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## Reparations for Victims at the International Criminal Court: A New Way Forward?

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# Reparations for Victims at the International Criminal Court: A New Way

## Forward?

### Introduction

Most articles on reparations and other victim provisions at the International Criminal Court (ICC) often open with how 'innovative' these provisions are for a criminal court. However nearly twenty years on from the agreement on the Rome Statute in 1998, there has yet to a shared understanding on how reparations should look like at the ICC. Despite three convictions and one guilty plea at the Court there has only been one reparations decision in the *Lubanga* case in 2012, and it still has not made it out of the courtroom to the victims. The novelty of reparations has faded as the hard reality of translating meaningful redress for thousands of victims into practice becomes apparent. These challenges stem from loading reparations for numerous victims on the back of the conviction of a single person. The ICC remains a criminal court with reparations copy-and-pasted at the end, leaving it dependent on which perpetrators and charges are convicted.<sup>1</sup>

Although there are reasonable expectations that the ICC would deliver justice to victims, the failure to dispense timely and appropriate reparations continues to undermine the legitimacy of the Court. More worryingly, there has been limited recognition of certain types of victimisation and access to the court, in particular sexual and gender-based violence. Despite the factual occurrence of sexual violence in the first four completed cases before the Court, only in the *Bemba* case saw the first conviction for rape at the ICC. The lack of convictions for sexual violence has not been due to lack of participation from victims, but rather insufficient evidence or narrow selection of charges.<sup>2</sup>

This article explores the continuing wrangles over reparations at the ICC. It begins by outlining the reparation regime at the Court, including a discussion on the drafters' intention in including such measures, before moving onto examine three continuing quandaries of reparations at the ICC: the relationship between the charged convicted and victim eligibility; the role of the Trust Fund for Victims and its assistance mandate; and instances of acquittals and the role of the state. These predicaments reflect the continuing disputed role of reparations at the Court amongst judges, victims and other organs of the Court. In particular this article analyses reparations for sexual violence, which has been prevalent in the first few cases before the ICC and calls for reparations, yet remains limited to assistance programmes by the Trust Fund. In light of the contested space of reparations at the ICC this article explores three possible options in finding a more settled approached to delivering justice to victims through such measures through: transformative reparations; reparative complementarity; and a reparations chamber.

### **Justifying Reparations at the International Criminal Court**

Reparations in the Rome Statute were one of the cornerstones of a more victim-centred approach of the ICC, distinguishing it from previous international criminal tribunals. In the early drafts of the Rome Statute before the International Law Commission some delegates felt that reparations would be inappropriate for a criminal court, owing to their complexity and the large numbers of victims affected by international crimes.<sup>3</sup> In order to overcome this a trust fund was include for the 'benefit of victims of crime' collected from fines or confiscated property.<sup>4</sup> Subsequently the Preparatory Commission deemed it was more feasible to make the state responsible for reparations if an individual convicted person acting in an official

capacity was indigent, or in the case of non-state actors to allow the Court to recommend reparations to the affected state.<sup>5</sup>

At the Rome Conference there was a general consensus amongst states to prevent the ICC having the authority to order reparations against a state as a deal-breaker, as it would detract from punishing individual perpetrators.<sup>6</sup> As a result Article 75 in the Rome Statute is explicitly limited to individuals, with the Trust Fund for Victims (TFV) in Article 79 included to act as a stopgap for funding if the convicted person has no assets. However, Article 79 also provides that it will be for the 'benefit of victims of crimes within the jurisdiction of the Court', which has been interpreted by the Assembly of State Parties as creating an assistance mandate beyond just facilitating reparations.<sup>7</sup>

In comparison to other international reparation bodies, such as the Inter-American Court of Human Rights or the UN Claims Commission, the ICC represents a unique reparations system. It is not based on state responsibility, and it does not follow more tort or delicts requirements of private law. Instead the ICC system represents something closer to the *partie civile* procedure common in civil law countries, where victims join the criminal case to seek compensation.<sup>8</sup> Although the *partie civile* analogy may make sense for a criminal court, it is grossly inadequate when addressing international crimes and reparations, where the issue of numerous victims is also compounded by the complexity of the trial, the political nature of violence and the larger commission of violence by numerous actors and other crimes that are not captured in the trial of one or a few individuals.

Other international criminal tribunals have highlighted the constraints of containing reparations within a criminal process. Not long after the agreement of the Rome Statute, the judges at both the ad hoc tribunals for the former Yugoslavia and

Rwanda wrote letters to the UN Security Council supporting victims claims for compensation, but finding that reparation proceedings would be time consuming, likely to increase the workload of the Tribunals, and contrary to the defendant's right to an expeditious trial.<sup>9</sup> Instead, the judges suggested that a separate claims commission established by the UN Security Council would be better placed to realise victims' rights to reparation. Effectively the drafters' intention of the Rome Statute was to give effect to notions of 'justice for victims' by allowing them to claim reparations against individual convicted persons, but not to encroach upon state responsibility. As the ICC started to complete its first few cases from 2012 onwards, the implementation of this framework ring-fencing responsibility around only convicted individuals has started to strain the feasibility of reparations at the Court.

