage victim expectation and safeguard an effective functioning of reparations. These could include the modalities of reparations, eligibility, enforcement and more general provisions to protect the right of victims.\textsuperscript{74} Reparation principles could set the criterion for reparation awards in order to reach a degree of certainty and consistency and to reduce the risk of unmet expectations of victims.\textsuperscript{75} According to McCarthy, the establishment of effective reparations principles is key to the success of the ICC’s reparations regime.\textsuperscript{76}

3.2 Reparation Orders

Establishing principles is only one part of the overall reparations regime. One very important element of the regime is the ICC’s power to issue reparations orders, which is set out in Article 75(2)(1): "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."

3.2.1 Beneficiaries

The right to file claims for reparations before the ICC is reserved to victims.\textsuperscript{77} Rule 85 define victims as \textit{natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court}.\textsuperscript{78} Institutions devoted to, \textit{inter alia}, religion, education, humanitarian purposes and which property have sustained direct harm are also included in the definition of victims.\textsuperscript{79} This very broad definition of victims, as both natural and legal persons, is applicable in all instances where victims are mentioned in the Rome Statute.\textsuperscript{80} To conclude, for a person to have the right to file claims for reparations, the damage loss or injury must emanate \textit{as a result} of a crime for which the perpetrator is responsible. The Court has jurisdiction over crimes listed in Article 5 of the Rome Statute, with respect to crimes committed after the Statute entered into force on 1 July 2002.\textsuperscript{81} To be eligible for reparations, the person has to qualify as a \textit{victim} and the crime resulting in the harm must have led to a conviction. The Court may make reparation orders directly against a perpetrator after a

\textsuperscript{74} REDRESS, 2011, Annex 1, p. 82.
\textsuperscript{75} Dwertmann, 2010, p. 61.
\textsuperscript{76} McCarthy, 2012, p. 182.
\textsuperscript{77} Article 75(1)(2) of the Rome Statute; Rule 94 of the RPE.
\textsuperscript{78} Rule 85(a) of the RPE.
\textsuperscript{79} Ibid., Rule 85(b).
\textsuperscript{80} Dwertmann, 2010, p. 197.
\textsuperscript{81} Article 11 of the Rome Statute.
conviction; reparations should therefore accordingly only concern the harm to which the convicted persons criminal responsibility relates.\textsuperscript{82}

Although no definition of what constitutes harm has been provided for in the Rules or Rome Statute, the definition of the term is very relevant to determine eligibility for reparations. It is not clear if \textit{harm} is an umbrella term consisting of the sub-categories \textit{damage, loss, injury} as stated in Article 75(1), however, the Court have recognized other forms of harm. The ICC has affirmed that material, physical or psychological harm, if suffered personally by the victim, falls under the scope of Rule 85.\textsuperscript{83} The Court has also noted that, in absence of a definition of \textit{harm}, the term has to be determined on a case-by-case basis and in accordance with internationally recognized human rights as stipulated in Article 21(3) of the Rome Statute.\textsuperscript{84} The Court has additionally recognized emotional suffering and economic loss to fall within the scope of \textit{harm} in the meaning of Rule 85.\textsuperscript{85}

There is further no provision in the Rome Statute or Rules, which expressly set forth if the term \textit{harm} encompasses indirect harm under Rule 85(a). Could indirect victims, such as family members who are linked to the direct victim, also receive victim status? They may in fact have suffered harm \textit{as a result} of a crime within the Court’s jurisdiction. When drafting Rule 85 no agreement to expressly include family members of direct victims could be reached, but this should not be interpreted as to exclude family member only because of the fact that they are not explicitly mentioned in Rule 85.\textsuperscript{86} The Court has set forth that individuals can either be a direct or an indirect victim of crime within the Court’s jurisdiction. What determines if an individual will receive victim status under Rule 85 is whether or not the harm suffered is personal to the individual. This will in turn have to be determined in the light of the particular circumstances.\textsuperscript{87}

\textsuperscript{82} McCarthy, 2012, p. 136.
\textsuperscript{83} ICC-01/04-01/06-1432, AC, \textit{Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008}, 11 July 2008, para. 32.
\textsuperscript{84} ICC-01/04-101, PTC1, \textit{Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6}, 17 January 2006, para. 81.
\textsuperscript{85} Ibid., para. 116.
\textsuperscript{86} Dwertmann, 2010, pp. 84–86.
\textsuperscript{87} ICC-01/04-01/06-1432, AC, \textit{Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008}, 11 July 2008, para. 32.
3.2.2 “In Respect of” Victims

The Court cannot only order reparations to victims, but also in respect of victims as stated in Article 75(2) of the Rome Statute. This clarifies the fact that other than those who qualifies as victims might potentially benefit from reparations. Where indirectly harmed collectives or family members are not recognized as victims under Rule 85, there is still a possibility to benefit from reparations in respect of. Furthermore, reparations may be awarded in respect of deceased victims, where the person filing the reparations claim can be awarded reparations on behalf of the deceased victim. According to Dwertmann, this wording could be interpreted as a clarification of the Court’s ability to de facto make reparation awards through the TFV. The decision to use the wording in respect of was made to widen the scope of potential beneficiaries to persons who are indirectly affected by the crime. The objective of awarding reparations in respect of is seemingly to benefit as many of those individuals affected by the crime as possible, and to be able to contribute to restoration in a broader sense.88

3.2.3 Causation

To assess if there is a relation between the conduct of a perpetrator and the harm caused to the victim, the Court must make both a factual and a legal causation analysis. This is a very complex assessment to make since the harm resulting from an international crime in relations to the act of a single perpetrator often depends on several factors. The harm caused to victims is oftentimes the result of several combined actions committed by more than one person. The Court must therefore determine to what extent the individual perpetrator contributed to the harm in order to decide the liability for reparations in respect to the harm caused. There is no single test of factual causation to determine the liability to make reparations. Setting a high threshold for the harm caused relating to the perpetrator may result in no reparations; setting a low threshold could result in the perpetrator’s liability to make reparations getting out of proportion.89

Once it can be determined that the perpetrator factually caused the harm, a second causation analysis is needed; an analysis to determine the nexus between the harm and the criminal conduct. In addition, this nexus has to be sufficiently close in order for the perpetrator to be

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obliged to make reparation.\textsuperscript{90} However, considering the gravity of harm normally caused by international crimes in combination with the limited resources allocated to reparation awards, determining eligibility for reparations will become a matter of allocating resources and prioritizing rather than formulating a legal causation test.\textsuperscript{91}

\subsection*{3.2.4 Modalities of Reparations}

The Rome Statute specifies that reparations include restitution, compensation and rehabilitation,\textsuperscript{92} yet the list is non-exhaustive. It is left to judicial discretion to define the content of these forms of reparations. International human rights law, particularly the UNBPG, is a valuable source for the ICC to draw from when defining the contents of the modalities of reparations.\textsuperscript{93}