### **The current quandary: Between law and expectations**

Despite the overarching goal of doing justice for victims through reparations, there remain two major fault lines that continue to cause debate amongst ICC judges: the relationship between the charges of which the perpetrator is convicted and eligibility for victims; and the role of the Trust Fund for Victims and its assistance mandate. A third emerging issue has caused more confusion in the recent *Ruto and Sang* case with regards to situations where there is insufficient evidence or a defendant is acquitted leaving it up in the air what role or responsibility the ICC and the state have in ensuring 'justice for victims' with reparations.

#### ***Relationship between convicted charges and victim eligibility for reparations***

Article 75(2) clearly states that the 'Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims'. However, it does not stipulate whether such reparations should be based on the

charges of which the perpetrator is convicted or a broader examination of his/her responsibility at a lower evidential standard for reparations. In the *Lubanga* case aside from the Trial Chamber and Appeals Chamber disagreeing over whether or not Thomas Lubanga was responsible for reparations, with the latter finding he was, they also fundamentally disagreed on which victims were eligible for reparations.<sup>10</sup> This stems from the narrow charges brought by the Prosecutor against Lubanga for only using child soldiers, despite the numerous other alleged crimes he was responsible for and the challenges victims made to the Court to broaden them to include sexual violence.<sup>11</sup> Although the Prosecution called for sexual violence to be included in the sentencing and reparations decisions, they presented no further evidence than that which was incidentally raised through witness testimony or questions by the victims' legal representatives.<sup>12</sup> As a result, reparations in the first case of *Lubanga* were limited to those who were child soldiers in his militia. Accordingly, victims' eligibility for reparations at the ICC is dependent on the Prosecutor's selection of charges and perpetrators, effectively a prioritisation of suffering based on evidence and expeditiousness that creates a stark hierarchy of victimhood in reparation proceedings.

It make legal sense that a person should only be held to account for the crimes of which they are found guilty and the added expressive dimensions for victims in acknowledging the convicted person's responsibility for their suffering,<sup>13</sup> However, it very much reflects that reparations are an 'add-on' to the criminal trial. This is contrary to the nature of reparations, which are intended to be victim-centred in responding to their harm, rather than being dependent on the identification, prosecution or conviction of an accused.<sup>14</sup> As Stahn asserts the Appeals Chamber stipulates a more 'perpetrator-centred' vision of reparations at the ICC.<sup>15</sup> This has

implications on the burden of proof, proportionality of reparations of which the perpetrator is found liable and the role victims in the trial proceedings.<sup>16</sup> As Williams and Palmer note similar limitations with the Extraordinary Chambers in the Courts of Cambodia, prosecutors can be cautious in how they approach or neglect certain crimes, closing or limiting avenues for victims to obtain redress before international courts.<sup>17</sup> The convoluted nature of reparations at the ICC and the narrow victim eligibility for such measures is further obscured by the role of the Trust Fund and its assistance programmes.

#### ***Role of the Trust Fund for Victims and its assistance mandate***

Despite an Appeals Chamber decision and order on reparations, the role of the TFV and its mandate for reparations and assistance still remain contested. In the *Lubanga* case the TFV, which has been funding a number of assistance programmes in the DRC, was held by the Trial Chamber as being ‘well placed’ to ‘determine appropriate forms of reparations and to implement them’.<sup>18</sup> The Appeals Chamber modified the Trial Chamber’s approach, which made victim participation dependent on whether the TFV ‘considers it appropriate’.<sup>19</sup> Moreover, the Appeals Chamber stipulated that victims would be consulted on collective reparations before the TFV implements them, clawing back some of victims’ agency in the reparation process.<sup>20</sup> However, the Appeals Chamber rejected the Trial Chamber’s endorsement of the TFV’s suggestion of community-based reparations.<sup>21</sup> As a result, the Appeals Chamber clarified the line between reparations and assistance, with the former being responsive to victims’ rights and the latter benefitting affected communities, as well as vindicating victims’ agency before the ICC in reparation proceedings. The Appeals Chamber’s approach represents a shift from the Trial Chamber’s decision in *Lubanga* that rubber-stamped

the TFV's five point plan for reparations, which effectively gave them decision making powers over it, to the Appeals Chamber's more closer supervision of each stage of the TFV implementation of reparations by a new constituted Trial Chamber II.

Since the Appeals Chambers judgment in 2015 contest has continued with the TFV arguing that community based reparations are the only way for reparations to become 'meaningful for cases of mass atrocities which fall under the jurisdiction of the Court.'<sup>22</sup> Furthermore, the Trust Fund asserted that the definition of a victim under Rule 85 of Court's Rules of Procedure and Evidence was too narrow, and beneficiaries of reparations do not need to meet such a standard.<sup>23</sup> The Appeals Chamber noted that while victims of sexual violence would be ineligible for reparations in the *Lubanga* case, it is appropriate for the Board of Directors of the TFV to consider at its discretion of including such victims within its assistance mandate.<sup>24</sup> This exhibits the distinction between the limits of the reparations regime imagined by the drafters of the Rome Statute and the rhetoric and want of ICC actors to expand the benefits of reparations as assistance to the largest possible group of victims.