*Restitution* refers to restoring the victim to the original situation, prior to any atrocities. This includes, inter alia, restoration of liberty, enjoyment of human rights, identity, family life and citizenship and return of property.\textsuperscript{94} The goal of *restitution in integrum* is, in the majority of cases, not applicable to the harm caused by crimes under the Court’s jurisdiction. The obligation to make reparations should only be provided to the extent where it is not materially impossible and does not involve a disproportionate burden.\textsuperscript{95} *Compensation* should be provided for economical damage as in proportion to the gravity of the violation on a case-by-case basis. Examples of damages are physical or mental harm, lost opportunities as employment and education, loss of earnings and costs relating to legal assistance and social services.\textsuperscript{96} A prerequisite for compensable economical damage is that the harm should have affected the actual person or property, e.g. the pure violation of rights is not compensable. Although monetary compensation is the most frequent form of reparation in international human rights law, restitution remains the preferred form.\textsuperscript{97} *Rehabilitation* includes medical and psychological care.\textsuperscript{98} As victims of international crimes often suffer from long-term

\begin{footnotes}
\textsuperscript{90} McCarthy, 2012, pp. 148–149.
\textsuperscript{91} Ibid., pp.150–152.
\textsuperscript{92} Articles 75(1) and 75(2) of the Rome Statute.
\textsuperscript{93} Moffet, 2014, pp. 167–168.
\textsuperscript{94} Principle 19 of the UNBPG.
\textsuperscript{95} Article 35 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001.
\textsuperscript{96} Principle 20 of the UNBPG.
\textsuperscript{97} McCarthy, 2012, p. 162.
\textsuperscript{98} Principle 21 of the UNBPG.
\end{footnotes}
physical injuries and post-traumatic stress disorder, rehabilitation is a particularly important form of reparation.\(^{99}\)

Although only three modalities of reparations are mentioned in the Rome Statute, the Court may adopt other internationally recognized forms of reparations. There are five types of reparations generally accepted in international human rights law. Apart from the three explicitly mentioned in Article 75 of the Rome Statute, two more symbolic forms of reparations are furthermore considered internationally recognized; satisfaction and guarantees of non-repetition.\(^{100}\) Satisfaction acts as an umbrella of measures to satisfy victims other needs such as end of cessation of violations, public apology, commemorations to victims and judicial sanctions against perpetrators.\(^{101}\) Given the gravity of harm caused by crimes under the Court’s jurisdiction, restitution may at times be impossible as well as the funds to provide for compensation may be limited; satisfaction can act as an important form of reparation.\(^{102}\) Guarantees of non-repetition include measures of structural character such as ensuring effective civilian control of military, strengthening judicial independence and promoting instruments for preventing social conflicts.\(^{103}\) The fact that these other two forms of reparations were omitted from the Statute does not mean that they are redundant. The use of the term \textit{including} in Article 75(1) of the Rome Statute suggests that the list is illustrative and permits other types of reparations.\(^{104}\) The Court has affirmed the abovementioned in its decision establishing the principles and procedures to be applied to reparations in the case of \textit{The Prosecutor v. Thomas Lubanga Dyilo} (the Lubanga reparations decision).\(^{105}\) By stating that the modalities of reparations mentioned in the Rome Statute are not exclusive, the Court set forth that reparations with a symbolic, preventive or transformative value may be appropriate.\(^{106}\)

\(^{100}\) Moffet, 2014, pp. 172–173.
\(^{101}\) Principle 22 of the UNBPG.
\(^{103}\) Principle 23 of the UNBPG.
\(^{105}\) ICC-01/04-01/06-2904, TC1, \textit{Decision establishing the principles and procedures to be applied to reparations}, 7 August 2012 (the Lubanga reparations decision).
\(^{106}\) Lubanga reparations decision, para. 222.
3.3 Implementation of Court-Ordered Reparations

Apart from the forms of reparations explicitly mentioned in Article 75(1) and (2) of the Rome Statute, there are no further provisions on how these reparations could be awarded. The Rules, do however, provide the possibility to award both individual and collective reparations. Rule 97(1) states that: “Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”. As both types of reparations can exist in the same award, there is a possibility for victims to benefit from individual and collective awards; the one need not exclude the other.

3.3.1 Individual Awards

It is important to note that although international crimes may affect a collective, they also affect individuals as part of this collective.\textsuperscript{107} The general rule is that reparation awards should be made on an individualized basis, collective reparations are undoubtedly allowed, but they should only be awarded where appropriate.\textsuperscript{108} Individual rewards could have a useful role in scenarios where crimes have led to a small or very distinct category of victims, making collective awards inapposite.\textsuperscript{109} As money usually serve as the measure of value, individual awards generally tend to be of a monetary rather than of a non-monetary character. The aim of individual reparation awards is typically to redress a specific harm. As both the harm and causal link between the harm and criminal conduct have to be assessed in each individual case, court-ordered reparations directly to victims could be a costly process.\textsuperscript{110}

It could also be impossible or impractical for the ICC to make individual awards directly to victims. If this would be the case, the Court could let the TFV distribute those awards.\textsuperscript{111} How to assess if it is impossible or impractical to make individual awards is not provided for in the Rules. The Regulations, however, stipulates two scenarios. Firstly, where beneficiaries have been identified but information such as names and locations are unknown.\textsuperscript{112} Secondly, where beneficiaries have not been identified or where there are such a large number of victims,
making it burdensome to identify them.\textsuperscript{113} Unlike the ICC, the TFV uses a more standardize
criteria when verifying individual claims, which could result in that individual awards made
through the Fund not being as individualized as rewards made directly by the Court.\textsuperscript{114}

As a concluding remark, it is important to note that if reparation awards solely would be
based on an individual claims procedure, there would evidently be a risk of creating a
tendency of only addressing harm on an individualised basis. This could, in turn, lead to
unnecessary difficulties on how to prioritise and allocate resources between groups of victims
and different forms of harms. A disproportionate focus on individual reparation claims could,
in a wider perspective, lead to reparations being designed in a way, which fails to use limited
financial resources in the best interest of victims as a whole.\textsuperscript{115}

3.3.2 Collective Awards

Due to the character of the crimes under the ICC jurisdiction, there is a risk that ordering
reparations in respect of all individual victims who have submitted claims would be
burdensome or impractical. Administering a claims process is very costly if there is a large
group of potential beneficiaries and this could risk depleting the resources available to fund
reparations. Granting claims to all the victims who are legally entitled them may, in other
words, be practically impossible.\textsuperscript{116} A reparation reward can therefore be directed to a
collective of victims, focusing on the victimised group rather than the individual victim.

There is a significant risk of the convicted person lacking financial resources to the extent of
compensating a larger number of victims. Furthermore, the greater the harm, the less likely it
is that individual awards are capable of remedying such harm. There is a risk of individual
reparations not being implemented or excluding a large part of equally harmed victims.
Hence, collective reparations may be the most realistic way of addressing the harm caused to
victims.\textsuperscript{117} The concept of collective reparations is the reasoning behind it; more precisely that
certain crimes may be directed towards a specific group, consequently leading to the
individual being victimised as a result of the victimisation of the entire group. Unidentified
victims who cannot claim reparations before the ICC, either due to their social situation or

\textsuperscript{113} Regulation 60 of the RTFV.
\textsuperscript{114} Dwertmann, 2010, p. 120.
\textsuperscript{116} Ibid., p. 354.
\textsuperscript{117} Dwertmann, 2010, p. 121.
victimisation, could benefit from collective reparations. These types of awards are furthermore better suited to address the harm that international crimes characteristically cause. Collective awards typically allow a very flexible approach on how to remedy harm; they can include financial awards as well as reparation measures of a more symbolic nature.\textsuperscript{118}

Where the number of victims and the scope of reparations make a collective award more appropriate, the Court may order that the award should be made through the TFV.\textsuperscript{119} The Fund shall then set out the structure and means of implementation of the collective awards.\textsuperscript{120} This type of reparation can be awarded for collective purposes as well as it can be awarded to individual members as a part of the collective.\textsuperscript{121} Furthermore, the ICC has the possibility to order reparations to be made through the TFV to an intergovernmental, international or national organization representing a collective of victims, acting as an intermediary when it comes to distributing the awards.\textsuperscript{122}

The reparations could additionally consist of an amount of money awarded to an institution designed to benefit a group of victims as a whole. The more symbolic types of collective awards could be categorized as moral reparations; measures aiming to restore the dignity of victims. These could include a public apology made by the convicted person; such an apology should always be awarded the victimised group if the convicted person is willing to do so. Other types of collective reparations could include anything from educational and rehousing programmes to the establishment of rehabilitation centres for victims who suffer either physical or psychological harm.\textsuperscript{123}

\subsection*{3.4 Difficulties in Ordering Reparations against a Convicted Person}

The ICC can make an order directly against a convicted person as provided for in Article 75(2) of the Rome Statute. A significant problem of ordering reparations is the risk of inadequate resources of the perpetrator, making it impossible to afford reparations for thousands of victims. As the Court relies on individual criminal responsibility, this may

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{118} Dwertmann, 2010, pp. 122–123.
    \item \textsuperscript{119} Rule 98(3) of the RPE.
    \item \textsuperscript{120} Regulation 69 of the RTFV.
    \item \textsuperscript{121} Dwertmann, 2010, p. 121.
    \item \textsuperscript{122} Rule 98(4) of the RPE.
    \item \textsuperscript{123} Dwertmann, 2010, pp. 126–128.
\end{itemize}
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consequently risk impeding the amount of reparations that victims can receive.124 There may be situations, although this presumably only will happen in few exceptional cases, where the convicted person has accumulated a significant amount of personal wealth, enabling the perpetrator to provide reparations to the victims.125 This is however, considered highly unlikely as there is a significant risk of perpetrators being declared indigent. The convicted persons inabilities to make reparations to their victims pose a great challenge to the ICC reparations regime. To overcome this issue, the Court has to rely on the voluntarily contributed resources of the TFV.126

4 The Trust Fund for Victims

The TFV was officially established on 9 September 2002, pursuant to Article 79(1) of the Rome Statute.\textsuperscript{127} The Fund is the first of its kind in international law with the mission of supporting activities, which address the harm of victims caused by international crimes.\textsuperscript{128} As there are practical challenges of implementing Court-ordered reparation awards, the TFV has a crucial role to play when working with victims in the implementation process. If the ICC would not be able to provide a meaningful reparations programme, it would lose credibility in the eyes of the victims and the general public.\textsuperscript{129} There are two distinct aspects of the overall mandate of the TFV. First, to implement reparation awards ordered by the Court against a convicted person and second, to use its other resources for the benefit of victims subject to Article 79 of the Rome Statute.\textsuperscript{130}

4.1 The Relation Between the TFV and ICC

The TFV is an independent body under the ICC, although the degree of independence has not been specified any further.\textsuperscript{131} The Fund is required to manage its activities in accordance with its Regulations, created by the Assembly of States Parties (ASP).\textsuperscript{132} The activities of the TFV and the allocation of its funds are managed by its Board of Directors, which must adhere to the provisions set out in the Regulations, the Rome Statute, and the Rules.\textsuperscript{133} When the Board of Directors of the TFV decides to implement an assistance programme to benefit victims, it has to formally notify the Court, which in turn gets a chance to determine the eligibility of the assistance.\textsuperscript{134}

4.2 Funding

Although the TFV is not part of the budgetary framework of the Court, the possible funding resources of the Fund are many. Resources can be collected through Court-ordered reparation

\textsuperscript{127} ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002.
\textsuperscript{128} Vasiliev et al., 2013, p. 1361.
\textsuperscript{130} Rule 98(2–5) of the RPE.
\textsuperscript{131} Dwertmann, 2010, p. 289.
\textsuperscript{132} ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, 3 December 2005; The Court has the possibility to propose amendments to the Regulations and if any changes shall be made, the approval of the ASP is needed in accordance with Regulation 78 of the RTFV.
\textsuperscript{133} ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002, para. 7.
\textsuperscript{134} Regulation 50(a) of the RTFV.
awards and the Court can further order resources to be collected through fines and to be transferred to the TFV. The ASP can decide to allocate contributions to the Fund as well as the TFV can receive voluntary contributions by governments, international organizations and other entities.\textsuperscript{135} Voluntary contributions by the ASP are the major source of the TFV’s resource base, which was estimated to EUR 10 million in July 2014.\textsuperscript{136} As adequate resources shall be provided by the TFV to complement Court-ordered reparation awards, EUR 3.6 million is currently reserved for this purpose.\textsuperscript{137}

### 4.3 Beneficiaries

Article 79(1) of the Rome Statute states that the TFV is established for “[…] the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”\textsuperscript{138}

As the TFV’s mission is to support programmes that address harm resulting from international crimes; consequently the scope of beneficiaries has to be wide. The adding of victims’ families to the beneficiaries is one aspect of what broadens the scope beyond that of the Court. The other part relates to how crimes within the jurisdiction of the Court can differ depending on which of its two mandates the Fund if fulfilling. When the TFV implements Court-ordered reparations it can only relate to a crime that a person has been convicted for.\textsuperscript{139}

If the TFV provides assistance from its other resources, neither the Rules nor the Regulations require a link to a limiting criterion such as on-going proceedings.\textsuperscript{140} In principle, the TFV’s competence could extend to all victims of international crimes even in absence of a link to the ICC. However, to establish if a person has been the victim of a crime within the Court’s jurisdiction implies that some form of recognition by the Court would seem necessary. To be able to maintain a threshold for the access to the TFV it has been proposed that the Fund’s resources only should be accessible once the Court has made a decision to let the Prosecutor commence an investigation.\textsuperscript{141}

\textsuperscript{135} Regulation 21 of the RTFV.
\textsuperscript{138} See also Regulation 48 of the RTFV.
\textsuperscript{139} Regulation 46 of the RTFV.
\textsuperscript{140} Regulations 42 and 47 of the RTFV.
\textsuperscript{141} Bottigliero, 2004, pp. 231–232.
4.4 The Dual Mandate of the TFV

What differentiates the ICC’s reparations regime from its predecessors, is the possibility to complement reparations orders with voluntary contributed resources not deriving from the perpetrator. As the TFV is an independent body of the Court, it does not have to link its own finances to the convicted person. Dwertmann points out the fact that Court-ordered reparations primarily addresses the harm caused to persons rather than their current needs. Reparations could be strictly symbolic while victims are in need of material support. The TFV’s assistance mandate makes it possible for victims and their families to receive assistance prior to a conviction, using the Fund’s voluntary contributed resources. Although the assistance is not linked to a convicted perpetrator, the support is very important as to address victims’ urgent needs that predate the conviction. This may consequently have a reparatory effect on victims. The Rome Statute does not expressively mention that the TFV can provide independent support to victims. Rule 98(5) sets out the option for the Fund to provide assistance to victims outside the scope of Court-ordered reparations: “Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79”. The other resources refer to resources other than those collected through reparations, fines and forfeitures; i.e. voluntarily contributed resources.