The continuing wrangling over reparations between the judges and TFV suggests that the Trust Fund is struggling to fit its mostly assistance approach into a juridical one, where it is used to more discretion in distributing funds based on needs rather than responding to victims' rights.<sup>25</sup> This reflects a critical juncture between reparations as a right to be claimed by victims with legal standing against a discretionary needs-based approach. The TFV's role in reparations risks diluting victims' 'right' to reparation by merging it with assistance. The Appeals Chamber only recognised that assistance and reparations may become blurred where it risks



prejudicing the rights of the convicted person, rather than as a concern for ensuring victims' right to reparation.<sup>26</sup>

It is likely that the vast majority of cases before the ICC that result in reparations will always be dependent on the TFV for financial support and reparations delivery. In cases where perpetrators have substantial financial assets these are likely to be depleted through funding their defence counsel, such as the in *Bemba* case where the defendant had over €5 million in assets seized, but over €2.79 million had been spent by December 2014 and he is now a defendant in a witnessing tampering trial.<sup>27</sup>

As Dixon refers to this as the 'Swiss cheese model' whereby the TFV assistance mandate is used to 'fill in the gaps of reparations regimes where they are restricted by legal definitions of victims and victimization'.<sup>28</sup> However the difficulty with reparations at the ICC is that these gaps remain quite wide that even assistance if well coordinated is unlikely to sufficiently provide any meaningful redress to victims. In all the emerging ICC reparations regime is overly elaborate and a headache even for lawyers. This complex system is likely to change with the second case of *Katanga* where most victims are looking for individual compensation, rather than more collective awards made in the *Lubanga* case.

#### ***Acquittals and the responsibility of the state***

The final contested area of reparations at the ICC involves situations where a defendant is not found responsible for a crime, such as there being insufficient evidence against them, the defendant dies during the trial, declared unfit or is acquitted, preventing any reparation proceedings. This is the situation that judges faced in the collapse of the *Ruto and Sang* case due to insufficient evidence against

the accused. The judges were divided on whether or not reparations could be ordered despite no one being convicted. As Judge Fremr bluntly stated

As a result of the case ending without a conviction, no reparations order can be made by this Court pursuant to Article 75 for the benefit of victims of the post-election violence. While I recognise that this must be dissatisfactory to the victims, a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.<sup>29</sup>

Judge Fremr acknowledged that the Post-Election Violence (PEV) and victims' suffering was never contested.<sup>30</sup> Yet this position reflects the fatal flaw of reparations at the ICC that after years of waiting for justice and dependent on the Court being the last resort for redress, it ultimately dependent on which individuals and charges are convicted.

It comes at no surprise that one of the other judges was compelled to bridge the gap between victims' expectations and the mandate of the ICC under the more general rubric and marketing of the Court of 'doing justice for victims'. Judge Eboe-Osuji distinguished the collapse of the *Ruto and Sang* case from the Appeals Chamber reparations decision in the *Lubanga* case.<sup>31</sup> Although he recognised the value in placing the responsibility of making reparations at the foot of those who cause such harm to victims, despite their indigence, he suggest that it was not the only basis for reparations at the ICC.

Judge Eboe-Osuji broke away from the *Lubanga* case reasoning by stating that based on other sources of international law 'there is no general principle of law that requires conviction as a prerequisite to reparation.'<sup>32</sup> He argued that a conviction is an

undesirable prerequisite for reparations, given that victims suffer harm regardless of the individual responsibility of perpetrators and individual litigation is inefficient, which has often seen states create no-fault criminal compensation schemes. As such, Judge Eboe-Osuji asserted that the ICC process establishes victims' victimhood status and reparations should follow from it, rather the finding of guilt of the accused, which are 'beyond the control of the victims'.<sup>33</sup> That all said his finding of the *Ruto and Sang* case being frustrated by a campaign of the Kenyan government and its failure to provide reparations or effectively investigate the PEV, could give rise to an obligation to make reparations at the international level. Accordingly while courting the boundaries of explicitly limiting of reparations to convicted person, and the drafters' intent to avoid state responsibility, Judge Eboe-Osuji suggested the reparations be based on the Kenyan government's lack of cooperation and called upon victims to submit their views and concerns.<sup>34</sup>

In response the common victims legal representative (CVLR) Wilfred Nderitu argued that the Kenyan state has a 'reversionary obligation' to make reparations to victims by ceding to international treaties and the Rome Statute as it is ceding national jurisdiction. He also suggested that the ratifying Kenyan act of the Rome Statute makes provision for 'any assistance', which could be interpreted as including the Court making a request of the Kenyan government to ensure victims receive reparations.<sup>35</sup> Agreeing with Judge Eboe-Osuji the CVLR is able to look past the language of Article 75(2) in requiring a conviction as the sole basis of reparations. Instead given the failure of the Kenyan government to investigating and remedy the Post-Election Violence, it incurs state responsibility. Moreover the CVLR argues that despite his own mandate to represent victims in the case, all victims in the Kenyan situation should be eligible for reparations.<sup>36</sup> Accordingly given the Kenyan

government's lack of cooperation with the ICC and its failure to fulfil its obligations under the Rome Statute, the Court should make an order against it or at least refer it to the Assembly of State Parties for non-compliance.<sup>37</sup> Ultimately the majority of judges in Trial Chamber V(A) rejected the standing of the CVLR and Trust Fund to make submissions on reparations as case against the Ruto and Sang was terminated, ending the jurisdiction of the Court.<sup>38</sup> Perhaps the International Court of Justice is a more appropriate forum for such treaty breaches.