Without prejudice to its assistance mandate, the Board of Directors shall further undertake all reasonable endeavours to provide adequate resources to complement Court-ordered reparations. Given the dual mandate of the TFV, an important question is how to apportion its other resources between complementing Court-ordered reparations and its assistance programmes. The Court has touched upon this matter in its decision on the notification by the TFV to implement assistance programmes in the Democratic Republic of the Congo (DRC). Pre-Trial Chamber I held that “[...] the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to article 75 of the Statute.” The TFV would have to take factors such as the nature of the crimes and the size of the beneficiary group, when deciding on what adequate

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142 McCarthy, 2012, p. 82.
144 Rule 98(5) of the RPE; Regulation 47 of the RTFV.
146 Regulation 47 of the RTFV.
147 Regulation 56 of the RTFV.
148 ICC-01/04-492, PTC1, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, 11 April 2008, p. 7.
resources would amount to within the meaning of the TFV being required to allocate resources for reparations.\textsuperscript{149}

\textbf{4.4.1 Reparation Mandate}

Article 75(2)(2) provides that: "Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79." This wording does not provide any clarity of what is meant by the Court having the ability to order reparations \textit{through} the TFV. According to McCarthy, the term could indicate that the Court has the power to order reparation awards utilizing the TFV’s \textit{other resources}. A more narrow interpretation would be that the TFV acts as an intermediary, which distributes property deriving from the convicted person to the victims. This interpretation implies that it is left to the sole discretion of the TFV if the other resources are to complement a Court-ordered reparation.\textsuperscript{150} To determine what is meant by the wording \textit{through}, the drafting process of the Rules is of great importance. The delegates did \textit{de facto} reject the option of granting the Court the power to order the TFV to complement awards with its other resources. The reason for rejecting this suggestion was that the TFV is to be considered an independent body of the ICC.\textsuperscript{151}

The Fund’s reparations mandate is linked to resources collected through fines or forfeiture and awards for reparations as stipulated in Section II of the Regulations. The Board of Directors is to determine the use of such resources with regard to the scope of beneficiaries and the nature of the awards and in accordance with any instructions given by the Court.\textsuperscript{152} If no such instructions are provided, the Board of Directors can determine the use of the resources in accordance with Rule 98 of the Rules.\textsuperscript{153} It is furthermore up to the Board to decide whether to complement the resources for awards with the TFV’s other resources.\textsuperscript{154} The TFV is, in conclusion, not legally obliged to complement reparations with its other resources.\textsuperscript{155}

\textsuperscript{149} Regulation 55 of the RTFV.
\textsuperscript{150} McCarthy, 2009, p. 265.
\textsuperscript{151} Dwertmann, 2010, p. 273.
\textsuperscript{152} Regulation 43 of the RTFV.
\textsuperscript{153} Ibid., Regulation 44.
\textsuperscript{154} Ibid., Regulation 56.
\textsuperscript{155} Ibid.; Rule 98(5) of the RPE.
Whether victims of crimes under the jurisdiction of the ICC *de facto* will benefit from individual Court-ordered reparations depends on a variety of conditions. The ICC Prosecutor have to decide to prosecute an alleged perpetrator, there must be a conviction and the convicted person’s financial resources, if there are any such assets, have to be seized. In order for victims of crime to benefit from Court-ordered reparation awards, they have to qualify as victims within the meaning of Rule 85. Additionally, if they do receive victim status, the causal link between the suffered harm and the criminal act of the perpetrator has further to be established.\(^{156}\)

As illustrated above, victims of crimes under the jurisdiction of the Court must meet numerous amounts of requirements in order to be eligible for a Court-ordered reparation award. As this is a very selective process, it would appear very arbitrary if victims, who have been determined eligible for these reparations, would not receive any form of compensation. As stated earlier in this research paper, the reliance on individual criminal responsibly poses great challenges to the overall reparations regime of the Court. The risk of the convicted person lacking financial resources may jeopardise the right of victims to have the harm they suffer remedied. Although the TFV has financial resources reserved for the purpose of supplementing Court-ordered reparation awards, it is not legally obliged to do so. This may appear rather odd and arbitrary from a victim’s point of view.

The Court can order a convicted person to compensate victims, which in itself has a very symbolic value and encompasses the notion of reparations. However, the financial resources that end up being used for these awards may most likely not consist of the asset of the perpetrator. This form of uncertainty would appear to predispose victim dissatisfaction. If victims have made it all the way to receive the victim status needed in order to be eligible for Court-ordered reparations awards. Then they should moreover be allowed to predict that they actually would receive such reparation. The *Lubanga* case further reflects these abovementioned issues.

**4.4.2 Assistance Mandate**

The TFV began operating under its assistance mandate in 2008 when the Court approved the Fund’s submission of launching projects of victim assistance in two situations under the

Court’s jurisdiction, the DRC and Uganda. The TFV has formed several partnerships with non-governmental organizations (NGOs) and local grassroots organizations; and particularly works with these intermediaries as they already have an established presence on the ground. Prior to issuing any grants to its partners, the TFV assesses the situation to be able to target the most marginalized victims; ensuring that the assistance projects directly addresses their harm. The Court approved 34 projects in 2008 and after operating for more than six years, numerous victims and their communities have benefitted from the TFV’s assistance mandate. The projects implemented by the TFV emphasises victim participation in programme planning as well as transparent and sustainable grant-making. Since the TFV began its work, over 110,000 victims of international crimes have been provided support.

The TFV provides three forms of support under its assistance mandate in accordance with Regulation 48; physical rehabilitation, psychological rehabilitation and material support. The same regulation further sets out that the Fund’s other resources shall be used to benefit victims and their families. It should be noted that the term reparation was mentioned in the drafting process of Regulation 48, yet it was a deliberate and considered decision to exclude the term in the finally adopted version. This signifies that there was an intention to conceptually separate reparations within the meaning of Article 75 of the Rome Statute from the use of the TFV’s other resources, which should be used to benefit victims. Noting the terminology and the drafting process, the TFV’s support to victims is not to be equated with reparations under the Rome Statute.

The assistance mandate is based on the programme experience of the TFV and the forms of support constitute a relevant response to the effect of international crimes. By addressing the needs of victims and their families that otherwise would not have been addressed by any other governmental agency, the TFV assistance mandate and its implementing partners manages to fill an important void. As these forms of support can be combined, the assistance mandate strengthens the recognition of that effects of international crimes do not occur in isolation. Beneficiaries of the TFV’s assistance mandate have reported back significant changes such as

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the ability to allowing themselves to make plans for the future, to have a more positive outlook on life as well as regaining the possibility to life a normal life again.\footnote{163}{Trust Fund for Victims [http://www.trustfundforvictims.org/two-roles-tfv] 2014-12-08.}

Physical rehabilitation focuses on supporting victims who have suffered physical injury with medical healing, enabling them to restore their ability to engage in daily life in post-conflict communities. The TFV programmes for physical rehabilitation currently includes the provision of reconstructive and general surgery for, \textit{inter alia}, burns, mutilation and chronic wounds. Prosthetics due to loss of limbs from human amputation, medical services for survivors of sexual violence and physiotherapy sessions are also provided for.\footnote{164}{Ibid.}

Physiological rehabilitation offer programmes to victims, which suffer from psychosocial and trauma-related conditions. These vulnerable beneficiaries include those who have suffered sexual violence, child soldiers and victims who were abducted. The physiological rehabilitation tries to undertake the task of promoting social acceptance in order to reduce stigmatisation of victims. Activities may include counselling to provide psychosocial support, training for trauma counsellors, individual and group-based therapy sessions as well as peacebuilding activities. These type of rehabilitation programmes often result in contributing to broader goals of reconciliation in conflict affected societies.\footnote{165}{Ibid.}

Material support in areas suffering from the effects of international crimes includes supporting the urgent socio-economic conditions of victims. This kind of support addresses problems such as the destruction of property and the loss of income-earning family members. TFV programme activities include establishing and supporting groups, which in turn, include anything from accessing safe shelters and providing educations grants to re-integrate child soldiers and improving agricultural techniques. In other words, material support reflects measures to promote a greater economic security and rebuild community.\footnote{166}{Ibid.}

The design of each assistance programme will address certain cross-cutting themes including; supporting the advancement of women’s human rights and incorporate gender perspectives to ensure that the work of the TFV adopts a gender sensitive design. Promoting peace-building and reconciliation through the acknowledgement and response to stigma and trauma of

\footnotesize{\begin{footnotes}
\item 164 Ibid.
\item 165 Ibid.
\item 166 Ibid.
\end{footnotes}}
specific vulnerable victims. Supporting the rights of children affected by armed conflict, as they are a global human rights priority and a very vulnerable victim group of international crimes. There is confusion in many communities as to the distinction between TFV-funded projects and ICC prosecution efforts. This have in the DRC, generated a reputational risk for the assistance programmes’ implementing partners. It is therefore important to develop communications on how to manage expectations, change attitudes and mobilise communities with the objective of increasing the knowledge of the relationship between the TFV and ICC.  

4.5 Reparations or Humanitarian Aid?

Development programmes or humanitarian aid typically aspire to satisfy basic and urgent needs, making their beneficiaries perceive such programmes as focusing solely on goods distribution to which they, as human beings and not as victims, have rights. Development programmes do not always encompass reparative measures and they do not exclusively target individual or collective victims. They also comprise a high level of uncertainty, as development goals are characteristically both long-term and complex.  

The other resources of the TFV should be used to redress physical, psychological and/or material harm. According to McCarthy, the TFV should be used to redress one of these explicitly mentioned types of harms and not, although seemingly beneficial, provide wider forms of socioeconomic assistance to victims. McCarthy further notes that, if the TFV would provide a wider form of assistance, there would be a risk of conflating the role of the Fund with other humanitarian organizations working in the same area. The use of the TFV’s other resources is meant to act as an acknowledgement of the wrongdoings the victims were subjected to. McCarthy means that the TFV should represent the moral status of the victim as, to be more exact, a victim of a crime under the jurisdiction of the Court. For the TFV to reach such an acknowledgement, it is imperative that the work of the Fund is seen as distinct from general humanitarian aid and it is essential that victims understand this perspective.  

169 Regulation 48 of the RTFV.
This view is, to a certain extent, shared by the TFV. In the *Lubanga* Observations on reparations,\(^{171}\) the TFV stated that it is important to communicate the difference between reparations and development or humanitarian aid.\(^{172}\) It explicitly mentioned *reparations*, but as already presented in this research paper, reparations can include a complement of the TFV’s own voluntary contributed funds. The TFV further shared the views of the International Centre for Transitional Justice’s (ICTJ) report on the concept and challenges of collective reparations. The report addressed the question of how far, or if reparations should take on the form of development or humanitarian assistance. It presents that:

Reparations should not substitute for the state’s duty to pursue development and provide basic needs and social services to everyone regardless of their status as victims […] it is fundamental to make this distinction in order to acknowledge the harm suffered […] it is necessary to articulate the relationship between reparations and development because when poverty is widespread it is simply impossible to avoid the confusion in practice.\(^{173}\)

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\(^{172}\) Ibid., para. 210.

5 Prosecutor v. Thomas Lubanga Dyilo

The very first conviction of the ICC is based upon the ethnic conflict in the Ituri district of the DRC. Thomas Lubanga Dyilo, president of the Union of Congolese Patriots (UPC), and chief commander of its military wing, the Patriotic Forces for the Liberation of Congo (FPLC), was on 14 March 2012 convicted by the ICC.\(^1\) A few months later, the Chamber sentenced Mr Lubanga to 14 years of imprisonment.\(^2\) He was found guilty of war crimes, namely the crimes of conscripting and enlisting children under the age of 15 into the FPLC and actively using them in hostilities from September 2002 to August 2003.\(^3\) Lubanga is said to have had around 3,000 child soldiers under his command at one point and his forces have been accused of carrying out ethnic massacres, rapes and forcing minors into sexual slavery. Human rights activists mean that his conviction does not reflect the scale of atrocities that occurred in the Ituri region, which left as many as 50,000 dead.\(^4\)

5.1 TFV Observations

Prior to any reparations order being issued in the Lubanga case, the TFV was invited to make observations on issues regarding the reparations procedure.\(^5\) According to the Fund, the Court should include explicit language in its reparations stating that reparations should aim at reconciliation. To be able to prevent revictimisation and preventing future violence, reparations should address underlying causes of the conflict.\(^6\) By reaffirming the non-exclusiveness of the forms of reparations set out in Article 75(1) of the Rome Statute, the TFV stated that it could be beneficial for reparations to take on a transformative role and not simply serve as a form of reparative justice. In the aftermath of mass atrocities, transformative reparations could help to overcome structural inequalities. In the context of crimes under the jurisdiction of the ICC, it is often not appropriate to aim for \textit{restitutio in integrum} as victims of such crimes most likely were powerless at the time when the conflict started.\(^7\)

\(^1\) ICC-01/04-01/06-2842, TC1, \textit{Judgment pursuant to Article 74 of the Statute}, 14 March 2012, para. 1142.
\(^2\) ICC-01/04-01/06-2901, TC1, \textit{Decision on Sentence pursuant to Article 76 of the Statute}, 10 July 2012, para. 99.
\(^3\) Lubanga was found guilty of crimes within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute; ICC-01/04-01/06-2842, TC1, \textit{Judgment pursuant to Article 74 of the Statute}, 14 March 2012, para. 1358.
\(^5\) ICC-01/04-01/06-2844, TC1, \textit{Scheduling order concerning timetable for sentencing and reparations}, 14 March 2012.
\(^7\) Ibid., paras. 77 and 72–73.
combination of reparations and structural transformative measures could play an important role for marginalized victims, such as girl child soldiers and victims of gender-based violence.\textsuperscript{181}