Together this evolving position in the aftermath of the collapse of the *Ruto and Sang* case represents the ambiguous legal boundaries the judges are working within while trying to attain some form of meaningful justice for victims. The language of Article 75(2) states that the 'Court may make an order directly against a convicted person'. There is no explicit limit on reparations being connected to the convicted person, but in practice after years of trial proceedings all the evidence will point to the accused, it is a different proceeding to examine the responsibility for other actors for reparations. That said during Lubanga's trial Uganda and Rwanda were implicated in training and supporting him, implying their responsibility in his crimes. Judge Eboe-Osuji postulates the responsibility of states in reparations before the ICC, but does not go far to promise or rule on it. There are political and financial consequences as the Assembly of State Parties could exert pressure on the Court by withholding funds or failing to cooperate with the ICC.

### **Overcoming these challenges**

Given these limitations and the continued debate over the purpose and legal basis of reparations at the ICC, where can the Court go from here? There are three possible

solutions: transformative reparations; reparative complementarity; and a reparations chamber.

### *The promise of transformative reparations at the ICC*

Transformative reparations have been increasingly advocated in the aftermath of widespread or systematic sexual violence, where the occurrence of the crime reflects more ingrained structural discrimination and marginalisation of certain groups that precipitates such violence. More broadly transformative reparations have been shifted the gaze on the nature of reparations to examine the gendered impact of conflict on women as well as on social and economic rights.<sup>39</sup> According to Rubin-Marín, reparations can also have a transformational potential ‘to subvert, instead of reinforce, pre-existing structural ... inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes’.<sup>40</sup> Yet, ruptures in governance and the law may not offer opportune moments to reform social and cultural perceptions and practices when more pressing needs of security, peace and redress need to be tackled.

There has been increasing attention to tackle sexual violence in terms of transformative reparations to better address the causes and cultures that precipitate such violence.<sup>41</sup> The Nairobi Declaration 2007 states that reparations

‘must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women’s and girls’ human rights predate the conflict situation.’<sup>42</sup>

It is within this theoretical space that reparations in the *Lubanga* case were constructed in collective terms to victims as transformative reparations, no matter how limited, could contribute to preventing future violence.<sup>43</sup> The TFV drawing from academic research and the Nairobi Declaration recognised the limits of *restitutio in integrum* and advocated for transformative reparations that would eliminate ‘the pre-existing structural inequalities that have led to or encouraged the violence.’<sup>44</sup>

Adopting this approach, the Trial Chamber stated

Reparations may include measures to address the shame felt by some former child soldiers, and to prevent any future victimisation, particularly when they endured sexual violence, torture and inhumane and degrading treatment following their recruitment. ... the Court's reparations strategy should, in part, be directed at preventing future conflicts and raising awareness that the effective reintegration of the children requires eradicating the victimisation, discrimination and stigmatisation of young people in these circumstances.<sup>45</sup>

The Appeals Chamber agreed with such an approach, given that it is up for the TFV to deliver reparations.<sup>46</sup>

It may just all be hopefully thinking and rhetoric that one reparation award by the ICC can transform a society and prevent future conflict. Durbach and Chappell note that the transformational reparations proposed by the TFV and Chamber suggest an ‘aspirational’ goal, but was not challenged by other parties before the Court.<sup>47</sup> Ullrich in her research of Court judges and staff suggest that transformative reparations is superficial and even neo-colonial.<sup>48</sup> The ICC does not have a democratic mandate to reform State Parties’ societies through reparations. Transformative reparations need to be placed within their political, economic, social and cultural context.<sup>49</sup> Moreover, using victims’ claims for reparations as a means of

social engineering risks exploiting their suffering to improve the legitimacy of the Court and the State. As Walker suggests beyond the challenges of practical realism and political feasibility, transformative reparations endanger displacing victim-centred nature of reparations in remedying their harm to instrumentalising them for social justice.<sup>50</sup> As such, transformative reparations can undermine the importance of the remedial and individual acknowledgement of victims' suffering, by placing it secondary improving a society and preventing future victimisation. This tension between remedial and transformative reparations was noted by the Peruvian Comprehensive Reparations (PIR) that in developing a reparations programme,

...the PIR cannot and should not be considered as one more instrument of social policy. The PIR does not seek to resolve problems of poverty, exclusion and inequality, which are structural in nature and respond to the overall operation of the political and economic system. While some of its programs can and should contribute to improving the quality of life of victims and their family members, its central objective is the repair and recognition of victims as human beings, whose fundamental rights have been violated. This does not mean that the State should not also undertake a policy of social development aimed at attacking poverty and inequality at the root ... but the PIR responds to other goals.<sup>51</sup>

As such, the transformative potential of reparations rests in their ability to prioritise and publicise victimisation and underlying structural inequalities that precipitated or compounded violence. Where reparations are used solely to prevent future victimisation, such as community education or human rights training for the armed forces, and not redressing the individual harm. This risks overburdening the expectations of reparations in affected communities and forces those victimised to

forego their remedy in the wide hope of reconciliation and peace. In such circumstances victims of past violence are silenced or neglected to extend the gaze of the transition to future peace and reconciliation. This is a result of judicially based reparations being delivered through an assistance mandated Trust Fund, which fundamentally changes the nature and benefit of such reparations to victims.

Reparations as a vehicle of remedy are victim-centred measures of redress to vindicate victims' rights. As such victims are in the front passenger giving directions on what reparations are appropriate in redressing their harm with judges steering the process. The current *Lubanga* reparations scheme places the TFV in the driving seat with the judges as passengers watching the Trust Fund's advance of its peacebuilding and assistance mandate, and victims left behind on the side of the road, no better off. In looking forward to preventing future violence, victims become increasingly distant, shrinking objects in the rear view mirror as we move closer to tackling wider causes of violence, maximising welfare or community benefits. Ultimately the greater the focus on transformative reparations at the ICC the further we lose sight of redressing the harm of those who suffered the most. While in the *Lubanga* case transformative reparations may benefit female child soldiers who suffered sexual violence, by including them in rehabilitation or community awareness schemes, it negates the acknowledgement and more direct remedy of their individual harm.

Usually there is a not a clear demarcation between transformative and more corrective or restorative reparations, this academic debate may be moot in practice. The Trial and Appeals Chambers in the *Lubanga* case both abdicated their oversight of what reparations should substantively involve by allowing the TFV to shape it, rather than taking into account what was appropriate for the victims. In the *Katanga* case the victims are more at odds with this approach, with the majority demanding



individual compensation and finding collective and transformative measures as ineffective as non-victimised members of the community were able to benefit.<sup>52</sup> The quandary of reparations at the ICC reflects an existential crisis for the Court, which tasked with investigating, prosecuting and punishing perpetrators is then left at the end of the process with trying to address the rights of victims. The Court itself does not have a coherent approach in what reparations should look like, instead the TFV is able to portray its assistance mandate as reparations, which from the *Katanga* case is not what victims want. Framing reparations at the ICC as transformative and through the TFV as repackaged assistance is likely to cause victims to disengage with the Court, as their role is reduced to policy legitimisation and facilitation for others rather than their individual redress. This is already occurred with 47 victims pulling out of participating in the *Ruto and Sang* case before it collapsed on the grounds of collective reparations would benefit the communities that contributed to their victimisation.<sup>53</sup>

Ultimately the TFV reparations construction in the *Lubanga* case is effectively trying to deliver guarantees of non-repetition, which are really the responsibility of states. The TFV is unlikely to have the capacity to deliver to deliver such measures on a large scale, long term and meaningful way. Instead what is needed is state cooperation and a rethinking of the obligations on state parties and the notion of complementarity.

### ***Revisiting reparative complementarity***

If the ICC is an ineffectual or inappropriate locus in delivering transformative reparations, then the State in which the crime occurs is the necessary actor to ensure the rights of victims.<sup>54</sup> In the *Lubanga* case the judges missed an opportunity to call

upon the Congolese government to establish a national reparations mechanism, instead it suggested that the State could cooperate through educational or outreach activities to acknowledge victims' harm and to increase society's awareness of the crimes committed by Mr Lubanga.<sup>55</sup>

The relationship between the Court and State Parties is guided by the principle of complementarity, in that states have the primary obligation to investigate and prosecute international crimes with the ICC only intervening as a last resort where the state is unable or unwilling to meet its obligations, so-called 'negative complementarity'.<sup>56</sup> Positive complementarity is in narrow terms how States can be encouraged to investigate and prosecute international crimes, in broader terms how the ICC can catalyse wider transitional justice processes in a country guided by fair trial practices and human rights. In terms of reparations, complementarity could begin to fill the gap between the limited scope of victims who will be eligible for redress at the ICC and the larger population of individuals and groups who have suffered from international crimes in a situation. This has been termed 'reparative complementarity' in that to effectively provide reparations in a situation such as the DRC, the State Party needs to create a domestic reparations programme to complement any reparation awards by the Court.<sup>57</sup> Otherwise reparations at the ICC only benefit a few victims in a situation, which could cause tensions within communities or secondary victimisation to those victims excluded from the Court's awards. Reparative complementarity does not go as far as a 'reversionary obligation' suggested by the CVLR in the *Ruto and Sang* case, but recognises the role States should actively play in developing domestic reparation programmes giving their existing human rights obligations to remedy for such violations whether committed by state or non-state actors.<sup>58</sup>

What should reparative complementarity look like? In terms of sexual violence, Durbach and Chappell asserts that to achieve gender justice for sexual violence it 'requires extensive state-sponsored, collective measures to bring about equal gender representation in decision making, a significant redistribution of economic resources and the removal of socially and culturally embedded gender-biased practices.'<sup>59</sup> Transformative reparations could achieve some of these goals, but even reparations have their limits. It would require substantial engagement of a multitude of state and non-state actors to tackle the causes and consequences of violence that its simply formulation has plagued the transitional justice field for decades.

To transform the legal regime for sexual violence, laws on rape, domestic violence, procedural and evidential rules on vulnerable witnesses and victims would need to be reformed. This may be too interventionist for the ICC, which was established to investigate and prosecute international crimes, rather than catalyst diverse national legal systems into uniform ones beyond international criminal law. Moreover, the need for changes in terms of gender representation and economic redistribution require a substantial rethinking of the constitutional, social and cultural practices of a country. In addition, gender equality and the impact of crimes of women would need to be substantively addressed, but so do the structural harm suffered by other victims. There is a danger of creating a hierarchy of victimhood by only prioritising gender in reparation debates, while vital, there are other marginalised victims such as children, those left disabled or seriously injured, indigenous or ethnic minorities, or families of those disappeared who also acutely require reparations to alleviate their continuing suffering and to prevent the repetition of such crimes. There has been little engagement on reparations by situations complementing the work of the ICC. This could be due to the controversial and costly nature of reparations, which

go to heart of debates on who is responsible for the violence and who deserves to be acknowledged as a victims and their harm remedied.