The number of children under the age of 18 who have been demobilized from armed groups in the Ituri district between 2003 and 2009 is estimated to 15,000; a number provided to the TFV for its assistance work. Out of this number, approximately 2,900 children could have been part of the UPC/FPLC but there are no further statistics on how many of these children that were under the age of 15 when they were enlisted.\textsuperscript{182} Many of these potentially eligible victims, will however never make it to the ICC. Those who made it all the way to the Court does not necessarily have to constitute a representative sample of the total amount of victims as only 85 applications were submitted to participate in the reparation proceedings.\textsuperscript{183}

During the process of the TFV’s work under its assistance mandate, it has been noticed that programmes that solely focuses on former child soldiers could lead to jealousy in the community and even within families. The majority of people who live in the conflict affected Ituri district are all affected by extensive and severe poverty and insecurity. The ICC reparations process could also lead to identifying ex-child soldiers who preferably would have wanted to maintain a more anonymous role in their community. If singled out in the reparations process, the ex-child soldiers could likely remind the community of their previous action and risk being stigmatised.\textsuperscript{184}

There is a risk of former child-soldiers and their families will refuse to partake in any reparations measures, as they fear reprisals within the community. The TFV believe it is important to address the crime of enlisting child soldiers on a community level before any reparations can begin.\textsuperscript{185} Indeed, many people in the Ituri district do not even perceive enlistment of child soldiers as a crime and therefore do no view them as victims.\textsuperscript{186} The war in Ituri also had an ethnic element and the recruitment of child soldiers was only conducted within a few ethnic communities. Victims who possibly could benefit from either individual or collective reparation will consequently be from a few ethnic groups. Other groups would

\textsuperscript{181} Ibid., para. 76.
\textsuperscript{182} Ibid., para. 106.
\textsuperscript{183} Ibid., paras 107 and 105.
\textsuperscript{184} Ibid., para. 140.
\textsuperscript{185} Ibid., para. 150.
\textsuperscript{186} Ibid., para. 145.
not be able to benefit from reparations even though they themselves have suffered harm from
the violence caused by the UPC child soldiers.\textsuperscript{187} Although it is legally justifiable under the
Rome Statute to target victims as individuals or individuals as part of a group, the procedure
could be very costly and burdensome and risk being counter-productive. Reparations at an
individual level are not advocated by the TFV as this approach may lead to re-victimisation,
stigmatisation, tension and the rebirth of violence.\textsuperscript{188} If reparations only would involve a
small group of victims, the exclusion of the victimised community from which they originate,
risks to impair the very intention behind the reparation in the first place.\textsuperscript{189} Instead, the TFV
promotes a view where collective reparations including measures that involve society as a
whole.\textsuperscript{190}

The TFV points out that the main goal of reparation is to redress harm caused to victims,
contrary to improving the well-being of victims in general.\textsuperscript{191} It is very important to address
questions of unrealistic victim-expectation as the financial resources for the reparation will be
limited. As the people of Ituri face poverty on a daily basis, it is of great importance to
communicate the differences between reparations and humanitarian aid or development
measures.\textsuperscript{192} While the TFV stresses the importance the symbolic value of Lubanga’s
financial contribution to the reparations, it also notes how a reparative effect on victims could
be improved if the TFV’s voluntary contributions was to complement a Court-ordered
reparation.\textsuperscript{193}

5.2 Approaches to the Implementation of Reparations

Pursuant to Rule 97(1), the Court may award reparations on a individualized or collective
basis; or a combination of them both. Several different approaches on how to distribute
reparation awards were presented prior to the Court’s decision. The prosecution suggested
that the Chamber should award reparations both collectively and individually.\textsuperscript{194} It was
contented that collective reparations could provide justice to the wider class of victims and

\textsuperscript{187} Ibid., para. 141.
\textsuperscript{188} Ibid., paras. 151–152.
\textsuperscript{189} Ibid., paras. 163–164.
\textsuperscript{190} Ibid., para. 155.
\textsuperscript{191} Ibid., para. 184.
\textsuperscript{192} Ibid., paras. 209–210.
\textsuperscript{193} Ibid., paras. 241 and 244.
\textsuperscript{194} Lubanga reparations decision para. 46.
affected communities. Collective reparations were considered the best way, given the limited resources, to provide accessible reparations to the community as a whole. Regarding individual reparations, the prosecution highlighted the sense of justice that victims may feel if granted individual awards. Notwithstanding these remarks, it would be an even further sense of justice if Lubanga himself would compensate the victims of crimes for which he was convicted. The prosecution submitted this fact, but due to Lubanga’s limited resources he would be unable to compensate for all the harm that was inflicted on victims. Hence, it would be unnecessary to raise victims’ expectations.

Regarding collective reparations, the defence observed that there are two possible approaches on how to award victims this type of reparation. There is firstly a possibility to award a collective compensation, which remedies the harm that particular individuals have suffered, but on a collective basis. Secondly, collective reparations can be awarded as compensation to a community, without identifying individual members. The defence submitted that if collective reparations are granted, the beneficiaries must be individually identified. It was argued that ordering reparations through the TFV would risk losing any link to the present case. By referring to assistance programmes already run by the TFV, the defence further contented that victims who already had received some form of compensation should not be eligible to receive any further awards.

ICTJ argued that direct victims may be rewarded individual reparations and that the Chamber consequently should prioritise these victims. The legal representatives for one group of victims, correspondingly, submitted that the victims who were authorized to partake in the reparations proceedings should be awarded with individual reparations, taking into account the specific stigma and harm suffered by the victims. The United Nations Children's Fund (UNICEF) points out the risk of individual reparations leading to stigmatisation of the beneficiaries, but notes at the same time that individual awards could have significant utility.

195 Ibid., para. 76
196 Ibid., para. 58.
197 Ibid., para. 46.
198 Ibid., para. 131.
199 Ibid., para. 59.
200 Ibid., para. 77.
201 Ibid., para. 50.
202 Ibid., para. 42.
for marginalized victims. Collective reparations could furthermore risk that the beneficiaries only would represent one side of the ethnic conflict.

As expressed in the TFV’s Observations, the Fund advised against an individualistic approach to reparations, as those reparations would depend on a successful application and would not be representative of the thousands of likely victims in the area. The best way of using the limited funds would be collective reparation measures, as these do not require a time-consuming and costly process of verification. As different ethnic groups were involved in the conflict, the best way to approach reparation would be to give the term collective reparations a wide interpretation. The NGO’s shared the view of the TFV Observations, that individual reparations could be perceived as discriminatory if the international community were to “reward” those who themselves committed horrible acts of violence. Noting that collective reparations do not have to presume collective harm, the NGO’s argue that collective reparations would be the best way to build a reconciled society.