In narrow terms reparative complementarity can ensure that State Parties fulfil their obligations to cooperate with the ICC in terms of identification, tracing and freezing of assets, or the exhumation of grave sites in returning bodies of those disappeared to families.<sup>60</sup> A more expansive approach to complementarity as a transitional justice driver in a country risks overburdening the ICC with a superjudicial function that its jurisprudence has political weight that can override domestic democratic processes. With the collapse of the Kenyan cases at the ICC, there is a strong impetus to think about what the cooperation obligations are on states and how best the ICC and the Assembly of State Parties can enforce such duties.

### *A Reparations Chamber*

Given the length of trials, the requirements of victims' eligibility for reparations being limited to those charges and individuals convicted before the ICC and victim participation in the trial is unnecessary to claim reparations, it is perhaps worth thinking about creating a separate reparations chamber within the ICC unconnected from criminal convictions. Some may question whether the ICC is best situated to deal with reparations beyond those who are convicted before it. Yet given that the Court is often the only international or external adjudicating body dealing with these situation and is the only permanent forum for international crimes for 124 State Parties it is well placed to be an avenue for redress for victims where states are unwilling or unable to provide reparations. Although regional human rights courts to an extent do this already in Latin America, Europe and Africa, their jurisdiction is for wider human rights violations and the responsibility of the state. Increasingly

international crimes are transnational, committed by a range of non-state armed groups, mercenaries, multi-national corporations and states with limited or no forums for redress for victims.<sup>61</sup> A reparations chamber at the ICC would focus on more acute international crimes where State Parties are unwilling or unable to investigate, prosecute or provide a remedy to victims.

Others have advocated for such a separate Reparations Chamber or Commission, given the challenges currently facing the ICC reparations regime.<sup>62</sup> This author has been reluctant to advocate for a separate chamber, given that those who have done so before have prompted it to remove victims from participating in trial proceedings at the Court. Victims participating at the ICC play an important part in ensuring the transparency of trial proceedings and to effectively protect their interests.<sup>63</sup> A reparations chamber suggested here would not get rid of victim participation in trial proceedings, but instead would work to provide reparations to victims in situations by directly engaging with states. The Trust Fund could be used to provide more interim awards to those victims applying to the Court, such as rehabilitation, similar to the provisional measures of the Inter-American Court of Human Rights to prevent death or irreparable harm.<sup>64</sup> Alternatively focusing the TFV assistance mandate to directly focus on those victims before the ICC through provisional measures could help to concentrate resources on those cases before the Court.

In terms of procedural and evidential rules, victims' legal representatives would lead the presentation of evidence, supported by the Office of Public Counsel for Victims and Victims Participation and Reparations Section. Victims would have to satisfy the lower evidential burden of proof on the balance of probabilities common to reparations proceedings. The lower evidential threshold would allow a broader

establishment of the harm that was suffered. Victim application forms to participate and claim reparations would be submitted early in proceedings enabling the chamber to begin to map out the crimes, harms and views of victims on what reparations would look like. In order to protect the rights of any later identified individuals or responsible organisations, they would be invited to participate and any finding of civil responsibility could not be relied upon for a criminal trial, given the lower evidential burden. That said factual findings on whether or not certain crimes happened in a location, the nature of conflict etc. in a reparations judgment, could guide trial chambers' understanding of a conflict, but would be inadmissible in proving the defendant's criminal responsibility. Alternatively if reparations proceedings have not commenced, then a criminal conviction would be used for a basis of reparation as currently is the case under Article 75(2). Individual convicted persons found guilty would then contribute to reparations through symbolic measures such as acknowledgments of responsibility or voluntary apologies, or more material means through court-ordered seizure of their assets.<sup>65</sup>

The Presidency could under the Rome Statute create a reparations chamber as part of a trial chamber.<sup>66</sup> After the *Lubanga* decision, Trial Chamber II has effectively become a reparations chamber given that it is dealing with the implementation of reparations in the *Lubanga* case and is deciding on the reparations in *Katanga* case. The Appeals Chamber judgment on reparations in the *Lubanga* case also sets down clear monitoring and implementation requirements for the trial chamber for the TFV to carry out such as identifying eligible victims. This practice is making Trial Chamber II increasingly specialised in the adjudication on reparations. Moreover the distinct nature of reparations, lower evidential threshold, increasing participatory rights for victims and differing legal principles makes sense that the expertise gained

by court staff and judges is retained in a specialised reparation chamber. This can be added to with powers already available to the court in appointing reparations experts ‘to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations’.<sup>67</sup>

A reparations chamber would allow victims to directly petition the Court for reparations from the opening of a situation, rather than victims have to wait years for a criminal conviction. This solution provides a dual-track approach to dealing justice to victims and ending impunity by both at the same time investigation and prosecuting those responsible as well as allowing victims to come forward and make their case for reparations. A reparations chamber would also contribute to facilitating and monitoring states in building capacity on reparations, as the ICC itself could not deliver reparations to all victims in a situation, it could highlight the issue and order such awards to be carried out by the state with support from the TFV and Assembly of State Parties. Such an approach would balance the ICC from being perpetrator and retributive focused to more comprehensively doing justice for victims. Of course this can be dismissed as naïve, expanding the scope of a reparations system, which is already overburdened with just one case. There would be challenges for low-income countries in affording large reparations programmes, but innovative solutions can be found, such as World Bank or other donor support reparations as in Nepal, and countries like Sierra Leone and Ivory Coast have begun to deliver reparations to such victims despite their low-income status. Given the ICC’s unique position as a permanent international court on international crimes, it is well placed to be an avenue of redress for the world’s most serious crimes and to be a focal point for reparations. States and the ICC have to work together in delivering justice beyond

criminal trials to avoid a hierarchy of victims by delivering reparations to all those who seriously suffer from international crimes.

## **Conclusion**

Reparations in law are about acknowledging, remedying and alleviating victims' suffering. The inclusion of reparations in the Rome Statute of the ICC offered the promise of tangible and symbolic redress for victims of international crimes. Yet nearly two decades on from the signing of the Rome Statute and five years since the first reparations judgment, reparations have yet to make it into the hands and hearts of victims. Continuing legal wrangles on reparations at the ICC are trying to make an unworkable system feasible, but victims are increasingly losing out as time passes.

The problems with reparations at the ICC stem from pasting it onto the end of a criminal trial, which undermines its victim-centred nature. How far can we go with the current reparations model at the ICC to the extent that the Court can maintain any sort of legitimacy of its meaningful and effectiveness for victims that it does not re-victimise them by creating unrealistic expectations or reparations so convoluted that they make no difference? The alternatives are to drop reparations from the ICC or to uncouple reparation proceedings from the criminal trial and create a reparations chamber. This will not be easy and states will protest it due to the issues of state responsibility it will raise if reform of Article 75 is brought before the Assembly of State Parties.

The disagreeing positions of judges in the *Lubanga* and *Ruto and Sang* cases show the contested space that reparations continue to evoke amongst the ICC judiciary that they themselves alone cannot develop a consistent position on reparations, even if it did include state responsibility. Although Judge Eboe-Osuji opined a vision of reparations beyond those convicted at the ICC, it will require the



Assembly of State Parties to not only amend Article 75(2) to include state or other actors responsibility, but also enforcement mechanisms in how States cooperate with the Court. As such together transformative reparations, reparative complementarity and a reparations chamber together may start to bring the gap between victims' right to reparations and redress at the ICC.

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<sup>1</sup> As per Article 75, Rome Statute.

<sup>2</sup> Luke Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court, *Criminal Law Forum*, 26(2) (2015) 255-289.

<sup>3</sup> Report of the International Law Commission on the Work of its 44th Session, 4 May to 24 July 1992, Official Records of the General Assembly, 47th session, Supplement No. 10, paras.88-92.

<sup>4</sup> Article 53(4), Report of the International Law Commission on the Work of its 45th Session, UN Doc. A/48/10, 1993, p125.

<sup>5</sup> Draft Article 73, Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, p116-118.

<sup>6</sup> See Fiona McKay, Are Reparations Appropriately Addressed in the ICC Statute? In D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) 163-174, p167; and Christopher Muttukumaru, Reparations to Victims, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (Kluwer 1999) 262-270.

<sup>7</sup> Resolution ICC-ASP/1/Res.6, adopted at the 3rd plenary meeting, 9 September 2002.

<sup>8</sup> See Articles 52 and 706-742 of the French Criminal Code; Articles 85-91, 371-375, and 418-426 of the French Code of Criminal Procedure; Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, (Hart 2008), p310.

<sup>9</sup> Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, S/2000/1063, 3<sup>rd</sup> November 2000; Letter dated 9<sup>th</sup> November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, S/2000/1198, 15<sup>th</sup> December 2000.

<sup>10</sup> Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012; and Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129, 3 March 2015.

<sup>11</sup> Luke Moffett, *Justice for Victims before the International Criminal Court*, (Routledge 2014), p120-121.

<sup>12</sup> Prosecution's Submissions on the principles and procedures to be applied in reparations, ICC-01/04-01/06-2867, 18 April 2012, para.19-20.

<sup>13</sup> Carsten Stahn, Reparative Justice after the *Lubanga* Appeal Judgment, *Journal of International Criminal Justice*, 13 (2015) 801-813, p806.

<sup>14</sup> Principle 9, UN Basic Principles 2005.

<sup>15</sup> Stahn n.13, p807.