The Office of the Public Counsel for Victims (OPCV), recommended a combination of both individual and collective reparations. Given the factors of Lubangas declared indigence and the TFV’s limited resources, there is a need for a deadline to be set for individual reparation claims in order not to delay the proceedings. They suggest that compensation should be awarded the former child soldiers that previously had submitted individual application forms. Bearing in mind the risk of impacting any wider reparations programme by granting individual reparations rewards, Womens’s Initiatives additionally highlighted the benefits of combining both individual and collective reparations as it is of importance to recognize those who participated in the trial. Some of the victims additionally suggested that those victims who had already benefitted from NGO programmes should not receive any further reparations from the ICC.

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203 Ibid., para. 49.
204 Ibid., para. 53.
205 Ibid., para. 44.
206 Ibid., para. 55.
207 Ibid., para. 48.
208 Ibid., para. 63.
209 Ibid., para. 43.
210 Ibid., para. 47.
211 Ibid., para. 68.
Evidently, there are several benefits of awarding collective reparations. The limited financial resources reserved for reparation awards will be able to help more victims if awarded collectively. By applying reparations equally to a group, there risk of creating a hierarchy of suffering between victims will be very limited. Collective reparations could furthermore benefit the vast majority of victims who does not receive victim status under Rule 85 and become part of a case before the Court. It should be noted that collective reparations awarded to the community as a whole could compromise the right to reparation of the individual. Such reparations may furthermore risk marginalizing the needs of certain vulnerable groups in affected communities; groups such as women and children may have different needs than other affected victims. Non-repaired physical or psychological injuries may e.g. prevent individual victims from earning a living, leaving them to a life in poverty. If individual reparations are to be excluded, it may risk that the harm caused by international crimes remains.

5.3 The First Reparations Decision of the ICC

The very first conviction in the case of the Prosecutor v. Thomas Lubanga Dyilo, was consequently followed by the first reparations decision by the Court. In its decision, and in accordance with Article 75(1) of the Rome Statute, the Trial Chamber established certain principles relating to reparations and their implementation.

When establishing principles of reparations the Court is obliged to treat all victims fairly and equally, not limiting reparations only to those who participated in the trial or applied for reparations awards. All victims have to be taken into account, especially children, elderly, victims with disabilities and those who have suffered gender-based violence. Reparations are to be granted without differentiating between grounds including, inter alia, gender, age, race, religion, wealth or social origin. They should also address underlying injustices and avoid further stigmatisation. In its introductory remarks, the Court noted that reparations are to be provided in a broad and flexible manner, granting the widest possible remedies for victims. When addressing the harm caused by crimes of which Lubanga has been convicted, it

\[\text{\textsuperscript{212}}\text{Ibid., para. 20.}\]
\[\text{\textsuperscript{213}}\text{Ibid., para. 181.}\]
\[\text{\textsuperscript{214}}\text{Ibid., para. 187.}\]
\[\text{\textsuperscript{215}}\text{Article 68 of the Rome Statute; Rule 86 of the RPE.}\]
\[\text{\textsuperscript{216}}\text{Article 21(3) of the Rome Statute.}\]
\[\text{\textsuperscript{217}}\text{Lubanga reparations decision, para. 192.}\]
is important to use great deal of flexibility.\textsuperscript{218} In this case, the Court addressed the following issues with the objective of creating reparation principles; non-stigmatisation, beneficiaries of reparations, accessibility and consultation with victims, victims of sexual violence, child victims, scope of reparations, modalities of reparations, proportional and adequate reparations, causation, standard and burden of proof, rights of the defence, states and other stakeholders and the publicity of the principles.\textsuperscript{219}

Regarding the issue of priority, the Court acknowledged the fact that some victims may be in a particularly vulnerable situation and require immediate medical or trauma care. To be able to guarantee equal and safe access to reparations, the use of affirmative action could be imperative.\textsuperscript{220} As to the uncertainty of the number of victims is in this specific case, the Court stated that the reparations should have a collective approach to ensure that they reach the currently unidentified victims.\textsuperscript{221} As the TFV recommended, the Court furthermore agreed with the fact that the collective approach would be to prefer with regards to the very costly and resource intensive process of granting individual awards.\textsuperscript{222}

As Lubanga has been declared indigent and no monetary resources have been identified for the purpose of reparations, the Court declared that his participation in the reparations purely would be symbolic.\textsuperscript{223} As regards to reparations being made through the TFV, the Court ascertains that in the case of a convicted person being declared indigent, the reparations award is not limited to the seized assets deposited with the TFV; the award can be supported by the Fund’s own resources in accordance with Rule 98(5) and Regulation 56. The Court draws on the language of Regulation 56 and acknowledges that it imposes an obligation on the TFV to complement the resources collected for reparations awards under Rule 98(3) and (4).\textsuperscript{224} In accordance with the \textit{Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund}, the Court reaffirmed that the main responsibility of the TFV is to ensure that sufficient fund are

\textsuperscript{218} Ibid., para. 180.
\textsuperscript{220} \textit{Lubanga} reparations decision, para. 200.
\textsuperscript{221} Ibid., para. 219.
\textsuperscript{222} Ibid., para. 274.
\textsuperscript{223} Ibid., para. 269.
\textsuperscript{224} Ibid., para. 271.
available to complement any potential reparation orders under Article 75 of the Rome Statute.\textsuperscript{225}

The Court endorsed a five-step implementation plan through which victims will obtain reparations.\textsuperscript{226} The first step consists of identifying localities, which ought to be involved in the reparations process and secondly, start a consultation process in the identified localities. During this consultation process and as a third step, a team of experts should assess the harm suffered by victims. As a fourth step, public debates should be carried out in each identified locality in order to address victim expectation and to explain the reparations principles and procedures. The final step consists of collecting proposals for collective reparations measures that are to be carried out in each locality.\textsuperscript{227} It was also stated that the TFV, in this given case, should undertake the assessment of harm, the work of identifying the victims and beneficiaries as well as taking over the application process.\textsuperscript{228} Lastly, the Chamber decided not to examine any individual application forms for reparation awards, the ones already received should be transmitted to the TFV. The Court should furthermore be able to exercise any necessary monitoring functions of the implementation process; otherwise it can decline the TFV to implement future reparation orders that are to be based on voluntary contributions.\textsuperscript{229}

Although the Trial Chamber established certain abovementioned principles relating to reparations and the implementations of such reparations, it was clarified that they only were limited to the present case. These principles are not intended to affect victims’ rights to reparation in other cases.\textsuperscript{230} From a victim’s perspective, it is unfortunate that Court-wide reparation principles were not agreed upon in advance of this decision. It could be argued that the Court has failed to ensure victims both certainty and predictability by making reparation principles case-based. The \textit{Lubanga} reparations decision raises the importance of how to manage victims’ expectations. If Court-wide principles were to be provided in advance, victims would then be granted a higher degree of certainty. Victims should be allowed to expect that reparations should reflect and remedy the harm they have suffered. It could also

\begin{itemize}
\item \textsuperscript{225} \textit{Lubanga} reparations decision, para. 272.
\item \textsuperscript{226} Ibid., para. 281.
\item \textsuperscript{227} Ibid., para. 282.
\item \textsuperscript{228} Ibid., paras. 283–284.
\item \textsuperscript{229} Ibid., para. 289.
\item \textsuperscript{230} Ibid., para. 181.
\end{itemize}
appear arbitrary that the full responsibility of implementing awards was left in the hands of an independent body of the Court.