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- <sup>16</sup> Ibid. p809-810.
- <sup>17</sup> Sarah Williams and Emma Palmer, Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia, *International Journal of Transitional Justice* 10(2) (2016) 311-331, p330.
- <sup>18</sup> *Lubanga*, ICC-01/04-01/06-2904, para.266.
- <sup>19</sup> ICC-01/04-01/06-3129, para.160.
- <sup>20</sup> ICC-01/04-01/06-3129, para.160.
- <sup>21</sup> *Lubanga*, ICC-01/04-01/06-2904, para.274.
- <sup>22</sup> Observations of the Trust Fund for Victims on the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations", ICC-01/04-01/06-3009, para.171.
- <sup>23</sup> ICC-01/04-01/06-3009, para.170.
- <sup>24</sup> ICC-01/04-01/06-3129, para.199 and para.269-273, in light of Rule 98(5), Rules of Procedure and Evidence, and Regulation 56 of the Regulations of the Trust Fund.
- <sup>25</sup> See Emily L. Camins, Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law, *International Journal of Transitional Justice*, 10(1) (2016) 126-145, p134.
- <sup>26</sup> ICC-01/04-01/06-3129, para.182.
- <sup>27</sup> Defence Submissions on Sentence, ICC-01/05-01/08-3376-Red, 26 April 2016, fn.232.
- <sup>28</sup> Peter Dixon, Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo, *International Journal of Transitional Justice* 10(1) (2016) 88-107, p105.
- <sup>29</sup> *Ruto and Sang*, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red 5 April 2016, para.149.
- <sup>30</sup> Ibid. para.150.
- <sup>31</sup> Reasons of Judge Eboe-Osuji, para.58-254.
- <sup>32</sup> Ibid. para.201.
- <sup>33</sup> Ibid. para.202.
- <sup>34</sup> Ibid. para.464.
- <sup>35</sup> Section 20, International Crimes Act 2008. ICC-01/09-01/11-2035, 15 June 2016, para.13.
- <sup>36</sup> ICC-01/09-01/11-2035, para.40-41.
- <sup>37</sup> Ibid. para.49-54.
- <sup>38</sup> Decision on the Requests regarding Reparations, ICC-01/09-01/11-2038, 1 July 2016. See Dissenting Opinion of Judge Eboe-Osuji, ICC-01/09-01/11-2038-Anx, 1 July 2016.
- <sup>39</sup> See Anne Saris and Katherine Lofts, Reparation Programmes: A Gendered Perspective, in C. Ferstman, M. Goetz, and A. Stephens (eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, 79-99. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007, para.4 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.' UN Guidance Note of the Secretary-General Reparations for Conflict-Related Sexual Violence, para.4.
- <sup>40</sup> Ruth Rubin-Marín, The Gender of Reparations in Transitional Societies, in R. Rubin-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (CUP 2009), 63-120, at 66. See Reparations for Conflict-Related Sexual Violence, UN Guidance Note of the Secretary-General, June 2014.
- <sup>41</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 23 April 2010, para.32; and UN Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, June 2014, p8.
- <sup>42</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, para.3.
- <sup>43</sup> ICC-01/04-01/06-2904, para.236.
- <sup>44</sup> Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, 25 April 2012, para.77.
- <sup>45</sup> ICC-01/04-01/06-2904, para.240.
- <sup>46</sup> Ibid. para.202-203.
- <sup>47</sup> Andrea Durbach and Louise Chappell, Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations, *International Feminist Journal of Politics*, 6(4) (2014) 543-562, p550.

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<sup>48</sup> Leila Ullrich, Can Reparations transform Societies? The Practice of ‘Transformative Justice’ at the International Criminal Court (ICC), presentation at Oxford Transitional Justice Research Seminar, 9 March 2016.

<sup>49</sup> Durbach and Chappell n.47.

<sup>50</sup> Margaret Urban Walker, Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just, Reparations *International Journal of Transitional Justice* 10(1) (2016) 108–125, p110.

<sup>51</sup> CVR Final Report, Vol. LX, section 2.2.2.1, p.148, cited and translated by Lisa Magarrell, Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice, *Windsor Yearbook of Access to Justice* 22 (2003) 85–98, p95.

<sup>52</sup> *Prosecutor v Katanga*, Registry’s Report on applications for reparations in accordance with Trial Chamber II’s Order of 27 August Annex 1, ICC-01/04-01/07-3512-Anx1-Red2, 21 January 2015.

<sup>53</sup> *Prosecutor v Ruto and Sang*, Common Legal Representative for Victims’ Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, ICC-01/09-01/11-896-Corr-Red, 5 September 2013, para.12.

<sup>54</sup> Principle 16, UNBPG.

<sup>55</sup> ICC-01/04-01/06-2904, para. 239.

<sup>56</sup> John T. Holmes, The Principle of Complementarity, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (Kluwer 1999), 41–78.

<sup>57</sup> Luke Moffett, Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court, *The International Journal of Human Rights*, 17(3) (2013) 368-390.

<sup>58</sup> See UN Basic Principles 2005; Article 2(3), International Covenant on Civil and Political Rights; Article 13, European Convention on Human Rights; Articles 10 and 25, American Convention on Human Rights; Article 7(1)(a); African Charter on Human and Peoples’ Rights; and Article 31, Articles on State Responsibility for Internationally Wrongful Acts.

<sup>59</sup> Durbach and Chappell n.47, p554.

<sup>60</sup> Article 93(1)(g) and (k).

<sup>61</sup> See Ciara Hackett and Luke Moffett, Mapping the Public –Private Law Divide: A hybrid approach to corporate accountability, *International Journal of Law in Context* 12(3) (2016) 312-336.

<sup>62</sup> Stahn n.13, p811; and Christine Van den Wyngaert, Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, *Case Western Reserve Journal of International Law* 44 (2011) 475-496, p495-496.

<sup>63</sup> See Moffett n.2.

<sup>64</sup> Article 63(2), American Convention of Human Rights. See Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, OUP (2013), p251-298.

<sup>65</sup> See *Prosecutor v Bemba*, Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute, ICC-01/05-01/08-3444, 17 October 2016.

<sup>66</sup> Articles 34, 38, and 75. Rule 95 on ‘Procedure on the motion of the Court’ does not stipulate what chamber reparation proceedings will be heard.

<sup>67</sup> Rule 97(2), RPE.