5.4 Appeals

Both the legal representatives of victims and the OPCV acting on behalf of the victims as well as the Defence chose to appeal the reparations decision. Grounds of appeal included the decision to dismiss the individual applications for reparations without considering them on their merits. The Court would then fail in its obligations to give full effect to victims’ right to reparations as well as the victims who had submitted their applications would de facto be deprived of their right to have their applications decided upon in accordance with Article 75(1) of the Rome Statute.231 The appeal grounds also included the fact that the Court erred in law when it decided to delegate reparations responsibilities to a non-judicial entity such as the TFV. It was stated that decisions regarding responsibilities for reparations should be fulfilled within a strictly judicial framework.232 The Court further erred in law when it decided that the convicted person’s only contribution to the reparation process would be a possible voluntary apology.233 The Defence appealed against reparations decision as a whole.234

Prior to the Court actually considering any actual grounds of appeal, there was a need to resolve a large number of procedural issues. These first and foremost included whether the decision was an appealable reparations decision under Article 75 of the Rome Statute, or if the decision solely was a procedural decision setting out the guidelines for determining reparations. On 14 December 2012, it was decided by the Appeals Chamber that the decision actually was a reparations decision and the victims were given a legal standing in the appeals.235

231 ICC-01/04-01/06-2909, Office of Public Counsel for Victims V02 team of legal representatives, Appeal against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, 24 August 2012 (OPCV Appeals), paras. 17–19; See also ICC-01/04-01/06-2914, V01 team of legal representatives, Appeal against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, 3 September 2012 (V01 Appeals), paras. 11–15.


233 V01 Appeals, para. 15.

234 ICC-01/04-01/06-2917, Defence team for Mr Thomas Lubanga Dyilo, Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparation rendered on 7 August 2012, 6 September 2012, para. 6.

235 ICC-01/04-01/06-2953, AC, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, para. 11.
The grounds of appeal could be considered rather expected as the Trial Chamber did in fact recognize the possibility of awarding both individual and collective reparations concurrently in the Lubanga reparation decision. It therefore appears rather contradictory that the Chamber decided to dismiss any individual awards in favour of collective reparations. Factors such as costly and resource intensive processes of granting individual awards, the possibility of community based reparations reaching a larger amount of affected victims and the risk of causing secondary victimisation and stigmatisation to former child soldiers, contributed to the decision of excluding individual reparation awards. It appears as the Court is trying to maximize the scope of potential beneficiaries by deciding not to examine any individual application forms for reparation awards. From a reparative justice perspective, the preferable approach would be to grant both individual and collective reparations. On the one hand, it would not be possible for victims to receive any acknowledgement of the specific harm they have suffered, if the possibility to receive individual awards would be excluded. This could consequently risk losing the very notion of reparation, the acknowledgement of harm. On the other hand, allowing a larger number of victims to have their dignity restored and the harm they have suffered repaired could provide victims with a more fair perception of the overall justice mechanism. From a reparative justice perspective, it appears to be favourable if collective reparations are designed to remedy the harm that particular individuals have suffered, but on a collective basis.

Lubanga had furthermore, on 3 October 2012, decided to appeal both his sentence and conviction, asking for an acquittal and annulment or a reduction of his 14-year sentence. He argued that the Prosecution had failed to investigate alleged factual errors in relation to the age of the FPLC enlisted individuals. This consequently resulted in the Appeals Chamber deciding to put the all of the abovementioned reparations appeals on hold until Lubanga’s conviction and sentence appeal had been resolved.

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236 ICC-01/04-01-06-2934, AC, Defence team for Mr Thomas Lubanga Dyilo, Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I’s Judgment pursuant to Article 74 of the Statute of 14 March 2012, 3 October 2012.
237 ICC-01/04-01-06-2949, AC, Defence Team for Mr Thomas Lubanga Dyilo, Mr Thomas Lubanga’s appellate brief against Trial Chamber I’s 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute, 3 December 2012.
238 ICC-01/04-01-06-2953, AC, Decision on the admissibility of the appeals against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, para. 86.
It was not until 1 December 2014 that Lubanga’s conviction appeal resulted in the Court’s very first appeals verdict. Judge Erkki Kourula and a panel of five judges rejected all of Lubanga’s grounds of appeal in a majority decision. The total sentence of 14 years was accordingly confirmed. Kourula stated there was no reason to doubt the original verdict.\textsuperscript{239} The TFV’s reparations mandate have, due to the abovementioned circumstances, remained inactive. The judgement of 1 December 2014 does however “[…] bring victims in the case closer to justice and to receiving reparation for the harm they suffered, after almost eight years of proceedings.”\textsuperscript{240}

\textsuperscript{239} ICC Press Release on 01/12/2014, \textit{The ICC Appeals Chamber confirms the verdict and the sentence against Thomas Lubanga Dyilo}, ICC-CPI-20141201-PR1069.  
6 Conclusion

The Rome Statute was created to end impunity and to provide justice for victims. While the ICC reparations regime appears groundbreaking on paper, its ability to deliver justice for victims will have to remain questionable. The ICC Reparations Regime consists of all the provisions in the legal framework attempting to repair the harm suffered by victims; including the assistance mandate of the TFV.

Court-ordered reparations, can only be ordered directly against a convicted by specifying appropriate forms of reparations. These forms include, as stipulated in Articles 75(1) and 75(2)(1) of the Rome Statute; restitution, compensation and rehabilitation. As the list is non-exclusive, satisfaction and guarantees of non-repetition have furthermore been reaffirmed as appropriate forms of Court-ordered reparations. How to finance these reparations is one of many concerns of the ICC reparations regime, as the convicted person will most likely not be able to afford to pay for reparations for thousands of victims. To overcome this problem, the Court can rely on the TFV’s other resources to supplement Court-ordered reparation awards. It is important to stress the fact that the other resources of the Fund consist of voluntary contributions; it is impossible to make an estimation of income from such contributions. As the TFV is not legally obliged to complement reparation orders by the Court, the risk of the convicted person lacking financial resources may jeopardise the right of victims to have the harm they suffer remedied. This void is to a certain extent, filled by the assistance mandate of the TFV, which widens the scope of beneficiaries.

It is most likely that Court-ordered reparations are to be awarded collectively. This may risk widening the scope of reparations to the extent that it loses the connection to the conviction. Court-ordered reparations may end up looking like just another form general assistance provided by the TFV. The assistance mandate of the Fund may in turn end up quite indistinguishable from other forms of humanitarian aid provided on the ground. This could cause great confusion, especially from a victim’s perspective, as it is makes it difficult to know what reparations actually are. What financial resources that make up an award for reparation may be of great importance for victims, as it makes the convicted person acknowledging their harm. In line with reparative justice, a central challenge for the TFV is how it can use its dual mandate to maximise the number of potential beneficiaries at the same time as ensuring clear recognition of the harm caused to victims.
It is important from a reparative justice perspective, that reparations are perceived as maintaining a link to the justice process and the convicted person. In conclusion, implementation of Court-ordered reparations *through* the TFV may blur the distinction between reparations and development aid. Due to the structure of the ICC reparations regime, it will only partly be able to adhere to reparative justice.
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